

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

PEOPLE OF THE VIRGIN ISLANDS,

PLAINTIFFS,

v.

**JAHMAL A. RIVERA, AND
DUMARAY ISLES,**

DEFENDANTS.

JURY TRIAL DEMANDED

CASE NOS.

SX-15-CR-337

SX-15-CR-338

Appearances:

CLAUDE E. WALKER, ESQ.

Virgin Islands Attorney General

For the People

ALPHONSO G. ANDREW, ESQ.

Special Assistant Attorney General

For the People

MARTIAL WEBSTER, ESQ.

Kingshill, USVI

For Jahmal A. Rivera

ESZART WYNTER, ESQ.

Frederiksted, USVI

For Dumaray Isles

MEMORANDUM OPINION

WILLOCKS, Administrative Judge.

THIS MATTER is before the Court on Defendant Jahmal Rivera's Motion to Sever (hereinafter Motion to Sever), filed March 21, 2018, and Defendant Enock Cole's Motion to Dismiss, filed December 23, 2016. Oral argument on these motions was heard September 21, 2018.

BACKGROUND

In August 2015, the victim of a beating, identified as Augustus Bannis (hereinafter “Bannis”), was found in Frederiksted, St. Croix. Bannis had sustained severe injuries, including head trauma. He was ultimately transported to a Florida hospital for treatment but died of his injuries in October 2015 having never regained consciousness to identify his attacker or attackers.

On September 23, 2015, an anonymous witness, who claims to have observed the entire attack, told police that Bannis had been attacked by four men with whom he/she was familiar. Those men were named as the four defendants in this matter. Defendants Jahmal Rivera (hereinafter “Rivera”) and Dumaray Isles (hereinafter “Isles”) were charged with murder, robbery, assault, and unauthorized use of a vehicle in November 2015. Defendants Enock Cole (hereinafter Cole”) and Avondale George (hereinafter “George”) were taken into custody about the same time but were charged with the same offenses in September 2016 after being held in detention for about a year.

Shortly after this, in December 2016, Cole filed a Motion to Dismiss his case. The Motion to Dismiss was still pending when the People of the Virgin Islands moved to consolidate the four individual cases on March 1, 2017. As to the consolidation, Cole submitted a response of no objection. No response was received from the other defendants. The cases were consolidated by an order issued March 30, 2017, but Rivera filed a Motion to Sever on March 21, 2018. The Court scheduled oral arguments on the Motion to Sever and the Motion to Dismiss on September 21, 2018.

DISCUSSION

A. Cole's Motion to Dismiss must be denied because there is no speedy trial violation.

In the Motion to Dismiss, Cole alleges a violation of his Sixth Amendment right to a speedy trial on three grounds: 1) that he had been in custody for more than a year—most of that time without being charged; 2) at the time the motion was filed, the government had not provided any disclosures or requested information; and 3) due to the length of his detainment, any witnesses to the attack on Bannis, other than the anonymous witness who identified Cole, will have been lost. (Mot. to Dismiss 2-3.) The People did not respond to Cole's Motion.

At the time of oral argument, Cole had obtained new counsel who, upon inquiry from the Court, adopted the Motion to Dismiss. The Court did not hear oral argument on the Motion to Dismiss but denied it for the following reasons:

Speedy trial issues are analyzed under *Barker v. Wingo*, 407 U.S. 514 (1972). *Francis v. People*, 63 V.I. 724 (2015); see *People v. Rivera*, 54 V.I. 116 (Super. Ct. 2010). *Barker* states that courts must utilize a balancing test to determine “whether a particular defendant has been deprived of his right....” *Barker*, 407 U.S. at 530. The *Barker* Court identifies four factors to be used in making the determination: 1) length of delay between arrest and trial; 2) reason for the delay; 3) when the defendant asserted his right to speedy trial; and 4) prejudice caused to the defendant. *Id.*

I. Length of Delay

“The length of delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance...[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.” *Id.* at 531.

In *Francis v. People*, the Supreme Court of the Virgin Islands noted that a one-year delay before charging a defendant raises a presumption of prejudice and a violation of the right to a speedy trial. *Francis*, 63 V.I. at 748 (citing *Carty v. People*, 56 V.I. 345 (2012)). However, the Court found that “presumptive prejudice” does not prove such a violation. *Francis*, 63 V.I. at 754 (citing *Doggett*, 505 U.S. at 655). Despite Francis being incarcerated for 15 months prior to trial, the Court found that the other *Barker* factors indicated that dismissal of the case was warranted. See *Francis*, 63 V.I. at 755 (“The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.”) (citing *Beavers v. Haubert*, 198 U.S. 77 (1905)).

In the present case, Cole was taken into juvenile custody and charged in November 2015 but held until his transfer from the Juvenile Division to the Criminal Division in September 2016. The trial was initially set to begin October 22, 2018, nearly three years after the beginning of Cole’s detainment, but due to the severance of Cole and George’s case from that of Rivera and Isles—discussed below—Cole will not go to trial until 2019 at the earliest. The circumstances of this case thus warrant a presumption of prejudice caused by a speedy trial violation.

II. *Reason for Delay*

Whether there is a justified cause for the delay is fundamental:

A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay. *Barker*, 407 U.S. at 531.

To be sure, the Court's overcrowded docket has played a role in the delay, but this case has been moving steadily—albeit slowly—to trial. The People have offered no response to the Motion to Dismiss and no official explanation for a three-year delay in reaching trial preparedness. According to Cole, the government had not provided the defense with any requested information, including results of DNA comparisons or police reports as of December 2016. (Cole's Mot. 2). Since that time, however, it appears that discovery has been completed and the parties have indicated that they are ready for trial. In fact, the severed trial for Rivera and Isles is scheduled to take place in October 2018, and Cole and George have been made aware that they will have a final pre-trial conference in February 2019, at which time a date will be set for trial.

Taking all these factors into consideration, and without more information, it is impossible to say whether the delay is "justified." Though the Court abhors the slow movement of criminal cases, there does not appear to be any evidence of a bad faith attempt to stall the criminal justice process. For that reason, the Court finds that this factor in the *Barker* analysis does not lend itself to the determination of whether Cole's right to a speedy trial has been violated.

III. *Defendant's Assertion of his Right*

While a defendant's timing of the assertion of his right to speedy trial is a factor in this balancing test, it is ultimately the burden of the government to take a case to trial. *Barker*, 407 U.S. at 528 (noting that "[a] defendant has no duty to bring himself to trial...").

Here, Cole asserted his right after about a year in custody, right about the time when the Virgin Islands finds the presumption of prejudice begins. Though the Motion to Dismiss sat stagnant and unattended for some time, especially after Cole obtained successor counsel who did not seek to renew or adopt the motion, Cole clearly began to feel the weight of the delay in December 2016 when the Motion to Dismiss was filed.

The filing of such a motion under these circumstances clearly puts a court and the prosecution on notice that their delays may be causing a defendant prejudice. Despite this, the Court has already noted that the reasons for the delay, discussed above, do not necessarily suggest an unreasonable speedy trial violation.

IV. *Prejudice to Defendant*

Finally, courts must consider three interests of the defendant in determining whether prejudice exists. *Id.* at 532. The speedy trial right was meant to: “(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.” *Id.* The final of those interests is the most important. *Id.*

In this case, Cole’s pretrial incarceration has not been oppressive. Cole has two pretrial release orders on file, one from November 2016 and the other from February 2018. At the time of this Memorandum Opinion, Cole is in the custody of the Bureau of Corrections and the third-party custody of relatives. Additionally, other than the Motion to Dismiss, Cole has not indicated to the Court any anxiety relating to his incarceration or to his upcoming trial.

Finally, Cole's defense has not been impaired. After Bannis was attacked in August 2015, only one witness came forward. There is no indication that the delay in reaching trial has impaired the witness' recollection of events. Neither is there evidence that the defense has lost some critical piece of evidence since Cole's arrest.

Overall, the only *Barker* factor that speaks to prejudice is the length of delay. However, the presumptive prejudice to Cole caused by the length of delay is not dispositive. *Francis*, 63 V.I. at 754. As such, in considering all the *Barker* factors, the Court finds no apparent prejudice to Cole that warrants a dismissal of his case and the charges against him.

B. Rivera's Motion to Sever must be granted to avoid prejudice to the defendants.

Rivera's basis for the Motion to Sever is that proceeding to trial with Cole and George as co-defendants would be manifestly prejudicial. (*See* Mot. to Sever 2-3.) Rivera states that his co-defendants "may offer exculpatory testimony for Rivera at a separate trial" and expresses concern that his co-defendants will plead the Fifth rather than exonerate him. (*Id.* 3.) Rivera states that should his co-defendants refuse to testify, he could seek an order from the Court granting them immunity and compelling them to testify. (*Id.* 3-4.)

Rivera's second argument is that a joint trial might cause the jury to find him guilty by association, assuming that Cole and George are guilty. (*See id.* 4.)¹ Third, Rivera asserts the potential for constitutional confrontation issues if the People offer the statements of co-

¹ The Court does not find this argument persuasive. Because Rivera has not pointed to a specific instance that would cause a reasonable person to believe the jury cannot be neutral. Rivera's claim is purely speculative and does not warrant severance. *See Peterson*, 1985 V.I. at *4 ("If 'guilt by association' was a ground for severance there would indeed be few multi-defendant trials.") (citing *United States v. De Larosa*, 450 F.2d 1057, 1065 (finding that an "unfavorable impression" caused by "identification with an unpopular social and political group" does not require severance). However, the Court recognizes the other claims of prejudice and will sever for those reasons.

defendants into evidence, but those co-defendants refuse to testify or submit to cross-examination. (*Id.* 4-5.) Isles joined the motion.

The People's Amended Opposition (hereinafter "Opposition") argues that Rivera has not met his burden of proving a risk of prejudice serious enough to warrant the severance of cases properly joined for trial. (Opp'n. 3-4.) The People note that Rivera "is not entitled to a severance merely because he may stand a better chance of acquittal in a separate trial." (Opp'n 4 (citations omitted).) Guilt by association is not grounds for a severance, and the People claim there are no confrontation issues stemming from their use of co-defendant statements because none are going to be used by the People at trial. (*Id.* 11-12.)

Additionally, the People initially asserted that Rivera has not stated the nature of the alleged exculpatory testimony or that his co-defendants would, in fact, refuse to testify.² (*Id.* 4-5.) Finally, the People strongly disagree with Rivera's assertion that he could seek immunity for a co-defendant. (*Id.* 8-11.) That power belongs with the prosecution and the use of that authority cannot be compelled. (*Id.*) There were no other responses to Rivera's Motion to Sever.

I. Exculpatory Testimony and Co-defendants' Refusal to Testify

Properly joined cases may be severed if joinder would cause prejudice to a defendant. V.I. R. Crim. P. 14. To sever trial, "the prejudice alleged must outweigh the underlying purposes of joinder of defendants...." *Gov't of the V.I. v. Peterson*, Nos. 156/1985, 157/1985, 158/1985, 1985 V.I. LEXIS (July 16, 1985) (stating that "[t]here is a public interest in joint trials... They avoid time consuming and expensive trials. They also avoid recalling witnesses, conserve

² Though Rivera did not allege any specifics regarding the statement in the Motion to Sever, the content of the statement was briefly discussed at oral arguments on September 21, 2018.

judicial resources and lessen the burden on jurors who must make sacrifices. Joint trial is the rule; severance is the exception....”). Additionally, it is the burden of the defendant requesting a severance to prove “substantial prejudice.” *Id.* at *4. And, though there may be several interests to consider, the decision whether to sever trial is ultimately discretionary. *See* V.I. R. Crim. P. 14.

In this case, Rivera claims prejudice because one of his co-defendants might have exculpatory testimony they would be reluctant to share. (Mot. to Sever 3.) Though not stated explicitly in the Motion to Sever, it appears the alleged nature of the testimony is that either Cole or George made a statement to police that could exonerate Rivera or otherwise aid his defense. Rivera is correct that the admission of a co-defendant’s statement by the government might cause a *Bruton* issue. In *Bruton v. United States*, 391 U.S. 123 (1968), the United States Supreme Court found that the admission of a co-defendant’s statement against another would cause prejudice if the co-defendant then refused to take the stand, thereby preventing cross-examination and confrontation.

At this point, the Court must address Rivera’s claim that, should he call an uncooperative co-defendant to testify, “[a]t that time, [Rivera] could seek an order requiring the government to grant use immunity to the co-defendant’s testimony....” (Mot. to Sever 3.) As the People point out, Section 20 of Title 14 of the Virgin Islands Code is the applicable immunity statute, (Opp’n. 6.), and it does not impart the authority to issue immunity orders to either a defendant or to a court. 14 V.I.C. § 20. Specifically, the rule states that an order for immunity may be issued “upon the request of the United States Attorney or the Attorney General of the Virgin Islands.” *Id.* The rule cannot be read to impart authority to the courts.

As such, even if Rivera decides to call his co-defendants to testify on his behalf and they refuse to testify, the Court cannot compel them to give such testimony without the request of the Attorney General of the Virgin Islands. Given the People's response to Rivera's Motion to Sever, it appears unlikely that such a request will be made.

With regard to the *Bruton* and immunity issues, the People have stated that they do not have any statement of a co-defendant that will be presented as evidence. Additionally, the defense has not shown any evidence that a *Bruton* issue exists. Rivera's Motion is based solely upon conjecture. Moreover, the Court is unconvinced that the severance of trial will convince either Cole or George to give testimony for Rivera.

II. Potential Testimony of Anonymous Witness

At oral argument, it also became apparent to the Court that the testimony of the anonymous witness may pose a prejudice problem. The witness will allegedly testify that her delay was caused by fear of the Defendants stemming from an attack on her boyfriend. However, the attack on the boyfriend was allegedly made only by Rivera and Isles. Cole and George pointed out that if this is not made clear to the jury, they will be unnecessarily prejudiced by evidence of an uncharged assault and battery that they had nothing to do with. *See V.I. R. Evid. 403* (stating that "court[s] may exclude relevant evidence if its probative value is substantially outweighed by a danger of...unfair prejudice; confusing the issues; [or] misleading the jury....").

Rivera also argued that the witness' testimony will introduce what amounts to impermissible character evidence. Virgin Islands Rule of Evidence 404 prohibits "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." The witness' potential testimony is not

necessarily character evidence because the purpose of its introduction would not be to introduce a character trait, but rather to explain the witness' delay in reporting.³ Regardless, the Court recognizes that the witness' reason for delay would be substantially more prejudicial to Rivera and Isles than probative if both cases were tried together. *See* V.I. R. Evid. 404(2).

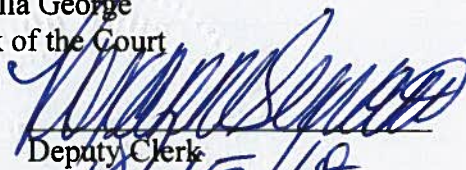
CONCLUSION

It is for the above reasons that the Court has denied Defendant Cole's Motion to Dismiss and granted Defendant Rivera's Motion to Sever. Orders consistent with this Opinion were signed by the Court on September 24, 2018.

DATED this 12 day of October, 2018.

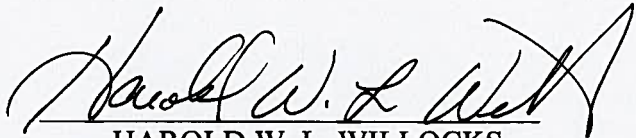
ATTEST:

Estrella George
Clerk of the Court

By: 

Deputy Clerk

Dated: 10/15/18


HAROLD W. L. WILLOCKS
Administrative Judge of the Superior Court

³ Evidence of a crime, wrong, or other act may be admissible for other purposes, such as...motive, opportunity, intent, preparation plan, knowledge, identity, absence of mistake, or lack of accident" if "the probative value of such proof...substantially outweighs its prejudicial effect." V.I. R. Evid. 404(2).