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

10	)	Criminal Case No. 93-132
11	)	
12	)	
13	)	<b>DECISION AND ORDER</b>
14	)	<b>DENYING MOTION</b>
15	)	<b>TO DISMISS</b>
16	)	
17	)	

COMMONWAEALTH OF THE NORTHERN  
MARIANA ISLANDS,  
Plaintiff,  
v.  
NANCY RUBIDIZO.  
Defendant.

This matter came before the Court on August 16, 1994, on Defendant's motion to dismiss on the grounds that the Government violated her right to a speedy trial. Defendant claims that the Government has violated her right to a speedy trial under: a) the Sixth Amendment of the U.S. Constitution, Article 1, § 4(d) of the Commonwealth Constitution, and Rule 48(b) of the Commonwealth Rules of Criminal Procedure of this Court; and, b) the due process guarantees of the Fifth Amendment of the U.S. Constitution and Article I, § 5 of the Commonwealth Constitution. The Government opposes the motion.

**FOR PUBLICATION**

1 I. FACTS

2 On August 12, 1993, the Government filed a criminal  
3 information, charging Defendant with two counts of prostitution in  
4 violation of Public Law 8-14, § 4. On the same day, a warrant was  
5 issued and executed for her arrest. On August 13, 1993, Defendant  
6 was brought before the court for a bail hearing. Defendant was  
7 released to a third party, and ordered, among other things, not to  
8 leave Saipan absent court permission.

9 On September 20, 1993, Defendant filed a Motion to Dismiss  
10 Count II, alleging a defect in the affidavit of probable cause  
11 supporting the information. On October 13, 1993, the motion was  
12 withdrawn by Defendant pursuant to a stipulation between the  
13 parties.

14 Initially, the case was scheduled to be tried on November 20,  
15 1993. At Defendant's request it was removed from the trial  
16 calendar pending the disposition of a motion, in which Defendant  
17 joined, testing the constitutionality of the newly enacted  
18 prostitution statute. See Commonwealth v. Liarta, Crim. Case Nos.  
19 93-133, 93-125, 93-126, 93-127, 93-128, 93-129, 93-131, 93-132,  
20 93-155 (Super. Ct., Jan. 20, 1994). On January 20, 1993, the Court  
21 held that the prostitution statute was constitutional.

22 On May 31, 1994, four and a half months later, Defendant  
23 filed the instant motion. No trial date has been set. Defendant  
24 contends that she has been deprived of her right to a speedy  
25 trial. First, she argues that the delay is presumptively  
26 prejudicial to her defense. Second, she argues that she has been  
27 vigilant in asserting her rights. Finally, she argues that she has  
28 been prejudiced by the travel restriction contained in her bail

1 order. Defendant's Memorandum at 3, 4.

2  
3 **II. ISSUES**

4 The Court will consider whether a delay of nearly seven  
5 months violates:

6 A. Defendant's right to a speedy trial pursuant to the  
7 Sixth Amendment to the United States Constitution,  
8 Article I, § 4(d) of the Commonwealth Constitution, and  
9 Rule 48(b) of the Rules of Criminal Procedure of this  
10 Court.

11 B. Defendant's right to a speedy trial under the guarantees  
12 of due process pursuant to the Fifth Amendment of the  
13 U.S. Constitution, and Article I, § 5 of the  
14 Commonwealth Constitution.

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16 **III. ANALYSIS**

17 **A. THE RIGHT TO A SPEEDY TRIAL UNDER THE SIXTH**  
18 **AMENDMENT, ARTICLE I, § 4(d), AND RULE 48(b)**

19 The Sixth Amendment to the United States Constitution<sup>1/</sup>,  
20 Article I, § 4(d) of the Commonwealth Constitution, and Rule 48(b)  
21 of the Rules of Criminal Procedure of this Court protect a  
22 defendant's right to a speedy trial. The right attaches once an  
23 individual is accused, either through formal indictment,  
24 information, or arrest. *Commonwealth v. Flores*, Crim. Case No.  
25 92-197 (Super. Ct., Mar. 22, 1993) (citing *Commonwealth v. Aquino*,  
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27 <sup>1/</sup> Article V, § 501(a) of the *Covenant to Establish a*  
28 *Commonwealth of the Northern Mariana Islands in Political Union*  
*with the United States of America* extends the protection of the  
Sixth Amendment to the Commonwealth of the Northern Mariana  
Islands.

1 Crim. Case No. 90-127, slip op. at 3 (Apr. 24, 1991)); *U.S. v.*  
2 *Marion*, 92 S.Ct. 455, 463 (1971); Wright, Federal Practice and  
3 Procedure: Criminal 2d § 814.

4 The guarantee to a speedy trial is intended to minimize: 1)  
5 deprivation of liberty while a defendant is awaiting trial and is  
6 either incarcerated or out on bail; 2) anxiety and disruption of  
7 life due to unresolved criminal charges; and, most importantly, 3)  
8 impairment of the accused's ability to present an effective  
9 defense. *U.S. v. McDonald*, 102 S.Ct. 1497 (1982); *Barker v. Wingo*,  
10 92 S.Ct. 2193 (1972).

11 In *Barker v. Wingo*, the Court enunciated a four-part test to  
12 determine whether the right to a speedy trial has been denied. The  
13 same test is used regardless of whether the speedy trial right is  
14 asserted under the Sixth Amendment, the Commonwealth Constitution,  
15 or Rule 48(b).<sup>2/</sup> The test examines the following: 1) the length  
16 of the delay; 2) the reason for the delay; 3) the defendant's  
17 assertion of the right; and, 4) the prejudice to the defendant.  
18 *Id.*; *U.S. v. Nance*, 666 F.2d 353 (9th Cir. 1982), cert. denied,  
19 102 S.Ct. 1776; *U.S. v. Saunders*, 641 F.2d 658 (9th Cir. 1980)  
20 cert. denied, 101 S.Ct 3155 (1981); *Flores*, *supra*; *Aquino*, *supra*.  
21 Standing alone, no one of these factors is dispositive. Rather,  
22 they are inter-related and must be considered together, along with  
23 other circumstances relevant to the particular case. *Barker*, *supra*  
24 at 2193.

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26 <sup>2/</sup> "In determining whether there has been unnecessary delay  
27 [under Rule 48(b)] the courts use the same process of balancing  
28 the relevant factors as is used in a speedy trial claim" Wright,  
Federal Practice and Procedure: Criminal 2d §814. In *Barker v.*  
*Wingo*, *id.*, the Court was reviewing a claim under the Sixth  
Amendment.

1            1 The Lensth of the Delay

2            The Court in Barker established that "[u]ntil there is some  
3 delay which is presumptively prejudicial, there is no necessity  
4 for inquiry into the other factors that go into the balance". Id.  
5 at 2192. Although there is no bright 'line test to establish the  
6 amount of delay which is "presumptively prejudicial", courts  
7 generally require a minimum of five or six months.<sup>3/</sup> Id.; United  
8 States v. Nance, 666 F.2d 353 (9th Cir. 1982) (complete Barker  
9 inquiry unwarranted, as delay less than six months); United States  
10 v. Rich, 589 F.2d 1025 (10th Cir. 1972); see, United States v.  
11 Diaz-Alvarado, 587 F.2d 1002, 1005 (9th Cir. 1978), cert. denied,  
12 99 S.Ct. 1261 (1979).

13            Under the Speedy Trial Act, 18 U.S. C. A. § 3161 (1993) ("the  
14 Federal Act"), federal criminal trials must commence within  
15 seventy days of the accusation of the defendant. The Federal Act  
16 pertains to federal cases only, and is therefore not controlling  
17 here. However, the Federal Act is instructive, since its  
18 requirements are considered more stringent than the Sixth  
19 Amendment's. Thus, "it will be an unusual case in which the time  
20 limits of the Speedy Trial Act have been met but the Sixth  
21 Amendment right to speedy trial has been violated." Nance, supra  
22 at 354. Of significance to this case is § 3161 (h)(1)(f), which  
23 excludes "delay resulting from any pre-trial motion, from the  
24 filing of the motion through the conclusion of the hearing on, or  
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26            <sup>3/</sup> "Nevertheless, because of the imprecision of the right to  
27 speedy trial, the length of delay which will provoke such an  
28 inquiry is necessarily dependent upon the peculiar circumstances  
of the case. To take but one example, the delay that can be  
tolerated for an ordinary street crime is considerably less than  
for a serious, complex conspiracy charge." Id.

1 other prompt disposition of, such motion". See U.S. v. *Allsup*, 573  
2 F.2d 1141 (9th Cir. 1978); U.S. v. *Sandoval*, 990 F.2d 481, 485  
3 (9th Cir. 1993).

4 The instant case involves a delay of six months and nineteen  
5 days or 202 days. To arrive at this figure, the Court followed the  
6 guidelines set out by caselaw and § 3161 (h) (1) (f), excluding from  
7 the computation the periods during which motions were pending.  
8 Thus, from the overall period of 291 days, commencing with the  
9 Defendant's arrest until the filing of this motion, the Court  
10 subtracted eighty-nine days.<sup>4/</sup> These delays were caused by  
11 Defendant and were clearly justified under caselaw and § 3161  
12 (h) (1) (f) of the Speedy Trial Act.

13 Given that the delay here is almost seven months, it  
14 qualifies as presumptively prejudicial and warrants a balancing of  
15 the other Barker factors.

## 16 17 2 The Reason for the Delay

18 The analysis of each Barker factor necessarily runs into the  
19 analysis of the others. Accordingly, courts consider the length of  
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21 <sup>4/</sup> The Court subtracted the twenty-three day period, from  
22 September 20, 1993 until October 13, 1993, during the pendency of  
23 Defendant's Motion to Dismiss for defective affidavit of probable  
cause; and, the sixty-six day period, from November 15, 1993 until  
January 20, 1994, during the pendency of Defendant's statutory  
challenge.

24 Defendant anticipated that a more lax formula would be used,  
25 claiming that the delay here is substantial, whether "it be  
26 measured from the date of Defendant's arrest or from the date of  
27 **Judge Taylor's decision [on the statutory challenge]."** Defendant's  
28 Memorandum, at 2. (emphasis added). While it may have been proper  
to use this formula, it would have resulted in a delay of less  
than five months, which would have precluded a balancing under  
Barker, as it is not "presumptively prejudicial". Nance, supra. at  
360-361, citing Barker, supra. at 2192; Rich, supra; see, Diaz-  
Alvarado, supra at 1005.

1 the delay in light of the government's reason for the delay.  
2 Courts assign great weight to delay intentionally caused by the  
3 government to weaken the defendant's case, lesser weight to delay  
4 negligently caused, or caused by a backlog of cases, and, no  
5 weight to justified delay." Barker, supra at 2192.

6 In the case at bar, the delay resulted largely from a failure  
7 to re-enter the case on the trial calendar. Defendant does not  
8 suggest that this was intentional.<sup>6/</sup> Presumably, it was an  
9 accidental oversight. Likewise, the remainder of the delay was  
10 unintentional; it was apparently caused by court congestion.  
11 Nevertheless, it is the government's responsibility to prosecute.  
12 Therefore, this prong of the Barker analysis weighs slightly in  
13 favor of Defendant.

### 14 3 Defendant's Assertion of the Right

15 Whether and how a defendant asserts the right to a speedy  
16 trial is highly significant. "The more serious the deprivation the  
17 more likely a defendant is to complain." Id. Thus, "failure to  
18 assert the right will make it difficult for a defendant to prove  
19 that he was denied a speedy trial." Id. at 2193. Further, the  
20 speedy trial analysis does not ask whether the defendant asserted  
21 his/her rights, generally. Rather, it asks whether the defendant  
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24 <sup>5/</sup> An example is delay caused by attempts to locate a missing  
25 witness.

26 <sup>6/</sup> Rather, Defendant speculates that the delay was caused by  
27 the Government having "lost interest in cases of this sort"  
28 Defendant's Memoranda at 3. This theory relies on the claim that  
"there have been no further roundups of alleged prostitutes." Id.  
Defendant's reliance is misplaced. Only the Government's action,  
or inaction, toward this defendant is relevant to the issue  
presented.

1 asserted his/her right to a speedy trial, specifically.

2 In this case, Defendant claims to have "been vigilant in  
3 guarding her rights, as is evident from the fact that this is the  
4 third time that Defendant has invoked a procedural challenge to  
5 the prosecution." *Defendant's Memorandum at 3*. However, Defendant  
6 does not claim to have asserted her **specific** right to a speedy  
7 trial, nor do her prior two challenges address this issue. The  
8 first challenge sought dismissal of Count II based on an  
9 insufficient affidavit of probable cause supporting the  
10 information. The second challenge concerned Defendant's joinder in  
11 a constitutional challenge of the prostitution statute.<sup>2/</sup> Most  
12 important, however, is the fact that Defendant failed to assert  
13 her right in the most obvious way possible: by attempting to have  
14 the case re-entered onto the trial calender. This could have been  
15 achieved by simply filing a motion to set this matter for trial.

16 Thus, since Defendant failed to assert her right to a speedy  
17 trial, this prong of the **Barker** analysis weighs heavily against  
18 Defendant.

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20 **4 The Prejudice to the Defendant**

21 Defendant cites *Arizona v. Moore*, 94 S.Ct. 188 (1973), in  
22 support of her assertion that she does not have to make an  
23 affirmative demonstration of prejudice. *Defendant's Memorandum at*  
24 *3*. This argument is misleading. The Court in *Arizona* did not hold  
25 that a defendant does not have to prove prejudice. Rather, the

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28 <sup>2/</sup> Defendant erroneously categorized this as a procedural  
challenge; it is actually a substantive challenge.



1 Court merely reaffirmed its earlier instruction that no one factor  
2 is dispositive to the determination of a speedy trial claim.  
3 Arizona v. Moore, supra at 189, (citing Barker, supra at 2193).  
4 Thus, in **certain instances** it is possible to find a denial of the  
5 right to speedy trial without demonstrating prejudice. However,  
6 this is quite rare. The vast majority of cases require an  
7 affirmative showing. *U.S. v. Beamon*, 992 F.2d 1009, 1015 (9th  
8 Cir. 1993) (defendant must demonstrate actual prejudice; impaired  
9 plea bargaining position does not constitute prejudice). Nance,  
10 supra; *Creekmore v. Dist. Ct. of 8th Judicial District*, 745 F.2d  
11 1236 (9th Cir. 1984); *U.S. v. Penland*, 429 F.2d 9 (9th Cir.  
12 1970)(bare allegations of prejudice through Defendant's memory  
13 loss insufficient); *Mull v. U.S.*, 402 F.2d 571 (9th Cir. 1968),  
14 cert. denied, 89 S.Ct. 917 (1970). An affirmative showing of  
15 prejudice is unnecessary only where other circumstances weigh so  
16 severely against as to render the delay shocking on its face.  
17 Arizona, supra (prejudice presumed where defendant suffered a  
18 delay of nearly three years and repeatedly asserted his right to  
19 a speedy trial); *U.S. v. Beckom*, 324 F.Supp. 253 (D.C.N.Y.  
20 1971)(prejudice presumed where trial more than twelve years after  
21 alleged criminal act and five years after indictment).

22 Here, Defendant does not specify what type of prejudice  
23 should be presumed. She may be claiming prejudice through memory  
24 loss, as she quotes Justice Powell's statement that "there is also  
25 prejudice if defense witnesses are unable to recall accurately  
26 events of the distant past. Loss of memory however, is not always  
27 reflected in the record because what has been forgotten rarely can  
28 be shown." Defendant's Memorandum at 3,4 (citing Barker, supra).

1 From this statement, it appears that Defendant wishes this Court  
2 to conclude that such allegations do not have to be substantiated.  
3 To the contrary, Justice Powell was merely advising courts to be  
4 sensitive to the difficulty in determining prejudice of this  
5 nature, and to recognize that certain delay can be prejudicial on  
6 its face.

7 Further, even if this Court found it appropriate to presume  
8 prejudice, which it does not, it would need to have some  
9 indication of the severity of the prejudice sustained, as a speedy  
10 trial claim involves a balancing of the relevant factors. Here,  
11 Defendant has given the Court no guidance in this regard. The  
12 Court is unsure even of the type of prejudice alleged. If we  
13 assume allegations of memory loss, essential information, such as  
14 the identity of the witness(es) and the estimated relevance of the  
15 testimony is lacking.

16 In sum, neither the length of the delay, nor the reason for  
17 the delay weigh so heavily against the Government as to justify a  
18 presumption of prejudice. In addition, Defendant's failure to  
19 assert her right by at least filing a motion to set a trial date  
20 belies her claim to prejudice. The Court further rejects  
21 Defendant's argument that she was prejudiced by the restriction in  
22 her bail order prohibiting travel off of Saipan absent court  
23 approval. Bail orders are regularly modified upon a showing of  
24 good cause." Yet, the record reflects that Defendant made no

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26 <sup>2</sup>/ For example, in *C.N.M.I. v. Wong v. Jun-Guo Dong*, Crim.  
27 Case No. 93-122F & 93-121 (consolidated), another case brought  
28 under the prostitution statute, the Court granted the defendants'  
motions to remove the travel restriction in their bail orders  
based on uncorroborated assertions that they wished to visit China  
to see their families during the Chinese New Year and to attend to  
(continued...)

1 attempt at modification. Accordingly, the Court can only assume  
2 that Defendant had no wish to leave Saipan and was not prejudiced  
3 by the order. Thus, this last prong of the Barker analysis weighs  
4 against Defendant.

5 After weighing the four factors, the Court finds that the  
6 Government did not violate Defendant's speedy trial right as  
7 guaranteed by the Sixth Amendment of the U.S. Constitution,  
8 Article 1 § 4(d) of the Commonwealth Constitution, and Rule 48(b)  
9 of the Rules of Criminal Procedure of this Court.

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11 **B. THE RIGHT TO A SPEEDY TRIAL UNDER GUARANTEES OF DUE PROCESS**

12 The due process clause of the Fifth Amendment to the U.S.  
13 Constitution and the due process guarantee contained in Article I,  
14 § 5 of the Commonwealth Constitution protect the right to a speedy  
15 trial, **only as it relates to pre-indictment or pre-charge delay.**  
16 Moreover, substantial prejudice to the defense must be proven in  
17 all instances. Commonwealth v. *Flores*, Crim. Case No. 92-197  
18 (Super. Ct., Mar. 22, 1993); Wright, Federal Practice and  
19 Procedure; Criminal **2d** § 813. This guarantee is distinguished from  
20 that of the Sixth Amendment, Article I, § 4(d), and Rule 48(b),  
21 *infra.*, as the latter does not attach until a defendant is charged  
22 either by indictment, information, or arrest.

23 The Court finds Defendant's due process argument to be  
24 meritless. There was no pre-charge delay here. Defendant was  
25 charged on the same day that she was arrested, August 12, 1994.

26  
27 \_\_\_\_\_  
28 §/ (...continued)  
business interests.

1 The following day she was brought before the Court for a bail  
2 hearing. In addition, there is no suggestion of Government delay  
3 in the arrest of Defendant. Frivolous arguments such as this tries  
4 the patience of the Court.

5 Therefore, the Court DENIES Defendant's speedy trial claim  
6 made under guarantees of due process.

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8 **IV. CONCLUSION**

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10 For the foregoing reasons, Defendant's motion to dismiss is  
11 **DENIED.**

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13 So ORDERED this 15<sup>th</sup> day of December, 1994.

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16 ALEXANDRO C. CASTRO, Presiding Judge  
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