FOR PUBLICATION

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, **Plaintiff,** **vs.** **NUMIDO FLORENDO, *et al.*,** **Defendants.**	**CRIMINAL CASE NO. 11-0181** **ORDER DENYING DEFENDANTS' MOTION TO DISMISS**

I. INTRODUCTION

THIS MATTER was heard on February 2, 2012 at 1:30 p.m. in Courtroom 217A on a motion to dismiss. The Government appeared through Assistant Attorney General Peter Prestley. Dante Parinas, Lamberto Flores, Numido Florendo and Robert Lozano (collectively, "Defendants") appeared through their counsels Loren Sutton, Esq., Chief Public Defender Adam Hardwicke, Steven Pixley, Esq. and Bruce Berline, Esq., respectively. On February 3, 2012, the Court notified the parties that the motion to dismiss was denied and a written order will issue at a later date. The Court, having had the benefit of written briefs, and oral argument from counsel, now enters this written Order.

II. PROCEDURAL BACKGROUND

On January 12, 2012, two days before trial, Defendant Parinas filed a motion to dismiss arguing that his right to a speedy trial was violated "because the Government unnecessarily delayed in filing the Information against him." (Def. Parinas Mot. to Dismiss at 1.) The other defendants joined in the motion.

This case was originally filed on March 29, 2010 charging Defendants with one count of assault and battery in violation of 6 CMC 1202(a) and one count of riot in violation of 6 CMC 3102(a) for alleged acts that took place on February 14, 2010. The Defendants were served by penal summons. The charges were dismissed without prejudice on June 30, 2010. The reason for the dismissal was that a defense attorney had told the prosecuting attorney in that case that a witness would testify that the incident in question was a mutual fight. Upon learning this new information, the prosecutor determined that he needed more time to investigate this allegation; therefore, he moved to dismiss the charges without prejudice and the Court granted the motion.

Afterwards, an officer at the Department of Public Safety re-investigated the case and concluded that there was no additional information beyond what was in the original reports. Meetings with the victim and investigating officers followed.

Satisfied that there was no substance to defense counsel's statements, the prosecutor re-filed the same Information on June 30, 2011. On November 15, 2011 the first status conference occurred wherein this Court suggested that trial take place before December 25, 2011, or essentially within 40 days. One of the defense counsel objected to such an early trial date because of scheduling conflicts. Instead, all counsels agreed to the January 17, 2012 trial date.

III. ANALYSIS

The focus of Defendants' motion, as well as the Government's opposition, is on the Speedy Trial Clause of the Sixth Amendment. Both parties rely heavily on *Barker v. Wingo*, 407 U.S. 514 (1972) and the four factors considered therein in analyzing whether the Defendants' right to a speedy trial have been violated. Defendants ask this Court to find that their right to a speedy trial has been violated by a delay in re-filing charges that had been dismissed without prejudice and that the Court use NMI R. Crim. Proc. 48 to dismiss the re-filed charges. As explained below, the law cited by both parties does not apply to the facts of this case. The Court will begin with an analysis of the applicable law for pre-accusation delay.[1]

A. Pre-Accusation Delay

The Fifth Amendment of the United States Constitution is applicable in the Commonwealth via the Covenant.[2] "The Fifth Amendment guarantees that defendants will not be denied due process as a result of excessive preindictment delay." *United States v. Sherlock*, 962 F.2d 1349, 1353 (9th Cir. 1989); *see also United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Marion*, 404 U.S. 307 (1971). However, the Fifth Amendment plays a limited role in protecting a defendant from excessive pre-accusation delay because "statutes of limitations, which provide predictable, legislatively enacted limits on prosecutorial delay, provide 'the primary guarantee against bringing overly stale criminal charges.'" *Lovasco*, 431 U.S. at 788-789 (quoting *Marion*, 404 U.S. at 322). In this case, all of the charges against Defendants were filed within the two-year limitations period. *See* 6 CMC § 107(b)(3). Nevertheless, "the statute of limitations does not fully define the [defendants'] rights with respect to the

---

[1] Much of the law cited herein uses the term "pre-indictment delay." The charging document at issue here is an Information rather than an Indictment. Therefore, the Court uses the term "pre-accusation delay" or "pre-accusatory delay" in place of "pre-indictment delay."

[2] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 48 U.S.C. § 1801 note, *reprinted in* CMC at lxxxi, § 501(a).

events occurring prior to indictment." *Marion*, 404 U.S. at 324. Therefore, a Due Process Clause violation may occur even within the limitations period.

Importantly, not "every delay-caused detriment to a defendant's case should abort a criminal prosecution," *Marion*, 404 U.S. at 324-25, and "the Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment," *Lovasco*, 431 U.S. at 790. Rather, "the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id.* Indeed, the Court cautioned that a contrary rule would encourage prosecutors to put speed before the search for truth which runs the risk of inducing the filing of charges quickly when further investigation would have shown that to be unwise. *Id.* at 794-95.

Pursuant to *Lovasco* and *Marion*, a defendant "can make out a claim under the Due Process Clause only if he can show both (1) that the delay between the crime and the [accusation] actually prejudiced his defense; and (2) that the government deliberately delayed bringing the [charges] to obtain an improper tactical advantage or harass him." *United States v. Beckett*, 208 F.3d 140, 150-51 (3d Cir. 2000) (citing *Marion*, 404 U.S. at 325, and *Lovasco*, 431 U.S. at 789-90). *See also United States v. Rogers*, 118 F.3d 466, 474-75 (6th Cir. 1997); *Jones v. Angelone*, 94 F.3d 900, 907 (4th Cir. 1996); *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992); *United States v. Comosona*, 848 F.2d 1110, 1113 (10th Cir. 1988); *United States v. Benson*, 846 F.2d 1338, 1342-43 (11th Cir. 1988).

1. Absence of Prejudice

Defendants must satisfy the first prong of the test by showing actual prejudice before the Court even considers the second prong. *United States v. Huntley*, 976 F.2d 1287, 1290-91 (9th Cir. 1992). "The standard for pre-indictment delay is nearly insurmountable, especially because proof of actual prejudice is always speculative." *United States v. Rogers*, 118 F.3d 466, 477 n.10 (6th Cir. 1997).

> This is a heavy burden because it requires not only that a defendant show actual prejudice, as opposed to mere speculative prejudice, but also that he show that any actual prejudice was substantial — that he was

> meaningfully impaired in his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was likely affected.

Jones v. Angelone, 94 F.3d 900, 907 (4th Cir. 1996) (citations omitted). Defendants contend that they suffered prejudice in two ways, each separately analyzed below.

i. Witness moved out of the Commonwealth

Defendants contend that the delay in re-filing the charges against them prevented the Defendants from the opportunity to use the victim's treating physician as a witness at trial. Defendants contend that because the physician has since moved out of the Commonwealth to New York, it would be too burdensome for Defendants to front the travel expenses so that the physician could testify at trial.

At oral argument, Defendants' counsel stated that he had been in contact with the physician. It was indicated that Defense counsel had sent an email to the physician and even spoke to him on the phone. It was during these contacts that the physician stated that he did not remember treating the victim. However, at no time did Defendants attempt to issue an out-of-state subpoena to the physician, nor did they argue why a telephonic appearance would not suffice. Assuming that the physician's testimony would be favorable, there is nothing to indicate that he is unavailable to testify on Defendants' behalf.

ii. Loss of Memory

Next, Defendants claim that the pre-accusatory delay impaired the treating physician's memory, and now he is unable to recall his interaction with the victim. At oral argument, Defendants contended that the physician is a potential witness and "may have remembered more had the trial been earlier" and "if the [physician] had a recollection, he would have been able to provide exculpatory evidence." Defendants, however, conceded that they are speculating "but with indications of credibility." Defendants surmise that, had the trial been earlier in time, the physician may have been able to remember some specific facts as to the level of intoxication of the victim and this may impact the

credibility of the victim. The Court, however, finds Defendants' argument to be based entirely on surmise and speculation.

"Generalized assertions of the loss of memory, witnesses, or evidence are insufficient to establish actual prejudice." *United States v. Manning*, 56 F.3d 1188, 1194 (9th Cir. 1995). As the Court in *Lovasco* explained, the due process inquiry concerns the question of whether the delay "violates those fundamental conceptions of justice which lie at the base of our civil and political institutions . . . and which define the community's sense of fair play and decency." *Lovasco*, 431 U.S. at 790 (internal quotation marks omitted). Merely because "memories will dim . . . [is] not in [itself] enough to demonstrate that [defendants] cannot receive a fair trial and to therefore justify the dismissal of the indictment." *Marion*, 404 U.S. at 325-26.

In this case, Defendants speculate that had the trial been earlier, the treating physician might have remembered more about his interaction with the victim and just maybe these memories would serve to undermine the credibility of the victim. In reality, we do not know what caused the physician's memory loss or how early in time the trial would had to have been to make meaningful use of the physician as a witness. Defendants failed to show, specifically what the physician would have testified to, and how exactly this would have benefited the defense. *See United States v. Corona-Verbera*, 509 F.3d 1105, 1113 (9th Cir. 2007) (failing to make a specific showing as to what an unavailable witness would have said makes argument of prejudice "pure conjecture"); *United States v. Trammell*, 133 F.3d 1343, 1351 (10th Cir. 1998) (defendant did not show actual prejudice where he did "not specifically allege how [unavailable] witnesses' testimony would have been of benefit to his case").

The prejudice Defendants allege falls far short of triggering "fundamental concepts of justice." Not only are the allegations based entirely on surmise and supposition, the alleged testimony would be duplicative. Other testimony is available to corroborate the victim's intoxication at the time of the incident. For example, the Government stated that two responding officers can testify as to what they

witnessed at the scene and that officers interacted with the victim three hours before the victim saw the treating physician at the hospital, making their testimony of the victim's level of intoxication more accurate. Therefore, the physician's inability to remember his interaction with the victim does not prejudice the Defense.

2. Delay was not Tactical

Defendants' argument also fails because they have not met their burden of showing that "the delay was an intentional device by the government to gain a tactical advantage." *United States v. Brown*, 667 F.2d 566 (6th Cir. 1982) (citing *Marion*, 404 U.S. 307 and *Lovasco*, 431 U.S. 783). In fact, at oral argument Defendants conceded that the original case "was not dismissed to hamper the defense."

The Government moved to dismiss the charges because Defense counsel indicated that they have evidence the incident was a mutual fight. The Government wanted to investigate these allegations before proceeding to trial; therefore, the Government sought a dismissal without prejudice. Thereafter, an investigation was conducted which revealed nothing of consequence to the prosecution's case. The current prosecutor could not explain when the investigation was completed and why it took nearly a year to re-file the same charges. Nevertheless, nothing before the Court suggests that the Government caused the delay for a tactical purpose. Indeed, "[i]nvestigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused,' and does not deprive a defendant of due process even if he is 'somewhat prejudiced by the lapse of time.'" *Lovasco*, 431 U.S. at 795-96 (quoting *Marion*, 404 U.S. at 324).

In summary, Defendants' claims of potential prejudice fail to satisfy their burden under the applicable law. Instead, such claims are protected by the applicable statute of limitations. *See Marion*, 404 U.S. at 322 ("The law has provided other mechanisms, [primarily, the statute of limitations,] to guard against possible as distinguished from actual prejudice resulting from the passage of time between crime and arrest or charge.").

B. Commonwealth Rule of Criminal Procedure 48

Defendants contend that the Court should dismiss the charges pursuant to Rule 48(b) of the Commonwealth Rules of Criminal Procedure because of the Government's unnecessary delay in re-filing the charges against them. The Government maintains that the delay was necessary to investigate allegations that the incident was a mutual fight.

Rule 48 "authorizes dismissal of an indictment, information, or complaint 'if there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the [] court, or if there is unnecessary delay in bringing a defendant to trial . . . ." *Marion*, 404 U.S. at 319; NMI R. Crim. Proc. 48. In this case, Defendants have failed to show that the delay in re-filing charges was purposeful or oppressive.[3] More fundamentally, however, is that Rule 48 "is clearly limited to post-arrest situations" and not pre-accusatory delay. *Marion*, 404 U.S. at 319. Therefore, Defendants' reliance on Rule 48 for dismissal of their case due to pre-accusatory delay is misplaced.

C. Speedy Trial

The Sixth Amendment's speedy trial clause does not apply in analyzing whether charges should be dismissed because of delay between the alleged offense and initiation of prosecution. *See Lovasco*, 431 U.S. at 788; *Marion*, 404 U.S. at 320; *United States v. MacDonland*, 456 U.S. 1, 7 (1982). The Supreme Court has concluded that after dismissal of charges "a citizen suffers no restraints on his liberty and is [no longer] the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer." *United States v. Loud Hawk*, 474 U.S. 302, 311 (1986) (quoting *MacDonland*, 456 U.S. at 9). The *Loud Hawk* Court made it clear that the distinction

---

[3] "In evaluating Rule 48(b) motions and orders, courts appropriately examine prosecutorial misconduct which contributed to the delay in question." *United States v. Sears, Roebuck and Co.*, 877 F.2d 734, 738 (9th Cir. 1989). Generally, dismissal with prejudice is "appropriate only where there is delay that is ***purposeful or oppressive***." *Id.* at 739 (emphasis added). *See also Commonwealth v. Palacios*, 2003 MP 6 ¶ 12 n.14.

between a citizen against whom charges have been dismissed and a defendant "who has been arrested and held to answer" is essential to the speedy trial analysis, because "when defendants are not incarcerated or subject to other substantial restrictions on their liberty, a court should not weigh that time towards a claim under the Speedy Trial Clause." *Id.* at 312. Thus, the Speedy Trial Clause is inapplicable where, as is the case here, a defendant is claiming prejudice from delay in re-filing charges.

IV. CONCLUSION

Based on the forgoing, Defendants' motion to dismiss is hereby **DENIED**.

SO ORDERED this 9th day of February, 2012.

PERRY B. INOS, Associate Judge