

APRIL 29, 1993

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SUPERIOR COURT

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

COMMONWEALTH OF THE NORTHERN )  
MARIANA ISLANDS, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
JOSE AQUINO, )  
 )  
Defendant. )

CRIMINAL ACTION NO. 90-127

ORDER OF DISMISSAL

The Defendant has moved for a motion to dismiss pursuant to Comm.R.Cr.Pro. 12.

Sometime between March 16th and March 19, 1990, three or four bricks of marijuana were stolen from the Customs Area at Saipan International Airport. On March 19, 1990, the Defendant, a customs sgent, allegedly gave a brick of marijuana to a co-worker in the airport parking lot. This co-worker allegedly saw three or four bricks of marijuana in Defendant's car at this time.

On March 25, 1990, the police executed a search warrant at the home of the Defendant's girlfriend. The search was conducted for the purpose of locating the marijuana that had been stolen from the Customs storage room. During that search, the police discovered

marijuana seeds and residue in the bedroom in which the Defendant was sleeping. The Defendant was arrested and subsequently released. No charges were ever filed with respect to this incident.

On March 27, 1990, the police obtained a warrant for the Defendant's arrest in connection with the marijuana stolen from the Customs storage area. The Defendant was released on the same day after posting bond. The bond was exonerated on April 2, 1990, because no charges had been filed.

On August 27, 1990, the Defendant was charged by information with Trafficking in Marijuana in connection with the events alleged to have occurred in the airport parking lot on March 19, 1990.

On December 3, 1990, an Amended Information was filed charging Defendant with an additional count for Burglary of the storage closet in the airport's Customs area.

Defendant has moved for dismissal of the Information on three grounds. First, Defendant claims his right to a speedy trial has been violated. **Second**, Defendant claims that the Government violated his due process by waiting for five (5) months after his initial arrest before filing an Information against him, thus causing him undue hardship and prejudice. Finally, Defendant argues that Comm.R.Cr.Pro. 48(b) requires this Court to dismiss the action against him since the Government unnecessarily delayed filing an Information against him.

### SPEEDY TRIAL and PROSECUTORIAL DELAY

Article 1, §4(d) of the CNMI Constitution mandates that criminal defendants are entitled to a speedy trial. This right is also protected by the Sixth Amendment to the United States Constitution.<sup>1</sup>

Though neither the United States nor our own Supreme Court has defined at what specific point in the criminal process the right to a speedy trial attaches, the United States Supreme Court has indicated that the right does not attach until an individual has been "accused" of a crime. *United States v. Marion*, 404 U.S. 321, 92 S.Ct. 455 (1971). In the CNMI, this accusatory period begins at the time an arrest warrant is executed.

6 CMC §107 governs the time limitation for initiating prosecutions in this jurisdiction. Section 107(e) states: "A prosecution is commenced either when an Information or Complaint is filed, or when an arrest warrant or other process is executed without unreasonable delay." 6 CMC §107(e). It would be difficult for the Government to argue that the statutory period that determines when a prosecution begins for statute of limitations purposes can differ from the time a formal prosecution or accusation has been made for speedy trial purposes. The United States Supreme Court's language in *Marion*, supra, is instructive on the serious consequences that flow from being arrested.

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The Court only discusses United States Supreme Court case law as instructive authority since the CNMI Constitution provides sufficient impetus for resolving the issues involved in this case.

Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and friends. *Id.* at 404 U.S. at 320, 92 S.Ct. at 463.

In the present case, an arrest warrant was issued for the Defendant's arrest. This warrant was executed, the Defendant was jailed, forced to post bond and later released. The Court finds that these circumstances alone are enough to invoke the Defendant's right to a speedy trial. In so finding, the Court looks to the test applied by the U.S. Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972), in order to determine whether the Defendant's speedy trial right has been violated.

Under the *Barker* test, four factors must be considered. These factors include: 1) the length of the delay; 2) the reason for the delay; 3) the Defendant's assertion of his right; and 4) prejudice to the Defendant. *Barker v. Wingo, supra* at 530, 92 S.Ct. at 2192.

Following the arrest and subsequent release of the Defendant, the Government waited five months before filing an Information. The Government offers no explanation for this delay. The Defendant asserted this right in a timely fashion. The Defendant has claimed prejudice to the extent that he is unable to return to his employment as a customs official until this matter has been resolved. Defendant has also claimed that he is unable to obtain alternative employment because of the distrust arising from his arrest in March, 1990. The Court finds that these consequences of his arrest combined with an unexplained prosecutorial delay of five months constitute

actual prejudice. The Court further finds the Government's unexplained delay of an additional three months prior to amending the Information to be highly prejudicial to the Defendant's right to a speedy trial,

The Court also finds that even in the absence of a violation of the Defendant's right to a speedy trial, the Defendant's right to due process under the CNMI Constitution has been violated.

#### **DUE PROCESS and PROSECUTORIAL DELAY**

The mechanism by which an individual is generally protected from the bringing of stale charges is the applicable statute of limitations. *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044 (1977). The statute of limitations is not, however, a crutch to be used by the Government in order to justify prolonged disruptions of citizens' lives without explanation. Therefore, the Due Process Clause contained in Article I, Section 5 of the CNMI Constitution must be considered in conjunction with the statute of limitations in order to determine whether pre-indictment delay is unduly oppressive. *United States v. West*, 568 F.2d 365 (5th Cir. 1978). First, the Defendant must show actual prejudice resulting from the undue delay. Second, in order to comply with the requirements of due process, the prejudice caused to the Defendant must be weighed against the reasons for prosecutorial delay. *United States v. Lovasco*, supra, 431 U.S. at 790, 97 S.Ct. at 2049,

In the present case, the applicable statute of limitations is four years. For the reasons previously stated, the Court finds that

the Defendant was prejudiced by this delay. Normally, at this point, the Court would weigh the prejudice to the Defendant against the Government's justification for delay. Unfortunately, the Government offers no explanation for the delay. Therefore, it is the Court's inescapable conclusion that the Defendant's right to due process under Article 1, Section 5 of the CNMI Constitution has been violated. Any other result would act to turn due process on its head.

The prosecution argues that "fundamental conceptions of justice" and "the community's sense of fair play and decency" will not be offended by overlooking the Government's delay in prosecuting this action. See, *United States v. Townley*, 665 F.2d 579 (5th Cir. 1982). The Court concedes that this might be true if the Government offered some reason for its inaction. However, the Court finds this suggestion highly unusual since fair play and decency would dictate at the very least that the Government offer some explanation for such a lengthy delay.

The Court does not overlook the necessity for the prosecution to establish a solid case prior to filing an Information against a defendant, but no such necessity was established or claimed here. Additionally, none of the facts pertinent to the Government's case at the time of filing the Information differed from those that existed at the time of the Defendant's initial arrest.

Even if the Court did not find that violations of the Defendant's rights to both a speedy trial and due process exist in

this case, the Court would find that Commonwealth Rules of Criminal Procedure 48(b) has been violated.

**COMMONWEALTH RULES OF CRIMINAL PROCEDURE 48(b)**

CRCP 48(b) is modeled on Federal Rule of Criminal Procedure 48(b). This rule states:

If, there is unnecessary delay in filing an information against a defendant who has been held to answer, or if there is unnecessary delay in bringing a defendant to trial, the Court may dismiss the information or complaint. CRCP 48(b).

Rule 48(b) serves both as a means of implementing and enforcing the constitutional speedy trial guarantees and as a means of restating the Court's inherent power to dismiss a case for want of prosecution. *United States v. Zabady*, 546 F. Supp. 35 (E.D. Tenn. 1982).

Under Rule 48(b), a delay in prosecution need not rise to the level of an Article 1, §4, or Sixth Amendment violation before the Court may exercise its power to dismiss the action, *United States v. Correia*, F.2d 1095, 1099 (1st Cir. 1976).

The rule is stricter and allows for a lower threshold of tolerance when assessing the impact of prosecutorial delay. *United States v. Cartano*, 420 F.2d 363 (1st Cir. 1970). Therefore, the Court need not wait for prosecutorial delay to rise to the level of a constitutional violation before it dismisses the action. The Court may, however, consider the same factors that would be relevant to a constitutional speedy trial issue. *United states v. Zabady, supra*.

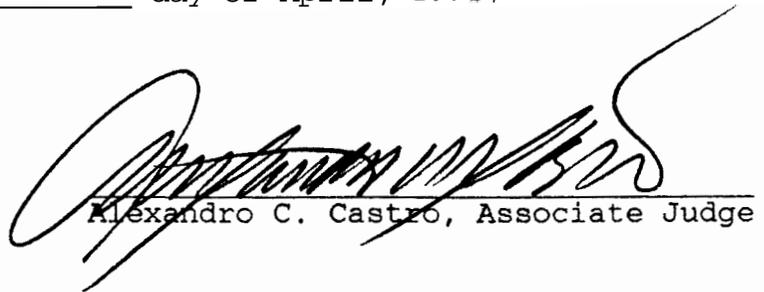
Since the Court has found that the prosecutorial delay in this

case has risen to a level of constitutional impermissibility, the lower threshold required for Rule 48(b) has simultaneously been met. The spirit and letter of Rule 48(b) simply do not allow individuals to be subjected to long periods of unexplained action in the prosecution of alleged violations under our criminal code.

For the foregoing reasons,

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the charges filed against the Defendant. Jose Aquino, shall be and are hereby **DISMISSED** with prejudice. The government violated Defendant's right to a speedy trial; Defendant's right to due process; and Rule 48(b) of the Commonwealth Rules of Criminal Procedure.

Entered this 24 day of April, 1991.

  
Alejandro C. Castro, Associate Judge