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4 **IN THE SUPERIOR COURT**  
5 **OF THE**  
6 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

6 COMMONWEALTH OF THE )  
7 NORTHERN MARIANA ISLANDS, )  
8 Plaintiff, )  
9 vs. )  
10 EDGAR SANTOS, )  
11 Defendant. )

TRAFFIC CASE NO. 96-06252R

**ORDER GRANTING  
MOTION TO DISMISS**

12 **THIS MATTER** came before the Court on January 31, 2001 at 9:00 a.m. in Rota for a bench  
13 trial. Assistant Attorney General Elaine Paplos, Esq., appeared on behalf of the Government. Public  
14 Defender Sean Elameto, Esq., appeared on behalf of Defendant EDGAR SANTOS [hereinafter  
15 SANTOS]. Having read and considered all the papers filed in connection with this motion, having  
16 considered the arguments advanced by the parties and being fully informed, the court **GRANTS**  
17 Defendant's motion to dismiss.

18 **I. BACKGROUND**

19 Rota Department of Public Safety [hereinafter DPS] pulled over and arrested Defendant  
20 SANTOS for alleged traffic offenses on June 15, 1996. SANTOS was booked, detained, and released  
21 the following day. A traffic citation was not issued to SANTOS. However, on July 29, 1996 the  
22 Attorney General's Office [hereinafter AGO] filed an information and penal summons charging  
23 SANTOS with violating 9 CMC § 7104(a) (reckless driving), 9 CMC § 7105(a) (driving under the  
24 influence of alcohol), and 9 CMC § 7106 (failure to submit to a breath test).

25 On September 9, 1996, the court issued an order stating, "[t]his matter was taken off calendar by  
26 the Prosecution, due to the Defendant not being served." According to the file associated with this case,  
27 the AGO stated that the Defendant could not be served because the

28 **FOR PUBLICATION**

1 defendant had permanently left the jurisdiction. SANTOS had not left the jurisdiction.  
2 However, SANTOS had not left the jurisdiction. SANTOS remained in Rota and was employed by  
3 Mr. Diego Songao (whom he presently still works for) and resided less than a block away from the  
4 Police Station. The only time SANTOS left Rota was December 1997, when SANTOS went on a  
5 one-month vacation to the Philippines.

6 Rota DPS again arrested SANTOS on July 8, 2000 for alleged traffic offenses. It was not until  
7 SANTOS was arrested for this separate traffic offense that the Government instigated any action to  
8 bring SANTOS to trial for his alleged 1996 offenses. SANTOS now argues that the 1996 case should  
9 be dismissed because the case (1) violates SANTOS fight to a speedy trial, (2) violates due process,  
10 and (3) violates Commonwealth Rule of Criminal Procedure 48(b).

## 11 II. DISCUSSION

### 12 I. Commonwealth Rule of Criminal Procedure 48(b).

13 Pursuant to Commonwealth Rule of Criminal Procedure 48(b), “[i]f there is unnecessary delay  
14 in filing an information against a defendant who has been held to answer, or if there is unnecessary delay  
15 in bringing a defendant to trial, the court may dismiss the information or complaint.”.

16 Because Rule 48(b) is modeled after Federal Rule of Criminal Procedure 48(b), interpretation of  
17 the federal rule is instructive. *Commonwealth v. Ramangmau*, 4 N.M.I. 227, 233 n.3 (1995).  
18 Therefore, the court will turn toward the applicable Ninth Circuit analysis of Federal Rule 48(b).

19 Under Rule 48(b) a court may dismiss a case, even when the prosecutorial delay does not amount  
20 to a violation of the Sixth Amendment. *United States v. Yuan Qing Jiang*, 214 F.3d 1099, 1101 (9th  
21 Cir. 2000); *see also United States v. Hatstrup*, 763 F.2d 376, 377 (9th Cir. 1985). Although the Rule  
22 allows a judge discretion in dismissing an information, "a Rule 48(b) dismissal should be imposed only  
23 in extreme circumstances." *United States v. Talbot*, 51 F.3d 183, 186 (9th Cir. 1995) (*citing United*  
24 *States v. Huntley*, 976 F.2d 1287, 1291 (9th Cir. 1992) (*quoting United States v. Sears, Roebuck*  
25 *& Co.*, 877 F.2d 734, 737 (9th Cir. 1989))).

26 This limitation mandates that a court may dismiss a count under Rule 48(b) only "with caution"  
27 and only after "forewarning" prosecutors of the consequences of their delay. *Talbot*, 51 F.3d at 186-87  
28 (*citing United States v. Simmons*, 536 F.2d 827, 836 (9th Cir. 1976), *cert. denied*, 429 U.S. 854,

1 97 S. Ct. 148, 50 L. Ed. 2d 130 (1976)). Although the record does not indicate any forewarning, the  
2 prosecution can be charged with constructive knowledge of the court's authority to dismiss the  
3 information under certain circumstances. *Talbot*, 51 F.3d at 187 n.2 (citing *United States v. Henry*,  
4 815 F. Supp. 325, 327 (D. Ariz. 1993)).

5 In *Henry*, the court held that an explicit forewarning by the court is not always necessary. The  
6 prosecution in *Henry* did not present Henry's case to the grand jury until nearly four years after the  
7 alleged crime occurred. Dismissing the indictment under Rule 48(b), the court reasoned that "[under]  
8 these circumstances, the government is charged with the constructive knowledge of the Court's  
9 statutory authority pursuant to Rule 48(b) and that is warning enough." *Henry*, 815 F. Supp. at 327  
10 (emphasis added). Here, like the prosecution in *Henry*, the government is charged with "constructive  
11 knowledge" of the courts authority to dismiss because the government has failed to bring SANTOS'  
12 case to trial in a timely fashion. Accordingly, the "forewarning" requirement is satisfied.

13 Next, the court must determine if the "caution" requirement has been satisfied. The term "caution"  
14 is used "in a non-obvious, technical sense" and is satisfied where the reason for dismissal is  
15 "prosecutorial misconduct and actual prejudice to the accused". *Yuan Qing Jiang*, 214 F.3d at 1101  
16 (citing *Huntley*, 976 F.2d at 1292).

17 Here, the government's failure to prosecute this case was based upon their alleged inability to  
18 serve the Defendant. Given that SANTOS never left the jurisdiction with the exception of a one-month  
19 vacation, and keeping in mind the size of Rota, it appears that the failure to serve SANTOS can be  
20 attributed to neglect and nothing more. Nothing in the record indicates that the prosecution was  
21 engaged in any type of "misconduct" or that the Defendant would be prejudiced by the delay.

22 However, several Circuit Courts have presumed prejudice in the Rule 48(b) context from the  
23 mere length of the delay. *Yuan Qing Jiang*, 214 F.3d at 1103; *see also, e.g., United States v.*  
24 *Zabady*, 546 F. Supp. 35, 38-40 (M.D. Pa. 1982) (four months of actual delay plus the prospect of at  
25 least one year of prospective delay before trial presumptively prejudicial); *United States v. Dowl*, 394  
26 F. Supp. 1250, 1257 (D. Minn. 1975) (28-month delay presumptively prejudicial); *United States v.*  
27 *Blanca Perez*, 310 F. Supp. 550, 554 (S.D.N.Y. 1970) (four year delay presumptively prejudicial).

28 Here, the delay in bringing the Defendant to trial was in excess of five years. This delay is

1 considerably longer than any of the delays cited above. Consistent with the above cited cases, the court  
2 concludes that the delay of more than five years in bringing SANTOS to trial was presumptively  
3 prejudicial. Accordingly, the court holds that the requirements for "caution" and "forewarning" prior to  
4 dismissal of a case pursuant to Rule 48(b) are satisfied and the Court will exercise its judicial discretion  
5 allowed pursuant to said rule. Since the court concludes dismissal pursuant to Rule 48(b) is proper, the  
6 constitutional arguments need not be addressed because constitutional issues will not be considered  
7 unless necessary. In re Tudela, 4 N.M.I. 1, 5 (1993).

8 **III. CONCLUSION**

9 For the foregoing reasons, Defendant's motion to dismiss the information with prejudice is hereby

10 **GRANTED**

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13 So **ORDERED** this 13th day of February, 2002.

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15 /s/ \_\_\_\_\_  
16 DAVID A. WISEMAN, Associate Judge  
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