REPUBLIC OF PALAU
Plaintiff,

v.

ALFONSO DIAZ, DEBORAH RENGIIL, MARGO LLECHOLCH, SHERRY TADAO, MARK REMELIIK, SANTORY BAIEI a.k.a SANTORY NGIRKELAU, STEVEN KANAI, NGIRAKESOL MAIDESIL, JULIUS TEMENGIL a.k.a. JULIUS BLAILES, and SEIKO KING,

Defendants.

Civil Action No. 13-008

Supreme Court, Trial Division
Republic of Palau

Decided: December 20, 2013

[1] **Civil Procedure**: Motions to Reconsider

A motion to reconsider is not a vehicle for a party to undo its own procedural failures or present arguments or evidence that could and should have been presented to the trial court prior to judgment.

[2] **Constitutional Law:** Equal Protection

A party alleging an equal protection violation due to selective enforcement must demonstrate that discriminatory intent was a motivating factor in the enforcement decision.

Counsel for Plaintiff: AAG Timothy McGillicuddy
Counsel for Defendants: Siegfried Nakamura, Salvador Remoket, Yukiwo Dengokl, William Ridpath

The Honorable R. ASHBY PATE, Associate Justice:

On November 29, 2013, this Court granted summary judgment in favor of Plaintiff and against Defendants Sherry Tadao and Santory Baiei, a.k.a. Santory Ngirkelau (Defendants), who have now filed a motion to reconsider and amend the judgment.[1] Defendants argue that the Court erred in granting summary judgment because material issues of fact exist concerning their affirmative defense that the Republic violated their right to equal protection by selectively enforcing the Executive Clemency Act (Act) against them. For the following reasons, Defendants' motion is **DENIED.**

A. Defendants fail to carry burden under ROP R. Civ. P. 59(e)

Under ROP R. Civ. P. 59(e), this Court may alter or amend a judgment if the moving party demonstrates the existence of "newly discovered material evidence or a manifest error of law or fact." *Dalton v. Borja*, 8 ROP Intrm. 302, 304 (2001). A motion based on newly discovered evidence should be granted only if "(1) the facts discovered are of such a nature that they would probably change the

[1] In its opposition, the Republic correctly points out that Defendants filed their motion prematurely because, although the Court had granted summary judgment, it had not yet entered a final judgment. However, final judgment has now issued and the substantive issues remain unchanged; so, the Court will address the motion on the merits.

outcome; (2) the facts alleged are actually newly discovered and could not have been discovered earlier by proper diligence; and (3) the facts are not merely cumulative or impeaching." *Infusion Res., Inc. v. Minimed, Inc.*, 351 F.3d 688, 696–97 (5th Cir. 2003). "A manifest error of law "is the 'wholesale disregard, misapplication, or failure to recognize controlling precedent." *Dalton*, 8 ROP Intrm. at 304.

Defendants identify no newly discovered evidence that was somehow unavailable to them at the time the Court granted summary judgment, nor do they identify any manifest error of law. Instead, Defendants assert—for the first time—that the decision to enforce the Act against them was based on their "lowly" social status and clan affiliation. At summary judgment, however, Defendants neglected to make this argument, and they failed to introduce any evidence regarding their social status or clan affiliation. They did not even request to file a sur-reply to address any of the issues raised in the Republic's reply brief, despite the Court providing them ample time to do so. Importantly, Defendants do not suggest that some piece of evidence was unavailable to them until after summary judgment, nor do they explain how the Court's failure to deny summary judgment on the basis of an argument not presented to the Court can somehow constitute manifest error. Put simply, this Court cannot be expected to divine the premise of Defendants' equal protection argument when Defendants failed to articulate it at the summary judgment stage.[2]

[1] Rule 59(e) "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." *Id.*; *see also Dale & Selby Superette & Deli v. United States Department of Agric.*, 838 F.Supp. 1346, 1348 (D. Minn. 1993) (noting that Rule 59 motions are "not intended to routinely give litigants a second bite at the apple"). Defendants had ample time for discovery and a full opportunity to respond to the Republic's motion for summary judgment, but they failed to allege discrimination on the basis of social status or clan affiliation or provide any evidence to that effect. *See Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004) ("[A]n unexcused failure to present evidence available at the time of summary judgment provides a valid basis for denying a subsequent motion for reconsideration."). Accordingly, their motion for reconsideration fails for this reason alone.

B. Defendants fail to carry burden under substantive equal protection law

Even assuming that Defendants had made their equal protection argument in a timely manner, summary judgment is nonetheless proper because Defendants also failed to demonstrate the existence of a genuine dispute regarding either the discriminatory effect or the discriminatory intent of the Republic's decision to enforce the Executive Clemency Act.

First, the governing law concerning Defendants' burden to prove discriminatory effect requires them to introduce some evidence showing that they were treated differently than similarly situated individuals. In other words, they must introduce evidence

[2] In their opposition to summary judgment, Defendants neglected even to identify the elements of their equal protection defense or cite any applicable law.

that other individuals received procedurally suspect pardons and that the Republic knowingly declined to enforce the Act against those individuals. In its summary judgment order, the Court gave Defendants the benefit of the doubt by assuming, without deciding, that Defendants put forth some evidence that similarly situated individuals had been treated differently. However, given Defendants' discussion of this issue in their motion for reconsideration, the Court notes that, in fact, Defendants' equal protection claim fails concerning discriminatory effect as well.

Defendants identify two so-called similarly situated individuals whom they allege have been treated differently. Specifically, Defendants identify High Chief Gibbons and Senator Baules, both of whose sentences, Defendants allege, were commuted by President Remengesau prior to his consideration of the required recommendations. Defendants argue that, because the Republic has not yet challenged these allegedly suspect pardons, Defendants have been treated differently than these similarly situated individuals and thus discriminated against.

But Defendants' very premise—that High Chief Gibbons' and Senator Baules' pardons were granted prior to the President's consideration of the required recommendations—is simply not true. In fact, the only evidence in the record on this point suggests that President Remengesau actually did receive and consider the required recommendations before ultimately issuing the commutations to these two individuals.[3] *See* Republic's Reply in Support of Summary Judgment, Exhibit A at 2 ("[The] constitutional clemency process [for High Chief Gibbons] required opinions on the request for clemency from the Office of the Attorney General, the Parole Board, the Minister of Justice and the Director of the Bureau of Public Safety. These recommendations were received and given due consideration."); Defendant Tadao's Opposition to Summary Judgment, Exhibit A at 10-11 (noting that the President "reviewed [Senator Baules'] petition along with the required recommendations of the Bureau of Public Safety, the Parole Board, the Attorney General, and Vice President Antonio Bells, who also serves as the Minister of Justice" and discussing those recommendations in detail). Defendants have offered no evidence whatsoever to refute those documents. Accordingly, Defendants failed to raise a triable dispute as to whether the Republic has treated them differently than similarly situated persons, and, by Defendants own admission, their equal protection argument cannot survive summary judgment. *See* Defendant's Motion for Reconsideration at 2 n.1 ("Defendants Sherry and Santory would readily concede that their denial of equal protection of laws argument would be defeated if there is evidence that such recommendations were obtained with respect to [Gibbons] and [Baules].").

[2] Second, and most importantly, the record is also entirely lacking in evidence of

[3] The documents demonstrate that President Remengesau issued a temporary reprieve to Senator Baules while awaiting the required recommendations. Regardless of the legality of that action, it remains undisputed that the President did receive and consider the required recommendations before ultimately commuting Senator Baules' sentence. Neither of these Defendants received a procedurally suspect temporary reprieve that was shortly thereafter supplanted by an apparently valid commutation or pardon, so neither Defendant is similarly situated to Senator Baules in this respect.

discriminatory intent. In criminal cases where selective enforcement in violation of equal protection is offered as a defense, courts require the defendant put forth "some evidence" that discriminatory intent was a "motivating factor in the decision" to enforce the law before the defendant can even obtain discovery, much less proceed to trial. *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1264 (10th Cir. 2006). This "demanding" standard is justified because a selective enforcement defense "asks a court to exercise judicial power over a 'special province' of the Executive," and judicial review of charging decisions could "chill law enforcement by subjecting the prosecutor's motives and decision-making to outside inquiry[.]" *United States v. Armstrong*, 517 U.S. 456, 464-65 (1999) (citations omitted). Indeed, prosecutors are entitled to a presumption that they have not violated equal protection. *Id.* at 465. Similarly, in civil cases where an equal protection claim is premised on selective enforcement of a law, evidence of discriminatory intent is necessary for the claim to survive summary judgment. *See Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 16-17 (2d Cir. 1999) (affirming summary judgment because the plaintiff "failed to show a material issue of fact as to the key issue in an equal protection claim alleging selective enforcement—impermissible motive").

Here, Defendants point to no evidence that the allegedly selective treatment was actually "motivated by an intention to discriminate on the basis of" social status or clan affiliation. *Zahra v. Town of Southold*, 48 F.3d 674, 683 (2d Cir. 1995). Rather, they simply deposited into the record a couple of pardons, which were issued in favor of some high-profile individuals at various times in the past twenty years, and which were granted in fewer than 60 days, and asked the Court to connect the dots and imply some form of executive favoritism or animus, or, at the very least, to give Defendants another chance—outside of the procedural boundaries—to figure out how to prove animus at trial. This is just not how the law works in this arena.

In the end, Defendants acknowledge that their equal protection argument is underdeveloped and supported by scant evidence, yet they ask this Court to "grant them an opportunity to have a trial on their affirmative defense of a denial of their right to equal protection so that they can present the evidence they need in order to fully develop and present such a defense." Defendant's Motion for Reconsideration at 4. Yet, even now, Defendants do not articulate how they plan to prove their claim at trial. They simply ask for more time to develop their case. Defendants are not entitled to survive summary judgment on the basis of unsubstantiated allegations "coupled with the hope that something can be developed at trial . . . ." *Smith v. Hudson*, 600 F.2d 60, 65 (6th Cir. 1979). The time for clearly articulating the basis of their equal protection argument and providing evidence to raise a triable dispute as to each element was at summary judgment, and that time has passed. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

For the foregoing reasons, Defendants' motion is **DENIED.**

REPUBLIC OF PALAU
Plaintiff,

v.

MARY GRACE BACONGA, JERYL BLAS a.k.a. MAMAMSANG, TEMMY SHMULL, and HARUO ESANG ,
Defendants.

Criminal Case No. 13-165

Supreme Court, Trial Division
Republic of Palau

Decided: April 15, 2014

[1] **Criminal Procedure**: Joinder and Severence

Generally, there is a preference for the joint trial of defendants who are charged together.

[2] **Criminal Procedure**: Joinder and Severence

Severance of the trials of coedefendants is appropriate if the risk of prejudice to the government or the defendants outweighs the public interest in joint trial.

[3] **Criminal Procedure**: Joinder and Severence

The primary consideration in determining prejudice in cases involving multiple defendants is whether or not a jury would be able to distinguish each individual defendant and the charges against him from that of the group.

Counsel for Plaintiff: Pro Se
Counsel for Baconga: Rachel Dimitruk
Counsel for Blas: Siegfried Nakamura
Counsel for Shmull & Esang: Oldias Ngiraikelau

The Honorable R. ASHBY PATE, Associate Justice:

Before the Court is Defendants Shmull and Esang's motion for severance, and the Republic's response. The Court held oral argument on April 11, 2014 at 9:00 a.m.

In their motion, as well as during the oral argument, Defendants Shmull and Esang ask the Court to sever their trial from the trial of their co-defendants, Mary Grace Baconga and Jeryl Blas, because, among other things, the offenses with which Shmull and Esang have been charged are non-jury trial offenses. That is, Defendants Shmull and Esang argue that the significant delay, financial burden, and disparity between the severity of the crimes with which they are charged as contrasted with the crimes with which their co-defendants are charged would unfairly prejudice their case. Defendants Shmull and Esang request a bench trial, which can be set on an expedited basis and which has fewer procedural hurdles with which to contend than a jury trial. For the reasons outlined below, Defendants' motion is denied.

CONTROLLING LAW

It is well settled that the joinder of offenses and defendants in the same information may be proper under Rule 8 of the Rules of Criminal Procedure. Conversely, the Court possesses the discretion, under Rule 14 of the Rules of Criminal Procedure, to order

separate trials of counts, sever the defendants' trials, or provide any other appropriate relief if the joinder of offenses or defendants appears to prejudice a defendant or the government. *See* ROP R. Crim. P. 8 & 14.

Because there is scant decisional law in the Republic on this issue of severance in criminal cases, the Court looks to the law of other jurisdictions for guidance. *Kazuo v. Republic of Palau*, 1 ROP Intrm. 154, 172 (1984); *see also Mesubed v. Urebau Clan*, 20 ROP 166, 167 & n.1 (2013) (citing 1 PNC § 303, which requires that "[t]he rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Republic in applicable cases . . . .").

Moreover, the Republic's Rules of Criminal Procedure are similar to those of the United States. This similarity lends support to the notion that the Court should now look to United States case law for assistance in developing its own jurisprudence on the issues of joinder and severability. *See Kazuo v. ROP*, 3 ROP Intrm. 343, 346 (1993) (relying on United States case law for guidance where the Palauan constitutional provision was similar to the United States constitution); *Blailes and Wasisang v. ROP*, 5 ROP Intrm. 36, 39 (1994) (finding United States cases helpful in interpreting Palauan statute that is substantially similar to United States' statute).

[1][2] In the United States, "[t]here is a preference in the federal system for joint trials of defendants who are indicted together." *Zafiro v. U.S.*, 506 U.S. 534, 537, (1993); 5 Am. Jur. *Indictments & Informations* §197. However, Federal Rule of Criminal Procedure 14, like the ROP Rule of Criminal Procedure, recognizes that joinder, even when proper, may prejudice either the defendant or the government. *Zafiro*, 506 U.S. at 538. Ultimately, the United States' rule on severance leaves the determination of risk of prejudice and any remedy that may be necessary to the sound discretion of the trial court. *Id.* at 541; *U.S. v. Ginyard*, 65 F. App'x 837, 838 (3d Cir. 2003); 5 Am. Jur. *Indictments and Informations* §215.

[3] In deciding whether to grant a severance motion, "the trial court should balance the public interest in a joint trial against the possibility of prejudice inherent in the joinder of defendants." *U.S. v. Eufrasio*, 935 F.2d 553, 568 (3d Cir. 1991) (*citing U.S. v. De Peri*, 778 F.2d 963, 984 (3d Cir. 1985)). The primary consideration in determining prejudice in cases involving multiple defendants is whether or not a jury would be able to distinguish each individual defendant and the charges against him from that of the group. *See U.S. v. Escalante*, 637 F.2d 1197, 1201 (9th Cir. 1980), *cert. denied*, 449 U.S. 856 (1980); *U.S. v. De Larosa*, 450 F.2d 1057, 1065 (3d Cir. 1971).

ANALYSIS

Each of the eighteen counts against the four defendants in the Information here stems from what the Republic alleges is part of a common scheme or plan to carry on a business in the Republic designed, at least in part, to profit from people trafficking and prostitution. Each of the alleged crimes charged in the Information took place at the same establishment over a period of about one year. These charges are of a similar character and are based on the same acts and transactions comprising this common scheme. Thus, the Court finds that joinder of the offenses and

defendants here was appropriate under ROP R. Crim. P. 8.

When joinder is appropriate, there is a strong preference for trying defendants who are indicted together in the same trial in order to achieve the underlying goals of joinder—trial efficiency and the conservation of judicial resources. *U.S. v. Martin*, 567 F.2d 849 (9th Cir. 1977). Joint trials also serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability. *Richardson v. Marsh*, 481 U.S. 200, 210 (1987).

Here, Defendants Baconga and Blas are charged with the same misdemeanor counts of unlawful employee restrictions as is Defendant Esang. And Defendant Esang is the owner of the establishment where Defendants Baconga and Blas are charged with carrying on the scheme alleged by the Republic. Defendant Shmull is alleged to be a regular patron of the establishment owned by Defendant Esang and operated by Defendants Baconga and Blas. Four of the primary witnesses, at least according to the Republic, are the same for all charges and all defendants. They are Maria Lolita Ramirez, Maria Theresa Serapion, Winnielyn Marcelino, and Ellen Amante. These witnesses are currently off-island and, if the Court severed the trial, the witnesses would be required to fly back to the Republic at least two separate times, if not more. Moreover, because all of the offenses arise from the same alleged common scheme at the same establishment, if the Court ordered two, three, or even four separate trials, the Republic would be forced to present—and the Court would be forced to hear—the same or similar evidence from the same or similar witnesses relative, at least in the case of the unlawful employee restrictions, to some of the same or similar charges numerous times. This would not be an efficient use of judicial resources or the resources of the Republic.

Although joinder is proper under the facts of this case, and a single trial is the best way to conserve judicial resources and streamline the process, the Court must also carefully consider the competing interest of potential prejudice to Defendants. *Zafiro*, 506 U.S. at 538; *Eufrasio* 935 F.2d at 568. It is true that the counts in the Information charge all four of the defendants with offenses of varying degrees of culpability, which is a factor that favors Defendants Shmull and Esang's severance argument. *See U.S. v. Balter*, 91 F.3d 427, 432–33 (3d Cir. 1996) (*citing Zafiro*, 506 U.S. at 539) (a 'complex case' involving 'many defendants' with 'markedly different degrees of culpability,' may prejudice defendants). Defendants Baconga and Blas are charged with some of the most severe felonies involving people trafficking, which trigger their right to a jury trial under 4 PNC § 602(a), while Defendant Shmull is charged with one felony count of prostitution, and Defendant Esang is charged with two misdemeanor counts of unlawful employee restrictions and aiding and abetting a violation of the requirement of obtaining a foreign investment certificate. As noted above, Defendants Baconga and Blas are also charged with the misdemeanor counts.

Accordingly, Defendants Shmull and Esang make two arguments that merit consideration. First, because Defendants Baconga and Blas are charged with the crimes that carry the most severe punishments and social opprobrium, Defendants Shmull and Esang argue that the "spillover effect," may prejudice the fact-finder against them. Second, they argue that, because there is only one courtroom in Koror equipped to handle a jury trial (and numerous jury trials are already

scheduled in that courtroom), their right to a speedy trial will be impaired if the Court orders that their trial be joined with the jury trial for Defendants Baconga and Blas, which trial may not be set until the end of this year.

Addressing their arguments in order, the Court first notes that differing levels of culpability do not alone justify severance. *United States v. Chang An-Lo*, 851 F.2d 547, 556-57 (2d Cir. 1988), *cert. denied*, 488 U.S. 966 (1988). "Differing levels of culpability and proof are inevitable in any multi-defendant trial and, standing alone, are insufficient grounds for separate trials." *United States v. Carson*, 702 F.2d 351, 366-67 (2d. Cir. 1983). Furthermore, Defendants Shmull and Esang are not charged with numerous or complex crimes; so, the risk of jury confusion or incurable "spillover effect" is low. And, while Defendants Baconga and Blas are charged with numerous crimes, the crimes with which they are charged are not unduly complex.

Turning to Defendants' speedy trial concerns, the Court concludes that those concerns are outweighed by other considerations. To limit the inconvenience to off-island witnesses, to minimize the possibility of inconsistent verdicts (which could lead to a miscarriage of justice and erode the public trust), to conserve judicial resources, and to avoid the burden of conducting two or more trials based on a events occurring at the same establishment with the same players in an alleged common scheme, the Court finds that the ends of justice are best served by continuing the matter to the extent necessary to accommodate a single, joint trial. Moreover, there is another jury-equipped courtroom in the Republic in the Capitol complex in Melekeok, and the Court will schedule the jury trial in that location at the earliest possible date if necessary to avoid excessive delay.

In balancing the public interest in joint trials against the potential prejudice to Defendants Shmull and Esang, the Court in its discretion determines that the best solution, given the particular circumstances of this case, is to deny Defendants Shmull and Esang's motion and proceed with a joint trial. The Court finds that the primary consideration in cases involving multiple defendants—that is, whether or a jury would be able to distinguish each individual defendant and the charges against him from that of the group—suggests that the potential for prejudice with a joint trial is not significant in this case. *Escalante*, 637 F.2d at 1201; *De Larosa*, 450 F.2d at 1065. Defendants Shmull and Esang's motion for severance is denied.