IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS, Plaintiff, vs. **JAMAL A. MORTON,** Defendant.	**Case No. ST-10-CR-164**

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant Jamal A. Morton's Motion To Dismiss Based On Speedy Trial Violation Pursuant to Federal Rule of Criminal Procedure 48(b) And The 6th Amendment, Motion To Dismiss For Due Process Violation, filed September 13, 2016 (the "Motion to Dismiss"). The People filed an opposition on November 14, 2016 (the "Opposition"), and the Court held a hearing on the matter on May 2, 2017. For the reasons set forth herein, Morton's motion to dismiss will be denied.

Relevant Background

The procedural history of this case is unquestionably long and tortured. See the Memorandum Opinion issued by this Court January 12, 2018, where the Court denied Morton's earlier motion to dismiss for speedy trial violation. Mem. Op. 5-13, Jan. 12, 2018.

Defendant Jamal A. Morton ("Morton")'s current motion alleges that the People of the Virgin Islands (the "People") have deliberately attempted to delay his case by preventing Morton's defense expert from accessing the ballistic evidence. Further, Morton alleges that he has been unable to properly prepare for trial as the Bureau of Corrections has inexplicably transferred him to various correctional facilities in the States and refused to return him to the Territory.[1] Morton now asks that the Court dismiss his case with prejudice for the People's actions violate his Sixth Amendment right to a speedy trial and his Fifth Amendment right to due process. At the hearing, Morton also asked the Court to take judicial notice of the testimony of Defendant's alibi witness - Michael Howsen – which the Court heard during the hearing on the earlier motion to dismiss.

Discussion

"A criminal defendant is guaranteed a speedy trial under the Sixth Amendment of the United States Constitution, which is applicable in the Virgin Islands pursuant to the Revised Organic Act of 1954." *Francis v. Virgin Islands*, 63 V.I. 724, 744, 2015 V.I. Supreme LEXIS 35.[2] In *Barker v. Wingo*, 407 U.S. 514, 530 (1972), the United States Supreme Court identified four factors a court should assess in determining whether a defendant has been deprived of their Sixth Amendment right to a speedy trial. As weighed by the Virgin Island Supreme Court, the four "*Barker* factors" are "(1) the length of delay; (2) the reason for the delay; (3) the

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[1] While this Motion was pending, Morton was returned to St. Thomas, Virgin Islands, in January 2017.

[2] Morton also references Federal Rule of Criminal Procedure 48. However, other than providing the rule itself, Morton does not state how it applies, or cite any relevant binding authority. Therefore, the Court will not address Morton's reference to Federal Rule of Criminal Procedure 48. *See In re Catalyst Litig.*, 2015 V.I. LEXIS 145, *3-6 n. 12 (V.I. Super. Ct. 2015) ("The Supreme Court of the Virgin Islands has established that in order for a motion to be properly before the court, parties must support their arguments by citing the proper legal authority, statute or rule").

defendant's assertion of his rights; and (4) and prejudice to the defendant." *Carty v. People of the V.I.*, 56 V.I. 345, 364, 2012 V.I. Supreme LEXIS 15. "The most important factor to evaluate is whether the defendant suffered prejudice from the delay." *Rivera v. People of the Virgin Islands*, 64 V.I. 540, 582, 2016 V.I. Supreme LEXIS 16.

(1) Length of Delay

"The length of delay is measured from either the date of arrest or the date a defendant is indicted, whichever is earlier." *People of the V.I. v. Hakim*, Case No. SX-09-CR-0435, 2014 V.I. LEXIS 67, at *8 (V.I. Super. Ct. 2014) The length of delay in bringing a defendant to trial "is a 'trigger' that, if found to be 'presumptively prejudicial,' requires a court to consider and weigh the remaining three *Barker* factors." *Brown v. People of the V.I.*, 55 V.I. 496, 503, 2011 V.I. Supreme LEXIS 13 (citing *Doggett v. United States*, 505 U.S. 647, 652-53 (1992)), *overruled in part on different grounds by Williams v. People of the Virgin Islands*, 56 V.I. 821, 832 n.8, 2012 V.I. Supreme LEXIS 54. With regards to a defendant arrested for murder, "a delay over 12 months is presumed to be sufficiently prejudicial to require evaluation of the three remaining factors." *Rivera*, 64 V.I. at 582.

Morton was arrested March 26, 2010 – nearly eight years ago – and has yet to go to trial. Thus, the delay easily passes the prejudicial threshold, thereby triggering the Court to consider and weigh the remaining three *Barker* factors.

(2) Reason for the Delay

Once the Court has determined a delay is sufficiently lengthy to trigger a speedy-trial analysis, the Court then determines which party is responsible for the delay and why. *Francis*, 63 V.I. at 748. "Delays attributed to the People weigh in favor of a defendant's speedy trial claim, while delays attributed to the defendant do not." *Rivera*, 64 V.I. at 582. "The reason for the delay impacts the weight given a particular delay." *Francis*, 63 V.I. at 748. For example, "[a] deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government . . . However, a more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered . . . ." *People of the V.I. v. Ilarraza*, 2013 V.I. LEXIS 70, at *9 (V.I. Super. Ct. Dec. 5, 2013) (internal quotations omitted) (citing *Barker*, 407 U.S. at 530).

A. Delay In Testing Ballistic Evidence.

Morton alleges the People deliberately attempted to delay his case by preventing Morton's defense expert, Gerald R. Styers, from accessing and testing the ballistic evidence.

The background is as follows: on May 21, 2015 Morton filed a Motion To Allow Inspection And Testing, where he asked for his ballistics expert Gerald Styers, who is not a resident of the Territory, to have access to the ballistics evidence to inspect and test it. The Motion necessarily created certain issues including chain of custody and where the expert would conduct the testing. But at a Status Conference on June 10, 2015, the People announced that they had no objection to the motion and the parties advised the Court they would confer and agree upon a stipulated order to resolve Morton's Motion To Allow Inspection And Testing. On July 20, 2015, the Court entered the stipulated Order which ordered that Defendant's expert be allowed to inspect the evidence and perform the following:

> 1. Test fire the suspect firearms for functionality and recover test fired cartridge(s) cases (including a location to test fire the suspect firearm and recover the test fired cartridge(s));
>
> 2. Test fire the suspect firearms and recover test field bullets (including a location to test fire the suspect firearm and recover the test fired bullet(s));
>
> 3. Compare the test fired bullets and cartridge cases with the evidence (the fired bullets and cartridge cases) (including a comparison microscope to perform comparison of the test fired bullet(s) and cartridge(s) with the evidence).

The parties then agreed that the Defendant's expert would travel to St. Croix, Virgin Islands, to inspect and test the evidence and he would do so in the presence of VIPD's firearm expert, M.L. Cooper. Not long thereafter a different assistant attorney general assumed responsibility for the case and the People then resisted the Order to which it had stipulated. As of the date of the instant Opinion, Morton's expert has still not fully tested the ballistic evidence.

On April 6, 2016, Morton filed a Motion to Exclude Evidence & Preclude Expert Witness Testimony (the "Motion to Exclude Evidence"), asking the Court to exclude the Government's ballistics evidence, including expert witness testimony, as the People had failed to comply with the July 2015 Order. Exhibit A to the Motion to Exclude is a series of emails and correspondence spanning the period between April

2015 and February 2016, showing efforts by Morton's attorney, Joseph A. DiRuzzo, III, Esq, to set up a time for Mr. Styers to examine the evidence. Mot. to Exclude Evidence and Preclude Expert Witness Test. (Apr. 6, 2016) Ex. A. The correspondence paints a dizzying picture of miscommunication and misdirection, with defense counsel being steered in circles within the Virgin Islands Police Department ("VIPD"), although the then assigned assistant attorney general did appear to try to assist. From September through November 2015, Attorney DiRuzzo repeatedly attempted to contact the VIPD Commissioner and that department's legal counsel. Finally, in February 2016 Attorney DiRuzzo reached out to the new assistant attorney general assigned to the matter, Daniel H. Huston, to suggest that, as VIPD was continuing to refuse Defendant access to the evidence, the evidence be sent back to the FBI facilities in Quantico, Virginia, so Mr. Styers could examine it there.

At an April 18, 2016 Status Conference, the People (through Attorney Huston) stated that they would allow Mr. Styers to use the Virgin Islands equipment on St. Croix, Virgin Islands, because the People were hesitant to send the evidence to Mr. Styers—who did not live in the Virgin Islands.[3]

Thereafter, in a written Response to the Defendant's Motion to Exclude Evidence, the People stated:

> "Given the status of this matter, the difficult logistics involved, and the poor alternative options, it is the People' position that the Defendant's expert should be granted access to test fire the suspect firearms and to conduct a ballistics comparison of those test-firings with the underlying

[3] The July 2015 Order directed the People to supply a comparison microscope to the defense expert. Therefore, the People now signaled they would finally comply with the Order.

> evidence. To facilitate the foregoing, this access and analysis will require...the use of VIPD facilities and equipment. It will also result in a breach of the current chain of custody that exists for the applicable evidence."

Although the People – through Attorney Huston – finally agreed to comply with the July 2015 Order and allow Mr. Styers to use their equipment, full compliance has still not occurred. At a status conference held on August 9, 2016, the Court noted that a full year had elapsed since the July 2015 Order and no progress had been made in allowing Mr. Styers to examine the evidence.[4]

The Court finds that the delay resulting from the People's resistance of the stipulated Order must be attributed to the People. However, the Court also finds the People did not resist the stipulated Order to deliberately delay the trial[5] and therefore, the delay is not heavily weighted.

B. Transfer to Stateside Prisons.

Morton also alleges that his trial has been delayed due to the fact that he has been moved out of the Territory and housed in various prison facilities in the U.S. Mainland. After one status conference for which Defendant did not appear and another where he participated by telephone from a stateside prison facility, the People filed a Motion for Return of Defendant, which the Court immediately

[4] Defendant has since filed another motion to dismiss based on a violation of his right to a speedy trial, which raises for the first time the details of the expert's failed attempt to thoroughly test the evidence when he traveled to St. Croix in March 2017. Therefore, the Court will address that motion and that failed effort in a later opinion.
[5] The Court further notes that the unresponsiveness of the VIPD and the general confusion surrounding the testing of the evidence also played roles in the delay.

granted.[6] Nonetheless, at a status conference held on August 9, 2016, the Court was informed that Morton was still being housed at a facility in Arizona. He was eventually returned to the Virgin Islands sometime in January 2017.

The Court finds that the delay resulting from Morton's inability to appear in court due to his incarceration in the States is attributable to the People and the Bureau of Corrections. However, as Morton's expert has still not been able to examine the evidence the Defense is not ready to go to trial, thus the delay is not heavily weighted.

3. Morton's Assertion of his Right.

A defendant, represented by counsel, shows that he has asserted his right to a trial when "he can identify a motion or evidence of direct instructions to his counsel to assert that right at a time when a formal assertion of his rights would render some chance of success." *Carty*, 56 V.I. at 367.

This factor weighs in Morton's favor because he has properly asserted his right to speedy trial by motion in three instances.[7]

[6] Motion filed April 22, 2016. Court granted Motion on April 26, 2016.

[7] Morton's initial "Motion to Dismiss Based on Speedy Trial Violation" was filed November 15, 2011, and then renewed on March 19, 2013. The Court denied that motion on February 5, 2015 and issued the supporting Memorandum Opinion on January 18, 2018.

4. Prejudice

"The most important factor to evaluate is whether the defendant suffered prejudice from the delay." *Rivera*, 64 V.I. at 582.Even if a defendant had suffered from delays attributed to the government, their speedy trial motion may still be denied if they fail to identify prejudice. *See Brown*, 55 V.I. at 504 ("although Brown did assert his right to a speedy trial and there were some delays . . . which were attributable to the government...the Superior Court did not err in finding that the Barker factors, when weighed and balanced, did not justify dismissal of the information."). In assessing prejudice to a defendant caused by a speedy trial violation, the Court considers three interests a right to a speedy trial is designed to protect: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Carty*, 56 V.I. at 367 (quoting *Barker*, 407 U.S. at 532). "The burden of proving prejudice lies with the defendant." *Id.*

The People advance the argument that since "at all times during pendency of this case, the Defendant was incarcerated" on another matter, Morton could not have suffered oppressive pretrial incarceration or anxiety as a result of the instant case. People's Opp. to Def.'s Mot. to Dismiss for Speedy Trial 8 (Nov. 14, 2016). However, in *Smith v. Hooey*, 393 U.S. 374 (1969), the Supreme Court of the United States made it clear that a prosecuting authority is not relieved of its obligation to provide a defendant a speedy trial just because he is in custody elsewhere. As *Hooey* explained,

> [a]t first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from "undue and oppressive incarceration prior to trial." But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed. Secondly, under procedures now widely practiced, the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him.
> And while it might be argued that a person already in prison would be less likely than others to be affected by "anxiety and concern accompanying public accusation," there is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a prisoner as upon a person who is at large.

Hooey, 393 U.S. at 378.

Although the Sixth Amendment right to a speedy trial is preserved for a defendant who is already incarcerated under a separate lawful sentence, Morton has not argued he has been prejudiced in either of the manners expressed in *Hooey*. In fact, Morton does not advance any argument regarding oppressive pre-trial incarceration that would be applicable to a defendant already incarcerated on a separate lawful sentence. Therefore, the Court finds Morton has not demonstrated how his incarceration is oppressive, in light of the totality of the circumstances.

Morton argues that he and his family have had to endure the anxiety of the pending criminal case for several years. Mot. to Dismiss 8. This argument is unpersuasive. Not only does Morton not support this allegation with any specific facts, this assertion could be true due to Morton's other criminal cases, including the case that resulted in his current incarceration for second degree murder. Moreover, as noted in *Rivera*, these types of prejudice and anxiety, "suffered by the majority of incarcerated individuals" are not sufficient to prove a Sixth Amendment speedy trial violation. 64 V.I. at 585. Therefore, it cannot be said that Morton has shown that he suffered prejudice under either of the first two factors.

Finally, the Court must consider if the delays have impaired Morton's defense. Morton has not made any allegation that his defense has been impaired by his intermittent transfers and incarceration in stateside facilities. *See United States v. Ewell*, 383 U.S. 116, 122 (1966) ("the appellees' claim of possible prejudice in defending themselves is insubstantial . . . . They mention no specific evidence which has actually disappeared or has been lost, no witnesses who are known to have disappeared.") Although "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify," *Francis*, 63 V.I. at 754, Morton still has to able to point to a particular prejudice impacting his ability to receive a fair trial, as a "possibility of prejudice" is not enough to prove a Sixth Amendment speedy trial violation. *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986). The transfers to stateside facilities that cause Morton to miss certain Court hearings or cause the hearings to be continued are certainly frustrating. However, that alone does not establish the necessary prejudice prong. Therefore, the Court finds Morton has failed his burden of showing the most important factor – prejudice.

Conclusion

Although Morton has asserted his right to a speedy trial and there were substantial delays and many frustrating conferences because those delays which, although not heavily weighted are nonetheless attributed to the People – the Court finds that the *Barker Factors*, when weighed and balanced, do not justify dismissal of the information.

Therefore, Defendant Morton's Motion to Dismiss Based on Speedy Trial Violation Pursuant to Federal Rule of Criminal Procedure 48(b) and the 6th Amendment, Motion to Dismiss for Due Process Violation will be denied.

An Order denying the motion to dismiss will be entered.

DATED: February 8, 2018

Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court

BY:
LORI BOYNES TYSON
Chief Deputy Clerk 2 / 8 / 18