One of the elements of escape is that the person charged is under lawful custody. Chk. S.L. No. 6 66, § 912. Sipenuk's custody had exceeded twenty-four hours at the time he committed the alleged escape and therefore was not lawful. 12 TTC 68. Furthermore, the evidence to support the charge was obtained as a direct result of that unlawful detainment, and was therefore inadmissible. 12 TTC 70. Therefore, escape could not be proven.

The court notes that resort to self-help by a detainee is inherently dangerous to the prisoner, the police, and to the public, as an attempted escape may result in circumstances where there is resort to force either by or against the detainee. Therefore, in cases of unlawful detainment, it is much preferred as a matter of public policy for counsel or other person to move the court for a detainee's immediate release. 12 TTC 70. The court cannot, however, find fault with the defendant for resorting to self-help and safely leaving police custody when the police had no legal basis for holding him.

The court also notes that a finding that the arrest was without probable cause may also have supported dismissal. *See* 30A C.J.S. *Escape* § 9, at 413 (1992) (an arrest without probable cause does not constitute an authorized arrest which can serve as a predicate for an escape charge where the escape was without force).

IV. Conclusion

Therefore, the case was dismissed.

* * * *

CHUUK STATE SUPREME COURT TRIAL DIVISION

CHUUK STATE,	)	CRIMINAL CASE NO. 012-2010
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
ROCKY INEK,	)	
	)	
Defendant.	)	
	)	

ORDER DENYING STAY

Camillo Noket
Chief Justice

Hearing: June 1, 2010
Decided: June 4, 2010

APPEARANCES:

For the Plaintiff: Charleston Bravo, Assistant Attorney General
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Weno, Chuuk FM 96942

For the Defendant: Fredrick A. Hartmann
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* * * *

HEADNOTES

Appellate Review – Stay – Criminal Cases

Since, under Rule 38(a)(2), a defendant who has been sentenced to imprisonment and who has appealed will be released pursuant to Appellate Procedure Rule 9(b) and since, by contrast, Criminal Rule 46(c) applies to requests for release when a defendant has been found guilty but has not yet been sentenced, when a motion for stay of execution was ruled on after sentencing, the court will treat it as a request pursuant to Criminal Rule 38(a)(2), and not one under Rule 46(c). Chuuk v. Inek, 17 FSM Intrm. 137, 142 (Chk. S. Ct. Tr. 2010).

Appellate Review – Stay – Criminal Cases

Under Rule 38(a)(2), a defendant who has been sentenced to imprisonment and who has appealed may seek release under Appellate Procedure Rule 9(b). After the filing of a notice of appeal and a motion to stay, the defendant's release is not automatic but within the court's discretion, and the burden is on the defendant to establish the criteria for release. Chuuk v. Inek, 17 FSM Intrm. 137, 142 (Chk. S. Ct. Tr. 2010).

Appellate Review – Stay – Criminal Cases

The burden to meet the criteria for release is on the defendant. Such criteria include the burden to establish that the defendant will not flee or pose a danger to others in the community. These and other criteria were intended to be set forth by statute but since there is no such statute, the Chuuk State Supreme Court will adopt the criteria provided for under FSM Appellate Rule 9(c) to the extent consistent with the apparent intent of Chuuk Appellate Rule 9(c). Chuuk v. Inek, 17 FSM Intrm. 137, 142-43 (Chk. S. Ct. Tr. 2010).

Appellate Review – Stay – Criminal Cases

The trial court will grant a stay only if the appellant meets his burden to reasonably assure the court through his written and oral presentations that he will not flee or pose a danger to any other person or to the community and that his appeal is not for purpose of delay, and if he raises a substantial question of law or fact. Chuuk v. Inek, 17 FSM Intrm. 137, 143 (Chk. S. Ct. Tr. 2010).

Appellate Review – Stay – Criminal Cases

For purposes of a stay, a "substantial question of law or fact" is defined as one that is a "close" question or one that could be decided the other way. If a substantial question of law or fact is raised, the defendant must also show that the issue raised is likely to result in either 1) a reversal; 2) an order for a new trial; 3) a sentence that does not include a term of imprisonment; or 4) a reduced sentence to a term of imprisonment less than the total of the time already served. Chuuk v. Inek, 17 FSM Intrm. 137, 143 (Chk. S. Ct. Tr. 2010).

Appellate Review – Stay – Criminal Cases

When a criminal defendant wants to be released pending appeal but his appeal does not raise any substantial question likely to obtain the result sought by the appeal, the court may draw the inference that the appeal was brought for the purpose of delay. Chuuk v. Inek, 17 FSM Intrm. 137, 143 (Chk. S. Ct. Tr. 2010).

Appellate Review – Stay – Criminal Cases

Raising a series of non-substantial issues on appeal does no ne or convert them into a substantial issue entitling the movant to a stay since it is quality, not qu that creates a substantial or close issue. Chuuk v. Inek, 17 FSM Intrm. 137, 143 (Chk. S. Ct)10).

Appellate Review – Stay – Criminal Cases

If an issue raised for appeal is too vague to clearly show a ntial or close question for appeal, the motion to stay will be denied. Chuuk v. Inek, 17 FSM 137, 143 (Chk. S. Ct. Tr. 2010).

Appellate Review – Stay – Criminal Cases

When the defendant has met his burden to show that he will ee or pose a danger to any other person or to the community, the defendant must, in order for th t to grant a stay, also raise a substantial question of law or fact that will result in either a rev an order for a new trial, a sentence without imprisonment, or a sentence reduced to a term of imp ment less than time already served. Chuuk v. Inek, 17 FSM Intrm. 137, 143 (Chk. S. Ct. Tr. 20

Appellate Review – Stay – Criminal Cases

When the defendant seeks a stay and raises for appeal that th of the alleged offense was not specific enough to inform him of the charge and the defendant ra hat argument regarding the sufficiency of the information in his pre-trial motions, so preserving th e for appeal, and when the court already denied the pre-trial motion on this issue and the defendan not provided any additional authority to show a close issue, the defendant has failed to meet his bu to show a substantial issue of fact or law upon which he will prevail on appeal. Chuuk v. Inek, 1 SM Intrm. 137, 143 (Chk. S. Ct. Tr. 2010).

Criminal Law and Procedure – Information

When the defendant asserts that the investigating officer's af vit was deficient because it is inconsistent with the date specified in the police report but this ument was not raised in the defendant's pre-trial motions as a challenge to the sufficiency of th fidavit of probable cause and therefore to the extent the defendant contends there was a defect in th formation, that objection was waived. Chuuk v. Inek, 17 FSM Intrm. 137, 143 (Chk. S. Ct. Tr. 2).

Appellate Review – Stay – Criminal Cases

When the defendant seeks to challenge the court's finding of v the offense occurred, based on the inconsistent dates in the police report and the information, h challenging the sufficiency of the evidence to prove the charge. A defendant faces a high hurdle n challenging the sufficiency of the evidence. For the challenge to be considered a close or substa issue for appeal entitling the defendant to a stay, he must, in light of the trial judge's role of weighi e evidence, come forth with more than mere assertions of inconsistencies in the evidence espec when he faces the additional hurdle that he is now using as a basis for his contention of inconsiste s in the record, evidence that was not and which the defendant did not seek to introduce into th ord. Chuuk v. Inek, 17 FSM Intrm. 137, 143-44 (Chk. S. Ct. Tr. 2010).

Appellate Review – Stay – Criminal Cases; Evidence – Hearsay

Although a criminal defendant may seek introduction of a polic rt as an offering against the government of a factual finding resulting from an investigation mad ant to authority granted by law and the declarant's availability would have been immaterial purposes of ruling on the report's admission, when the defendant did not seek to admit the and the report was not part of the record, the court will not consider it as a basis to challenge the ncy of its findings. Chuuk v. Inek, 17 FSM Intrm. 137, 144 (Chk. S. Ct. Tr. 2010).

Appellate Review – Stay – Criminal Cases; Criminal Law and Procedure – Information

A defendant's contention that as a result of the police report containing an inconsistent date of the offense, he was misled as to when the alleged offense took place, borders on the spurious because the information is the charging document that informs the defendant of the charge he is called upon to defend against and a police report that was not mentioned in the affidavit of probable cause and which no one sought to admit into evidence has no bearing on whether the defendant was sufficiently informed of the allegations. Chuuk v. Inek, 17 FSM Intrm. 137, 144 (Chk. S. Ct. Tr. 2010).

Criminal Law and Procedure – Information

If before trial a defendant asserts that an affidavit was deficient because the affiant did not indicate the sources of his investigation, and that there was no probable cause to support the allegations regarding the dates of the offense, the court could then have addressed the asserted deficiencies, but when he did not, issues regarding deficiencies in the information were waived. Chuuk v. Inek, 17 FSM Intrm. 137, 144 (Chk. S. Ct. Tr. 2010).

Appellate Review – Stay – Criminal Cases; Criminal Law and Procedure – Information

A mere inconsistency between the allegations contained in the information and a document that the defendant did not seek to admit into evidence does not provide the court with a substantial question of law or fact. Chuuk v. Inek, 17 FSM Intrm. 137, 144 (Chk. S. Ct. Tr. 2010).

Appellate Review – Stay – Criminal Cases; Criminal Law and Procedure – Sexual Offenses; Evidence

Although physical evidence or the lack thereof may be compelling in some cases, it is not a requirement of proof when the victim herself testified credibly to the alleged act and when her testimony was neither impeached nor rebutted. The lack of physical evidence may even be expected in a case charging sexual abuse because, unlike sexual assault, proof of sexual abuse does not require proof of sexual penetration, but only of sexual contact. Sexual contact is defined as any touching of the sexual or other intimate parts of a person not married to the defendant, done with the intent of gratifying the sexual desire of either party. It would be highly unlikely for a doctor examining a person days after her genitalia or intimate parts had been touched to be able to determine whether she had in fact been touched. Thus, the lack of physical evidence in a sexual abuse case is rather to be anticipated, and does not provide the defendant with a defense. Chuuk v. Inek, 17 FSM Intrm. 137, 145 (Chk. S. Ct. Tr. 2010).

Criminal Law and Procedure – Motions

A motion made before trial must be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after finding, but no such determination can be deferred if a party's right to appeal is adversely affected. When factual issues are involved in determining a motion, the court must state its essential findings on the record; otherwise, the court is required to exercise sound judicial discretion in considering a request for dismissal that requires that the court have factual information supporting the request. Chuuk v. Inek, 17 FSM Intrm. 137, 145 (Chk. S. Ct. Tr. 2010).

Appellate Review – Stay – Criminal Cases

Where the court addressed the defendant's motions before trial and ruled that the issues raised were subject to proof at trial and where, at the conclusion of trial, the court denied the motion and made its findings on the record, the defendant does not raise a substantial issue of fact or law when he cannot state how the court's deferred ruling adversely affected his right to appeal or how the ruling otherwise violated Criminal Rule 12(e). Chuuk v. Inek, 17 FSM Intrm. 137, 145 (Chk. S. Ct. Tr. 2010).

Appellate Review – Stay – Criminal Cases; Criminal Law and Procedure – Motions

No substantial issue of law or fact is raised when the defendant argues that the government

failed to file a written response to his second motion to dismiss and therefore it should have been granted since the court has the discretion to allow argument without the filing of a brief and since the court will not grant an unopposed motion unless there are otherwise good grounds to grant it. Chuuk v. Inek, 17 FSM Intrm. 137, 145 (Chk. S. Ct. Tr. 2010).

* * * *

COURT'S OPINION

CAMILLO NOKET, Chief Justice:

I. INTRODUCTION

On June 1, 2010, the court held a sentencing hearing and sentenced defendant Rocky Inek to three years imprisonment with two years suspended with conditions on the charge of sexual abuse. The court then heard defendant's motion for stay of execution pending his appeal. The Government opposed the motion. The court took the motion under advisement. The court denies the motion for the reasons set forth herein.

II. BACKGROUND

The defendant filed two pre-trial motions to dismiss. In the first motion, he argued that the information was deficient because it and the supporting affidavit stated only that the offense had occurred sometime during the first or second week of December and not an exact day or time. In his supplemental motion, the defendant reasserted the grounds for the first motion, and also contended that the defendant was in Guam on the date of the offense. In support of this contention, the defendant referred to a police report regarding the incident, which indicated that the date of the offense was December 25, 2009 when the defendant was not in Chuuk where the offense occurred but in Guam. Also, he contended that a doctor's report regarding the incident proved that the incident could not have occurred because it would show no physical evidence of the offense. The Government filed a written response to the first motion, but not the second.

Before trial, the court addressed the defendant's motions to dismiss, and indicated that the defendant's contentions regarding the defendant's presence in Chuuk during the alleged timeframe and his belief that the doctor's report proved his innocence would be subject to proof at trial, but that it would proceed to trial on the allegations as stated in the information.

At trial, the victim testified that over Christmas, 2009 the defendant touched her vagina with his fingers and penis. The testimony was not impeached or rebutted. Travel documents showed that the defendant departed from Chuuk to Guam on December 21, 2009, but he was in Chuuk during the period when the offense was alleged to have occurred. Before it closed its case-in-chief, the Government moved to amend its information to include an allegation that defendant touched the victim's vagina with his penis. The motion was unopposed and the court granted the motion. The Government did not move to amend the dates when the offense was alleged to have occurred. Before delivering its findings, the court orally denied the motion to dismiss based on its finding that the Government had proved the charge of sexual abuse against the defendant as occurring sometime during the two week period before December 21, 2009.

In reviewing his motion and his oral arguments, the court discerns that the defendant has raised the following issues for his appeal:

1. The allegation that the offense occurred sometime during the second and third week of December, 2009 failed to sufficiently inform the defendant of the charge he was called upon to defend against;

2. A police report that was reviewed by the investigating officer whose affidavit provided probable cause for the information contained dates of the alleged incident that were inconsistent with the those specified in the affidavit and the information;

3. The police officer who prepared the police report was subpoena'd by the defense, but did not testify because he claimed he was sick;

4. Because of the inconsistency between the date on the police report and the information and affidavit, the defendant was misled as to the date when the offense was alleged to have occurred;

5. The inconsistency between the information and the police report supported a finding of insufficient evidence to prove the charge;

6. Expert witness testimony and government documents supported dismissal;

7. The court should have ruled on and granted defendant's pre-trial motions to dismiss before proceeding to trial, and the court's failure to rule on the motions until after trial was in error;

8. The government did not respond to the defendant's second motion to dismiss.

III. Analysis

The court finds no published Chuuk State Supreme Court rulings or other rulings applying the Chuuk Criminal Rules of Procedure for granting stays of appeal and therefore adopts the analysis for granting stays pursuant to the FSM Rules of Criminal Procedure as set forth in FSM v. Petewon, 14 FSM Intrm. 463 (Chk. 2006).

After the court issued its guilty finding, the defendant filed his notice of appeal and motion for stay of execution. The court heard argument on the motion for stay of execution immediately after sentencing. Under Rule 38(a)(2), a defendant who has been sentenced to imprisonment and who has appealed shall be released pursuant to Appellate Procedure Rule 9(b). Criminal Rule 46(c), by contrast, applies to requests for release when a defendant has been found guilty but has not yet been sentenced. FSM v. Petewon, 14 FSM Intrm. 463, 468 (Chk. 2006). Since the motion for stay of execution was ruled on after sentencing, the court treats it as a request pursuant to Criminal Rule 38(a)(2), and not under Rule 46(c).

Under Rule 38(a)(2), a defendant who has been sentenced to imprisonment and who has appealed may seek release pursuant to Appellate Procedure Rule 9(b). After the filing of a notice of appeal and a motion to stay, the defendant's release is not automatic but within the court's discretion. The burden is on the defendant to establish the criteria for release. Chk. App. R. 9(c); FSM v. Moses, 12 FSM Intrm. 509, 511 (Chk. 2004). Appellate Rule 9(c) is provision that specifies the criteria for release under Appellate Rule 9(b). Chuuk Appellate Rule 9(c), however, contemplates but does not specifically identify the criteria, instead providing that the decision as to release pending appeal shall be made in accordance with the applicable statute. The Rule further specifies that the burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant. Chk. App. R. 9(c). The court interprets this provision to mean that the

burden to meet the criteria for release is on the defendant and that such criteria include the burden to establish that the defendant will not flee or pose a danger to others in the community. In the court's reading of the provision, these criteria and other criteria were intended to be set forth by statute. Since the court finds no statute setting forth the criteria, the court adopts the criteria provided for under FSM Appellate Rule 9(c) to the extent consistent with the apparent intent of Chuuk Appellate Rule 9(c).

Pursuant to FSM Appellate Rule 9(c), the trial court will grant a stay only if the appellant meets his burden to reasonably assure the court through his written and oral presentations to the court that he will not flee or pose a danger to any other person or to the community, and that his appeal is not for purpose of delay, and raises a substantial question of law or fact. Petewon, 14 FSM Intrm. at 468; FSM v. Moses, 12 FSM Intrm. 509, 511 (Chk. 2004); FSM v. Nimwes, 8 FSM Intrm. 299, 300 (Chk. 1998); FSM v. Akapito, 10 FSM Intrm. 255, 256 (Chk. 2001). For purposes of a stay, a "substantial question of law or fact" is defined as one that is a "close" question or one that could be decided the other way. FSM v. Petewon, 14 FSM Intrm. 320, 324 (Chk. 2006). If a substantial question of law or fact is raised, the defendant must also show that the issue raised will likely to result in either 1) a reversal; 2) an order for a new trial; 3) a sentence that does not include a term of imprisonment; or 4) a reduced sentence to a term of imprisonment less than the total of the time already served. Petewon, 14 FSM Intrm. at 468; Petewon, 14 FSM Intrm. at 324. When a criminal defendant wants to be released pending appeal but his appeal does not raise any substantial question likely to obtain the result sought by the appeal, the court may draw the inference that the appeal was brought for the purpose of delay. Moses, 12 FSM Intrm. at 511. And, raising a series of non-substantial issues on appeal does not combine or convert them into a substantial issue entitling the movant to a stay. It is quality, not quantity, that creates a substantial or close issue. FSM v. Wainit, 14 FSM Intrm. 164, 170 (Chk. 2006). Also, if the issue raised for appeal is too vague to clearly show a substantial or close question for appeal, the motion will be denied. Petewon, 14 FSM Intrm. at 325.

The court finds that the defendant met his burden to show that he will not flee or pose a danger to any other person or to the community. But, in order to grant a stay, the defendant must also raise a substantial question of law or fact that will result in either a reversal, an order for a new trial, a sentence without imprisonment, or a sentence reduced to a term of imprisonment less than time already served. Petewon, 14 FSM Intrm. at 468. Therefore, the court examines the arguments that defendant has raised in support of his appeal.

The first argument the defendant raises for appeal is that the time of the alleged offense was not specific enough to inform the defendant of the charge. The defendant raised that argument regarding the sufficiency of the information in his pre-trial motions, so the issue was preserved for appeal. Chk. Crim. R. 12(b)(2); Petewon, 14 FSM Intrm. at 326. Since the court has already denied the pre-trial motion on this issue, however, and the defendant has not provided the court with any additional authority to show a close issue, the defendant has failed to meet his burden to show a substantial issue of fact or law upon which he will prevail on appeal.

The second argument raised is regarding a police report that was prepared when the incident alleged in the information was first reports. That report identifies the date of the incident as December 25, 2009. The defendant asserts that the police report was reviewed by the investigating officer who prepared the affidavit of probable cause in support of the information. According to the defendant, the investigating officer's affidavit is deficient because it is inconsistent with the date specified in the police report. This argument was not raised in the defendant's pre-trial motions as a challenge to the sufficiency of the affidavit of probable cause and therefore to the extent it contends there was a defect in the information, that objection was waived. Petewon, 14 FSM Intrm. at 326. Instead, the argument appears to challenge the court's finding of when the offense occurred, based on the inconsistent dates in the police report and the information. As such, the defendant appears to challenge the sufficiency

of the evidence to prove the charge. A defendant faces a high hurdle when challenging the sufficiency of the evidence and to be considered a close or substantial issue for appeal, and in light of the trial judge's role of weighing the evidence, must come forth with more than mere assertions of inconsistencies in the evidence. Wainit, 14 FSM Intrm. at 169. Here, the defendant faces the additional hurdle that he is now using as a basis for his contention of inconsistencies in the record, evidence that was not and which the defendant did not seek to introduce into the record.

The defendant may have sought introduction of the police report as an offering against the Government of a factual finding resulting from an investigation made pursuant to authority granted by law. Chk. Evid. R. 803(8). The availability of the declarant would have been immaterial for the purposes of ruling on the report's admission. *Id.* The defendant did not, however, seek to admit the report. Since the report was not part of the record, and the defendant made no attempt to admit it into the record, the court will not now consider it as a basis to challenge the sufficiency of its findings. The court notes that even if the police report had been admitted into evidence, the court's findings regarding the date of the offense were not based on dates identified by police investigators in their reports, but on the victim's testimony.

With his third argument, the defendant raises a related issue, contending that he was not allowed to examine the officer who prepared the police report containing the inconsistent date of the offense. The asserted reason is that on the date the officer was summoned to testify he claimed to be sick. As with the issue regarding admission of the police report, the onus was on the defendant to take adequate steps to ensure that evidence was brought before the court. If the defendant had asked the court to order the officer's presence subject to contempt and had asked for a continuance until the officer was brought before the court to testify, the court would have considered that motion. The defendant also could have sought to depose the witness if the circumstances warranted. Chk. Crim. R. 15. And, as previously stated, he could have sought admission of the police report without the presence of the witness. Instead, the defendant proceeded to his next witness without objection and without taking steps to obtain the officer's testimony. As with the second issue, the court will not revisit its findings based on evidence that could have been but was not proffered to the court.

With his fourth argument, the defendant contends that as a result of the police report containing the inconsistent date of the offense, he was misled as to when the alleged offense took place. This argument borders on the spurious. The information is the charging document, which informs the defendant of the charge he is called upon to defend against. A police report that was not referenced in the affidavit of probable cause and which no one sought to admit into evidence has no bearing on whether the defendant was sufficiently informed of the allegations. If before trial the defendant had asserted that the affidavit was deficient because the affiant did not indicate the sources of his investigation, and that there was no probable cause to support the allegations regarding the dates of the offense, then the court would have addressed the asserted deficiencies. Since he did not, issues regarding deficiencies in the information were waived. Chk. Crim. R. 12(b).

With his fifth argument, the defendant argues that inconsistencies between the dates specified in the police report and in the information and affidavit should have resulted in a finding of insufficient evidence to support the charge. As with the defendant's other arguments regarding the sufficiency of the evidence, the suggestion of a mere inconsistency between the allegations contained in the information and a document that the defendant did not seek to admit into evidence does not provide the court with a substantial question of law or fact.

With his sixth argument, the defendant argues that expert witness testimony and government documents supported dismissal. This argument is apparently based on the police report and doctor's report referenced in the defendant's second motion to dismiss. The contention is too broad for the

court to determine what question of law or fact is raised . the court has already addressed the issues raised regarding the police report. With respect to th or's report, the defendant's apparent belief that a lack of physical evidence supported dismissal founded. Although physical evidence or the lack thereof may be compelling in some cases, it is equirement of proof when the victim herself testified credibly to the alleged act and when her test was neither impeached nor rebutted. The lack of physical evidence may even be expected in a charging sexual abuse. Unlike sexual assault, Chk. S.L. No. 6-66, §403, proof of sexual abuse d not require proof of sexual penetration, but only of sexual contact. Sexual contact is defined as a uching of the sexual or other intimate parts of a person not married to the defendant, done with tent of gratifying the sexual desire of either party. Chk. S.L. No. 6-66, §§404, 401. It would ghly unlikely for a doctor examining a person days after her genitalia or intimate parts had been to to be able to determine whether she had in fact been touched. Thus, the lack of physical evic in a sexual abuse case is rather to be anticipated, and does not provide the defendant with a de

With his seventh argument, the defendant contend the court erroneously deferred ruling on the defendant's pre-trial motions to dismiss. The p ure for the court's ruling on pre-trial motions in criminal cases is set forth in Criminal Rule 12(e), ch provides that a motion made before trial shall be determined before trial unless the court, fo d cause, orders that it be deferred for determination at the trial of the general issue or until after ng, but no such determination shall be deferred if a party's right to appeal is adversely affect Where factual issues are involved in determining a motion, the court shall state its essential fi s on the record. Chk. Crim. R. 12(e). The court is otherwise required to exercise sound judic scretion in considering a request for dismissal, which requires that the court have factual informa supporting the request. FSM v. Ching Feng 767, 12 FSM Intrm. 498, 504 (Pon. 2004). In this , the court addressed the defendant's motions before trial and ruled that the issues raised were bject to proof at trial. At the conclusion of trial, the court denied the motion and made its findings o he record. The defendant does not state how the court's deferred ruling adversely affected his rig appeal, nor does he address how the ruling otherwise violated Criminal Rule 12(e) or in what re it raises a substantial issue of fact or law.

With his last argument, the defendant argues th the Government failed to file a written response to the defendant's second motion to dismiss and t ore it should have been granted. Since the court has the discretion to allow argument without filing of a brief and will not grant an unopposed motion unless there are otherwise good groun grant it, the court finds no substantial issue of law or fact raised with this argument.

Therefore, the court concludes that the defendant iled to raise a substantial issue of law or fact likely to result in him prevailing on appeal.

IV. Conclusio

The motion to stay execution of the defendant's s ce pending appeal is denied.

* * * *