

FILED
SUPERIOR COURT
OF GUAM

2024 APR 17 AM 9:44

CLERK OF COURT

BY: _____



IN THE SUPERIOR COURT OF GUAM

THE PEOPLE OF GUAM,

CRIMINAL CASE NO. CF0313-21

vs.

DECISION AND ORDER

NICHOLAS WAYNE MOORE,

Defendant.

INTRODUCTION

This matter came before the Honorable Vernon P. Perez on January 31, 2024, for hearing on Defendant Nicholas Wayne Moore's ("Defendant") Motion for Court to Compel Attendance of Eric Salone at Trial or in the Alternative Motion to Dismiss filed November 15, 2023 and Motion to Dismiss, to Compel Appearance of Salone, for Disqualification, to Compel *Brady* and Other Evidence and for Evidentiary Hearings filed December 11, 2023. Present were Assistant Attorney General Sean E. Brown on behalf of the People of Guam ("the Government") and Defendant with counsels David J. Lujan, Michael F. Phillips, and William L. Gavras. Having reviewed the pleadings, the arguments presented, and the record, the Court now issues the following Decision and Order.

BACKGROUND

Defendant is charged with (1) two counts of Aggravated Assault (As a Second Degree Felony) with attached Special Allegation: Deadly Weapon Used in the Commission of a Felony; (2) one count of Terrorizing (As a Third Degree Felony) with attached Special Allegation: Deadly Weapon Used in the Commission of a Felony); and (3) one count of Possession of an Unregistered

1 Firearm (As a Third Degree Felony). (Am. Superseding Indictment, Jun. 13, 2022). The original
2 Superseding Indictment in this matter also charged a co-actor, Eric Benjamin Salone (“Salone”),
3 with (1) Aggravated Assault (As a Second Degree Felony) – 2 Counts with Special Allegation:
4 Deadly Weapon Used in the Commission of a Felony; (2) Terrorizing (As a Third Degree Felony)
5 with Special Allegation: Deadly Weapon Used in the Commission of a Felony; and (3) Possession
6 of a Firearm Without a Firearms Identification Card (As a Third Degree Felony).¹ (Superseding
7 Indictment, Mar. 24, 2022). The defendants were subsequently severed for trial. *See* Order, May.
8 20, 2022 (granting an oral stipulation for severance of defendants). On June 16, 2022, Salone
9 plead guilty to Possession of a Firearm without a Firearms Identification Card (As a Third Degree
10 Felony) and Discharge of Firearms (As a Misdemeanor) pursuant to a deferred plea agreement
11 with the Government. *See* Deferred Plea Agreement in CF0313-21-01, Aug. 11, 2022. The
12 Deferred Plea Agreement includes a cooperation provision with the Government. *Id.*

13 Defendant Moore’s Jury Selection and Trial commenced on the Amended Superseding
14 Indictment June 15, 2022 and continued throughout the fall of 2022 before Judge Alberto E.
15 Tolentino. Salone testified at trial during the Government’s case in chief on August 22, 2022,
16 August 23, 2022, August 24, 2022, August 25, 2022, September 6, 2022, September 15, 2022,
17 and October 10, 2022.² At the conclusion of Salone’s testimony on October 10, 2022, Attorney
18 Lujan indicated that he would subpoena Salone if needed for recall. (Digital Recording at 2:33:29,
19 Oct. 10, 2022).

20 On November 9, 2022, the court adjourned trial until January 10, 2023, to allow trial jurors
21 an opportunity to travel over the holidays. At this point in trial, Defendant was conducting his
22 cross-examination of Government witness Brian Mendiola. Judge Tolentino was unable to
23

24
25 ¹ These charges are reflected as charges four to six in the Superseding Indictment. (Superseding Indictment, Mar.
26 24, 2022).

27 ² On October 4, 2022, the court granted the Government’s Motion to Bar Further Cross-Examination of Salone by
28 Defendant, finding that “defense counsel has already impeached Salone several times and presented to the jury
Salone’s potential lack of credibility” and that “based on Attorney Lujan’s representations on August 25, 2022 and
September 6, 2022, Attorney Lujan had sufficient time to finish his cross-examination.” *See* Dec. & Order, Oct. 10,
2022.

1 resume trial on January 10, 2023, due to medical issues that developed throughout the holiday
2 break.

3 On January 23, 2023, Judge Arthur R. Barcinas granted Defendant's January 9, 2023
4 Motion for a Mistrial.³

5 On May 15, 2023, Jury Selection and Trial commenced for the second time before Judge
6 Tolentino.⁴ After four days of jury selection, Defendant filed a Motion for Mistrial. *See* Mot.
7 Mistrial Resulting from Violations Banning Media Coverage and Public Access, and Failure to
8 Maintain an Open Court and Public Trial, May 19, 2023. In light of the Motion, the fifth day of
9 jury selection was cancelled.⁵

10 On October 3, 2023, Defendant filed a Reassertion of Speedy Trial.
11

12 ³ Judge Barcinas presided over the matter in a case management role to address housekeeping issues.
13

14 ⁴ After a mistrial was declared in January 2023, the matter was subsequently presided over by Judge Maria T.
15 Cenzon and Judge John C. Terlaje until Judge Tolentino's return to the bench on May 15, 2023. *See* Notice of Judge
16 Assignment, Jan. 23, 2023 (Judge Cenzon assigned); Notice of Judge Assignment, Mar. 9, 2023 (Judge Tolentino re-
17 assigned); Am. CTS Order, Mar. 13, 2023 (signed by Judge Terlaje for Judge Tolentino). Judge Elyze M. Iriarte
18 also briefly presided over this matter after Defendant's re-assertion of speedy trial on May 5, 2023. *See* Notice, May
19 5, 2023; Minute Entry, May 8, 2023. The matter did not proceed to trial before Judge Iriarte, however, in light of
20 the Government's withdrawal of its waiver of Judge Iriarte's conflict of interest after the Pre-Trial Conference on
21 May 8, 2023.

22 ⁵ It is not entirely clear to the Court how the May 19, 2023 Motion and the May 15, 2023 jury venire were
23 subsequently addressed. On May 18, 2023, the day before the filing of the Motion, the jury venire was instructed to
24 return for continued selection the following day at 9:00 a.m. (Minute Entry, May 18, 2023). The May 19, 2023
25 selection was later vacated in the Court's case management system with a note "by Court (Motion filed)". No further
26 hearing was calendared until the filing of Defendant's Ex Parte Motion for Release with Conditions on June 2, 2023.
27 At the Motion Hearing on June 5, 2023, Defendant was released back on electronic monitoring and a Status Hearing
28 was set for August 8, 2023. On June 5, 2023, Defendant also waived his right to a speedy trial. The Court notes that
the Judiciary of Guam was closed for business upon the declaration of COR 2 by *I Maga'hågan Guåhan* on May 21,
2023, in light of Typhoon Mawar approaching the Mariana Islands, and was only opened for limited court-related
services and urgent proceedings on May 30, 2023. *See* ADM23-003, May 21, 2023; ADM23-004, May 29, 2023.
The Supreme Court of Guam subsequently directed certain urgent matters to continue to be scheduled and heard and
for all other matters, including criminal and civil trials, to be rescheduled until June 9, 2023. *See* ADM23-005, May
30, 2023; ADM23-006, Jun. 2, 2023. On October 16, 2023, at the start of Jury Selection, Attorney Phillips inquired
with the court about the status of the Motion and the jury venire from May. (Digital Recording at 9:15:58, Oct. 16,
2023). Judge Tolentino indicated he believed the Motion for Mistrial was withdrawn. *Id.* at 9:16:48. Judge Tolentino
also informed the parties that he had discharged the jury venire from May. *Id.* at 9:17:50 ("The jury commissioner
asked the court you know are we still going to keep them because they're kind of in limbo and I said no. We'll go
ahead and discharge them.").

1 On Monday, October 16, 2023, Jury Selection and Trial commenced for the third time.
2 A jury of twelve and four alternates was empaneled the following day, however, the matter did
3 not immediately proceed to opening statements and witness testimony.

4 On November 15, 2023, Defendant filed a Motion for Court to Compel Attendance of Eric
5 Salone at Trial or in the Alternative Motion to Dismiss (“Motion to Compel”). On November 4,
6 2023, the Government filed its Opposition. On December 4, 2023, Defendant filed his Reply.
7 On December 6, 2023, the Government also filed a Request for Leave to File a Surreply to
8 Defendant’s Ex Parte Motion to Compel Eric Salone to Testify at Trial or Dismiss the Case.

9 On December 11, 2023, Defendant filed a Motion to Dismiss, to Compel Appearance of
10 Salone, for Disqualification, to Compel *Brady* and Other Evidence and for Evidentiary Hearings
11 (“Motion to Dismiss”). On December 19, 2023, the Government filed its Opposition. On
12 December 22, 2023, Defendant filed his Reply.

13 Both motions were scheduled to be heard before Judge Tolentino on January 8, 2024.⁶
14 The Motion Hearing did not go forward before Judge Tolentino, however, in light of a Statement
15 of Objection filed by Defendant that day.

16 On January 18, 2024, this matter was re-assigned to this Court. *See* Notice of Judge
17 Assignment, Jan. 18, 2024.

18 On January 31, 2024, the Court heard arguments on the motions and subsequently placed
19 the matters under advisement.

20 On April 9, 2024, this Court granted Defendant’s October 17, 2023 Motion for a Mistrial
21 and discharged the October 2023 jury. *See* Order re: Defendant’s Oct. 17, 2023 Mot. Mistrial,
22 Apr. 9, 2024; Minute Entry, Apr. 9, 2024.

23 On April 15, 2024, Defendant re-asserted his right to a speedy trial. Jury Selection and
24 Trial is currently set to commence on April 30, 2024.

25
26
27 ⁶ The first Motion was scheduled to be heard on December 14, 2023. The hearing was rescheduled upon request of
28 Defendant. *See* Ex Parte Unopposed Motion to Move Motion Hearing, Dec. 13, 2023.

1 expense, Defendant will pay for Salone's flight to and from Guam will provide
2 room, board and a per diem to Salone while on Guam for Defendant's trial.

- 3 3. An evidentiary hearing should be held to determine to what extent the
4 government is culpable in Defendant not being able to secure Salone's
5 appearance at trial and what efforts the government has made to secure Salone's
6 appearance at trial.
- 7 4. An evidentiary hearing should be held to determine which and to what extent
8 employees of the Attorney General's Office violated their duty of candor. Any
9 employee found to have violated their duty of candor should be disqualified
10 from this prosecution.
- 11 5. A hearing should be held to determine if the government has sufficiently
12 justified its representation to Judge Cenzone that Salone's testimony was so
13 untruthful that the government's conscience cannot tolerate calling Salone as a
14 witness in either this prosecution or in *People v. Moore*, CF0314-23.
- 15 6. The government should be ordered to identify, line by line, 1) which parts of
16 Salone's transcripts contain untruthful statements, 2) what the truth is, 3) when
17 the government learned of this truth, 4) how the government learned of this
18 truth, and 5) why the government has not previously provided this information
19 to the Defendant.

20 *Id.* at 19. Defendant argues that the Government violated its duty of candor because (1) it failed
21 to object to Salone's December 20, 2022 request to relocate to the mainland, (2) it represented to
22 the Court that Salone complied with his terms of probation, (3) it did not ask the court to continue
23 the December 20, 2022 hearing so that counsel for Defendant could be present, (4) subsequent to
24 the December 20, 2022 hearing the Government has represented that Salone did not testify
25 truthfully, (5) the Government represented to Judge Cenzone in CF0314-21 that it will not call
26 Salone as a witness because of his untruthful perjurious testimony in CF0313-21, (6) the
27 Government represented to the court in the December 20, 2022 hearing that Salone testified
28 truthfully, and (7) the Government has failed in its duty to inform the court that Salone gave false
testimony which is a violation of his plea agreement. (Mot. Dismiss at 4-9).

The Government opposes both motions. As to the first Motion, the Government argues
that "Defendant would suffer no prejudice by Salone's unavailability to testify at trial. The
Defendant can introduce into evidence Salone's testimony from the first trial because Salone

1 qualifies as an unavailable witness under GRE 804(a)(5).” (Opp’n at 3, Nov. 29, 2023). The
2 Government further argues that the introduction of Salone’s testimony from the first trial would
3 not violate his rights because the “Defendant had an opportunity to ask those [questions that are
4 vital to his defense] and any other questions related to his defense . . . when he examined Salone
5 at the first trial,” *id.* at 2, and the court “already ruled that the probative value of the additional
6 questions the Defendant wants to ask Salone is outweighed by considerations of waste of time
7 and needless presentation of cumulative evidence.” *Id.* at 3. As to the second Motion, the
8 Government argues that (1) Defendant failed to provide an adequate basis for an ex parte motion;
9 (2) that it has reached out to Salone’s attorney to see if he would be willing to come back to Guam
10 to testify; and (3) it has “committed no misconduct or intentionally violated Defense’s rights
11 under the confrontation clause.” (Opp’n at 2, Dec. 19, 2023).

12 “[D]ismissal of an indictment is inappropriate absent flagrant and prejudicial prosecutorial
13 misconduct.” *People v. Naich*, 2013 Guam 7 ¶ 33 (quoting *United States v. Jacob*, 855 F.2d 652,
14 655 (9th Cir. 1988)).

15 [A] court has two available theories for dismissing an indictment on the basis of
16 prosecutorial misconduct: if the government’s actions are so extreme as to
17 constitute a violation of due process or, if not rising to that level, under the court’s
18 supervisory powers. Under the second theory, the court is empowered to act “to
19 implement a remedy for the violation of a recognized statutory or constitutional
20 right; to preserve judicial integrity by ensuring that a conviction rests on appropriate
21 considerations validly before a jury; and to deter future illegal conduct. Dismissal
22 for these reasons is only proper in cases of flagrant prosecutorial misconduct.

23 *Id.* (internal citations and quotation marks omitted).

24 **A. The December 20, 2022 Progress Hearing in CF0313-23-01**

25 As much of Defendant’s Motion to Dismiss stems from Salone’s December 20, 2022
26 hearing, the Court finds it necessary to go through what occurred at the hearing. Defendant asserts
27 several things occurred at the hearing, including that (1) the main subject was Salone’s counsel’s
28 request that Salone be permitted to relocate to the mainland; (2) the Government represented to
the Court that Salone had complied with the terms of his probation; (3) the Government

1 represented that Salone testified truthfully at trial; and (4) the Government should have asked for
2 a continuance. *See Mot. Dismiss at 4-9.*

3 The December 20, 2022 hearing was calendared as a Progress Hearing for Salone before
4 Judge Tolentino. According to the Court's case management system, a Progress Hearing was
5 initially set for October 18, 2022 after Salone changed his plea on June 16, 2022. The October
6 18, 2022 Progress Hearing, however, was rescheduled to December 20, 2022 due to an ongoing
7 trial. There is no filed Notice of Hearing in the system, so the Court is unaware at this time how
8 parties were notified of the hearing. Present at the December 20, 2022 hearing before Judge
9 Tolentino were Salone with counsel, F. Randall Cunliffe, Assistant Attorney General Sean Brown
10 on behalf of the People of Guam, and Probation. (Minute Entry (CF0313-21-01), Dec. 20, 2022).
11 At the hearing, Probation advised the court that Salone completed all his conditions and that the
12 only thing pending was restitution. (Digital Recording at 2:12:53 (CF0313-21-01), Dec. 20,
13 2022). When asked about the issue of restitution, AAG Brown indicated that there was difficulty
14 in finalizing it with the victim because trial was ongoing:

15 COURT: Excellent, excellent job Mr. Salone. He's completed everything. Only
16 pending item is the restitution amount. Did we liquidate that amount Mr. Brown?

17 AAG BROWN: Your Honor, I don't, I don't think we did. If I think about it there
18 might have been some compensation by criminal injuries compensation and I was
19 waiting for the victim to kind of finalize things for us but because we're in trial
20 actively it's kind of hard to talk to the victim. So, I think we might need to come
21 back. Plus, I think the defendant only plead guilty recently so I don't think there's
22 a problem with continuing this for a few more months to see where we're at. If it's
23 just restitution we can move that to collections court if that's all that's left, but once
24 a substantial period of time has gone by.

25 *Id.* at 2:13:13. The court then placed Salone on unsupervised probation, without objection from
26 AAG Brown or Attorney Cunliffe:

27 COURT: Okay, Mr. Salone, you did your end, you did your part of the deal. The
28 only thing that's left to work out is the payment of restitution. The court is going to
relieve you of your obligation to check in okay. It will be an unsupervised period
of time until we get that restitution dollar amount ordered, okay.

SALONE: Yes, Your Honor. Thank you.

1 COURT: So yeah, just don't get in trouble again. We will notice you for another
2 hearing once we get the dollar amount, if any, of restitution, okay?

3 SALONE: Yes, Your Honor. Thank you.

4 *Id.* at 2:15:05. The following month, counsel for Salone submitted an Order for Return of
5 Defendant's Passport on January 18, 2023, which was signed by Judge Tolentino and filed on
6 January 24, 2023.

7 In light of the above, the Court does not find that the Government failed to object to
8 Salone's request to relocate to the mainland on December 20, 2022, because one was not formally
9 made on the record at that hearing. The Court further does not find that the Government
10 represented to the court at the December 20, 2022 hearing that Salone complied with his terms of
11 probation or that it represented to the court that Salone testified truthfully at trial. Rather, it
12 appears that probation advised the court that Salone completed all his conditions of probation and
13 that it was the presiding court itself that told Salone "*you did your part of the deal.*" There was
14 no specific statement that Salone testified truthfully at trial by the Government at the hearing.
15 The Government did not comment on the veracity of Salone's testimony at trial. The Government
16 noted that Salone had only recently changed his plea and asked for the matter to be brought back
17 in a couple of months to address restitution. Both the Government and the presiding court noted
18 that trial was still ongoing. Therefore, the Court does not find the Government violated its duty
19 of candor at the hearing nor does it find the Government committed "flagrant prosecutorial
20 misconduct" and will not dismiss this matter under that basis.

21 **B. Salone's Deferred Plea Agreement in CF0313-21-01**

22 Although Salone was placed on unsupervised probation by the court presiding over his
23 case in CF0313-21-01, the Court notes that his deferred probationary term does not expire until
24 June 2025. Salone's deferred probation term is for a period of three (3) years. *See* Deferred Plea
25 Agreement (CF0313-21-01), Aug. 11, 2022. As he changed his plea in June 2022, the court
26 technically still has jurisdiction over Salone until June 2025. Salone's plea agreement provides
27 in relevant part:

28 Pursuant to this agreement, Defendant shall, in good faith, cooperate with any
investigation by the government into the events described in the Indictment and

1 related police report for CF0313-21 and GPD Report No. 20-25884. Defendant
2 shall make himself available to be interviewed by any law enforcement officer, law
3 enforcement representative, and/or any agent of the Office of the Attorney General;
4 which requirement shall be accomplished by providing his Probation Officer with
5 complete and accurate contact information and complying with a continuing duty
6 to update his contact information. A willful effort to avoid detection by the above
7 referenced government entities shall be considered a substantive violation of the
8 terms of this agreement. *Defendant agrees that he shall testify truthfully and
9 completely in any matter requiring his testimony which is related to the
10 aforementioned cases and police reports.*

11 ***

12 If the Defendant fails to cooperate with police or the Office of the Attorney General
13 in preparation of trial and at trial, then the deferred plea of guilty will be entered
14 and the Defendant will be sentenced to serve up to four (4) years of incarceration
15 at the Department of Corrections, Mangilao.

16 ***

17 *Defendant agrees to testify truthfully against his co-defendant, Nicholas Wayne
18 Moore, at any court proceeding.*

19 (Deferred Plea Agreement at 5; 7; & 8 (CF0313-21-01)) (emphasis added). In light of these
20 provisions, the Court finds that Salone may still be subject to testify at Defendant's trial in the
21 instant matter. *See, e.g., Miles v. State*, 85 S.W.3d 907, 914 (Ark. 2002) ("Under the
22 circumstances of the plea agreement in this case, we are not persuaded that the word 'trial' applies
23 solely to the first trial that ended in a mistrial. Clearly, the intent of the parties was for the
24 testimony to be used in a trial deciding the issue of guilt. Viewing the plain language of the
25 agreement as a whole, we conclude that [the defendant] was obligated to give truthful testimony
26 in a proceeding leading to an adjudication of the legal issues.").

27 **C. Salone's Trial Testimony in Fall 2022**

28 The Court next turns to the issue of the Government's representations that Salone did not
testify truthfully and whether or not the Government wants to call him as a witness. The Court
notes that it has varying statements from different Assistant Attorney Generals and in different
proceedings. Defendant sets forth statements made by now retired Assistant Attorney General J.
Basil O'Mallan III before a different judge in a different matter involving Defendant and a

1 statement set forth in email from Assistant Attorney General Christine S. Tenorio, both of which
2 discuss the issue of Salone having potentially committed perjury. *See* Mot. Compel at 2, Nov.
3 15, 2023; Mot. Dismiss, Dec. 11, 2023. At a July 31, 2023 Motion Hearing in CF0314-21⁸ before
4 Judge Maria T. Cenzon, AAG O'Mallan represented the following:

5 Your Honor, Mr. Salone is not on my witness list. That's not an oversight, that was
6 an intent based on his multi-day cross examination by Mr. Lujan in the felony 313-
7 21 case where basically he has proved untrustworthy. I do not feel comfortable
8 putting someone on the stand who has a great potential to perjure himself. That's
9 why I'm not planning on bringing him in.

9 (Digital Recording at 10:47:16 (CF0314-21), Jul. 31, 2023). When asked about the cooperation
10 agreement Salone was subject to by the court, AAG O'Mallan stated the following:

11 It is a full cooperation plea agreement. But I mean based on his appearance on the
12 witness stand in the other case I don't feel comfortable putting him on the stand. I
13 don't think he's trustworthy.

14 *Id.* at 10:48:08. Then, when asked about whether or not the Government would be able to assist
15 defense counsel in securing Salone's appearance for trial in CF0314-21, AAG O'Mallan
16 responded:

17 I mean, my concern is it almost feels like suborning perjury. This guy has indicated
18 he's not trustworthy and that's why I was a little surprised by the request. But I can
19 contact, I can make an attempt to contact Mr. Salone and see if he's willing to come
20 back but I have no intention of using him.

21 *Id.* at 10:48:53. Subsequently, on October 24, 2023, Attorney Gavras emailed AAG Tenorio
22 requesting the Government's assistance in securing the testimony of Salone at the upcoming trial.
23 (Mot. Dismiss, Attachment). AAG Tenorio responded with the following statement:

24 Based on Mr. Salone's prior testimony at the first trial, we believe this satisfied any
25 obligation under his plea agreement. We are not in contact with Mr. Salone and we
26 do not currently know of his whereabouts. We would have no objection to you
27 using his prior testimony, as it would fall under a hearsay exception. However, it
28 should be understood that the AG's office does not intend to suborn perjury.

⁸ CF0314-21 is a separate pre-trial matter involving Defendant and is assigned to Judge Cenzon. Defendant is also represented by Attorneys Lujan, Phillips, and Gavras in that matter.

1 *Id.*

2 Contrastly, at the January 31, 2024 hearing in the instant matter, AAG Brown stated that
3 if Salone were brought to Guam, he would want him to testify at trial. (Digital Recording at
4 3:09:40, Jan. 31, 2024) (“I have no objection to him testifying. If he is able to get on a plane and
5 fly out here, I would love to have him testify again.”). AAG Brown noted that Salone’s testimony
6 may have had inconsistencies but indicated that it was the inevitable result of having testified for
7 over fourteen hours or so. *Id.* at 3:00:43; 3:09:32. Additionally, the Government’s Opposition to
8 the December 2023 Motion sets forth that “there are no guarantees that Salone did or did not
9 commit perjury. Witnesses change their answers routinely without [there] being perjury.” (Opp’n
10 at 2, Dec. 19, 2023).

11 Neither AAG O’Mallan or AAG Tenorio are currently assigned to this matter, and AAG
12 O’Mallan’s statements were made in a completely separate matter. Their statements imply that
13 Salone may have made perjurious testimony. The currently assigned Assistant Attorney General
14 does not appear to have the same opinion. As this Assistant Attorney General will be handling
15 the case at trial, the Court finds that his opinion regarding Salone as a witness should control, and
16 further notes that the task of evaluating and weighing evidence and inconsistencies of testimony
17 lies within the purview of the jury. Nonetheless, the Court also orders the Government to
18 reconcile the statements made by the other prosecutors at the Office of the Attorney General.
19 Should the Government formally change its position regarding Salone’s trial testimony, it shall
20 *immediately* inform the Court and defense counsel, and shall also specifically identify any known
21 instances of perjury committed by Salone during his testimony. *See, e.g., California v. Trombetta*,
22 467 U.S. 479, 485 (1984) (“The most rudimentary of the access-to-evidence cases impose upon
23 the prosecution a constitutional obligation to report to the defendant and to the trial court
24 whenever government witnesses lie under oath.”).

25 Lastly, AAG Brown represented to the Court at the January 31, 2024 hearing that the
26 Government has made some efforts to contact Salone. This included contacting Attorney Cunliffe
27 to see if Salone would be available for trial, noting the existence of the plea agreement and that
28 he was still a witness in this case. (Digital Recording at 3:01:05, Jan. 31, 2024). AAG Brown

1 indicated that Salone advised him via email that he had young kids and was employed and would
2 not be able to come back to Guam. *Id.* at 3:01:27. These statements clearly contrast those set
3 forth in the email correspondence indicating that the Office of the Attorney General was not in
4 contact with Mr. Salone and did not currently know of his whereabouts. AAG Brown further
5 indicated that it was not a “for sure thing” that Salone would not come back but acknowledged
6 he didn’t really want to come back. AAG Brown represented that the Government could continue
7 making efforts and additionally suggested that the Court hold a hearing with Attorney Cunliffe
8 and Salone to fully ascertain whether or not Salone would be willing to return to Guam for trial.

9 At this time, because Defendant has asserted his right to a speedy trial and said trial is set
10 to commence on April 30, 2024, there is limited time to coordinate off island witness testimony.
11 The Court hereby orders the Government to continue its efforts to ascertain Salone’s ability to
12 immediately return to Guam to testify at trial in light of the provisions set forth in his deferred
13 plea agreement and to advise the Court of said efforts at the Pre-Trial Conference set for Friday,
14 April 19, 2024 at 10:00 a.m. The Court will also notice Salone’s counsel to appear for the Pre-
15 Trial Conference. Should Salone be unable to appear in person at trial, despite all reasonable
16 efforts being made, the Court will further address the use of his prior trial testimony as an
17 unavailable witness under Guam Rules of Evidence 804(a)(5) and (b)(1).⁹

18
19 ⁹ The Court acknowledges there is a preference for live testimony, as such testimony “gives the jury (or other trier
20 of fact) the opportunity to observe the demeanor of the witness while testifying. . . . [T]hrough live testimony, and
21 this procedure only, the persons who are to decide upon the evidence have an opportunity of observing the quality,
22 age, education, understanding, behavior, and inclinations of the witness.” *United States v. Yida*, 498 F.3d 945, 950
(9th Cir. 2007) (citations omitted). “Demeanor is of the utmost importance in the determination of the credibility of
23 a witness. . . . The demeanor of a witness . . . is ‘wordless language.’” *Id.* (quoting *Gov’t of Virgin Islands v. Aquino*,
24 738 F.2d 540, 548 (3d Cir. 1967)). Nonetheless, GRE 804 provides in relevant part:

25 (a) Definition of unavailability. “Unavailability as a witness” includes situations in which the
26 declarant --

27 * * *

28 (5) is absent from the hearing and the proponent of a statement has been unable to procure
the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2),
(3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.

* * *

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is
unavailable as a witness:

1 **CONCLUSION**

2 For the foregoing reasons, the Court does not find the Government committed “flagrant
3 prosecutorial misconduct” and DENIES the portions of Defendant’s Motions that request
4 dismissal. The Court, however, ORDERS the Government to continue its efforts to ascertain
5 whether or not Salone is able to immediately return to Guam to testify at trial.

6 **IT IS SO ORDERED** this 17th day of April, 2024.

7 

8
9
10 **HONORABLE VERNON P. PEREZ**
11 Judge, Superior Court of Guam

12
13
14
15
16
17
18 **SERVICE VIA EMAIL**

19 I acknowledge that an electronic
20 copy of the original was e-mailed to:

21 AG, W. Gavras, M. Phillips,
22 P. Lopez

23 Date: 4/17/24 Time: 9:51am

24 Antonio P. Cruz
25 Deputy Clerk, Superior Court of Guam

26 (1) Former testimony. Testimony given as a witness at another hearing of the same or a
27 different proceeding, or in a deposition taken in compliance with law in the course of the
28 same or another proceeding, if the party against whom the testimony is now offered, or, in
a civil action or proceeding, a predecessor in interest, had an opportunity and similar
motive to develop the testimony by direct, cross, or redirect examination.

Guam R. Evid. 804.