

**For Publication**

**IN THE SUPREME COURT OF THE VIRGIN ISLANDS**

<b>JERRIS BROWNE,</b>	)	<b>S. Ct. Crim. No. 2020-0021</b>
Appellant/Defendant,	)	Re: Super. Ct. Crim. No. 174/2017 (STX)
	)	
v.	)	
	)	
<b>PEOPLE OF THE VIRGIN ISLANDS,</b>	)	
Appellee/Plaintiff.	)	
	)	

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On Appeal from the Superior Court of the Virgin Islands  
Division of St. Croix  
Superior Court Judge: Hon. Robert A. Molloy

Argued: March 9, 2021  
Filed: May 13, 2021

Cite as: 2021 V.I. 9

**BEFORE:**     **RHYS S. HODGE**, Chief Justice; **IVE ARLINGTON SWAN**, Associate Justice  
                  and **JOMO MEADE**, Designated Justice.

**APPEARANCES:**

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## **OPINION OF THE COURT**

**SWAN, Associate Justice.**

¶1 Jerris Browne appeals the Superior Court’s grant of the People’s motion to dismiss without prejudice the case filed against him. For the reasons elucidated below, we affirm the Superior Court’s decision.

### **I. FACTS AND PROCEDURAL HISTORY**

¶2 On January 31, 2017, the People filed a twenty-four count information against Jerris Browne (“Browne”), Syed Gilani (“Gilani”), and Gregory Christian (“Christian”) alleging that the three engaged in a conspiracy to defraud the Virgin Islands Government of federal funds allocated to the Virgin Islands Bureau of Motor Vehicles (“BMV”) for the implementation and maintenance of an enhanced identification program (“Real ID”) pursuant to the federal Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (May 11, 2005). The information charged all three defendants with similar crimes, including fraud and embezzlement under the Virgin Islands Criminally Influenced and Corrupt Organizations Act, 14 V.I.C. § 604(e)(16)(19) and 14 V.I.C. § 605(a); obtaining money by false pretenses, 14 V.I.C. § 834; conversion of government property, 14 V.I.C. § 895(a); falsification of public accounts, 14 V.I.C. § 1662(6); and embezzlement by a public officer, 14 V.I.C. § 1089.

¶3 On June 19, 2017, Browne, Gilani, and Christian were arrested. Despite the arrests, the People’s case proceeded gradually and haphazardly because of unexpected natural occurrences similar to the 2017 Hurricanes Irma and Maria, and numerous administrative conundrums in the Virgin Islands Department of Justice (“DOJ”), which included substituting one assistant attorney

general for another, reassigning the assistant attorney general of record to other cases, and transferring the case to DOJ's St. Croix office despite it being originally assigned to DOJ's St. Thomas Office.

¶4 On May 25, 2018, Gilani filed a motion to dismiss or, alternatively, to revise the court mandated scheduling order. Subsequently, Browne joined in Gilani's motion by filing a notice on June 12, 2018. The motion alleged that the People's ineptitude was needlessly delaying the trial's commencement, thereby violating the defendants' Sixth Amendment right to a speedy trial and their Fifth Amendment due process rights. Specifically, the motion stated the People's failure to adhere to established deadlines in the scheduling order compromised the defendants' ability to honor those deadlines. Moreover, the motion also expounded on the People's repeated rescheduling of a defense physical review of critical computer servers, thereby restricting defendants' access to pivotal pieces of evidence, hindering their ability to develop a defense strategy, and constraining their attempts to procure expert witnesses because defendants could not identify what experts were needed due to the inability to view or assess the servers and the information they contained. Finally, the motion informed that no forensic analysis had been performed on the servers despite a probable cause affidavit the People filed with the arrest warrants that indicated all servers had been forensically analyzed. Accordingly, Gilani and Browne requested the court dismiss the case or, alternatively, modify the scheduling order to allow them sufficient time to review the servers and investigate their contents.

¶5 On October 19, 2018, the People filed a motion to continue the trial date beyond the December 10, 2018 commencement date because forensic analysis by the Federal Bureau of Investigation ("FBI") of the computer servers was ongoing and the People did not know how long

the FBI would take to conduct the analysis. The People asked the FBI to forensically analyze the servers because DOJ lacked the funds to do so locally.

¶6 On November 9, 2018, following a request from the court, Gilani filed a motion to dismiss the case with prejudice or, alternatively, without prejudice. On December 4, 2018, Browne joined in Gilani's motion by filing an appropriate notice. The motion reiterated the same Fifth and Sixth Amendment grounds delineated in Gilani's May 2018 Motion to Dismiss or, alternatively, to revise the scheduling order.

¶7 On December 6, 2018, the court entered an order that granted the People's motion to continue the trial date. In that order, the court also scheduled a hearing for January 29, 2019 on Gilani's prior motions. Finally, the order explained the possible existence of exculpatory evidence on the servers, the need for the People to advise the court within five days of the order's date as to when it will be ready for trial, and the court's inability to decide the defendants' motion to dismiss without knowing when the People would be ready for trial.

¶8 At the January 29, 2019 hearing, the court apparently consolidated all Gilani's prior motions and memorialized its decision in a February 1, 2019 order. The February 1, 2019 order denied, without prejudice, Gilani's motions to dismiss as well as Browne's notices of joinder to the extent the joinder notices were construed as motions to dismiss. Lastly, the February 1, 2019 order mandated that the People file written updates with the court every two months commencing on February 15, 2019, concerning the status of the FBI's forensic analysis of the servers.

¶9 On January 24, 2020, Gilani filed a renewed motion to dismiss with prejudice or, alternatively, without prejudice. Subsequently, with a January 29, 2020 notice, Browne joined in

Gilani's renewed motion. Notably, Gilani's renewed motion to dismiss cited the same Fifth and Sixth Amendment grounds previously asserted. Additionally, Gilani's renewed motion also referenced the People's inability to adhere to the court's instructions in its February 2019 order, namely the requirement that the People file written updates with the court every two months concerning the status of the FBI's analysis of the computer servers. On January 30, 2020, the court ordered a show cause hearing to ascertain why the People should not be sanctioned for failing to adhere to instructions in the December 2018 order.

¶10 On February 6, 2020, Browne filed a motion to dismiss citing failure to prosecute as well as violations of his Fifth and Sixth Amendment rights as grounds for the dismissal.

¶11 On February 10, 2020, the People filed a motion to dismiss without prejudice, citing its inability to satisfy its burden of proof at trial as grounds for the dismissal. However, the People sought to preserve its right to refile some of the charges pursuant to 5 V.I.C. § 3541(a).

¶12 On February 14, 2020, Gilani filed an opposition to the People's motion to dismiss without prejudice and Browne, with a February 18, 2020 notice, joined in Gilani's opposition to the People's motion to dismiss without prejudice.

¶13 On February 14, 2020, the court granted the People's motion to dismiss without prejudice and denied all other pending motions as moot.

¶14 On February 18, 2020, Gilani filed a motion to revoke the court's order granting the People's motion to dismiss without prejudice or, alternatively, to reconsider and dismiss the case with prejudice. On February 19, 2020, Browne filed a notice to join in Gilani's motion to revoke. Among other things, the motion asked the court to reconsider its ruling granting the People's

motion to dismiss without prejudice because the court granted the motion before Gilani submitted his response to the People's dismissal motion.

¶15 On March 13, 2020, the court issued a judgment denying Gilani's motion to revoke the order granting the People's motion to dismiss without prejudice. In the March 13, 2020 order, the court opined that, although Gilani's motion to revoke contended that the court acted prematurely in granting the People's dismissal motion, Gilani's real intention with the revocation motion was to challenge the People's Rule 48(a) dismissal which the court said it was uncertain a criminal defendant had the right to do. Importantly, the court stated Virgin Islands Rule of Criminal Procedure 48(a) provides for dismissal by the government and the dismissal is without prejudice unless otherwise stated. Furthermore, the court recognized a defendant's consent for a Rule 48(a) dismissal is only required if the dismissal is sought during trial. Finally, the court concluded that leave of the court is unrequired in either scenario which contradicts the Federal Rules of Criminal Procedure provisions that condition a government dismissal upon leave of the court.

¶16 On March 12, 2020, Browne perfected the instant appeal.

## **II. JURISDICTION**

¶17 "The Supreme Court [has] jurisdiction over all appeals arising from final judgements, final decrees, and final orders of the Superior Court." 4 V.I.C. § 32(a). "An order that disposes of all claims submitted to the Superior Court is considered final for the purposes of appeal." *Jung v. Ruiz*, 59 V.I. 1050, 1057 (2013) (citing *Matthew v. Herman*, 56 V.I. 674, 677 (2012)). Because the Superior Court's February 14, 2020 order granting the People's motion to dismiss without

prejudice disposed of all claims submitted for adjudication, the order is final and we exercise jurisdiction over Browne’s appeal.

### III. STANDARD OF REVIEW

¶18 We review the trial court’s factual findings for clear error and exercise plenary review over its legal determinations. *Thomas v. People*, 63 V.I. 595, 602-03 (2015) (citing *Simmonds v. People*, 53 V.I. 549, 555 (2010)). “[We] review[] a dismissal or a refusal to dismiss an information for abuse of discretion.” *Phillip v. People*, 58 V.I. 569, 598 (V.I. 2013).

### IV. DISCUSSION

¶19 On appeal, Browne contends our ruling in *Phillip* demonstrates that the Superior Court abused its discretion when it granted the People’s motion to dismiss without prejudice because *Phillip* implied the court may reject the People’s motion to dismiss without prejudice and dismiss an action with prejudice under specific circumstances, including the prosecution’s bad faith.<sup>1</sup> However, as Browne’s appellate brief and the Superior Court’s March 2020 order denying Gilani’s motion to revoke indicates, Rule 48(a) of the Virgin Islands Rules of Criminal Procedure<sup>2</sup> governs

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<sup>1</sup> Although *Phillip* concluded the People did not act in bad faith and a dismissal with prejudice in that case was unwarranted, it enumerated three specific instances where a court may dismiss with prejudice despite the People’s motion to dismiss without prejudice. Specifically, the court opined the trial court may deny a motion to dismiss, or may grant the dismissal but with prejudice only to protect a defendant from harassment by a prosecutor acting in bad faith, to protect the public interest in the fair administration of criminal justice and to preserve the integrity of the courts. *Phillip* 58 V.I. at 599.

<sup>2</sup> “Dismissal (a) By the Government. The government may file a dismissal or nolle prosequi of an information. Such a dismissal is without prejudice unless otherwise stated. The government may not dismiss the prosecution during trial without the defendant’s consent. (b) By the Court. The court may dismiss an information if unnecessary delay occurs in: (1) filing an information against a defendant; or (2) bringing a defendant to trial.” V.I. R. CRIM. P. 48(a).

dismissals. Importantly, those rules were inapplicable at the date of the *Phillip* decision, because they were promulgated after the case was decided.<sup>3</sup>

¶20 To decide *Phillip*, this Court utilized the federal version of Rule 48(a)<sup>4</sup> which differs from the local provision in one pronounced way— Virgin Islands Criminal Rule 48(a) lacks the phrase “with leave of the court,” which the federal rule incorporates into the provision relating to government dismissals. Undoubtedly, “[t]he Federal Rules . . . do not apply in the Virgin Islands Superior Court because adherence to them has [not] been mandated by Congress” nor is it required by the United States Constitution; on the contrary, Congress, through the Revised Organic Act of 1954, provided that “[t]he rules governing the practice and procedure of . . . courts established by local law . . . shall be governed by local law or the rules promulgated by those courts.” *Antilles School v. Lembach*, 64 V.I. 400, 418 (V.I. 2016) (citations omitted). Accordingly, although the Federal Rules are persuasive authority, they do not supersede the Criminal Rules of Procedure this Court promulgates. *See In re: Deceased Plaintiffs*, No. SX-06-CV-198, 2020 WL 2096427, at \*14 (V.I. Super. Apr. 26, 2020) (explaining the distinctions between territorial court rules and the federal rules, and noting that territorial rules must be observed because lower courts cannot “rewrite, revise, modify, or amend rules under the guise of interpretation”); *Chciuk-Davis v. People*, 57 V.I. 317, 324 (V.I. 2012) (concluding that, although Federal Rule of Criminal Procedure 32 regulated the same subject as former Superior Court Rule 134, Rule 32 could not

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<sup>3</sup> *Phillip v. People*, 58 V.I. 569 (V.I. 2013) was decided in 2013 and the Virgin Islands Rules of Criminal Procedure were adopted in October 2017 and effective in December 2017.

<sup>4</sup> “Dismissal (a) By the Government. The government may, with leave of the court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant’s consent. (b) By the Court. The court may dismiss an indictment, information, or complaint if unnecessary delay occurs in: (1) presenting a charge to the jury; (2) filing an information against a defendant; or (3) bringing a defendant to trial.” FED. R. CRIM. P. 48(a).



usurp Rule 134 because application of Rule 32 would render Rule 134 wholly superfluous); *Corraspe v. People*, 53 V.I. 470, 482 (V.I. 2010) (explaining that, Federal Rule of Criminal Procedure 11(c), which prohibits judicial participation in plea agreements, was inapplicable to the territory because Superior Court Rule 126, which lacks the prohibition of judicial participation in plea agreements, governs plea agreements in the Virgin Islands to the exclusion of Rule 11(c)); *People v. Rivera*, 68 V.I. 393, 405 (V.I. 2018) (explaining that, although former Superior Court Rule 135 was borrowed from Federal Rule of Criminal Procedure 33, decisions from other courts interpreting Rule 33 were not binding (but only instructive) in this jurisdiction when local courts interpreted Rule 135); *Cf. Jones v. Lockheed Martin Corp.*, 68 V.I. 158, 170 (V.I. Super. Ct. 2017) (“[W]here . . . a rule of procedure . . . [conflicts] with a pre-existing procedural statute, the rule supersedes the statute and controls.”).

¶21 Therefore, because Virgin Islands Rule of Criminal Procedure 48(a) does not include the phrase “with leave of the court” in the provision relating to government dismissals and the provision mandates a dismissal predicated on the government’s motion is without prejudice, the Superior Court could not deny the People’s motion to dismiss without prejudice or dismiss with prejudice pursuant to the government’s motion because it lacked authority to do so. Essentially, Federal Rule of Criminal Procedure 48(a) may allow the trial court latitude in whether to grant the People’s motion to dismiss or whether to designate the dismissal motion as being with prejudice. However, Virgin Islands Rule of Criminal Procedure 48(a) – applicable at the time of the proceedings below – does not afford similar latitude. Consequently, “[t]he trial court should refuse to grant the People’s dismissal request in only the ‘rarest’ of cases, for it is the People who are presumed to be the best judge of where the public interest lies with respect to a criminal

prosecution.” *Phillip*, 58 V.I. at 600. See *In re Richards*, 213 F.3d 773, 786 (3d Cir. 2000) (“‘[F]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.’”) (citations omitted); *Rinaldi v. U.S.*, 434 U.S. 22, 29 n. 15 (1977) (explaining that the “leave of the court” proviso in Federal Rule 48(a) obviously vests some discretion in the trial court about whether to grant the People’s motion to dismiss because a defendant may need protection from prosecutorial harassment).

¶22 Moreover, this Court adopted the Virgin Islands Rules of Criminal Procedure and omitted the stipulation “with leave of the court” from Rule 48(a). Undeniably, we understood the implication of the omission when the rules were ratified, but did so despite the limitations. Unequivocally, “this Court does not abandon its collective knowledge . . . when it exercises rule-making authority and surely . . . would not knowingly promulgate any rule it regarded as [invalid].” *Mills-Williams v. Mapp*, 67 V.I. 574, 585 n. 6 (V.I. 2017). Simply stated, promulgation of the Virgin Islands Rules of Criminal Procedure superseded reliance on the Federal Rules of Criminal Procedure. Ipso facto, any Virgin Islands case law predicated on the Federal Rules of Criminal Procedure must yield to the Virgin Islands Rules of Criminal Procedure to the extent the case law is inconsistent with the prevailing rules promulgated by this Court. Accordingly, although *Phillip* discussed several ways the trial court could dismiss with prejudice despite the government’s motion to dismiss without prejudice, *Phillip* was decided before the Virgin Islands Rules of Criminal Procedure were promulgated and, therefore, is not binding on this issue after their promulgation. Consequently, it is overruled to the extent that it conflicts with this opinion. *Estate*

of *Knoster v. Ford Motor Co.*, 200 Fed. Appx. 106, 111 n. 3 (3d. Cir. 2006) (holding the adoption of a new court rule “plainly supersedes” any cases to the contrary that applied the former rule).

¶23 Therefore, we conclude the Superior Court did not abuse its discretion when it granted the People’s motion to dismiss without prejudice.

¶24 On appeal, Browne also asserts prosecutorial bad faith. Presumably, Browne makes the assertion because, in *Phillip*, we announced several grounds, including prosecutorial harassment or bad faith, which the trial court could employ in deciding whether to dismiss with prejudice. However, although Federal Rule 48(a) contemplates the court’s discretion to refuse the government’s motion to dismiss because of prosecutorial bad faith, Virgin Islands Criminal Procedure Rule 48(a), as stated above, lacks such discretion because it omits the phrase “with leave of the court.” Therefore, Rule 48(a) does not authorize consideration of prosecutorial bad faith as a basis to refuse the government’s Rule 48(a) dismissal. *See United States v. Wecht*, 2008 WL 65605, at \*3 (W.D. Pa. Jan. 4, 2008) (“The primary purpose of the requirement that the prosecutor obtain leave of the court is to prevent harassment of the defendant by a prosecutor’s charging, dismissing, and recharging the defendant with a crime.”) (citations omitted); *United States v. Dyal*, 868 F.2d 424, 427 (11th Cir. 1989) (explaining that the purpose of the leave-of-court provision in Federal Criminal Rule 48(a) is to protect against prosecutorial harassment); *United States v. Hayden*, 860 F.2d 1483, 1487 (9th Cir. 1988) (“Because of the concern that prosecutors were abusing [their] discretion and harassing defendants by indicting, dismissing, and reindicting without triggering the protections of the double jeopardy clause, Rule 48(a) was enacted to provide a check on prosecutorial behavior.”).

¶25 Regardless, both the federal and Virgin Islands versions of Rule 48’s subsection b state, among other things, that a court may independently dismiss a case if there is a delay in bringing a defendant to trial. Because it is apparent that Browne’s bad faith argument inherently implicates the delay in his trial’s initiation, we will briefly probe the contention, if only for completeness. Yet, we will not consider the remaining arguments in his brief because they encapsulate the other foundations proclaimed in *Phillip*, which we have now held are moot.

¶26 Unlike subsection (a), subsection (b) of Rule 48 of the Virgin Islands Rules of Criminal Procedure is identical to its federal counterpart. Therefore, we may examine cases that interpret Federal Rule 48(b) for guidance about whether this provision as adopted in the Virgin Islands encompasses prosecutorial bad faith. *See State v. Fuller*, 374 N.W.2d 722, 727 (Miss. 1985) (“[A] decision of the United States Supreme Court interpreting a comparable provision of the federal constitution that . . . is textually identical to a provision of our constitution, is of inherently persuasive, although not necessarily compelling, force.”); *People v. Ventura*, 2014 WL 3767484, at \*55-56 (V.I. Super. Ct. July 25, 2014) (“[C]ourts typically view . . . earlier constructions of borrowed rules as [being] persuasive, not mandatory.”).

¶27 Rule 48(b) bestows two distinct powers on the court which it may use to dismiss with prejudice and, in rare cases, without prejudice. *U.S. v. Goodson*, 204 F.3d 508, 513-14 (4th Cir. 2000). First, Rule 48(b) allows the court to protect a defendant’s Sixth Amendment speedy trial rights by dismissing a case that the government failed to timely prosecute. *Id.* The advisory notes to Federal Rule 48(b) state the government’s failure to prosecute is called “want of prosecution.” *Id.* The government’s failure to prosecute may be predicated on the inability of a witness to appear at trial, *see United States v. Hattrup*, 763 F.2d 376, 377-78 (9th Cir. 1985); the government’s

inability to be prepared for trial, *see United States v. Correia*, 531 F.2d 1095, 1098-99 (1st Cir. 1976), or a violation of the defendant’s Fifth Amendment due process rights, *see United States v. Restrepo*, 930 F2d 705, 712-13 (9th Cir. 1991).

¶28 Before deciding a Rule 48(b) dismissal premised on the government’s want of prosecution, the court should evaluate the circumstances under which the delay arose. Specifically, the court should assess the length of the delay, the reason for the delay, the defendant’s assertion of his rights, and prejudice to the defendant. *Gov’t. of the V.I. v. Castillo*, 50 V.I. 565, 574-75 (D.V.I. 2008). Because want of prosecution and unnecessary delay are virtually synonymous, the analysis is identical regardless of which term is employed. *See* FED. R. CRIM. P. 48(b), Advisory notes.

¶29 To commence the fact intensive analysis for an unnecessary delay dismissal, the court must first contemplate the government’s reasons for the delay. *Castillo*, 50 V.I. at 575. For example, if the delay is due to the government’s deliberate attempt to confound the defense or prevent the trial’s commencement, particularly after the denial of the government’s motion to continue, the court should harshly construe those actions against the government. *Id.* (citing *Baker v. Wingo*, 407 U.S. 514, 531 (1972)). However, if the delay arises because of the government’s negligence or the inability of a witness to appear at trial, the court should not weigh those actions heavily against the government. *Id.* (citations omitted). Therefore, under Rule 48(b), a court may dismiss if the government engages in intentional misconduct. *See Gov’t. of the V.I. v. Allick*, 48 V.I. 503, 508 (D.V.I. 2006) (“Where . . . the delay result[s] . . . from the government’s deliberate misconduct in delaying the matter, dismissal is appropriate under Rule 48.”); *compare Wells v. Petsock*, 941 F.2d 253, 257-259 (3d Cir. 1991) (explaining that longer delays may be permitted, without prejudicial effect, when the crime is extremely serious or complex).

¶30 Under the next prong of the unnecessary delay test, a defendant must have asserted his rights for timely trial. “This factor is significant because ‘the more serious the deprivation, the more likely a defendant [will] complain.’” *Castillo*, 50 V.I. at 576. Therefore, a defendant must claim a violation of his Sixth Amendment speedy trial rights before a court can dismiss pursuant Rule 48(b).

¶31 Under the final prong of the unnecessary delay test, actual prejudice must materialize because of the government’s conduct. “[A]bsent demonstrable prejudice or [a] substantial threat thereof, dismissal of the indictment is clearly inappropriate, [although] the violation may be deliberate.” *Id.* (citations omitted). *See Allick*, 48 V.I. at 510 (“[A]ctual prejudice to the defendant is the touchstone inquiry for determining whether delay warrants dismissal.”); *id.* (explaining that, in determining whether dismissal is appropriate due to [an] unnecessary delay, the inquiry “centers primarily on whether the defendant’s ability to present a defense at trial has been impaired by the delay, [or] the defendant’s lengthy and oppressive pretrial incarceration coupled with the anxiety and concern suffered as a result of . . . public accusation of [a] crime [restricts the defendant]”).

¶32 Even if the court concludes there is prejudice to the defendant sufficient to warrant a Rule 48(b) dismissal, a dismissal with prejudice is a harsh remedy and its use is a significant event. *Goodson*, 204 F.2d at 514. “The analysis of whether dismissal with prejudice is warranted ‘compels consideration of society’s interest in bringing the particular accused to trial.’ . . . ‘The graver the crimes, the greater the insult to societal interests if the charges are dropped . . . without a meaningful determination of guilt or innocence.’” *Castillo*, 50 V.I. at 576 (citations omitted). “Accordingly, to reconcile these competing interests, it is established that a . . . court may not, in the management of its docket, exercise its discretion to dismiss an indictment with prejudice, either

under Rule 48(b) or under its supervisory power, unless the violation caused prejudice to the defendant or posed a substantial threat thereof.” *Goodson*, 204 F.2d at 514.

¶33 Rule 48(b) also allows a court to dismiss under its supervisory powers. “Rule 48 . . . restates the court’s inherent power to dismiss an indictment for lack of prosecution where the delay is not of constitutional magnitude.” *Castillo*, 50 V.I. at 573 (citing *Goodson*, 204 F.3d at 513); *United States v. Dreyer*, 533 F.2d 112, 116-17 (3d Cir. 1976) (same); *U.S. v. Rowbotham*, 430 F. Supp. 1254, 1256 (D. Mass. 1977) (same).

¶34 In determining whether to exercise its discretionary power to dismiss pursuant to Rule 48(b), the court may consider the same factors relevant to a constitutional decision pertaining to a denial of a speedy trial. *Rowbotham*, 430 F. Supp at 1256-57. “The Rule imposes a stricter standard of tolerable delay than does the [S]ixth [A]mendment. Consequently, it may be proper for a court to exercise its discretion to dismiss an indictment under Rule 48(b) even though the unreasonable delay in prosecuting does not rise to a constitutional violation.” *Id.* (citations omitted). To decide whether to dismiss pursuant to its inherent powers under Rule 48(b), the court may evaluate the same factors it employs for a speedy trial violation — the length of the delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant. *Id.*

¶35 In this case, Browne alleges prosecutorial bad faith because, among other things, the People filed its motion to dismiss without prejudice but failed to respond to his pending motion to dismiss with prejudice, the People failed to inform him of the FBI’s completion of its analysis of the computer servers, and the alleged prejudice he will continue to experience because the People may refile two of the current charges because those charges have no statutes of limitation.

¶36 Browne’s argument concerning the People’s failure to respond to his motion to dismiss with prejudice before the People filed its motion to dismiss without prejudice is de minimis and any error potentially harmless. Importantly, Virgin Islands Criminal Rule 48(a) provides that the People may file a motion to dismiss at any time prior to trial without a defendant’s consent. Therefore, the People possessed the right to file a Rule 48(a) motion before it responded to Browne’s motion to dismiss. Once filed, the People’s Rule 48(a) motion constituted a new circumstance that made the People’s response to Browne’s motion to dismiss moot because the Court lacked discretion to deny the Rule 48(a) motion and the motion’s approval terminated the case. “[E]ven if a motion is still pending—because the party who filed it has not withdrawn it or because the court has not yet ruled on it—subsequent events can have rendered the motion moot.” *Mitchell v. Gen. Eng’g. Corp.*, 67 V.I. 271, 277-78 (V.I. Super. Ct. 2017). *See Der Weer v. Hess Oil Virgin Islands Corp.*, 60 V.I. 91- 98-99 (V.I. Super. Ct. 2014) (“A motion becomes moot when something occurs after the motion is filed that resolves the issues raised in that motion. . . . In that instance, the motion should be dismissed or denied as moot because a decision will have no practical impact in the case however the court decides the motion.”). Accordingly, although the People should have responded to Browne’s motion to dismiss, the filing of the People’s Rule 48(a) dismissal rendered a response to Browne’s motion unnecessary because the court lacked latitude to deny the Rule 48(a) dismissal and the dismissal ended the case to the extent that Browne’s motion to dismiss with prejudice was essentially denied and mooted. Even if the People’s failure to respond to Browne’s motion to dismiss was error, the error was harmless because Browne did not suffer any prejudice as a result of the error to warrant a dismissal with prejudice. *See Browne v. Virgin Islands*, 56 V.I. 207, 237 (V.I. 2012) (“In applying harmless error review, we must



determine whether an error affects substantial rights, and if there is no such effect, then the error will not constitute grounds for reversal.”).

¶37 Browne’s argument relating to the People’s failure to inform him of the FBI’s completion of its analysis of the computer servers also fails to provide any grounds to reverse the Superior Court in this case. In her opposition to the court’s January 31, 2020 show cause order, former Assistant Attorney General Tiffany McClean delineated the precarious nature of the People’s case. In the opposition, McClean stated that DOJ could not procure local funds to forensically analyze the computer servers and had to ask the FBI to do so. (J.A. 142). Subsequently, the FBI reported that the analysis could take six months to one year to complete. (J.A. 143). During that time, McClean was removed from the case and reassigned. (J.A. 145). Moreover, the case was transferred from DOJ’s St. Thomas office to its St. Croix office. (J.A. 145). Apparently, after McClean’s removal and the transfer of the case to DOJ’s St. Croix office, no Assistant Attorney General was assigned to the case before Assistant Attorney General Joseph Ponteen became attorney of record in approximately January 2020. (J.A. 147). Essentially, the People’s failure to advise Browne of the completion of the FBI’s analysis resembles negligence rather than intentional misconduct especially considering how haphazardly the case proceeded. As stated above, the government’s negligence could not sustain a Rule 48(b) dismissal and could definitely not justify a dismissal with prejudice. *See Gov’t. of the V.I. v. Ubiles*, 317 F. Supp. 2d 605, 608-09 (D.V.I. 2004) (explaining the government’s delay in forwarding forensic reports was not predicated on bad faith, but an unwillingness or inability to coordinate efforts with local police and the trial court abused its discretion when it dismissed the case with prejudice because alternate remedies, such as a continuance or excluding evidence, could have cured any alleged prejudice to the defendant);

*United States v. Atkinson*, No. 1:07-CR-16, 2007 WL 1747151, at \*2 (W.D. Mich. Jun. 18, 2007) (“[A] defendant’s Fifth Amendment due process rights are generally not implicated where the government offers a valid reason for the delay. ‘It is well-established that a delay resulting from investigative efforts ‘does not deprive [a defendant] of due process, even if his defense may have been somewhat prejudiced by the lapse of time.’”).

¶38 Lastly, it’s axiomatic that the government’s ability to refile charges cannot, without more, justify a Rule 48(b) dismissal or a dismissal with prejudice.<sup>5</sup> In *United States v. Hayden*, 860 F.2d 1483 (9th Cir. 1988), the defendant stated that, despite the case being dismissed without prejudice, he was subject to continued prejudice because of the possibility of re-indictment. Thus, the defendant argued that the period between an initial dismissal without prejudice and a re-indictment needs to be considered as supporting the dismissal of refiled charges with prejudice. The *Hayden* court rejected the defendant’s argument and cited *United States v. Loud Hawk*, 474 U.S. 302, 311 (1986), where the United States Supreme Court acknowledged that – just as pre-indictment delay can cause “stress, discomfort, and perhaps a certain disruption of normal life” for a prospective defendant – it is not cognizable in speedy trial considerations, *id.* at 311-12 (citing *United States v. Marion*, 404 US 307, 309 (1971)), and that “public suspicion” during the period when no charges are pending (before a re-indictment) is also not a valid consideration for speedy trial purposes. *See also United States v. Kaufmann*, 985 F.2d 884, 890 (7th Cir. 1993) (explaining a dismissal without prejudice does not prohibit a new indictment); *United States v. Brown*, 183 F.3d 1306, 1310

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<sup>5</sup> Browne claims he will suffer continued prejudice because the government may refile two charges (embezzlement of public moneys and falsification of public records) with which he is currently charged. The government possesses the ability to refile because those charges lack statutes of limitation pursuant to 5 V.I.C. § 3541.

(explaining that under then-applicable federal statutes charges against a defendant may be refiled if the court granted a dismissal without prejudice).

¶39 In this case, following the court’s approval of the People’s Rule 48(a) dismissal, Browne’s liberty was not jeopardized, and his freedom was unrestricted. Without the fear of an impending trial, Browne could travel extensively, conduct business, earn income, and do all that while asserting his innocence, if he chose. Although the possibility that two charges can be refiled exists, there is also the possibility the People will elect not to refile. Regardless, the People had every right to seek a Rule 48(a) dismissal and reinstate charges at a later date. Therefore, although Rule 48(b) allows a court to dismiss because of the government’s intentional misconduct, we find the government did not engage in any deliberate misconduct that prejudiced Browne so gravely as to warrant a dismissal with prejudice.

## **V. CONCLUSION**

¶40 For the foregoing reasons, we affirm the Superior Court’s approval of the People’s Rule 48(a) dismissal of the charges against Browne without prejudice.

**Dated this 17<sup>th</sup> day of May 2021**

**/s/ Ive Arlington Swan**  
**IVE ARLINGTON SWAN**  
Associate Justice

**ATTEST:**  
**VERONICA J. HANDY, ESQ.**  
Clerk of the Court

**By: /s/ Natasha Illis**  
**Deputy Clerk II**

**Date: May 17, 2021**