IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

REPUBLIC OF PALAU,
Appellant,
v.
KALINGO KANGICHI and STEPHAN KUAL KOCHI aka STEPHAN KUAL PETIT,
Appellees.

Cite as: 2019 Palau 2
Criminal Appeal Nos. 18-002 & 18-003
Appeal from Criminal Case Nos. 18-006 & 18-007

Decided: February 5, 2019

Counsel for Appellant	Graham Leach
Counsel for Appellees	Danail M. Mizinov

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice
JOHN K. RECHUCHER, Associate Justice
R. BARRIE MICHELSEN, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Associate Justice, presiding.

OPINION

PER CURIAM:

[¶ 1] On January 17, 2018, Kalingo Kangichi ("Appellee Kangichi") and Stephan Kual Kochi aka Stephan Kual Petit ("Appellee Kochi") were charged with multiple drug-related offenses.[1] On April 16, 2018, following several status conferences in which no trial date was set, Appellees asserted that their

[1] Appellee Kangichi was charged with three counts of Trafficking a Controlled Substance—one count in violation of 34 PNC § 3301(a)(1) and two counts in violation of 34 PNC § 3301(d). Appellee Kochi was charged with one count of Trafficking a Controlled Substance, in violation of 34 PNC § 3301(d), and one count of Criminal Conspiracy to Traffic a Controlled Substance, in violation of 17 PNC § 1001 & 34 PNC §§ 3301(d), 3305.

rights had been violated under the Speedy Trial Act[2] and moved for dismissal of the charges against them. The Trial Division granted Appellees' motions to dismiss after concluding that a violation had occurred and exercised its discretion to dismiss the charges with prejudice. The Republic of Palau appeals, asserting both that there was no violation of the Speedy Trial Act and that, if a violation occurred, the case should be dismissed without prejudice.

[¶ 2] For the reasons set forth below, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** for reconsideration in accordance with this opinion.

BACKGROUND

[¶ 3] Before turning to the facts of this case, we note that, although filed as separate criminal cases (and subsequent appeals), Appellee Kochi's charges arise from the same underlying facts as one of the charges against Appellee Kangichi. As discussed below, the Appellees' cases proceeded through the trial court on nearly identical timelines and raise the same legal issues.[3] As such, the Court has consolidated the two cases.

[¶ 4] Appellee Kangichi first appeared before the Trial Division on January 18, 2018 and Appellee Kochi's first appearance occurred on January 17, 2018. Appellees had an initial status conference on February 20, 2018. Without setting a trial date, a second status conference was set for both Appellees for March 16, 2018. Again, no trial date or pretrial motion schedule was set, but a third status conference was set for April 16, 2018. Appellees were represented by an attorney from the Public Defender's Office during all court appearances, although not always the same attorney.

[¶ 5] At the April 16th conference, counsel for each Appellee orally moved to dismiss the charges with prejudice for violation of the Speedy Trial Act. The Trial Division ordered that the motions be submitted to the court in writing by April 20, 2018.

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[2] The "Speedy Trial Act" is a colloquial reference to Sections 403 through 405 of Title 18 of the Palau National Code.

[3] Furthermore, the parties in this case have already treated the two cases as intertwined. Appellant has filed an identical brief in each case, including references to Appellee Kochi in Appellee Kangichi's filing, and vice versa. And while Appellees do not refer to each other in their filings, the argument sections of the two briefs are identical.

[¶ 6] In opposition to the Appellees' motions, Appellant argued that Appellees had never asserted their right to a speedy trial, that Appellant could not negotiate a plea agreement because it was unclear which attorney in the Public Defender's Office was representing each Appellee, and that the time between the second and third status conferences should not be included in the speedy trial calculation because one of the public defenders working on Appellees' cases was off island. Appellant also asserted that there was no prejudice to either Appellee because Appellee Kangichi was out on a bond and Appellee Kochi was also incarcerated on a separate incident.

[¶ 7] In nearly identical orders issued the same day, the Trial Division rejected Appellant's arguments. It concluded that the Speedy Trial Act was violated because neither of Appellees' trials began within seventy days of their first court appearance and "none of the listed periods of delay which may be excluded from computing the time within which trial must begin are applicable to the facts of this case." Order Granting Defendant's Motion to Dismiss With Prejudice at 3, *Republic of Palau v. Kangichi*, Criminal Case No. 18-006 (June 22, 2018) [hereinafter *Kangichi* Dismissal Order]; Order Granting Defendant's Motion to Dismiss With Prejudice at 3, *Republic of Palau v. Kochi*, Criminal Case No. 18-007 (June 22, 2018) [hereinafter *Kochi* Dismissal Order]. After determining that dismissal of the charges was required by law, the Trial Division turned to whether the information should be dismissed with or without prejudice and ultimately concluded that dismissal with prejudice was appropriate.

[¶ 8] Appellant filed a Motion to Reconsider in each case, arguing for the first time that the Trial Division should exclude an unspecified amount of time from the speedy trial calculation because the controlled substance evidence in the case had not been sent for testing until June 11, 2018. Additionally Appellant asserted, also for the first time, that Appellees had constructively waived their speedy trial rights between the March 16th and April 16th conferences by agreeing to a status conference on April 16th—after the seventy-day statutory requirement. The Trial Division denied Appellant's motions after noting that "all of the arguments raised by the Republic could and should have been raised in response to the original defense motion." Order Denying Motion for Reconsideration of Dismissal of Charges With Prejudice at 1, *Republic of Palau v. Kangichi*, Criminal Case

No. 18-006 (July 6, 2018); Order Denying Motion for Reconsideration of Dismissal of Charges With Prejudice at 1, *Republic of Palau v. Kochi*, Criminal Case No. 18-007 (July 6, 2018). Appellant timely appealed.

STANDARD OF REVIEW

[¶ 9] Although this Court has been presented with several cases regarding the Speedy Trial Act, we have yet to clearly articulate the appropriate standard for reviewing the Trial Division's dismissal of an information with prejudice for violations of the Act. The Speedy Trial Act was "a near-wholesale adoption of the U.S. act by the same name." *Mengeolt v. Republic of Palau*, 2017 Palau 17 ¶ 6 (internal quotation marks omitted). In light of this, it is appropriate to look to United States courts in articulating the standard of review. *See id.* ¶ 7.

[¶ 10] We review issues of statutory interpretation *de novo*. *Id.* ¶ 4. The Trial Division's "compliance with the legal requirements of the Speedy Trial Act is reviewed *de novo,* and its underlying factual findings are reviewed for clear error." *United States v. Larson*, 627 F.3d 1198, 1203 (10th Cir. 2010).

[¶ 11] "We review for an abuse of discretion whether [the Trial Division] should dismiss an [information] with or without prejudice for a violation of the Speedy Trial Act." *United States v. Knight*, 562 F.3d 1314, 1321 (11th Cir. 2009); *see also United States v. Taylor*, 487 U.S. 326, 332 (1988). The Trial Division abuses its discretion "when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment." *Pettit v. Republic of Palau*, 2016 Palau 6 ¶ 11 (internal quotation marks omitted).

[¶ 12] Where the legislature "has declared that a decision will be governed by consideration of particular factors, [the Trial Division] must carefully consider those factors as applied to the particular case and, whatever its decision, clearly articulate their effect in order to permit meaningful appellate review." *Taylor*, 487 U.S. at 336. And while appellate review must ensure that the Trial Division is acting within the discretion afforded to it by the legislature, "the role of an appellate court is not to

substitute its judgment for that of the [Trial Division] . . . .” *Id.* Instead, appellate review “is limited to ascertaining whether [the Trial Division] has ignored or slighted a factor that [the legislature] has deemed pertinent to the choice of remedy.” *United States v. Koerber*, 813 F.3d 1262, 1273 (10th Cir. 2016) (internal quotation marks omitted). As such, “when the statutory factors are properly considered, and supporting factual findings are not clearly in error, the [Trial Division]’s judgment of how opposing considerations balance should not lightly be disturbed.” *Taylor*, 487 U.S. at 337.

DISCUSSION

[¶ 13] The Speedy Trial Act is an additional remedy to prevent unnecessary delay in criminal prosecutions which augments the constitutional right to a speedy trial, Palau Const. art. IV, § 7, and the court’s authority pursuant to ROP R. Crim. P. 48(b) to dismiss cases for prosecutorial delay. It establishes statutorily mandated time frames upon which a defendant in a criminal case must be brought to trial. As relevant here, a criminal defendant’s trial “shall begin within seventy days . . . from the date a defendant has appeared before a judge or justice of the court in which the charge is pending.” 18 PNC § 403(c). The statute also sets out periods of time which should be excluded from the seventy-day calculation including, as relevant here “a reasonable period of delay when waiting for the results of laboratory testing or persons or substances essential to the case,” 18 USC § 403(h)(5), and “any period of delay resulting from a continuance granted by any judge . . . if the judge granted such continuance based on findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial,” 18 PNC § 403(h)(9)(A).

[¶ 14] Under the Speedy Trial Act, if “seventy days, less excludable time periods, elapse without a trial, [the Trial Division] has no choice but to grant a defendant’s timely-filed motion to dismiss.” *United States v. Rushin*, 642 F.3d 1299, 1303 (10th Cir. 2011); *see also* 18 PNC § 404(a)(2) (“If a defendant is not brought to trial within the time limit required by section 403(c)[,] as extended by section 403(h), the information of complaint *shall be dismissed* on motion of the defendant.” (emphasis added)). However, after

weighing the factors listed in the statute, the Trial Division maintains the discretion to dismiss the case with or without prejudice. 18 PNC § 404(a)(2).

[¶ 15] Appellant contests both the Trial Division's finding that the Speedy Trial Act was violated and its dismissal with prejudice of the information against Appellees. We address each contention in turn.

I. Was the Speedy Trial Act Violated?

[¶ 16] Appellant first argues that there was no violation of the Speedy Trial Act because Appellees waived their speedy trial rights by agreeing to a status conference after the seventy-day deadline. This argument is easily dismissed. After reviewing the language of the Speedy Trial Act and the public interest served by the Act, the United States Supreme Court has held that "a defendant may not prospectively waive the application of the Act." *Zedner v. United States*, 547 U.S. 489, 500–01 (2006). Because there is no indication that the OEK intended for a different interpretation of the waiver provisions here, we presume the interpretation adopted by the United States Supreme Court applies. *See Mengeolt*, 2017 Palau 17 ¶ 7. Therefore, a defendant cannot waive his right to a speedy trial; instead "the Act demands that defense continuance requests fit within one of the specific exclusions set out in subsection (h). Subsection (h)([9]), which permits ends-of-justice continuances, was plainly meant to cover" such defense continuance requests.[4] *Zedner*, 547 U.S. at 500; *see also* 18 PNC § 403(h)(9)(A) (to exclude delay resulting from a continuance—even one "granted . . . at the request of the defendant or his counsel"—the Trial Division must find "that

[4] The confusion over the defendant's ability to waive his speedy trial rights appears to stem from the sentence: "Unless the defendant consents in writing to the contrary, the trial shall not begin less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se." 18 PNC § 403(c). However, a close reading shows that the defendant is allowed to consent, in writing, to a trial beginning within thirty days of the defendant's first appearance in court. It says nothing about the defendant's ability to consent to a trial beginning after the statutorily mandated seventy days. Indeed, the statute indicates only one way that a defendant may waive his speedy trial rights: "Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section." 18 PNC § 404(a)(2).

the ends of justice served . . . outweigh the best interest of the public and the defendant in a speedy trial").[5]

[¶ 17] Appellant next argues that there was no violation of the Speedy Trial Act because the statute permits the exclusion of reasonable delay while waiting for the results of laboratory testing. *See* 18 PNC § 403(h)(5). As an initial matter, Appellant failed to raise this at the trial court[6] and therefore, this argument is waived on appeal. *See Kotaro v. Ngirchechol*, 11 ROP 235, 237 (2004) ("No axiom of law is better settled than that a party who raises an issue for the first time on appeal will be deemed to have forfeited that issue . . . ."); *Chieh-Chun Tsai v. Republic of Palau*, 9 ROP 142, 144 (2002) (noting that a criminal defendant who fails to raise an argument at the trial court has waived it on appeal).

[¶ 18] However, even if we were to consider this argument, it fails on the merits. Appellant argues that one of the elements it must prove at trial is that the substance Appellees were trafficking is a controlled substance and to do so, it must provide laboratory testing. Because Palau does not have a laboratory to test controlled substances, evidence is taken to Guam for testing. And, according to Appellant, the time and cost of transporting such evidence to Guam justifies the transportation of such evidence in batches.

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[5] To the extent that Appellant asserts that the time between the March 16, 2018 conference and the April 16, 2018 conference should be excluded under § 403(h)(9)(A), such an argument fails. The statute precludes any exclusion of time under this section "unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served . . . outweigh the best interest of the public and the defendant in a speedy trial." 18 PNC § 403(h)(9)(A). As no findings were made here, exclusion of this delay is prohibited as a matter of law.

[6] As noted above, Appellant did raise this issue for the first time in its Motions for Reconsideration. Appellees argue that the issue is waived on appeal because "[t]he ROP Rules of Criminal Procedure do not allow for motions to reconsider in criminal cases." Appellees' Brs. 10. We need not determine whether such a motion is permissible under the Rules because, even assuming that a motion for reconsideration could be raised in a criminal case, it "does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to advance arguments that could and should have been presented to the trial court prior to judgment." *See Dalton v. Borja*, 8 ROP Intrm. 302, 304 (2001) (*quoting Aghar v. Crispin-Reyes*, 118 F.3d 10, 16 (1st Cir. 1997) (alterations omitted)). Appellant's failure to raise this issue in its initial response to Appellees' Motions to Dismiss constitutes a waiver.

Two such trips were made in 2018—one on January 24th and one on June 11th. Appellees first appeared in court on January 18, 2018 (Appellee Kangichi) and January 17, 2018 (Appellee Kochi), making their seventy-day speedy trial deadline March 29th and March 28th, respectively. Appellant did not send the evidence to Guam for testing until June 11th. Therefore, the issue is whether the delay in sending evidence to be tested is excludable under 18 PNC § 403(h)(5).

[¶ 19] "The first step in statutory interpretation is to look at the plain language of a statute. . . . It is well-established that if statutory language is clear and unambiguous, the courts should not look beyond the plain language of the statute and should enforce the statute as written." *Pamintuan v. Republic of Palau*, 16 ROP 32, 42 (2008). Section 403(h)(5) excludes from the seventy-day speedy trial calculation "a reasonable period of delay when *waiting for the results* of laboratory testing . . . essential to the case." (emphasis added). It is a narrow exclusion designed to cover only reasonable delays arising from the procedures surrounding actual testing of evidence. The delay resulting from failure to send evidence to the laboratory for testing is not the same as the delay resulting from waiting for laboratory testing results. Therefore, delay resulting from failure to send evidence for testing is not excludable under § 403(h)(5). Under the plain language of the statute, only a delay resulting from the testing of the evidence *after* June 11th is properly excludable.[7]

[¶ 20] We agree with the Trial Division's conclusion that none of the excludable periods of delay listed in 18 PNC § 403(h) apply to Appellees. As such, the Speedy Trial Act mandated that Appellee Kangichi's trial begin no later than March 29, 2018, and Appellee Kochi's trial begin no later than

[7] While Appellant's failure to send the evidence in a timely manner cannot be excluded under § 403(h)(5), had Appellant informed the Trial Division at any of the status conferences of the delay in sending the evidence for testing, the Trial Division could have determined whether a continuance was appropriate under § 403(h)(9)(A). As it stands, Appellant failed to even notify the Trial Division that such evidence had not been sent for testing, much less request for a continuance until such testing could be completed. Nor has Appellant provided even a cursory explanation as to why the evidence in these cases (which was seized no later than November 29, 2018) could not have been sent to Guam on January 24th or any indication to this Court or the Trial Division how long such testing would take. We are not unsympathetic to the difficulties Appellant faces in prosecuting drug trafficking crimes; however, we encourage Appellant to be more diligent in future cases.

March 28, 2018. As neither trial began by the statutorily mandated deadline, the Trial Division correctly dismissed the information against Appellees.

[¶ 21] We turn now to whether the Trial Division abused its discretion in dismissing the information with prejudice.

II. Did the Trial Division Abuse its Discretion?

[¶ 22] "The Speedy Trial Act does not indicate a preference as between dismissals with and dismissals without prejudice." *United States v. Giambrone*, 920 F.2d 176, 180 (2d Cir. 1990) (citing *Taylor*, 487 U.S. at 334–35). To determine whether a dismissal under the Speedy Trial Act should be with or without prejudice, "the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of sections 403 and 404 and on the administration of justice." 18 PNC § 404(a)(2).[8] In addition to the factors articulated within the statute, prejudice to the defendant should also be considered. *Taylor*, 487 U.S. at 334.

[¶ 23] We discuss the analytical framework for these factors before considering, in turn, the Trial Division's analysis of each. Here, the Trial Division stated that it had "considered the factors whether dismissal in this case should be with or without prejudice." *Kangichi* Dismissal Order at 4; *Kochi* Dismissal Order at 4. But, this alone is not enough; the Trial Division must "clearly articulate" its analysis of each factor "as applied to the particular case." *Taylor*, 487 U.S. at 336. Because the Trial Division failed to provide a clearly articulated analysis identifying the relevant considerations for each factor and weighing the separate factors against each other, its analysis was incomplete. And by basing its dismissal with prejudice on an incomplete analysis, the Trial Division abused its discretion.

[8] Appellant cites to *Republic of Palau v. Sisior*, 4 ROP Intrm. 152 (1994) and *Republic of Palau v. Decherong*, 2 ROP Intrm. 152 (1990) for the assertion that this Court has "embraced the four-part balancing test developed by the United States Supreme Court in *Barker v. Wingo*, 92 S. Ct. 2182, 2186–95 (1972)." Appellant's Brs. 9. This is only partially correct. We have embraced the *Barker* test only for determining whether a defendant's *constitutional* speedy trial right has been violated. Appellees have not asserted a violation of their constitutional right to a speedy trial; they allege only a violation of their *statutory* right to a speedy trial. As such, we evaluate the factors as articulated by the OEK.

A. Seriousness of the offense

[¶ 24] In considering whether a violation of the Speedy Trial Act should result in a dismissal with or without prejudice, the Trial Division must consider the seriousness of the charged offense. 18 PNC § 404(a)(1). The Trial Division can determine the seriousness of an offense by looking to the length of the sentence established by the statute. *Koerber*, 813 F.3d at 1276. "If the court determines the offense committed by the defendant is serious, this factor weighs in favor of a dismissal without prejudice." *Id.* at 1274 (citation omitted).

[¶ 25] Here, the Trial Division correctly noted that the charges in these cases "are, in fact, serious felony charges." *Kangichi* Dismissal Order at 4; *Kochi* Dismissal Order at 4. And while it did not explicitly say that such a factor weighs against a dismissal with prejudice, the context in which the statement occurs clearly indicates that the Trial Division treated it as such. Although succinct, we conclude the Trial Division did not ignore or slight this factor. On remand, the Trial Division should again weigh the seriousness of these offenses in favor of a dismissal with prejudice.

B. Facts and circumstances leading to dismissal

[¶ 26] The second factor that the Trial Division must consider is the facts and circumstances leading to the dismissal of the case. 18 PNC § 404(a)(2). "In determining whether the facts and circumstances warrant dismissal with prejudice we focus on the culpability of the conduct that led to the delay." *Koerber*, 813 F.3d at 1283 (citation omitted). However, "we are mindful that [the legislature] mandated courts to consider the facts and circumstances of the case *which led to the dismissal*, not just the facts and circumstances which led to the delay." *Id.* at 1277 (internal quotation marks omitted). This factor "focuses equally on the impact of the court's conduct and the impact of the government's conduct on any judicial delay." *United States v. Bert*, 814 F.3d 70, 80 (2d Cir. 2016) (citing *United States v. Pringle*, 751 F.2d 419, 429 (1st Cir. 1984)). "Where the delay is the result of intentional dilatory conduct[] or a pattern of neglect on the part of the Government, dismissal with prejudice is the appropriate remedy." *United States v. Jones*, 213 F.3d 1253, 1257 (10th Cir. 2000). We note, however, that "a finding of 'bad faith' is not a prerequisite to dismissal with prejudice." *Bert*, 814 F.3d at 80 (citing *Taylor*,

487 U.S. at 339). A "demonstrably lackadaisical attitude on the part of the government attorney in charge of the case" can be indicative of a "disregard for the responsibility to bring criminal cases to trial expeditiously." *Giambrone*, 920 F.2d at 180 (citing *Taylor*, 487 U.S. at 338–39). Conversely, while "a defendant has no duty to bring himself to trial and has no duty to bring any delay to the court's attention," "[d]efendants who passively wait for the speedy trial clock to run have a lesser right to dismissal with prejudice than do defendants who unsuccessfully demand prompt attention." *United States v. Moss*, 217 F.3d 426, 431 (6th Cir. 2000) (internal quotation marks omitted). Finally, the length of the delay can be used to measure the seriousness of the speedy trial violation and should be included in the facts and circumstances evaluation as well as in determining any prejudice to the defendant. *Bert*, 814 F.3d at 81 (citing *Taylor*, 487 U.S. at 340).

[¶ 27] Here, the Trial Division indicated that at least part of the delay was caused by Appellant. *See Kangichi* Dismissal Order at 4; *Kochi* Dismissal Order at 3 ("[T]he fact that there may be staffing issues at the Office of the Attorney General should not be held against Defendant, particularly when an attorney from the Office of the Public Defender appeared at all scheduled conferences in this case."). However, it did not indicate how much of the delay was attributable to Appellant and how much, if any, was attributable to Appellees. Additionally, the Trial Division made no findings regarding whether any delay attributable to Appellant was the result of "intentional dilatory conduct[] or a pattern of neglect on the part of the Government." *See Jones*, 213 F.3d at 1257.

[¶ 28] As to the length of the delay, approximately three weeks[9] is a relatively short delay that would normally weigh in favor of a dismissal without prejudice. However, there are several factors the Trial Division should consider in evaluating the weight to afford the short delay. First, the record indicates that the delay was the result of repeated status conferences. No trial date was set, no plea deal was being considered, and no continuances were requested. There is no indication that even a cursory attempt was made

[9] Appellee Kangichi's delay was 18 days at the time of his oral motion to dismiss and 22 days at the time of his written motion. Appellee Kochi's delay was 19 days at the time of his oral motion to dismiss and 23 days at the time of his written motion.

to comply with the requirements of the Speedy Trial Act. Furthermore, Appellant concedes that, because of the delay in sending the evidence for testing, it would not have been able to prove all of the elements of the offenses charged (and thus, could not proceed to trial) until sometime after June 11, 2018—nearly two months after the seventy-day deadline. And while an ends-of-justice continuance might have been warranted had it been requested, the findings needed to grant such a continuance cannot be made on remand. *United States v. Ammar*, 842 F.3d 1203, 1212 (11th Cir. 2016) (citing *Zedner*, 547 U.S. at 506).

[¶ 29] The Trial Division abused its discretion in failing to consider which party caused the delay, whether any delay attributable to Appellant was intentional or indicative of a pattern of a neglectful or lackadaisical attitude, and the length of the delay in weighing this factor. On remand, the Trial Division must decide whether, after evaluating the above considerations, this factor weighs in favor of a dismissal with or without prejudice.

C. Impact of a reprosecution on the Speedy Trial Act and the administration of justice

[¶ 30] The final statutory factor requires the Trial Division to consider the impact of a reprosecution on the administration of the Act and on the administration of justice. 18 PNC § 404(a)(2). Because the Act is designed to protect a defendant's constitutional right to a speedy trial and the public's interest in prompt criminal proceedings, "[w]henever the 'government—for whatever reasons—falls short of meeting the Act's requirements, the administration of justice is adversely affected.'" *Moss*, 217 F.3d at 432 (quoting *United States v. Ramirez*, 973 F.2d 36, 39 (1st Cir. 1992)). However, the administration of justice also incorporates the public's interest in prosecuting criminal offenses. As a result, "there is almost always some tension between the administration of the Act and the administration of justice." *United States v. Williams*, 314 F.3d 552, 559 (11th Cir. 2002) (internal quotation marks omitted). Defendants often contend that "dismissal without prejudice takes the teeth out of the Act's requirements" while the government argues that "reprosecution furthers the public's interest in bringing criminals to trial." *Id.* at 559–60 (internal quotation marks and alterations omitted). This tension is especially pronounced in Palau.

[¶ 31] In the United States, "[a] dismissal without prejudice requires the government to re-indict, may work to the disadvantage of the government on limitations grounds, and may make reprosecution less likely." *Jones*, 213 F.3d at 1257. Thus, while prosecutors are often able to obtain a new indictment after a dismissal without prejudice, it is not without some costs to the prosecution and the courts. *Bert*, 814 F.3d at 82 (quoting *Zedner*, 547 U.S. at 499). Contrarily, Palau does not require the Attorney General's Office to seek an indictment from a grand jury and consequently, it does not bear the cost or inconvenience of seeking a new indictment following a dismissal without prejudice. Instead, the Attorney General's Office effectively "gains successive 70-day periods in which to bring the defendant to trial." *Bert*, 814 F.3d at 82 (internal quotation marks omitted).

[¶ 32] A dismissal with prejudice sends a strong message about the importance of complying with the Act and "is more likely to induce salutary changes in procedures, reducing pretrial delays." *Id.* (citation omitted). But, barring reprosecution is a severe sanction, and it is clear that the OEK did not intend for all cases to be dismissed with prejudice. *Taylor*, 487 U.S. at 342 ("If the greater deterrent effect of barring reprosecution could alone support a decision to dismiss with prejudice, the consideration of the other factors identified in [§ 404(a)(1)] would be superfluous, and all violations would warrant barring reprosecution."). Thus, while not every case should be dismissed with prejudice, such a sanction "gives the prosecution a powerful incentive to be careful about compliance," *Zedner*, 547 U.S. at 499, and the comparatively negligible consequence of a dismissal without prejudice is an important consideration the Trial Division must weigh when looking at this factor.

[¶ 33] In addition to the overarching policy concerns regarding a defendant's right to a speedy trial and the public's interest in prompt criminal proceedings, this factor requires the Trial Division to consider the case-specific "aggravating and mitigating factors[, such] as the length of the delay and the prejudice to the defendant." *Williams*, 314 F.3d at 560. Prejudice to the defendant is separated into two types: "(1) trial prejudice, i.e., prejudice in the defendant's ability to mount a defense at trial; and (2) non-trial prejudice." *Bert*, 814 F.3d at 82. Non-trial prejudice refers to "the restrictions on [a defendant's] liberty, for 'whether he is free on bail or not, the delay may

disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.'" *Giambrone*, 920 F.2d at 180–81 (quoting *Taylor,* 487 U.S. at 340).

[¶ 34] Here, the Trial Division concluded that, because "dismissal without prejudice to re-file the charges would be punishing the Defendant for the Republic's violations of the Speedy Trial Act," each Appellee "has demonstrated prejudice resulting from the delay in bringing him to trial." *Kangichi* Dismissal Order at 3; *Kochi* Dismissal Order at 4. While this statement can be interpreted as a conclusion that the administration of justice would be negatively affected by dismissing the case without prejudice, the Trial Division has provided no analysis of how it reached such a conclusion. Nor is there any discussion of the potential impact of a dismissal with prejudice on the public's interest in the prosecution of serious drug offenses. It is entirely possible that the Trial Division weighed these factors and determined that a dismissal with prejudice was warranted based on Appellant's attitude toward the delay or the potential deterrent effect of the sanction. But we cannot assume the Trial Division evaluated these considerations without an explanation as to its conclusion.

[¶ 35] Furthermore, its broad statement fails to identify the prejudice that it concluded Appellees suffered from as a result of the Appellant's violation of the Act. While it is clear the Trial Division believes Appellees were prejudiced in some way, there is no indication that the Trial Division weighed this prejudice (and any deterrent effect a dismissal with prejudice could have on future compliance with the Act) against the administration of justice and the public's interest in seeing Appellees face trial. Again, it is possible the Trial Division weighed these considerations in making its conclusion. But, without providing an analysis explaining its reasoning, we have no way to review whether its consideration was properly balanced.

[¶ 36] The Trial Division abused its discretion in failing to identify and consider what, if any, specific trial and non-trial prejudice Appellees suffered. Additionally, the Trial Division failed to determine whether Appellant's delay-causing behavior was intentional or "truly neglectful" and how a dismissal with prejudice could affect future administration of the Act and the public's interest in speedy trials of criminal defendants. We leave determining

whether, after reweighing these considerations, this factor weighs in favor of a dismissal with or without prejudice to the sound discretion of the Trial Division on remand.

[¶ 37] Although we conclude the Trial Division abused its discretion in dismissing the information against the Appellees with prejudice, we cannot conclude that the appropriate sanction in these cases is a dismissal without prejudice. It is not the role of the appellate court to decide in the first instance whether the statutory factors weigh in favor of a dismissal with or without prejudice; such a task is properly the province of the Trial Division. *See Jones*, 213 F.3d at 1257 ("Of course, an appellate court cannot exercise discretion for the [trial] court."). Given the dearth of evidence in the record, we simply cannot undertake any meaningful appellate review of the Trial Division's analysis. As such, a remand is necessary for the Trial Division to make the relevant factual findings and properly exercise its discretion in weighing whether the factors support a dismissal with or without prejudice. *See Bert*, 814 F.3d at 86; *Koerber*, 813 F.3d at 1286–87.

CONCLUSION

[¶ 38] We **AFFIRM** the Trial Division's judgment that Appellant violated the Speedy Trial Act and Appellees are entitled to dismissal of the information against them. We **REVERSE** the Trial Division's judgment that the dismissals should be with prejudice and **REMAND** for reconsideration whether the information against Appellees should be dismissed with or without prejudice.

[¶ 39] If, after further consideration, the Trial Division again concludes that a dismissal with prejudice is appropriate, it shall enter an opinion and judgment embodying that disposition. If the Trial Division instead concludes that a dismissal without prejudice is appropriate, it shall enter an order to that effect. We intimate no view as to the decision the Trial Division should reach on remand.

[¶ 40] Either party may file a timely appeal from the Trial Division's new order or judgment.