No. 18-8046

IN THE

SUPREME COURT OF THE UNITED STATES

STEPHEN L. PAULMIER – PETITIONER

vs.

STATE OF HAWAII – RESPONDENT

ON A PETITION FOR A WRIT OF CERTIORARI TO

INTERMEDIATE COURT OF APPEALS STATE OF HAWAII

PETITION FOR WRIT OF CERTIORARI

Law Office of Gary C. Zamber
Gary C. Zamber, Esq.
21 Waianuenue Avenue, Suite 3
Hilo, Hawaii 96720
808-969-3600
Court-Appointed Counsel for Defendant

QUESTIONS PRESENTED

1. Whether the ICA gravely erred in failing to recognize Stephen Paulmier's constitutional rights to due process and/or find his waiver of a jury trial was invalid because he was not informed in a knowing, voluntary or intelligent manner that a bench trial was not held on continuous days like a jury trial, that it could be continued indefinitely day-by-day depending on the schedules of State Prosecutor the Family Court, such that without advance notice or warning, Defendant would be subject to a four-day trial over a seven-month time period?

2. Do the Hawaii Family Court Rules provide for separate trial calendar apart from the regularly clogged court calendar?

3. Does a Defendant who waives his right to a jury trial have the same due process constitutional right to consecutive trial days as a jury trial Defendant?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTUIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 8

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 28

INDEX TO APPENDICES

APPENDIX A - Intermediate Court of Appeals Memorandum Opinion filed 7-20-2018

APPENDIX B - Judgment of Circuit Court of the Third Circuit filed 7-28-2015

APPENDIX C - HSC Order Rejecting Appl for Writ of Certiorari filed 11-23-2018

APPENDIX D – Motion to Dismiss Complaint for Due Process & Speedy filed 2-6-2015

TABLE OF AUTHORITIES CITED

CASES **PAGE NUMBER**

Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972) 9, 10, 20

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) 14, 25

Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962) 13

State v Almeida, 54 Haw 443, 448, 509 P.2d 549, 552 (1973) 20

State v Friedman, 93 Hawai'i at 68, 996 P.2d at 273 (2000) 12, 13, 26, 27

State v. Gomez-Lobato, 130 Hawai`i 465, 312 P.3d 897 (2013) 13, 25, 27

State v. Han, 130 Hawai'i 83, 89, 306 P.3d 128, 134 (2013) 13

State v. Ibuos, 75 Haw. 118, 120, 857 P.2d 576 (1993) 12, 13, 26, 27

State v. Jackson, 81 Hawai'i 39, 912 P.2d 71 (1996) 27

State v. Lau, 78 Haw. 54, 63, 890 P.2d 291, 300 (1995) 20

State v. Vaitogi, 59 Haw. 592, 585 P.2d 1259 (1978) 13

State v. Valdez, 98 Haw. 77, 42 P.3d 654 (2002) 26

Tachibana v. State, 79 Hawai'i 226, 900 P.2d 1293 (1995). 26

United States v. Cochran, 770 F.2d 850 (9th Cir.1985) 13

Wong v. Among, 52 Haw. 420, 477 P.2d 630 (1970) 13

STATUTES AND RULES

Hawaii Family Court Rules, Rule 40. . . . . 2, 11

Hawaii Rules Penal Procedure, Rule 5(b)(1) 12, 27

Hawaii Rules Penal Procedure, Rule 12.2. . . . . 3, 27

Hawaii Rules Penal Procedure, HRPP Rule 48. . . . . .3, 27

Hawaii Revised Statutes § 709-906(1) 2, 8

Hawai'i Revised Statutes (HRS) § 806–60 2

Rules of the Circuit Courts of the State of Hawaii Rule 13(a) 2, 11

OTHER

Hawaii State Constitution, Article 1 § 8 5

Hawaii State Constitution Art. I, § 14. 13

OPINIONS BELOW

The opinion of the highest state court to review the merits is The Intermediate Court of Appeals attached to the petition as Appendix A and is published at 143 Hawai'i 100, 423 P.3d 419 (Table only)

The opinion of the State of Hawaii, Family Court of the Third Circuit is attached as Appendix B, and is unpublished.

JURISDICTION

The date on which the Hawaii Supreme Court denied discretionary review is November 13, 2018, a copy of that decision appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Hawaii Family Court Rules, Rule 40:

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)**

Rules of the Circuit Courts of the State of Hawaii Rule 13(a):

(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.

Hawaii Revised Statutes "HRS" § 709-906(1)
Abuse of family or household members; penalty. (1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member or to refuse compliance with the lawful order of a police officer under subsection (4).

Hawaii Revised Statutes §806-60 Jury of twelve required. 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.

Hawaii Revised Rules of Penal Procedure, Rule 5 (b)(1) 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 Hawai'i 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.

Hawaii Rules Penal Procedure, Rule 12.2. TRIAL SETTING UNDER SPECIAL CIRCUMSTANCES.

(a) Motion for firm trial setting. Upon written motion of a party, the court may set a firm trial when (1) a complaining or a material witness is a person with special needs, (2) a witness is from out-of-state, (3) a large number of potential jurors are needed, (4) a defendant is in pretrial custody, or (5) other special circumstances exist.

(b) Motion for advancement or continuance of trial. When ruling upon a motion for advancement or continuance of a trial under this Rule 12.2, the court shall consider the totality of the circumstances, including, but not limited to, the following:

(1) a defendant's rights to a speedy and fair trial, effective assistance of counsel, the right to confront and cross-examine witnesses and other rights guaranteed by the constitutions of the State of Hawai'i and the United States;

(2) any substantial adverse impact the time of trial may have on the witness.

(c) Application of term. For purposes of this rule, a person with special needs includes, but is not limited to, a child under the age of fourteen.

Hawaii Rules Penal Procedure, HRPP 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.

Hawaii Rules of Penal Procedure, Rule 52. HARMLESS ERROR AND PLAIN ERROR.

(a) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

HAWAII STATE CONSTITUTION, Article 1 § 5

DUE PROCESS AND EQUAL PROTECTION

Section 5. No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

HAWAII STATE CONSTITUTION, Article 1 § 8

RIGHTS OF CITIZENS

Section 8. No citizen shall be disfranchised, or deprived of any of the rights or privileges secured to other citizens, unless by the law of the land.

HAWAII STATE CONSTITUTION, Article 1 § 14

RIGHTS OF ACCUSED

Section 14. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, or of such other district to which the prosecution may be removed with the consent of the accused; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against the accused, provided that the legislature may provide by law for the inadmissibility of privileged confidential communications between an alleged crime victim and the alleged crime victim's physician,

psychologist, counselor or licensed mental health professional; to have compulsory process for obtaining witnesses in the accused's favor; and to have the assistance of counsel for the accused's defense. Juries, where the crime charged is serious, shall consist of twelve persons. The State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment.

RULES OF THE CIRCUIT COURTS OF THE STATE OF HAWAII, Rule 13.
TRIAL CALENDARS AND THE FIRST CIRCUIT ON-CALL STATUS; CIVIL CASES.

(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.

(b) The first circuit on-call status.

(1) All first circuit trials in which doctors or other experts will be offered as witnesses will have a fixed trial date and counsel will be on "24-hour notice" to commence trial the entire week. However, by Friday of the assigned week, if the trial cannot commence, then the trial judge will return the file to the administrative judge and the parties will:

(i) either agree to a new trial week which will fall within 90 days from the date of the original trial week, subject to the administrative judge's approval, or

(ii) if the parties cannot agree or the administrative judge cannot accommodate the agreed upon date, then the parties will meet with the administrative judge for a trial setting which will, in any event, be no later than 90 days from the date of the originally scheduled week.

(2) In cases not involving doctors or other expert witnesses, trial counsel will be on a 24-hour notice during the week trial is set, and if trial does not commence during said week, they will then be on a "48-hour notice" for the next 2 calendar weeks.

UNITED STATES CONSTITUTION, FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, SEC. 1

Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

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. 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).

During jury trial waiver colloquy, the Family Court 1) questioned if Defendant was being threatened to waive a jury trail, 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].

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].

The Defendant would not know that a bench trial is not continuous days like a jury trial, his only experience was in a different state where they had a separate trial calendar of continuous days.

The ICA claims in it's Memorandum Opinion filed July 20, 2018, that Paulmier's 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 disingenuous, 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 (attached as Appendix D).

If the Defendant failed to demand a speedy trial, it was plain error, as the title Motion to Dismiss for Violation of Due Process and Speedy Trial infers the Defendant is making a demand for a speedy trial, not a trial that continues on and on at the whim of the State and the Courts' clogged calendars.

Mr. Paulmier did request a speedy trial and due process in his Motion to Dismiss filed 2/6/2015, 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, not just the Defendant, summarily invalidating the 3rd and 4th and prongs of the Barker[1] test *which does not mention bias to the court or the state.*

Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972).

REASONS FOR GRANTING THE WRIT

This is a case of first impression, there are no statutes or caselaw available for the issue of a knowing, voluntary, intelligent waiver which includes a statement of the length of time a bench

[1] 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. Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972)

trial could possibly take therefore the ICA erroneously concluded that Mr. Paulmier is not entitled to relief on this claim that his jury trial waiver was invalid. In the Memorandum Opinion filed 7/20/2018, the ICA claims in footnote 3 at the bottom of page 8:

> 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 (emphasis added).** 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.

The ICA erroneously contends Paulmier did not make a separate due process argument on appeal, as his Opening Brief, page 20 exactly states:

> 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.

In its Memorandum Opinion, the ICA contends Paulmier's waiver of a jury trial is without merit because he did not seek to withdraw his waiver or argue that the waiver was invalid in the Family Court, therefore not preserving the issue for appeal, but he argued exactly that the waiver was not knowing in the filed motion as well as during the hearing on his Motion to Dismiss on 2/25/2015. [OB; pg 14-16].

The Barker balancing factors are for speedy trials. Mr. Paulmier wanted the quickest disposition of his case, he thought that by waiving the jury, it would be handled that much quicker. This case is not one of weighing counterbalancing factors, e.g. delay and speedy trial and prejudice factor. This case is to determine whether the Defendant had complete knowledge of the difference between a jury trial and a bench trial – including the bench trial continuing on many days for many months.

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 trail, 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 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 standard. 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) dealing with admissibility of a confession. Here, Petitioner 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' trial dragged on, the violation became more apparent as he had to then contend with anxiety, worry, loss of memory, and at trial, when counsel for the Defendant tried to ask the Defendant how the lengthy delays in bench trial affected his reputation in the community.

ARGUMENTS FROM OPENING BRIEF PG 13-18

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] **(emphasis added)**

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 LOWER COURT ERRED IN DENYING MR. PAULMIER'S MOTION TO DISMISS COMPLAINT FOR VIOLATION OF DUE PROCESS AND SPEEDY TRIAL [OB; pg 23-29]

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.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.

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.

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. Speedy trial rules are geared to the Defendant, it is the Defendant's rights which are at question here, not the state or the court. Yet the state and the court justified their delays as their rights, not the defendants.

> 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 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.

CONCLUSION

Mr. Paulmier still claims his innocence and wanted a quick trial because he believed he would prevail while the evidence and memory of all involved would remain fresh. He thought the only difference in a jury trial and a bench trial was the time saved seating a jury.

For the above stated reasons Petitioner Stephen L. Paulmier respectfully requests that this Honorable Supreme Court of the United States court grant this application and issue a 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 separate trial calendar and handled on several consecutive days) in order to have a bench trial which apparently could be continued on indefinitely.

Petitioner humbly prays for review of this important *prima facia* case by this Supreme Court of the United States of America.

DATED: Hilo, Hawaii, February 13, 2019

/s/ 

Gary C. Zamber, Esq.

Electronically Filed
Intermediate Court of Appeals
CAAP-15-0000381
20-JUL-2018
07:46 AM

NO. CAAP-15-0000381

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, 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 Hawai'i (**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, Hawai'i, July 20, 2018.

On the briefs:

Gary C. Zamber,
for Defendant-Appellant.

Sylvia Wong,
Deputy Prosecuting Attorney,
County of Hawai'i,
for Plaintiff-Appellee.

Chief Judge

Associate Judge

Associate Judge

COPY

APR - 2 2015

STATE OF HAWAII FAMILY COURT OF THE THIRD CIRCUIT	JUDGMENT GUILTY CONVICTION AND SENTENCE NOTICE OF ENTRY	CASE NUMBER FC-CR. NO. 14-1-00101
STATE OF HAWAII vs. Stephen L. Paulmier	DEFENDANT'S GUILTY/NO CONTEST PLEA ENTERED JUDGE'S FINDINGS ENTERED	POLICE REPORT NO(S). C14007901/HL

ORIGINAL CHARGE(S)	CHARGE(S) TO WHICH DEFENDANT PLEAD
ABUSE OF FAMILY OR HOUSEHOLD MEMBER	Same

DEFENDANT IS CONVICTED AND FOUND GUILTY OF SAME CHARGE(S) TO WHICH DEFENDANT PLEAD

JUDGMENT AND SENTENCE OF THE COURT: PROBATION for a term of 2 (X) YEAR(S).

It is adjudged that the defendant has been convicted and is guilty as stated above.

IT IS THE JUDGMENT AND SENTENCE of the court that the defendant is hereby placed on probation for the period stated above, commencing as of the date of this judgment and unless sooner discharged by order of the Court, upon condition that the defendant comply with all of the terms and conditions of probation set forth in the attached document.

IT IS ORDERED that copies of this Judgment be delivered to the Adult Probation Services Division of this court, that a probation officer of this court take charge of and have supervision of the defendant and instruct the defendant regarding the terms and conditions of probation.

IT IS FURTHER ORDERED, that Defendant shall faithfully and regularly attend a domestic violence intervention program, as recommended by your Probation Officer and approved by the Court, until you are clinically discharged. Also, by agreement of the parties, that the following charge(s) be dismissed:

Bail conditions are canceled.

DATE	JUDGE	SIGNATURE
APR - 1 2015	LLOYD VAN DE CAR	LLOYD VAN DE CAR (SEAL)

NOTICE OF ENTRY

THIS JUDGMENT HAS BEEN ENTERED AND COPIES MAILED OR DELIVERED TO ALL PARTIES

I hereby certify that this is a full, true and correct copy of the original on file in this office.

Clerk, Third Circuit Court, State of Hawaii

DATE	CLERK
APR - 1 2015	Helen Realin

FILED
2015 APR -3 PM 1:03
CLERK
FAMILY COURT 3RD CIRCUIT
STATE OF HAWAII

Distribution: X Orig File X Pros X Def X DEF ATTY X APP

IN THE FAMILY COURT OF THE THIRD CIRCUIT
STATE OF HAWAII

STATE OF HAWAII	FC-CR NO.: 14-1-0101
vs.	CHARGE(S): Abuse of Family or Household Member
STEPHEN L. PAULMIER,	
SSN: xxx-xx-0807 DOB: 1955	REPORT NO(S): C14007901/HL
DEFENDANT	

TERMS AND CONDITIONS OF ☒ PROBATION ☐ DANCP ☐ DAGP

IT IS THE ORDER OF THE COURT that during the period of your ☒ probation ☐ supervision, you shall comply in all respects with the MANDATORY/SPECIAL TERMS AND CONDITIONS for ☒ probation ☐ supervision sentences set forth below:

A. MANDATORY:

1. You must not commit another Federal or State crime or engage in criminal conduct in any foreign jurisdiction or under military jurisdiction that would constitute a crime under Hawaii law during the term of ☒ probation ☐ supervision;
2. You must report to a ☒ Probation ☐ Supervision officer as directed by the court or the ☒ Probation ☐ Supervision Officer;
3. You must remain within the jurisdiction of the court, unless granted permission to leave by the court or by the ☒ Probation ☐ Supervision Officer;
4. You must notify your ☒ Probation ☐ Supervision Officer prior to any change in address or employment;
5. You must notify the ☒ Probation ☐ Supervision Officer promptly if arrested or questioned by a law enforcement officer;
6. You must permit a ☒ Probation ☐ Supervision Officer to visit you at home or elsewhere as specified by the court; and
7. You must make restitution for losses suffered by the victim or victims if the Court has ordered restitution pursuant to Section 706-646.

B 2 SPECIAL TERMS AND CONDITIONS OF ☒ PROBATION ☐ SUPERVISION:

1. You will be confined to the Hawaii Community Correctional Center for 30 days with credit for ~~20~~ 2 days time served. As a special condition of ☒ Probation ☐ Supervision, all but 48 hours days will be stayed for a period of 24 months, subject to imposition at the discretion of the court. MITTIMUS to issue stayed pnly appeal

SLP
Deft's Init.

2 2. You shall faithfully and regularly attend a domestic violence intervention program, as recommended by your ☒ Probation ☐ Supervision Officer and approved by the court, until you are clinically discharged.

___ 3. You shall obtain a substance/alcohol abuse assessment from a qualified evaluator selected by your ☐ Probation ☐ Supervision Officer and to faithfully and regularly undertake the course of treatment, if any, recommended by the assessment until you are clinically discharged.

___ 4. You shall submit to urinalysis or other similar assessments, as directed by your ☐ Probation ☐ Supervision officer, at your own expense and in accordance with your ability to pay. A positive finding, a failure to provide a valid specimen within two (2) hours of instruction, the use of a tampering device or a specimen determined adulterated or inconsistent with human urine by laboratory testing may be considered prima facie evidence of probation/deferral violation.

___ 5. You shall not use any narcotic drugs or controlled substances without first obtaining a prescription for such drugs or substance.

___ 6. You shall not possess or consume any alcoholic beverages.

___ 7. You will undergo a [ ] psycho-social and/or [ ] psycho-sexual evaluation by a qualified evaluator selected by your ☐ Probation ☐ Supervision Officer and faithfully and regularly undertake the course of treatment, if any, recommended by the evaluation until you are clinically discharged.

2 8. You shall be responsible for payment of the fees and costs for the domestic violence intervention program and any court-ordered assessment and evaluation, as well as the treatment recommended by the assessment and evaluation. You shall budget your finances, obtain full or part-time employment, or arrange to work for the services provided to you to fulfill this requirement. You shall sign all consents/releases as requested by the ☒ Probation ☐ Supervision Officer to enable the ☒ Probation ☐ Supervision officer and the court to receive information regarding your assessment, evaluation and/or treatment.

waive 9. You shall pay a Criminal Injuries Compensation fee of $_____ and a ☐ probation ☐ supervision fee of $_____, in [ ] in full by _____, 20____ , or [ ] in monthly installments of $_____ starting the month of _____, 20____.

___ 10. You shall perform _____ hours of community service before _____.

SRD
Deft's Init.

___ 11. You shall pay a fine of $_____ [ ] by _____, 20____, or [ ] in monthly installments of $_____ starting the month of _____, 20____.

___ 12. ~~You will pay restitution of $_____ to the victim [ ] by _____, 20____, or [ ] in monthly installments of $_____ starting the month of _____, 20____.~~

2 13. You shall not contact, threaten or harm Merj Alves Partner.

2 14. You shall comply with the reasonable instructions of your ☒ Probation ☐ Supervision Officer.

2 15. You shall not possess a firearm, destructive device or ammunition. Any such items shall be surrendered to the Hawaii County Police Department within 24 hours.

___ 16. You will apply the net income you earn to the support, maintenance and education of your family.

___ 17. You will work conscientiously at suitable employment or pursue a course of study or vocational training as recommended by your ☐ Probation ☐ Supervision Officer that will equip you for suitable employment.

___ 18. You shall refrain from going to the following places:

_____.

___ 19. You shall refrain from socializing or having contact with the following individuals:

_____.

___ 20. You will not be permitted to reside in the following geographical areas: _____.

___ 21. You will confine yourself to residing in the following geographical areas: _____.

2 22. A) You shall appear periodically before the court to show proof of your compliance with the judgment of the court and the terms and conditions of your ☒ probation ☐ supervision.
B) Next proof of compliance date: June 17, 2015 at 8:30 a.m.

2 23. Other: F A) Execute the Terms & Conditions of ☒ Probation ☐ Supervision today.
F B) Enroll in court ordered program services within 14 days ☐ of your release.

_____.

NOTICE AND WARNING:

1. The following reasons are NOT considered acceptable excuses for your failure to comply with the terms and conditions of your ☒ probation ☐ supervision:
   A. "I couldn't afford to pay for the domestic violence treatment program, etc."
   B. "I had car trouble."
   C. "I had no transportation."
2. In addition, illness or injury is NOT considered an acceptable

excuse unless you first inform your ☒ Probation ☐ Supervision Officer and the person you are supposed to see that you will be unable to do so. If confirmation of your illness or injury is requested, you must provide a doctor's report or other evidence satisfactory to your ☒ Probation ☐ Supervision Officer.

3. Failure to comply with any term or condition of your ☒ probation ☐ supervision may result in the revocation of your ☒ probation ☐ supervision. Upon revocation, the court can re-sentence you to any sentence it could have imposed upon you for the offense for which convicted.

ACKNOWLEDGMENT:

The foregoing terms and conditions of probation and notice and warning have been fully explained to me; I fully understand them, agree to abide by them in every way and understand the consequences for not doing so. I have received a copy of these terms and conditions of ☒ probation ☐ supervision.

Dated: APR - 1 2015

Stephen Paulmier
(Print Your Name)

(Signature of Defendant)

(Signature of Witness)

SCWC-15-0000381

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I,
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, Hawai'i, November 23, 2018.

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

APPENDIX C

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were served upon the following parties:

OFFICE OF THE PROSECUTING ATTORNEY
655 Kilauea Avenue
Hilo, Hawai`i 96720-4232

☐ Via facsimile to number: (808) 934-3503.

☒ By leaving same in the party's court jacket.

☐ Via electronic mail via the Judiciary Electronic Filing System.

☐ By hand-delivery.

2/6/15
DATE

SIGNATURE
OFFICE OF THE PUBLIC DEFENDER