

DISSENTING OPINION BY REIFURTH, J.

While I agree that there was substantial evidence to support Palic's conviction, I would not reach this question because, contrary to the majority's conclusion, I believe his conviction should be vacated on speedy trial grounds. The majority's conclusion – that there were *reasonable grounds to believe* that Pisarek would later be present at trial – is simply unsupported by the underlying facts. I, therefore, respectfully dissent.

The majority relies upon Pisarek's original cooperation with the police to establish "reasonable grounds to believe" that Pisarek and his testimony would be available at a later date within the meaning of HRPP Rule 48(c)(4)(i). Mem. Op. at 10-11. Pisarek's original, and only, assistance with this case, however, came in 2002, within days of Palic's alleged offense. It was not for another seven years that the question of whether Pisarek's presence could be secured at trial arose. In light of such temporal separation, I find Pisarek's original assistance to be irrelevant to the question of whether he would be so amenable seven years later.

Moreover, at the time of the continuance, Pisarek was no longer local. As best the prosecution could determine, as ascertained through an intermediary, Agent Bugarin, Pisarek was out at sea and not expected to return for several weeks time. Furthermore, he was not returning to Hawai'i, but to somewhere in California, an ocean away.

In the State's efforts to locate Pisarek, the only certainty is that the State left a message with Agent Bugarin; all else, however, is at best vague or speculative. Agent Bugarin could only say that Pisarek was expected to return in "several weeks" time.^{1/} The record is vague as to whether Agent Bugarin ever even spoke to Pisarek, but even if he did, the

^{1/} What formed the basis for Agent Bugarin's expectation is not made clear, although while discussing Pisarek's unavailability for the 2011 trial, the State clarified that Agent Bugarin's role was to "log[] the different merchant marines' trips out because they handle the insurance matters and things like that."

content of any such communication was never established.^{2/} Further, there is no evidence of precisely where Pisarek would return ashore, and it is entirely speculative whether he would remain ashore for any meaningful length of time.

In the end, the State's – and the majority's – argument is tied not to any legitimate expectation but, rather, to several speculative contingencies. Would Pisarek receive the message left for him with Agent Bugarin? Would he be inclined to respond after so long?^{3/} Most dubiously, would Pisarek be both available and willing to take time to travel overseas to help prosecute a ten-dollar robbery that occurred seven years earlier?

Whatever "reasonable grounds to believe" means, it must mean something more definite than an attenuated hopefulness. For example, a witness's demonstrated and contemporaneous willingness to testify, see *State v. Ferraro*, 8 Haw. App. 284, 298–99, 800 P.2d 623, 631–32 (1990), the predictability of a witness's return from a temporary absence, see *State v. Ahlo*, 79 Hawai'i 385, 393–94, 903 P.2d 690, 698–99 (App. 1995), or the reliability of a witness's whereabouts for purposes of service, see *State v. Filoteo*, No. 29921, 2011 WL 2126149, at *2 (Haw. Ct. App. May 25, 2011), may suffice.

But I find it wholly inadequate to predicate any likelihood of securing the presence of an overseas witness, whose current employment involves some degree of extended travel, and whose interest in assisting the prosecution is utterly unknown and unpredictable, at trial in Hawai'i upon no more than a phone message left with a third party who promises to pass along the

^{2/} In its January 26, 2011 memorandum in opposition to Palic's Motion to Dismiss, the State represented that it had been "able to track [Pisarek] down, and even make contact with him while he was at sea." Later, in 2011, when the State was discussing Pisarek's unavailability for the continued trial, the State asserted: "[p]reviously we were able to get in touch with him on the ship, and that was through [Agent Bugarin], so [we're] hoping that this means will yield that contact again." If there were more specific facts regarding the nature or substance of Agent Bugarin's contact with Pisarek, it is reasonable to expect that the State would have presented them below.

^{3/} Indeed, there is no indication that Pisarek ever received the State's message or contacted the State in response. Ultimately, the State had to *nolle prosequi* the robbery charge.

message seven years after the offense.

Therefore, I respectfully dissent.

Lawrence M. Reife