IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

JUSTIN NAICH,
Defendant-Appellant.

Supreme Court Case No. CRA12-002
Superior Court Case No. CF0208-10

OPINION

Cite as: 2013 Guam 7

Appeal from the Superior Court of Guam
Argued and submitted October 25, 2012
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

TORRES, J.:

[1] Following a jury trial, Defendant-Appellant Justin Naich was convicted of two counts of Aggravated Assault with a *Special Allegation* Possession and Use of Deadly Weapon in the Commission of a Felony and one count of Terrorizing, and sentenced to a total of fifteen years in prison. Naich argues on appeal that the judgment should be reversed and the indictment dismissed. First, he argues that the trial court abused its discretion by denying his motion to dismiss the indictment, finding that although Plaintiff-Appellee People of Guam ("the People") violated the court's discovery orders, dismissal was not the appropriate sanction. Second, he contends that the trial court abused its discretion by finding that the People did not violate his constitutional right to a speedy trial under the Sixth Amendment of the United States Constitution.

[2] The trial court fashioned an appropriate remedy for the discovery violations that occurred and did not abuse its discretion in declining to dismiss the indictment because of the People's failure to timely comply with the court's discovery orders. Naich was also not deprived of his constitutional right to a speedy trial. Accordingly, the judgment of the trial court is affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] On April 6, 2010, a grand jury indicted Justin Naich on six counts, stemming from an assault with a machete directed at Kachinori Suta. Specifically, the grand jury returned an Indictment for:

> (1) One count of Aggravated Assault (As a 2nd Degree Felony) with a *Special Allegation* Possession and Use of a Deadly Weapon in the Commission of a Felony;

(2) One count of Aggravated Assault (As a 3rd Degree Felony) with a *Special Allegation* Possession and Use of a Deadly Weapon in the Commission of a Felony;

(3) One count of one count of Aggravated Assault (As a 3rd Degree Felony) with a *Special Allegation* Possession and Use of a Deadly Weapon in the Commission of a Felony;

(4) One count of Aggravated Assault (As a 3rd Degree Felony) with a *Special Allegation* Possession and Use of a Deadly Weapon in the Commission of a Felony;

(5) One count of Aggravated Assault (As a 3rd Degree Felony) with a *Special Allegation* Possession and Use of a Deadly Weapon in the Commission of a Felony; and

(6) One count of Terrorizing (As a 3rd Degree Felony).

Record on Appeal ("RA"), Indictment at 1-4 (Apr. 6, 2010).

[4] On April 14, 2010, Naich was arraigned, pleaded not guilty and waived speedy trial. The court accepted Naich's not guilty plea and waiver of speedy trial and ordered that grand jury recordings and discovery be provided to him.

[5] Over the course of the next several months, the court held a series of scheduling conferences, and certain discovery was provided to Naich by the People. The Alternate Public Defender ("APD") was initially appointed as counsel for Naich. On April 14, 2010, the APD filed a motion to withdraw as counsel due to a conflict, and the court appointed attorney James Canto. According to Naich, on or around April 29, 2010, his attorney received the first twenty-four pages of discovery from the People.[1]

[6] Next, on September 28, 2010, the trial court held a scheduling conference and issued its first Criminal Trial Scheduling Order informing the parties of their continuing duty to disclose and exchange discovery materials. In this order, the court also set jury selection and a trial date of March 16, 2011.

[1] It does not appear that Naich's attorney signed this form or the subsequent one on May 18, 2010; however, Naich concedes that his attorney received both deliveries. RA, Mot. Dismiss at 1-2 (Oct. 14, 2011).

[7] On December 17, 2010, then-attorney James Canto filed a motion to withdraw as counsel for Naich, because Canto was moving to a new position as the Governor's Legal Counsel. Thereafter, on March 2, 2011, attorney Leevin Camacho was appointed as Naich's new counsel. Camacho received the same twenty-four pages of discovery material from the People. By May 3, 2011, a third attorney was appointed for Naich, Joaquin C. Arriola Jr., who acknowledged receipt of the twenty-four pages of discovery material, but deemed it minimal for a multi-count aggravated assault case and again requested all discovery from the People. There is no reason apparent in the record or argued on appeal as to why Naich received new counsel on these later two occasions.

[8] The People then sent Naich discovery pages 25 through 38, which were received on May 6. Naich's counsel then sent a request to the People for discovery similar to the one he provided on April 12, 2011.

[9] On September 13, 2011, the trial court held another criminal trial setting hearing and issued a second criminal trial scheduling order, setting jury selection and trial for January 18, 2012. The order also contained the standard language regarding the exchange of mutual discovery and duty to disclose. Naich waived speedy trial again at this hearing.

[10] On September 20, 2011, Naich asserted his right to a speedy trial. The trial court held a hearing on September 27, 2011, set jury selection and trial for October 26, 2011, and ordered the parties to submit motions, witness lists and exhibits by October 11, 2011, the date of the pre-trial conference.

[11] On October 11, 2011, the People turned over discovery pages 39 through 82. This material included Naich's *Miranda* waiver and written statement to police, the victim Kachinori

Suta's written statement to police, and numerous *Laxamana*[2] notes and evidence custody receipts. Both Naich and Suta's statements were written in Chuukese. At the pre-trial conference, the trial court granted Naich leave to file additional motions but kept the trial date of October 26, 2011.

[12] On October 14, 2011, Naich moved to dismiss the indictment both as a sanction against the People for the delayed production of discovery and for violation of his right to a speedy trial. Naich contended that there was no justification for withholding the discovery material until the motion cut-off date especially after numerous court orders to disclose and exchange discovery. He argued that dismissal with prejudice was warranted because the discovery was of the type explicitly designated by statute and the delay in receipt was over one year. With respect to the violation of his speedy trial rights, Naich argued that it was "highly unlikely" that trial would commence within forty-five days of arraignment or assertion of his right to speedy trial pursuant to 8 GCA § 80.60 (a)(2), particularly because the belatedly produced discovery material in Chuukese would need to be translated. RA, Mot. Dismiss at 1-9. In addition to alleging violation of his statutory speedy trial rights, Naich argued that the People violated his constitutional right to a speedy trial under the Sixth Amendment of the Constitution because nineteen months had passed from his arrest to his trial date, and the delay was largely due to the People's continued failure to provide discovery.

[13] At the hearing on the motion to dismiss, the People conceded that the trial court's discovery orders were violated and that the violations were "on the part of the Attorney General's Office." Transcripts ("Tr.") at 13 (Hr'g Mot. Dismiss, Oct. 25, 2011). The People argued that the delay "was in the form of mistake," because the police failed to notify the

[2] *People v. Superior Court (Laxamana)*, 2001 Guam 26 (holding that a police officer's field notes are discoverable).

Attorney General's Office when they added documents to Naich's file. *Id.* at 13-16. The People stated that the ordinary process involved the prosecutor asking the police on a periodic basis if they had added any information to the file, but this did not occur here and that could explain why there had been such a failure. The trial court specifically noted that the case was originally scheduled for trial in March 2011, that it was reset in September 2011 for the October 26, 2011 trial date, and that apparently the People had not attempted to obtain the information until October 11, 2011. The People had no answer as to why it did not obtain this discovery and send it to Naich, other than to note that the prosecutor may have been on military duty until October 1, 2011.

[14] The court explicitly articulated its disapproval of the delay in Naich's receipt of Suta's statement and expressed concern that the delay might harm Naich's counsel's ability to prepare Suta's cross-examination, particularly because both Suta's and Naich's statements were not in English nor translated. In addition, the court also stated that such discovery delays were "becoming a pattern and endemic." *Id.* at 34.

[15] The People discussed whether or not the material could be translated into English and utilized by Naich prior to trial, suggesting that both were possible. Further, the People believed that there was nothing material in the *Laxamana* notes that was not already in the police report, to which Naich had earlier access. The People argued that a lesser sanction than dismissal was appropriate, such as limiting the use of the material at trial.

[16] Naich argued that dismissal was warranted. He contended that any suppression would have to include testimony by Suta regarding what he wrote in his statement, which in turn would encompass his identification of Naich and information in the police officer's statement, because that information was derived from the *Laxamana* notes. Naich argued that merely barring

testimony inconsistent with the withheld material would be insufficient to deter the People from committing future discovery violations.

[17] In a written ruling issued the same day as the hearing, the trial court denied Naich's motion to dismiss the indictment. The court found that the People violated several court orders by providing Naich with delayed access to discovery materials. However, the court did not find "the People's conduct grossly shocking and so outrageous as to violate the universal sense of justice." RA, Dec. & Order at 2 (Oct. 25, 2011). The court was not satisfied that the People had a good reason for the delay in disclosure, but concluded that the delay was not attributable to bad faith. The court found that Naich was prejudiced only by having less time to prepare for trial and believed that, if the *Laxamana* notes contained exculpatory or impeachment evidence, then Naich could have moved for a continuance in order to better assess the evidence. The court noted that Naich did not move for a continuance, then cited law that suggested that failure to do so can undermine the argument that the defendant suffered prejudice from the delay. The court determined that "less harsh sanctions than dismissal is [sic] appropriate and feasible." *Id.* Consequently, the court ordered the People to translate Suta's statement into English by 12:00 p.m. on October 26, 2011, and it partially excluded certain evidence from trial. Additionally, the court barred the People from referencing either Suta's statement or his discussion with police that led to the *Laxamana* notes, and it barred the use of any statements or notes to refresh the recollections of any of its witnesses. Naich, however, was permitted to use the materials at trial.

[18] Using a four-part balancing test, the trial court found no violation of Naich's speedy trial rights. It noted that the length of delay from Naich's assertion of speedy trial on September 20, 2011 until the expected trial date of October 26, 2011 was only thirty-six days. Further, while dismayed at the People's delay in providing discovery, the trial court did not find this to be a

deliberate or strategic attempt by the People to delay trial or hinder the defense. The court found that the delay was not unreasonable in part because much of it was attributable to Naich. Specifically, it found that his attorneys had not attended scheduled matters, had requested continuances, and had repeatedly withdrawn from representing him, necessitating delays while new counsel was appointed. Further, Naich did not establish how he was prejudiced by the delay, although the court recognized that since he sought pre-trial relief he did not need to establish prejudice. Weighing the factors together, the trial court found no violation of Naich's constitutional right to a speedy trial. Due to Naich's waiver, the trial court also concluded that there was no statutory speedy trial violation.

[19] At the start of trial, the prosecutor acknowledged that translations had been made. In a pretrial filing, Naich submitted exhibits that included translations of both Suta and Naich's statements.

[20] The People moved to dismiss counts Two through Four of the indictment and Naich was tried on the remaining counts. The jury convicted Naich on all remaining counts. The trial court sentenced Naich to ten years in prison on Count One, and five years on the Special Allegation, to run consecutively; five years on Count Five, to run concurrently with the other sentences, and five years on the Special Allegation in Count Five, to run concurrently; and to five years on Count Six, to run concurrently, for a total sentence of fifteen years imprisonment. The court issued a final judgment, and Naich filed a timely notice of appeal the same day.

II. JURISDICTION

[21] We have jurisdiction over appeals from final judgments pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw current through Pub. L. 113-9 (2013)); 7 GCA §§ 3107(b) and 3108(a) (2005); and 8 GCA §§ 130.10 and 130.15(a) (2005).

III. STANDARD OF REVIEW

[22] We review the trial court's discovery orders, and sanctions imposed for violations of discovery orders, for an abuse of discretion. *People v. Tuncap*, 1998 Guam 13 ¶ 11. We review a constitutional speedy trial claim *de novo*. *People v. Flores*, 2009 Guam 22 ¶ 9 (citing *People v. Mendiola*, 1999 Guam 8 ¶ 22).

IV. ANALYSIS

[23] On appeal, Naich argues that dismissing the indictment is the proper remedy for the People's discovery violations and that the court violated his constitutional speedy trial rights. Appellant's Br. at 9-10 (Aug. 27, 2012). Naich does not argue on appeal that the People violated his statutory right to a speedy trial prescribed under 8 GCA § 80.60. *Id.* at 14-16. We will first address the discovery violations.

A. Discovery Violations

[24] Naich argues that the trial court abused its discretion when it denied his motion to dismiss the indictment based upon the People's repeated and "inexcusable" discovery violations. *Id.* at 10. He contends that the People violated at least five court orders related to discovery, he repeatedly requested discovery material, the items requested were among the types of discovery explicitly listed as discoverable by statute, and the only justification for the violations was that it was "a mistake." *Id.* at 12-13. He asserts that he was prejudiced because he only received the information on the eve of trial and a continuance was not viable, given that he had requested a speedy trial and had been confined for eighteen months by then. *Id.* at 13-14. Naich also notes the trial judge's statement that late discovery was "becoming a pattern and endemic." *Id.* at 14 (citing Tr. at 34 (Hr'g Mot. Dismiss)).

1. Discovery Requirements

[25] Pretrial discovery in criminal cases is governed by Chapter 70 of Title 8 of the Guam Code Annotated. *See* 8 GCA §§ 70.10 - 70.80 (2005). The People must, upon the court's order, disclose to the defense certain discoverable "material and information within [the People's] possession or control, the existence of which is known, or by the exercise of due diligence may become known to the [People]." 8 GCA § 70.10(a). This material includes, among other things, written or recorded statements made by victims, likely witnesses and the defendant, as well as generally exculpatory material. *Id.* Notes made by police officers in the course of an investigation, both in the field and in conducting interviews, are also discoverable. *See Laxamana*, 2001 Guam 26 ¶ 44.

[26] The trial court found—and the People conceded—that the People violated discovery laws and court orders by failing to turn over to the defense Suta's statement, Naich's statement, the *Laxamana* notes, and Naich's *Miranda* waiver. Tr. at 13 (Hr'g Mot. Dismiss); RA, Dec. & Order at 1-2. Naich contends that he was prejudiced by the discovery delay, and while acknowledging that the sanction of dismissal is a disfavored remedy, he believes it was appropriate under the circumstances. Appellant's Br. at 13-14. The People argue that the trial court properly exercised its discretion in denying Naich's motion to dismiss because the government did not commit flagrant misconduct resulting in prejudice to Naich and the sanctions were proportionate to the misconduct. *See generally* Appellee's Br. at 8-13 (Sept. 26, 2012). We now examine whether or not the court abused its discretion in imposing sanctions other than dismissal for the discovery violations.

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2. Sanctions

[27] When a party fails to comply with a court's discovery orders, "the court may order such party to comply with the prior order, grant a continuance, or issue such other order as it deems just under the circumstances." 8 GCA § 70.45. The trial court declined to dismiss under these circumstances, but it chose to bar the People from referencing either Suta's statement or his discussion with police that led to the *Laxamana* notes, and it precluded the People from using any statements or notes to refresh the recollections of any of its witnesses. RA, Dec. & Order at 5. Naich was permitted to use the materials in his defense or upon cross-examination of the People's witnesses. *Id.* at 3.

[28] In imposing a sanction, "it seems better policy for the court to apply sanctions which affect the evidence at trial and the merits of the case as little as possible." *Tuncap*, 1998 Guam 13 ¶ 23 (internal quotation marks omitted). We have disfavored dismissal as a remedy, and held that "the court should impose the least severe sanction that will accomplish the desired result [--] prompt and full compliance with the court's discovery orders." *Id.* ¶ 24 (quoting *United States v. Sarcinelli*, 667 F.2d 5, 7 (5th Cir. 1982)). Dismissal is appropriate where government misconduct is "grossly shocking and so outrageous as to violate the universal sense of justice." *Id.* ¶ 26 (citation omitted).

[29] The Fifth Circuit in *Sarcinelli* relied on Federal Rules of Criminal Procedure Rule 16(d)(2), which provides authority for sanctions for discovery violations. *Sarcinelli*, 667 F.2d at 6-7; Fed. R. Crim. P. 16(d)(2). That rule is substantially similar to 8 GCA § 70.45. *Compare* Fed. R. Crim. P. 16(d)(2) ("If a party fails to comply with this rule, the court may: (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit that party from introducing

the undisclosed evidence; or (D) enter any other order that is just under the circumstances."), *with* 8 GCA § 70.45 ("If at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with an order issued pursuant to this Chapter, the court may order such party to comply with the prior order, grant a continuance, or issue such other order as it deems just under the circumstances.").

[30] In *Tuncap*, the defendant twice requested discovery materials from the People, including police reports and physical evidence. 1998 Guam 13 ¶ 4. The People failed to respond or comply. *Id.* Shortly before trial was scheduled to begin, the trial court held a hearing and directed the People to provide the discovery materials. *Id.* ¶ 5. The People agreed to turn over some of the requested materials, but disputed other requests, and several hearings were held over the next few days to resolve the matter. *Id.* ¶¶ 5-8. The trial court ultimately dismissed the case with prejudice, finding that the People failed to disclose discovery material despite being repeatedly ordered to do so, that the failure to turn over the material prejudiced the defendant, and that the People's actions were "shocking and outrageous." *Id.* ¶ 9.

[31] On appeal, we reversed the trial court's dismissal of Tuncap's indictment. *Id.* ¶ 35. In deciding the appropriateness of sanctions imposed, we examined the following factors: "1) reasons why the disclosure was not made; 2) the extent of the prejudice, if any, to the opposing party; 3) the feasibility of rectifying that prejudice by a continuance, and 4) any other relevant circumstances." *Id.* ¶ 25 (citing *Sarcinelli*, 667 F.2d at 7).

[32] We stated in *Tuncap* that the goal of sanctions was "to get prompt and full compliance with the discovery order," and we noted that dismissing the case did not achieve that end. *Id.* ¶ 27. Further, we determined that less harsh sanctions could have been imposed, such as holding the Chief Prosecutor or the Attorney General in contempt and imposing fines. *Id.* ¶ 28. We were

unable to determine why the People failed to comply with the discovery orders or if the defendant would have suffered any prejudice by the delay, because the trial court did not make a particularized inquiry into those factors. *Id.* ¶ 29. Finally, we believed that although invocation of speedy trial rendered a request for a continuance unfeasible, there remained time—eight days—before trial was scheduled to begin to remedy any prejudice the defendant suffered. *Id.*

[33] The Ninth Circuit has held that dismissal of an indictment is inappropriate "absent flagrant and prejudicial prosecutorial misconduct." *United States v. Jacobs*, 855 F.2d 652, 655 (9th Cir. 1988). The Ninth Circuit has also held that a court has two available theories for dismissing an indictment on the basis of prosecutorial misconduct: if the government's actions are so extreme as to constitute a violation of due process or, if not rising to that level, under the court's supervisory powers. *United States v. Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008) (citation omitted). Under the second theory, the court is empowered to act "to implement a remedy for the violation of a recognized statutory or constitutional right; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and to deter future illegal conduct." *Id.* at 1085 (quoting *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991)). Dismissal for these reasons is only proper "in cases of flagrant prosecutorial misconduct." *Id.* (quoting *Simpson*, 927 F.2d at 1091). The Ninth Circuit has subsequently held that a court's supervisory powers may extend beyond those three reasons enumerated in *Simpson*. *United States v. W.R. Grace*, 526 F.3d 499, 511 n.9 (9th Cir. 2008) (recognizing the abrogation of *Simpson*).

[34] We now review the trial court's application of the *Sarcinelli* factors articulated in *Tuncap* to determine whether the sanctions imposed by the trial court for the discovery violations are appropriate.

a. Reasons Why Disclosure Was Not Made

[35] The first factor requires inquiry into the reasons why disclosure was not made. *Tuncap*, 1998 Guam 13 ¶ 25. The trial court found that the People did not offer a good reason for the delay, but that it had not acted in bad faith and had only made a mistake. RA, Dec. & Order at 2. In *Tuncap*, the trial court did not discuss this factor, so we did not have occasion to comment on it further. *See Tuncap*, 1998 Guam 13 ¶ 29. The trial court's finding here is reasonable and consistent with the People's proffered reason for the delay as being a mistake, which Naich has not disputed. *See* Appellant's Br. at 13 (stating but not challenging People's proffered reason for delay). The People argued that the police did not notify them when new information was added to Naich's file, and that the prosecutor in charge of the case had military duty that may have compromised his ability to check in with the police periodically. Tr. at 13-17 (Hr'g Mot. Dismiss). There is nothing in the record to suggest that this was not the case.

[36] However, the People's failure to comply with several court orders, as well as with Guam's discovery statute, over a long period of time, even if by mistake, is troubling and not consistent with the standards under which the Office of the Attorney General ought to conduct itself. In the future, it is imperative that the People be more diligent in seeking to comply with discovery requests and orders, even if this requires proactive efforts. Nevertheless, we agree with the trial court's findings that the errors were not in bad faith but rather a series of mistakes.

b. The Extent of the Prejudice, If Any, to the Opposing Party

[37] The extent of any prejudice to the opposing party was the next factor considered by the trial court in deciding what sanction to impose. *Tuncap*, 1998 Guam 13 ¶ 25. The court found that Naich was prejudiced only by having less time to prepare for trial, with only fifteen days from receipt of the discovery until trial began. RA, Dec. & Order at 2. In *Tuncap*, we held that

eight days was arguably sufficient time to use belated discovery materials to prepare for trial, although the extent of the defendant's prejudice was not known. 1998 Guam 13 ¶ 29. There was no trial in that case because the trial court dismissed the indictment, so our statement was only that time was still available to remedy the prejudice suffered by the defendant, if any. *Id.* The discovery material in that case was similar to that at issue here, including police reports and witness statements, but also included physical evidence not involved in this case. *Id.* ¶¶ 4-5.

[38] The trial court found that just as a defendant receiving exculpatory evidence with time to make effective use of it does not warrant a new trial, Naich "receiving potentially impeaching evidence does not warrant a dismissal of the Indictment." RA, Dec. & Order at 3 (citing *People v. Kitano*, 2011 Guam 11 ¶ 22). The trial court's finding that Naich was only prejudiced by having less time to prepare for trial is supported by the record. *Id.* at 2. A careful review of the material and the trial transcripts has not revealed any significant inconsistencies between the material and the testimony, nor has Naich argued that any such inconsistencies exist. Further, the court was correct to note that the time between receipt and trial was sufficient to give him time to prepare adequately. The fifteen-day period is substantially longer than the eight days in *Tuncap*. Indeed, even on appeal, Naich has not suggested any different strategic actions he might have taken had he had more time to prepare and utilize the delayed discovery material.

[39] We are mindful that the defense only received the translated statements by Suta and Naich on the morning of trial. While receipt of the translated statements on the day of trial may not be a sufficient amount of time to review the material and utilize it, Naich has again failed to state what he would have done differently had he received that information earlier.

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c. The Feasibility of Rectifying Prejudice By a Continuance

[40] The third factor is the possibility of resolving any prejudice the defendant suffered by granting a continuance. *Tuncap*, 1998 Guam 13 ¶ 25. As the trial court noted, Naich did not move for a continuance to have more time to review the evidence, he still had time on his speedy trial clock to do so, and having such a viable alternative form of relief was a further reason not to dismiss the indictment. *Id.* (citing *Kitano*, 2011 Guam 11 ¶ 27; *Tuncap*, 1998 Guam 13 ¶ 29).

[41] In *Kitano*, the People provided certain discovery material, including *Laxamana* notes, only nine days before the start of trial. *Kitano*, 2011 Guam 11 ¶ 10. We held that "assuming arguendo that the field notes contained exculpatory or impeachment evidence, the fact that Kitano did not move for a continuance in order to be afforded an opportunity to better assess the new evidence hurts any argument that he suffered prejudice by the delay." *Id.* ¶ 27. In *Tuncap*, we held that the defendant asserted speedy trial and did not need to request a continuance as an alternative remedy. *Tuncap*, 1998 Guam 13 ¶ 29. However, we also noted that he received the material eight days before trial, giving him time to review the evidence and thus rectifying "the actual prejudice, if any." *Id.*

[42] Naich asserted speedy trial, so he was not required to request a continuance as an alternative remedy. *See id.* However, as noted above, the only prejudice to be rectified in the first place was Naich having less time to prepare for trial, so while his failure to move for a continuance does not work against him, it does not establish that he suffered any particular prejudice or that the trial court was otherwise unable to minimize it.

d. Any Other Relevant Circumstances

[43] Finally, the court may look to any other relevant circumstances. *Tuncap*, 1998 Guam 13 ¶ 25. The trial court found that discovery violations of this type were "becoming a pattern and

endemic." Tr. at 34 (Hr'g Mot. Dismiss). Neither the parties nor the court provided more information on this point.

[44] Trial courts are in the best position to judge whether discovery violations are in fact systemic and all-too-common. One instructive example of a court addressing the failure to disclose material evidence to a defendant occurred in the Federal District Court of Massachusetts. *See United States v. Jones*, 686 F. Supp. 2d 147 (D. Mass. 2010). The court in *Jones* recounted "a dismal history of intentional and inadvertent violations of the government's duties to disclose in cases assigned to this court," and gave notice that it was considering ordering that district's Assistant United States Attorney to personally reimburse the court for the time spent by the indigent defendant's court-appointed counsel in dealing with the issues raised by the errors. *Id.* at 148 (internal quotation marks omitted). In response, the Assistant United States Attorney asked to defer the imposition of sanctions in order to undertake numerous reforms, ranging from increased training for its attorneys generally to increased supervision and training for the specific attorney who had erred in that case, and, in conjunction with local judges, law professors, and defense attorneys, to put on an educational program. *Id.* at 152-54. The court was satisfied with the response and declined to impose sanctions. *Id.* at 158. The court mentioned, however, that prosecutors should recognize that "it is in their enlightened self-interest to discharge their discovery obligations properly" and "[i]n some instances, the failure to do so requires the dismissal of promising cases." *Id.* at 156-57. Such dismissals may also result in the return of "undeserving, dangerous defendants to the community." *Id.* at 157.

[45] The court here did not make the kind of case-by-case findings found in *Jones*. Without a developed record on this subject, we cannot say that the problem is endemic or systemic, at least insofar as dismissal is warranted as a sanction. Indeed, the court in *Jones*, even after examining

a troubling pattern in a case-by-case discussion, found that steps short of dismissal were warranted. *Id.* at 150, 158. Accordingly, this factor cuts against dismissing the indictment.

e. Conclusion

[46] Taking these four factors together, we hold that the trial court did not abuse its discretion in declining to dismiss the case. It found that the discovery violations were not intentional, nor were they shocking and outrageous, and the only prejudice Naich would suffer was a shorter time to prepare for trial. It also imposed sanctions that limited the People's use of the delayed discovery material while allowing Naich to utilize it. Finally, while the court did state this type of problem was becoming "endemic," it did not make particularized case-by-case findings that this was the case, or find that dismissal of this case was the only way to ensure future compliance in other cases by the People. Tr. at 34 (Hr'g Mot. Dismiss). Under the facts of this case, the trial court fashioned an appropriate remedy and did not abuse its discretion in declining to dismiss the indictment.

B. Speedy Trial

[47] Naich also argues that the trial court abused its discretion by finding that there was no violation of his right to a speedy trial. Appellant's Br. at 14. He argues that over eighteen months passed between his arrest and indictment in March and April 2010, respectively, and the beginning of his trial in October 2011. *Id.* at 15. He further contends that the delay stemmed largely from the People's failure to provide discovery, and that he suffered prejudice as a result of having to wait eighteen months for his trial. *Id.* at 15-16.

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[48] Naich raises only a violation of his constitutional speedy trial right and does not assert a violation of his statutory right to a speedy trial found in 8 GCA § 80.60.[3] He has not clearly raised the statutory issue in his brief, other than to cite to the standard of review. *See id.* at 9. Moreover, he admits in his brief that the length of delay between his assertion of his right to a speedy trial and the start of trial was thirty-six days, while the statute mandates that trial commence within forty-five days. *Id.* at 15; *see also* 8 GCA § 80.60(a)(2). At oral argument, he explicitly conceded that the trial court did not violate his statutory speedy trial rights. Digital Recording at 2:14:25-2:14:34 (Oral Argument, Oct. 25, 2012).

[49] 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. In turn, the Organic Act of Guam makes that provision specifically applicable to Guam. 48 U.S.C.A. § 1421(b)(u) (Westlaw current through Pub. L. 113-9 (2013)). In evaluating a constitutional speedy trial violation claim, we employ a four-part balancing test employed by the U.S. Supreme Court in *Barker v. Wingo*. *See Flores*, 2009 Guam 22 ¶ 42 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). The following factors are considered:

(1) The length of the delay;
(2) The reason for the delay;
(3) The defendant's assertion of his right to a speedy trial; and
(4) The presence or absence of prejudice resulting from the delay.

Id. (citing *Barker*, 407 U.S. at 530). "[T]he factors must be considered together and balanced in relation to all of the relevant circumstances of the delay in bringing the defendant to trial." *Id.* (citing *Barker*, 407 U.S. at 533).

[3] Title 8 GCA § 80.60(a)(2) provides that a criminal action shall be dismissed if "[t]he trial of a defendant, who is in custody at the time of his arraignment, has not commenced within forty-five (45) days after his arraignment," provided, however, that the defendant has not impliedly or explicitly consented to trial beyond that time period. 8 GCA § 80.60(a)(2) (2005).

1. The Length of the Delay

[50] The length of delay is measured from the point of arrest or indictment until trial. *Id.* ¶ 43. In evaluating the impact of the length of the delay, the court must consider conduct of the prosecution and the defense, as well as the nature of the case. *Id.* We will not analyze the other factors unless there is a presumptively prejudicial delay. *Id.* ¶ 44. In *Flores*, we held that a six-year gap between arrest and trial fits this presumptively prejudicial criterion. *Id.* In an earlier case, *People v. Mendiola*, we deemed a four-and-a-half year delay between the arrest and trial sufficient to meet this test. 1999 Guam 8 ¶ 24. While the 18-month delay here is substantially less than those time periods, the trial court found that this factor weighed in favor of finding a speedy trial violation. RA, Dec. & Order at 3. Accordingly, any error in this finding is in Naich's favor, and without commenting on whether an 18-month delay is presumptively prejudicial, we do not see any reason to disturb the finding because the government has not challenged it on appeal.

2. The Reason for the Delay

[51] Delay may be deliberate, negligent, or reasonable. *Flores*, 2009 Guam 22 ¶ 45. Deliberate delay is weighted heavily against the government, negligent delay is "weighted less heavily against the government than is deliberate delay but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant," and justified delay, such as delay attributable to the defendant, is not counted at all against the People. *Id.* (internal quotation marks omitted). The trial court found the delay here not to be deliberate on the part of the government, although it was "dismayed" at the delay in providing discovery insofar as it contributed to the delay. RA, Dec. & Order at 3-4. It further found that much of the delay was attributable to Naich himself or his attorneys. *Id.*

[52] It was not an abuse of discretion to attribute a portion of the delay to Naich. His attorneys did not attend scheduled conferences and hearings; he had three different attorneys at different times, leading to delays during appointment, withdrawal, and preparation time; and he made two requests for a continuance. *Id.* at 4. Naich has not disputed his own culpability in contributing to the delays or otherwise explained why such delay should not be attributed to him. *See* Appellant's Br. at 15-16. While it is not clear from the record why Naich changed counsel repeatedly or requested continuances, we have no basis to attribute fault for those delays to anyone other than Naich. Further, no one has disputed that the People's delays in providing discovery, to the extent they contributed to the delay in trial, was anything other than negligent, so this action is only weighted somewhat against the People. *Flores*, 2009 Guam 22 ¶ 45. Accordingly, it was not an abuse of discretion to find that this factor in total did not weigh in favor of finding a speedy trial violation, when Naich himself contributed to the delays and the People's actions were at worst negligent.

3. The Defendant's Assertion of His Right to a Speedy Trial

[53] Naich did not assert speedy trial until September 20, 2011, almost a year and a half after being arrested and confined. RA, Indictment at 1-4; RA, Statement Re: Speedy Trial (Sept. 20, 2011). Neither did he assert it at the hearing held on September 13, 2011, even though trial was set for January 2012. *See* RA, Dec. & Order at 4. Given the significant delay in asserting speedy trial and the fact that the trial began thirty-six days after he did request it, the trial court properly found that this factor weighed against Naich. *Id.*

4. The Presence or Absence of Prejudice Resulting From Delay

[54] "A long, unexplained pretrial delay may give rise to a presumption of prejudice, and shift the burden to the government to justify the delay." *Flores*, 2009 Guam 22 ¶ 49 (citation

omitted). A court examines three interests protected by the right to a speedy trial in evaluating whether a defendant suffered prejudice:

(1) Preventing oppressive pretrial incarceration;
(2) Minimizing anxiety and concern of the defendant; and
(3) Limiting the possibility that the defense will be impaired.

Id. (citing *Barker*, 407 U.S. at 532). The third factor is the most serious because impairment of the defense "skews the fairness of the entire system." *Id.* (citing *Barker*, 407 U.S. at 532). "The impairment nevertheless must be serious enough to amount to a constitutional deprivation." *Id.* (quoting *United States v. Franco*, 112 F. Supp. 2d 204, 216 (D.P.R. 2000)).

[55] In a case involving a claim of statutory speedy trial violations, we held that where a defendant seeks pretrial relief, he does not have to show prejudice. *People v. Nicholson*, 2007 Guam 9 ¶ 24. The trial court relied in this aspect of *Nicholson* when finding that Naich did not need to demonstrate prejudice, and found that the factor weighed in his favor as a result. RA, Dec. & Order at 4 (citing *Nicholson*, 2007 Guam 9 ¶ 24). However, we have held that "constitutional standards and analysis have no application when the question is whether the defendant has been denied a statutory speedy trial right." *People v. Julian*, 2012 Guam 26 ¶ 19. We have never held that a defendant seeking pretrial relief does not need to show prejudice in a constitutional speedy trial case. By contrast, we have relied on the traditional prejudice requirements from *Barker* in a case where the defendant filed a pretrial motion to dismiss based on a constitutional speedy trial violation. *See, e.g.*, *Flores*, 2009 Guam 22 ¶¶ 6, 49-57.

[56] While the court applied the wrong standard, such error worked in Naich's favor since the court found that the factor favored him automatically. RA, Dec. & Order at 4. Regardless, in applying the test from *Flores* and *Wingo*, Naich cannot demonstrate that he suffered prejudice. Naich has not argued either that the time he spent in prison before trial was particularly

oppressive. *See generally* Appellant's Br. at 15-16; *Flores*, 2009 Guam 22 ¶ 50 ("[E]vidence of a lengthy pre-trial incarceration, standing alone, is insufficient to establish that a defendant's right to a speedy trial has been violated . . . where the defendant neither asserts nor shows that the delay weighed particularly heavily on him . . . ." (omissions in original) (internal quotation marks omitted)). In addition, he has not argued that he suffered particular anxiety and concern, such that it amounts to a constitutional violation. *See generally* Appellant's Br. at 15-16; *Flores*, 2009 Guam 22 ¶ 51 ("[T]o establish prejudice based on anxiety, a defendant must do more than simply make an assertion but must show that the alleged anxiety and concern had a specific impact on [his] health or personal or business affairs." (second alteration in original)). Finally, as noted above, he has not pointed to any actual prejudice in the delay in preparing for trial. Accordingly, this factor does not support finding a constitutional violation of Naich's right to a speedy trial.

5. Conclusion

[57] Considering all of these factors together and balancing them in relation to all of the relevant circumstances of the delay in bringing Naich to trial, we cannot say the trial court abused its discretion in holding that Naich's constitutional right to a speedy trial was not violated. An eighteen-month delay from arraignment to trial was not nearly as long as the delays of four-and-a-half and six years in *Mendiola* and *Flores*, respectively. More significantly, much of that delay was attributable to Naich, and he has not provided us with any reasons why we should overturn the trial court's findings on this point. In addition, once Naich asserted his right to speedy trial, his trial took place within thirty-six days. Finally, the trial court found that Naich did not need to show prejudice and that the factor cut in his favor, but even with such a finding, the overall result of the factors does not result in a constitutional violation of his right to a speedy

trial. Even analyzing the delay for prejudice under *Flores*, Naich does not demonstrate that he suffered any.

V. CONCLUSION

[58] The sanctions imposed by the trial court for the discovery violations were reasonable, supported by the record, and in proportion to the nature and scope of the People's violations. The People's actions, while worthy of disapproval, were not so grossly shocking as to mandate dismissal of the indictment.

[59] The trial court also properly found no violation of Naich's constitutional right to a speedy trial. The delay from arraignment to trial was not nearly as long as other cases in which we have held the time to be presumptively prejudicial, much of the delay was attributable to Naich, trial began thirty-six days after his request for speedy trial, and he did not suffer any tangible prejudice beyond the delay itself. Accordingly, Naich's convictions and sentence are **AFFIRMED.**

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Associate Justice

Original Signed By: **Katherine A. Maraman**
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: **F. Philip Carbullido**
F. PHILIP CARBULLIDO
Chief Justice