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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

vs.

JOSEPH D. VILLIARIMO,  
Petitioner/Defendant-Appellant.

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SCWC-10-0000109

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CAAP-10-0000109; FC-CR. NO. 08-1-0035(4))

FEBRUARY 12, 2014

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

I concur with the majority's holding that the family court abused its discretion in denying Villiarimo's request for a continuance of his resentencing hearing. However, I write separately because I disagree with the majority's conclusion that "good cause" is the appropriate standard for the granting of a

continuance to obtain the testimony of an unavailable witness in the probation revocation or modification hearing context. While it is appropriate for the court to apply a more lenient standard in the hearing context than in the trial context, the court should apply the Lee test to determine whether a continuance is warranted.<sup>1</sup>

The majority concludes that the court should apply the "good cause" standard when determining whether to grant a continuance in a probation revocation or modification proceeding. Majority at 20. Pursuant to the good cause standard, the court must balance the "good cause" demonstrated by the defendant for requesting the continuance against the public interest in a prompt resolution of the case. Majority at 20. The majority stresses that the Rules of the Circuit Courts of the State of Hawai'i (RCCSH) mandate that a continuance only be granted upon a showing of "good cause." Majority at 20. The majority also cites to the numerous other contexts in which Hawai'i appellate courts have applied a good cause standard. Majority at 21.

Hawaii's courts have not previously used the good cause standard in the unavailable witness context. Rather, the ICA has developed a list of factors termed the Lee test.

In moving for a continuance based on the unavailability of a

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<sup>1</sup> Given my conclusion that the family court abused its discretion in denying Villiarimo's request for a continuance of his resentencing hearing, I do not reach the other issues addressed by the majority.

witness, the movant must generally show that: "[1] due diligence has been exercised to obtain the attendance of the witness, [2] that substantial favorable evidence would be tendered by the witness, [3] that the witness is available and willing to testify, and [4] that the denial of the continuance would materially prejudice the defendant."

State v. Lee, 9 Haw. App. 600, 604, 856 P.2d 1279, 1282 (1993) (emphasis added) (quoting United States v. Walker, 621 F.2d 163, 168 (5th Cir. 1980)); see also State v. Rivera, No. 30080, 2012 WL 5831177, at \*2 (Haw. App. 2012) (SDO); State v. Jacobson, No. 28863, 2009 WL 977302, at \*1 (Haw. App. 2009) (SDO). Primarily, the Lee factors guard against unnecessary delay during trial. The Lee test gives considerable weight to due diligence, witness availability, willingness of the witness to testify, and the materiality of the testimony sought. These factors place a heavy burden on the party seeking the continuance to demonstrate that the delay in the trial is unavoidable and the testimony of the absent witness is essential.

This court has not explicitly adopted the Lee test. However, we have often applied some combination of these factors in evaluating a motion for a continuance to obtain the testimony of an unavailable witness at trial. In State v. Valmoja, 56 Haw. 452, 540 P.2d 63 (1975), we held that the trial court abused its discretion in denying a motion for a continuance where the defendant exercised due diligence in attempting to obtain the testimony of the absent witness and the materiality of the witness's evidence was apparent. 56 Haw. at 454, 540 P.2d at 64.

In State v. Mara, 98 Hawai'i 1, 41 P.3d 157 (2002), we concluded that the circuit court did not abuse its discretion in denying the defendant's request for a continuance where the defendant failed to show that he was materially prejudiced by his inability to present the unidentified witness's testimony. 98 Hawai'i at 14-15, 41 P.3d at 170-71.

This case is unlike our previous unavailable witness cases because it concerns a probation revocation or modification proceeding rather than a trial. As the majority notes, an evidentiary hearing does not function under the strictures of a trial. There is a greater degree of procedural flexibility in a probation revocation or modification proceeding; the court is not bound by the Hawai'i Rules of Evidence (HRE) or by the time constraints created by the presence of a jury. Majority at 25. Consequently, a greater degree of flexibility in the granting of a continuance to obtain the testimony of an unavailable witness is warranted. But, this is insufficient justification for a wholesale abandonment of the Lee factors.

It is undisputed that the court must balance the movant's reasons for requesting the continuance against the public interest in a speedy resolution of the proceeding. I recommend that instead of merely considering whether the movant has demonstrated "good cause," courts should also consider the

Lee factors: whether (1) due diligence has been exercised to obtain the witness's attendance; (2) the witness would provide substantial favorable evidence; (3) the witness is available and willing to testify; and (4) the denial of the continuance would materially prejudice the defendant. These factors should be interpreted more leniently in the probation revocation or modification proceeding context, where the public interest in a speedy resolution is far less weighty than during trial.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

