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BY *[Signature]*
DEPUTY CLERK OF COURT

1 **FOR PUBLICATION**

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

8 **COMMONWEALTH OF THE**)
9 **NORTHERN MARIANA ISLANDS**) **CRIMINAL CASE NO. 16-0160**
10 **Plaintiff,**)
11 **v.**) **ORDER GRANTING**
12 **MICHAEL MURPHY**) **COMMONWEALTH'S RULE 48(a)**
13 **Defendant.**) **MOTION TO DISMISS WITHOUT**
14) **PREJUDICE**

15 **I. INTRODUCTION**

16 This matter came before the Court on August 10, 2017 for a hearing on the
17 Commonwealth's Motion to Dismiss Without Prejudice Pursuant to Rule 48(a) of the
18 Commonwealth Rules of Criminal Procedure ("Commonwealth's Rule 48(a) Motion to
19 Dismiss").¹ Defendant Michael Murphy ("Defendant") was present and represented by Attorney
20 Janet H. King. The Commonwealth was represented by Assistant Attorney General Betsy
21 Weintraub.

22 Based on a review of the parties' filings, oral arguments and applicable law, the Court
23 hereby **GRANTS** the Commonwealth's Rule 48(a) Motion to Dismiss.
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25 _____
26 ¹ The Court construed the Commonwealth's Notice of Voluntary Dismissal as a Motion to Dismiss pursuant to Rule 48 (a) of the Commonwealth Rules of Criminal Procedure.

AG King

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II. BACKGROUND

This matter involves two alleged sexual assault offenses. On August 25, 2016, the Commonwealth filed an Amended Information charging Defendant with the following counts: (1) Sexual Abuse of a Minor in the First Degree, in violation of 6 CMC §1306(a)(1) and punishable under 6 CMC § 1306(b); and, (2) Sexual Abuse of a Minor in the Second Degree, in violation of 6 CMC § 1307(a)(2) and punishable by 6 CMC §1307(b). In the Court's pretrial order dated October 11, 2016, the matter was set for a jury trial on February 13, 2017.

To accommodate the prosecution and defense, the Court entertained multiple requests for extensions and continuances. First, pursuant to the Commonwealth's motion to continue trial due to a personal conflict, the February 13, 2017 trial date was rescheduled to April 3, 2017. Second, pursuant to a stipulated motion to continue trial to allow for additional forensic testing, the Court rescheduled the April 3, 2017 trial date to September 11, 2017. On March 16, 2017 the Court issued a Second Amended Pre-Trial Order requiring counsels to complete the exchange of discovery materials no later than July 26, 2017. Additionally, the Second Amended Pre-Trial Order stated that requests to change procedure dates must be made within fifteen (15) days from the date of issuance.

On July 7, 2017, the Commonwealth filed a Motion to Extend the Discovery Deadline. Therein, Assistant Attorney General Weintraub argued that she was unaware of the discovery deadline until one month prior to the deadline. Additionally, even if counsel was aware of the deadline, additional testing revealed probative information after the deadline had passed. The Commonwealth also stated that this discovery extension does not affect the September 11, 2017 trial date since Defendant has not expressed any indication to call for its own expert.

On August 2, 2017, the Court denied the Commonwealth's Motion to Extend the Discovery Deadline. Therein, the Court found that Assistant Attorney General Weintraub had adequate opportunity to prepare and meet the above-mentioned discovery deadline. Additionally, the Court

1 found that Assistant Attorney General Weintraub failed to show excusable neglect for moving to
2 change the deadline within the time stated in the Court's Second Amended Pre-trial Order. Lastly,
3 the Court disagreed that late discovery of probative information will not affect the trial date as
4 Defendant will need additional time to inspect the evidence and defend against it. Ultimately, the
5 Court found that another extension was not warranted.

6 During the August 8, 2017 Status Conference, the Commonwealth orally moved for
7 reconsideration of the Court's Order Denying the Commonwealth's Motion to Extend Discovery
8 Deadlines. The Commonwealth stated that late DNA testing revealed probative DNA evidence
9 and the Commonwealth only received said evidence after the July 26, 2017 discovery deadline set
10 by the Court's Second Amended Pretrial Order. Upon review, the Court found that reconsideration
11 would prejudice the defense and cause extreme delay. Additionally, the Court found that the
12 Commonwealth failed to provide sufficient legal basis for reconsideration and simply reiterates
13 previous arguments.

14 On August 10, 2017, the Commonwealth filed the present Rule 48(a) Motion to Dismiss.
15 Therein, the Commonwealth indicated its inability to prove its case due to established discovery
16 deadlines and potential competency issues.

17 On August 11, 2017, Defendant filed an Opposition to Commonwealth's Notice and Motion
18 to Dismiss without Prejudice; and Defendant's Motion under Rule 48(b) to Dismiss with Prejudice
19 ("Defendant's Opposition").² Therein, the defense argued that the Commonwealth failed to
20 prosecute diligently and moved to dismiss in bad faith to circumvent established discovery
21 deadlines, thereby causing Defendant to suffer prejudice. Additionally, the defense argued that, as
22 an appropriate remedy for the Commonwealth's bad faith, the Court should dismiss the case with
23 prejudice.

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25 ² Later than afternoon, the defense submitted an Amended Opposition to Commonwealth's Notice and Motion to Dismiss without Prejudice; and Defendant's Motion under Rule 48(b) to Dismiss with Prejudice ("Defendant's Amended Opposition") to include signed affidavits from Defendant and expert witness, Dr. Phillip Danielson.

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III. LEGAL STANDARD

Rule 48(a) of the Commonwealth Rules of Criminal Procedure (“Rule 48(a)”) provides a mechanism for the Commonwealth to dismiss charges against a defendant, stating, in its pertinent part: “[t]he attorney for the government may by leave of court file a dismissal of an information or complaint and the prosecution shall thereupon terminate.” NMI R. Crim. P. 48(a).³ While the words “leave of court” obviously vest some discretion in the court, the rule provides no criteria for the exercise of discretion. Moreover, the Commonwealth Supreme Court has not decided the circumstances in which discretion may properly be exercised.

In *CNMI v. Hui*, the court ruled, “the ‘leave of court’ language in Rule 48(a) permits a court to exercise discretion as to whether a pending prosecution should be terminated and whether it should be with or without prejudice, if so terminated.” *CNMI v. Hui*, Crim. No. 04-0116 (NMI Super. Ct., Nov. 15, 2004) (Order Granting the Commonwealth’s Motion to Dismiss Information at 2-3). Additionally, the court indicated that the “leave of court” requirement protects a defendant against prosecutorial harassment stemming from “charging, dismissing, and recharging.” *Id.* at 3.

IV. DISCUSSION

The Court will discuss the Commonwealth’s Rule 48(a) Motion to Dismiss and Defendant’s Rule 48(b) Motion to Dismiss, respectively.

A. Dismissal Pursuant to Rule 48(a)

It has been frequently held that under Rule 48(a), the courts are vested with the power and duty to exercise their judicial discretion in determination whether to grant the government leave to dismiss a criminal prosecution. *See Rinaldi v. United States*, 434 U.S. 22, 30 (1977); *see also United States v. Valencia*, 492 F.2d 1071, 1074 (9th Cir. 1974). In *United States v. Hastings*, the court noted that in deference to the primary responsibility of the executive branch to supervise

³ Because the Commonwealth Rules of Criminal Procedure are patterned after the Federal Rules of Criminal Procedure, interpretations of the federal rules are instruction. *Commonwealth v. Ramangmau*, 4 NMI 227, 233 n.3 (1995).

1 prosecutions, dismissal is warranted if the court is satisfied that the reasons advanced are
2 substantial, supported by a factual basis, and are compatible with the public interest. 447 F. Supp.
3 534, 537 (E.D. Ark. 1977) (citing *United States v. Greater Blouse Skirt & Neckware Contractor's*
4 *Ass'n*, 228 F.Supp. 483 (1964)).

5 Here, the Commonwealth argues that the Court should dismiss the case, without prejudice,
6 for a number of reasons, such as, the doctrine of separation of powers, public interest favoring
7 dismissal, prosecutor's lack of bad faith and insufficient evidence.

8 **1. Exercise of Judicial Discretion Does Not Violate Doctrine of Separation of Powers**

9 As a preliminary matter, the Commonwealth's bare argument that denial of the
10 Commonwealth's Rule 48(a) Motion to Dismiss would encroach on the Doctrine of Separation of
11 Powers is not persuasive. Before the promulgation of Rule 48(a), the common law provided
12 prosecutors unfettered discretion, before empaneling the jury, to enter a *nolle prosequi*, a decision
13 not to prosecute or abandon prosecution, without first obtaining the court's consent. *See United*
14 *States v. Salinas*, 693 F.2d 348, 350 (5th Cir. 1982). Due to concerns that prosecutors were abusing
15 that discretion and harassing defendants by charging, dismissing and re-charging without triggering
16 the protections of the double jeopardy clause, Rule 48(a) was enacted to provide a check on
17 prosecutorial behavior. *See Rinaldi v. United States*, 434 U.S. 22, 29 n.13 (1977). "With the
18 adoption of Rule 48(a), the absolute authority of the prosecutor was tempered and leave of court
19 was required for dismissal of an indictment, information, or complaint at *any* stage of the
20 proceedings. *Korematsu v. United States*, 584 F. Supp. 1406, 1411 (N.D. Cal. 1984). Since then,
21 courts have held that Rule 48(a) limits the broad discretionary power of the executive branch
22 granted under the constitutional separation of powers and vests in the judiciary the power to
23 exercise its discretion to preserve the public interest and check the abuse of power. *United States v.*
24 *N.Y. Nederlandsche Combinatie Voor Chemische Industrie*, 75 F.R.D. 473, 475 (S.D.N.Y. 1977)

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1 (Where an indictment has been returned, decision to terminate a prosecution is not exclusively
2 within province of the Executive Branch.).

3 **2. Public Interest Weighs in Favor of Denying Dismissal**

4 Rule 48(a)'s "leave of court" requirement gives the Court the ability to protect the public
5 interest in the fair administration of criminal justice. *See United States v. Cowan*, 524 F.2d 504 (5th
6 Cir. 1975). In *N.Y. Nederlandsche Combinatie Voor Chemische Industrie*, the denial of the
7 government's motion to dismiss the indictment alleging a criminal conspiracy involving essential
8 life-saving drugs was proper since permitting the Government to unilaterally terminate a nine-year-
9 old indictment of great public significance would be clearly contrary to manifest public interest. 75
10 F.R.D. at 474-475. In *United States v. Biddings*, the court denied the prosecutor's motion for leave
11 to dismiss the indictment charging kidnapping and transportation of a stolen automobile because
12 "manifest public interest, represented by several unrecanting victims, requires a trial to vindicate
13 them or the defendant." 416 F.Supp. 673, 675 (N.D. Ill. 1976).

14 Here, Assistant Attorney General Weintraub stated that dismissal of the case is in the
15 public's best interest because of the Commonwealth's inability to present the best case possible. *In*
16 *arguendo*, Assistant Attorney General Weintraub discounted the resources exerted in preparation
17 for trial by both the people of the Commonwealth and the defense. Moreover, Assistant Attorney
18 General Weintraub exhibited a complete disregard for the Judiciary's docket. In opposition, the
19 defense stated that it is in the public's interest to have an efficient prosecutor and judicial system.

20 The Court highly disagrees with the Commonwealth's argument that public interest is better
21 served by dismissal. This matter involves serious charges of sexual assault, which is a matter of
22 great public significance in the Commonwealth, even more so to the alleged victim and/or
23 Defendant. Moreover, a tremendous amount of resources have been expended in the prosecution
24 and defense of this matter, including thousands of wasted taxpayer dollars and resources of already-
25 overburdened agencies, such as, the Department of Public Safety, Department of Corrections and

1 the Commonwealth Judiciary. And most importantly, public interest requires a trial to vindicate the
2 alleged victim or Defendant. Clearly, Assistant Attorney General Weintraub needs to reevaluate her
3 definition of public interest.

4 **3. Prosecution's Insufficient Evidence Warrants Great Weight in Favor of Dismissal**

5 It has been held that a prosecutor's motion for leave to dismiss an action will be granted
6 when it appears that the government lacks sufficient evidence to warrant prosecution and to sustain
7 a conviction. *See United States v. Bettinger Corp.*, 54 F.R.D. 40, 41 (D. Mass. 191); *see also United*
8 *States v. Doe*, 101 F. Supp. 609, 611 (D. Conn. 1951); *see also United States v. Greater Blouse,*
9 *Skirt Neckwear Contractors Ass'n*, 228 F.Supp. 483, 486 (S.D.N.Y. 1964); *see also United States v.*
10 *Biddings*, 416 F. Supp. 673, 675 (N.D. Ill. 1976) (Court did not allow the dismissal of the
11 indictment on the ground of insufficient evidence where the court found the evidence is sufficient to
12 warrant a trial and to sustain a conviction).

13 Here, the Commonwealth's Rule 48(a) Motion to Dismiss cites the inability to present last-
14 minute forensic evidence that was not tendered during discovery and a challenge to witness
15 competency as reasons for dismissal. While the Court does not disagree that Assistant Attorney
16 General Weintraub's lack of diligence and case-management are reasons for its self-acclaimed
17 inability to prove its case at trial, insufficient evidence warrants great weight in considering a Rule
18 48(a) motion to dismiss.

19 **4. Prosecutor's Bad Faith and Prosecutorial Harassment**

20 "A fundamental consideration in assessing the propriety of a prosecutor's [Rule 48(a)]
21 dismissal motion is whether the motion is made in good faith." *United States v. Wallace*, 848 F.2D
22 1464, 1468 (9th Cir. 1988); *see also Rinaldi*, 434 U.S. at 30 (examining government's notice for
23 seeking leave to dismiss in determining appropriateness of granting Rule 48(a) motion); *see also*
24 *Salinas*, 693 F.2d at 351 ("The key factor in a determination of prosecutorial harassment is the
25 proprietary or impropriety of the government's efforts to terminate the prosecution—the good faith

1 or lack of good faith of the government in moving to dismiss.”). “There is little question that this
2 Court can reject the government’s motion to dismiss charges if it is satisfied that dismissal is sought
3 in bad faith.” *United States v. Hastings*, 447 F. Supp. 534, 536 (E.D. Ark. 1977).

4 A number of cases support the view that the purpose of Rule 48(a) is to protect a criminal
5 defendant from harassment by the government through charging, dismissing and then re-charging
6 without placing a defendant in jeopardy. See *Rinaldi*, 434 U.S. at 30 n.15; *United States v. Greater*
7 *Blouse, Skirt & Neckwear Contractors Ass’n*, 228 F. Supp., 483, 487 (S.D.N.Y. 1964)
8 (“Applications should be granted where it appears . . . the dismissal is not for the purpose of
9 subjecting a defendant to harassment by the commencement of another prosecution at a different
10 time or at a place deemed more favorable to the prosecution.”).

11 The procedural history in this matter is significant in that it entails patterns of delays,
12 inefficient case management and the Court’s multiple accommodations to allow for the fair
13 administration of justice. Upon the Court’s denial of the third motion to continue trial and motion to
14 extend discovery deadlines, the Commonwealth filed the present Rule 48(a) Motion to Dismiss.
15 Therein, the Commonwealth cites the inability to present last-minute forensic evidence that was not
16 tendered during discovery and a challenge to witness competency as reasons for dismissal.
17 Defendant’s opposition argues that the Commonwealth’s motion was made in bad faith in order to
18 circumvent established discovery deadlines. In support of the opposition, the defense included an
19 email communication from Assistant Attorney General Weintraub, dated August 9, 2017, stating
20 her intent to file a voluntary dismissal without prejudice and then re-charge the case.

21 Here, Defendant’s concern for prosecutorial harassment is warranted. Upon review, the
22 Court found that Assistant Attorney General Weintraub filed a Rule 48(a) Motion to Dismiss in
23 another matter shortly after that court’s Order Denying Motion to Continue Trial. See *CNMI v.*
24 *Manglona*, Crim. No. 16-0157-CR (NMI Super. Ct., Dec. 14, 2016) (Order Denying Motion to
25 Continue Trial). On January 25, 2017, the Commonwealth re-filed charges against the defendant in

1 Criminal Case 17-0012. The present matter is substantially analogous to Assistant Attorney General
2 Weintraub's prerogative in *CNMI v. Manglona*, Criminal Case Nos. 16-0157-CR and 17-0012-CR.
3 Moreover, Assistant Attorney General Weintraub's email communication to the defense solidifies
4 her intent to dismiss then subsequently re-file charges against Defendant.

5 However, based on the above case law, the Court cannot draw the conclusion that the mere
6 intention to re-file charges necessarily equates to bad faith, especially when coupled with
7 insufficient evidence to proceed to trial. While the Court does not approve of Assistant Attorney
8 General Weintraub's waste of Commonwealth resources, dilatory tactics, or attempts to circumvent
9 established Court Orders due to the lack of diligence and case management, the Court finds
10 sanctions to be an appropriate deterrent against prosecutorial harassment and lack of diligence in
11 this particular matter. *See Matsunaga v. Matsunaga*, 2001 MP 11 ¶ 19; *see also Atalig v.*
12 *Commonwealth Superior Court*, 2008 MP 19 ¶ 18.

13 **B. Dismissal Pursuant to Rule 48(b)**

14 Rule 48(b) of the Commonwealth Rules of Criminal Procedure (Rule 48(b)”) states: “if
15 there is unnecessary delay in filing an information against a defendant who has been held to answer,
16 or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the
17 information or complaint.” NMI R. Crim. P. 48(b).

18 The Court finds Defendant's Motion Under Rule 48(b) to Dismiss with Prejudice misplaced.
19 *See United States v. Hayden*, 860 F.2d. 1483, 1485 (9th Cir. 1988) (“Rule 48(b) protects against
20 unreasonable preindictment and postindictment delays”). Additionally, Defendant fails to provide
21 any legal authority to support the argument that dismissing the case with prejudice is an appropriate
22 remedy for the matter at hand. Accordingly, the Court declines to rule on the Defendant's Motion
23 Under Rule 48(b) to Dismiss with Prejudice.

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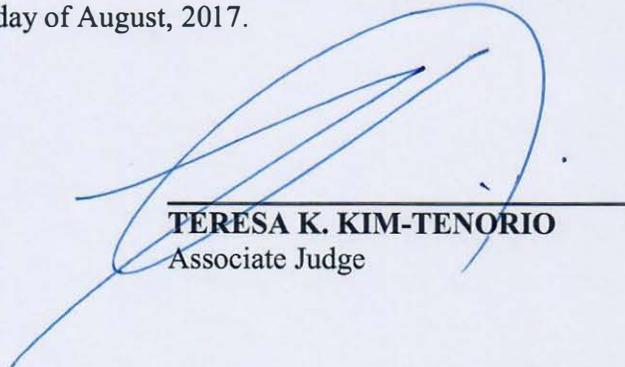
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V. CONCLUSION

Based on above, the Commonwealth's Rule 48(a) Motion to Dismiss is hereby **GRANTED**. Accordingly, the charges against Defendant are dismissed without prejudice. The jury trial presently scheduled for September 11, 2017 at 9:00 a.m., as well as the Pretrial Conference scheduled for August 15, 2017 at 9:00 a.m., is hereby vacated.

Based on the matters adduced, Assistant Attorney General Weintraub is hereby ordered to appear in Court on August 29, 2017 at 9:00 a.m. in Courtroom 217A to show cause as to why she should not be sanctioned for the above-mentioned lack of diligence and dilatory tactics.

SO ORDERED this 15th day of August, 2017.



TERESA K. KIM-TENORIO
Associate Judge