FOR PUBLICATION

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,	) Criminal Case No. 18-0013
Plaintiff,	) **ORDER DISMISSING CASE WITH PREJUDICE FOR VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHT TO SPEEDY TRIAL PURSUANT TO ARTICLE I, SECTION 4(D) OF THE NMI CONSTITUTION AND THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION BECAUSE THE OFFICE OF THE ATTORNEY GENERAL WAS NEGLIGENT OR RECKLESS BY FILING A CLEARLY MERITLESS INTERLOCUTORY APPEAL CAUSING A DELAY RESULTING IN DEFENDANT NOT HAVING HIS TRIAL FOR OVER A YEAR AND ELEVEN MONTHS SINCE HIS ARREST**
v.	
JEFFRY MANARANG FERNANDEZ,	
Defendant.	

I. INTRODUCTION

THIS MATTER came before the Superior Court for the Northern Mariana Islands ("Superior Court") on October 4, 2019, for an evidentiary/motion hearing on Defendant Jeffry Manarang Fernandez's Motion to Dismiss with Prejudice Due to Violation of his Right to Speedy Trial ("Speedy Trial Motion").

Assistant Attorney General Frances Demapan appeared for the Commonwealth Government ("Commonwealth"). Assistant Public Defender Heather Zona appeared for Defendant Jeffry Manarang Fernandez ("Defendant" or "Fernandez"), who was also present.

Fernandez filed a sworn declaration. The Commonwealth, despite being given the opportunity, declined to cross-examine Defendant. Both parties were given an opportunity to call other witnesses, however, both parties declined to do so.

II. FINDINGS OF FACT

On January 25, 2018, Commonwealth of the Northern Mariana Islands ("CNMI") Department of Public Safety ("DPS") Detective Wally Emul, Jr. swore out a declaration alleging probable cause existed for the charges of Sexual Abuse of a Minor in the First Degree and Sexual Assault in the First Degree against Defendant Fernandez. Defendant was then arrested. Bail was set for $25,000.

On February 1, 2018, at the Preliminary Hearing, the Superior Court found probable cause for Sexual Abuse of a Minor in the First Degree (6 CMC § 1306) and Sexual Assault in the First Degree (6 CMC § 1301).

On February 5, 2018, Defendant came before the Court for an arraignment and entered his plea of not guilty on both counts.

On February 9, 2018, at the Bail Modification Hearing, Defendant posted a modified bail. Defendant was released upon posting ten percent (10%) of the original $25,000 bail ($2,500) and an unsecured $22,500 appearance bond. At the same hearing, the Superior Court scheduled a trial for May 21, 2018 – less than four months after Defendant's arrest.

On March 5, 2018, Defendant's counsel filed a motion to continue the trial date and requested a two-week continuance due to a death in the family and resulting memorial service in the United States mainland. The Court continued the trial.

On March 16, 2018, the House of Justice, Guma Hustisia, Iimwal Aweewe ("Guma Hustisia") closed to the general public as a result of serious mold problems caused by the air

conditioning system not working. As a result of Guma Hustisia's closure, the CNMI judiciary had to rely on satellite courtrooms. The only courtroom suitable for a jury trial was the United States District Court for the Northern Mariana Islands courthouse, which United States District Court Chief Judge Ramona V. Manglona graciously allowed the five (5) CNMI Superior Court Judges to use.[1]

On March 26, 2018, Defendant filed his Motion to Compel Discovery and Request for an Evidentiary Hearing.

On April 5, 2018, Defendant filed a Motion to Dismiss Count II of the Information, Sexual Abuse in the First Degree (6 CMC § 1301), for violating Defendant's right to not be jeopardized twice for the same offense ("Double Jeopardy Motion"). The Court set the following schedule: opposition due on April 30, 2018; reply due on May 15, 2018; and a hearing on the Double Jeopardy Motion was set for May 16, 2018.

On April 11, 2018, the Court reset the trial date for August 20, 2018. Though Defendant requested that the trial be moved by only two weeks, Guma Hustisia's closure greatly increased the Court's difficulty in its ability to secure use of the District Court's courtroom. August 20, 2018, was the earliest available date the Court could schedule a jury trial at the United States District Court for the Northern Mariana Islands courthouse.

On May 16, 2018, the Commonwealth filed its opposition to Defendant's Double Jeopardy Motion. The parties agreed at the May 16, 2018 hearing to permit the Court to make its ruling on the Double Jeopardy Motion based on the briefs and arguments made during the

[1] The United States District Court for the Northern Mariana Islands courthouse was also used as an appellate courtroom by the Supreme Court of the Commonwealth of the Northern Mariana Islands, thus adding to the congestion and limited access to the courtroom. There were temporary satellite courtrooms at the Multi-Purpose Building (and later at the Marianas Business Plaza), however none of these satellite courtrooms were large enough to handle jury selection, jury deliberation, etc. As of the time this order was issued, the Guma Hustisia continues to be closed to the general public.

hearing. Present for the Double Jeopardy Motion hearing were Assistant Attorney General Teri Tenorio and Assistant Public Defender Heather Zona.

On May 23, 2018, the Court issued its Order Granting Defendant's Motion to Dismiss Count II as it was Multiplicitous and Violates the Constitutional Protection from Double Jeopardy ("Double Jeopardy Order") and dismissed Count II. The Double Jeopardy Order did not dismiss Count I, Sexual Abuse of a Minor in the First Degree. The Commonwealth proceeded on charging Defendant with Count I.

On June 11, 2018, a different Assistant Attorney General, Assistant Attorney General Jonathan Wilbershied, filed the Commonwealth's Motion to Reconsider Granting Defendant's Motion to Dismiss Count II ("Motion to Reconsider"). On July 24, 2018, the Court issued its written Order denying the Commonwealth's Motion to Reconsider ("Reconsideration Order").

On July 16, 2018, Defendant filed his Motion to Exclude Improperly Noticed and Unnoticed Expert Testimony.

On July 26, 2018, the Commonwealth filed its Amended Notice of Expert Testimony because it intended to introduce expert testimony at trial from Rosemarie Camacho pertaining to child sexual abuse accommodation syndrome and to dispel the misconceptions associated with victim behaviors. On the same day, Defendant filed his Supplemental Brief in Support of His Second Motion to Exclude Improperly Noticed and Unnoticed Expert Testimony.

On August 3, 2018, Defendant filed his Notice of Motion and Motion Pursuant to NMI Evidence Rule 412.

Also, on August 3, 2018, almost two weeks before the trial, the Commonwealth filed its Notice of Appeal to the Supreme Court of the Commonwealth of the Northern Mariana Islands ("Supreme Court"). The Notice of Appeal sought appellate review of both the Court's Double

Jeopardy Order and the Court's Reconsideration Order ("Commonwealth's Interlocutory Appeal").

On August 6, 2018, Defendant filed his Notice of Motion and Motion to Strike Commonwealth's Intent to Introduce Evidence of Prior Acts or in the Alternative for a Hearing.

Also, on August 6, 2018, based on the Office of the Attorney General filing of the Notice of Appeal, the Superior Court stayed any further proceedings and vacated the trial date.

During the course of the appeal, the Superior Court's Clerk of Court's Office filed a number of requests with the Supreme Court for extension of time to file the certified record, with the fourth request filed on June 14, 2019. The Superior Court's Clerk of Court's Office filed notice of the record on July 11,2019 – Eleven Months after the Commonwealth filed its Notice of Appeal.

On July 11, 2019, the Superior Court's Clerk of Court's Office certified the record; the Supreme Court then issued a Notice to the Parties Regarding Filing of Certificate of Record and Briefing Schedule. The briefing schedule set the due date for the Commonwealth's opening brief for August 20, 2019.

On August 1, 2019, the Commonwealth filed its Motion to Voluntarily Dismiss Appeal ("Appellate Dismissal Motion"). The Commonwealth stated in its Appellate Dismissal Motion that it: (1) had not appealed the Double Jeopardy Order dismissing Count II within the thirty (30) day time frame provided by NMI Supreme Court Rule 4(b)(1); (2) would face an "extremely high hurdle" in having to prove the Superior Court abused its discretion by failing to correct a "clear error" or "manifest injustice" in the Superior Court's denial of the Commonwealth's Motion to Reconsider; and (3) believed "that it is unlikely that this appeal will succeed in demonstrating that the [Superior Court] abused its discretion in denying the Motion to

Reconsider." (Appellant/Commonwealth's Motion to Voluntarily Dismiss Appeal at 1). The Commonwealth's dismissal of the appeal of the Double Jeopardy Order was not based on any changes in either the law or in the circumstances of the case.

On August 6, 2019, exactly one year after the Superior Court stayed the proceedings in this case, the Supreme Court granted the Commonwealth's Motion to Dismiss its appeal.

On August 23, 2019, Defendant filed the Declaration of Jeffry Fernandez in Support of his Motion to Dismiss with Prejudice Due to Violation of His Right to Speedy Trial ("Fernandez's Declaration"). In his Declaration, Fernandez stated that: (1) Fernandez was forced to stay away from his wife and daughter as a condition of his bail – which has resulted in Fernandez being unable to spend quality time with them and attend many family functions; (2) Fernandez's anxiety about the criminal charges brought against him caused him to experience high blood pressure that had to be treated with medication for some time; (3) Fernandez's career plans have been put on hold since the time of the arrest; and (4) several newspaper articles have been written about Fernandez concerning the case and the charges brought against him.

On September 23, 2019, the Commonwealth filed its Opposition to Defendant's Motion to Dismiss for Violation of His Right to Speedy Trial. On October 3, 2019, Defendant filed his Reply Memorandum in Support of His Motion to Dismiss for Violation of His Right to Speedy Trial.

On October 4, 2019, the Court heard all of the motions that had been stayed pending appeal – (1) Defendant's Second Motion to Exclude Improperly Noticed and Unnoticed Expert Testimony, (2) the Commonwealth's Motion to Skype, (3) Defendant's Motion Pursuant to NMI Evidence Rule 412, and (4) Defendant's Motion to Strike Commonwealth's Intent to Introduce Evidence of Prior Acts or in the Alternative for a Hearing – as well as Defendant's Speedy Trial

Motion. At the hearing, the Court adjudicated the four motions that had been pending during the appeal and took Defendant's Speedy Trial Motion under advisement.

III. LEGAL STANDARD

There are three phases in a criminal conviction. First, the Commonwealth investigates the alleged crime to determine whether to arrest and charge a suspect. Second, after the arrest and charge, the suspect, now the defendant, stands accused of the charge brought against him but is presumed innocent until proven guilty or pleads guilty. Finally, after a finding or plea of guilt, the Court imposes a sentence on the defendant. *See Betterman v. Montana*, 136 S. Ct. 1609, 1613 (2016).

During the second phase of the criminal proceeding,[2] starting from the initiation of criminal proceedings – either the arrest of the defendant or the filing of an accusatory pleading against him, whichever occurs first –[3] the defendant has a constitutional right to a speedy trial under both the Commonwealth Constitution, NMI CONST. art. 1, § 4(d), and the United States Constitution, U.S. CONST. amend. VI, the latter of which applies to the Commonwealth through the Fourteenth Amendment of the United States Constitution and Section 501 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ("the Covenant"). *See Klopfer v. North Carolina*, 386 U.S. 213, 222-23 (1967) (finding that the accused's right to a speedy trial is a "fundamental" right applicable to the states through the Fourteenth Amendment's Due Process Clause); *Commonwealth of the N. Mar. I. v. Crisostomo*, 2018 MP 5 ¶ 73 n.17 (stating that under Section 501 of the Covenant, the Fourteenth Amendment's Due Process Clause applies to the CNMI as if it were one of the several states).

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[2] *See Betterman v. Montana*, 136 S. Ct. 1609, 1613 (2016) (finding that a defendant's constitutional right to a speedy trial attaches during the second phase of a criminal proceeding).

[3] *See Barker v. Wingo*, 407 U.S. 514 (1972); *Doggett v. United States*, 505 U.S. 647, 651-52 (1992).

The question of whether a defendant's constitutional speedy trial right has been violated cannot be answered by referencing a quantifiable number.[4] *See Vermont v. Brillon*, 556 U.S. 81, 89 – 90 (2009). Instead, "the speedy-trial right is 'amorphous,' 'slippery,' and 'necessarily relative.'" *Id.* at 89 (quoting *Barker v. Wingo,* 407 U.S. 522 (1972)). When analyzing a defendant's speedy trial rights under both Article 1, Section 4(d) of the NMI Constitution and the Sixth Amendment of the United States Constitution, courts utilize a flexible four-factor balancing test. *See Barker v. Wingo,* 407 U.S. 514 (1972) (adopting a four-factor balancing test for determining whether there is a speedy trial violation under the Sixth Amendment of the United States Constitution); Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands 16 (1976) (stating that the four-part *Barker* test is the test for determining whether there is a speedy trial violation under Article 1, Section 4(d) of the NMI Constitution). The four factors are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion or non-assertion of the right to a speedy trial, and (4) the prejudice to the defendant resulting from the delay. *Barker*, 407 U.S. at 530-32. Though none of the four factors are controlling in determining whether a defendant's speedy trial right has been denied, *id.* at 533 ("We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial."), the reason for the delay "is the focal point of the inquiry," *United States v. King*, 483 F.3d 969, 976 (9th Cir. 2007); *see United States v. Loud Hawk*, 474 U.S. 302, 315 (1986) ("The flag all litigants seek to capture is the second

[4] The absence of a qualifying number is one of the differences between a defendant's constitutional right to a speedy trial and a defendant's right to a speedy trial under many of the speedy trial statutes currently enacted in several United States jurisdictions. 18 USC § 3161(stating that the United States Government has a maximum of seventy (70) days, excluding the time periods listed as valid delays, to bring a defendant to trial); 8 GCA § 80.60 (stating that the Government of Guam has a maximum of sixty (60) days to bring a defendant to trial, unless "good cause is shown for the failure to commence the trial within the prescribed period"). The Commonwealth Legislature has ***not*** enacted a speedy trial statute at the time of this Order.

factor, the reason for delay."); *Cole v. Beck*, 765 F. App'x 137, 138 (7th Cir. 2019); *United States v. Carpenter*, 781 F.3d 599, 610 (1st Cir. 2015).

In determining whether there is a constitutional speedy trial violation, "the conduct of both the prosecution and the defendant are weighed." *Barker*, 407 U.S. at 530.

The remedy for a violation of a defendant's speedy trial right is dismissal. *See Strunk v. United States,* 412 U.S. 434, 439-40 (1973); *see also United States v. Toombs*, 574 F.3d 1262, 1274 (10th Cir. 2009) (stating that a finding of a Sixth Amendment speedy trial violation "would require the [...] court to dismiss the case with prejudice").[5]

IV. DISCUSSION

For the reasons stated below, the Court finds that the Commonwealth violated Defendant's constitutional speedy trial rights.

A. Length of Delay

The first factor is actually a double inquiry:

> Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from "presumptively prejudicial" delay, since, by definition, he cannot complain that the government has denied him a "speedy" trial if it has, in fact, prosecuted his case with customary promptness. If the accused makes this showing, the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim. This latter enquiry is significant to the speedy trial analysis because [...] the presumption that pretrial delay has prejudiced the accused intensifies over time.

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[5] For additional analysis of a defendant's constitutional speedy trial rights see also *Commonwealth of the Northern Mariana Islands v. Allan Apatang Taitano*, Crim. No. 13-0111E (NMI Super. Ct. Mar. 07, 2016) (Order Granting Commonwealth's Motion To Stay Pending Appeal Pursuant To 6 CMC § 8101 As It Has Shown The Seriousness Of The Questions Raised And The Balance Of Hardships Tips Sharply In The Commonwealth's Favor), and *Commonwealth of the Northern* Mariana *Islands v. Edith Eleanor Deleon Guerrero*, Tr. No. 16-2199 (NMI Super. Ct. May 07, 2018) (Order Denying Defendant's Motion To Dismiss As The Information Is Sufficient To Put The Defendant On Notice To The Charges Against Her, Whether The Vehicles Are "Government Vehicles" Is For The Ultimate Finder Of Fact To Determine, The Defendant's Speedy Trial Right Has Not Been Violated, And Count III Is Not Time Barred).

Doggett v. United States, 505 U.S. 647, 651-52 (1992) (citations omitted).

Federal courts generally consider a delay of one year to be presumptively prejudicial. *See id.* at 652 n.1 (finding that "the lower courts have generally found post-accusation delay 'presumptively prejudicial' at least as it approaches one year"); *United States v. Lazzara*, 709 F. App'x 578, 580 (11th Cir. 2017) (finding that "[a] delay of one year is considered presumptively prejudicial"); *Norris v. Schotten*, 146 F.3d 314, 327 (6th Cir. 1998); *United States v. McFarland*, 116 F.3d 316, 318 (8th Cir. 1997) (finding a seven month delay too short of a period to trigger the speedy trial analysis); *Wright v. Uribe*, No. CV 12-10787-GW (JEM), 2016 U.S. Dist. LEXIS 162781, at *17 (C.D. Cal. Aug. 4, 2016) ("In general, a delay of a year or more is considered presumptively prejudicial."). However, some courts have found that a delay of several months is presumptively prejudicial in certain circumstances. *See United States v. Koller*, 956 F.2d 1408, 1414 (7th Cir. 1992) ("A delay of eight and one-half months is enough to warrant further inquiry in this case.").

Here, this case has been pending since Defendant's arrest on January 25, 2018; almost two years ago. Because Defendant's case has not proceeded to trial in over one year, the Court finds that the delay is presumptively prejudicial. Therefore, the Court will analyze the other *Barker* factors.

B. Reason for the Delay

"[T]he prosecutor and the court have an affirmative constitutional obligation to try the defendant in a timely manner and [...] this duty requires a good faith, diligent effort to bring him to trial quickly." *McNeely v. Blanas*, 336 F.3d 822, 826 (9th Cir. 2003). As such, the prosecutor has the burden to explain a delay in bringing the accused to trial. *See id.* at 827; *see also Brown v. Romanowski*, 845 F.3d 703, 714 (6th Cir. 2017); *United States v. Seltzer*, 595 F.3d 1170, 1177

(10th Cir. 2010).

The prosecutor's burden can be satisfied by showing that the defendant caused the delays at issue. *See Doggett*, 505 U.S. at 651 (stating that the Court will look to "whether the government or the criminal defendant is more to blame for [the] delay"); *Brillon*, 556 U.S. at 90 (stating that any "delay caused by the defense weighs against the defendant"); *see also King*, 483 F.3d at 976 (finding that the second factor weighed heavily against finding a speedy trial violation because the defendant requested for continuances, the case was very complex, and defendant changed attorneys about halfway through the proceedings). Having the defendant's own actions weigh against him for speedy trial purposes prevents a defendant from employing delay tactics in the hope of receiving a favorable speedy trial ruling. *See Brillon*, 556 U.S. at 90 (citing *Barker*, 407 U.S. at 521). The defendant's own actions include the actions taken by his agents, which includes his defense attorney. *See id.* at 90-91 (finding that because "'the attorney is the [defendant's] agent when acting, or failing to act, in furtherance of the litigation,' delay caused by the defendant's counsel is also charged against the defendant." (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)). This is true even when the defendant is represented by an attorney from the public defender's office. *See id.* at 91 ("Unlike a prosecutor or the court, assigned counsel ordinarily is not considered a state actor.").[6]

All delays that are not attributed to the defendant are given different weight depending upon their severity. Actions that weigh heavily against the Commonwealth include: deliberate attempts by the Commonwealth to delay the trial, *see Barker*, 407 U.S. at 531, and delays by the Commonwealth motivated by bad faith or harassment, *see Doggett*, 505 U.S. at 656 (stating that

[6] Despite the general rule of attributing delays caused by the defendant's appointed public defender to the defendant, a "[d]elay resulting from a systemic breakdown in the public defender system could be charged to the State." *Vermont v. Brillon*, 556 U.S. 81, 94 (2009) (citation omitted).

"official bad faith in causing delay will be weighed heavily against the government"); *see also United States v. Schreane*, 331 F.3d 548, 553 (6th Cir. 2003). Neutral reasons for delay, such as overcrowded courts and negligence, are still weighed against the Commonwealth, albeit less heavily, because "it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun." *Doggett*, 505 U.S. at 657; *see also Barker*, 407 U.S. at 531 (weighing neutral delays against the Government because "the ultimate responsibility for such circumstances must rest with the government rather than with the defendant").[7] Finally, "a valid reason, such as a missing witness, should serve to justify appropriate delay." *Barker*, 407 U.S. at 531.

"[A]n interlocutory appeal by the Government ordinarily is a valid reason that justifies delay," and, therefore, is generally not weighed against the Commonwealth for speedy trial purposes.[8] *Loud Hawk*, 474 U.S. at 315. However, there are exceptions to this general rule. The United States Supreme Court in *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986) stated that:

> In assessing the purpose and reasonableness of such an [interlocutory] appeal [filed by the Commonwealth], courts may consider several factors. These include the strength of the [Commonwealth's] position on the appealed issue, the importance of the issue in the posture of the case, and – in some cases – the seriousness of the crime.

Id. Additionally, an interlocutory appeal's reasonableness may also be rebutted by a showing of

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[7] This category includes any delay caused by the exceedingly prolonged renovation of Guma Hustisia. *See Barker*, 407 U.S. at 538 (White, J., concurring) (stating that "unreasonable delay in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal-justice system are limited and that each case must await its turn"); *see also People v. Johnson*, 26 Cal. 3d 557, 571 (1980) (finding that "[a] defendant's right to a speedy trial may be denied simply by the failure of the state to provide enough courtrooms"). Therefore, the Court notes that the limited resources of the CNMI Judiciary cannot justify what would otherwise be a violation of Defendant's constitutional right to a speedy trial. The CNMI Constitution is the written expression of the will of the People of the Commonwealth and created for the benefit and protection of the People – not for the benefit and protection of the governmental entities of the Commonwealth.

[8] Similarly, delays caused by a defendant's interlocutory appeal are weighed against the defendant. *See United States v. Loud Hawk*, 474 U.S. 302, 316 (1986) ("A defendant who resorts to an interlocutory appeal normally should not be able upon return to the district court to reap the reward of dismissal for failure to receive a speedy trial.").

bad faith on the part of the appellant. *See id.* at 316 (finding that "[t]here is no showing of bad faith or dilatory purpose on the Government's part"); *see also United States v. Herman*, 576 F.2d 1139, 1146 (5th Cir. 1978) ("when the government acts arbitrarily, negligently, or in bad faith, the delay may not be justifiable.").

In assessing the strength of the Commonwealth's position on the appealed issue, a showing that the Commonwealth succeeded in its interlocutory appeal is prima facie evidence that the Commonwealth had a strong position on the appealed issue. *Loud Hawk*, 474 U.S. at 16 ("The Government's position in each of the appeals was strong, and the reversals by the Court of Appeals are prima facie evidence of the reasonableness of the Government's action."). Inversely, a showing that the Commonwealth voluntarily dismissed its appeal is prima facie evidence that the Commonwealth had a weak position on the issue it appealed. *See State v. Tyler J. K. (In re Tyler J . K.)*, 2008 WI App 36, 308 Wis. 2d 396, 746 N.W.2d 605 (finding that "[t]he State's notice of voluntary dismissal is prima facie evidence of the lack of strength of [its] case just as the two reversals by the Ninth Circuit were prima facie evidence of the strength of the government's position in Loud Hawk"); *see also Herman*, 576 F.2d at 1146 (stating that the court would not justify the delay caused by the appeal "if the government's position was so weak that it should have known it would lose").

Here, the Commonwealth failed to show that Defendant is responsible for the delay. Though Defendant filed several motions and requested that the original May 2018 trial date be continued, Defendants actions did not significantly contribute to the delay. Comparatively, the Commonwealth's Interlocutory Appeal caused the trial to be delayed by a year, which is enough by itself to trigger a constitutional speedy trial analysis. Though Defendant's motions may have theoretically also resulted in such a delay, this ultimately never happened because the

Commonwealth's Interlocutory Appeal stayed the Superior Court proceedings.[9]

Additionally, the Commonwealth's argument that the Clerk of Court of the Superior Court was responsible for some of the delay because the Clerk filed a number of requests with the Supreme Court for an extension of time to file the certified record is also unpersuasive because any delay attributed to the Clerk of Court of the Superior Court also weighs in Defendant's favor for speedy trial purposes. *See Barker*, 407 U.S. at 531.

Therefore, the Court needs to determine whether the Commonwealth acted reasonably in filings the Commonwealth's Interlocutory Appeal. Under these particular set of facts, the Court finds that the delay caused by the Commonwealth's Interlocutory Appeal is neither valid nor justified because the Commonwealth had a clearly weak position in its appeal of the Reconsideration Order and was negligent in bringing and maintaining its appeal of the Double Jeopardy Order for a year. *See Loud Hawk*, 474 U.S. at 315.

The Commonwealth appeal of the Court's Reconsideration Order was clearly weak. The weakness of the appeal of the Reconsideration Order is evidenced by the Commonwealth's act of voluntarily dismissing its appeal of the Reconsideration Order. *See State v. Tyler J. K. (In re Tyler J . K.)*, 2008 WI App 36, 308 Wis. 2d 396, 746 N.W.2d 605.[10] Furthermore, the Commonwealth conceded that its position in its appeal of the Reconsideration Order was weak when it stated in its Motion to Voluntarily Dismiss Appeal that "the Commonwealth believes that it is unlikely this appeal will succeed." (Appellant/Commonwealth's Motion to Voluntarily Dismiss Appeal at 1).

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[9] The Court notes the holding in this case may have been different if both the Commonwealth and Defendant significantly contributed to the delay.

[10] The Northern Mariana Islands Supreme Court Rules have procedures in place to prevent parties from proceeding with frivolous appeals for the sake of maintaining an appearance of having a valid claim. NMI Supreme Court Rule 38 ("If the Court determines that an appeal is frivolous, it may, after a separately filed motion or notice from the Court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.").

Additionally, the Commonwealth was negligent in brining and maintaining its appeal of the Superior Court's Double Jeopardy Order because the Commonwealth failed to file its appeal of the Court's Double Jeopardy Order within the thirty (30) day time frame specified by NMI Supreme Court Rule 4(b)(1), thereby making the Court's Double Jeopardy Order unreviewable by the Supreme Court. The Commonwealth attempted to justify its untimely filing of the appeal of the Double Jeopardy Order by stating that, "at the time of filing the appeal, it was not evident to the Commonwealth" that it would be unable to appeal the Double Jeopardy Order. (Opposition to Defendant's Motion to Dismiss for Violation of His Right to Speedy Trial at 5). However, the Commonwealth's justification for filing its appeal is unpersuasive because the Supreme Court stated in *Commonwealth v. Hocog*, 2017 MP 15, published a year before the Commonwealth filed its appeal in this case, that a defendant's motion to reconsider does not toll the time for appealing the underlying trial court order. 2017 MP 15 ¶ 8. Therefore, the Commonwealth should have known about *Hocog's* implications before it filed its appeal. This is especially true because the relevant Commonwealth attorneys work out of the same office, the CNMI Office of the Attorney General Criminal Division, that litigated *Commonwealth v. Hocog*, 2017 MP 15, at both the trial and appellate level. *See* Model Rules of Professional Conduct 3.1 (2019) ("A lawyer shall not bring [...] a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."); *see also In re BLANKENSHIP*, 3 NMI 209, 215 (1992) (stating that one is presumed to know the law). Further, the Commonwealth maintained the appeal for a year before learning of *Hocog's* implications. Though the Commonwealth may have been waiting for the certified record for some time, this delay does not justify failing to conduct the research to discover that it filed an appeal that cannot be brought

before the Supreme Court. Therefore, the Court finds that the Commonwealth's act of filing its appeal of the Double Jeopardy Order without performing the due diligence necessary to make itself aware of *Hocog* and maintaining the appeal for a year constituted negligence or reckless behavior.[11]

Therefore, as to the second *Barker* factor the Court needs to determine what weight the Court should give to the Commonwealth's actions.

The Commonwealth's act of negligently bringing and maintaining its appeal of the Double Jeopardy Order weighs against the Commonwealth, because it "falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun." *Doggett*, 505 U.S. at 657.

Additionally, the Commonwealth's act of filing its clearly weak appeal of the Reconsideration Order and maintaining it for over a year, weighs heavily against the Commonwealth. The Commonwealth argued that because the delay caused by the Commonwealth's Interlocutory Appeal "was not intentionally calculated to hamper the defense," its actions should not be weighed heavily against it under *Barker*. (Opposition to Defendant's Motion to Dismiss for Violation of His Right to Speedy Trial at 4). However, the United States Supreme Court in *Loud Hawk* stated that, "a delay resulting from an appeal would weigh *heavily* against the [Commonwealth] if the issue [appealed] were *clearly* tangential or frivolous" to the Commonwealth's case. 474 U.S. 302, 315-16 (1986) (emphasis added). Therefore, if a finding that the issue appealed was "clearly tangential or frivolous" is enough to warrant a finding that

[11] If the Office of the Attorney General knew about *Hocog*, the Commonwealth's act of proceeding with the appeal would be intentional and considered reckless, which the Court may have weighed heavier against the Commonwealth. *See Hakeem v. Beyer*, 990 F.2d 750, 771 (3d Cir. 1993) (stating that a finding of grossly negligent or reckless behavior by the Commonwealth with regards to the defendant's constitutional speedy trial rights perhaps could result in a finding that the Commonwealth's behavior should be weighed heavily against it); *see also United States v. Ferreira*, 665 F.3d 701, 706 (6th Cir. 2011).

the second *Barker* factor weighs heavily against the Commonwealth, then a finding that the Commonwealth's position on appeal was clearly weak also weighs heavily against the Commonwealth. Therefore, because the Court found that the Commonwealth filed a clearly weak appeal, the Commonwealth's assertion that the delay caused by its appeal "was not intentionally calculated to hamper the defense" rings hollow and is unpersuasive. (Opposition to Defendant's Motion to Dismiss for Violation of His Right to Speedy Trial at 4).

Because the weight of the Commonwealth's negligent act of filing and maintaining the Commonwealth's appeal of the Double Jeopardy Order is added to the weight of the Commonwealth's act of filing its clearly weak appeal of the Reconsideration Order, the Court finds that the second factor weighs heavily against the Commonwealth. *See Doggett*, 505 U.S. at 657.

C. Assertion of Speedy Trial Right

The third factor is whether the accused asserted his speedy-trial right. This factor "is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right," because a "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 531-32. A defendant is not required to formally raise his speedy trial right by motion. *See United States v. Tigano*, 880 F.3d 602, 618 (2d Cir. 2018). Instead, the Court will look to whether the defendant put the Commonwealth on notice. *See id.* at 618. Whether a defendant succeed in such an endeavor will be determined on an ad hoc basis by the Court after it examines the three other factors. *See id.*; *see also Barker*, 407 U.S. at 530-31 (finding that the strength of a defendant's efforts to raise his speedy trial right "will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice").

Because the analysis into whether a defendant asserted his speedy trial right is closely related to the factors, "[c]ourts look with some skepticism at assertions of speedy trial rights made by defendants who contribute to the delay, and are particularly skeptical of those who raise the issue for the first time in a motion to dismiss." *Carpenter*, 781 F.3d at 614; *see also Loud Hawk*, 474 U.S. at 314 (finding that the third factor does not weigh in the defendant's favor because "[a]t the same time respondents were making a record of claims in the District Court for speedy trial, they consumed six months by filing indisputably frivolous petitions for rehearing and for certiorari").

Here, the Commonwealth, in the Commonwealth's Opposition to Defendant's Motion to Dismiss for Violation of His Right to Speedy Trial, did not oppose Defendant's assertion that the third factor weighs in his favor. Additionally, as stated above, the Defendant did not significantly contribute to the delay in proceeding to trial – the motions Defendant filed before the August 2018 trial date were stayed pending appeal, were later quickly adjudicated and disposed of once the appeal was dismissed and the Superior Court proceedings resumed.

Therefore, the Court finds that this factor weighs in Defendant's favor.

D. Prejudice

The fourth factor asks whether the defendant was prejudiced by the delay. The United States Supreme Court stated that:

> [t]he speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.

United States v. Macdonald, 456 U.S. 1, 8 (1982).

"The individual claiming the Sixth Amendment violation has the burden of showing

prejudice." *Toombs*, 574 F.3d at 1275. Though a defendant is not necessarily required to show actual particularized prejudice, *Doggett*, 505 U.S. at 658 (finding a presumption of prejudice when the Government's negligence caused a six-year delay), courts will find a presumption of non-particularized prejudice only in the extreme circumstances where the Commonwealth caused a delay of at least five or six years, *see United States v. Shell*, 974 F.2d 1035, 1036 (9th Cir. 1992) (finding a presumption of prejudice after five years); *Goodrum v. Quarterman*, 547 F.3d 249, 260 (5th Cir. 2008) (finding that "the *Doggett* presumption applies only where the delay is at least 5 years"); *Jackson v. Ray*, 390 F.3d 1254, 1264 (10th Cir. 2004) (finding that "because the delay is less than six years, clearly established [United States] Supreme Court law does not require application of the *Doggett* rule"). When such an extreme delay is not present, the defendant must make a particularized showing of how the delay actually prejudiced him. *See United States v. Banks*, 761 F.3d 1163, 1183-84 (10th Cir. 2014) (finding that because "this case does not present an instance of extreme delay, [...] Defendants must present specific evidence of prejudice" (quotation omitted)); *see also Quarterman*, 547 F.3d at 260-61.

When a defendant is required to make a particularized showing of prejudice, the Court will examine the three interests the prejudice factor was designed to protect. The three interests are: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532. The defendant must show "a causal connection between the particular alleged prejudice and the delay in question." *United States v. Ghailani*, 751 F. Supp. 2d 515, 531 (S.D.N.Y. 2010); *see also United States v. Knight*, 562 F.3d 1314, 1324 (11th Cir. 2009) (finding no oppressive incarceration because the defendant "would have been otherwise serving a state sentence of imprisonment and was housed in the [federal] maximum-security facility because of his earlier

escape."); *United States v. Watford*, 468 F.3d 891, 907-08 (6th Cir. 2006) ("[B]ecause Watford was already incarcerated on state murder charges, he [...] suffered no oppressive pretrial incarceration at the hands of federal authorities.").

To prove "oppressive incarceration," the defendant must:

> make some showing that his or her incarceration is wrongful. In addition, the petitioner must make a particularized showing that the incarceration is oppressive beyond that experienced by others awaiting the outcome of their appeals. That is, the petitioner must show some oppressiveness unique to his or her situation that is directly attributable to the excessive delay in adjudicating the petitioner's appeal.

Harris v. Champion, 15 F.3d 1538, 1565 (10th Cir. 1994).

In regards to minimizing anxiety and the concern of the accused, a defendant "must show that the alleged anxiety and concern had a specific impact on [his] health or personal or business affairs." *People v. Flores*, 2009 Guam 22 ¶ 51 (quoting *Hammond v. United States*, 880 A.2d 1066, 1087 (D.C. 2005))). Furthermore, because considerable anxiety normally follows the initiation pendency of criminal charges, "a defendant must show that his anxiety extended beyond that which is inevitable in a criminal case" for the Court to find that this factor weighs in a defendant's favor. *Hakeem v. Beyer*, 990 F.2d 750, 762 (3d Cir. 1993); *see also Flores*, 2009 Guam 22 ¶ 51 ("Some prejudice to a defendant in the form of anxiety is 'inevitable simply by virtue of the existence of impending criminal charges.'" (quoting *Graves v. United States*, 490 A.2d 1086, 1103 (D.C. 1984))). "Accordingly, the critical question is whether the delay in bringing the accused to trial *unduly prolonged* the disruption of his life or *aggravated* the anxiety and concern that are inherent in being accused of a crime." *State v. Zimmerman*, 2014 MT 173 ¶ 32 (emphasis in original).

Finally, of the three interests:

> the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or

> disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past.

Barker, 407 U.S. at 532; *see also Toombs*, 574 F.3d at 1275 (finding that the prejudice factor does not weigh in the defendant's favor because "[e]ven assuming the first two interests, prevention of oppressive pretrial incarceration and minimization of the accused's anxiety and concern, weigh in [the defendant's] favor, the third, and most important, does not").

Here, the only evidence received by the Court was Fernandez's written declaration. *See Domingo v. Celis*, 2016 MP 18 ¶ 12 ("[The Supreme] Court has stated that it need not unsettle the rule that 'arguments and statements made by lawyers are not evidence.'" (quoting *Inos v. Inos*, 2015 MP 5 ¶ 10)). The Commonwealth, despite being given the opportunity, declined to cross-examine Defendant. Furthermore, despite both parties being given the opportunity to call other witnesses, both parties declined to do so.

Defendant made a mixed showing that he suffered oppressive pretrial incarceration. Defendant's $25,000 bail, of which he only posted $2,500, matches the fee schedule for defendants charged with sexual abuse of a minor.

However, for almost two-years, Fernandez has been ordered to stay away from his wife and children as a condition of his bail. This is no small matter. Defendant has missed out in spending valuable time with his family, the loss of which can never be recuperated.[12]

Defendant also failed to show that he suffered improper anxiety and concern as a result of the delay. Defendant's written declaration about having elevated blood pressure is not unusual for defendants awaiting trial. Further, Defendant's claim that he took medication for his high blood pressure lacks the necessary evidence for the Court to consider this assertion. This lack of

[12] However, the restraints placed on Defendant's ability to interact with his minor children also need to be balanced against the seriousness and nature of the charge brought against him.

evidence includes, but is not limited to, a sworn testimony from a doctor that there is a causal relationship between Defendant's high blood pressure and the criminal charges leveled against him.

Additionally, Defendant stating that his career has faced setbacks and that local papers have written about him does not separate his situation from many of the other individuals charged with crimes in the Commonwealth, especially those charged with sexually abusing a minor.

Finally, and most importantly, Defendant failed to show that the delay prejudiced his defense.

The Court, in weighing all the factual evidence received, finds that this factor is, at best, mixed in determining whether Defendant suffered a speedy trial violation.

V. CONCLUSION

As stated above, in balancing the four *Barker* factors, the Court is cognizant that the *Barker* test does not require the Court to find that each factor weighs in a particular party's favor for the Court to rule in favor of that party.

For the reasons stated above, the Court finds that the *Barker* factors, when balanced together, weigh heavily against the Commonwealth. **THEREFORE**, the Court finds that the Commonwealth violated Defendant's constitutional right to a speedy trial by failing to bring him to trial for over a year and eleven months since his arrest. Though the "dismissal of an indictment for denial of a speedy trial as an unsatisfactorily severe remedy," *Strunk*, 412 U.S. at 439, because "it means that a defendant who may be guilty of a serious crime will go free, without having been tried," *id.* (quoting *Barker*, 407 U.S. at 522), it is "the only possible remedy," *id.*, for a constitutional speedy trial violation.

Therefore, the Court **DISMISSES WITH PREJUDICE** the charge of Sexual Abuse of a Minor in the First Degree, 6 CMC § 1306, the only remaining charge in the case, against Defendant Jeffry Manarang Fernandez for violation of his constitutional right to a speedy trial under Article I, Section 4(d) of the NMI Constitution and the Sixth Amendment of the United States Constitution.

SO ORDERED this 12th day of November, 2019.

JOSEPH N. CAMACHO, Associate Judge