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2 **FOR PUBLICATION**

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

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11 **COMMONWEALTH OF THE NORTHERN**
12 **MARIANA ISLANDS,**

13 **Plaintiff,**

14 **v.**

15 **ANTONIO TENORIO BENAVENTE, et al.**

16 **Defendants.**

CRIMINAL CASE NO. 02-0042

**ORDER DENYING
THE COMMONWEALTH'S
MOTION TO DISMISS
INFORMATION AND
MOTION TO RENEW
COMMONWEALTH'S
REQUEST FOR IMMUNITY**

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18 **I.**

19 **INTRODUCTION**

20 This matter came before the Court on January 14, 2003 for Commonwealth's *Motion to Dismiss*
21 *Information and Motion to Renew* [the] *Commonwealth's Request for Immunity*. The Commonwealth
22 was represented by Clyde Lemons, Jr. The defendants were represented by Brien Sers Nicholas, Perry
23 B. Inos. and Pedro Atalig. Trial began in this matter on January 13, 2002.

24 **II.**

25 **FACTUAL BACKGROUND**

26 On February 8, 2002, the Commonwealth filed an information for criminal charges against several
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1 defendants arising out of the death of a young girl. Trial in this matter was set for January 13, 2003.

2 On December 17, 2002 and pursuant to the Commonwealth's witness-immunity statute, 6 CMC
3 § 6502, the Commonwealth filed a *Request for Immunity for Frances Duenas Salas and James P.*
4 *Deleon Guerrero*, two of the defendants in this matter (or potential immunized defendants).

5 On January 7, 2003, the Court ordered a status conference to hear arguments from counsel
6 regarding the immunity issue. During this conference, the Commonwealth asserted that they fully intended
7 to prosecute the potential immunized defendants, but it wanted them to testify during the trial of the other
8 defendants. The Court expressed concern that the immunity statute would infringe on the defendants'
9 privilege against self-incrimination if it meant that they would be compelled to testify before the same jury
10 that would determine their guilt or innocence. In light of this concern, the Commonwealth recommended
11 that the Court sever the defendants from the trial.

12 On January 10, 2003, this Court denied the Commonwealth's request for immunity and declined
13 to entertain the Commonwealth's suggestion that the trial be severed. The Court proceeded with the
14 scheduled trial on January 13, 2003. On the first day of trial, the Commonwealth filed a notice of appeal
15 for this Court's immunity order. Additionally, the Commonwealth moved for a stay of proceedings with
16 the Supreme Court on January 13, 2003. The next day, the Supreme Court denied the Commonwealth's
17 motion to stay proceedings.

18 Immediately thereafter, the Commonwealth, over defendants' objection, moved this Court to
19 dismiss, without prejudice, the charges as to the potential immunized defendants. Accompanying the motion
20 to dismiss was the Commonwealth's *Motion to Renew* [the] *Commonwealth's Request for Immunity*.
21 In seeking to reestablish immunity for the defendants, the Commonwealth stated that, "the Commonwealth
22 has addressed one of the Court's concerns by dismissing the charges against James P. Deleon Guerrero
23 and Frances Duenas Salas." (Mot. to Renew Comm.'s Req. for Immunity at ¶ 3).

24 III.

25 DISCUSSION

26 A. Dismissal Under Rule 48(a).

27 Rule 48 of the Commonwealth Rules of Criminal Procedure provides a mechanism for the

1 government to dismiss charges against a defendant, stating, in pertinent part: “(a) By Attorney for the
2 Government. The attorney for the government may by leave of court file a dismissal of an information or
3 complaint and the prosecution shall thereupon terminate. Such a dismissal may be filed during the trial
4 without the consent of the defendant.” Com. R. Crim. P. 48(a).

5 Because the Commonwealth Rules of Criminal Procedure are patterned after the Federal Rules
6 of Criminal Procedure, interpretations of the federal rules are instructive. *Commonwealth v.*
7 *Ramangmau*, 4 N.M.I. 227, 233 n.3 (1995). Rule 48(a) of the Federal Rule of Criminal Procedure is
8 different from our local rule because it requires the consent of the defendant if the dismissal is filed during
9 trial. However, federal interpretation of the court’s discretion under this rule is still instructive.

10 1. Leave of Court.

11 The “leave of court” language in the rule encompasses a court’s limited discretion to deny the
12 government’s request to dismiss charges consistent with separation of powers. The prosecutorial function
13 of a criminal case is historically within the province of the executive branch. However, the “leave of court”
14 language in Rule 48(a) permits a court to exercise discretion as to whether a pending prosecution should
15 be terminated. “The principal object of the ‘leave of court’ requirement is apparently to protect a defendant
16 against prosecutorial harassment, *e.g.*, charging, dismissing, and recharging, when the Government moves
17 to dismiss an indictment over the defendant’s objection. But the Rule has also been held to permit the court
18 to deny a Government dismissal motion to which the defendant has consented if the motion is prompted
19 by considerations clearly contrary to the public interest.” *Rinaldi v. United States*, 434 U.S. 22, 29 n.15,
20 98 S. Ct. 81, 85 n.15, 54 L. Ed. 2d 207, 214 n.15 (1977) (per curiam) (internal citations omitted).

21 A court’s discretion, however, is limited. A judge cannot merely substitute his judgment for that
22 of a prosecutor, but he must instead defer to the prosecutor unless the prosecutor is clearly wrong. *See*
23 *Unites States v. Hamm*, 638 F.2d 823 (5th Cir. 1981). Because of this limited discretion, courts have
24 recognized two circumstances in which a court may deny leave to dismiss an indictment. First, where the
25 defendant objects to the dismissal. Second, when dismissal is clearly contrary to the manifest public
26 interest. *United States v. Jacobo-Zavala*, 241 F.3d 1009, 1012 (8th Cir. 2001).

27 i. Where the defendant objects to dismissal.

1 Federal interpretation of this circumstance is not persuasive, *per se*, because the Commonwealth's
2 rule, as discussed above, expressly does not require the consent of the defendant.

3 ii. Clearly contrary to the public interest.

4 In determining whether dismissal under Rule 48(a) is within its discretion, a court "is limited to
5 assessing whether the government's motion is contrary to manifest public interest because it is not based
6 in the prosecutor's good faith discharge of her duties." *Id.* at 1013. "The key factor in a determination of
7 prosecutorial harassment is the propriety or impropriety of the Government's efforts to terminate the
8 prosecution - - the good faith or lack of good faith of the Government in moving to dismiss." *United*
9 *States v. Salinas*, 693 F.2d 348, 351 (5th Cir. 1982) (*citing Rinaldi*, 434 U.S. at 29, 98 S. Ct. at 85,
10 54 L. Ed. 2d at 214). "The Government must not be motivated by considerations 'clearly contrary to the
11 public interest.'" *Id.*

12 In determining whether the dismissal of charges is motivated by good or bad faith, a court proceeds
13 with the presumption that the prosecution is acting in good faith. *United States v. Cowan*, 524 F.2d 504,
14 514 (5th Cir. 1975). Furthermore, the court must find an affirmative reason to believe that the dismissal
15 motion was motivated by considerations contrary to the public interest. *Salinas*, 693 F.2d at 352.

16 Although the burden is not on the Commonwealth to show that dismissal would be in the public
17 interest (*United States v. Hamm*, 659 F.2d 624, 631 (5th Cir. 1981)), the court must at least know the
18 Commonwealth's reasons for seeking the dismissal so that the court, in exercising its discretion, may make
19 a satisfactory consideration of the motivations behind the dismissal. *Salinas*, 693 F.2d at 352 n.17.

20 a. The Commonwealth's motivations.

21 There is no question as to the motivations behind the Commonwealth terminating the prosecution.
22 By their own admission, the Commonwealth is dismissing these charges to address the Court's concern
23 about forcing a defendant to testify in his own trial – the issue of the original immunity order. (Mot. to
24 Renew Comm.'s Req. for Immunity at ¶ 3).

25 Thus, their motivation is to take advantage of their broad authority to bring charges by invoking
26 Rule 48(a). In doing so, they would eliminate Frances Duenas Salas and James P. Deleon Guerrero as
27 defendants, take advantage of the witness immunity statute, force them to testify during this trial, then re-file

1 charges against them. The prosecution has stated that it fully intends to prosecute the potential immunized
2 defendants notwithstanding their use immunity.

3 This is not a case where the Commonwealth decided it would best serve the public interest to
4 dismiss the charges because of a legitimate concern to grant the defendants immunity. Rather, this is a case
5 where the Commonwealth decided to create a solution by manipulating their broad authority to prosecute.
6 This is the very reason why Rule 48(a) contains “leave of court” provision – to insure a system of checks
7 and balances between the executive branch and the courts for the actions of the government.

8 It is clear then, that the motivation behind the Commonwealth dismissing the charges is not to grant
9 immunity to the defendants. Instead, the Commonwealth’s motivation is to get around the posture of the
10 case in light of this Court’s denying immunity in the first instance. The Commonwealth is dismissing the
11 charges to address, or strategically maneuver around, the Court’s concern in its previous order regarding
12 immunity.

13 Why does the Commonwealth find that it should strategically maneuver around the Court’s concern
14 regarding immunity? The circumstances leading up to this Court’s decision in the original immunity order
15 were created by the Commonwealth through their own inadvertence. The lateness and nature of the
16 original immunity request compelled this Court to one conclusion.¹ Because of that, the Commonwealth
17 now petitions this Court to sanction their appetite to have *these defendants* testify during *this trial*. The
18 Court cannot accommodate the Commonwealth given the circumstances surrounding this request.

19 The Commonwealth encourages this Court to find their actions consistent with “aggressive
20 prosecution” rather than bad faith. It is true that the Commonwealth is following procedures authorized by
21 our court rules to assert their position. However, in determining its discretion to deny the Commonwealth’s
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23 ¹ In no way does the Court find that the Commonwealth’s filing of the motion to dismiss on the third day of
24 trial as relevant in exercising the Court’s discretion under Rule 48(a). Motions under this rule can be brought at any
25 time – even after a finding of guilt. *See United States v. Hamm*, 659 F.2d 624 (5th Cir. 1981). The Court does not
26 consider this procedurally temporal element as a factor in this decision. On the other hand, the timing of the events
27 in this matter contribute to this Court’s determination that the Commonwealth’s motivations to terminate the
28 prosecution against these defendants was in bad faith. The Commonwealth filed charges on February 8, 2002 but
did not raise the immunity issue (which contributed to their current dismissal of the charges) until December 17, 2002.

1 motion to dismiss under Rule 48(a), the Court is not concerned with whether the motion to dismiss is
2 presented according to procedure. Instead, the Court is concerned with the motivations behind the
3 Commonwealth's decision to terminate the prosecution. And the Court finds that the motivations behind
4 the Commonwealth's decision to terminate the prosecution were in bad faith.

5 If the Court authorizes the motivations behind dismissing these charges, the result would be contrary
6 to the purpose of the Court's discretion encompassed by Rule 48(a). The result would be that the
7 prosecution could charge, dismiss and then recharge under the guise of "aggressive prosecution" when
8 really, the motivations are simply a tactical device to get desired testimony. This is contrary to the principal
9 object of a court's discretion - to protect a defendant from prosecutorial harassment.

10 The Commonwealth seeks to use Rule 48(a) to gain a position of advantage or "to escape from
11 a position of less advantage in which the Government found itself as the result of its own election." *Salinas*,
12 693 F.2d at 353. The motivation behind the Commonwealth's decision to terminate the prosecution for
13 these defendants is clearly not in the public interest. The integrity of the Court cannot accommodate the
14 Commonwealth's manipulative litigation strategy by dismissing the charges.

15 B. Motion to Renew Commonwealth's Request for Immunity

16 In light of the forgoing discussion, and consistent with the Court's previous order regarding
17 immunity for the two defendants, the Court must deny the Commonwealth's renewed motion for immunity.

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19 **IV.**

20 **CONCLUSION**

21 For these reasons, the Court DENIES the Commonwealth's *Motion to Dismiss Information* and
22 *Motion to Renew [the] Commonwealth's Request for Immunity*.

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26 **SO ORDERED** this 15th day of January 2003.

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/s/
David A. Wiseman
Associate Judge