IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM
Plaintiff -Appellee

vs.

JERRY CASTRO MENDIOLA,
Defendant-Appellant

Supreme Court Case No. CRA97-014
Superior Court Case No. CF0273-95

OPINION

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Appeal from the Superior Court of Guam
Argued and Submitted on October 7, 1998
Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, Chief Justice[1]; JANET HEALY WEEKS, and BENJAMIN J.F. CRUZ, Associate Justices.

CRUZ, J.:

[1] This is an appeal of the trial court's denial of Appellant Jerry Castro Mendiola's Motion to Dismiss for Prosecutorial Delay. Appellant also appeals his convictions for 1) Negligent Homicide (as a third degree felony) with a Special Allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony; and 2) Possession of a Firearm Without an Identification Card based upon the denial of his Sixth Amendment right to a speedy trial. Upon review of the pertinent facts and analysis of the relevant legal authorities, we affirm the decision of the trial court and Appellant's convictions for the reasons set forth below.

BACKGROUND

[2] On June 25, 1992, Appellant Mendiola (hereinafter "Appellant") and his "stepfather" Veta Feja Guerrero were attending a barbecue at Appellant's residence. The evidence adduced at trial showed that an altercation occurred between the two men concerning Appellant's plans to open his own business. Ultimately, this confrontation turned violent. Indeed, shortly after the barbecue concluded, Appellant shot Guerrero four to five times. Appellant, however, claimed he acted entirely in self-defense.

[3] In the early morning following this incident, the Guam Police Department (hereinafter "GPD") placed Appellant under arrest and detained him. About two weeks after his release,

[1]The signatures in this opinion reflect the titles of the justices at the time this matter was considered and determined.

Appellant made inquiries of GPD as to approximately one hundred dollars missing from his wallet from the time of the arrest. Appellant claims that GPD Internal Affairs investigators conducted a polygraph test regarding the money. Appellant contends that the investigators also questioned him regarding the homicide. As to that matter, Appellant maintains, that at the conclusion of the test, the investigators indicated that the results were in his favor and that he was telling the truth.

[4] Approximately one year after his arrest, Appellant moved to Rota, Commonwealth of the Northern Mariana Islands, in response to death threats allegedly made by Guerrero's family. Prior to this move, Appellant claims that he notified both GPD and the Attorney General's Office.

[5] On June 7, 1995, nearly three years after the actual incident, a grand jury convened and indicted Mendiola for: (1) Aggravated Murder; (2) Murder; (3) Manslaughter; and (4) Possession of a Firearm Without an Identification Card. Each charge included a Special Allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony. On June 13, 1996, approximately one year after the indictment, an order for extradition was issued by the Superior Court for the Commonwealth of the Northern Mariana Islands, resulting in Appellant's return to Guam.

[6] Appellant was arraigned on June 18, 1996. On this same date, he asserted his statutory and Constitutional right to a speedy trial for the first time. On June 27, 1996, Appellant waived his right to a speedy trial. Appellant later re-asserted his right to a speedy trial on October 16, 1996.

[7] The trial court heard pre-trial motions on November 21, 1996. Relevant to the instant appeal, Appellant brought the following motions in the court below: (1) a Motion to Dismiss the Indictment due to Prosecutorial Delay; and (2) a Motion to Compel Discovery. During the pre-trial hearing, the

prosecutor disclosed that no record of the polygraph examination existed. The prosecution also filed a Notice of Lost Evidence concerning the t-shirt obtained from the decedent on the night of the incident. At this time, defense counsel advised the trial court of the unavailability of investigating officer Winnie B. Rojas, as well as three guests at the barbecue, Greg Castro, Chris Chambers, and Mattias Salvatierra.

[8] Appellant's trial began on January 6, 1997. On January 17, 1997, the jury returned a guilty verdict for Negligent Homicide (as a Third Degree Felony) with a Special Allegation of Possession and Use of a Deadly Weapon in the Commission of a Felony, and for Possession of a Firearm Without an Identification Card. After sentencing on May 5, 1997, the trial court entered judgment on August 8, 1997. Appellant then filed the Notice of Appeal on August 13, 1997.

ANALYSIS

[9] This court has jurisdiction pursuant to 7 GCA §§ 3107 and 3108 (1994).

A. Pre-indictment Delay

[10] The trial court's decision on a defendant's motion to dismiss charges for pre-indictment delay shall be reviewed for abuse of discretion. *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992). "Findings on the issue of prejudice are reviewed under the clearly erroneous standard, keeping in mind [Appellant's] heavy burden," to prove such prejudice. *United States v. Dudden, 65* F.3d 1461, 1466 (9th Cir. 1995).

[11] Pre-indictment delay violates due process only if the defendant meets a two-part test. *United*

States v. Huntley, 976 F.2d 1287, 1290 (9th Cir. 1992). First, "the defendant must prove actual, non-speculative prejudice from the delay." *Id.* If the defendant meets this burden, the second part of the test shall then be employed. To meet the second step, the defendant must prove that, "the length of the delay, when balanced against the reason for the delay, [offends] those fundamental conceptions of justice which lie at the base of our civil and political institutions." *Id. citing United States v. Sherlock*, 962 F.2d 1349, 1353-4 (9th Cir. 1992).

[12] Demonstrating the actual prejudice necessary to invoke the second part of the test requires Appellant to show more than the mere loss of testimony, which generally is protected against by the statute of limitations. *United States v. Dudden*, 65 F.3d 1461, 1466 (9th Cir. 1995). Appellant must show "by definite and non-speculative evidence how the loss of a witness or evidence is prejudicial to the defendant's case." *Id.*

[13] Illustrative of the burden of establishing "actual prejudice," the court in *Huntley* remarked, "[t]he task of establishing the requisite prejudice for a possible due process violation is 'so heavy' that we have found only two cases since 1975 in which any circuit has upheld a due process claim." *Id.* (citations omitted). In the two cases that did find actual prejudice as a result of pre-indictment delay, evidence of non-speculative and non-cumulative nature existed to buttress the claim of actual prejudice. *See, United States v. Barket*, 530 F.2d 189 (8th Cir. 1976); *Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990).

[14] In the first of these two cases, the appellate court in *Barket* considered several factors in determining that the defendant did incur actual prejudice as a result of the pre-trial delay. *Barket*, 530 F.2d at 192. Among these factors were: 1) the passage of forty-seven (47) months for which the

defendant was not responsible; 2) the failure of the prosecution to exercise prosecutorial discretion concerning evidence adduced during a pre-trial hearing; and 3) the loss of material testimony from six witnesses that died during the delay as well as from others with faded memories who would have provided testimony material to the defense. *Id.* Notably, as to the third factor, the court held that the loss of the witnesses "undoubtedly impaired" the defendant's ability to defend himself. *Id.*

[15] In the second case involving actual prejudice, *Howell v. Baker,* 904 F.2d 889 (4th Cir. 1990) the actual prejudice necessary to "ripen a due process claim for adjudication" was assumed and conceded by both the court and the parties. *Howell,* 904 F.2d at 895. This assumption was made solely to allow the court to reach an entirely different issue, to wit, whether a defendant must also prove prosecutorial misconduct. *Id.*

[16] The aforementioned cases in which prejudice was deemed to exist are distinguishable from the case at bar. In *Barket,* the relevant time period of forty-seven months is substantially longer than the pre-indictment period of approximately thirty-six months in this case. The record before this court is also devoid of evidence of prosecutorial indiscretion involving the handling of evidence. As for the last factor, once again, the record fails to demonstrate how the loss of testimony, if any, "undoubtedly impaired" Appellant's case. The *Howell* case is similarly distinguishable. No such assumption or concession relating to the existence of actual prejudice has been made in this case by either the parties or the trial court. Likewise, this court will neither assume, nor concede, the existence of actual prejudice.[2]

[2]The United States Supreme Court has also addressed the issue of pre-indictment delay. In both *United States v. Lovasco,* 431 U.S. 783,797,97 S.Ct. 2044, 2052 (1977) and *United States v. Marion,* 404 U.S. 307, 325,92 S.Ct. 455, 466 (1971), the Court concluded that the particular facts of each case warranted a holding that the pre-indictment delay in each case did not rise to the level of a due process violation.

[17] Appellant Mendiola argues that the pre-indictment delay in his case resulted in "the loss of witnesses, loss of evidence, and faded memories." However, in order to base the claim of actual prejudice on "lost" witnesses and "diminished memories," Appellant "must show that the loss of testimony meaningfully has impaired his ability to defend himself' using only "definite and non-speculative evidence." *Huntley*, 976 F.2d at 1290. Here, Appellant attempts to establish the impact of the absence of the lost witnesses' testimony by contending that the jury was not able to appreciate the victim's demeanor. In addition, Appellant claims that some witnesses even refused to testify solely because the passage of time had faded their memories of the incident.

[18] The trial court found that the majority of the alleged prejudice alleged by the Defendant was "personal in nature" and did not "relate to the defense of this case." We agree. Nothing in the record supports Appellant's claim that the testimony of witnesses would be non-cumulative or non-speculative. The trial court further found that the Appellant "did not offer any specifics as to how his defense will be impaired except for the fact that one or two witnesses may not be able to testify or that such witnesses' memories may have faded." Recognizing that these allegations may have been true, the court nevertheless concluded that, "such factors do not constitute sufficient prejudice as to warrant dismissal of this case."[3] We agree. Although Appellant asserts that witnesses' memories of the victim's demeanor "had faded" and that most were "unwilling to testify," the

[3]Although Appellant is quite insistent that he has experienced, "loss of witnesses, loss of evidence and faded memories...," this court notes the fact that Appellant has chosen to prevent, his wife, possibly the most informed witness, from testifying in this case. While we are mindful of Appellant's right to assert the spousal testimonial privilege, we still note that what little prejudice that is present in this case may have been brought about, at least in some part by Appellant, himself. This court will not allow a party to base his defense motion on circumstances he created. To exclude key testimony by asserting a privilege and then claim prejudice as a direct result of the loss of similar testimony, the relevance of which is even more attenuated, is spurious at worse, curious at best.

unwillingness of witnesses to testify, though possibly detrimental to Appellant's case, is hardly evidence of actual prejudice. Even if we assume that their refusal to testify stems from their faded memories, these allegations, however plausible, are simply not definite and non-speculative evidence.

[19] As to the loss of the victim's t-shirt and the polygraph-related records, Appellant argues, "the issue is not whether the loss of evidence itself is in violation of his Constitutional right to a fair trial, but a symptom of the cause, pre-indictment delay." Although Appellant's arguments on this specific point are well taken, it does not follow that proof of lost evidence thereby entails the existence of actual prejudice. To make such a leap would do violence to the legal analysis requiring actual prejudice to be firmly established and convincingly proven rather than indirectly presumed. While insufficient to prove actual prejudice, the loss of evidence may instead indicate negligence. However, even if this court were to find the People's conduct to be negligent, the delay and/or prejudice suffered by the Appellant will have to be greater than what presently appears in the record before the court. *United States v. Ross,* 123 F.3d 1181, 1885 (9th Cir. 1997).

[20] Appellant's assertions notwithstanding, the instant case presents no reliable indicia of prosecutorial misconduct or negligence.[4] Indeed, the trial court directly addressed this issue, finding that there had been no showing of prosecutorial misconduct in this matter and that the delay in bringing this case was not unduly long.

[4]There is a clear and fundamental distinction between a delay necessitated by an ongoing investigation in search of an unknown suspect on one hand, and a delay of three years prior to an indictment of a readily ascertainable suspect on the other. The former delay is defensible and completely understandable. However, this court, while tolerant of the former, justifiable delay, has serious concerns as to the latter delay. A three year lapse of time between a homicide involving a known suspect and the indictment as in the case here, treads perilously close to the limits of justice.

[21] In determining that Appellant has failed to prove actual prejudice, we need not reach the second prong of the analysis whereby the court balances the length of the delay and the reasons for it. Based on the foregoing, we affirm the trial court's decision to deny Appellant's motion to dismiss due to prosecutorial pre-indictment delay.

B. Sixth Amendment Speedy Trial

[22] Appellant's Sixth Amendment speedy trial claim shall be reviewed *de novo. Coffey v. Gov't of Guam,* 1997 Guam 14, ¶ 6. The Sixth Amendment of the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. Const. amend. VI. The Supreme Court has set out a four-part test for determining whether the delay between the initiation of criminal proceedings and the beginning of trial violates a defendant's right to a speedy trial. *Barker v. Wingo,* 407 U.S. 514, 53092 S.Ct. 2182, 2192 (1972). This test requires the court to consider the "[l]ength of the delay, the reason for the delay, the defendant's assertion of his right to a speedy trial, and the presence or absence of prejudice resulting from the delay." *Id.*

1. Length of the delay.

[23] "[T]he length of the delay is to some extent a triggering mechanism." *Barker* at 530, 92 S.Ct. at 2192. In *United States v. Marion,* 404 U.S. 307, 313, 92 S.Ct. 455, 459 (1971), the United States Supreme Court held that, "the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused' . . . ." However, the period between arrest

and indictment must still be considered in evaluating a Speedy Trial claim. *See United States v. MacDonald,* 456 U.S. 1, 7, 102 S.Ct. 1497, 1501 (1982). Thus, contrary to the prosecution's assertion, the delay in this case of arguably three years as measured from the time of the incident to the indictment is still relevant to this analysis.

[24] Appellant was arrested on June 26, 1992. Appellant was indicted on June 7, 1995. His trial began on January 6, 1997. Thus, the total period at issue amounts to approximately four years and six months. While *Barker* held that length of delay serves to trigger the analysis, the Court also held that, "[u]ntil there is some delay that is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." We note that Appellant waived his right to a speedy trial for a period of three and one half months post-indictment, and the trial took place within sixty-two (62) days (two days beyond the statutorily prescribed period) of his re-assertion of this right. However, we believe the four year and six month period that preceded the trial is sufficient to trigger a careful review of the other three *Barker* factors required to establish a violation of the right to speedy trial.

2. Reasons for the delay.

[25] An allegation of unconstitutional delay must be evaluated by the facts of each particular case. *United States v. Marion,* 404 U.S. at 325, 92 S.Ct. at 465-66. Different weights should also be assigned to different reasons when analyzing the reasons for delaying a defendant's public and speedy trial. *Barker,* 407 U.S. at 530, 92 S.Ct. at 2192. For instance, a deliberate attempt to hamper the defense would weigh heavily against the government. *Id.* This is so because the government has

a duty to make a diligent, good faith effort to bring an indicted defendant promptly to trial. *Smith v. Hooey,* 393 U.S. 374, 382-83, 89 S.Ct. 575, 579 (1969). Negligence or overcrowded courts, although counted against the government, weigh less heavily under this analysis. *Barker,* 407 U.S. at 531, 92 S.Ct. at 2192. Alternatively, a missing witness should serve as a valid reason, justifying the delay. *Id.*

[26] Addressing local law, *People v. Vincent P. Palomo,* Crim. No. 00061 A, 1993 WL 129624 (D. Guam App. Div. Apr. 8, 1993), touched upon the issue of whether the trial court abused its discretion by denying the defendant's motion to dismiss for lack of speedy trial on statutory grounds.[5] While that case correctly cited *People v. Johnson* 26 Cal. 3d 557, 162 Cal. Rptr. 431, 606 P.2d 738 (1980), for the proposition that the defendant's motions did indeed "constitute good cause for delay of a criminal trial" it neglected to quote this proposition in its entirety. The paragraph misleadingly cited by *Palomo* states:

> The courts agree, for example, that delay caused by the conduct of the defendant constitutes good cause to deny his motion to dismiss. Delay for defendant's benefit also constitutes good cause. Finally, delay arising from unforeseen circumstances, such as the unexpected illness or unavailability of counsel or witnesses constitutes good cause to avoid dismissal. **Delay attributable to the fault of the prosecution, on the other hand, does not constitute good cause. Neither does delay caused by improper court administration.**

Johnson 26 Cal. 3d 557 at 570, 162 Cal. Rptr. at 439-40, 606 P.2d at 746-7. (Emphasis added to the portion omitted in Palomo.); *but cf Palomo,* 1993 WL 129624 at *8.

[27] The facts of this case indicate reasons for the delay that do not support Appellant's assertion of error. The initial date for hearing pre-trial motions was set for November 8, 1996. Because of

[5]Our analysis rests exclusively on constitutional rather than statutory grounds. Although not essential to the discussion, the citation to *Palomo* informs the issue.

Typhoon Dale, these proceedings were rescheduled to November 14, 1996. The People then filed a motion to recuse Judge Tydingco-Gatewood on November 13, 1996, the day before the hearing.[6] At the November l4th hearing, Judge Tydingco-Gatewood recused herself. On November 15, 1996 Judge Manibusan then set the trial for January 6, 1997.

[28] Without evidence of deliberate delay, fault on the part of the prosecution, or improper court administration, we have no reason to find that the delay in this case should weigh significantly against either party. We attribute the delay to the recusal, re-assignment, and rescheduling of this case. However, pursuant to *Barker,* we consider these reasons to carry nominal weight.

3. Demand for speedy trial.

[29] A defendant has the "responsibility to assert a speedy trial claim." *Barker,* 407 U.S. at 529, 92 S.Ct. at 2191. The "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.* at 532, 92 S.Ct. at 2193.

[30] Here, Appellant asserted this right on two occasions. The first assertion took place on June 18, 1996, the second assertion took place on October 16, 1996. Significantly, Appellant filed a Motion to Reconsider the Trial Date on November 18, 1996. In his motion, Appellant requested that the date for trial be changed to an earlier date to allow commencement within the sixty-day time period prescribed in 8 GCA § 80.60 (a) (3) (1993).[7] In response to the motion, the People argued

[6]This court is compelled to comment that proper trial preparation completed well in advance of trial as opposed to a mere day or two before would likely have apprised the People of the potential conflict. Surely, this apprisal would then have allowed the parties to avoid unnecessary delays of this nature.

[7]8 GCA § 80.60 (1993) provides in relevant part:

§ 80.60. When a Case to be Dismissed, or Not Dismissed for Reasons of Time.

below that the time period within which the trial must have been commenced would not have expired on or before January 6, 1997 because the motions on behalf of both the prosecution and defense tolled this period. The People further asserted that, assuming the sixty day period did expire, the trial, set just two days after the sixty day period elapsed, would commence within the 10 day grace period that is allowed as per 8 GCA § 80.60 (b) (1) (1993). This court notes the absence of the defendant's requisite consent to the extension. From the record it is clear that defendant denied this consent explicitly in his motion to reconsider the trial date.[8]

[31] Given the fundamental nature of the right to speedy trial, only the defendant, himself, and not his counsel, may waive this right. *People v. Johnson,* 26 Cal. 3d 577, 162 Cal. Rptr. 431, 606 P.2d 738 (1980). Such a waiver must be voluntary, knowing, and intelligent. *Id.; see also Curlee Townsend v. Superior Court of Los Angeles County,* 15 Cal. 3d 774, 781 543 P.2d 619 (1975). In the instant case, there is no record of the defendant himself waiving or asserting the right to speedy trial specifically to allow the ten day extension period to take effect.

4. Prejudice to the defendant.

(a) Except as otherwise provided in Subsection (b), the court shall dismiss a criminal action if:
(3) The trial of a defendant, who is not in custody at the time of his arraignment, has not commenced within sixty (60) days after his arraignment.
(b) A criminal action shall not be dismissed pursuant to Subsection (a) if:
(1) The action is set on a date beyond the prescribed period upon motion of the defendant or with his consent, express or implied, and he is brought to trial on the date so set or within ten (10) days thereafter;
(3) Good cause is shown for the failure to commence the trial within the prescribed period.

[8]8 GCA § 80.60 (b) (1) (1993) provides that:
(b) A criminal action shall not be dismissed pursuant to Subsection (a) if:
(1) The action is set on a date beyond the prescribed period upon motion of the defendant **or with his consent,** express or implied, **and** he is brought to trial on the date so set or within ten (10) days thereafter; (emphasis added).

[32] The right to speedy trial was designed to protect three interests: 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. *Barker*, 407 U.S. at 533, 92 S.Ct. 2182 at 2193. Of these three interests, "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*

[33] The facts of the instant case only touch upon the latter two interests protected by the right to speedy trial. With due respect for the anxiety and concern the Appellant undoubtedly endured during the period after his indictment, the weight of this factor is counter-balanced by his June 27, 1996 waiver of his right to a speedy trial and most especially, the manner in which the trial date was set as soon as possible after pre-trial motions were heard.

[34] As for the third interest, Appellant claims that he was prejudiced by the erosion of testimony and exculpatory evidence such as the polygraph results and the t-shirt. Conclusory allegations do not establish the required showing of prejudice. Indeed, Appellate courts have consistently held that conclusory assertions of prejudice, including unsubstantiated allegations of witnesses' faded memories, are insufficient to constitute proof of actual prejudice. *See e.g., United States v. Young,* 906 F.2d 615, 620 (11th Cir. 1990); *United States v. Russo,* 796 F.2d 1443, 1451 (11th Cir. 1986).

CONCLUSION

[35] Applying the *Barker* analysis, the balancing of the requisite factors: specifically, the length of delay, the reasons for the delay, the assertion of the right to speedy trial, and finally, prejudice to Appellant, leads this court to but one conclusion. The four and one half year period at issue, though

long, is more than counter-balanced by the other factors in the analysis. Appellant's inability to prove actual prejudice coupled with the justifiable reasons for the delay tip the balance against Appellant's assertion of error.

[36] Accordingly, we affirm the trial court's decision and thereby uphold Appellant's conviction. Appellant's appeal is therefore DENIED.

BENJAMIN J.F. CRUZ
Associate Justice

JANET HEALY WEEKS
Associate Justice

SIGUENZA, C.J.:

[37] I concur with the decision of the court that the Appellant suffered neither a denial of his rights under the Due Process Clause of the Fifth Amendment nor of his Sixth Amendment Speedy Trial Right as secured by the Sixth Amendment. With respect, however, it is my opinion that the majority did not adequately engage in the evaluation necessary for disposition of the matter and broached a subject in a way that was inapplicable to this case and would only serve to confuse the issues. Accordingly, I file this opinion.

I- Rights under the Due Process Clause of the Fifth Amendment

[38] The trial court's decision on a defendant's motion to dismiss charges for pre-indictment delay is reviewed for an abuse of discretion. *United States v. Martinez*, 77 F.3d 332, 335 (9th Cir. 1996); *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992).

[39] The Due Process Clause of the Fifth Amendment protects an accused against pre-indictment delay. *United States v. Lovasco*, 431 U.S. 783, 789, 97 S.Ct. 2044, 2048 (1977). A two-part test is used to determine whether pre-indictment delay denied a defendant's due process rights: First, the defendant must prove actual, non-speculative prejudice from the delay; and second, the length of delay, when balanced against the reason for the delay, must offend those "'fundamental conceptions of justice which lie at the base of our civil and political institutions.'" *Huntley*, 976 F.2d at 1290 (9th Cir. 1992)(citing *United States v. Sherlock*, 962 F.2d 1349, 1353-54 (9th Cir. 1992)). However, the first prong of the test, proof of actual prejudice, must be satisfied before reaching the balancing portion of the under the second prong. *Id*. "Such prejudice will inevitably be either the loss of

witnesses and/or physical evidence or the impairment of their use, e.g., dimming of the witnesses' memory." *United States v. Mays*, 549 F.2d 670, 677 (9th Cir. 1977). "To establish actual prejudice sufficient to warrant a dismissal, the defendant must show not only the loss of the witness and/or evidence but also just demonstrate how that loss is prejudicial to him." *Id.* (citations omitted). Proof of such must be definite and not speculative. *Id*. (citation omitted).

[40] In *United States v. Barket*, 530 F.2d 189 (8th Cir. 1976), the defendant was indicted forty-seven months after the transaction which was the gravamen of the complaint against him. The defendant was the president, chairman and primary beneficial owner of a bank. He had been charged with consenting to the contribution and expenditure of national bank funds to a political organization to pay election expenses and with mis-applying the same funds by means of the same contribution guised as a bank loan. The defendant claimed that his case was prejudiced by the forty-seven month delay because six witnesses who would have materially aided his defense died before the case could have come to trial.

[41] The Eighth Circuit affirmed the trial court's dismissal of the indictment. *Id*. at 193. The appellate court concluded that the defendant had demonstrated that the loss each of the witnesses impaired the defendant's ability to defend himself on the crucial issue of whether the funds in question were actually a loan made in the ordinary course of business or a political contribution. *Id*. Each witness who died in the intervening delay was either involved in the receipt of the questioned funds or was familiar with its repayment as a permissible loan.

[42] In *Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990), the defendant, in a petition for a writ of habeas corpus, asserted a due process violation arising out of a delay by law enforcement personnel in the service of his arrest warrant and the return of an indictment. The defendant specifically asserted that he was unable to locate an alibi witness for use at his trial as a result of delay lasting two years and four months. The federal magistrate, after conducting an evidentiary hearing, agreed. The magistrate made findings that the defendant had demonstrated actual prejudice because of the absence of the lone alibi witness.

[43] The issue before the Fourth Circuit Court of Appeals was whether, after proving actual prejudice, a defendant seeking due process relief from pre-indictment delay must further prove improper prosecutorial motive as the cause for the delay. *Id*. at 894. Although the court had assumed that the issue of actual prejudice had been conceded by the State of North Carolina, *id*., the case is illustrative of the defendant's burden in showing at an evidentiary hearing both: (1) the identification of the lost witness; and (2) a particularized demonstration of the content of the witness' testimony.

[44] In contrast, in the case of *United States v. Ross*, 123 F.3d 1181 (9th Cir. 1997), there was an eight year delay between the underlying incident and the first grand jury indictment. The defendant sought to demonstrate actual prejudice by asserting that, during the intervening eight years, his son, a potential witness, had died. The defendant presented evidence implying that the witness who died would have been implicated in the incident. In addition, defendant argued that the witness would have impeached the testimony of another witness. Finally, the defendant averred that because the government, at trial, argued that he was conveniently avoiding guilt by pointing the finger at his late son, who could not defend himself; the presence of the defendant's son would have bolstered his

defense.

[45] The Ninth Circuit found this prejudice speculative. *Id*. at 1185. It observed that the defendant did not claim to know, in fact, whether the missing witness did or did not do the acts which would have implied that he was involved with the incident. *Id*. Further, the testimony would have been cumulative and its effect speculative, given other evidence presented at trial. *Id*. at 1186. Thus, because the defendant could not demonstrate actual prejudice, there was no need to weigh the reasons for the delay versus its length. *Id. Cf. Huntley*, 976 F.2d 1287 (Concluding no actual prejudice occurs when the unavailable witness' testimony would have been cumulative and speculative and when another witness refused to incriminate himself.).

[46] In the instant case, the Appellant has failed to demonstrate the actual prejudice that necessitates this court's consideration of the length and reasons for the delay. *See Huntley*, 976 F.2d at 1290. The Appellant claims that his defense was prejudiced by the loss of evidence, the loss of witnesses and diminished memories. Unlike the defendants in *Barket* and *Howell*, Appellant's showing in this respect falls woefully short.

[47] First, the Appellant claims that the loss of the blood-stained shirt of the victim prejudiced his defense; however, he does not demonstrate how this evidence would have helped him. Appellant seems to ask this court to engage in speculation to discern what exculpatory value this piece of evidence would have.

[48] Next, he claims a polygraph examination which was allegedly taken would have shown he was cooperative and truthful. Appellant's Opening Brief at 13. He argues the polygraph would have been corroborative of his testimony at trial. Appellant's Opening Brief at 15. The fact of its very

existence had been contested by the parties. Transcript, vol. II at pp. 57, 75 (Hearing on Motions, Nov. 21, 1996). At the hearing, the Appellant offered no other proof as to the fact of its existence other than his self-serving statement that the test was given. Transcript, vol. II at pp. 57, 75 (Hearing on Motions, Nov. 21, 1996). The trial court found that, even if the test were given, its results would be questionable at best. Excerpts of Record at 28. While it is true, notwithstanding arguments to the contrary, that such evidence, if it existed, may be admissible under certain situations, *see United States v. Crumby*, 895 F.Supp. 1354 (D. Ariz. 1995), our review of the record indicates the effect of this evidence is too speculative to demonstrate that its loss prejudiced the Appellant. In fact, the parties had argued extensively to the jury that, for the most part, Appellant's testimony was consistent with his original account of the incident. The thrust of the case against the Appellant was the inconsistency between the physical evidence and his claim of self-defense.

[49] Appellant next claims that he had suffered actual prejudice by the loss of several witnesses. First, Appellant argues GPD Officer Winnie Rojas had obtained statements from the Appellant and his wife and that Appellant wanted to cross-examine the officer as to whether or not she obtained his wife's statement though duress or coercion. Transcript, vol II at p. 65 (Hearing on Motions, Nov. 21, 1996). However, the trial court had earlier granted Appellant's own motion to exclude the testimony of his wife, on the basis of spousal immunity. Transcript, vol. II at p. 62 (Hearing on Motions, Nov. 21, 1996). The trial court was correct when it observed that her absence was not an issue nor was it prejudicial because neither the Government nor Appellant had plans to call the wife as a witness. Transcript, vol. II at p. 65 (Hearing on Motions, Nov. 21, 1996). Thus, Officer Rojas's testimony would have been unnecessary and Appellant can not claim prejudice for its loss.

[50] Appellant also asserts prejudice as to the loss of Chris Chambers, Greg Castro and Mattias Salvatierra. However, Appellant failed to demonstrate how his case would be prejudiced by their loss. He continues to argue their testimony had the potential of providing exculpatory evidence because the witnesses could testify as to what they heard at the time of the shooting. Transcript, vol. II at p. 66 (Hearing on Motions, Nov. 21, 1996). Again, Appellant's argument is without merit. He merely speculates as to the content and value of the evidence these witnesses would have provided. He does not set forth the actual prejudice necessary to make a Due Process violation.

[51] Finally, Appellant avers actual prejudice because of dimmed memories. At the hearing, he indicated that there were five witnesses who heard gun shots and ten witnesses who had seen the victim before the shooting. Transcript, Vol II at p. 69 (Hearing on Motions, Nov. 21, 1996). Again, Appellant fails to identify who these witnesses are or what they would have testified to.

[52] The trial record is replete with indications that several witnesses had difficulty remembering exact details of what occurred or what they did. Appellant speculates that these witnesses, had their memories been better, would have shown behavior by the victim that caused imminent fear of injury and therefore, justified Appellant's use of force. However, in spite of such limitations, Appellant was able to present evidence at trial to make out his self-defense claim. At trial, Everett Torregrosa testified that he had heard an argument, gunshots, and a pipe falling at the scene of the incident. In addition, Appellant called, at minimum, five witnesses to testify as to the victim's propensity for violence. Also, Bernal Castro was called by the Appellant and testified that he had been present when the victim was allegedly confronting Appellant. Other witnesses were called and testified that

they had seen the victim arrive at the barbecue.[9] The trial court did not abuse its discretion in finding that the Appellant could not demonstrate actual prejudice because of the delay in this case. Because Appellant fails to demonstrate that actual prejudice resulted from the delay, there is no need to reach the second prong of the due process test, balancing the length of delay against the reasons for it.

II- Sixth Amendment Speedy Trial Right

[53] The right of an accused to a speedy trial is a fundamental right guaranteed by the Sixth Amendment of the United States Constitution. *Klopfer v. North Carolina*, 386 U.S. 213, 223, 87 S.Ct. 988, 993 (1967). In determining whether a defendant's right to a speedy trial has been violated, the conduct of both the prosecution and the defendant must be balanced utilizing the following four factors: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2191-2192 (1972). None of the four factors are "a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial." *Id*. at 533, 92 S.Ct. at 2193. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id*.

[9]The need for the other witnesses becomes especially troublesome because Appellant fails to identify who and what these witnesses with dimmed memories would have provided; all one might do is speculate. *See United States v. Mays*, 549 F.2d 670 (9th Cir. 1977). Given the evidence presented at trial, my view is that any additional evidence these unidentified witnesses would have provided would have been merely cumulative.

A- Length of Delay

[54] The analysis of the Speedy Trial issue begins with an examination of the 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 balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case.

Barker, 407 U.S. at 530-531, 92 S.Ct. at 2192.

[55] There are three distinct periods of time that the court must address in the instant case. The victim was shot and killed on June 25, 1992. The Appellant was immediately taken into police custody, arrested, but subsequently released. Approximately three years after the incident and arrest, the Superior Court Territorial Grand Jury returned an indictment charging the Appellant with Manslaughter and Possession of a Firearm without a Firearm Identification. The Appellant was returned from Rota and appeared before the court on June 15, 1996. Appellant was arraigned on June 18, 1996. Trial on the matter began on January 6, 1997. Thus, there was a period of approximately fifty-four months from the date of arrest and trial and another period of time, eighteen months, from the date of the indictment to trial.

[56] In *United States v. Marion*, 404 U.S. 307, 321, 92 S.Ct. 455, 463-464 (1971), the Supreme Court held that the Speedy Trial Clause of the Sixth Amendment does not apply to the period before a defendant is indicted, arrested, or otherwise officially accused. The Court observed that:

> On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time. The Amendment would appear to guarantee to a criminal defendant that the

> Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him.

Id. at 313, 92 S.Ct. at 459.

[57] In addition to the period after indictment, the period between arrest and indictment must be considered in evaluating a speedy trial claim. *Dillingham v. United States*, 423 U.S. 64, 96 S.Ct. 303 (1975). "Although delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment, or to a claim under any applicable statutes of limitations, no Sixth Amendment right to a speedy trial arises until charges are pending." *United States v. MacDonald*, 456 U.S. 1, 7, 102 S.Ct. 1497, 1501 (1982) (citation omitted). Here, Appellant became an "accused" when he was arrested and the government, for purposes of the speedy trial guarantee, thereby commenced prosecution of him. *Marion* made this clear where the Court stated:

> To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. These considerations were substantial underpinnings for the decision in *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988 (1967); *see also Smith v. Hooey*, 393 U.S. 374, 377-378, 89 S.Ct. 575, 576-577 (1969). So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment. Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge.

Marion, 404 U.S. 307, 320-321, 92 S.Ct. 455, 463.

[58] Accordingly, I disagree with the position taken by the Appellee, and would hold that consideration of the time from the date of Appellant's arrest to the date of trial must be examined in this speedy trial claim.

[59] Moreover, in the case of *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686 (1992), the Supreme Court observed that the lower courts have generally found post accusation delay to be presumptively prejudicial at least as it approaches one year. *Id*. at 652, n.1, 112 S.Ct. at 2691, n.1. The Court further advised that, in this threshold context, the term 'presumptive prejudice' simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* inquiry. *Id*.

[60] In this case, I am very concerned with the amount of time that had elapsed between the date of the incident, the arrest and the trial. The underlying incident was clearly a homicide. The suspect was identified and had made inculpatory statements regarding the incident. The passage of approximately thirty-six months from the date of the incident to the date the grand jury returned the indictment seems long despite the seriousness of this case. I can only conclude that the delay in this case warrants a more deliberate review of the other factors of *Barker* to determine whether Appellant's constitutional right to a speedy trial was violated.

B- Reasons for the Delay

[61] The next step in the analysis is to evaluate the reason the government seeks to justify the delay. *Barker*, 407 U.S. at 531, 92 S.Ct. at 2192. The *Barker* court observed that:

> [h]ere, too, different weights should be assigned to different reasons. 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.

Id.

[62] A review of the entire record reveals that, from the period of Appellant's arrest to the date the indictment was returned, the case had been in the hands of at least five different prosecutors. Transcript, vol. I at pp. 61-62 (Further Proceedings, Nov. 14, 1996). Further, the presence of a viable issue of self-defense seems to have apparently influenced the initial decision to pursue or not pursue further prosecution of Appellant. Transcript, vol. I at 53 (Further Proceedings, Nov. 14, 1996). As was observed by the United States Supreme Court:

> It requires no extended argument to establish that prosecutors do not deviate from "fundamental conceptions of justice" when they defer seeking indictments until they have probable cause to believe an accused is guilty; indeed it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause. It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. To impose such a duty "would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.

United States v. Lovasco, 431 U.S. 783, 790-791, 97 S.Ct. 2044, 2049 (1977). "[T]hus no one's interests would be well served by compelling prosecutors to initiate prosecutions as soon as they are legally entitled to do so." *Id*. at 792, 97 S.Ct. at 2050.

[63] Although *Lovasco* dealt with pre-indictment delay and this case deals with post-arrest delay, I do not perceive any particular distinction when judging the reasonableness of the government's inaction in this case. The issue of self-defense was properly a concern of the prosecutors as evidenced by the fact that the grand jury had refused to return an indictment charging the Appellant with two more serious forms of criminal homicide; rather, the grand jury settled on the Manslaughter charge upon which the defendant was ultimately convicted.

[64] Turning to the period after the indictment, the record is barren of any justification, by the government, for the delay in extraditing the Appellant from Rota. In fact, the prosecutor who was present at the return of the indictment was aware that the Appellant was residing in Rota when he had asked for a bench warrant to issue. Transcript, vol. I at p. 3 (Return of Grand Jury, June 7, 1995).

[65] Finally, the government brought a motion to recuse the original judge assigned to the case. Trial had originally been set for December 5, 1996. The originally assigned judge had been the Chief Prosecutor at the time of the incident. The prosecuting attorney explained that as more information was gathered, it appeared the judge herself may have been involved in the disposition of the case. Although she could not recall if she was involved in the investigation, the judge recused herself from the case and it was immediately re-assigned to the trial judge below. I find no fault in the government's motion to recuse and, in my view, does not represent dilatory conduct on its part.

[66] In conclusion, the trial court found, and my review of the record is in agreement, no deliberate attempt to delay the trial in order to hamper the defense. Such action would be "weighted heavily against the government." *Barker*, 407 U.S. at 531, 92 S.Ct. at 2192. At most, what the record indicates is that the various prosecutors who had the case were either seriously considering the self-defense issue or were unintentionally inactive. Nevertheless, for purposes of the *Barker* analysis, the factor weighs against the government "since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id*.

C- Defendant's Assertion of Rights

[67] The defendant's assertion of or failure to assert his right to a speedy trial must also be considered in an inquiry into the deprivation of the right. *Barker*, 407 U.S. at 528, 92 S.Ct. at 2191. As the *Barker* court observed:

> The strength of his efforts will be affected by the length of delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

407 U.S. at 531-532, 92 S.Ct. at 2192-2193.

[68] Moreover, if a defendant was aware of the charges pending against him, failure to invoke the right would be weighed heavily against him. *Doggett*, 505 U.S. at 653, 112 S.Ct. at 2691.

[69] In this case, the record indicates the Appellant was aware, by virtue of his arrest, of the pending charges against him. At the bail hearing, Appellant argued that he had been in contact with the government and the police and that he was constantly asking about the status of the case; however, no finding supporting such claim was made by the court below, nor can I find evidence of such in the record.[10] Appellant offered no specifics as to the identification of the individuals he had allegedly contacted. Appellant claimed that he had left Guam for Rota because of alleged threats; however, he failed to demonstrate the existence of police reports or other proof justifying

[10]The record shows that a document was presented to the court but no indication as to its contents was made by the court. *See* Transcript, vol. I at p. 16 (Bail Hearing, June 17, 1996). We cannot speculate what the document was nor what value it would have in this appeal. We do observe that hearings on the motions, including the motion for dismissal because of prosecutorial delay, offered Appellant countless opportunities to solidify the record which he did not do.

his departure.

[70] Thus, without more, I can only conclude that Appellant's failure to invoke his right must weigh against him and that his acquiescence contributed to the delay in bringing him to trial even though he proceeded to formally assert it while the case was before the court. Although I recognize that the defendant has no duty to bring himself to trial, *see Barker*, 407 U.S. at 527, 92 S.Ct. at 2190, he does have a responsibility to assert a speedy trial claim, the quality and quantity of which this court must take into account in evaluating into the deprivation of the right. *Id*. at 528-529, 92 S.Ct. at 2191.

D- Prejudice

[71] The last factor to consider is the prejudice to the defendant. *Barker*, 407 U.S. at 532, 92 S.Ct. at 2193. Prejudice should be assessed in light of the interests of defendants which the speedy trial right was designed to protect. *Id*. The *Barker* court identified three such interests: (1) to prevent oppressive pre-trial incarceration; (2) to minimize anxiety and concern of the accused; (3) to limit the possibility that the defense would be impaired. *Id.*

[72] From the record before the court, it does not appear that Appellant was subjected to the disadvantages that *Barker* found associated with lengthy pretrial incarceration. Furthermore, he has not demonstrated that the anxiety and concern he experienced was anything more than minimal. In this case, the Appellant was released shortly after he was formally arrested on June 26, 1992. Transcript, vol. I at p. 63 (Further Proceedings, Nov. 14, 1996). He was neither brought before the magistrate judge nor was he required to post bail to secure his release. Transcript, vol. I at p. 63

(Further Proceedings, Nov. 14, 1996). There is no indication that there was some other restraint on his liberty. Appellant had claimed that his re-location from Guam to Rota was because of alleged threats; but, as stated earlier, no proof on the record exists to support his claim.

[73] The remaining interest to be evaluated, the impairment of his defense, is the most serious. *Barker*, 407 U.S. at 532, 92 S.Ct. at 2193. This is "[b]ecause the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id*. Appellant's argument in this regard was the same as that made for his Due Process claim. For purposes of a speedy trial claim, I would also adopt the finding that the Appellant has suffered no prejudice because of the delay.

[74] At this point, it must be mentioned that the Supreme Court in *Doggett,* observed that:

> consideration of prejudice is not limited to the specifically demonstrable . . . affirmative proof of particularized prejudice is not essential to every speedy trial claim. . .*Barker* explicitly recognized that impairment of one's defense is the most difficult form of prejudice to prove because time's erosion of exculpatory evidence and testimony can "rarely be shown". . .Thus, we generally have recognized that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other Barker criteria, it is part of the mix of relevant facts, and its importance increases with the length of delay.

505 U.S. at 655-656, 112 S.Ct. at 2692-2693 (citations omitted).

[75] In *Doggett*, the court found that a eight and a half year delay in arresting an accused from the date of his indictment violated his speedy trial rights as guaranteed by the Sixth Amendment. The court applied the *Barker* criteria and found that Doggett's failure to cite any specifically demonstrable prejudice did not doom his claim. *Doggett,* 505 U.S. at 658, 112 S.Ct. at 2694. The court held that the government's egregious persistence in failing to prosecute Doggett was sufficient to warrant granting relief. *Id*. The court found that the negligence caused a delay six times longer

than generally deemed sufficient to trigger judicial review, and the presumption of prejudice was neither extenuated by Doggett's acquiescence, nor persuasively rebutted. *Id*.

[76] In this case, although the delay due to government negligence is significant; its effect is counter-balanced by the consideration that the Appellant was aware of the unresolved charges against him and failed to take steps to assert his right in any meaningful way. Moreover, a finding of prejudice to his case is militated against because the case itself was a straight-forward homicide involving a claim that Appellant acted in self-defense and that there were no other eyewitnesses to the incident beside the Appellant and his wife (whom he had excluded as a witness). Thus, it is difficult to conclude that the delay in this case adversely affected the Appellant's ability to present an effective defense.

[77] Therefore, after due consideration of the factors in *Barker,* I conclude that the Appellant's speedy trial right, as protected by the Sixth Amendment, was not denied.

[78] Accordingly, I join the court and would AFFIRM the Appellant's conviction.

PETER C. SIGUENZA
Chief Justice