

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX AT KINGSHILL**

GOVERNMENT OF THE VIRGIN ISLANDS,	)	CRIM. NO. 7/2002
	)	
Plaintiff,	)	
	)	
v.	)	AGGRAVATED RAPE/DV;
	)	UNLAWFUL SEXUAL CONTACT
HILARIO CASTILLO,	)	IN THE FIRST DEGREE/DV;
	)	CHILD ABUSE/DV.
Defendant.	)	
	)	
	)	<u>NOT FOR PUBLICATION</u>

Charlotte Poole-Davis, Esq.
Assistant Attorney General
Department of Justice
6040 Castle Coakley
Christiansted, St. Croix 00820-4375
(Attorney for the Plaintiff)

Harold Washington, Esq.
Assistant Public Defender
Office of the Territorial Public Defender
1-B Clifton Hill, Second Floor
Kingshill, St. Croix 00850
(Attorney for the Defendant)

CABRET, P.J.

MEMORANDUM OPINION
(April 29, 2002)

THIS MATTER is before the Court on the Government's Motion to file a Superseding Information, and the defendant's opposition. The Government earlier moved to amend its original Information. On March 21, 2002, the Court heard arguments on that motion and granted the Government's Motion to Amend the Information. The Court now grants the Government's

Motion to File a Superseding Information, for the same reasons supporting its decision to allow the earlier amendment.¹

. In opposing the amendments to the Information, Defendant relies on Federal Rule of Criminal Procedure 7(e), which provides:

The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

Fed. R. Crim. P. 7 (e) (emphasis added); *see also* 1 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 127, at 643-45 (1999). Generally, an "unconstitutional amendment occurs when impermissible additions are made to the indictment *during* trial." *Plaskett v. Government of the V.I.*, 147 F. Supp.2d 367 (D.V.I. App. 2001) (quoting *United States v. Zauber*, 857 F.2d 137, 151 (3d Cir. 1988)) (emphasis added). However, the Court disagrees that the limitations in the rule bar an amendment to the substantive charges *prior* to trial, where the defendant has sufficient notice of the charges and the conduct alleged, and where he is afforded an opportunity to prepare a defense.

First, the rules require that an Information contain "a plain, concise and definite written statement of the essential facts constituting the offense charged," so as to give the defendant notice of the charges faced and to permit him an opportunity to mount a defense. FED. R. CRIM. P. 7 (c)(1); *see also Government v. Lewis*, 38 V.I.101 (Terr. Ct. 1998). Courts reviewing challenges to amendments have held that, where such amendments are made prior to the start of trial, the threshold inquiry is whether the new charges in the Information violate the defendant's

¹ The Government has since filed an "Amended Superseding Information." That Information was filed on April 2, 2002 and is not the subject of the instant motion.

right to notice of the charges and his opportunity to mount a defense, thereby resulting in prejudice to the defendant and a denial of due process. *See, e.g. Tague v. Richards*, 3 F.3d 1133, 1141-42 (7th Cir. 1993) (holding that a defendant is prejudiced if he has no opportunity to defend against the new charge)(citing *Denton v. Duckworth*, 873 F.2d 144, 149 (7th Cir.), *cert. denied*, 493 U.S. 941, 110 S.Ct. 341, 107 L.Ed.2d 330 (1989)); *cf. State v. Neudorff*, 489 N.W.2d 689, 693 (Wis. App. 1992) (recognizing that state may add charges to the Information prior to trial, but holding that such amendment was not proper in that instance, where conspiracy charge added to Information charging only possession on the day of trial, because new charge based on different facts and different time period from original charge and required new witnesses and different defense; holding that, based on these factors, Defendant did not have adequate notice and opportunity to prepare a defense).

In *Tague*, the Seventh Circuit upheld the trial court's allowance of an amendment to the Information on the morning of trial to include additional charges stemming from a child molestation, despite the defendant's claim that the charge, alleging conduct on dates different from the original Information, presented new elements and affected his alibi defense. *Id.* at 1141. The Court reasoned that adding the charge of having sexual intercourse with a child to the existing charge of "deviate sexual conduct", was not error, because the defendant had prior notice of the claim that he had intercourse with the 12-year old minor from the affidavit appended to the original Information and, therefore, was aware of the need to defend against both theories. *Id.* Additionally, the defendant claimed no additional possible defense arising from the intercourse charge and, therefore, established no prejudice. *Id.*; *But, see Neudorff*, 489 N.W.2d at 693 (constitutional due process not met where the timing of an amendment and new

facts, times and witnesses supporting the new charge deprive the defendant of any opportunity to mount a defense); *State v. Alvarado*, 871 P.2d 663, 665 (Wash. 1994) (upholding amendment to Information to add charges of burglary and second-degree theft, in addition to possession originally charged, and noting that an Information may be amended to add new charges if made pretrial and no prejudice to the defendant is shown; burden to prove “specific prejudice” rests with the defendant).

In *United States v. Talbot*, 51 F.3d 183, 185-86 (9th Cir. 1995), the court of appeals held that Rule 7(e) did not apply to bar additional charges filed prior to trial by superseding Information. The Court, therefore, found it was not improper to permit additional charges to be filed in an Information, just six days before trial. *Id.* at 186 (citing *United States v. Brewer*, 681 F.2d 973, 974 (5th Cir. 1982)). The Court held that a “superseding accusatory instrument” can contain additional charges not charged in prior instruments and does not offend due process unless the defendant establishes specific prejudice. *See Alvarado*, 871 P.2d at 665 (Unlike amendments made during trial, there is no presumption of prejudice when an amendment is made prior to trial; rather, the defendant bears the burden to prove specific prejudice arising from the amendment.); *see also* 42 C.J.S. *Indictment and Information* § 59 (1991)(new, or successive, information is properly filed on the dismissal of the former one; a new information filed stands “in lieu of” the original, which is deemed quashed, abandoned, or superseded).² Moreover,

² Defendant contends that a superseding Information is not addressed in the rules and, therefore, may not be filed, and additionally argues that Rule 7(e) effectively bars the filing of any additional charges against a defendant once charges have been filed. The Court rejects this argument, in recognition of the authorities, noted above, that support the Government’s right to amend its charges or file a new Information before a trial begins, so long as doing so does no violence to the defendant’s right to have an opportunity to prepare a defense. If the defendant proves prejudice, then his remedy is to seek a continuance to enable him to prepare a defense.

Defendant points to *United States v. Goldstein*, 502 F.2d 526 (3d Cir. 1974) for the proposition that the Government cannot amend its Information. However, Goldstein involved a challenge to an amendment to an

prejudice is not shown where the new charge is based on the same facts, so that the defendant was fully aware of the need to defend against them, and where the new charge does not implicate any potentially new defenses or new witnesses. *See Tague*, 3 F.3d at 1141-41; *Neudorff*, 489 N.W.2d at 693-95; *Alvarado*, 871 P.2d at 665. Where new offenses are charged just before trial and affect the defendant's defense, the defendant's remedy is to seek a continuance if he anticipates new defense strategies as a result of the new charges. *See, e.g. Alvarado*, 871 P.2d at 665.

Here, the government initially charged the defendant with a five-count Information: two counts of aggravated rape in the first degree, aggravated rape, and two counts of unlawful sexual contact. The amended Information charges the defendant as follows: Aggravated Rape/Domestic Violence; Unlawful Sexual Contact in the First Degree/ Domestic Violence, and Child Abuse/Domestic Violence. A "superseding information" was subsequently filed, charging the same charges contained in the Amended Information, but adding additional factual language. These charges were based on the same facts filed in the initial Information and allege, generally, that the defendant unlawfully had sexual intercourse and sexual contact with a minor child in the same household, constituting rape, unlawful sexual contact, and child abuse – all acts of domestic violence. The Court rejects the defendant's argument that the addition of the child

Indictment, to conform to the proof at trial. The Court, though noting that there was no problem with notice or prejudice to the defendant, held that such an amendment was improper. However, the Court's reasoning was based on the requirement of strict adherence to an indictment, which emanates from a grand jury, rather than from the prosecution. *Id.* at 528-29.

Additionally, Defendant cites to "*Macbeth*" (Act V, Scene 5, Line 18) to support his argument that the "Government glibly states that Count Three mirrors the prior counts." The Court has reviewed the portion of *Macbeth* cited and concludes it is wholly irrelevant to the issues before the Court and adds nothing to the elucidation of Defendant's argument.

abuse charge improperly presents additional elements which the defendant will have to defend against.

First, the Court notes that the charges in the succeeding informations are all based on the same facts supporting the original Information: that the defendant is alleged to have engaged in sexual conduct with a minor under the age of 13. The charges are not only based on the same set of facts, but also on the same time periods. The charges implicate no new defenses or require new defense witnesses. Moreover, the defendant has been on notice, from the very inception of this case, that the Government is alleging that he had sexual intercourse and contact with a minor child within the same household and, therefore, is not prejudiced by the addition of the child abuse charge.

Under Title 14, Section 505, the charge of child abuse is made out where a person “abuses a child . . . or who knowingly or recklessly causes a child to be placed in a situation where it is reasonably foreseeable that a child may suffer physical, mental or emotional injury” Abuse, as it relates to this case, is defined in the statute to include “sexual conduct with a child.” See VIRGIN ISLANDS CODE ANN. tit. 14, § 503 (a). As charged, the charge of child abuse requires the Government to establish that the defendant had sexual conduct with a child.³

The original Information charged, in counts one, two and three, that the defendant had sexual intercourse with the minor child, by penetrating her vagina and committing sodomy. The remaining three counts charged some form of sexual contact. The allegations of sexual intercourse and other sexual conduct are also alleged in the affidavit accompanying the

³ Defendant argues that the final phrase of the statute requires proof that the Defendant caused a child to suffer physical, mental or emotion injury. That is not what the statute requires, however. Under Title 14, Section 505, the Government must show only that it was reasonably foreseeable that the child would suffer such injury as a result of the defendant’s conduct. However, the Court additionally notes that the Government has charged the defendant under the first phrase of the statute, requiring only proof of abuse.

Information. Indeed, these allegations formed the basis of defendant's arrest and were filed on January 9, 2002. The defendant was put on notice of the facts and conduct supporting the child abuse charge and was aware that he would have to defend against them. Therefore, he cannot now be heard to complain that adding the charge of "child abuse" unconstitutionally prejudices his defense. *Compare, Government of Virgin Islands v. Bedford*, 671 F.2d 758 (3d Cir. 1982) (upholding an amendment to information during trial, where the detailed and particular language of the original charge included all the necessary facts necessary to prove the new charge).

Indeed, the defendant has alleged no possible new defenses. Importantly, the defendant also has not alleged any prejudice resulting from the new charges and, indeed, the Court concludes there is none. The defendant at all times was aware of the alleged conduct and the evidence he would be required to defend against and had sufficient time to prepare a defense, from the filing of the charges on January 9, 2002 to the trial date, now set for April 29, 2002.

Finally, the addition of the domestic violence charges to each count also does not prejudice the defendant or require new defenses. Both the original Information and accompanying affidavit put the defendant on notice that his conduct constituted acts of domestic violence. Moreover, the charge is required to comply with the domestic violence statute. *See* 16 V.I.C. §§ 91 (c) (defining the types of victims protected under the domestic violence statute), 99 (d) (requiring that an act of domestic violence be charged where criminal acts are committed against victims defined in section 91 (c)); *see also Plaskett v. Government of the V.I.*, 147 F.Supp.2d 367, 375-76 (D.V.I. App. 2001) (amending charges to add domestic violence was proper and, in fact, was required to comply with the local statute).

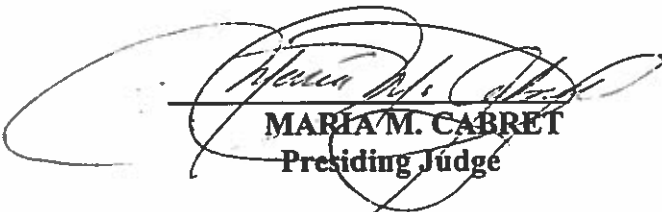
GOVERNMENT v. CASTILLO

CRIM. NO. 7/2002

ORDER -- MOTION TO FILE SUPERSEDING INFORMATION

PAGE 8

In view of the foregoing, the Government's motion for proceed on a Superseding Information is granted. An appropriate order follows.

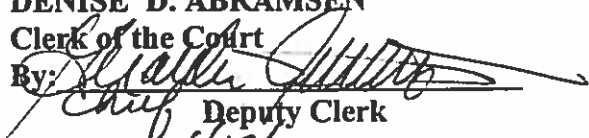


MARIA M. CABRET
Presiding Judge

ATTEST:

DENISE D. ABRAMSEN

Clerk of the Court

By: 

Deputy Clerk

Dated: 4/29/02