

1 **FOR PUBLICATION**

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

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8 **COMMONWEALTH OF THE NORTHERN**  
9 **MARIANA ISLANDS,**

10 **Plaintiff,**

11 **vs.**

12 **ENRICO SANTOS,**

13 **Defendant.**

14 **CRIMINAL CASE NO. 11-0125**

15 **ORDER DISMISSING CASE**  
16 **WITHOUT PREJUDICE**

17 **I. INTRODUCTION**

18 The Commonwealth of the Northern Mariana Islands has filed a motion to dismiss the  
19 above-referenced matter without prejudice. Jury trial was set in this matter by a pre-trial order  
20 dated May 12, 2011. A pre-trial conference was attended by both parties on November 2, 2011,  
21 and the Government advised the Court that it was ready for trial. Two issues were brought  
22 before the Court on that date: whether the minor child was to testify via closed circuit means  
23 and whether prior acts of the Defendant would be admissible. The Court deferred ruling on  
24 these requests until November 8, 2011 at 1:30 p.m.

25 **II. FACTUAL BACKGROUND**

26 On the morning on November 8, 2011, the Court was advised that the Government was  
27 requesting a continuance of the trial. At 1:30 p.m., the Court heard the Government's motion  
28 for a continuance. Basically, the Government stated that evidence taken from the alleged

1 victim via a swab had not been sent out for analysis and that the treating physician who treated  
2 the alleged victim was no longer on island and it was necessary to have another physician  
3 testify. Basically, the Government has said that it cannot proceed and prove its case at the trial  
4 set for November 14, 2011. Defense counsel maintained that they were ready to proceed and  
5 adamantly refused to agree to a continuance. After a meeting in chambers with counsel, the  
6 Court returned to the bench and denied the Government's motion for a continuance. On  
7 November 9, 2011, the Government filed its motion to dismiss without prejudice.

### 8 9 III. DISCUSSION

10 Rule 48(a) of the Commonwealth Rules of Criminal Procedure is the rule that governs  
11 dismissals. It provides:

- 12 (a) By Attorney for the Government: The attorney for the government may *by leave of*  
13 *court* (emphasis added) file a dismissal of an information or complaint and the  
14 prosecution shall thereupon terminate. Such a dismissal may be filed during the trial  
15 without the consent of the defendant.

16 Com. R. Crim. Pro. 48(a).

17 Rule 48 of the Commonwealth Rules of Criminal Procedure provides a mechanism for  
18 the government to dismiss charges against a defendant. Because the Commonwealth Rules of  
19 Criminal Procedure are patterned after the Federal Rules of Criminal Procedure, interpretations  
20 of the federal rules are instructive. *Commonwealth v. Ramangmau*, 4 N.M.I. 227 (1995). Rule  
21 48(a) of the Federal Rules of Criminal Procedure is different from our local rule because it  
22 requires the consent of the defendant if the dismissal is filed during trial. However, federal  
23 interpretation of the court's discretion under this rule is still instructive.

24 The "leave of court" language in the rule encompasses a court's limited discretion to  
25 deny the government's request to dismiss charges consistent with separation of powers. The  
26 prosecutorial function of a criminal case is historically within the province of the executive  
27 branch. However, the "leave of court" language in Rule 48(a) permits a court to exercise  
28 discretion as to whether a pending prosecution should be terminated. "The principal object of

1 the 'leave of court' requirement is apparently to protect a defendant against prosecutorial  
2 harassment, e.g., charging, dismissing, and recharging, when the Government moves to  
3 dismiss an indictment over the defendant's objection. But the Rule has also been held to permit  
4 the court to deny a Government dismissal motion to which the defendant has consented if the  
5 motion is prompted by considerations clearly contrary to the public interest." *Rinaldi v. United*  
6 *States*, 434 U.S. 22, 30, 98 S. Ct. 81, 86, 54 L. Ed.2d 207, 214 n. 15 (1977) (per curiam)  
7 (internal citations omitted).

8 The Court's discretion, however, is limited. A judge cannot merely substitute his  
9 judgment for that of a prosecutor, but he must instead defer to the prosecutor unless the  
10 prosecutor is clearly wrong. See *United States v. Hamm*, 638 F.2d 823 (5th Cir. 1981). Because  
11 of this limited discretion, courts have recognized two circumstances in which a court may deny  
12 leave to dismiss an indictment: first, where the defendant objects to the dismissal; and second,  
13 when dismissal is clearly contrary to manifest public interest. *United States v. Jacobo-Zavala*,  
14 241 F.3d 1009, 1012 (8th Cir. 2001) (citations omitted). Federal interpretation of the first  
15 circumstance is not persuasive, per se, because the Commonwealth's rule, as discussed above,  
16 expressly does not require the consent of the Defendant.

17 The defense has objected in writing to the Government's motion and attached its own  
18 order dismissing the case without prejudice and adding the language, "as the government  
19 cannot prove its case beyond a reasonable doubt, without more evidence."

20 In determining whether dismissal under Rule 48(a) is within its discretion, a court "is  
21 limited to assessing whether the government's motion is contrary to manifest public interest  
22 because it is not based in the prosecutor's good faith discharge of [their] duties." *Id.* at 1013.  
23 "The key factor in determination of prosecutorial harassment is the propriety or impropriety of  
24 the Government's efforts to terminate the prosecution—the good faith or lack of good faith of  
25 the Government in moving to dismiss." *United States v. Salinas*, 693 F.2d 348, 351 (5th Cir.  
26 1982)(citing *Rinaldi*, 98 S. Ct. at 85). "The Government must not be motivated by  
27 considerations 'clearly contrary to the public interest.'" *Id.*

1 In determining whether the dismissal of charges is motivated by good or bad faith, the  
2 court proceeds with the presumption that the prosecution is acting in good faith. *United States*  
3 *v. Cowan*, 524 F.2d 504, 514 (5th Cir. 1975). Furthermore, the court must find an affirmative  
4 reason to believe that the dismissal motion was motivated by considerations contrary to the  
5 public interest. *Salinas*, 693 F.2d at 352.

6 Although the burden is not on the Commonwealth to show that dismissal would be in  
7 the public interest, the Court is aware of the Commonwealth's reasons for not wanting to go to  
8 trial. The reasons are failure to send a swab out for analysis and lack of a physician to testify  
9 since the alleged victim's treating physician has left the island. Both of these reasons are  
10 lacking in substance. Everyone living on Saipan should know that doctors, like Assistant  
11 Attorney General, come and go. When a prosecutor gets a trial date, the first phone call should  
12 be to the doctor to make sure that the doctor will be on island or to line up an alternative. When  
13 a swab is taken, it should immediately be sent off-island for analysis. Both of these things  
14 could have been done expeditiously.

15 However, the Court cannot dismiss the case with prejudice because it is still relatively  
16 young. If this was a two-year-old case, the outcome would be different.

17 If the Commonwealth brings charges against the Defendant, a jury trial will be held on  
18 April 2, 2011. There will be no continuances for any reason whatsoever and the Court will not  
19 grant a dismissal without prejudice.

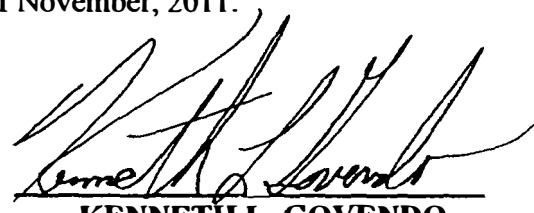
20 Attention is called to Rule 1.3 of the Model Rules of Professional Conduct. The Rule  
21 states that "[a] lawyer shall act with reasonable diligence and promptness in representing a  
22 client." MRPC Rule 1.3. A lawyer has a duty, both to the client and to the legal system, to  
23 pursue the matter on behalf of the client despite opposition, obstruction, and personal  
24 inconvenience to the lawyer. This duty requires the lawyer to get control of his or her workload  
25 so that each matter can be handled adequately. Both Ms. Neal and Mr. Mocanu have been lax  
26 in their preparation and they have breached this duty. If it happens again, there will be  
27 sanctions applied to them.

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**IV. CONCLUSION**

For these reasons, the Court GRANTS the Commonwealth's Motion to Dismiss Without Prejudice.

IT IS SO ORDERED this 9<sup>th</sup> day of November, 2011.



**KENNETH L. GOVENDO**  
Associate Judge