Republic of Palau
v.
Aida Kodep

Criminal Case No. 15-052

Supreme Court, Trial Division
Republic of Palau

Decided: July 1, 2015

Counsel for Republic of Palau ..... John Bradley
Counsel for Defendant ..... Allison Jackson

Order Granting Motion to Dismiss

The Honorable R. ASHBY PATE, Associate Justice:

Before the Court is Defendant's Motion to Dismiss for Want of Prosecution based on the Republic's alleged violation of the Speedy Trial Act and ROP R. Crim. P. 48(b), filed on April 23, 2015. The Republic responded on May 6, 2015, and the Defendant filed no reply. For the reasons set forth below, the motion to dismiss is **GRANTED**.

BACKGROUND

On March 19, 2015, the Attorney General's Office filed an information alleging that, from October 1, 2012, until November 30, 2012, Defendant drafted several checks on an account belonging to her sister-in-law, and charged Defendant with one count of Grand Larceny, one count of Cheating, and one count of Forgery. The Affidavit of Probable Cause alleges that police officers "spoke with Kodep at BPS" and that they "advised Kodep of her constitutional rights" on November 7, 2012, during which time, according to the affidavit, she admitted in her written statement that she stole the checks and forged the owner's signature. Inexplicably however, despite the alleged confession and relative simplicity of the case, the Republic did not bring charges against her for two and half years. Defendant appeared with counsel on April 3, 2015, and entered a plea of not guilty to all charges against her.

Shortly after her arraignment, Defendant filed this motion to dismiss seeking dismissal of the charges based on the Republic's alleged violation of the Speedy Trial Act and ROP R. Crim. P. 48(b). Because the charges will be dismissed under the Speedy Trial Act, subsequent analysis under Rule 48(b) is unnecessary.

ANALYSIS

Before addressing the relative merits of the legal arguments here, the Court feels compelled to address the fact that a simple search of the relevant case law on this issue would have uncovered two distinct and relevant sources of legal authority that were not brought to this Court's attention by either party.

First, the parties do not appear to be operating under the correct version of the Speedy Trial Act, specifically 18 PNC § 404(a). As incorrectly quoted in Defendant's motion, which mistake went uncorrected by the Republic's opposition, the wrong version of section 404(a)(1) states:

> If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no complaint or information is filed within the time limit required by section 403(b) as extended by section 403(h), such charge against that individual contained in such complaint shall be dismissed or otherwise dropped.

That, however, is not the text of section 404 as it exists today—it is the text of section 404 as it was originally enacted in 2002 in RPPL 6-24. But section 404(a)(1) was amended in 2008 in RPPL 7-51 to read as follows:

> If no complaint or information against an individual is filed until after the time limit required by section 403(b) as extended by section 403(h) has passed, any such charge against that individual contained in such untimely complaint shall be dismissed or otherwise dropped.

To say that the Court is decidedly underwhelmed by the fact that the parties have failed to argue this motion under the correct version of the statute is something of an understatement.

Even further, the parties also failed to cite a single Palauan case addressing this issue, despite the fact that even a basic search of Palauan case law would have uncovered at least one reported Court of Common Pleas case as well as two other unreported but very findable cases (as they are cited in the reported Common Pleas case) that directly address the speedy trial issue here. Though not binding on this Court, and though they predate the statutory amendment that neither party seems to be aware has occurred, they are clearly instructive, and the Court is mystified by the fact that neither party here has chosen to bring them to the Court's attention, either to cite them in support of a position or to attempt to distinguish them or call their holdings into question. This is just plain sloppy.

With that out of the way, the Court now turns to the relative merits of the arguments under the current statute, as it was enacted prior to both the offenses alleged and the charges being brought.

I. The Arguments

Defendant argues that the Republic violated her right to a speedy trial by its failure to bring charges against her for almost two and half years. Specifically, she alleges that, under the Speedy Trial Act, she should have been charged within 30 days of her arrest, which she contends occurred during her original questioning back in 2012. The three issues with respect to a Speedy Trial Act violation are (a) whether she was actually arrested in 2012, (b) whether such an arrest was in connection with the charges before this Court, and (c) if so, whether the speedy trial clock was running and expired so as to mandate dismissal of the charges for the Republic's failure to bring them within 30 days of that arrest.

Defendant contends—and this Court agrees—that the definition of arrest in the Palau National Code is very broad: "any form of legal detention by legal authority." 18 PNC § 101(a). That is, "[a]n arrest takes place when, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. The question here is not whether the officer intended to arrest defendant." *ROP v. Gibbons*, 1 ROP Intrm. 547A, 547N (1988) (citations omitted). Pursuant to 18 PNC § 218, a person under arrest must be advised of his right to an attorney and his right to remain silent. 18 PNC § 218(b). In fact, "it [is] unlawful for those having custody of one arrested, before questioning him about his participation in any crime, to fail to inform him of his rights and their obligations under subsections (a)(1) - (3) of [18 PNC § 218]." 18 PNC § 218(a)(4). Thus, Defendant contends that she was clearly arrested in 2012, because the entire colloquy of the officer reading, translating, and having her initial and sign the Advice of Rights form would have been entirely unnecessary if Defendant were not under arrest, and that, even if the officer's intention was something other than to place her under arrest, a reasonable person in Defendant's position, sitting in a room in the Bureau of Public Safety, with a police officer reading her statutory warnings—after which, the Court notes, the Defendant allegedly confessed to the crimes—would believe she was not free to leave and was under arrest.

According to Defendant, because she was arrested in 2012, the Republic's failure to charge her within 30 days violated her right to a speedy trial. The Speedy Trial Act (hereinafter referred to as the "Act") provides for various deadlines for filing informations or complaints and for holding trials in criminal cases. 18 PNC §§ 403-405. Importantly, Defendant argues that 18 PNC § 403(b) sets out the deadline for filing an information: "any information or complaint charging an individual with the commission of an offense shall be filed within thirty days from the date on which the individual was arrested or served with a summons in connection with such charges." *See* 18 PNC § 403(b). Further, 18 PNC § 404(a)(1) provides: "If no complaint or information is filed until after the time limit required by section 403(b) as extended by section 403(h) has passed, any such charge against that individual contained in such untimely complaint shall be dismissed or otherwise dropped." *See* 18 PNC § 404(a)(1).

Because Defendant's arrest on November 7, 2012, was not followed by a formal charging instrument until March 23, 2015, Defendant argues that this fact necessitates dismissal of the charges.

In its incredibly short, three-page response, which, as noted above, fails even to cite the three relevant cases that arguably support its position or to correct Defendant's incorrect statutory quotation, the Republic simply contends that it has preserved all of the relevant documents, which it tendered to Defendant as part of discovery, and that the Defendant was never arrested because no arrest warrant was issued for the Defendant. Rather, the defendant "was brought to the police station for investigation," where she was provided—and later waived—her constitutional rights, and then gave a written statement to a detective, which, according to the Republic's affidavit of probable cause, contained a confession. According to the Republic, the Defendant was *then* free to leave. The Republic calls this an "arrest for examination." Moreover, the Republic—again, without comment to the amendment of section 404—contends that 18 PNC section 403 contains a trigger requiring a defendant to have been charged with an offense and thus, because the Republic chose not to charge her until 2015, the issue falls under a pre-charge investigation, which should simply be governed by the six year statute of limitations.

II. Speedy Trial Violation

A. Arrest

Defendant's argument hinges first on whether she was arrested during the November 2012 meeting with the detective who drafted the affidavit of probable cause. As an initial observation, it must be noted that the Republic has all but conceded that the Defendant was under at least some form of arrest, calling it an "arrest for examination," and though 18 PNC § 218 admittedly distinguishes between the two types of arrest, the Speedy Trial Act does not. The Court is bound, in the absence of any cogent argument by the Republic, to construe any statutory ambiguity in favor of a criminal defendant. *See Scott v. ROP*, 10 ROP 92, 97 n.5 (2003) (discussing the rule of lenity). But more importantly, the law is clear that, for constitutional purposes, an "arrest for examination" in this fashion is a seizure that requires an arrest warrant, or an exception to the warrant requirement, based upon probable cause. *See* Palau Const. Art. IV § 6; *see also* 18 PNC § 211(d) (allowing for arrest for examination under the title of "[a]uthority to *arrest* without warrant") (emphasis added).[1] A police officer who has

[1] The Court notes that § 218 references § 211(d), which allows for the arrest and detention for examination of "persons who may be found under such circumstances as justify a reasonable suspicion that they may have committed or intend to commit a felony." The "reasonable suspicion" language, however, clearly refers to what came to be known as a *Terry* Stop—which is not at all what occurred here, given than the

probable cause that a crime has occurred may seek an arrest warrant, but an officer lacking probable cause but having suspicions about a suspect "may not [] 'seek to verify their suspicions by means that approach the conditions of arrest." *ROP v. Osias*, Crim. No. 15-031, slip op at *6 (Ct. Com. Pl. June 12, 2015) (quoting *Florida v. Royer*, 103 S.Ct. 1319, 1325 (1983) (citing *Dunaway v. New York*, 99 S. Ct. 2248 (1979)). "[W]hen the police . . . forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes," such person is objectively arrested. *See id.* (quoting *Hayes v. Florida*, 105 S. Ct. 1643, 1647 (1985)).

Even were "arrest for examination" not categorically a form of arrest, the Court finds that the facts surrounding this particular event would lead a reasonable person to believe that he or she was not free to leave. First, the Defendant was "brought to the police station," as characterized by the Republic in its own response. Then, the Defendant was informed of her constitutional rights by the detective assigned to investigate the matter, after which she waived her rights and provided a written statement allegedly containing an admission that she stole the checks and forged the owner's name on them. The mere fact that she *was* free to leave *after* this meeting does not in any way indicate to this Court that she was not under arrest at the time and that she was not justified in believing that she was under arrest at the time—in fact, it implies the contrary, particularly given that the Republic all but concedes that "custodial action by the Bureau of Police . . . dissolved the minute Defendant left the Bureau of Public Safety." The Court is hard pressed to understand how something that the Republic argues didn't exist can allegedly dissolve.

The Republic, however, argues that want of prosecution is only triggered under section 403 if the arrested individual is charged with an offense at that time. Without citation, it effectively invokes the holding of several previous trial courts in the Republic that found this was the case. In *ROP v. Iyar*, Crim. No. 04-411 (Tr. Div. Nov. 28, 2005), the Trial Division examined the triggering provision of the Speedy Trial Act in effect at that time, even though the primary holding of the decision hinged on the fact that the Defendant was never actually arrested. But the court held that the provisions of Palau's Speedy Trial Act were identical to those of the United States,[2] and went on to observe

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Defendant was brought to the station and interrogated. *See generally Terry v. Ohio*, 392 U.S. 1 (1968).

[2] Generally, "'[w]hen the legislature of a state adopts a statute which is identical or similar to one in effect in another state or country, the courts of the adopting state usually adopt the construction placed on the statute in the jurisdiction in which it originated.'" *Id.* at 3 (citing *ROP* v. *Wong,* Crim. Case No. 03-355, slip op. at 3 (Tr. Div. Jan. 16, 2004) (quoting 2B NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 52.02 at 282 (5th ed. 1992)); *see also id.* at 3 (citing *Caroline Prods. Co. v. United States,* 323 U.S. 18, 26 (1944) ("[T]he general rule [is] that

that at least two American federal circuit courts have addressed whether a mere arrest alone triggers the provisions of the Speedy Trial Act. Both American circuits had determined that the act is only triggered if there is an arrest with a charge or charges filed at the same time or shortly thereafter. *United States* v. *Boyd,* 214 F.3d 1052, 1056-57 (9th Cir. 2000); *United States* v. *Graef,* 31 F.3d 362,364 (6th Cir. 1994); *see also United States* v. *Francis,* 390 F.Supp.2d 1069, 1072 (N.D. Fla. 2005) (following *Boyd* and *Francis).* Agreeing with the U.S. analysis of the language of that statute, the Trial Division went on to reason as follows:

> [T]o avoid the anomalous result of conferring a right without a remedy, §§ 403(b) and 404(a) must be read together. Thus, the triggering mechanisms in § 403(b)—specifically an arrest or summons—must be consistent with the language of the remedy, which provides for the dismissal of the "charge against that individual *contained in such complaint.*" 18 PNC § 404(a) (emphasis added). Therefore, the arrest "trigger" for § 403(b) applies only to arrests made either on a complaint or which were immediately followed by a complaint. *See United States* v. *Mills,* 964 F.2d 1186, 1189 (D.C. Cir. 1992); *United States* v. *Blackmon,* 874 F.2d 378,381 (6th Cir. 1989). The second "trigger" of § 403(b)—summons—also requires a complaint or information to be filed. *See* ROP R. Crim P. 4(a) and 9(a) (stating that summons may be issued upon a complaint or information). A finding that a complaint is a prerequisite for the Speedy Trial Act's thirty-day clock conforms to the policy and purpose of the Act, which is to "expedite the processing of pending criminal proceedings" as opposed to supervising "the exercise by a prosecutor of his investigative or prosecutorial discretion at a time when no criminal proceeding is pending before the court." *United States* v. *Varella,* 692 F.2d 1352, 1358 n.4 (11th Cir. 1982) (quoting *United States* v. *Hillegas,* 578 F.2d 453 (2d Cir. 1978)). Thus, for the purposes of the Speedy Trial Act, an "arrest" occurs only when "an individual is formally charged with an offense or when a formal complaint is filed alleging an offense." *United States* v. *Francis,* 390 F.Supp.2d at 1072 (collecting cases).

Iyar at 4.

This Court notes that this interpretation actually had been broadly adopted in the United States, not just by the aforementioned Sixth and Ninth Circuits, but also by the Second, Fourth, Fifth, Seventh, Eighth, and Eleventh. *See United States v. Summers*, 894 F.2d 90, 90 (4th Cir. 1990); *United States v. Bloom*, 865 F.2d 485, 489–90 (2nd Cir.

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adoption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording."); *Gordon v. Maine Cent R.R.,* 657 A.2d 785, 786 (Me. 1995) (stating that it is appropriate to look to analogous statutes and case law for guidance when a term is not defined in relevant statutory provisions or prior judicial decisions).

1989); *United States v. Amuny*, 767 F.2d 1113, 1120 (5th Cir. 1985); *United States v. Janik*, 723 F.2d 537, 543 (7th Cir. 1983); *United States v. Sayers*, 698 F.2d 1128, 1131 (11th Cir. 1983); *United States v. Jones*, 676 F.2d 327, 329–31 (8th Cir. 1982). Two separate courts in the Republic have also followed this reasoning—*ROP v. Matsutaro*, Crim. Case No. 05-375 (Tr. Div. Feb 8, 2006) (order denying a defendant's motion to dismiss when defendant was arrested in October 2003, but not formally charged until November 2005), and *ROP v. Mobel*, 13 ROP 283 (Ct. Com. Pl. 2006) (order denying a defendant's motion to dismiss when defendant was arrested on December 29, 2005, but not formally charged until February 1, 2006).

Despite all this, the *Mobel* court, however, was forced to acknowledge some of the pitfalls both in applying this so-called remedy in practice here in Palau, as well as in discerning the OEK's intent in adopting the act as a whole. Indeed, the fact that the Palauan Speedy Trial Act was a near-wholesale adoption of the U.S. act, despite the fact that U.S. and Palauan criminal charging practice differs substantially (including the requirement of indictment by grand jury in United States federal felony cases), gave rise to some significant ambiguities that the Court of Common Pleas in *Mobel* felt necessarily compelled to square away. The court noted that, in originally adopting the Speedy Trial Act, the OEK made one simple but significant change to the statutory provisions in the U.S. Speedy Trial Act: in light of the fact that Palauan law does not provide for grand jury indictments, the OEK replaced the word "indictment" with "complaint" in both sections 403 and 404. Thus, the remedy provision then read: "If, in the case of any individual against whom a complaint is filed charging such individual or offense, no complaint or information against an individual is filed until after the time limit required by section 403(b) as extended by section 403(h) has passed, any such charge against that individual contained in such untimely complaint shall be dismissed or otherwise dropped." 18 PNC § 404(a)(1).

The problem was that the first and third uses of "complaint" already appeared in the United States Speedy Trial Act in the remedy section—and they meant something entirely different than the one added in Palau. *See* 18 USC § 3162(a)(1). The "complaint" discussed in the United States Act has been interpreted, almost universally, to refer to the filing of criminal charges prior to the release of an arrested person, and Courts have held that if a person is arrested but released without charges being filed, the 30 day period for filing of an indictment or information is not triggered. *See, e.g., United States v. Sayer*, 698 F.2d 1128, 1131 (11th Cir. 1983). This is because United States law requires law enforcement to file a sworn complaint with a judicial officer that then must be superseded by the government by bringing an information or indictment within the 30 day time period. *See United States v. Boyd*, 214 F.3d 1052, 1057 (9th Cir. 2000). The government is not allowed to skip the complaint step in the United States. The word "complaint," however, as used by the OEK in the first clause of the former § 404(a), clearly was used as a substitute for the word "indictment" because indictments are not used to bring criminal charges in Palau—but "complaints" can be. "Complaint" as used in the context of "no complaint or

information" and as used in the context of "against whom a complaint is filed" meant different things.

As such, the Court of Common Pleas noted how difficult it was to divine the OEK's intent in originally enacting the Act. For example, the Senate's Judiciary and Governmental Affairs Standing Committee Report No. 6-102 indicates that "The Bill is to establish by law a time within which a person *charged with a crime* must be tried," (emphasis added) and the House of Delegate's Judiciary and Governmental Affairs Standing Committee Report No. 6-102 indicates that it is concerned with the amount of time "criminal defendants . . . languish in jail or uncertainty." At the same time, however, H.O.D. Report No. 6-22 states that the bill was introduced "to address the problem of the length of time that often passes either before criminal charges are brought against a person, or that a prosecution takes before coming to a resolution. An undue length of time in resolving a criminal case not only presents difficulties for persons *suspected* of involvement in an offense but not charged . . . but also for the victims of crimes who desire a resolution for determination of restitution and for emotional closure." *Id.* (emphasis added). In addition, H.O.D. Report No. 6-102 also mentions that the remedy provisions will only occur after "the defendant has already spent a significant amount of time either in jail or *under threat of prosecution*." (emphasis added). These latter reports would seem to support Mobel's—and this Defendant's—position, but the Court of Common Pleas nonetheless denied the defendant's motion to dismiss because of the inconsistency within the legislative history, stating that "[t]he inconsistencies in the congressional reports render them less than helpful in the present case, and the Court cannot rely on them for its decision."

With the above in mind, it must be noted that statutory interpretation, much like statutory drafting, is not an exact science. It is unquestionably difficult to draft a statute that will anticipate all future potential factual scenarios under which it might be applied, but courts are asked to evaluate such scenarios on a daily basis. In doing so, it is well settled that the first step is to look at the plain language of the statute and, if it is clear, courts will go no further beyond that plain language. *ROP v. Palau Museum*, 6 ROP Intrm. 277, 279(1995). But when the statutory language is ambiguous, "the all-important or controlling factor is legislative will," and "[c]onsideration of the evil which the legislature sought to correct and prevent is a strong force in statutory interpretation." *Id.* at 278, 279. The *Iyar*, *Matsutaro*, and *Mobel* courts all attempted to determine the legislative will and reached the same conclusion—that, despite differences in Palauan criminal charging practice and that of the United States, the legislature had intended to adopt the United States construction of the Act.

But no court, particularly in the area of statutory interpretation, truly is infallible, and it is common for statutory decisions of courts to be overruled by subsequent changes to the statute itself. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 335–36 (1991) (noting that, between 1975 and 1990, United States Congress overrode an average of about twelve statutory Supreme

Court decisions per congressional term). As is its right and prerogative, and at the direct request of the Supreme Court for clarification, the OEK answered these court decisions in 2008 by amending section 404 of the Speedy Trial Act in a crucial fashion: it struck out the second prong of the triggering requirement and reworded the provision as follows to clarify that the act did *not* contemplate two separate charging documents:

> § 404. Sanctions
>
> (a)(1) If~~, in the case of any individual against whom charges of an offense are sought, where a complaint is filed charging such individual with an offense,~~ no complaint or information *against an individual* is filed *until after* ~~within~~ the time limit required be section 403(b) as extended by section 403(h) *has passed*, *any* such charge against that individual contained in such *untimely* complaint shall be dismissed or otherwise dropped.

Senate Bill 7-204, Draft PD1; *compare* RPPL 7-51 § 2 (Section 404 as amended) *with* RPPL 6-24 § 1 (Section 404 as originally enacted).

The report of the House of Delegates Committee on Judiciary and Governmental Affairs, Stand. Com. Rep. No. 7-192, confirms the reason for this change. It notes that the purpose of 18 PNC § 403(b) is to "require[] the government to file a complaint or information charging an individual with an offense within thirty days after the individual is arrested or served with a summons. [Section] 404 governs how a court should respond when a complaint or information is filed after the thirty day time limit has expired. As [previously] written, however, Section 404(a)(1) may be understood to require two complaints." The corresponding report of the Senate Committee on Judiciary and Governmental Affairs, Stand. Com. Rep. No. 7-269, similarly states that the amendment was intended to "remove[] any ambiguity or any suggestion that two complaints are required." The legislature made it very clear that the Act contemplates only *one* charging document, and that such document may be untimely; in doing so, this Court finds that it abrogated the speedy trial holdings of *Iyar* and *Mobel*. Put simply, after considering the 2008 amendment, the idea that the Act, subsequent to the amendment, prohibits only an additional information or complaint after someone is arrested and charged concurrently ignores both the realities of charging practice in Palau and the will of the legislature in clarifying the statute.

Had this case arisen under the former version of the statute, substantively identical to its United States counterpart, this Court would likely have agreed with its learned colleagues who decided *Mobel, Iyar*, and *Matsutaro*, and denied this motion. Those courts found, and this Court agrees, that the original legislative record contained insufficient evidence to suggest that the legislature intended to drastically change the behavior and practice of the Bureau of Public Safety and the Office of the Attorney General. But subsequent to the 2008 amendment, this simply is no longer the case. By removing one of the two triggering requirements to the dismissal remedy of the Act,

leaving only the arrest requirement in place, the OEK has provided clear instruction distinguishing the purpose and requirements of the Act in Palau from its United States counterpart. In the United States, the requirement that "arrest" must be coupled with charges to trigger the Act comes from the language "against whom a complaint is filed charging such individual with an offense"—language which no longer exists in Palauan law. *See Sayers*, 698 F.2d at 1131. Subsequent to this change, any information or complaint charging an individual who has been arrested in connection with those charges must be filed within thirty days from the date of arrest.

Indeed, such an understanding flows naturally from the broad Palauan definition of arrest as "any form of legal detention by legal authority," a definition the United States Act does *not* contain. *See* 18 PNC § 101(a). We have here a defendant who was brought to the police station (as opposed to some other neutral location, or her own home) and informed of her constitutional rights. Even if this was an "arrest for examination," this qualifies as an arrest under section 101(a), especially since the event was presided over by the detective assigned to investigate the matter—clearly the "legal authority" under which Defendant was detained. Given that the standard for lawfully arresting Defendant and for charging her is the same—probable cause—the Court has no idea why the Defendant was not formally booked and charged at this time,[3] but, based on the totality of these particular circumstances, the Court finds that Defendant was arrested in 2012.[4]

B. Arrest in Connection with these Charges

Not all arrests trigger the need to charge all possible offenses, or even the offense being investigated, nor could they reasonably. If, for example, a defendant who was already under investigation for cashing fraudulent checks were arrested for driving under the

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[3] The Republic has implied that charges were not brought at this time because the investigation was ongoing. However, if it is the Republic's position that it could not bring charges because it did not yet have sufficient probable cause, then the stationhouse arrest was unlawful—and the fruits of such unlawful arrest and examination, including but not limited to Defendant's confession, would need to be suppressed.

[4] This finding is not intended to suggest that every stationhouse interrogation can be construed to constitute an arrest under Title 18's admittedly broad definition. Rather, it is limited to these particular facts, which suggest she was *brought* to the station and read her rights, and that she then provided a written statement containing an alleged confession at that time. A reasonable person would view this situation as an arrest. Her confession at the time provides further evidence at least of her subjective state of mind, which, although not the objective reasonable person standard that controls here, creates an interesting problem for the Republic if they wish to characterize her confession as unreasonable under the circumstances.

influence, the arrest for an unrelated offense would not trigger the Speedy Trial clock and require charging of the check fraud allegations.[5] Nor should the Republic be expected to charge a defendant, arrested for interrogation in connection with certain allegations, who, for example, at that time provides what appears to be an airtight alibi.

As discussed above, the amended statute removes the requirement that the arrest must be concurrent with charges—it simply prohibits any charges "in connection with" that arrest if filed more than 30 days later. These amendments make it clear that the Act contemplates only one charging document, potentially subsequent to an arrest, and that such charging document might be untimely—indeed, the legislature considered using the term "against whom charges of an offense are sought," necessarily implying that the charges had not yet been brought. *See* Senate Bill 7-204, Draft CD1. Given that the statute obviously contemplates later-filed charges, the Court declines to adopt the Republic's argument that the statute is not triggered because the charges had not *previously* been filed. Section 403(b) does not even *apply* to arrests and charges that are unconnected, so it stands to reason that if a charging complaint can be too late, the charges need not pre-date or have been concurrent with the the connected arrest in question—reasoning that would preserve the "two complaint" reading the legislature sought to eliminate.

The statute does not require that the arrest in question be in immediate conjunction with, as a result of, subsequent to, or in execution of criminal charges that have been previously filed; it requires only that the arrest must be "in connection with such charges." Such a requirement is reciprocal; no sequence of events or temporal order is given or even implied by its wording.[6] An arrest that causes charges to be filed, such as when an officer witnesses an assault and arrests a suspect immediately, is every bit as "in connection with such charges" as an arrest that occurs as a result of charges being filed and a suspect being arrested for arraignment on the pending charges.

On the facts of this case, the Court has little trouble concluding that the Defendant's arrest was "in connection with [these] charges," based solely on the Republic's own response and Affidavit of Probable Cause. *See* 18 PNC § 403(b). First, the Republic admits that Defendant was "brought" to the police station for investigation, an investigation Officer Steven Aderkeroi's Affidavit of Probable Cause states was directly related to the check fraud allegations. Second, no alternative bases, plausible

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[5] *But see United States v. Nixon*, 634 F.2d 306, 309 (5th Cir. 1981) ("[I]f the second charge is but a part of or only gilds the initial charge, the initial arrest would start the critical period for trial.").

[6] The language is reciprocal as a linguistic matter only; rationally, no violation of the 30 day clock could possibly occur if the charges were brought *before* a defendant were ever arrested in connection with such charges, as the time to file an information or complaint would have been satisfied.

or otherwise, for Defendant's arrest have been alleged or appear in the record. Defendant does not appear to have been under investigation for any other offenses, nor does the Republic suggest that its interview of the Defendant was untargeted—the Affidavit specifically notes that Defendant was a suspect, and the record does not even discuss the existence of any other suspects. The Republic concedes that the arrest was for "investigation of the *underlying allegations*." ROP Opp. ¶ 8 (emphasis added). Third, no exculpatory evidence or statements, suggesting that further investigation was in any way needed, appear to have been raised by the interrogation. No break in the chain of causation is alleged or even implied; in fact, it is apparent that the Republic's case relies heavily on Defendant's confession. Although the Republic nakedly asserts that the investigation was ongoing, absolutely no factual explanation has been provided suggesting that these charges do not flow directly and solely from the evidence that led to Defendant's arrest and the alleged confession that Defendant provided at such time.[7]

This Court leaves for another day, and for another court, consideration of what facts may sufficiently attenuate a later charging document from a previous arrest such that the Act might not be implicated. However, in this case, no argument or evidence has been presented suggesting that these charges were not in connection with Defendant's arrest, a basic requirement of the Act that the Republic's scant briefing made absolutely no effort to challenge. The Court finds that the charges filed on March 19, 2015 are in connection with Defendant's arrest on November 7, 2012.

C. Speedy Trial Trigger

Having found that Defendant was arrested in connection with these charges at the time of her interrogation, and that the Act no longer requires concurrent charging to start the clock, it is clear that the remedial provision of section 404 was triggered by the Republic's failure to bring these charges within the required 30 day period. The Act plainly requires that "[a]ny information or complaint charging an individual with the commission of an offense shall be filed within thirty days from the date on which the individual was arrested or served with a summons in connection with such charges." 18 PNC § 403(b). And the remedy provision, styled as a sanction against the Republic, states that "[i]f no complaint or information against an individual is filed until after the

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[7] The Affidavit of Probable Cause states that the investigating officer "retrieved copies of the forged checks from the Pacific Bank." It does not disclose, and the Republic has not argued, when this occurred or if there was any reason for any delay in acquiring these checks. The Court finds it hard to believe, however, that this should have taken more than 100 days—the total amount of time, barring any excludable time under 18 PNC § 403(h), that the Republic could have delayed trial had it brought the information on the final available day. Furthermore, if acquisition of the checks was essential to a finding of probable cause, Defendant's arrest, if it occurred prior to such acquisition, was unlawful as previously noted. *See supra* n. 3.

time limit required by section 403(b) as extended by section 403(h) has passed, any such charge against that individual contained in such untimely complaint *shall* be dismissed or otherwise dropped." *Id.* § 404(a) (emphasis added). This remedy is not discretionary.

This Court is not unsympathetic to the resource and staffing constraints that regularly bind the Bureau of Public Safety and the Office of the Attorney General, the two state entities on which this change places constraints. This Court further recognizes the original purpose of the United States Act's 30-day requirement, as protecting an accused against "the extension of the period when the accused is under legal restraint but does not know the charges she will eventually face," appears inapplicable in a case such as this where the Defendant was not under any legal restraint. *See United States v. DeJohn*, 368 F.3d 533, 539 (6th Cir. 2004); *see also Janik*, 723 F.2d at 543 ("The Speedy Trial Act does not protect the man whose peace of mind is disturbed because, though he is not under arrest or out on bond and no charge has been lodged against him, he is likely to be charged."). But the OEK, with the agreement and substantial comments of the President, has spoken, changing the nature of the Act in Palau. It is not for this Court to opine on the wisdom of policy decisions that, while influenced by United States law, choose to depart from the original intent and purpose of the United States Congress. The OEK's instruction, removing the requirement that the arrestee have been charged with an offense at the time of arrest from the section requiring dismissal of a late-filed information, admits no other interpretation. Because the Defendant was arrested in connection with charges that were filed more than two years later, the Speedy Trial Act, as it exists following legislative clarification, requires that the charges be dismissed. What remains is to determine whether dismissal should be with or without prejudice.

III. Prejudice

Left unchanged by the amendment to section 404 is the list of factors a court is required to consider when deciding whether a required Speedy Trial dismissal should be with or without prejudice. Adopted verbatim from the United States Act, "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 re-prosecution on the administration of sections 403 and 404 and on the administration of justice." 18 PNC § 404(a)(1); *see also* 18 USC § 3162(a)(1) (listing identical factors). For the same reasons previous courts looked to United States law when interpreting the Act as adopted from the United States, this Court looks to United States law in interpreting this section that remains identical to its United States counterpart, as the legislature has left it unchanged despite the amendment in RPPL 7-51.

The seminal case in determining whether Speedy Trial dismissals should be with or without prejudice is *United States v. Taylor*, 487 U.S. 326 (1988). *Taylor* primarily held

that it is an abuse of discretion to dismiss a case under the Speedy Trial Act without analyzing the required statutory factors that determine whether a case should be dismissed with or without prejudice. *Id.* at 336. *Taylor* further noted clear legislative history that suggested that prejudice to the defendant, while not an enumerated statutory factor, was a factor the legislature intended to be relevant to a trial court's consideration. *Id.* at 334. Because the OEK has enumerated and required consideration of the same factors, this Court will treat *Taylor* as instructive.

This Court must, however, briefly discuss the continued viability of the prejudice analysis as adopted from United States Law. Even today, were a court to dismiss charges with prejudice, the result is the same as in the United States; they are extinguished fully and finally, and may not be brought again. However, were a Palauan court to dismiss charges without prejudice, a significant question now remains as to the continued effect of the Speedy Trial Act given that the Act, as it exists in Palau, no longer contains the requirement that the triggering arrest must be in conjunction with formal charges. As such, if this Court were to dismiss these charges *without* prejudice, a number of questions would likely present. Does the 30 day pre-information clock start running again immediately, or at all? Does the clock reset? If not, when does the clock continue from, and, if the clock continues, how would new charges not immediately be subject to dismissal for the same Speedy Trial violation? If this Court dismisses the charges without prejudice, and if the 30 day clock resets, it appears that the Republic could immediately re-file the charges simply by changing the date on the Information and filing a new copy. How would this offer any kind of a sanction against the Republic for its violation of Defendant's Speedy Trial rights, and how does this offer any kind of a remedy for the Defendant?

This situation is fundamentally distinct from that of the United States. In the United States, felony charges cannot be brought back following dismissal without prejudice for a Speedy Trial Act violation without once again presenting them to a grand jury and having such grand jury return a new indictment—a significant burden on the government and one that often presents a hurdle to re-prosecution. *See, e.g.*, *United States v. Medina*, 524 F.3d 974, 982 (9th Cir. 2008); *see also* United States Fed. R. Crim. P. 6 (describing the requirements for convening a grand jury and seeking an indictment). The United States also retains the "arrest coupled with pending charges" rule that the OEK did away with by its amendment to section 404, so, when charges are not pending, the 30 day clock does not run at all following dismissal of such charges. *See United States v. DeJohn*, 368 F.3d 533, 538–39 (6th Cir. 2004). But as Palau has done away with this rule, it appears to this Court that the mandatory prejudice analysis that remains in section 404 may now be outdated and ineffective because of the statutory amendment doing away with the two-complaint rule. Nevertheless, because the plain language of the law requires this Court consider these factors, they will be weighed.

A. The Seriousness of the Offense

The Court recognizes that the crimes alleged are serious felonies and that the alleged financial impact on the victim was significant. In particular, Count three, for Forgery, carries a sentence of up to ten years. However, "serious" is not an all or nothing proposition, and there are, of course, degrees of seriousness. Any reasonable person understands, for example, that trafficking in methamphetamine is a significantly more serious crime than petty shoplifting, but that murder is a significantly more serious crime than trafficking. As such, the Court must consider the gravity of the alleged offenses within their context, and declines to adopt an "is it serious or is it not serious" framework.

The Court also considers the fact that, while not applicable to the current charges, Palau has recently revised its criminal code and substantially reclassified a number of crimes. Notably, the Forgery of which Defendant is accused of appears, at least from the pleadings, no longer to carry a potential ten year sentence. Defendant is accused of signing stolen personal checks which, admittedly without the benefit of evidence or argument, do not appear to fall within the categories of "valuable instruments issued by a government or governmental agency" or "instruments representing interests in or claims against a corporate or other organization or its property," and thus would not constitute Forgery in the First Degree under the new criminal code. RPPL 9-21 § 2801.[8] As such, the maximum penalty under the current law appears to have been reduced to a sentence of five years imprisonment, given that a personal check is arguably an "instrument that . . . create[s] . . . a legal right, interest, obligation, or status," because it creates an obligation for the bank to transfer money to a payee who has a right to receive it. *Id.* § 2802; *see also id.* § 662(b) (setting the maximum penalty for a Class C felony). The legislature has decided that the offense alleged is a serious crime, but a less serious one than the forgery of government bonds or corporate stocks, and the Court accepts the legislature's judgment in this matter. As such, this factor neither weighs for nor against dismissal with prejudice.

B. The Facts and Circumstances of the Case Which Led to the Dismissal

The *Taylor* Court did "not dispute that a truly neglectful attitude on the part of the Government reasonably could be factored against it in a court's consideration" of whether to dismiss with or without prejudice. *Taylor*, 487 U.S. at 338. And, although recognized primarily in the constitutional (and post-charging) context, not the context of the Speedy Trial Act, United States Courts have widely recognized that a delay of greater than one year is presumptively prejudicial. *See Doggett v. United States*, 505 U.S. 647, 651 n. 1 (1992). Further noted is that unreasonable delay between accusation and

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[8] Despite having been passed in February of 2014, the new criminal code has yet to be codified in Title 17. Nevertheless, it is the law currently in effect and this Court considers it persuasive.

trial "threatens to produce more than one sort of harm, including 'oppressive pretrial incarceration,' 'anxiety and concern of the accused,' and 'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence. Of these forms of prejudice, 'the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.'" *Id.* at 654 (quoting *Barker v. Wingo*, 407 U.S. 514, 532 (1972)).

The facts and circumstances of the case that led to this dismissal are nothing short of baffling. The Court is at an absolute loss to understand why and how it took two and a half years to charge a Defendant who apparently was the only suspect in an alleged crime and who had allegedly confessed, in some detail, to that crime. Even assuming, without deciding, that it might reasonably take several months for a diligent officer or Assistant Attorney General to acquire copies of the identified and allegedly fraudulent checks, absolutely no explanation has been argued or alleged for this delay. The Republic has simply nakedly asserted that "[t]he matter was still under investigation" without any substantive explanation or justification. But an unexplained two year delay, along with a barebones legal response utterly lacking in legal citation or authority, is precisely the kind of "demonstrably lackadaisical attitude on the part of the government attorney in charge of the case or [] pattern of dilatory practices on the part of the [Attorney General's] office in the district in question" that courts take into account when considering this factor. *See United States v. Giambrone*, 920 F.2d 176, 180 (2d Cir. 1990) (applying *Taylor*). "Such delays also harm both the interest of the defendant and the interest of the public, for if the defendant is innocent, he has an interest in early vindication; and if he is guilty, the public has an interest in expeditious punishment . . . ." *Id.* at 181.

Given the lack of any reasonable explanation in the record for the extraordinary delay in charging this Defendant (other, perhaps, than a lack of knowledge on the part of the Attorney General's Office that section 404 had been amended—an explanation this Court would find unreasonable), the Court finds the facts and circumstances which led to this dismissal weigh strongly in favor of dismissal with prejudice.

C. The Impact of a Re-prosecution on the Administration of Sections 403 and 404 and on the Administration of Justice

The third factor, the impact of a re-prosecution on the administration of the Act and on the administration of justice, incorporates several substantial policy concerns: "(1) the defendant's right to a timely trial; (2) the potential deterrent effect of a prejudicial dismissal on repeated violations of the Speedy Trial Act; and (3) the public's interest in bringing the defendant to trial." *United States v. Blank*, 701 F.3d 1084, 1090 (5th Cir. 2012). In many cases, this factor can be duplicative of the previous factor, and its considerations are similar. But in Palau, the Court is particularly concerned with how the Bureau of Public Safety and the Office of the Attorney General have been administering Sections 403 and 404 of the act. It is problematic that the 2008 amendment to the act, an amendment specifically targeted at disavowing the

Republic's theory that the clock to file an information or complaint only applies to suspects who have already been charged, is not being implemented the way the OEK and the President intended. This weighs against the Republic and in favor of dismissal with prejudice.

Nevertheless, the public interest in bringing criminal defendants to trial and in punishing criminal activities is also significant. It appears unlikely, given the confession allegedly provided, that no wrongdoing occurred here. Dismissal of charges with prejudice likely means that the public interest in expeditious punishment—or in punishment at all—will not be vindicated. This weighs in favor of dismissal without prejudice, but, while this can be regrettable, the law contains numerous situations where the rights of defendants are placed above the interest of the public in acquiring evidence and seeking convictions, such as the exclusion of unconstitutionally obtained evidence and a defendant's absolute right against self incrimination. Weighed against the apparent non-administration of the 2008 amendment, an amendment specifically designed to clarify defendants' statutory right to speedy trial, the public interest comes up short. The Court finds that the re-prosecution of what would now be only a Class C felony does not outweigh the damage done to the administration of the Speedy Trial Act, and finds that this factor also weighs in favor of dismissal with prejudice.

CONCLUSION

Because the information against Defendant was not filed for more than two years after her initial arrest in connection with these charges, the charges contained in the information must be dismissed. And, based primarily on the Republic's "demonstrably lackadaisical attitude" in bringing these charges despite being in possession of more than enough evidence to do so, the charges are dismissed with prejudice. The Speedy Trial Act contains two separate clocks, and the legislature intended that both would have teeth. Because the Republic failed to bring charges in a timely fashion after arresting the Defendant in connection with such charges, these charges are barred by Section 403 and 404 of the Act.