DISSENTING OPINION BY GINOZA, J.

In my view, the Circuit Court of the Fifth Circuit (Circuit Court) properly denied Appellant Vicente Kotekapika Hilario's (Hilario) Motion to Dismiss under Hawaiʻi Rules of Penal Procedure (HRPP) Rule 48.

As noted by the majority, the first relevant time period for purposes of analyzing Hilario's HRPP Rule 48 motion was the period between the May 14, 2012 trial date and the continued trial date of September 17, 2012 (Period One, consisting of 126 days). For the reasons expressed by the majority, I agree that Period One was properly excluded from the HRPP Rule 48 calculation and therefore do not further address that part of the analysis.[1]

However, unlike the majority, I conclude that under the unusual circumstances of this case, the period between the September 17, 2012 trial date and the January 7, 2013 trial date (consisting of 112 days) should also be excluded from the HRPP Rule 48 calculation. Even if the Circuit Court was incorrect in its determination that Jens Kyler Hansen-Loo (Hansen-Loo) was an alibi witness under HRPP Rule 12.1, that ruling did not in itself cause the delay in the trial. Rather, as the Circuit Court correctly determined, the *delay in the trial* was a result of Hilario filing his Notice of Alibi, which was filed on August 22, 2012 (less than a month before the scheduled September 17, 2012 trial date). The Notice of Alibi stated that Hilario "gives notice pursuant to Rule 12.1 of the [HRPP] of his intention to rely upon the defense of alibi." Although Hilario's counsel later argued that he did not believe Hansen-Loo was an alibi witness and that he filed the Notice of Alibi "in an abundance of caution," Hilario nevertheless chose to file the Notice of Alibi and never withdrew it. As acknowledged by Hilario's counsel, the Notice of Alibi was filed in order to preserve Hansen-Loo's

[1] As noted by the majority, Hilario does not raise on appeal any issue related to his constitutional right to a speedy trial, and that issue need not be addressed.

availability as a witness. In light of the Notice of Alibi, the Circuit Court continued the trial in order to allow Hilario to present Hansen-Loo as a witness at trial. In addressing HRPP Rule 48, this court has previously noted that "[t]he supreme court has counseled that a defendant shall not be heard when the delays were a direct result of his own act or were the result of a benefit granted to him." State v. Dunn, 8 Haw. App. 238, 243, 798 P.2d 908, 911 (1990)(quoting State v. Smith, 59 Haw. 456, 469, 583 P.2d 337, 345 (1978))(brackets omitted).

A notice of alibi usually must be filed "within the time provided for the filing of pretrial motions or at such later time as the court may direct[.]" HRPP Rule 12.1(a). Thus, under HRPP Rule 48(d)(2), a notice of alibi does not usually result in excluded time for purposes of HRPP Rule 48(c)(1). In this case, however, the Notice of Alibi was filed less than a month before the scheduled September 17, 2012 trial date and resulted in a delay of trial. See State v. Hoey, 77 Hawaiʻi 17, 30, 881 P.2d 504, 517 (1994) (noting "the centrality of actual delay" as an element as to whether time is excluded under HRPP 48(c)). In these circumstances, Hilario's filing of the Notice of Alibi should be considered a proceeding concerning the defendant, such that the period of delay caused by the Notice of Alibi is excluded under HRPP Rule 48(c)(1).

For these reasons, I respectfully dissent.