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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I,
Respondent/Plaintiff-Appellant,

vs.

QUINCY L.F. CHOY FOO, III,
Petitioner/Defendant-Appellee.

SCWC-13-0000636

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-13-0000636; CR. NO. 12-1-0829)

MARCH 16, 2018

DISSENTING OPINION BY NAKAYAMA, J.,
IN WHICH RECKTENWALD, C.J., JOINS

Generally, Hawai'i Rules of Penal Procedure (HRPP) Rule 48 requires criminal trials to commence within six months of a defendant's arrest. The only issue here is whether a twenty-one day period between Petitioner/Defendant-Appellee Quincy L.F. Choy Foo, III's (Choy Foo) initial appearance in the District Court of the First Circuit (district court) and the court-scheduled

hearing for a waiver or demand of his right to a jury trial is excludable from the six-month window. Unlike the Majority, I believe it is.

On February 16, 2012, Choy Foo was arrested for allegedly committing sexual assault, and bail was set at \$2,000. Respondent/Plaintiff-Appellant State of Hawai'i (the State) later filed a complaint in the district court alleging that Choy Foo committed the offense of sexual assault in the fourth degree, in violation of Hawai'i Revised Statutes (HRS) § 707-733(1)(a).¹

Choy Foo made his first appearance in district court on March 15, 2012. At that time, he was without counsel. The district court, after reading the charges and informing him of the maximum penalties, scheduled Choy Foo's hearing for a waiver or demand of his right to jury trial three weeks later. The district court then referred Choy Foo to the Office of the Public Defender and told him to "call them right away for an appointment."

¹ HRS § 707-733 (1993) provides in relevant part:

Sexual assault in the fourth degree. (1) A person commits the offense of sexual assault in the fourth degree if:

- (a) The person knowingly subjects another person to sexual contact by compulsion or causes another person to have sexual contact with the actor by compulsion;

. . . .

- (2) Sexual assault in the fourth degree is a misdemeanor.

Three weeks later, on April 5, 2012, Choy Foo returned to the district court without a lawyer, and requested a continuance. The continuance was granted until May 15, 2012. On May 15, 2012, Choy Foo requested and was granted a second continuance until May 30, 2012. On May 30, 2012, Choy Foo appeared with a deputy public defender and demanded a jury trial.

The case was then transferred to the Circuit Court of the First Circuit (circuit court). On June 12, 2012, Choy Foo was arraigned in circuit court and entered a not guilty plea. After several continuances, on March 11, 2013, Choy Foo filed a motion to dismiss pursuant to HRPP Rule 48.² Choy Foo contended that the Rule was violated when his trial did not commence within six months (excluding the time chargeable to the defense) of the date of his arrest on February 16, 2012. On March 13, 2013, the State filed a memorandum in opposition to Choy Foo's motion to dismiss. The State argued that six months had not yet elapsed because the twenty-one day period between Choy Foo's appearance in district court and the jury waiver/demand hearing was

² HRPP Rule 48 (2000) allows the court to dismiss a criminal charge when:

[(b)] 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[.]

excludable from the six-month window under HRPP Rule 48(c)(1) and 48(c)(8).³

Determining that the twenty-one day period was "not excludable" under the Rule, the circuit court granted Choy Foo's motion to dismiss the charges with prejudice. But the Intermediate Court of Appeals (ICA) vacated the circuit court's decision, determining that both HRPP Rules 48(c)(1) and 48(c)(8) excluded this period from the six-month window.

In vacating the ICA's decision, the Majority holds that the twenty-one day period cannot be excluded under HRPP Rule 48(c)(1) ("collateral or other proceedings") or HRPP Rule 48(c)(8) ("good cause"). Majority at 18. Therefore, it holds that the circuit court did not err in dismissing this case for violating HRPP Rule 48. Majority at 30.

While I agree with the Majority that the twenty-one day period cannot be excluded under HRPP Rule 48(c)(8),⁴ the language

³ HRPP Rule 48(c) provides in relevant part:

(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;

. . . .

(8) other periods of delay for good cause.

⁴ As this court stated in State v. Abregano, "a period is excludable as good cause under HRPP Rule 48(c)(8) if the events causing the delay are
(continued...)

of HRPP Rule 48(c)(1) and the underlying purposes of HRPP Rule 48 indicate to me that the twenty-one day period is excludable as a "collateral or other proceeding" that delayed trial. Therefore, I would affirm the ICA's February 14, 2017 Judgment on Appeal on that basis. Accordingly, I respectfully dissent.

I. DISCUSSION

In noting my disagreement with the Majority, I respectfully raise two points. First, I believe that the plain language of HRPP Rule 48(c)(1) suggests that the twenty-one day period is excludable as a "collateral or other proceeding" that delayed Choy Foo's trial. Second, I believe the purpose of the Rule and case law interpreting the Rule indicate that a continuance of reasonable duration to ensure that a defendant has counsel at a jury waiver/demand hearing is excludable from the six-month calculation.

A. The Plain Language of HRPP Rule 48(c)(1)

I agree with the Majority that the "fundamental starting point" in interpreting HRPP Rule 48(c)(1) is the language of the Rule itself. State v. Wheeler, 121 Hawai'i 383, 390, 219 P.3d 1170, 1177 (2009); see also Citizens Against

⁴(...continued)

unanticipated and not reasonably foreseeable." 136 Hawai'i 489, 498, 363 P.3d 838, 847 (2015). Here, it is reasonably foreseeable that many defendants will make their initial appearance in district court without an attorney. Majority at 28. Therefore, the period between a defendant's first appearance and a hearing for a waiver or demand of jury trial is actually anticipated and reasonably foreseeable, and cannot be excluded for "good cause."

Reckless Dev. v. Zoning Bd. of Appeals, 114 Hawai'i 184, 194, 159 P.3d 143, 153 (2007) (applying rules of statutory construction to administrative rules). HRPP Rule 48(c)(1) states that a period should be excluded in computing the time for trial commencement if: "[the period delays] the commencement of trial and [is] 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[.]"

The Majority states that the district court's twenty-one day continuance for a waiver/demand hearing or for appointment of counsel "does not fall within the plain language of exclusions under HRPP Rule 48(c)(1)." Majority at 23. I respectfully disagree. HRPP Rule 48(c)(1) specifically states that a period that "delay[s] the commencement of trial" and is caused by "collateral or other proceedings concerning the defendant" can be excluded under the Rule. I believe that the twenty-one day period here meets both requirements under HRPP Rule 48(c)(1) -- the period delayed the commencement of trial and was caused by a collateral or other proceeding concerning the defendant. Furthermore, I believe HRPP Rule 48(d) cannot provide guidance on whether a proceeding can be excluded under HRPP Rule 48(c)(1) because that Rule only applies if a motion is filed.

1. The district court's continuance meets both requirements of Rule 48(c) (1).

First, the twenty-one day period delayed the commencement of trial. Because Choy Foo's case involved a right to jury trial, and because a jury-waived trial would be held in district court while a jury trial would be held in circuit court, Choy Foo's trial could not be scheduled without a waiver or demand of jury trial. Choy Foo was charged with a misdemeanor, which is punishable by up to one year in prison. HRS § 706-663 (1993). Therefore, Choy Foo was entitled to a jury trial. The district court generally has jurisdiction to hear misdemeanor cases, but cannot conduct jury trials. HRS § 604-8.⁵ Therefore, HRPP Rule 5(b) (3) requires that jury trials for misdemeanors be transferred to circuit court. The defendant's decision in a misdemeanor case to waive or demand jury trial determines which court has jurisdiction to hear the case. Before a defendant

⁵ HRS § 604-8 (Supp. 2001) provides in relevant part:

Criminal, misdemeanors, generally. (a) District courts shall have jurisdiction of, and their criminal jurisdiction is limited to, criminal offenses punishable by fine, or by imprisonment not exceeding one year whether with or without fine. . . .

In any case cognizable by a district court under this section in which the accused has the right to a trial by jury in the first instance, the district court, upon demand by the accused for a trial by jury, shall not exercise jurisdiction over the case, but shall examine and discharge or commit for trial the accused as provided by law; provided that, if in any such case the accused does not demand a trial by jury on the date of arraignment or within ten days thereafter, the district court may exercise jurisdiction over the case, subject to the right of appeal as provided by law.

waives or demands a jury trial, no trial can take place. Therefore, the twenty-one day period before the jury waiver/demand hearing can easily be described as a period that delayed trial.

Second, the twenty-one day period was caused by a "collateral or other proceeding concerning the defendant." HRPP Rule 48(c)(1). True, HRPP Rule 48(c)(1) explicitly lists proceedings that are per se excludable: "penal irresponsibility examinations and periods during which the defendant is incompetent to stand trial, pretrial motions, interlocutory appeals and trials of other charges[.]" Continuances for a hearing to waive or demand jury trial are not explicitly excluded. But that does not end the inquiry, because HRPP Rule 48(c)(1) clearly states that "collateral or other proceedings concerning the defendant" are "not limited" to the ones specifically listed. This demonstrates that the plain language of the Rule itself imagines that there are "other proceedings" not explicitly listed that are still excludable under Rule 48(c)(1).⁶

A waiver/demand hearing for jury trial is a proceeding concerning the defendant. A "proceeding" is described as ["t]he

⁶ For this reason, I believe the Majority errs when it concludes that because a period for a waiver/demand hearing is not explicitly excluded by HRPP Rule 48, it therefore must be included in calculating the time within which trial must commence. Contra Majority at 23.

regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.” Proceeding, Black’s Law Dictionary (9th ed. 2009). Here, the defendant’s jury waiver/demand hearing can be classified as a “proceeding” concerning Choy Foo.⁷ The hearing was necessary to determine which court had jurisdiction to hear Choy Foo’s case, and can be described as an “act” between the time of commencement and the entry of judgment. Moreover, the hearing concerned Choy Foo.⁸ Therefore, the twenty-one day period can be excluded because it falls within the language of HRPP Rule 48(c)(1) as a “collateral or other proceeding” that delayed Choy Foo’s trial.

2. HRPP Rule 48(d)(2)’s plain language cannot apply when a motion has not been filed.

The Majority believes HRPP Rule 48(d) “provides some

⁷ According to this court’s principles of statutory construction, our rule against surplusage demands that “collateral” and “other” must mean two different things.

It is a cardinal rule of statutory construction that courts are bound to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute.

State v. Kaakimaka, 84 Hawai’i 280, 289-90, 933 P.2d 617, 626-27 (1997) (citing State v. Ortiz, 74 Haw. 343, 351-52, 845 P.2d 547, 551-52 (1993)).

⁸ Furthermore, at least one ICA decision suggests that a demand for jury trial is a “collateral proceeding” under HRPP Rule 48(c)(1). See State v. Coyaso, 9 Haw. App. 232, 236, 832 P.2d 737, 741 (1992) (“Nevertheless, the demand for jury trial is a collateral proceeding concerning Defendant[.]”) overruled on other grounds by State v. Coyaso, 73 Haw. 352, 357, 833 P.2d 66, 69 (1992).

insight for the application of HRPP Rule 48(c)(1),” and believes that Rule 48(d) makes clear that the period at issue here cannot be excluded. Majority at 19-20. HRPP Rule 48(d)(1)⁹ lists certain periods, from the filing of a motion to the disposition of that motion, as per se excludable. From this, the Majority believes that “[t]he fact that initial appointment of counsel was not placed among the examples of ‘collateral or other proceedings’ in subsections (c)(1) or (d)(1) suggests that it was not intended to be treated like the items on those lists.” Majority at 22. In other words, because the period here was not per se excluded by HRPP Rule 48(c)(1) or (d)(1), the Majority concludes that it was not meant to be an excluded period under the expressio unius canon of statutory construction. Majority at 22-23.

To the extent that the Majority relies on HRPP Rule

⁹ HRPP Rule 48(d)(1) provides:

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.

(Emphasis added.)

48(d) to interpret whether a certain period can be excluded under HRPP Rule 48(c)(1), I believe its reliance on that subsection in this case is misplaced. As the Majority recognizes, HRPP Rule 48(d) clearly lists per se excluded or included periods of delay due to a filing of a motion. Majority at 22. All agree that Choy Foo did not file a motion for the twenty-one day continuance. Majority at 3. Therefore, I believe HRPP Rule 48(d)(1) is inapplicable to this case.

Instead, HRPP Rule 48(c)(1) contemplates the exclusion of periods which have nothing to do with the filing of a motion. While the word "motion" permeates HRPP Rule 48(d), it is only one of several bases on which to exclude a period under HRPP Rule 48(c)(1). For instance, HRPP Rule 48(c)(1) also explicitly excludes periods of delay caused by penal irresponsibility examinations, interlocutory appeals, and trials of other charges. Therefore, the excludability of certain periods of time pursuant to HRPP Rule 48(c)(1) does not exclusively depend upon whether a motion is filed.

Based on the language of HRPP Rule 48(c)(1) and the inapplicability of HRPP Rule 48(d) to Choy Foo's case, I conclude that HRPP Rule 48(c)(1) at least suggests that a continuance for a hearing for a waiver/demand of jury trial can be excluded as a "collateral or other proceeding" that delayed Choy Foo's trial.

B. The Purpose of HRPP Rule 48

Moreover, the purpose of HRPP Rule 48 and our decisions interpreting similar periods of time where the defendant was without counsel provide further support that the twenty-one day period at issue here should be excluded.

- 1. Generally, excluding periods where a defendant must obtain counsel before "critical stages" of the prosecution accords with the purposes of HRPP Rule 48.**

HRPP Rule 48 was intended to achieve two purposes: to ensure a speedy trial for criminal defendants and to relieve congestion in the trial courts. State v. Hoey, 77 Hawai'i 17, 29, 881 P.2d 504, 516 (1994). In other words, HRPP Rule 48 was intended to benefit both defendants and the trial courts. To accomplish both purposes, HRPP Rule 48 requires a court to dismiss a criminal charge with or without prejudice if trial is not commenced within six months from the date of arrest (or the filing of the charge, whichever is earlier). HRPP Rule 48(b)(1).

But HRPP Rule 48 also excludes certain periods from the six-month calculation. HRPP Rule 48(c). An examination of the Rule indicates that generally, a period of delay attributable to the defense, or one that benefits the defendant, is excludable. See HRPP Rule 48(c)(1); 48(c)(3) (periods caused by a continuance granted at the request or with the consent of the defendant or the defendant's counsel); 48(c)(5) (periods caused by the absence

or unavailability of the defendant); 48(d)(1) (motions for withdrawal of counsel including the time period for appointment of new counsel if so ordered). This makes sense; while the Rule was intended to provide speedy trials for the defendant, a delay that is caused by or inures to the benefit of the defendant does not appear to further either purpose of HRPP Rule 48.

Our case law analyzing periods excludable under HRPP Rule 48 due to a defendant's lack of counsel echo this general principle. In State v. Senteno, this court held that a one-month delay attributable to a defense counsel's motion to withdraw and the ensuing five-month period when the defendant was without counsel were excludable. 69 Haw. 363, 368, 742 P.2d 369, 373 (1987). Because HRPP Rule 48 had not yet been amended to include subsection (d) at that time, this court could not rely on the per se excludable period for motions for withdrawal of counsel.¹⁰ But we reasoned, "[b]ecause trial could not proceed in the absence of trial counsel or waiver of the right to counsel, this period was excluded under the 'good cause' provision of subsection (c)(8)." Id. This court affirmed that general reasoning in State v. Samonte, where we similarly held that a

¹⁰ At the time that Senteno (1987) was decided, and at the time of the defendant's trial in Samonte (1993), there was no per se excludable period in HRPP Rule 48. The Rule was amended in 1994 to include subsection (d), which specifically made excludable "motions filed by a defendant . . . for withdrawal of counsel including the time period for appointment of new counsel[.]"

defense counsel's motion to withdraw as counsel was excludable under HRPP Rule 48. See 83 Hawai'i 507, 516, 928 P.2d 1, 10 (1996).

While it is true that the periods excluded from the six-month calculation in Senteno and Samonte involved defense counsels' motions to withdraw as counsel and HRPP Rule 48(d) now explicitly excludes such motions, the same considerations apply in this case. Here, just as in Senteno and Samonte, without continuing the hearing for a waiver or demand of jury trial, Choy Foo would have been without counsel at a "critical stage" of the proceedings.¹¹ As this court has previously held that defendants are entitled to counsel at these proceedings, see Pitts, 131 Hawai'i at 541, 319 P.3d at 460, the hearing for a waiver or demand of jury trial "could not proceed in the absence of trial counsel or a waiver of the right to counsel." Cf. Senteno, 69 Haw. at 368, 742 P.2d at 373.

Based on the record here, I am persuaded that the district court ordered the twenty-one day continuance in order to ensure that Choy Foo appeared with counsel at the hearing to waive or demand his right to jury trial. Choy Foo was without

¹¹ This court has held previously that the right to counsel attaches at all "critical stages" of the prosecution. State v. Pitts, 131 Hawai'i 537, 541-42, 319 P.3d 456, 460-61 (2014). A critical stage is defined as one "where potential substantial prejudice to defendant's rights adheres." Id. (citing State v. Masaniai, 63 Haw. 354, 359, 628 P.2d 1018, 1022 (1981)). A hearing to waive or demand a jury trial is clearly a critical stage of the prosecution.

counsel at his initial appearance. At that time, he was handed the complaint and told that the maximum penalty for the misdemeanor was a \$2,000 fine, one year in jail, or both. After Choy Foo stated that he understood the possible penalties, the district court stated:

THE COURT: So, we need to set this for demand or waiver of your right to a jury trial. So, we're going to set it for three weeks. I'm going to give you a referral to public defend -- defenders, excuse me, and you need to call them right away for an appointment. And the bond to continue.

Thank you very much.

[CHOY FOO:] Thank you.

THE COURT: You have a seat. We'll get your paperwork.

The trial transcript demonstrates that the district court was aware that Choy Foo was being charged with a misdemeanor that carried with it a possible prison sentence. The district court also knew that Choy Foo was without counsel. Therefore, the district court's explicit referral to the Office of the Public Defender and its suggestion that Choy Foo call them right away for an appointment indicates that the continuance was due, at least in part, to the fact that Choy Foo was without counsel at his appearance and that he should not be without counsel when he waived or demanded his right to a jury trial.

Choy Foo argues that "[t]he practice of scheduling a waiver/demand hearing is the same for represented and unrepresented defendants." But there is no evidence in the record to suggest that a three-week continuance occurs in all

misdemeanor cases requiring a waiver/demand hearing. In fact, the record indicates that there are misdemeanor cases in which public defenders will appear with the defendant at his or her initial appearance to just go through the waiver/demand hearing. As Choy Foo stated at trial,

[O]ccasionally, public defenders -- if you have a defendant who makes an initial appearance for, like, a driving without license as a third offense, which is a full misdemeanor, we will make special appearances to go through just the waiver/demand and to have the defendant enter a plea and agree to pay the standard fine for that offense.

When the district court knew that Choy Foo was unrepresented, it was necessary to continue the proceeding to a later date so Choy Foo could obtain and talk to an attorney before being required to either waive or demand his right to jury trial. Cf. Senteno, 69 Haw. at 368, 742 P.2d at 373. Excluding such a period fulfills the purposes of HRPP Rule 48 and is in line with our precedent excluding periods where the defendant is without counsel such that trial cannot proceed.

2. The duration of the continuance was reasonable under the circumstances.

I believe that a continuance in order for a defendant to obtain counsel before a "critical stage" of the prosecution (like a waiver/demand hearing) is excludable under HRPP Rule 48(c)(1). But that is not to say that a delay of any duration, no matter how long, between the defendant's first appearance without counsel and a court-scheduled hearing for a waiver/demand

of the right to jury trial should be excludable under the Rule.

Instead, just as this court adopted a "case-by-case" approach to excludability based on HRPP Rule 48's "good cause" provision, that same approach should be taken here. Cf. Abregano, 136 Hawai'i at 499, 363 P.3d at 848 (stating that whether the nature and duration of a period of time is excludable is "dependent on the facts of each case"). The Rule itself appears to envision that excludable periods of delay be of a reasonable duration. For example, while HRPP Rule 48(d)(1) does not directly apply to the period at issue here, it only intended to toll the six-month period on motions filed by a defendant "from the filing through the prompt disposition" of the motion.

Adopting this approach here, the question I would ask on review is whether the length of the delay was of reasonable duration to effect the purpose of the delay -- here, whether the twenty-one day period was of a reasonable duration to allow Choy Foo to obtain counsel before his jury waiver/demand hearing.

Based on the facts of this case, I believe excluding a period of twenty-one days to obtain counsel before a waiver/demand hearing is reasonable. First, even with the twenty-one day delay, Choy Foo did not have counsel when he returned to district court. On April 5, 2012, three weeks after his first appearance, Choy Foo explained that the public defenders asked him to request a continuance. The district court

granted Choy Foo's request, and granted a second request for a continuance when he again appeared without a lawyer. It was not until May 30, some eight weeks later, that Choy Foo, accompanied by a deputy public defender, finally demanded a jury trial. Therefore, even with a court-ordered twenty-one day continuance, Choy Foo was unable to obtain a public defender in time for his April 5, 2012 hearing. This suggests that the continuance here was reasonable because Choy Foo was unable to secure counsel even after the twenty-one days elapsed.

In addition, we have previously held that even a five-month period in which a defendant was without counsel was excludable under HRPP Rule 48. See Senteno, 69 Haw. at 368, 742 P.2d at 373. Of course, that period was caused by a counsel's motion to withdraw. But this court's reasoning in excluding the period in Senteno (i.e., that trial could not proceed without counsel or a waiver of the right to counsel) similarly applies here -- without counsel present, Choy Foo could not have waived or demanded his right to jury trial, and no trial could proceed.

Finally, not excluding these continuances as part of the six-month window will, I fear, create more problems than it solves. The Majority relies on Choy Foo's contention at oral argument, unchallenged by the State, that the twenty-one day continuance is regularly included in the HRPP Rule 48 calculation. Majority at 25. However, there is nothing in the

record that definitively states that this is, in fact, a regular practice of the district courts. But even if this is true, after today's decision, prosecutors will surely insist that any court-ordered continuance be shortened (to minimize the days included in the six-month calculation). If a district court decides to shorten a continuance in cases where a defendant appears without counsel at his or her first appearance, that defendant will likely be forced to return to court before he or she has had a chance to obtain counsel.¹² At that time, the defendant would request a continuance in order to obtain counsel, which the district court would certainly grant. True, these continuances would be explicitly excluded by HRPP Rule 48(d)(1). But multiple appearances would not benefit defendants, who would be required to appear in court repeatedly, and will often take time off from work to do so. Neither would they benefit the district courts, which would be further congested by hearings that would inevitably be continued. These repercussions, ironically, are the exact opposite of what HRPP Rule 48 intended. Hoey, 77 Hawai'i at 29, 881 P.2d at 516.

¹² If a defendant cannot secure counsel within three weeks, it is even less likely that a defendant, especially one that is indigent, will be able to do so in a shorter period of time.

As the deputy public defender appeared to acknowledge at oral argument when she stated that there are only eleven deputy public defenders in district court, public defenders would not be able to appear with defendants mere days after their first appearances. State v. Choy Foo, SCWC-13-0000636, Oral Argument, available at <http://www.courts.state.hi.us/oral-argument-before-the-supreme-court-of-hawaii-no-scwc-13-0000636>, at 14:00.

II. CONCLUSION

It is true that court-ordered continuances are not explicitly excluded by HRPP Rule 48. But HRPP Rule 48(c)(1) contemplates that periods which delay trial and are caused by "collateral or other proceedings" of the defendant may be excluded. Here, a hearing for a waiver or demand of jury trial can certainly be classified as one such period. Moreover, our case law with respect to periods of time where a defendant lacks counsel further indicate that a delay that allows a defendant to secure counsel for a "critical stage" of a proceeding inures to the benefit of that defendant, and should be excluded. Under the "case-by-case" approach that this court and HRPP Rule 48 itself endorse, a twenty-one day delay in order for Choy Foo to secure counsel before waiving or demanding a jury trial is reasonable. Therefore, this period should be excludable from the six-month window in which Choy Foo's trial was required to commence.

For these reasons, I would affirm the ICA's February 14, 2017 Judgment on Appeal, and respectfully dissent.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

