IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

	)	**CASE NO.: SX-08-CR-97**
PEOPLE OF THE VIRGIN ISLANDS,	)	**CHARGE(S): UNAUTHORIZED POSSESION OF A FIREARM; POSSESION OR SALE OF AMMUNITION; POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE; ASSAULT IN THE THIRD DEGREE, AGGRAVATED ASSAULT & BATTERY**
Plaintiff,	)	
VS.	)	
JUDE BREWSTER,	)	
Defendant.	)	
	)	**JURY TRIAL DEMANDED**

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant's Motion to Dismiss filed on July 17, 2013. For the following reasons, Defendant's motion will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

On or around February 24, 2008, the victim, Keisha Hughes, was allegedly assaulted in a domestic violence dispute while at her boyfriend, Jude Brewster's house in Peter's Rest, St. Croix. The Virgin Islands Police Department responded to the scene and initiated an investigation of the reported assault. When they arrived at the scene, Ms. Hughes was naked. They escorted her into the house to get some clothes. While the police were in the house, Ms. Hughes showed them contraband (drugs) in the microwave and in an oats container. She also told them that Brewster had thrown a gun and a bag of marijuana outside of the house. The police searched outside of the property and located two guns in the trash bin approximately forty to fifty feet from the road and twenty feet from the house. They also located a bag filled with marijuana over the fence in the neighbor's adjacent property. The police retrieved these items as evidence. Defendant was then arrested on that same date.

Defendant appeared before the Superior Court on February 25, 2008 for an advice of rights hearing. Defendant was appointed a Public Defender. On February 26, 2008, a bail hearing was held and Defendant was released to a Third-Party Custodian and placed on house arrest.

On March 11, 2008, the People filed an Information charging Defendant with Unauthorized Possession of a Firearm, 14 V.I.C. § 2253(a), Possession or Sale of Ammunition, 14 V.I.C. §2256(a), Possession of a Controlled Substance with Intent to Distribute, 19 V.I.C. § 604(a)(1); Assault in the Third Degree/ Domestic Violence, 14 V.I.C. § 297(2) and 16 V.I.C. § 91(b)(1) & (2), and Aggravated Assault & Battery/ Domestic Violence, 14 V .I.C. § 298(5) and 16 V.I.C. § 91(b)(1) & (2). On March 12, 2008, Defendant appeared for arraignment. Defendant entered a plea of not guilty and requested a speedy jury trial. The request for jury trial was granted and the case was scheduled for calendar call on May 19, 2008 and trial for the period of June 2, 2008 – June 27, 2008.

At Calendar Call on May 19, 2008 Defendant disputed the People's request to obtain buccal samples from him. The Court rescheduled Calendar Call for June 30, 2008. Jury selection and trial were scheduled for the period of July 14, 2008 – August 8, 2008. On June 24, 2008, a Motion to be Relieved as Defendant's Counsel was granted by the Court due to a conflict of interest between the Public Defender and the victim's family. The current defense counsel was appointed to represent Brewster on June 25, 2008. The June 30, 2008 Calendar Call was then continued to September 22, 2008 to give defense counsel time to become familiar with the case. Jury selection and trial were scheduled for the period of October 6, 2008 – October 31, 2008.

At Calendar Call on September 22, 2008, the Court was informed by Defendant that there were outstanding discovery issues. The case was scheduled for December 15, 2008 and trial for the period of December 29, 2008 – January 23, 2009. On December 15, 2008, the parties requested the matter be set for disposition and was scheduled for December 19, 2008. On December 19, 2008, the matter was scheduled for Calendar Call on January 26, 2009.

Defendant filed a Motion to Suppress on or about December 30, 2008. At the January 26, 2009 Calendar Call, Defendant stated that he was ready for trial but that the suppression motion was still pending. The People asked for a copy of the motion so they could respond. Defendant filed a Revised Motion to Suppress on or about February 23, 2010. A suppression hearing was scheduled for April 27, 2009 and was then rescheduled for February 24, 2010. Defendant moved to continue the suppression hearing due to conflicts in defense counsel's schedule with other cases. The suppression hearing was continued to May 5, 2010, at which time the People moved to continue the hearing. A suppression hearing was held May 12, 2010. During the suppression hearing, the Court sought more information regarding the ownership of the trash bin. The Defendant filed the affidavit of Corene Lewis and written lease agreement on May 19, 2010. The Defendant also filed a Motion for Ruling on Motion to Suppress on December 10, 2010. Defendant filed his Second Motion for Ruling on Motion to Suppress on December 12, 2012.

Since the People have not responded to Defendant's Motion to Dismiss as of the date of this Opinion, their response is deemed waived.

II. DISCUSSION

Defendant's Motion to Dismiss the indictment for speedy trial violations will be examined in the context of the *Barker v. Wingo* factors to determine whether Defendant's Sixth Amendment right to a speedy trial has been violated by these proceedings.

A. DEFENDANT'S SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL HAS NOT BEEN VIOLATED BASED ON THE *BARKER V. WINGO* FACTORS.

The right to a speedy trial under the Sixth Amendment to the United States Constitution is applicable to the Virgin Islands Code through the Revised Organic Act of 1954.[1] 48 U.S.C. § 1561; Revised Organic Act of 1954, § 3. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to a speedy and public trial . . . ." Accordingly, the Court will evaluate Defendant's Motion to Dismiss in the context of the *Barker* factors.

The right to a speedy trial is more vague than other procedural rights. *Id.* at 521. There is no definitive time period for ascertaining when the right to a speedy trial has been denied. *Id.* Consequently, the relative nature of the right necessitates that each case be evaluated in the context of the totality of the particular circumstances of that case. *Id.* at 521-22. In *Barker*, the Supreme Court provided four factors courts should assess when determining whether a defendant has been denied the right to a speedy trial: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *Id.* at 530. "None of the factors is either a necessary or sufficient condition, and the factors must be considered together with such other circumstances as may be relevant." *U.S. v. Battis*, 589 F.3d 673, 678 (3d Cir. 2009) (quoting *Barker*, 407 U.S. at 533) (internal quotations omitted); *see also U.S. v. Dreyer*, 533 F.2d 112, 117 (3d Cir. 1976) (finding speedy trial violation based on a totality of the circumstances and application of the *Barker* factors). Each of these factors will be addressed based on the particular circumstances of this case and

---

[1] The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1994), *reprinted in* V.I. Code Ann., Historical Documents, Organic Acts, and U.S. Constitution at 73-177 (1995 & Supp. 1997) (preceding V.I. Code Ann. tit. 1).

attributed to either the government or the defendant. If the defendant has been deprived of the right to a speedy trial under the *Barker* factors, the only possible remedy is dismissal of the indictment with prejudice. *Barker*, 407 U.S. at 522; *Strunk v. U.S.*, 412 U.S. 434 (1973).

1. Length of Delay

The length of delay is measured from the earlier period of the date of an arrest or an indictment. *Battis*, 589 F.3d at 678. The length of delay is less a factor than it is a triggering mechanism that indicates whether a court should weigh the three remaining *Barker* factors. *Doggett v. U.S.*, 505 U.S. 647, 651-52 (1992). The Third Circuit has held that a post accusation delay is presumptively prejudicial and triggers evaluation of the remaining three factors if it exceeds fourteen months, and other circuits have held that a delay that exceeds one year triggers evaluation of the three remaining factors. *Id.* at 652 n.1; *Battis*, 589 F.3d at 678.

The Information charging Defendant was filed on March 11, 2008. Defendant was arrested on February 24, 2008. Five years and five months have passed since the date of Defendant's arrest and indictment without a trial. The length of delay in this case has undoubtedly crossed the threshold of being presumptively prejudicial, and the three remaining *Barker* factors must be evaluated to determine whether Defendant's right to a speedy trial has been violated by the delay.

2. Reason for the Delay

The second *Barker* factor is the reason the government assigns to the delay. *Barker*, 407 U.S. at 531. The court should assign different weights to different reasons. *Id.* For example, deliberate attempts to delay trial should be weighed heavily against the government, whereas valid reasons might include a reasonable delay due to a missing witness. *Id.* More neutral reasons, such as negligence or overcrowded courts, are weighed less heavily but are still considered against the government since the government bears the ultimate responsibility for such circumstances. *Id.* In evaluating this factor, the amount of delay caused by the defendant is subtracted from the amount of delay caused by the government. *See Battis*, 589 F.3d at 680; *Vermont v. Brillion*, 129 S. Ct. 1283, 1290 (2009) (providing that "delay caused by the defense weighs against the defendant . . . ."). Defendant asserts that he has not been the cause of the delay, and the government bears sole responsibility for the delay. The government has not advanced any reason to justify the delay. The relevant period for the delay in this case is the five years and five months between the date of Defendant's arrest and the date of this order, since Defendant's trial has still not started.

In the early stages of the case, between the date of Defendant's arrest on February 24, 2008 and June 16, 2008, Defendant's prior appointed attorney was relieved due to conflicts of interest. On June 25, 2008, a second defense attorney was appointed and began representing Defendant. However, the case came before the Court for calendar call and trial dates were set on three separate occasions between May 19, 2008 and September 22, 2008, and Defendant requested a continuance all three times. Furthermore, after Defendant filed his Motion to Suppress, he requested that the suppression hearing be continued. This resulted in another delay of approximately three months. The Suppression hearing was not held until May 12, 2010. The Court finds that the nearly seven-month delay between the date of Defendant's arrest and September 22, 2009 and three month delay regarding the suppression hearing is attributable to Defendant.

The delay between the January 26, 2009 Calendar Call and February 24, 2010, when the suppression hearing was first scheduled is attributable to the Court. This thirteen-month delay is attributable to the Court, and is weighed against the government, though not as heavily. *Barker*, 407 U.S. at 531.

The remaining period between the time when the suppression hearing was held and the date that this order was written is also attributable to the Court. That lapse lasted approximately 3 years and 3 months.

The Court finds that Defendant bears responsibility for approximately ten months of the five year and five month delay while four years and four months are attributable to the government. The reasons for the delay that are attributable to the government fall into the category of "more neutral reasons" created in *Barker*, as the delays are not due to any deliberate efforts to delay the trial. *Id.* at 531. These delays are still weighed against the government, though "less heavily." *Id.* Therefore, the second *Barker* factor weighs against the government.

3. Defendant's Assertion of the Right

The third *Barker* factor is if, how, and when the defendant asserted the right to a speedy trial. The defendant's assertion of the speedy trial right is entitled to strong evidentiary weight in determining whether the defendant is being denied the right. *Id.* at 531. Asserting the right to trial provides evidence that the defendant is being deprived the right because the more serious the deprivation is, the more likely the defendant is to object. *Battis*, 589 F.3d at 680. When a defendant is represented by counsel, a defendant can show he has asserted the right to a speedy trial by identifying a motion containing a formal assertion of the right at a time when asserting the right had some reasonable chance of success. *Id.* at 681.

Defendant requested a speedy jury trial at the arraignment on March 12, 2008. Defendant formally asserted his right to a speedy trial in the Motion to Dismiss dated July 17, 2013. Furthermore, Defendant filed two motions requesting rulings on the motion to suppress, which implicitly invoked his speedy trial right. These motions were filed December

10, 2010 and December 12, 2012. Therefore, the third *Barker* factor also weighs in Defendant's favor.

4. Prejudice to the Defendant

a. Actual Prejudice

The fourth and most critical *Barker* factor is the prejudice to the defendant from the delay. *Wells v. Petsock*, 941 F.2d 253, 258 (3d Cir. 1991). Lengthy delays may significantly impair the defendant's ability to defend himself. *Barker*, 407 U.S. at 526. While a finding of prejudice is not alone enough to find a violation of the Sixth Amendment, it is one of the relevant factors in determining whether a violation has occurred and its importance increases with the length of the delay. *Doggett*, 505 U.S. at 655. Prejudice is assessed in the light of three interests of the defendant: (1) to prevent oppressive pretrial incarceration, (2) to minimize anxiety and concern of the accused, and (3) to limit the possibility that the defense will be impaired. *Id.* at 532. A defendant can establish specific prejudice by showing that these interests have been impaired by the delay. *Id.* Of these three factors, the most serious factor is the last, because "the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* The burden of proving prejudice rests on the defendant. *Hakeem v. Beyer*, 990 F.2d 750, 760 (3d Cir. 1986).

Here, Defendant has failed to meet his burden with respect to all three of the interests. Defendant's motion to dismiss highlights that his house arrest has been difficult for him as he cannot travel and has no social life. However, "a certain amount of anxiety and other forms of personal prejudice to the accused is inevitable in a criminal case." *U.S. v. Deyer*, 533 F.2d 112, 116 (3d Cir. 1976). There is no evidence of physical manifestations of distress such as loss of sleep, loss of appetite, or emotional stress. *See Burkett v. Fulcomer*, 951 F.2d 1431, 1444 (3d Cir. 1991). Unfortunately, boredom and inactivity are not uncommon among the those confined to house arrest. Significantly, defendants placed under house arrest are not considered to suffer the same oppressive pretrial detention conditions that incarcerated defendants endure, making it more difficult for them to claim Sixth Amendment violations. *Jakupovic v. State*, 695 S.E. 2d 247 (Ga. 2010). They are usually not in as much danger as incarcerated defendants, can somewhat abide they their own schedules and rules, can have guests, and enjoy the comforts of home. Defendant has not shown any evidence of the specific psychological disorders suffered as a result of the delay. *See id.*; *Gov't of the V.I. v. Pemberton*, 813 F.2d 626, 630 (3d Cir. 1987). Defendant has not demonstrated any unusual burden of anxiety as a result of the delay.

Importantly, Defendant also has not shown that the delay has prejudiced or impaired his ability to adequately prepare his defense. Defendant has not alleged that the delay has led to the unavailability of witnesses or eroded the memories of the parties involved. *See Carty v. People*, S. Ct. Crim. No. 2009-0034, 2012 WL 653900, at *12 (V.I. 2012). Defendant does claim that his house arrest has impaired his ability to obtain employment to pay for his legal representation. However, Defendant admits to holding a job during house arrest. Defendant's financial condition furthermore does not impede him having counsel. An Order Appointing Counsel was signed June 25, 2008, and since that time Defendant has been diligently represented by his court-appointed attorney. Defendant does not claim or provide any evidence that his ability to prepare a defense has been impaired by his reliance on court-appointed counsel due to the inability to obtain employment. Defendant has not shown that his ability to prepare an adequate defense was in any way prejudiced by the pre-trial delay.

The final consideration in evaluating prejudice to the defendant is oppressive pretrial incarceration. In this case, Defendant has been on house arrest while awaiting trial. He has been allowed to move to and from work and can have visitors. While house arrest is certainly inconvenient and a punishment, it cannot be considered as oppressive as incarceration. Defendant can thus not allege that his conditions are oppressive.

Defendant has not shown actual prejudice in the form of oppressive pretrial incarceration, particularized anxiety or concern, or impairment of the defense. The Court finds that Defendant has not shown actual prejudice as a result of the pretrial delay.

b. Presumption of Prejudice

Our inquiry into the fourth *Barker* factor does not end with a consideration of only the three interests discussed above. Our jurisprudence provides that length of time alone can be sufficient for a presumption of prejudice even where there is no sign of actual prejudice based on the three interests evaluated in Section 4a above. *See Doggett*, 505 U.S. at 655-56; *Hakeem*, 990 F.2d at 763-64. In the case *U.S. v. Battis*, 589 F.3d 673, the Third Circuit Court of Appeals found that prejudice was presumed on a similar set of facts. In *Battis*, the defendant was indicted on charges including attempted homicide, aggravated assault, and firearms violations. *Battis*, 589 F.3d at 675-76. The defendant was incarcerated and held for forty-five months while he was prosecuted in state court before his trial in federal court. *Id.* The Third Circuit Court of Appeals found that the length of delay attributable to the government was approximately thirty-five months. *Id.* at 680. In evaluating the final *Barker* factor, prejudice to the defendant, the court discussed what period of time is sufficient to find presumptive prejudice under *Doggett*, 505 U.S. 655, and *Hakeem*, 990 F.2d 750.

The court stated:

> We now hold that prejudice will be presumed when there is a forty-five-month delay in bringing a defendant to trial, even when it could be argued that only thirty-five months of that delay is attributable to the Government. After such a long delay, witnesses become harder to locate and their memories inevitably fade. As *Doggett* recognized, the

> Government may attempt to rebut this presumption. However, here, as in *Doggett*, it has not affirmatively proved that the delay left Battis's ability to defend himself unimpaired.

Battis, 589 F.3d at 683.

The case before this Court presents similar factual circumstances. Here, the Defendant has been held on house arrest for over five years and five months — since February 24, 2008, the date of his arrest — awaiting trial on charges that include aggravated battery, assault in the third degree, firearms charges, and drug charges. The Court, in evaluating the second *Barker* factor, the reasons for the delay, has found that approximately four years and four months of the delay are attributable to the government and ten months — are attributable to Defendant. However, in *Battis*, thirty-five months of the delay were attributed to the government and only ten months were attributable to the defendant. *Id.* Like the *Battis* case, the reasons for the delay are more neutral reasons weighed less heavily against the government. *See Id.* at 680. The government could have mitigated the presumption of prejudice by showing that the delay left Defendant's ability to defend himself unimpaired, but the government has not filed a response to Defendant's motion to dismiss in this case. *Doggett*, 505 U.S. at 655-56, 658, n.4.

The Court is bound by Third Circuit precedent.[2] Although prejudice is presumed under *Battis* since there has been a five year and five month delay in bringing Defendant to

---

[2] In *People v. Simmonds*, St. 10-CR-F359, 2012 WL 2550630, at *3 (V.I. Super. 2012), Superior Court Judge Adam G. Christian presented a convincing argument that Third Circuit precedent remains binding on the Superior Court until the Third Circuit is divested of its discretionary appellate authority over Virgin Islands Supreme Court decisions:

> [T]he V.I. Supreme Court previously held that decisions of the Appellate Division and the Third Circuit which were handed down prior to January of 2007, when the V.I. Supreme Court commenced operations, are binding on this Court. . . . The language used by the V.I. Supreme

trial, Defendant has not shown any actual prejudice resulting from the delay. Most importantly, Defendant, who bears the burden of proving prejudice, has not shown any impairment of the defense, which is the only type of prejudice that "poses the threat of affecting the fairness and reliability of the defendant's trial." *Wells*, 941 F.2d at 258 (citing *U.S. v. Marion*, 404 U.S. 307, 320 (1971). Accordingly, the fourth *Barker* factor weighs in the government's favor.

III. CONCLUSION

A motion to dismiss for violation of the Sixth Amendment right to a speedy trial requires application of the *Barker* factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. Defendant has been on house arrest for five years and five months without trial, triggering evaluation of the remaining three factors. Factor two weighs against the government since approximately ten months of that delay are attributable to Defendant, and four years four months are attributable

---

> Court in *In re People* [51 V.I. 374 (2009)] suggests that decisions of the Appellate Division and the Third Circuit issued after January of 2007 are not binding on this Court.
>
> This interpretation is consistent with the 1984 and 1994 amendments to Section 23 of the Revised Organic Act, which mandate that the relationship between Virgin Islands territorial courts and the federal courts shall be the same as the relationships between state and federal courts. Importantly, decisions of federal courts of appeals on federal constitutional issues are not binding on state courts, but constitute persuasive authority.
>
> Thus, according to such general principles, it appears that the post–2007 decisions of the Third Circuit are not automatically binding on Virgin Islands Courts. However, in Section 23 of the Revised Organic Act, the United States Congress expressly vested the Third Circuit with the authority to retain some discretionary appellate authority over decisions of the V.I. Supreme Court for a period not to exceed fifteen (15) years. Therefore, until either the expiration of the statutory fifteen-year period, or an earlier congressional enactment divesting it of its discretionary appellate authority, the Third Circuit still has the authority to render mandatory authority for the Virgin Islands. Hence, I am required to apply the precedent of [the Third Circuit].

The Court finds Judge Christian's reasoning convincing, and thus will follow the Third Circuit precedent set by *Battis* even though *Battis* was decided in 2009, after the V.I. Supreme Court commenced operations. Additionally, the recent V.I. Supreme Court decision *Carty v. People*, which also evaluated the *Barker* factors in the context of an alleged Sixth Amendment speedy trial violation, quoted and cited *Battis* in the discussion of the first and third *Barker* factors, indicating that *Battis* is an appropriate source of law for the Sixth Amendment discussion.

to the government. Factor three weighs in favor of the Defendant since the Defendant formally asserted his Sixth Amendment right to a speedy trial in the motion to dismiss. In the Third Circuit, prejudice is presumed when there is a forty-five month delay in bringing a defendant to trial. However, Defendant has not shown any actual prejudice that has resulted from the pre-trial delay, especially as he is only on house arrest.

"We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Barker*, 407 U.S. at 532. Applying the *Barker* balancing test to this case, the Court finds that the circumstances, when evaluated as a whole, do not indicate that Defendant's Sixth Amendment right to a speedy trial has been violated by the delay in bringing him to trial. This is not a case where the government has engaged in "egregious persistence in failing to prosecute defendant," *Doggett*, 505 U.S. at 657; rather, the delay is attributable to numerous factors. Defendant's "Motion to Dismiss" shall be denied under separate Order of even date.

Dated: August 20, 2013

DARRYL DEAN DONOHUE, SR.
PRESIDING JUDGE

ATTEST:
VENETIA H. VELAZQUEZ, Esq.
Clerk of the Court

By: ______________
Court Clerk Supervisor
Date: 8/20/13