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SUPERIOR COURT

FOR PUBLICATION

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DEPUTY CLERK OF COURT

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

**COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS,**

Plaintiff,

v.

BENIGNO R. FITIAL,

Defendant.

) **CRIMINAL CASE NO. 14-0051**
)
) **ORDER GRANTING DISMISSAL WITHOUT**
) **PREJUDICE AND DECLARING:**
)
) **THE STATUTORY PROSECUTORIAL**
) **AUTHORITY OF THE OFFICE OF THE PUBLIC**
) **AUDITOR IS DIVESTED ONCE A GOVERNOR**
) **NO LONGER SERVES IN AN OFFICIAL**
) **CAPACITY**
)
) **AND SUCH AUTHORITY THEREBY**
) **BECOMES EXCLUSIVE TO THE OFFICE OF**
) **THE ATTORNEY GENERAL OR A SPECIAL**
) **PROSECUTOR APPOINTED BY THE COURT**
)

I. INTRODUCTION

The prosecution of a former Governor, no longer serving as a government official and having the status of a private citizen, is the exclusive province and duty of the Office of the Attorney General, the Commonwealth of the Northern Mariana Islands (hereinafter "Commonwealth") assuming it finds probable cause to prosecute notwithstanding the Court's inherent authority to appoint a Special Prosecutor when so warranted. The Office of the Public Auditor (hereinafter "OPA") OPA was divested of his statutory authority to initiate a criminal action against a Governor once he or she has left office, whether by resignation or removal, and no longer serves in the Governor's official capacity.

1 On March 6, 2013, the Commonwealth Superior Court issued a warrant for Defendant's
2 arrest based upon an affidavit of probable cause filed to support criminal charges, which were
3 brought by George Hasselback of the CNMI OPA, and executed as "Assistant Attorney
4 General/Special Prosecutor Office of the Public Auditor." The Affidavit of Probable Cause detailed
5 issues related to the departure of the former Attorney General, Edward Buckingham, who was also
6 prosecuted by the OPA in early 2014.

7 On March 10, 2014, Defendant moved to quash the warrant previously issued by the Court
8 and asked to be allowed to voluntarily appear and answer the charges brought against him. This
9 Court granted that motion and Defendant appeared voluntarily for an initial appearance on April 30,
10 2013. The Court allowed Defendant to post a property bond to secure his further appearance in the
11 proceedings against him, and scheduled an arraignment on the charges which had yet to be filed by
12 the Government.

13 On May 1, 2014, George Hasselback — again alleging to act as "Assistant Attorney
14 General/Special Prosecutor Office of the Public Auditor" — filed a criminal complaint in the
15 Commonwealth Superior Court, raising thirteen (13) counts of alleged criminal activity by
16 Defendant while he was in office relating to former Attorney General Edward Buckingham's escape
17 from the CNMI, the Michael Ada contract for services related to the use of ARRA funds, the escape
18 of a detainee from the Department of Corrections, and the contract related to the Commonwealth
19 Utilities Corporation.

20 On May 2, 2014, Defendant appeared before the Court for arraignment and orally moved to
21 dismiss the Complaint filed by Mr. Hasselback, on the grounds that he lacked the authority to bring
22 a criminal action through the Office of the Public Auditor under the Commonwealth Constitution
23 and 1 CMC § 7847(b). The Court declined to decide the motion during that hearing, and advised
24

1 Defendant that a written motion with legal authorities would be necessary for the Court to fully
2 consider the issues raised.

3 **B. MOTION TO DISMISS**

4 On July 7, 2014, Defendant filed a Motion to Dismiss the Information filed by the Public
5 Auditor on several grounds, including: (1) the Office of the Public Auditor is not authorized to
6 prosecute a criminal complaint against Defendant under 1 CMC § 7847(b); (2) even if authorized, 1
7 CMC § 7847(b) is unconstitutional and cannot bestow prosecutorial authority to the Public Auditor;
8 and alternatively, (3) the Public Auditor has no reasonable grounds to believe a crime was
9 committed, (4) the statutes which form the basis for the charges are vague and unenforceable, and
10 (5) the Information itself violates Rule 7(1)(c) of the Rules of Criminal Procedure because the
11 Public Auditor failed to provide a plain, concise, and written statement of essential facts and failed
12 to identify the statute, rule, regulation or other provision of law the Defendant is alleged to have
13 violated.

14 On July 18, 2014, the Government, by and through its counsel, filed an Opposition to
15 Defendant's Motion to Dismiss, arguing that: (1) Defendant's interpretation of 1 CMC § 7847 is
16 incorrect in that the statute should be read to authorize the OPA to prosecute criminal violations that
17 occur at a fixed point in time, and any other reading of the statute would result in absurdities; (2) 1
18 CMC § 7847 is a constitutional grant of prosecutorial authority by the CNMI legislature; (3)
19 Defendant misapplies a non-existent standard for dismissal in a criminal case; (4) the statutes are
20 not unconstitutionally vague; and (5) Defendant failed to properly request a bill of particulars in
21 advance of the present motion.

22 On July 22, 2014, Defendant filed a reply to the Government's Opposition, rebutting the
23 above arguments and alleging: (1) 1 CMC § 7847 is ambiguous and therefore should be defined by
24 its plain meaning and purpose; (2) a plain reading of the statute does not lead to absurd results, and,

1 on the contrary, the Government’s reading of the statute leads to absurd and dangerous
2 consequences; and (3) the Commonwealth Supreme Court case relied upon by the Government in
3 its Opposition stands to protect individuals from manipulation by the government.

4 **III. LEGAL STANDARD**

5 An information must contain a “plain, concise, and definite written statement of the
6 essential facts constituting the offense charged.” NMI R. Crim. P. 7(c). The information must also
7 set forth all elements of the crimes charged. *Apprendi v. New Jersey*, 530 U.S. 466, 500 (2000);
8 *Almednarez-Torres v. United States*, 523 U.S. 224, 228 (1998).

9 NMI R. Crim. P. 12(b)(2) allows “[a]ny defense, objection, or request which is capable of
10 determination without the trial of the general issues” to be raised before the trial. The United States
11 Supreme Court has determined that a defense is “capable of determination without trial of the
12 general issue . . . if trial of the facts surrounding the commission of the alleged offense would be of
13 no assistance in determining the validity of the defense.” *United States v. Covington*, 395 U.S. 57,
14 60 (1969). The term “general issue” has been defined as “evidence relevant to the question of guilt
15 or innocence.” *United States v. Ayarza-Garcia*, 819 F.2d 1043,1048 (11th Cir. 1987).

16 The court may consider factual issues when ruling on a Rule 12(b) motion. However, the
17 law generally favors factual determinations to be made during trial. *See United States v. Partridge-*
18 *Staudinger*, 287 F.R.D. 651, 653 (E.D. Wash 2013). The court may also defer ruling on a Rule
19 12(b) motion until after a trial on the “general issue.” NMI R. Crim. P. 12(e). Finally, if the court
20 grants a Rule 12(b) motion based upon a defect in the information, it may order that the defendant
21 continue to be held in custody or that his bail be continued until an amended information is filed.

22 NMI R. Crim. P. 12(h).

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1 **IV. DISCUSSION**

2 The Court now addresses the above-mentioned grounds for Defendant’s Motion to Dismiss,
3 as well as any arguments made in opposition by the Government’s counsel, to include the OPA’s
4 prosecutorial authority and the unconstitutionality of the deputizing statute, as well as the
5 alternative argument that even if the OPA retained authority to prosecute Defendant, it lacked
6 reasonable grounds to bring charges at the outset.

7 **A. AUTHORITY OF OPA TO PROSECUTE FORMER GOVERNOR**

8 First, the Court will evaluate Defendant’s argument that 1 CMC § 4878(b) does not give the
9 OPA the authority to prosecute a criminal case against a former governor.

10 Article III, Section 12 of the Commonwealth’s Constitution created the Office of the Public
11 Auditor, defining its duties and ascribing authority to its employees as follows:

12 The Public Auditor shall audit the receipt, possession and disbursement of
13 public funds by the executive, legislative, and judicial branches of the
14 government, an instrumentality of the Commonwealth or an agency of
15 local government and shall perform other duties provided by law . . . The
16 Public Auditor shall report to the legislature and the governor at least once
17 every year and this report shall be made public promptly.

18 NMI Const. art. III, § 12.

19 In an effort to grant the OPA the authority to investigate and prosecute a criminal action, the
20 CNMI Legislature passed the Commonwealth Auditing Act of 1983 (P.L. 3-91) — codified at 1
21 CMC § 7487 — which provides that “in carrying out his or her duties, the Public Auditor shall
22 report to the Attorney General whenever the Public Auditor has reasonable grounds to believe there
23 has been violations of either federal or Commonwealth criminal law.” 1 CMC § 7487(a).
24 Furthermore, as a result of the report provided by the Public Auditor based upon the necessary
reasonable grounds, “[t]he Attorney General may institute further proceedings.” *Id.*

1 However, the Legislature created an exception to the constitutional provision giving the
2 Attorney General the exclusive authority to prosecute crimes. 1 CMC § 7847(b) grants the OPA
3 the authority to bring a criminal complaint against only two persons — the Governor or the
4 Attorney General.

5 Specifically, 1 CMC § 7847(b) provides:

6 If the Public Auditor has reasonable grounds to believe **the Governor**
7 **or Attorney General** has violated federal or Commonwealth criminal
8 law, the Public Auditor may use the legal counsel for the office of the
9 Public Auditor or retain special counsel who shall serve as an
10 assistant attorney general for purposes of investigating and
11 prosecuting, if necessary, the criminal law violations.

12 1 CMC § 7847(b) (emphasis added).

13 **1. Timely Filing of Complaint is Inapposite**

14 The Court now briefly addresses Defendant’s argument that the OPA failed to timely bring
15 his complaint.

16 Defendant claims that, at the time of his resignation on February 21, 2013, no criminal
17 charges were filed or pending against him, and that the OPA waited until March 6, 2014 to file an
18 Affidavit of Probable Cause naming Defendant in a criminal action seeking a warrant for his arrest.
19 Furthermore, Defendant claims that all of the allegations in that affidavit related solely to the events
20 surrounding the departure of former Attorney General Edward Buckingham, which had occurred
21 more than seven (7) months prior to filing the affidavit, and one month after Defendant tendered his
22 resignation.

23 Lastly, Defendant argues that while all of the events on which the allegations in the
24 Complaint are based occurred during the time Defendant was Governor of the CNMI, three of those
events occurred three (3) years before his resignation and the fourth incident related to an event that
occurred over six (6) months prior to his leaving office, and yet the Public Auditor failed to bring

1 charges against Defendant while he was in office and instead waited four (4) years before bringing
2 the majority of the charges contained in the Complaint. Thus, Defendant asserts that any authority
3 the Public Auditor may have had to bring a criminal complaint against Defendant ceased at the time
4 of his resignation.

5 Here, the Court acknowledges that the OPA filed criminal charges against Defendant
6 several years after the alleged conduct took place, during which time the OPA clearly retained the
7 authority to prosecute Defendant while he was still in office. However, the Court finds the fact that
8 the OPA filed criminal charges against Defendant after he tendered his resignation to be inapposite,
9 and the argument that the OPA's authority to bring criminal charges against Defendant ceased at
10 the time of his resignation will be addressed below.

11 **2. 1 CMC § 7847(b) is Clear and Unambiguous**

12 In granting this limited prosecutorial authority to the OPA, the Legislature remained silent
13 as to whether the subjects of prosecution — the Governor or Attorney General — must still be in
14 office when the charges are brought in order for the exception to operate and authorize the OPA to
15 institute a criminal action. Defendant relies heavily on this omission — whether an intentional
16 limitation by the Legislature or a mere oversight in drafting the statute — arguing that the statute is
17 unambiguous and should be interpreted according to its plain meaning, pursuant to the rules of
18 statutory construction. The Commonwealth also argues that the statute is unambiguous, but rebuts
19 Defendant's plain reading with an interpretation of its own.

20 *a. Plain Meaning of Statute Controls*

21 The CNMI Supreme Court has held that, when dealing with the interpretation of a statute or
22 constitutional provision, “the starting point is the . . . text itself, and if possible the text must be
23 given its plain meaning.” *Department of Public Lands v. Northern Mariana Islands*, 2010 MP 14 ¶
24 17 (citing *Camacho v. Northern Marianas Retirement Fund*, 1 NMI 362, 368 (1990)); 2A

1 Sutherland, Statutory Construction § 47:01 (6th ed. Singer 2000) (“The starting point in statutory
2 construction is to read and examine the text of the act and draw inferences concerning its meaning
3 from its composition and structure.”).

4 The most basic canon of statutory construction is that “the [statutory] language must be
5 given its plain meaning, where the meaning is clear and unambiguous.” *Calvo v. Northern Mariana*
6 *Islands Scholarship Advisory Board*, 2009 MP 2 ¶ 21 (quoting *Aguon v. Marianas Public Land*
7 *Corp.*, 2001 MP 4 ¶ 30). Thus, if the statutory language is unambiguous, “the plain meaning
8 controls, and courts will look no further, unless its application leads to unreasonable or
9 impracticable results.” *American Pacific Textile, Inc. v. United States*, 2013 WL 1147540, 4 (D. N.
10 Mar. I. 2013) (citing *Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881, 896 (9th Cir. 2005)
11 and *United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999)). Similarly, the CNMI Supreme
12 Court has required this Court to “avoid interpretations of a statutory provision which would defy
13 common sense or lead to absurd results.” *Commonwealth Ports Authority v. Hakubonan Saipan*
14 *Enter.*, 2 NMI 212, 224 (1991) (quoting *Office of the Att’y Gen. v. Cubol*, 3 C.R. 64, 78 (1987)).

15 The Commonwealth argues that the introductory clause of the first sentence of the statute,
16 specifically “[i]f the Public Auditor has reasonable grounds to believe the Governor or Attorney
17 General has violated federal or Commonwealth criminal law . . .”, is subordinate to the main
18 sentence of the statute and should be read accordingly. The Commonwealth also argues that the
19 CNMI Legislature intended the OPA to investigate and prosecute a particular category of “criminal
20 law violations” which were alleged to have been committed by either the Governor or the Attorney
21 General while in office, and that the fact that a particular individual may, at any time, leave a
22 particular office does not divest that authority. Thus, the Commonwealth asks this Court not to
23 consider the position held by the particular defendant at the time the charges are brought, but rather
24 the criminal law violations at the time they are alleged to have happened.

1 Here, the Court first finds that the provision of statute at hand — specifically, 1 CMC §
2 7487(b) — is clear and unambiguous as to what the Court believes to be an extremely limited grant
3 of prosecutorial authority, and thus it will be given its plain meaning pursuant to the most basic
4 canon of statutory construction detailed above. Next, the Court finds that the words “the Governor
5 or Attorney General”, which appear in the first part of the above provision, mean precisely what
6 they say they mean. Retaining the title of Governor or Attorney General denotes an official
7 capacity to act on behalf of the government of the Commonwealth of the Northern Mariana Islands,
8 and the general public, at the behest of which those offices serve. Thus, the Court finds that the
9 plain meaning of the words of the statutory provision control, and they will be given such a
10 meaning unless the results would otherwise be unreasonable or impracticable.

11 *b. Effect of Plain Meaning Not Unreasonable or Impracticable*

12 Next, the Court addresses whether the above reading of the statutory provision pursuant to
13 its plain meaning would lead to an unreasonable or impracticable result.

14 The Commonwealth relies on an analogy to the laws governing the disposition of juvenile
15 defendants, which are also prosecuted according to a statutory scheme establishing a particular
16 category of persons. In the CNMI Supreme Court case of *Nakatsukasa v. Superior Court of the*
17 *Commonwealth of the Northern Mariana Islands*, the Court held that juveniles are defined by their
18 age when they committed the offense and not their age at the time of the proceedings. *See* 6 N.M.I.
19 59 (1999). In *Nakatsukasa*, the Attorney General failed to file charges against an individual, which
20 were committed while he was a juvenile, until he was an adult, and thus he was charged as an adult
21 when the criminal complaint was filed in the Superior Court. The Court emphasized:

22 The most impartial criteria in determining which court’s jurisdiction
23 controls is clearly “the age at the time of the offense.” A person’s age at
24 the time he or she commits an offense is a fixed standard which can be
readily ascertained and will not usually be open to question. However in
using the date of the arrest, the date when legal proceedings are instituted,

1 or the date when the trial commenced, there are potential dangers for
2 manipulation.

3 *Id.* at 20.

4 However, *Nakatsukasa* does not help the Commonwealth nearly so much as it believes. In
5 *Nakatsukasa*, the Supreme Court stressed the underlying purpose of the statutes governing the
6 prosecution of juveniles — to protect the interests of juveniles from manipulation by prosecutors.
7 The Court feared that the Attorney General’s Office could manipulate the statutory scheme
8 governing the prosecution of juveniles by simply waiting to file charges until the subject of the
9 prosecution reaches adulthood, after which the Attorney General could effectively prosecute the
10 then-juvenile as an adult.

11 Here, the Commonwealth believes the manipulation could come from the subject of the
12 prosecution himself, where he could commit a crime while he was a juvenile and effectively avoid
13 the prosecutor’s jurisdiction until he reaches the age of majority. This is not only impracticable, but
14 also impossible, as no juvenile defendant is capable of spurning the jurisdiction of the prosecutor as
15 a minor by reaching the age of majority. Thus, such a scenario is distinguishable from the present
16 case, since the Commonwealth claims Defendant could manipulate the system by resigning from
17 office to avoid prosecution altogether.

18 The Court recognizes that the manipulation possible in the present case resides with the
19 prosecution, just as in *Nakatsukasa*. Defendant argues that the OPA could delay the prosecution of
20 a crime until some future event occurs, such as a Governor or Attorney General leaving office, and
21 thereafter file charges when it is “more politically expedient to do so, and without giving the
22 Attorney General the opportunity to review and exercise its own discretion as to the ‘necessity’ of
23 bringing such an action.” The Court will not speculate whether any intentional course of action on
24 the part of the OPA caused the charges to be filed nearly four years after the alleged criminal

1 activity was committed, and will not second-guess any legal strategy employed by the OPA at this
2 time. Further, the Court finds it incredulous, as Defendant so intimates, that the OPA is capable of
3 or had any ulterior motive to intentionally delay the initiation of criminal charges by stalling or
4 delaying the reporting of their investigation so that the Attorney General’s prosecutorial authority
5 would divest and the OPA would be authorized to file criminal charges.

6 However, the present circumstances do not lend themselves to the analogy as the
7 Commonwealth envisions, as statutory schemes for juvenile prosecutions necessarily revolve
8 around the age of the subject of the criminal charges, as opposed to the official capacity. The
9 objective of enabling juvenile prosecutions is to protect youth defendants who commit crimes
10 before they are fully capable of determining right from wrong; whereas the objective of the statutes
11 authorizing the OPA to file criminal charges against governors and Attorney Generals is to avoid
12 manipulation of the prosecuting body by the subject of the prosecution. That is, the OPA was
13 authorized to prosecute governors and Attorney Generals because they might be able to influence
14 the decisions of the Office of the Attorney General and effectively avoid prosecution by the
15 Attorney General while they are in office.

16 Similarly, the Commonwealth Supreme Court stated in *In re San Nicholas* that in order to
17 “minimize the pernicious effect that might arise from requiring the OAG to prosecute its own
18 members, the Attorney General, or the Governor, the Commonwealth Constitution established a
19 system of checks and balances, which included the creation of the OPA to serve as a sentinel
20 against government malfeasance.” 2013 MP 8 ¶ 13 (internal citations omitted). The Court
21 reasoned that it could not realistically expect the Attorney General to prosecute himself for a
22 criminal offense, considering the Attorney General could simply order his subordinates to dismiss
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1 the charges or cease the investigation. By the same logic, a Governor could simply remove the
2 Attorney General from his office should he attempt to bring criminal charges against him.²

3 However, once the Governor resigns from his office and becomes a private citizen, those
4 “pernicious effects” are effectively excised, as he no longer officially controls or has the power to
5 remove the Attorney General from his post. Put in another way, after a former Governor or
6 Attorney General leaves office, the danger for manipulation is removed — at least in an official
7 capacity, as he would have the same status as any other private citizen — and the OPA is no longer
8 necessary as a neutral party with equal authority to investigate alleged criminal activity and
9 prosecute the former Governor or Attorney General. Thus, in such a case, the Attorney General
10 retains prosecutorial authority, and the OPA’s authority is thereby divested.

11 The Commonwealth cautions the Court that such a reading of the statute would result in a
12 “cascade of absurdities”, arguing that a former Governor or Attorney General could still manipulate
13 the law by resigning from his position to avoid prosecution and taking advantage of favoritism with
14 the Office of the Attorney General. The Commonwealth reasons that this would effectively render
15 the statute authorizing the OPA useless, and result in a massive waste of government time and
16 resources expended in the investigation of such criminal activity by a defendant who held an
17 esteemed office. However, while the Court recognizes the potential for the existence of favoritism
18 between and amongst the various branches of the Commonwealth’s government, it cautions that
19 such favoritism does not violate any local or federal law, and in reality, few governments are totally
20 free from the kind of favoritism the Commonwealth claims as the source for manipulation.

21 Defendant argues that the OPA should not be allowed to wait in the wings for the subject of
22 the prosecution to resign from his office under the belief that the Attorney General may no longer

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24 ² However, the Court recognizes that, as a practical matter, with the CNMI’s first elected Attorney General to be sworn
in in a matter of months, this would no longer be possible.

1 lead the prosecution. The Court finds that the plain meaning provided above does not lead to
2 unreasonable or impracticable results because although the OPA's authority would effectively be
3 divested once the subject of the prosecution leaves office, the Attorney General retains
4 prosecutorial authority over the former Governor or Attorney General, and the prosecution could
5 still move forward under the Attorney General's authority, as opposed to under the OPA as an
6 "Assistant Attorney General/Special Prosecutor Office of the Public Auditor."

7 Accordingly, the Court hereby grants Defendant's Motion to Dismiss based upon the limited
8 prosecutorial authority granted to the OPA, which was divested once Defendant resigned and
9 became a private citizen, and is thereafter retained solely by the Attorney General or in a special
10 prosecutor appointed by the Court, pursuant to its inherent discretion to do so in circumstances
11 where a conflict of interest exists which prevents the Attorney General from prosecuting the case.

12 **B. 1 CMC § 7847(b) IS A CONSTITUTIONAL EXPANSION OF PROSECUTORIAL AUTHORITY**

13 Although the Court grants Defendant's motion based upon the above grounds, the Court
14 nevertheless addresses Defendant's alternative argument that the statute granting the OPA
15 prosecutorial authority is unconstitutional and that the OPA lacks the authority to prosecute
16 criminal actions against any Defendant, including an active Governor.

17 Defendant claims that the Commonwealth Constitution vests in the Office of the Attorney
18 General exclusive authority to initiate criminal actions in the CNMI. This is not a novel argument
19 before the Commonwealth Superior Court, as it was one employed in a Motion to Dismiss filed by
20 former Attorney General Edward Buckingham in a criminal case prosecuted by the OPA. The
21 Court denied the Defendant's Motion to Dismiss in an September 4, 2013 Order, concluding that
22 "[i]n light of *In re Joey P. San Nicolas* and the narrow application of § 7847(b), the Court holds
23 that § 7847(b) does not unconstitutionally infringe upon the prosecutorial power vested in the OAG
24 by Article III, § 11 of the Commonwealth Constitution." *Commonwealth of the Northern Mariana*

1 *Islands v. Edward T. Buckingham*, Case no. 12-0134 (Order Denying Defendant’s Motion to
2 Dismiss, September 4, 2013, at 4).

3 This Court agrees with the reasoning of the *Buckingham* court, which relied on the
4 Commonwealth Supreme Court’s opinion in *In re Joey P. San Nicolas*. The Supreme Court stated
5 in *In re Joey P. San Nicolas* that “[t]he power to prosecute is not absolute. If it were the OAG
6 would be required to prosecute attorneys within its office as well as the Governor, who currently
7 has the authority to appoint and remove the Attorney General. 2013 MP 8 ¶ 13 (Slip Opinion).
8 Thus, the Superior Court held in *Buckingham* that “[i]f the OAG cannot prosecute the Attorney
9 General or the Governor, then the legislature is free to delegate that prosecutorial authority to the
10 OPA without infringing upon the power vested in the OAG.” *Commonwealth of the Northern*
11 *Mariana Islands v. Edward T. Buckingham*, Case no. 12-0134 (Order Denying Defendant’s Motion
12 to Dismiss, September 4, 2013, at 4).

13 Furthermore, the Commonwealth argues in opposition that Article III, § 12 of the CNMI
14 Constitution provides the duties relegated to the OPA. Specifically, Article III, § 12 provides:

15 The governor shall appoint a public auditor with the advice and
16 consent of each house of the legislature. The public auditor shall
17 audit the receipt, possession and disbursement of public funds by the
18 executive, legislative and judicial branches of the government, an
instrumentality of the Commonwealth or an agency of local
government and shall perform **other duties provided by law**.

19 NMI Const. art III, § 12 (emphasis added).

20 Thus, it is clear the drafters of the CNMI Constitution intentionally left the door open for
21 legislative expansion upon the duties and authority of the OPA, a proposition which is supported by
22 the enactment of Public Law 3-91. Section 101 of Public Law 3-91 reads: “It is the purpose of this
23 act to implement Article III, Section 12 of the Commonwealth Constitution by creating an Office of
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1 the Public Auditor to conduct audits . . . and to **assign such additional duties to the Public**
2 **Auditor as the Legislature deems necessary.**” PL 3-91, § 101 (emphasis added).

3 However, the Court deigns to engage in what it believes would amount to judicial
4 legislation, and holds that if the Legislature intended to include the words "current" or "former" in
5 the authorizing statute, it would have. The Court cannot presume to know whether one agency of
6 government will take action against another — that is, whether the Attorney General will take steps
7 to initiate a criminal action against the current or former Governor of the CNMI. The Court agrees
8 that the OPA's duties are constitutionally expanded by granting the authority to prosecute the
9 Governor or Attorney General for alleged criminal violations, but again holds that once the subject
10 of prosecution leaves office, the danger for manipulation of the OAG is removed and the authority
11 reverts back to the discretionary power of the OAG to institute criminal actions in the CNMI. It is
12 within the prerogative of the OAG to decline to prosecute any instance of criminal activity of which
13 it does not believe reasonable grounds exist in support. It is the Court's opinion that the OPA
14 retains the same discretion while the subject of the investigation remains in office, and it may
15 choose to institute a criminal action or recommend to the OAG that it do the same once the
16 defendant has left office by filing a report detailing its ongoing investigation. It is then within the
17 exclusive prerogative of the OAG — discretion granted to it by the CNMI Constitution — to make
18 a determination of probable cause, seek an arrest warrant, and initiate a criminal action against the
19 subject of prosecution, should it choose to do so, just as with any other private citizen of the CNMI.

20 In conclusion, this Court finds that in absence of the OPA’s prosecutorial authority, the
21 Legislature is free to expand upon the OAG’s constitutional grant of power to prosecute all criminal
22 matters within the CNMI. Hence, as 1 CMC § 7847(b) reflects such an expansion, the Court finds
23 that the provision is constitutional. However, as stated above, the Court cautions that this
24 expansion operates only while the subject of prosecution remains in office, and the Court does not

1 now and will not attempt to expand the authority of the OPA by way of judicial activism. Should
2 the Attorney General find it necessary to file criminal charges against Defendant upon reasonable
3 belief he has committed a crime while in office, it is free to do so, as it retained exclusive
4 prosecutorial authority once Defendant resigned from office. Furthermore, the OPA, pursuant to its
5 constitutional mandate, may make a recommendation to the OAG that Defendant be prosecuted.

6 **C. REMAINING GROUNDS FOR DISMISSAL**

7 Lastly, the Court need not address Defendant's remaining grounds for dismissal — no
8 reasonable grounds for instituting action, vagueness of criminal statutes, and insufficient
9 information — because the Court has already ruled in its favor on its primary argument, the
10 authority of the OPA to prosecute a Governor who has resigned from office. However, the Court
11 will nevertheless briefly rule on the remaining grounds for dismissal for the sake of judicial
12 posterity.

13 First, the Court does recognize that Defendant unnecessarily pleads factual bases to support
14 its argument that no reasonable grounds existed which made it necessary to bring the present action.
15 In the context of a Rule 12 challenge, a defense is "capable of determination without trial of the
16 general issue . . . if trial of the facts surrounding the commission of the alleged offense would be of
17 no assistance in determining the validity of the defense." *United States v. Covington*, 395 U.S. 57,
18 60 (1969). The "general issue" is defined as "evidence relevant to the question of guilt or
19 innocence." *United States v. Ayarza-Garcia*, 819 F.2d 1043, 1048 (11th Cir. 1987). Here, the
20 factual allegations which form the bases of Defendant's claim of a defense necessarily involve the
21 general issue of fact pertaining to each offense charged. As such, these issues of fact are best left to
22 the fact-finder — or subsequent motions made if the case is refiled by the Attorney General
23 following the issuance of the instant order — and the Court denies Defendant's Motion to Dismiss
24 on this particular ground.

1 Second, no evidence exists that the statutes under which Defendant is charged are
2 unconstitutionally vague. Generally, statutes are presumed constitutional unless proven otherwise,
3 where the burden of proof lies with the challenging party and must be determined beyond a
4 reasonable doubt. *See People v. Janousek*, 871 P.2d 1189, 1195 (Colo. 1994). Moreover, where no
5 First Amendment or other constitutionally protected right is implicated, a reviewing court need only
6 scrutinize whether it is impermissibly vague as applied to the challenging party's conduct. *See*
7 *Parker v. Levy*, 417 U.S. 733, 757 (1974); *Village of Hoffman Estates v. Flipside, Hoffman Estates,*
8 *Inc.*, 455 U.S. 489, 497 (1982). Put in another way, a defendant whose conduct as accused, if
9 proven beyond a reasonable doubt at trial, would clearly violate the statute in question may not
10 successfully challenge the constitutionality of a law as being vague if it were applied to others. *See*
11 *Parker*, 417 U.S. at 757; *Hoffman Estates*, 455 U.S. at 495; *United States v. National Dairy*
12 *Products Corp.*, 372 U.S. 29, 32-33, 36 (1963). Thus, as the Court need not engage in factual
13 determinations at this stage, it accordingly finds that the statutes under which Defendant is charged
14 are not unconstitutionally vague as applied to Defendant.

15 Lastly, the Court finds that the Information does not violate Rule 7(c)(1) of the
16 Commonwealth Rules of Criminal Procedure. The Court also cautions the Defendant that, if he
17 believed the Information to be insufficient at the time of its filing, he could have filed a Motion for
18 a Bill of Particulars at the outset, in advance of filing the instant motion. The Court reminded
19 Defendant of this avenue of recourse in its Case Management Order dated May 2, 2014, where it
20 invited the filing of a motion for a Bill of Particulars, should Defendant feel one was necessary.
21 Defendant failed to file such a motion in the thirty-four (34) day time period between receiving the
22 First Amended Complaint until the deadline for filing such a motion had expired. Thus, the Court
23 finds the extreme remedy of dismissal based upon the Defendant's failure to file a dispositive
24 motion to be unnecessary and duplicative, as Defendant's primary argument for dismissal

1 nevertheless succeeded at this later stage. As such, the Court hereby denies Defendant's motion to
2 dismiss based upon the grounds that the Information violates Rule 7(c)(1) of the Rules of Criminal
3 Procedure.


4 **V. CONCLUSION**

5 For the foregoing reasons, the Court **HEREBY GRANTS** Defendant's Motion to Dismiss,
6 without prejudice, the criminal charges brought against him by the OPA, finding that the OPA lacks
7 authority to initiate a criminal action against the former Governor of the CNMI, now a private
8 citizen, and that the Attorney General retains prosecutorial authority over such an action when the
9 defendant is not currently in office. The onus remains with the Office of the Attorney General to
10 prosecute Defendant, if it so chooses, as the OPA's authority was effectively divested once
11 Defendant resigned from office and became a private citizen.

12 In the alternative, the OPA would only otherwise retain authority to prosecute Defendant if
13 the Office of the Attorney General formally declines to prosecute, based upon some now-apparent
14 conflict of interest, and the Court exercises its inherent authority to appoint a special prosecutor.
15 However, any prosecution would not commence should the Office of the Attorney General find no
16 probable cause to institute a criminal action against the Defendant, notwithstanding any
17 recommendation by the OPA to prosecute Defendant.

18 Lastly, the Court **HEREBY DENIES** Defendant's alternative grounds for dismissal, as the
19 Court concurrently granted Defendant's primary arguments.

20
21 **IT IS SO ORDERED** this 6th day of November, 2014.

22 
23 _____
24 David A. Wiseman, Associate Judge