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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,	)	**Civil Action No. 90-0168**
Plaintiff,	)	
v.	)	**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS INFORMATION**
FAUSTINO TAKESHI,	)	
Defendant.	)	

I. PROCEDURAL BACKGROUND

This matter came before the court on January 7, 2000 on Defendant Faustino Takeshi's motion to dismiss Count II of the Information. Daniel C. Bowen, Esq. appeared on behalf of the Defendant, and Kevin Lynch, Esq. appeared on behalf of the Government. The court, having reviewed the memoranda, declarations, and exhibits, having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its written decision. **[p. 2]**

II. FACTUAL BACKGROUND

1. On October 6, 1990 at approximately 4:00 p.m., Leoncio Iskawa attended a gathering in Koblerville. As the evening progressed, alcohol consumption increased and the Defendant became intoxicated. According to the Government, the Defendant began to boast about his drinking. In response, Iskawa began to taunt the Defendant about his manhood. When the Defendant invited Iskawa outside to fight, their mutual friends persuaded them not to ruin the party. Defendant left, only to return some thirty minutes later. The Defendant began shouting insults and throwing a rock at a neighbor's home. As Iskawa chased the Defendant down a hilly path, Iskawa slipped and dropped his flashlight. When Iskawa got to his feet

and attempted to retrieve the flashlight, the Defendant stabbed him in the stomach (Opp. at 2).

2. Following his arrest, Defendant gave a statement to the police in which he admitted stabbing Iskawa (Opp. at 4). According to the Defendant, however, Iskawa pushed him from behind. After falling and tumbling several times, the Defendant, holding his knife in his right hand, "ducked down" as he saw Iskawa approach. The Defendant covered the back of his head with his hands, holding the knife in his right hand *(Id.* at 4). Although he heard Iskawa running to him from behind, when no one touched him, the Defendant stated that he got up and ran home (*Id.*).

3. On October 10, 1990, the Commonwealth filed an Information against the Defendant charging him with one count of Assault with a Dangerous Weapon in violation of 6 CMC § 1204 and naming Iskawa as the victim. On October 15, 1990, Defendant was arraigned, and at a status conference held on October 30, 1990, a jury trial was scheduled for January 21, 1991. By stipulation, the parties continued the trial to February 11, 1991 and finally to April 22, 1991.

4. Up until April 22, 1991, the Defendant attended all court appearances. On April 17, 1991, however, the court issued an order canceling the jury trial on grounds that the Defendant may have been off-island (Opp. at 4). The court ordered a status conference **[p. 3]** for April 22, 1991 and issued a warning that if the Defendant failed to appear, then the court would issue a warrant for his arrest (Mot. at 2).

5. On April 22, 1991, the Defendant failed to appear. The court set bail at $10,000 and issued a bench warrant ordering the Department of Public Safety to arrest the Defendant.

6. Defendant's papers indicate that he had moved to Rota for work and was unaware of the bench warrant issued against him (Mot. at 2). Defendant further maintains that because he had apologized to the victim and paid restitution, he believed the matter had been settled by his attorney, then Chief Public Defender Oldeais Ngiralbau *(Id.* at ¶ 4; *see also* Opp. at Ex. C).

7. There is no evidence that while living and working in Rota, the Defendant made any effort to change or hide his identity or elude government authorities. In fact, on October 30, 1992,

some eighteen months later, DPS arrested the Defendant in Rota for reckless driving and driving under the influence (Tr. Case No. 93-0113(R) (Mot. at 2). Neither DPS nor the Attorney General's Office, however, moved to execute the April 22, 1991 bench warrant or resume prosecution of the instant case.

8. On November 18, 1993 and as part of a negotiated pre-trial plea in Case No. 93-113(R), the court placed the Defendant on five years probation, directed him to pay restitution, and ordered him to perform community service (Mot at 2). For nearly five years, the Defendant, still living openly as Faustino Takeshi, was supervised by the Department of Probation as he performed community service and paid restitution on a monthly basis (Mot. at 2-3).

9. On February 21, 1998, Defendant was arrested and charged with various offenses in Crim. Case No. 98-202(R). In connection with his plea of illegal possession of a rifle, the court ordered a pre-sentence report. The pre-sentence report, prepared on or about February 5, 1999, reflected the outstanding bench warrant of April 22, 1991 (Mot. at 3; Opp. At 4). The warrant was vacated and the matter was scheduled for a status conference on March **[p. 4]** 5, 1999, the date on which Defendant was sentenced in Crim. Case No. 98-202(R). On the same date, the instant case was set for a jury trial to commence November 1, 1999.

10. On March 16, 1999, Iskawa executed a Request Not to Prosecute the Defendant (the "Request"). As grounds for the Request, Iskawa stated that his injuries were accidental, resulting from his slipping and falling on the Defendant's knife (Ex. "C" to Opp. At ¶ 2). Iskawa also indicated that the Defendant had taken care of all medical bills and apologized (*Id.* at ¶¶1,3,4).

11. On July 6, 1999, Iskawa executed an Affidavit supporting the Request.[1] In the Affidavit, Iskawa again claims his injuries were accidental and the result of his grabbing the Defendant from behind and falling on the Defendant's knife (Ex. "B" to Mot).

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[1] The July 6, 1999 Affidavit was executed by one Leo Iksawa. The court assumes that Iksawa and Iskawa are the same individual.

12. On June 17, 1999, the Government filed an Information in Crim. Case No 90-168, adding a count of criminal contempt for failing to appear for trial on April 22, 1991.[2] The Information was not accompanied by any motion to amend, a summons, a motion to schedule an arraignment on the new charge, a motion for joinder of offenses, or any other motion seeking relief (Mot. at 3). The Government eventually served the Information on Defendant's counsel in Rota on October 8, 1999, nearly four months after filing with the court (*Id.*).

13. On October 17, 1999 the Defendant filed motion to dismiss the information, claiming that the Government's failure to prosecute this case violated his right to a speedy trial under the Commonwealth and United States Constitutions. Defendant also asserted that serving a criminal contempt charge more than three months after it was filed and nine years after the filing of the original Information smacked of bad faith, violated the statute of **[p. 5]** limitations, contravened court rules, and violated the Defendant's Fifth Amendment right to due process.

14. On November 5, 1999, Defendant entered a plea of not guilty to Count II of the Information and the court granted Defendant's Motion to Dismiss Count I. Following argument, the court took the matter under advisement to decide the remaining issues raised in Defendant's Motion to Dismiss and the Government's response thereto.

III. QUESTION PRESENTED

1. Whether prosecution of the Defendant for contempt in violation of 6 CMC § 3307 is barred by the statute of limitations, the CNMI Constitution, and procedural rules of court.

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[2] The Information charges that on or about April 22, 1991, the Defendant did unlawfully, knowingly, and willfully interfere directly with the operation and function of the court by failing to appear for his trial. 6 CMC § 3305 provides, in material part, that every person who resists or refuses or fails to comply with a lawful order of the court is guilty of criminal contempt and upon conviction thereof may be imprisoned for a period of not more than six months, or be fined not more than $100 or both.

IV. ANALYSIS

Defendant contends that Count II of the Information should be dismissed since serving a charge for criminal contempt more than three months after it was filed and nine years after the filing of the original Information violates the statute of limitations,[3] contravenes various procedural rules[4] and violates his Fifth Amendment guarantee of due process.

With regard to his contention that Count II is barred by the statute of limitations, Defendant argues that criminal contempt qualifies as an offense punishable by a maximum of six months. Since the contempt, if committed at all, was committed on April 22, 1991 when the Defendant failed to appear for trial, to comply with 6 CMC § 107(b)(2), the Information adding the additional charge of criminal contempt should have been filed no later than April 21, 1992.[5] Since Count II was not filed until June of 1999, Defendant argues Count II is time-barred.

The problem with the Defendant's statute of limitations argument, however, is that CNMI law expressly identifies two circumstances that toll the time for bringing a charge: **[p. 6]** (1) Defendant's absence from the jurisdiction, or the lack of a reasonably determinable place of abode or work; and (2) a pending prosecution. 6 CMC § 107(d). Since the original Information has been pending against the Defendant since October of 1990, under section 107(d)(2), the statute has yet to run. Nevertheless, this does not end the court's inquiry. While statutes of limitation provide the primary guarantee against bringing overly stale criminal charges, such statutes do not fully define a defendant's rights with respect to events occurring prior to indictment. *United States v. Marion*, 404 U.S. 307, 322, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971). Rules of court and the Due Process Clause of the Fifth Amendment also play a role in protecting against oppressive delay. *United States v. Lovasco*, 431 U.S. 783, 789, 97 S.Ct. 2044, 2048 (1977), *reh'g denied*, 434 U.S. 881, 98 S.Ct. 242, 54 L.Ed.2d 164 (1978).

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[3] 6 CMC § 107(b)(2) requires, in material part, that prosecutions for an offense punishable by imprisonment for six months or less be commenced within one year after the offense is committed.

[4] Defendant contends that the amended information violated Com.R. Crim. P. 7 (permitting information to be amended if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced) and Com. R. Crim. P. 8 (permitting joinder of offenses based on the same act or transaction).

[5] Under Commonwealth law, a prosecution is commenced when an information is filed. 6 CMC § 107(e).

The Defendant was formally charged with criminal contempt by information, on June 17, 1999. According to the Government, the reason for the delay in charging was the Defendant's non-appearance in April of 1991 (Opp. at 8). The Government claims that since it did not know of the Defendant's whereabouts until he was located, the "desire for further investigation justified delaying the charging decision until he was located" (*id.* at 9).

While the court does not question the good faith of the Government's counsel, the facts establish: (1) the Government discovered the warrant in February of 1999; (2) the Government waited more than eight years after the warrant had been issued and four additional months after discovering the warrant to file an information charging the Defendant with contempt for failing to appear in April of 1991; (3) since the Defendant's non-appearance in 1991, the Government did nothing to locate him;[6] (4) the Government tarried another four months before serving the **[p. 7]** Defendant's counsel with the new information for a 1991 charge; and (5) the Government offers absolutely no reason for delaying service of the contempt charge until the eve of trial. Although the Government professes that the delay was justified by some need to conduct an investigation, all facts and witnesses necessary to establish the contempt have been known to the Government since April of 1991 with the exception, supposedly, of the Defendant's location. The Govemment does not point to the discovery of any new evidence, nor does it recite any facts to demonstrate that any investigation of the Defendant's whereabouts even occurred. Contrary to the reasons recited to

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[6] Although the Government contends that the Commonwealth had no idea of the Defendant's whereabouts during this period of time, the court finds precisely the opposite to be true. During the eight years that transpired since the issuance of the warrant, Defendant was no fugitive from the law who consistently failed to appear before the courts, jumped bail, or attempted to avoid prosecution of the charges against him. The facts suggest instead that the Defendant was living openly in Rota, arrested twice for traffic violations and possession of an illegal firearm, placed on probation for five years, and supervised by the Office of Probation while he paid restitution on a monthly basis and performed more than 100 hours of community work service. (Mot at 2-3). During the eight years that transpired since the issuance of the warrant, the Defendant was himself the victim of a stabbing that was investigated and prosecuted by the Attorney General's Office. During the nine years that has transpired since the commencement of this proceeding, moreover, the Government did not point to a shred of evidence to support a finding that the Defendant was hiding his identity. For five years, from 1993 through 1998, the Government was actually monitoring the Defendant for compliance with criminal laws. Under these circumstances, the Government's claim that it was unable to locate the Defendant is inexcusable. The Government does not dispute that the bench warrant has been outstanding since April of 1991, that arrests were made in October of 1992 and February of 1998, and that a guilty plea was entered and somewhere recorded in November of 1993. Yet the Government offers no evidence explaining why, despite the existence of systems tracking police and traffic clearances and probation monitoring, it took until February of 1999 to discover the warrant by running a simple and routine check of DPS records. In short, the Government offers no proof that DPS took any steps at all to ascertain the Defendant's whereabouts, execute the warrant, or locate a man in plain sight for more than eight years. Under these circumstances, the court concludes that the Government did nothing to locate and apprehend the Defendant.

justify the investigative delay,[7] therefore, the timing of these events suggests instead that the Government was merely busy with other matters that it considered more important than locating the Defendant and prosecuting him for criminal contempt.[8]

Under these circumstances, Com. R. Crim. Procedure 48(b) permits the court to dismiss an indictment when unnecessary delay in filing an infomation occurs, or where, as here, there is unnecessary delay in bringing the defendant to trial. *United States v. Hattrup*, 763 F.2d 376, 377 (9th Cir. 1985). Rule 48(b) "is a restatement of the inherent power of the court to dismiss a case for want of prosecution." Advisory Committee Note to Fed. R. Crim. P. 48(b) in 3A C. **[p. 8]** Wright, A. Miller, M. Kane, 11 FEDERAL PRACTICE AND PROCEDURE [hereinafter, "WRIGHT AND MILLER"] § 813 at 209 (1995). A court may exercise its discretion to dismiss an indictment under Rule 48(b) even though the unreasonable delay in prosecuting does not rise to a constitutional violation. *Hattrup*, 763 F.2d at 377.

While the power to dismiss should be utilized with caution and only after a forewarning of the consequences,[9] the court finds that this relatively uncomplicated case has languished unattended for nearly eight years in the prosecutor's office. "In these circumstances, the government is charged with the constructive knowledge of the Court's statutory authority pursuant to Rule 48(b) and ...this is warning enough." *United States v. Henry*, 815 F.Supp. 325, 327 (D.Ariz. 1993). "To hold otherwise would create a situation in which the government could delay indictment and simultaneously prevent the Court's compliance with the forewarning requirement." *Id.* at 327. The pre-accusatory delay of seven years and ten months in this case far exceeds a reasonable period of time that would trigger judicial concern. *Id.* at 328.[10]

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[7] The Government asserts that the Defendant could have offered some explanation that would have staved off additional charges, made incriminating statements that would have strengthened the Government's case, or left the jurisdiction for good (Opp. at 10). Yet none of these "reasons" were shown by the Government to be the cause of the delay.

[8] Since the Government simply asserts, but does not prove, moreover, that the delay in charging the Defendant with contempt was investigative, there is no evidence concerning the reasons for the delay in the record. Unsworn statements and suggestions of counsel that are not part of the record cannot properly be considered by the trial court. *Adickes v. Kress & Co.*, 398 U.S. 144, 157-158 n.17, 90 S.Ct. 1590, 1608, n.17, 26 L.Ed.2d 142 (1970).

[9] *United States v. Simmons*, 536 F.2d 827, 836 (9th Cir.), *cert. denied*, 429 U.S. 854, 97 S.Ct. 148, 50 L.Ed.2d130 (1976).

[10] *See United States v. Blanca Perez*, 310 F.Supp. 550 (S.D.N.Y. 1970) (unexcused four-year delay is conclusively unnecessary so as to justify exercise of inherent power of judge to dismiss case for want of prosecution); *United States v. Roberts*, 293 F.Supp. 195 (S.D.N.Y. 1968) (prejudice presumed from delay of more than five years after indictment and ten years after acts in question).

In addition to the forewarning requirement, a court also must exercise caution before dismissing a case under Rule 48(b). *Henry*, 815 F.Supp. at 328. Although the "caution" requirement generally requires a finding of prosecutorial misconduct and prejudice to the accused, when the delay between the commission of an offense and accusation stretches to nearly eight years and is unnecessary, because of the government's negligence, there is no need for a showing of prejudice, since the standard for dismissal under Rule 40 (b) surely cannot be more demanding than on a Sixth Amendment claim. *See Doggett v. United States*, 505 U.S. 647, 654, 112 S.Ct. 2686, 2690-93, 120 L.Ed.2d 520 (1992) (where the delay in bringing the matter to trial is due to the government's negligence in pursing the defendant, prejudice to the defendant from the delay **[p. 9]** is presumed; depending on the nature of the charges...courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches on year"). *See also* WRIGHT AND MILLER § 814 at 226.[11] Because the court deems that dismissal of this proceeding is warranted under Com. R. Crim. P. 48(b), it need not determine whether the delay in charging the Defendant with criminal contempt violates the Defendant's due process rights or requires dismissal under other court rules.

V. CONCLUSION

Pretrial delay is often both inevitable and justifiable. In this case, however, justice delayed is justice denied. Because of an inexcusable and neglectful delay in prosecution, Defendant's motion to dismiss the Information in its entirety is **GRANTED**. .

So ORDERED this 27 day of March, 2000.

/s/ Timothy H. Bellas
TIMOTHY H. BELLAS, Associate Judge

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[11] *See also United States v. Navarre*, 310 F.Supp. 521 (E.D. La. 1969) (dismissal on nonconstitutional grounds under Rule 40(b) requires defendant to prove only that the delay was unnecessary and there is no need to show prejudice); *United States v. McKee*, 332 F.Supp. 823, 826 (D.Wyo. 1971) (to warrant dismissal under Rule regarding unnecessary delay, a defendant must prove that the delay was unreasonable and need not show prejudice). *Rhode Island v. Paquette*, 117 R.I. 505, 368 A.2d 566, 569 (1977) (presumption of prejudice applies).