

2 **IN THE SUPERIOR COURT**  
3 **FOR THE**  
4 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

5 **COMMONWEALTH OF THE** ) **CRIMINAL CASE NO. 07-0042(C)**  
6 **NORTHERN MARIANA ISLANDS,** ) **DPS Case No. 07-00550**  
7 )  
8 **Plaintiff,** ) **ORDER DENYING**  
9 **vs.** ) **WITHOUT PREJUDICE**  
10 ) **THE COMMONWEALTH’S**  
11 ) **MOTION TO DISMISS INFORMATION**  
12 **ERWIN EVENCE, and** ) **WITH PREJUDICE**  
13 **JESSE S. PEREDO,** )  
14 )  
15 **Defendants.** )

16 **I. Introduction**

17 THIS MATTER came before the Court for a hearing on November 8, 2007, on the motion by the  
18 Commonwealth of the Northern Mariana Islands (“Commonwealth”) to dismiss all criminal charges  
19 against both defendants Erwin Evence and Jesse S. Peredo. The Commonwealth was represented by  
20 Assistant Attorney General Anne-Marie Roy. Defendant Erwin Evence appeared and was represented  
21 by court-appointed counsel Bruce L. Berline, Esq. Defendant Jesse S. Peredo also appeared and was  
22 represented by court-appointed counsel Perry B. Inos, Esq. Based upon the representations of the  
23 Commonwealth’s legal counsel at the November 8, 2007 hearing, the Court took the matter of the  
24 government’s motion to dismiss under advisement and hereby issues its written ruling.

25 **II. Procedural Background**

26 The Commonwealth filed its Information on February 20, 2007, charging both defendants with  
27 felony theft, conspiracy to commit theft, and criminal mischief for taking telephone cables owned by  
28 Pacific Telecom Incorporation (PTI). A preliminary hearing was heard on February 22, 2007, and the  
29 Court, having heard testimony presented by the government’s witness, found probable cause to believe

1 both defendants committed the crimes charged and held them to answer to the charges. On September  
2 26, 2007, Defendant Peredo's case was set for a change of plea hearing to be held on October 1<sup>st</sup> and  
3 Defendant Evence's case was set for a jury trial to begin on March 31, 2008.

4 At the October 1<sup>st</sup> change of plea hearing for Peredo, the Court noted from its review of the  
5 Court's file that this is basically a copper wire theft case and found that the jail term agreed to by the  
6 parties was too lenient given the impact this kind of crime is having on the community. Furthermore,  
7 the Court learned from the Declaration of Probable Cause filed in this criminal case that a juvenile was  
8 also involved in this crime. The juvenile was in fact charged for this same incident and, as of the change  
9 of plea hearing, his case was also set for a change of plea hearing in the Juvenile Court.

10 The prosecutor argued that this case is not a "copper wire" theft case, preferring to characterize  
11 the matter as a "telephone cable" theft case. Furthermore, while professing ignorance of the proposed  
12 disposition of the juvenile case because another prosecutor was handling it and she had neglected to  
13 consult with the other prosecutor, the prosecutor in this case nevertheless insisted that the parties' terms  
14 were reasonable and should be accepted by the Court. Given the totality of these circumstances, this  
15 Court rejected the parties' plea agreement pursuant to Com.R.Cr.P. 11(e)(4), and set Peredo's case for a  
16 jury trial with co-defendant Evence on March 31, 2008.

17 October 4, 2007, three days after Peredo's change of plea hearing, the Commonwealth filed a  
18 motion to dismiss its case against both defendants pursuant to Com. R. Crim. P. 48(a), citing as its  
19 reason that it possessed insufficient evidence to prove its case at trial. The hearing on this motion was  
20 continued to October 31, 2007, when defendant Evence failed to appear. On October 30, 2007, the  
21 Commonwealth filed an amended motion to dismiss with respect to both defendants. The amended  
22 motion deletes the claim of "insufficient evidence" and simply states that "the Commonwealth believes  
23 it is in the interest of justice to dismiss the case with prejudice." The hearing was further continued to  
24 November 8, 2007, to again provide for the presence of all parties. At the November 8<sup>th</sup> hearing, the

1 Commonwealth's attorney stated that the government's lack of evidence was *not* its reason for seeking  
2 dismissal, but refused to disclose any factual basis for its motion. Upon inquiry by the Court, the  
3 prosecuting attorney admitted that the victim in this case had *not* been notified of the hearing or of the  
4 Commonwealth's decision to dismiss all charges with prejudice, notwithstanding the provisions of the  
5 Commonwealth's Victims' Rights Act. P.L. 10-81, codified at 6 CMC § 9101 *et seq.*<sup>1</sup> In particular, 6  
6 CMC Section 9104, or the Victim's Bill of Rights, states that:

7 *Officers and employees of the Office of the Attorney General and other departments and*  
8 *agencies of the Commonwealth of the Northern Mariana Islands engaged in the detection,*  
9 *investigation, or prosecution of crime shall make their best efforts to see that victims of*  
10 *crime are accorded the rights described in subsection (b) of this section.*

11 6 CMC 9104(a) (emphasis added). Subsection (b) provides that a crime victim has the following  
12 rights:

- 13 (1) The right to be treated with fairness and with respect for the victim's dignity and privacy.
- 14 (2) The right to be reasonably protected from the accused offender.
- 15 (3) *The right to be notified of court proceedings.*
- 16 (4) *The right to be present at all public court proceedings related to the offense, unless the*  
17 *court determines that testimony by the victim would be materially affected if the victim*  
18 *heard other testimony at trial.*
- 19 (5) *The right to confer with the attorney for the government in the case.*
- 20 (6) *The right to restitution.*
- 21 (7) The right to information about the conviction, sentencing, imprisonment, and release of  
22 the offender.

23 6 CMC 9104(b) (emphasis added).

24 Citing no legal authority, but generally invoking the doctrine of separation of powers and the  
prosecution's historical power to dismiss a prosecution, the Commonwealth maintains that its true  
reasons for seeking dismissal may be shielded from the Court, and that the latter is without  
constitutional authority to inquire as to the basis of its Rule 48(a) motion.

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<sup>1</sup> In reviewing the Court's entire file, a letter dated February 21, 2007 written by the Commonwealth Utilities Corporation's Management Specialist, on behalf of its customers, was discovered. She notified the prior judge handling the case of CUC's intentions to make court appearances and assert its advocacy position in wire-theft cases. She also expressed her exasperation at being effectively excluded from the proceedings by the failure of the court and the government to communicate with the victim, and formally notified the Court that she intended to assert an advocacy position. This letter was copied to the Commonwealth's Office of Attorney General.

1 Rule 48 of the Commonwealth Rules of Criminal Procedure provides for the dismissal of  
2 criminal charges on motion by the government as follows: “(a) By Attorney for the Government. The  
3 attorney for the government may *by leave of court* file a dismissal of an information or complaint and  
4 the prosecution shall thereupon terminate. Such a dismissal may be filed during the trial without the  
5 consent of the defendant.” Com. R. Crim. P. 48(a) (emphasis added). The pertinent provision of the rule  
6 is identical to Rule 48(a) of the Federal Rules of Criminal Procedure, and interpretations of the federal  
7 rule are instructive in this case.<sup>2</sup> *Commonwealth v. Ramangmau*, 4 N.M.I. 227, 233 n.3 (1995). Many  
8 courts have recognized that the adoption of federal rule 48(a) effected a curtailment of the formerly  
9 unbridled discretion of prosecutors to enter a *nolle prosequi* at any time by requiring that such dismissals  
10 be obtained “by leave of court.” *Rinaldi v. United States*, 434 U.S. 22, 29 n.15, 98 S.Ct. 81, 85 n.15, 54  
11 L.Ed.2d 207 (1977) (per curiam); *Commonwealth v. Antonio T. Benavente, et al.*, Crim. No. 02-0042  
12 (N.M.I. Super. Ct. Jan. 15, 2003) (Order Denying the Commonwealth’s Motion to Dismiss Information,  
13 p.3); 3B C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CRIM. 3d. § 812 (2007 Update);  
14 48 A.L.R. Fed. § 635.<sup>3</sup>

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17 <sup>2</sup> Fed. R. Crim. P. 48(a) differs in that it requires the consent of the defendant if the motion to dismiss is filed during trial.

18 <sup>3</sup> The history of Fed. R. Crim. P. 48(a) was exhaustively recounted by Tenth Circuit Senior Circuit Judge Murrah, sitting by  
19 designation on the Fifth Circuit, in *United States v. Cowan*, 524 F.2d 504, 505-512 (5<sup>th</sup> Cir. 1975). The original draft rule  
20 submitted to the Supreme Court by the Advisory Committee in 1944 stated: “The Attorney General or the United States  
21 Attorney may file a dismissal of the indictment or information with a statement of the reasons therefor and the prosecution  
22 shall thereupon terminate.” *Id.*, p. 510. At that time, however, over thirty states had adopted a contrary rule by which a  
criminal case once brought before the court could only be dismissed with the consent of the court, a rule endorsed by the  
American Law Institute and published a decade earlier in the A.L.I.’s Model Rules of Criminal Procedure. *Id.* The Supreme  
Court returned the Committee’s original draft of Rule 48(a) with the notation that the proposed rule should accord with its  
holding in *Young v. United States*, 315 U.S. 257, 258-259, 62 S.Ct. 510, 511, 86 L.Ed. 832 (1942) (government’s confessed  
error on appeal requires independent review by court). *Id.*, citing Orfield, *Criminal Procedure under the Federal Rules*, §  
48:17, p. 339 (1967).

23 Pressed by prosecuting attorneys to retain the common law practice of filing a *noelle prosequi*, the Advisory  
24 Committee resubmitted the proposed rule in its original form. Without comment, the Supreme Court then struck the  
requirement of “a statement of reasons therefore” and inserted “with leave of the court” and Rule 48(a) was published in its  
current form. Judge Murrah concluded: “It seems manifest that the Supreme Court intended to make a significant change in  
the common law rule by vesting in the courts the power and the duty to exercise a discretion for the protection of the public

1 Consistent with the constitutional doctrine of the separation of powers, the decision to prosecute  
2 a criminal case rests squarely with the executive branch, and the Commonwealth exercises full  
3 discretion over the manner in which it lawfully prosecutes a particular matter. *U.S. v. Gonzalez*, 58 F.3d  
4 459, 462 (9<sup>th</sup> Cir. 1995); *Commonwealth v. Benevente, supra* (Order, p. 3). The discretion conferred on  
5 the court by the “leave of court” requirement in Rule 48(a) is therefore limited, and the court may not  
6 substitute its judgment for that of the prosecutor. *United States v. Wallace*, 848 F.2d 1464, 1468 (9<sup>th</sup> Cir.  
7 1988). The rule has generally been interpreted to authorize the court to deny the government’s motion  
8 to dismiss when the prosecutor acts in bad faith, such as from a motive to harass the defendant or from  
9 other motives that are clearly contrary to the public interest. *Rinaldi, supra*, 434 U.S. at 29, n. 15, 98  
10 S.Ct. at 85, n. 15; *United States v. Salinas*, 693 F.2d 348, 351 (5<sup>th</sup> Cir. 1982). Because the prosecution is  
11 presumed to be acting in good faith, the denial of the government’s motion to dismiss will be justified  
12 only under extraordinary circumstances. *Gonzales*, 58 F.3d at 461. Where the court denies leave to  
13 dismiss in order to prevent the betrayal of the public interest, however, the rule serves as a proper check  
14 on executive power and does not represent an unconstitutional intrusion upon prosecutorial prerogative.  
15 *See, Commonwealth v. Castro*, 2002 MP 13, ¶ 24, 6 N.M.I. 434, 439; *United States v. Cowan*, 524 F.2d  
16 504, 512-513 (5<sup>th</sup> Cir. 1975).

17 Although the Court’s discretion to deny the Commonwealth leave to dismiss is limited, it is  
18 nevertheless extant in Rule 48(a). The Court cannot comply with its duty to competently exercise its  
19 discretion under the rule when the government’s reasons for seeking dismissal are avowedly withheld  
20 from the Court. *Salinas*, 693 F.2d at 352, citing *United States v. Hamm*, 659 F.2d 624, 631 (5<sup>th</sup> Cir.  
21 1981). The prosecutor does not have the burden of proving that dismissal is in the public interest, but it  
22 does have the obligation to provide the Court with a basis for the exercise of the Court’s discretion that

23  
24 interest.” *Cowan, supra*, 524 F.2d at 511. The Fifth Circuit’s analysis of Fed. R. Crim. P. 48(a) in *Cowan* was endorsed by  
both the majority and dissenting opinions in *Rinaldi*. 434 U.S. at 29, 30; *also see*, 434 U.S. at 33 (Rehnquist, J., dissenting).


1 is more than “a mere conclusory interest.” *Id.* At a minimum, the proffered reason should avoid raising  
2 the inference that the Commonwealth’s motivation may be contrary to the public interest. *Hamm*, 659  
3 F.2d at 630; *See, also, In re Richards*, 213 F.3d 773, 787-788 (3<sup>rd</sup> Cir. 2000) (court may hold hearing to  
4 inquire further into prosecutor’s reasons for dismissal); *accord, United States v. Nixon*, 318 F.Supp.2d  
5 525, 529-530 (E.D. Mich. 2004). In light of this persuasive authority and according to the Court’s  
6 interpretation of the plain language of Rule 48(a) of the Commonwealth Rules of Criminal Procedure,  
7 the Commonwealth’s position that leave to dismiss must be granted even when the reasons for dismissal  
8 are withheld from the Court is untenable.

9 **III. Conclusion**

10 Prior to this Court granting the Commonwealth leave to dismiss its criminal case against the  
11 defendants, the Commonwealth must present to the Court its reasons for seeking dismissal. The basis  
12 for the Commonwealth’s decision to request leave to dismiss must be stated in non-conclusory terms to  
13 permit the Court to competently exercise its discretion pursuant to Com. R. Civ. P. 48(a). Without  
14 intending to substitute its judgment for that of the prosecuting attorney, the Court reminds the  
15 prosecution that the interests of justice demand, *inter alia*, that both the Court and the Office of Attorney  
16 General comply with provisions of the Commonwealth’s Victim Bill of Rights. For these reasons, the  
17 Commonwealth’s motion for leave to dismiss the information in this case is DENIED without prejudice.

18 All parties are ordered to appear before the Court on December 12, 2007 at 9:00 a.m. in  
19 Courtroom 220A.

20 SO ORDERED this 28<sup>th</sup> day of November, 2007.

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23 \_\_\_\_\_  
24 RAMONA V. MANGLONA, Associate Judge