CONCURRING OPINION BY REIFURTH, J.

I agree with the majority's disposition of Lindsey's appeal, but have two reservations concerning the analysis of Lindsey's first point of error. Therefore, I concur separately.

Regarding an alleged violation of Hawai‘i Rules of Penal Procedure Rule 48 ("Rule 48"), the majority concludes that Lindsey "has failed to show plain error on this record." Summ. Disp. Order at 3. It is not apparent to me that a violation of Rule 48 is amenable to review absent a motion to dismiss. Therefore, I would conclude that it is not subject to plain-error review.

Rule 48 accords defendants the right to seek dismissal if they are not brought to trial within six months. Haw. R. Pen. P. 48. But unlike other speedy-trial schemes,[1] it does not compel courts to bring defendants to trial within any given time frame (irrespective of excludable periods). It does not proscribe excessive delay; rather, it provides courts with an incentive to mitigate undue delays. The only opportunity for error in contravention of Rule 48 is upon a motion to dismiss pursuant to that rule. Absent such a motion, I would conclude that there can be no error.

Regarding Lindsey's constitutional speedy-trial rights, the balance of *Barker* factors, *see Barker v. Wingo*, 407 U.S. 514 (1972), in my opinion, does not "weigh strongly toward the State." Summ. Disp. Order at 3. The majority appears to count against Lindsey the fact that he did not assert a violation of his rights. That fact, however, merely shifts our mode of review into one for plain error; it is not evidence that Lindsey failed to assert the right. *See Barker*, 407 U.S. at 530 (identifying the third factor as "the defendant's assertion of his right"). Indeed, through his emphatic objections to multiple continuances and express readiness to go to trial, Lindsey consistently "manifest[ed] his desire to be tried promptly." *United States v. Frye*, 489 F.3d 201, 212 (5th Cir. 2007) (quoting *United States v. Litton Sys., Inc.* 722 F2d 264, 271 (5th Cir. 1984) (internal

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[1/] For example, the federal Speedy Trial Act explicitly requires that courts bring defendants to trial within a prescribed period of time. *See* 18 U.S.C. § 3161 (2012).

quotation marks omitted)); *cf. State v. Wasson*, 76 Hawai‘i 415, 421, 879 P.2d 520, 526 (1994) (concluding that a motion to dismiss on speedy trial grounds is not evidence of an actual desire to be tried promptly).

Furthermore, while most, if not all, of the delay in bringing the case to trial was justifiable,[2] none of it was attributable to Lindsey. I would weigh this factor, then, neutrally, if not slightly against the State. *See Wasson*, 76 Hawai‘i at 420, 879 P.2d at 525; *see also United States v. Gomez*, 67 F.3d 1515, 1522 (10th Cir. 1995) ("[W]hile the delay attributable to trial preparation and substitution of counsel weighs against the government, it is not substantial.").

Ultimately, however, because Lindsey fails to identify any possibly prejudicial impairment of his defense, I cannot say that the Circuit Court plainly erred here. *See Barker*, 407 U.S. at 532 (recognizing such impairment as the most serious interest protected by the speedy trial right); *cf. United States v. Serna-Villarreal*, 352 F.3d 225, 232 (5th Cir. 2003) ("[I]f the government diligently pursues a defendant from indictment to arrest, prejudice will never be presumed." (citing *Doggett v. United States*, 505 U.S. 647, 656 (1992))).

As a result, these reservations notwithstanding, I respectfully concur.

[2/] Lindsey does not specifically allege that the Circuit Court erred in declining to sever his trial. The Circuit Court, however, appeared to accord minimal weight to Lindsey's speedy-trial concerns notwithstanding Lindsey's strenuous objection to another continuance and concomitant oral motion for severance. Even if, in such circumstances, Lindsey's speedy-trial right might have warranted greater consideration, *see State v. Iniguez*, 217 P.3d 768, 778-779 & n.10 (Wash. 2009) (en banc), I would not find plain error.