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1 **FOR PUBLICATION**

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

8 **COMMONWEALTH OF THE**) **CRIMINAL CASE NO. 12-0134**
9 **NORTHERN MARIANA ISLANDS,**) **(formerly 13-0037B)**
10)
11 **Plaintiff,**)
12) **ORDER DENYING**
13 **v.**) **DEFENDANTS'**
14 **AMBROSIO T. OGUMORO,**) **MOTION TO DISMISS**
15)
16 **Defendant.**)
17)
18)
19)
20)
21)
22)
23)
24)

25 **INTRODUCTION**

26 **THIS MATTER** came before the Court for a hearing on October 22, 2014 at 9:30 a.m. in
27 Courtroom 223A, on Defendant's Motion to Dismiss for Lack of Jurisdiction, filed on September 29,
28 2014. Defendants Ambrosio T. Ogumoro and Jordan Kosam were present and in custody, and
29 represented by Edward C. Arriola, Esq. and Joaquin Torres, Esq., respectively. The Commonwealth
30 was represented by Special Prosecutor George Hasselback, legal counsel for the Office of the Public
31 Auditor. Also present was Colin Thompson, Esq., counsel for co-defendant John T. Rebuenog,
32 although Mr. Thompson and his client were not parties to the instant motion. After reviewing the
33 written submissions and hearing the oral arguments of each party, the Court hereby **DENIES**
34 Defendants' Motion to Dismiss for Lack of Jurisdiction.

FAXED
11-9-14
A. Hasselback et al v. Ambrosio T. Ogumoro / J. Torres
TURNED

1 BACKGROUND

2 On August 17, 2012, this Court issued an Order appointing George Hasselback as Special
3 Prosecutor and charging him with the investigation and prosecution of matters or persons that are
4 connected or relevant to the charges filed in *CNMI v. Buckingham*, Criminal Case 12-0134B. On
5 March 20, 2013, Mr. Hasselback filed an Information charging the Defendant with fifteen different
6 counts of criminal violations relating to misconduct in public office, including: one count of
7 conspiracy to commit theft of services (6 CMC § 303(a)); eight counts of misconduct in public office
8 (6 CMC § 3202); one count of theft of services (6 CMC § 1607(b)); one count of conspiracy to
9 commit obstructing justice - interference with service of process (6 CMC § 303(a)); one count of
10 obstructing justice - interference with service of process (6 CMC § 3303); one count of conspiracy to
11 commit obstructing justice - interference with law enforcement office or witness (6 CMC § 303(a));
12 one count of obstructing justice - interference with a law enforcement officer or witness (6 CMC §
13 3202); and one count of criminal coercion (6 CMC § 1431(a)(6)).

14 On June 28, 2013, the Commonwealth Supreme Court ordered the trial court to “hold a
15 hearing regarding the OAG’s disqualification, and stay *Commonwealth v. Nekaiyes*, Crim. No. 13-
16 068, *Commonwealth v. Ogumoro*, Crim. No. 13-0073, *Commonwealth v. Kosam*, Crim. No. 12-
17 0134B, *Commonwealth v. Rebueng*, Crim. No. 12-0134B, and any other related cases brought by
18 the OPA pending the trial court’s resolution of the OAG disqualification issue.” *In re San Nicholas*,
19 2014 MP 8 ¶ 24.

20 The Court held such an evidentiary hearing on July 18, 2013 in Courtroom 223A, in which
21 the Court stated as follows:

22 Based on matters adduced and for good cause shown, the Court
23 received a stipulation to take the matter off calendar and that the Attorney
24 General no longer desired to be heard on the matter of disqualification.
The Attorney General concurs and agrees that the special prosecutor
George Hasselback is to remain as prosecutor in this matter and that such

1 concurrence be retroactive as well.

2 Based on the foregoing, the issue before the Court, to wit: the said
3 evidentiary hearing, is off calendar and is hereby moot in view of the
4 Attorney General's concurrence and reaffirmation of the Special
5 Prosecutor George Hasselback to remain as prosecutor in this matter.

6 Thus, the Court's compliance with the CNMI Supreme Court's Order requiring an evidentiary
7 hearing effectively lifted the stay imposed in relation to this case and the others cited above.

8 On September 29, 2014, Defendant filed the instant Motion to Dismiss for Lack of
9 Jurisdiction, arguing that: (1) the Public Auditor lacks constitutional authority to prosecute the
10 Defendant; (2) the Public Auditor lacks legislative authority to prosecute the Defendant; (3) the
11 Attorney General has no authority to delegate his prosecutorial powers to the Office of the Public
12 Auditor or personnel within the agency; and (4) an Executive Order will not cure the violation of the
13 separation of powers.

14 On October 20, 2014, the Commonwealth filed an Opposition to Defendant's Motion to
15 Dismiss, claiming that the Court should "deny the Motion in its entirety, as the arguments contained
16 therein are based upon a complete misunderstanding of the salient facts surrounding the prosecution
17 of this case." (Opp., at 1.) Specifically, the Commonwealth alleges that "[n]one of [the
18 Defendant's] arguments, however, recognize the specific, and particular, vehicle by which [counsel
19 for the Office of the Public Auditor] gained the authority to file criminal charges against the
20 Defendant." (*Id.*, at 2.) The Commonwealth clarifies that: (1) this case is not being prosecuted
21 pursuant to 1 CMC § 7847, as Defendant so states; (2) this case is not being prosecuted pursuant to
22 any authority delegated by the Office of the Attorney General; and (3) this case is not being
23 prosecuted pursuant to any hypothetical Executive Order. Lastly, the Commonwealth asserts that
24 "this Court should also refuse to entertain any attack upon the validity of the August 17, 2012 Order
... [and i]f Defendant wanted to challenge the *actual* source of the undersigned's authority, he
should have done so." (*Id.*, at 5, n.16.)

1 **LEGAL STANDARD**

2 An information must contain a “plain, concise, and definite written statement of the essential
3 facts constituting the offense charged.” NMI R. Crim. P. 7(c). The information must also set forth
4 all elements of the crimes charged. *Apprendi v. New Jersey*, 530 U.S. 466, 500 (2000); *Almednarez-*
5 *Torres v. United States*, 523 U.S. 224, 228 (1998).

6 NMI R. Crim. P. 12(b)(2) allows “[a]ny defense, objection, or request which is capable of
7 determination without the trial of the general issues” to be raised before the trial. The United States
8 Supreme Court has determined that a defense is “capable of determination without trial of the
9 general issue . . . if trial of the facts surrounding the commission of the alleged offense would be of
10 no assistance in determining the validity of the defense.” *United States v. Covington*, 395 U.S. 57,
11 60 (1969). The term “general issue” has been defined as “evidence relevant to the question of guilt
12 or innocence.” *United States v. Ayarza-Garcia*, 819 F.2d 1043, 1048 (11th Cir. 1987).

13 The court may consider factual issues when ruling on a Rule 12(b) motion. However, the
14 law generally favors factual determinations to be made during trial. *United States v. Partridge-*
15 *Staudinger*, 287 F.R.D. 651, 653 (E.D. Wash 2013). The court may also defer ruling on a Rule 12(b)
16 motion until after a trial on the “general issue.” NMI R. Crim. P. 12(e).

17 **DISCUSSION**

18 The Court now addresses each of Defendant’s arguments, as well as reconciles those made in
19 Opposition by the Commonwealth.

20 As an initial matter, the Court recognizes that during the October 22, 2014 hearing set for the
21 instant motion, counsel for co-defendant Jordan Kosam, Joaquin Torres, orally joined in Defendant’s
22 Motion to Dismiss, and thus any ruling on the merits of the instant motion applies to both defendants
23 in this matter. The Court hereby cautions Mr. Torres to exercise due diligence and first review its
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1 merits, if any, before making such future requests, as the Court finds no such merit in the instant
2 motion.

3 Moreover, the Court would like to make abundantly clear that this Court's August 17, 2012
4 Order — which purported to delegate prosecutorial authority to counsel for the Office of the Public
5 Auditor pursuant to the Court's inherent authority to appoint a special prosecutor — is not the
6 subject of Defendant's challenge here, nor would the Court entertain such an argument, which was
7 not made in neither Defendant's written filings nor during the motion hearing in open court.¹ This
8 comports with the Public Auditor's constitutional grant of prosecutorial authority — which is
9 established by Article III, § 12 of the CNMI Constitution — providing that “[t]he public auditor . . .
10 shall perform other duties provided by law.” CNMI Const., art. III, § 12. As stated above, the Court
11 notes that it properly exercised its inherent authority to appoint a special prosecutor, which expanded
12 the scope of the Public Auditor's duties as envisioned by the framers of the Constitution.

13 Second, Defendant argues that 1 CMC § 7847 does not grant the Office of the Public Auditor
14 (or its employees) the ability to file criminal charges against the Defendant, and thus this case was
15 improperly filed because the OPA's authority is limited to prosecution of the Governor or the
16 Attorney General, and Defendant has never held or served in such a capacity. On the other hand, the
17 Commonwealth argues, and this Court recognizes, this case was not filed pursuant to 1 CMC § 7847.
18 The Information filed on March 20, 2013 explicitly specifies that the criminal charges filed against
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20 ¹ Although, if such argument were to be made, the Court recalls its reasoning in its August 17, 2012 Order, reminding
21 the parties of the numerous cases cited therein which recognize the authority of a trial court to appoint a special
22 prosecutor. See, e.g., *White v. Polk County*, 17 Iowa 413, 414 (Iowa 1864); *Weems v. Anderson*, 516 S.W.2d 895, 898
23 (Ark. 1974); *State v. Basham*, 170 N.W.2d 238, 241 (S.D. 1969); *State ex rel. Thomas v. Henderson*, 175 N.E. 865,
24 866-67 (Ohio 1931); *State v. Gauthier*, 231 P. 141, 143 (Or. 1924) (“[T]he Circuit Court is a court of general
jurisdiction and has the inherent power, in the absence of such a statute, in a proper case like the one at bar, to appoint a
special prosecutor in order that justice may be done.”) (citations omitted); *State v. Kroenung*, 188 S.W.3d 89, 92 (Mo.
Ct. App. 2006); *In re Appointment of Special State's Attorneys*, 356 N.E.2d 195, 199 (Ill. Ct. App. 1976); *Byxbee v.*
State, 272 P. 493, 495 (Okla. Crim. App. 1928); see also 63C Am. Jur. 2d Prosecuting Attorneys § 11 (“In general, a
court has the power to appoint a prosecutor to represent the state when the appointed or elected prosecuting attorney is
absent or disqualified, or is otherwise unable to act.”) (citation omitted)).

1 Defendant were filed pursuant to the Office of the Public Auditor’s designation by this Court as a
2 “Special Prosecutor”, “pursuant to this Court’s August 17, 2012 Order.”

3 Here, the Commonwealth does not argue, as a primary grounds for his Opposition or in any
4 alternative argument, that it was bestowed the power to prosecute the Defendant pursuant to any
5 statutory, constitutional, or common law authority; the Commonwealth plainly, simply, and correctly
6 argues that the Office of the Public Auditor was, in fact, designated as a “Special Prosecutor” by this
7 Court, which conferred absolute prosecutorial authority upon the Office of the Public Auditor to
8 prosecute this particular case. As further support for the Commonwealth’s position, the Court also
9 acknowledges that it has consistently signed every filing in this matter as the following: “Special
10 Prosecutor pursuant to this Court’s August 17, 2012 Order.” As such, the Court finds Defendant’s
11 arguments to the contrary to be meritless, incredulous, and nearly sanctionable, and summarily
12 denies any related argument based upon the Office of the Public Auditor’s supposed invalid
13 authority to prosecute this case. The Court will further investigate whether the arguments contained
14 within the instant motion are subject to Rule 11 sanctions.

15 Third, the Court refuses to acknowledge and dismisses as irrelevant the Defendant’s reliance
16 upon the recent Superior Court decision in *CNMI v. Mondala*, Criminal Case No. 14-0070 (Super.
17 Ct. Sept. 10, 2014). In *Mondala*, the Court granted dismissal, citing a violation of the separation of
18 powers doctrine and finding that “the AG has no authority to delegate his prosecutorial powers to
19 OPA or personnel within the OPA.” Defendant relies heavily on the Court’s decision, which this
20 Court recognizes has absolutely no bearing on the outcome of this case — as the two are polar
21 opposites factually — and Defendant’s conflicting arguments remain irreconcilable. In *Mondala*,
22 the Attorney General purported to assign or delegate prosecutorial authority to the Office of the
23 Public Auditor, which the Court declared flew in the face of the Attorney General’s constitutionally
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1 and statutorily granted, exclusive authority to prosecute instances of criminal violations within the
2 CNMI.

3 Here, however, the Court again stresses that it exercised its inherent authority to delegate a
4 special prosecutor to prosecute a criminal case, and appointed the Office of the Public Auditor to
5 represent the Commonwealth. Defendant's arguments fundamentally ignore patently obvious and
6 readily apparent facts, of which he knew or should have known, in order to bolster arguments that
7 are irrelevant, inapposite, and groundless. Defendant goes so far as to claim, in the background
8 section of his motion, that "Defendant is not privy to any hearing held by the trial court as ordered
9 by the Superior Court." (Def.'s Mot. to Dismiss, at 2.) Again, this Court cautions Defendant to
10 refrain from filing frivolous or otherwise completely groundless motions, regardless of whether his
11 counsel claims he was unaware of essential facts which effectively render his entire motion moot.
12 Furthermore, in light of the discussion had during the instant motion's hearing in open court, and
13 upon discovering the salient facts which put the Defendant on notice that his arguments are no
14 longer with merit, or for that matter, never were, Defendant should have immediately, orally or
15 otherwise, withdrawn the instant motion from the Court's consideration in order to promote the
16 concept of judicial economy and prevent the Court from wasting precious time and resources to
17 essentially inform Defendant of facts of which he was previously unaware. The Court is not charged
18 with performing counsel's due diligent research on Defendant's behalf, nor does it tolerate any claim
19 of ignorance of facts germane to issues on which it purports to have complete insight.

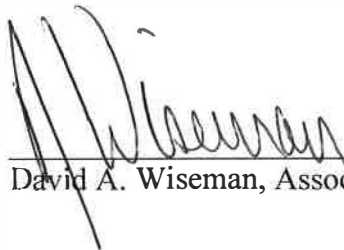
20 Lastly, the Court is perplexed as to the genesis of Defendant's argument that "an executive
21 order will not cure" the lack of the Office of the Public Auditor's authority to bring this particular
22 case. The Court is neither aware, now or at any time, of any executive order, mentioned or
23 referenced in any previous court ruling or other filings in this matter, which directly addresses the
24 events surrounding the instant case, nor was put on notice of such an order by any citation or proffer

1 of evidence by the Defendant, whether by name or by number. Again, Defendant relies upon the
2 Court's ruling in the *Mondala* case, where the Court held the "OPA falls outside the executive
3 branch. Accordingly, an executive order would not suffice to give the OPA more authority than that
4 which has been granted to it by the legislature." *CNMI v. Mondala*, Crim. Case No. 14-0070 (Super.
5 Ct. Sept. 10, 2014). The Court is once more at a loss as to the reason Defendant included the present
6 argument as grounds for dismissal, and in light of the complete misapplication of a previously
7 decided case — which remains merely persuasive authority at any rate — to a total
8 misunderstanding of the factual circumstances leading to the filing of this motion.

9 **CONCLUSION**

10 For the foregoing reasons, the Court wholly and summarily **DENIES** Defendant's Motion to
11 Dismiss for Lack of Jurisdiction — as to both Defendant Ogumoro and Kosam — holding that
12 Defendants patently ignore the crucial fact that this Court exercised its inherent authority to appoint
13 a special prosecutor to handle this particular case, and as such, each and every ground Defendant
14 cites for dismissal is without legal or factual merit whatsoever.

15 **IT IS SO ORDERED** this 7th day of November, 2014.

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18 David A. Wiseman, Associate Judge