Exhibit “E”

(Appellant’s Brief to High Court Appellate Division filed September 30, 2015)

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HIGH COURT OF AMERICAN SAMOA

APPELLATE DIVISION

APPELLATE ACTION NUMBER 02-15

HCCR No. 26-2012

JAMES BARLOW

APPELLANT

VS.

AMERICAN SAMOA GOVERNMENT

APPELLEE

APPELLANT'S BRIEF

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TABLE OF CONTENTS

Summary of Facts and Proceedings Below	Page 1
Issues Presented	Page 3
Standard of Review	Page 4
Argument	Page 4
Conclusion	Page 33

CASES

	Page
A.S.G. v. Futiga, 2 A.S.R. 646 (1950)	4
A.S.G. v. Salanoa, 1 A.S.R. 487 (Trial Div. 1933)	4
A.S.G. v. Tauala, 25 A.S.R. 2d 179 (Tr. Div. 1994)	4
United States v. Diaz-Cardenas, 351 F.3d 404 (9th Cir. 2003)	4
Roman Catholic Diocese v. Avegalio, et al, 20 A.S.R. 2d 71 (App. Div. 1992)	12
Miller v. California, 413 U.S. 15 (1973)	16
A.S.G. v. Talamoa, 10 A.S.R. 2d 14 (Trial Div. 1989)	17
A.S.G.. v. Solaita, 27 A.S.R. 2d 46 (Trial Div. 1992)	17
A.S.G. v. Whitney, 20 A.S.R.2d 46 (Trial Div. 1992)	17
Brookhart v. Janis, 384 U.S. 1 (1966)	23
Smith v. Illinois, 390 U.S. 129 (1968)	23
Davis v. Alaska, 415 U.S. 308 (1974)	23,24
People v. Hinchman, 574 P.2d 866 (1977)	24
People v. King, 179 Colo. 94 (1972)	24
People v. Bell, 88 Mich.App. (1979)	24
State v. Vaccaro, 142 N.J.Super (1976)	24
United States v. Madori, 419 F.3d 159 (2d Cir. 2005)	24,27
Brady v. Maryland, 373 U.S. 83 (1963)	27
Giglio v. United States, 405 U.S. 150 (1972)	27
United States v. Sudikoff, 36 F. Supp. 2d 1196 (C.D. Cal. 1999)	27
United States v. Jose Abonce-Barrera, 257 F.3d 959 (9th Cir. 2001)	27
United States v. Bernal-Obeso, 989 F.2d 331 (9th Cir. 1993)	27
United States v. Blanco, 392 F.3d 382 (9th Cir. 2004)	27
United States v. Triumph Capital Group, 260 F. Supp. 2d 470 (D. Conn. 2003)	28
Youngblood v. West Virginia, 547 U.S. 867 (2006)	28
Kyles v. Whitley, 514 U.S. 419 (1995)	28
Strickler v. Greene, 527 U.S. 263 (1999)	28
United States v. Agurs, 427 U.S. 97 (1976)	28
U.S.A. v. Ted Stevens, Cr. No. 08-321 (D.D.C. Apr. 7, 2009)	28
U.S.A. v. Aderoju 847 F. Supp. 2d 864 (Dist. Court, ED Virginia, 2012)	28
United States v. Archibald, 2003 WL 561096 (E.D. Pa. Feb. 26, 2003)	28
U.S.A. v. Mendelsohn, 896 F. 2d 1183 (9th Cir. 1990)	29
A.S.G. v. Majhor, 7 A.S.R. 3d 147 (Trial Div. 2003)	30
Barker v. Wingo, 407, U.S. 524 (1972)	30
Doggett v. United States, 505 U.S. 647 (1992)	31
United States v. Gomez, 67 F. 3d 1515 (10th cir. 1995)	31
Pene v. Am. Samoa Gov't, 12 A.S.R. 2d 43 (App. Div. 1989)	31
United States v. Loud Hawk, 474, U.S. 302 (1986)	31
United States v. Lovasco, 431 U.S. 7 (1977)	31
Doggett v. United States, 505 U.S. 647 (1992)	32
A.S.G. v. Ripley, HCCR: 117-09 (Trial Div. December 17, 2014).	21
State v. Rooth, 129 Wn.App. 761, 75 (2005)	32

Statutory Provisions

A.S.C.A. §46.0502
A.S.C.A. §46.4404

Constitutional Provisions

United States Constitution, Sixth Amendment

Revised Constitution of American Samoa, Article I, Sections 2, 6

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IN THE HIGH COURT OF AMERICAN SAMOA

APPELLATE DIVISION

JAMES BARLOW, Appellant, -vs.- AMERICAN SAMOA GOVERNMENT Appellee	HCAP: 02-15 HCCR: 26-12 APPELLANT'S BRIEF

Comes now above named Appellant, and submits the following Appellant's Brief:

FACTS RELEVANT TO APPEAL & SUMMARY OF PROCEEDINGS BELOW

On or about October 25, 2011, James Barlow and juvenile passengers were stopped for a DUI-related offense. As a result, James Barlow was charged with DUI. Three of the minor juveniles were subsequently charged with under-age drinking.

The juveniles, L.B., T.T., and T.L, entered into dispositional agreements adjudicating them for the underage drinking. While the actual dispositional agreements were never disclosed to the Defendant, it was generally understood that the juvenile defendants agreed to cooperate and testify truthfully against James Barlow in his DUI matter.

In or about November of 2011, the Attorney General's office, through Assistant Attorney General Terrie Bullinger, asked the juveniles' defense attorneys to inquire if Mr. Barlow had engaged in any inappropriate sexual activity. Terrie Bullinger had suspicions concerning Mr. Barlow because of Mr. Barlow's association with Ms. Bullinger's son. 6/25/14, Tr. 222-224. This

apparent secondhand knowledge led Ms. Bullinger to suspect, and indeed to presume, that Mr. Barlow had engaged in inappropriate and possibly illegal acts.

Ms. Bullinger then approached then-Public Defenders Leslie Cardin, 6/26/14, Tr. 240-244 and Donna Clement, Aff. of Donna Clement, 11/8/13 in support of Motion to Dismiss for Failure to Disclose Exculpatory Evidence, filed 11/8/13, to inquire if they could ask the juveniles whether or not inappropriate activity occurred between the juveniles and James Barlow. The juveniles specifically denied to their attorney(s) that any sexual acts occurred. According to Leslie Cardin, she made her client(s) available to Ms. Bullinger and Ms. Bullinger, along with another prosecution advocate, met with the juveniles. Subsequent to that meeting, Ms. Bullinger concluded that the juveniles indicated nothing inappropriate occurred. 6/26/14, Tr. 245: 6-18, 6/25/14, Tr. 225:16-17. At the time, Ms. Bullinger acted in the capacity of juvenile prosecutor. 6/25/14, Tr. 220:11-25; 221:8-10.

On or about March 2, 2012, one juvenile defendant, T.T., made an allegation to an officer/attorney at the Office of the Attorney General alluding or stating that something sexual had happened between the juvenile and Mr. Barlow. The assistant attorney general who conducted the interview was never named or disclosed in discovery. Subsequent to that alleged disclosure, the Attorney General's office contacted the Department of Public Safety and arranged for the police to interview the juvenile. The police interviewed T.T. on March 2nd, 2012, Ex. #10, and March 3, 2012. Ex. #11. After that initial disclosure by T.T., at least one other juvenile, T.L., claims to have been "arrested" and brought into DPS for questioning. 6/24/14, Tr. 34:20-21, 6/24/14, Tr. 43:18-21, 6/24/14, Tr. 43:22-23. A third individual, L.B., was also re-interviewed on or about March 3rd, 2012. During that March 2012 questioning, the juveniles made statements of varying degree and differing details concerning allegations that Mr. Barlow committed a wide range of inappropriate sexual acts on the minors. During these interviews the juveniles' criminal attorneys were not present, the juveniles' parents were not present and the interviews did not appear to be recorded.

Mr. Barlow was subsequently arrested and charged in a nineteen-count Information. See HCCR: 26-12, *American Samoa Government v. James Barlow*, Information, March 16, 2012. Mr. Barlow pled "not guilty" at arraignment and initially requested a jury trial. Mr. Barlow further requested, repeatedly, that exculpatory information be disclosed for his defense.

Even thought the Government was in possession of obvious and glaring exculpatory information, the ASG failed to disclose the November 2011 conversations with Assistant Attorney General Bullinger and the AG advocate. The Attorney General's Office failed to disclose the

substance and nature of the dispositional agreements. The Attorney General's Office further failed to disclose the identity of the AG witness who first interviewed T.T., and additionally failed to disclose the substance and nature of T.T.'s initial disclosure of the sexual acts.

Defense counsel repeatedly attempted to obtain discoverable evidence. See Motion to Continue Argument on Defense's Motion to Dismiss with Prejudice for Failure to Disclose Exculpatory Evidence or in the Alternative for Failure to do Due Diligence, HCCR: 26-12, November 12, 2013; Motion to Dismiss with Prejudice for Failure to Disclose Exculpatory Evidence or in the Alternative for Failure to Do Due Diligence & Supporting Memorandum, HCCR: 26-12, November 8, 2013; Motion for an Order to Compel & Supporting Memorandum, HCCR: 26-12, October 4, 2013; Request for Plaintiff to Provide Defendant with Exculpatory Discovery, HCCR: 26-12, September 6, 2013; Motion for Sanctions for Failure of the American Samoa Government to Comply with Request for Pre-Trial Discovery & Supporting Memorandum, HCCR: 26-12, February 20, 2013; Request for Pre-Trial Discovery, HCCR: 26-12, April 4, 2012.

These numerous efforts were repeatedly discounted by the Court. See Order Denying Defendant's Motions to Recuse, to Dismiss for Failure to Disclose Exculpatory Evidence, To Suppress Accomplice Statements, and Granting Counsel's Withdrawal Request, HCCR: 26-12, November 29, 2013; Order Denying Defendant's Motion for Reduction of Bail and Motion to Compel, HCCR: 26-12, October 7, 2013; Order Denying Defendant's Motion to Dismiss, HCCR: 26-12, May 30, 2013, pages 14-16; Order Denying Defendant's Motion for Sanctions, HCCR: 26-12, March 22, 2013.

On July 15, 2015, the Court issued a Decision and Order convicting Mr. Barlow of seventeen of the nineteen counts. The court found Mr. Barlow not guilty of Count 3 and Count 9. Defendant timely moved for reconsideration and then for appeal. For reasons set forth below, the decision must be reversed.

ISSUES PRESENTED

1. Whether the evidence was insufficient to sustain convictions against Barlow.
    a. Whether there was reasonable doubt as to Mr. Barlow's guilt, which should have led to a not guilty verdict on the sex offenses and pornography counts.
    b. Whether there was reasonable doubt as to whether Mr. Barlow aided T.L. to possess or consume alcohol.

2. Whether the Government failed to disclose material and exculpatory evidence and whether the trial court erred in failing to order disclosures of material and exculpatory evidence.
3. Whether Mr. Barlow's rights to a speedy trial were violated.
4. Whether the cumulative errors at trial warrant a reversal of the convictions.

STANDARD OF REVIEW

Issue one is reviewed as to whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime. Issue number two as to the denial of the multiple defense discovery motions, is reviewed for an abuse of discretion. Issue number three is reviewed *de novo*. Issue number four the court has discretion discretion to determine, on a case by case basis, as to whether such error or errors, although not reversible when standing alone, may when considered cumulatively require reversal because of the resulting cumulative effect.

ARGUMENT

A. There was Reasonable Doubt as to Mr. Barlow's Guilt. Accordingly, there was insufficient evidence to sustain a conviction.

"The burden [is] on the government to prove every essential element of the crime beyond a reasonable doubt in order to warrant a conviction." *A.S.G. v. Futiga*, 2 A.S.R. 646, 648 (1950). "In a criminal case like we have today, it rests upon the prosecution to prove their case beyond a reasonable doubt, that is, go much further than in a civil case. If there is any reasonable doubt cast upon the evidence given by the prosecution, then the verdict will be not guilty." *A.S.G. v. Salanoa*, 1 A.S.R. 487, 488 (Trial Div. 1933). Sufficient evidence to sustain a conviction exists if, viewing the evidence in a light most favorable to the government, and drawing all reasonable inferences in favor of the jury's verdict, a reasonable jury could have found all elements of the offense beyond a reasonable doubt. *Am. Samoa Gov 't v. Tauala*, 25 A.S.R. 2d 179, 180 (Tr. Div. 1994); *see also United States v. Diaz-Cardenas*, 351 F.3d 404, 407 (9th Cir. 2003).

There was reasonable doubt in this case. The three complainants, L.B., T.T., and T.L., made multiple inconsistent statements that were not only contradictory to one another, but were self-contradictory. All three complainants told multiple persons that nothing sexual happened between

the complainants and Mr. Barlow. When the complainants allegedly disclosed some type of sexual activity, the disclosures came in the context of juvenile dispositional agreements that required the juveniles' testimony against Mr. Barlow. The revelations of sexual misconduct, in the context of the dispositional agreements, cast further doubt on the credibility of the witnesses.

1. All three complainants made denials of any sexual activity

There can be no doubt that all three boys denied sexual activity. During and throughout the juvenile prosecutions, Leslie Cardin spoke with all three witnesses in the context of proposed dispositional agreements. During her meeting, all three witnesses stated that nothing sexual happened. As noted in Exhibit #14:

> "After explaining the plea offer, I asked my clients if anything sexual had happened between them and Mr. Barlow, specifically whether there had been any inappropriate sexual overtures or conduct; Aff. ¶ 9
>
> "My clients said that the only thing that happened that night was drinking alcohol and playing video games." Aff. ¶10
>
> "I specifically asked them if Mr. Barlow had touched them in appropriately, tried to touch them, or tried to solicit sex from them." Aff. ¶ 11.
>
> "I was told that nothing of that sort had happened; my clients denied that anything sexual had occurred that night." Aff. ¶ 13.
>
> "Both clients consistently denied that anything of a sexual nature occurred between themselves and James Barlow." Aff. ¶ 14.

Ms. Cardin clarified in her testimony that she meant to include all three clients. 6/26/14, Tr. 250:10-12.

These three juvenile witnesses, in the context of speaking to their attorney/advocate, had no motive to fabricate testimony. To the extent that providing negative information against Mr. Barlow could have assisted in negotiating a better dispositional agreement, the complainants should have freely disclosed such information to Ms. Cardin if in fact such acts had occurred.

Ms. Terrie Bullinger corroborated, in part, Ms. Cardin's testimony. This corroboration can not be overlooked.

The relevant testimony is summarized below:

a. "After you asked that question of defense attorney general [sic] at the time, what did they tell you." 6/25/14, Tr. 223:7-8.
b. "That they said noting happened." 6/25/14, Tr. 223:8.

c. "By saying "nothing happened," nothing sexual happened between Mr. Barlow and the boys?" 6/25/14, Tr. 223:16-17.
d. "That was my understanding. I mean it's---again it was oral." 6/25/14, Tr. 223:18-19.
e. "That was information that was relayed back to you, that they did not disclose any sexual acts." 6/25/14, Tr. 225:16.
f. "Exactly." 6/25/14, Tr. 225:17.

The testimony of Terrie Bullinger corroborates the testimony of Leslie Cardin. According to Ms. Cardin, AAG Bullinger made a plea offer in the juvenile cases that included a proposal that they cooperate with the Government in the prosecution of Mr. Barlow. 6/26/14, Tr. 241:1-2. Ms. Bullinger asked Ms. Cardin to convey the offer to the clients and to find out what the substance of their testimony would be. 6/26/14, Tr. 241:18-19. Ms. Cardin clarified that the proposed plea agreements came in late November, early December 2011, and that arrangements were made with Ms. Bullinger for Ms. Bullinger to interview the juveniles. 6/26/14, Tr. 242:16-20. Leslie Cardin clarified that the boys and Ms. Bullinger met at the public defender's office:

> "After brief introductions were made, Ms. Bullinger her colleague and the three boys went into one of the officers, the public defender's office, they met privately with the boys for somewhere between 15, 20, its maybe 30 at the most, but 15 - 30 minutes behind closed doors: Ms Bullinger, the three boys and the other member of the attorney general's office." 6/26/14, Tr. 243:19-25.

Ms. Bullinger then confirmed to Ms. Cardin that the boys stated that nothing sexual occurred:

> "She advised me that they had basically told her the same things they had told me and that they had denied that any sexual contact occurred." 6/26/14, Tr. 245: 6-18.

These unequivocal denials cast reasonable doubt on whether any sexual activity between the youth and Mr. Barlow transpired.

2. Each Individual Witness had material inconsistencies in his testimony

Not only did the complainants make specific and unequivocal denials, but each individual witness had material inconsistencies in his testimony:

a.) T.L.'s testimony cast reasonable doubt on the charges

The Government's first complainant/witness was T.L. When T.L. arrived, L.B. and T.T. were already there. According to T.L., "We were watching MTV," 6/24/14, Tr. 22:10, 36:19-21; 28:19-21.

T.L. further explained, "When I went into the bedroom, James Barlow locked the door." James Barlow then told me to sit on the bed then James Barlow took off my pants and pulled it down and grabbed what seemed to be a hand sanitizer and took off my boxer and poured the sanitizer on my thing, penis." 6/24/14, Tr. 23:9-14. As to the nature of the sexual activity, T.L. asserted that he ejaculated in James Barlow's mouth, 6/24/14, Tr. 24 9-10, and in exchange, James Barlow gave him $5.00, 6/24/14, Tr. 24:7-8. T.L. subsequently testified that he observed L.B. "fucking" Barlow's ass." 6/24/14. Tr. 27:18. Although T.L. used the term "fucking", T.L. did not clearly identify what "fucking" meant. As a matter of law, T.L.'s testimony did not make out the element of deviate sexual intercourse or sodomy vis-a-vis the allegation of anal intercourse.

T.L.'s explanation concerning his initial disclosure is suspect. T.L. admitted that he did not disclose the sexual activity to anyone until he was either actually or constructively "arrested". T.L. stated that he waited until, "The police officers came to my house and took me away." 6/24/14, Tr. 34:20-21. Later on, he specifically referenced being arrested, 6/24/14, Tr. 43:18-21, "earlier you testified that the first time you told anyone about the case was when the police arrested you." "Yeah." "I first told it to the police officer." 6/24/14, Tr. 43:22-23. Although the nature and circumstances of this arrest were not explored at trial, it is clear that the arrest does not refer to the time that T.L. and the other boys were stopped in Mr. Barlow's car.

Finally, when directly asked by Leslie Cardin, T.L. denied that any sexual activity occurred. Ex. #14, 6/26/14 Tr. 240-245.

The multiple inconsistencies in the nature, timing and substance of the disclosure cast doubt on T.L.'s testimony.

b.) L.B.'s testimony cast reasonable doubt on the charges

The Government's next complainant/witness was L.B. L.B. knew James Barlow and admitted to being in a vehicle with Barlow the night of Barlow's DUI arrest. At the time of his alcohol-related arrest, L.B. failed to disclose any sexual activity. More important, when L.B.'s attorney, Leslie Cardin, directly inquired as to whether sexual activity occurred, L.B. along with the other juveniles, responded, "No." Ex. #14, 6/26/14 Tr. 240-245.

In addition to denying sexual activity to his own Public Defender, L.B. also told a neutral third party that nothing happened. Specifically, L.B. told Simaima Mafilio that no sexual conduct occurred with Mr. Barlow. 6/25/14, Tr. 211:19-23.

L.B. had no appreciable motive to lie to Leslie Cardin and/or Simaima. Presumably Leslie Cardin acted in L.B's best interests and could or should have been a person that L.B. trusted. While Simaima may not have been a close friend or confident, L.B. could simply have refused to speak to Simaima. Instead, L.B. issued a specific denial.

The timing of L.B.'s disclosure is also suspect. L.B. failed to disclose any sexual activity until March 3, 2012. When the disclosure was made it was in direct response to a police inquiry targeting Mr. Barlow and suggesting that Mr. Barlow engaged in sexual acts. Assistant Attorney General Terrie Bullinger admitted to suggesting Barlow behaved inappropriately. 6/25/14, Tr. 224-225. Arguably Terrie Bullinger's actions equate to the targeting of Mr. Barlow. Given that the juveniles were required to testify against Barlow as part of a dispositional agreement arranged by Bullinger, it is not improbable that Bullinger pressured the youth to accuse Barlow of sexual acts. Unfortunately, and as elaborated upon later in this brief, Bullinger's discussions with the juveniles were not disclosed in discovery.

In addition to L.B.'s clear denials, L.B.'s trial testimony cast further doubt on the evening's events. For example, through the entire direct examination, L.B. failed to mention any anal sex with Mr. Barlow. L.B. specifically denied any acts other than "penis touching". L.B.'s clear denials that any other touching occurred is at odds with L.B.'s half-hearted allegations of anal sex. The relevant portions of L.B.'s testimony were as follows:

Direct Examination:

Q: "Did James touch you anywhere else on your body that night?
A: "Yes"
Q: "Where else did he touch you on your body?"
A: "No. I didn't say yes."
6/24/14, Tr. 111:5-9

On Cross Examination:

Q: "Didn't he only touch your penis," 6/24/14, Tr. 117:11-12
A: "After Mr. Barlow sucked your penis, did you have any other sexual contact?" 6/24/14, Tr. 120:1-3
Q: "No." P. 120, line 3.

Not only are L.B.'s statements self-contradictory, but his testimony also contradicts the initial statement given by T.T. T.T.'s first written statement, given on March 2nd, 2012 states as

follows (statement was submitted into the record in Samoan, but for purposes of this appeal the English translation is provided):

> "James was the one that forced me to go into the room with him to do dirty things with him and he'll pay me. I walked into the room and he followed me into the room. I was very drunk. I sat on the bed while he took off his clothes and I saw him nude. He jumped on top of me and started necking me and he sucked my penis. But Lucky went later on with James into the room after me. After James and I were done we came back outside and we continued drinking and continue with our funny jokes. All of a sudden I saw James and Lucky went into the room. I finished my third bottle of beer and then went to the restroom and saw Ta'umai looking into the room and I stood there with him and watch James and Lucky. ***Nothing much just them doing the same thing we did that I mentioned earlier...lol.*** That's all I know." Exhibit #10, admitted into evidence.

The initial statement from T.T. makes no mention of anal sex between L.B. and James Barlow. T.T.'s failure to mention the anal sex is consistent with L.B.'s failure to mention anal sex throughout direct examination. The logical conclusion is that the anal sex did not occur. In any case, there was reasonable doubt.

c.) *T.T.'s statements cast reasonable doubt on the charges*

T.T's statements were equally inconsistent and problematic. First, T.T. denied any sexual activity. Ex. #14, 6/26/14 Tr. 240-245. Then, at some point in preparation for Mr. Barlow's DUI trial, T.T. said something that led the Government to believe that sexual activity occurred. (The "something" was never disclosed to the Defense). As noted in Eldon Ane's testimony, the AG's office contacted Officer Eldon Ane and Eldon Ane took a statement from T.T. on March 2nd, 2012. 6/25/14, Tr. 196:5-18, 197:1-25. Eldon Ane is somewhat confused as to the timing of the statements—for instance, Eldon Ane states that L.B. was the first complainant interviewed. 6/25/14, Tr. 199:7-17. L.B.'s statement was taken March 3, 2012 at 12:27pm. 6/25/14, Tr. 199:10-13. Eldon Ane states that T.T. was the second person interviewed, and that T.T. gave a statement on March 3, 2012 at about 1:00pm. 6/25/14, Tr. 15-22. Clearly these two statements, both taken on March 3rd, and ostensibly the "first" and "second" statements taken by Eldon Ane were taken "after" T.T. gave the statement shown in Exhibit #10 was given at 4:33pm on March 2nd, 2012.

The initiation of events begs the obvious question: "Why did the AG's office contact Eldon Ane? And what was said to the AG's office that led the AG's office to contact Eldon Ane? And who from the AG's office contacted Eldon Ane and what did that person say?" The answers to these critical questions were not disclosed in discovery, despite the fact that this information was discoverable, material and possibly exculpatory.

After T.T. gave his March 2, 2012 statement, he changed his statement the next day, March 3, 2012, T.T. And at trial T.T.'s statement(s) changed again.

The first statement, Exhibit #10 states:

"James was the one that forced me to go into the room with him to do dirty things with him and he'll pay me. I walked into the room and he followed me into the room. I was very drunk. I sat on the bed while he took off his clothes and I saw him nude. He jumped on top of me and started necking me and he sucked my penis. But Lucky went later on with James into the room after me. After James and I were done we came back outside and we continued drinking and continue with our funny jokes. All of a sudden I saw James and Lucky went into the room. I finished my third bottle of beer and then went to the restroom and saw Ta'umai looking into the room and I stood there with him and watch James and Lucky. ***Nothing much just them doing the same thing we did that I mentioned earlier...lol***. That's all I know." Exhibit #10, admitted into evidence.

Exhibit #11 states:

The first that happened was I met with Lucky in front of the store after my exercise. His car reversed and asked me to come to the back after and I told him ok and so I went home first to take a shower and change my clothes. Afterwards I started walking towards to the palagi's house. I knocked on the door and Lucky opened the door and I went inside and I saw the palagi James drinking. I sat down and Lucky handed me a bottle and I started drinking. We hung out and when we finished all the beers another guy who knew James and asked James if we can go grab more beer and James said ok. We then went over to K.S. Mart and bought another case of beer. We went back home and continue our drinking session. We were telling funny jokes and laughing and when I was down to half of my sixth bottle James then asked me if my penis was big. I didn't know what to say but he asked me if we can go into the room and so I got up and walked towards the room and James was following me into the room. I sat on the bed and I saw James taking off his clothes and so I laid on the bed because I was to drunk. He jumped on top of me and started sucking my penis and he also licked my neck and worked his way down to my lower body parts. When I felt that I already reached my climax I told him to stop and then I put my clothes back on and made my way outside of the room and continue to drink. I didn't know what time Lucky and James went inside the room. I finished my 6th bottle and made my way to the restroom and I saw Taumai watching James and Lucky. Taumai came after our first case of beer was done. I also stood outside the room and I watched James and Lucky. Lucky and James were having anal sex. After I used the restroom I went back to the front and had a conversation with another guy that was drinking with us and Taumai joined us and we started talking. I about 3 minutes James and Lucky came back and we started hanging out again. James' friend asked James if he's going to buy beer again and he said yes and then we all left to go get beer. We went in James' car and we were heading towards K.S. Mart but K.S. Mart was closed and then Barlow's friend asked, "what about Star's store?" We then went there close to Luisa but the car accidentally went the wrong lane causing us to get caught by police and we pulled over in Fogagogo. Exhibit #11 admitted into evidence.

Exhibits #10 and #11 show that T.T. gave two completely different statements. T.T.'s initial statement fails to mention any anal sex between James Barlow and L.B. T.T.'s March 3rd statement mentions anal sex between L.B. and Barlow but fails to describe exactly what the anal sex entailed.

T.T.'s trial testimony demonstrated further material inconsistencies. For example, T.T.'s trial testimony mentioned only that L.B.'s hand and penis were touching James Barlow's ass, 6/25/14, Tr. 165:5-9. This testimony does not equate to actual anal penetration, or even slight anal penetration. The testimony could just have easily have depicted two people lying side by side, without actually having any anal sex.

Ultimately, we have three juveniles who repeatedly denied sexual activity with Mr. Barlow, who were subsequently questioned as a result of a dispositional agreement requiring them to testify against Mr. Barlow. Assistant Attorney General Terrie Bullinger alludes, and all but admits, that the AG's office was targeting Mr. Barlow for sexual activity as a result of Ms. Bullinger's personal opinion of Mr. Barlow. Apparently Ms. Bullinger had an issue with Mr. Barlow dating back to a time when her son and Mr. Barlow were roommates. 6/25/14, Tr. 222-224. Setting aside the fact that Ms. Bullinger may very well have had a professional conflict prohibiting her from being objective, it is clear that the interrogations of the boys with respect to Mr. Barlow's sexual activities were results driven in nature, were leading, and were possibly tainted.

Having received multiple answers from the boys that no sexual activity occurred, the AG's Office did not relent. Indeed, it appears that another round of AG/witness interviews occurred on or about March 2nd, and that this round of interviews resulted in the boys' subsequent 2012 police statements concerning Mr. Barlow. Based on T.L.'s testimony it is possible that that boys were "arrested" and hauled into the police station prior to giving the additional statements against Mr. Barlow.

Given that the boys were represented by the Office of the Public Defender, one must wonder, in the first instance, how the boys participated in preparation without the knowledge and/or assistance of their attorneys. Given that the AG's Office never turned over the nature of the interviews with the boys during the witness preparation, one can only speculate as to who was present, how the boys were questioned and what if anything was said. Clearly the Court failed to give consideration to the inherent bias of Ms. Bullinger, the fact that Ms. Bullinger's testimony contradicted Ms. Cardin's concerning the meeting with the boys and the multiple denials, and the multiple inconsistent statements.

In making a decision, the Court made credibility determination(s). Credibility determinations are difficult, but not impossible, to overturn. In the case of *Roman Catholic Diocese of Samoa Pago Pago v. Avegalio*, et al, 20 A.S.R. 2d 71 (App. Div. 1992) the court considered the effect of a trial court's decision to credit testimony of one witness over another in the context of a non-jury setting. The appellate court noted:

> "When a trial court's findings are based on the court's decision to credit testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error."

What is important to glean from *Avegalio* is that while the trial court has wide latitude in judging credibility, the trial court is not free to completely ignore contradictions and inconsistencies. In this case, however, the court unreasonably disregarded the inconsistencies. In making the credibility determination, the Court noted:

"Defendant's submission regarding inconsistencies in the juveniles' recollections of the night in question is that they indicate reasonable doubt as to whether Defendant committed the sexual acts. We find this not to be the case. Where there were some inconsistencies in the juveniles' testimonies such as the brand of beer—*Steinlager vs. Vailima*—they were drinking, in what room in Defendant's house the sexual acts occurred, whether all boys were present while pornography was on the television or whether there was a fourth person present in the house, the was solidarity in the juveniles' testimonies as to the salient [and shameful] events that night of October 24-25, 2011. Of course there will be inconsistencies: the events occurred many years ago; the juveniles were under the influence of beer; their written statements offered into evidence were in English, not their native Samoan; and the juveniles were, in statement and in life testimony, recounting difficult sexual matters perceived as shameful and taboo. However, the juveniles were quite consistent in their claims that Defendant provided them beer and engage in sexual activity with each of them, the crux and basis of the charges in question." The juveniles were also quite consistent that Defendant was "drunk" while driving to the store on the last trip, during which the vehicle was pulled over, which was corroborated by police observation and testing." At 10-11.

There are multiple issues with the Court's credibility assessment. First, the juveniles' statements were not in English, they were submitted in Samoan (their native language), thus eliminating the Court's rationale for inconsistencies. In addition, the issue is not proof that *"something sexual occurred"*. The Government had the burden of proving beyond a reasonable doubt that the acts occurred, and that they occurred in the specific manner as stated by the juveniles.

The Court also erred in determining a lack of bias. The Court acknowledged that there were dispositional agreements and acknowledged that the disclosures came after the finalization of those agreements. The Court failed to note that a requirement of the dispositional agreements was that the juveniles testify against Barlow. If anything, the juveniles would have disclosed sexual activity

prior to the finalization of the agreement, in hopes of obtaining a benefit. Instead, the disclosures came after, when the AG's office was preparing them to be witnesses at Barlow's D.U.I. trial. The timing of the disclosure begs the question of whether the juveniles were pressured and led into giving testimony concerning sex offenses. Given that the first disclosure came from T.T. in a meeting with the Assistant Attorney General, the Court erred in finding that the first disclosure came to a police investigator. T.T. made an initial disclosure to some official of the Attorney General's Office, who then contacted Police who then took a statement.

The Court also erred in dismissing L.B.'s denials to Simaima. In dismissing L.B.'s clear denial, the court gave what appeared to be an expert opinion concerning child sexual abuse victims. This expert opinion was improper absent expert testimony.

The Court also gave improper weight to Counsel Bullinger. The Court appeared to herald and laud Counsel Bullinger's personal suspicions of Barlow, arising from Bullinger's son's interactions with Barlow and therefore based on hearsay. The Court then took judicial notice of Ms. Bullinger's role:

> "Ms. Bullinger was referenced to by defense as the juvenile "prosecutor." We take judicial notice of counsel Bullinger's familiar role in the High Court's Family Drug and Alcohol Division as child advocate for the neglected and abused." Opinion and Order, p. 12, fn. 1.

The judicial notice was improper. Ms. Bullinger is not a court employee. She works for the AG's office and she did indeed prosecute the juveniles. She is properly referred to as the juvenile prosecutor and referred to herself as such during the trial, 6/25/14, Tr. 220:11-25; 221:8-10. She was not representing L.B., T.T., or T.L. in the context of a child abuse or neglect proceeding. If anything, Ms. Bullinger's personal bias and personal history should have mandated her recusal from the matter.

Ultimately, in making a credibility determination, the fact finder looks to motive, bias, and inconsistencies and reasonableness. See, e.g. Ninth Circuit Jury Instruction 3.9[1].

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[1] The court also failed to consider the motive, bias, look at credibility instruction.

The Ninth Circuit Jury Instruction on Witness Credibility offers helpful guidance:

3.9 CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

(1) the witness's opportunity and ability to see or hear or know the things testified to;

(2) the witness's memory;

(3) the witness's manner while testifying;

(4) the witness's interest in the outcome of the case, if any;

(5) the witness's bias or prejudice, if any;

In this case, the court failed to consider all three juveniles' interest in the outcome of the case, as well their bias. Each juvenile testified as a requirement of his dispositional agreement. In addition, the Court failed to consider whether other evidence contradicted the juveniles' testimony.

What is clear is that the complainants had no motive to lie to their own defense attorney Leslie Cardin. L.B. had no motive to lie to Simaima. More likely, the complainants had a motive to please the Attorney General's Office during witness prep for Barlow's Trial. The Attorney General's Office was clearly targeting Barlow and wanted to discover information about Barlow's sexual conduct. The Attorney General's Office, through Counsel Bullinger, was pre-disposed to seek information about Barlow. Thus the disclosures at the insistence and pressure of the Attorney General's Office (an office that would place these youth in juvenile detention if the youth did not do what the office wanted), are suspect. This suspicion grows if one believes that T.T. was "arrested" prior to giving his March 2012 statement(s).

3. There was insufficient evidence to convict Mr. Barlow on the pornography charges. All three complainants testified that they were at Barlow's at the same time. T.L. denied seeing pornography and stated that it was only MTV. Given that the minors were all in the living room where the television ostensible was, and given that T.L arrived before everyone else, then there was insufficient evidence.

A.S.C.A. 46.4404(1) states that "A person commits the crime of furnishing pornographic material to minors if, knowing its contents and character, he: (1) furnishes any material pornographic for minors, knowing that the person to whom it is furnished is a minor or acting in reckless disregard of the likelihood that the person is a minor.".

At trial, T.L. testified that he, L.B., T.T., and James Barlow were all in the front living room. In response to the question about whether anything was on the TV, he said, "Yes, we were watching MTV." 6/24/14, Tr. 22:4-10. T.L. had a chance to change his testimony later on when he was asked if, "at any point, was there anything else on the TV besides the MTV…?" However, T.L. again responded, "No." 6/24/14, Tr. 28:19-21.

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(6) whether other evidence contradicted the witness's testimony;
(7) the reasonableness of the witness's testimony in light of all the evidence; and
(8) any other factors that bear on believability.
The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

T.L.'s testimony is consistent with the statements made by T.T. to the police. In both Trial Exhibits #10 and #11, T.T.'s statements to the police, there is no mention of pornography or any video with naked men. See also 6/25/14, Tr. 186:19-187:7. And even though L.B. and T.T. spoke of a "video," Public Safety Officer Eldon Ane testified that there was never a Search Warrant obtained for Barlow's residence and the police never tried to find any "video' in Barlow's possession. 6/25/14, Tr. 203:3-12.

In the Court's Decision and Order, the Court believed T.L. that MTV was playing on the television. The Court thus found Barlow not guilty of Count 9, Furnishing Pornographic Materials to a Minor, T.L. This Court should have similarly found Barlow not guilty of Counts 8 and 10. According to T.L., both L.B. and T.T. were present with T.L. when the television was on. All of them were watching MTV.

T.L.'s testimony that MTV played on the television casts doubt on whether the material shown met the definition of pornographic. "If there is any reasonable doubt cast upon the evidence given by the prosecution, then the verdict will be not guilty." *Salanoa* 1 A.S.R. 487, 488 (Trial Div. 1933). Based on the testimony of T.L., a Government witness, there is reasonable doubt that any of the boys watched pornographic material on the TV on the night in question.

In addition, local evidentiary rules preclude a conviction on the pornography charges. The local rules of Evidence require the actual recording to prove up the contents of the recording. Rule 1002 requires the original to prove up the contents of a photograph. A photograph is described as including a photograph, and a photograph is described as including video tapes and motion pictures. Having failed to produce and authenticate the original, the Government failed to meet the evidentiary burden required in Rule 1002. See Rule 1002 RULE 1002.REQUIREMENT OF ORIGINAL: To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of the Fono. Photograph includes videos and movies, see Rule 1001(2) (2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

Absent the actual video, there is no way for the Government to prove that the materials were actually pornographic materials. Pursuant to our statute, pornography, including pornography involving minors, is defined as follows:

> (h) Pornographic: any material or performance is "pornographic" if, considered as a whole, applying contemporary community standards:
> (1) its predominant appeal is to prurient interest in sex;
> (2) it depicts or describes sexual conduct in a patently offensive way; and
> (3) it lacks serious literary, artistic, political or scientific value.

In determining whether any material or performance is pornographic, it is judged with reference to its impact upon ordinary adults.

> (i) Pornographic for minors: any material or performance is pornographic for minors if it is primarily devoted to description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, and:
> (1) its predominant appeal is to prurient interest in sex;
> (2) it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
> (3) it lacks serious literary, artistic, political, or scientific value for minors.

In this case, the rule required the original, as the video/movie qualified as a photograph. Nothing in the A.S.C.A. Pornography statutes, 46.4401 et. seq, carves out an exception to this rule. Absent the actual materials and absent authentication there is no proof that it is pornography. The issue is not how the minors may have perceived what they saw; the issue is what it actually was.

Furthermore, even if the juveniles watched a movie/video with naked individuals, absent the Government producing any physical evidence of the actual content of the video, the Government failed to meet the standard for obscenity (and derivatively puriant) set by the United States Supreme Court in *Miller v. California*, 413 U.S. 15, 93, S.C. 2607 (1973). In *Miller*, the Court stated that the test for determining whether obscene material is unprotected by the First Amendment to the United States Constitution:

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying con temporary community standards' would find that the work, taken as a whole, appeals t the prurient interest; (b) whether the work depicts, describes, in a patently offensive way conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.... If a state law that regulates obscene ml is thus limited, as written or construed, the First Amendment values applicable to the states through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an in dependent review of constitutional claims when necessary. 413 U.S. at 24 (citations omitted).

The Revised Code of American Samoa references a definition of pornographic for minors; however, this definition does not negate or override the implications of *Miller*. Without viewing the actual materials, there is no proof that the videos, assuming there were videos, "lack[ed] serious literary, artistic, political, or scientific value". There is no possible way for the Government to prove that the material withstood the requirements of our local statutes; and there is no proof that the materials withstand the Supreme Court requirements in *Miller*.

Accordingly, the Court erroneously convicted Mr. Barlow on counts 8 and 10.

B. The Government Failed to Provide Critical Discovery and Exculpatory Discovery.

Article I, Section 2 of the Revised Constitution of American Samoa states, in pertinent part, "No person shall be deprived of life, liberty, or property, without due process of law." This provision prohibits the prosecution in a criminal case from suppressing any evidence favorable to an accused, where the evidence is material either to guilt or punishment. *A.S.G. v. Talamoa*, 10 A.S.R. 2d 14 (Trial Div. 1989). "Failure to disclose or late disclosure of, evidence is prejudicial when the evidence would provide a significant chance of establishing a reasonable doubt that would not otherwise exist." *A.S.G.. v. Solaita*, 27 A.S.R. 2d 46, 47 (Trial Div. 1992) (internal citations omitted).

As a general matter, the High Court liberally construes a Defendant's discovery requests, See, e.g. Rev'd Const. Am. Samoa Art. I Section 2, *American Samoa Government v. Talamoa*, 10 A.S.R. 2d 14 (Trial Div. 1989)(general request by defense counsel for any evidence in possession of the prosecution that might tend to exculpate the defendant was within the scope of rule prohibiting suppression of material evidence favorable to the accused). When a defendant makes a request for discovery and disclosure of exculpatory information, the prosecutor's responses are inadequate when the prosecutor does not make a diligent inquiry from all relevant branches of government, as he or she must answer for the government as a whole. *A.S.G. v. Whitney*, 20 A.S.R.2d 46 (Trial Div. 1992). In responding to a defendant's request for discovery and disclosure of exculpatory information, the prosecutor must identify specifically by category the reason for which an item is not produced. *A.S.G. v. Whitney*, 20 A.S.R.2d 46 (Trial Div. 1992). Furthermore, to establish a *Brady* violation, a defendant must demonstrate that the prosecution suppressed evidence that was favorable to the defense or exculpatory and was material, i.e., demonstrated a significant chance that the evidence would have produced reasonable doubt.

Failure, however, to disclose, or late disclosure of, evidence is prejudicial when the evidence would provide a significant chance of establishing a reasonable doubt that would not otherwise exist. *A.S.G. v. Solaita*, 27 A.S.R.2d 9. Once the potential for an unfair trial has been cured, no *Brady* violation is possible, since *Brady* is premised on the right to a fair trial. *A.S.G. v. Whitney*, 20 A.S.R.2d 46.

Throughout the pre-trial and trial process, the Defense made numerous and futile attempts to obtain full discovery, including exculpatory evidence/information.

Defense repeatedly asserted that the Government failed to provide the defense with:

a) The nature and scope of the initial disclosures made to the Office of the Attorney General.

b) The nature of the denials and the specific statements made to the Attorney General's Office denying that sexual activity occurred.

c) The nature and substance of the dispositional plea agreements.

The Court's Orders denying defense discovery requests undermined the defense's need for the requested information in its finding of fact concerning the timing and nature of the juveniles' disclosure of sexual activity.

a. Prejudicial Effect of Failure to Disclose Statements and Sequence of Initial Disclosure of Sexual Activity with James Barlow

The Court's Opinion and Order specifically noted, "the juveniles did not admit to sexual activity with Defendant until March 2012 when they were directly asked by a police investigator." Decision and Order, p. 11. The Court further found that "[A]dmitting to the sexual activities did not affect the settlement of their juvenile delinquency cases." Decision and Order. p. 11. These factual findings are clearly erroneous. First, the evidence made clear that at least one juvenile, T.T., made an initial disclosure first to attorney(s) at the Office of the Attorney General, thus triggering the collateral police investigation. Second, there was no evidence that admitting to sexual activities subsequent to previous denials of sexual activity failed to affect the juvenile dispositions. Third, the court's findings imply that the juveniles were not previously specifically asked about whether or not sexual activity occurred with Mr. Barlow. Accordingly the Court's findings, whether actual or by implication, are misplaced.

The trial record amply demonstrates that the Office of the Attorney General received contrary statements from the juveniles months after the juveniles denied sexual activity to their own attorneys and Counsel Bullinger. More important, these contradictory statements came before the juveniles disclosing sexual allegations to the police officers. At the November 28, 2013 hearing on yet another one of Defendant's Motion to Compel Discovery, Counsel Mitzie Jessop represented to the Court:

"It wasn't until the D.U.I. was being investigated and being ready to go to trial that we then found out that they were sexual crimes involved with the same parties. And once we had that information, Your Honor, and we interviewed the victims… that is when the obligation is upon the

Government, for us to do our job, and that's exactly what we did...." November 18, 2013, Tr. 15:3-11.

At Mr. Barlow's bench trial, Officer Elden Ane corroborated Counsel Jessop's testimony:

A: "I was assigned to investigate a sexual assault case." 6/25/14, Tr. 196:3-4.

Q: "And how did this case come to your attention, or how did it come to your commander's attention." 6/25/14, Tr. 196:5-6.

A: "It was reported by one of the members of the Attorney General's Office." 6/25/14, Tr. 196:7-8.

Q: "And do you remember when this was reported by one of the members of the Attorney General's Office." 6/25/14, Tr. 196:9-10.

A: "I remember it was in March 2011." 6/25/14, Tr. 196:11.

Q: "2011 or 2012?" 6/25/14, Tr. 196:12.

A: "2012." 6/25/14, Tr. 196:13

The officer then clarifies that the AG had Officer Tafoavale take down a written statement from T.T. 6/25/14, Tr. 198:5-8.

Assistant Attorney General Terrie Bullinger corroborated Counsel Jessop and Officer Eldon Ane. At the June 25, 2014 hearing on the Defendant's motion to Release the Juvenile Records, Assistant Attorney General Terrie Bullinger stated to the court:

"I do know from reviewing the files as well as being involved that after the disposition it was the week I believe of March 1st, in the preparation for the D.U.I. trial that the first revelations were made that caused the felonies to be brought forward." 6/25/14, FDA Court, Tr. 11:16-21.

Based on the testimony of Counsel Jessop, Counsel Bullinger and Officer Elden Ane, there can be no doubt that at least one juvenile disclosed sexual activity to the Office of the Attorney General prior to the March 2012 supplemental police investigation.

b. Prejudicial Effect of Failure to Disclose the Juveniles' Explicit Denials of Sexual Activity. Prior to March of 2012, All Three Juveniles Made Unequivocal Denials that Any Sexual Activity Occurred

There can be no doubt that all three boys explicitly denied sexual activity. During and throughout the juvenile prosecutions, the juveniles' defense counsel, Leslie Cardin, spoke with all three witnesses in the context of proposed dispositional agreements. During her meeting, all three witnesses stated that nothing sexual happened.

Ms. Cardin's assertions find support in the trial court record. As noted in Exhibit #14:

"After explaining the plea offer, I asked my clients if anything sexual had happened between them and Mr. Barlow, specifically whether there had been any inappropriate sexual overtures or conduct; Aff. ¶ 9.

"My clients said that the only thing that happened that night was drinking alcohol and playing video games." Aff. ¶ 10.

"I specifically asked them if Mr. Barlow had touched them in appropriately, tried to touch them. or tried to solicit sex from them." Aff. ¶ 11.

"I was told that nothing of that sort had happened; my clients denied that anything sexual had occurred that night." Aff. ¶ 13.

"Both clients consistently denied that anything of a sexual nature occurred between themselves and James Barlow." Aff. ¶ 14.

Ms. Cardin clarified in her testimony that she meant to include all three clients, 6/26/14, Tr. 240:1-9. Ms. Cardin had plea negotiations with the American Samoa Government, 6/26/14, Tr. 240:10-12. Pursuant to the plea negotiations she conversed with Ms. Terrie Bullinger, 6/26/14, Tr. 240:13-25. The plea negotiations mandated that the juveniles cooperate with the Government in the prosecution of Mr. Barlow, 6/26/14, Tr. 241:1-2. These negotiations took place in or about November 2011, 6/26/14, Tr. 241:12-13. At Ms. Bullinger's request, Ms. Cardin spoke to the juveniles to discover if the juveniles were willing to cooperate in the prosecution of Mr. Barlow, 6/26/14, Tr. 241:15-19. Ms. Bullinger also requested to meet with the juvenile clients, 6/26/14, Tr. 242:5-8.

According to Ms. Cardin, the juveniles agreed to meet with Ms. Bullinger, 6/26/14, Tr. 242:24-15 and Ms. Bullinger subsequently came to the Public Defender's Office to meet with the juveniles, 6/26/14, Tr. 243:1-3. Ms. Bullinger and another member of the Attorney General's Office met with the juveniles for 15 – 30 minutes, 6/26/14, Tr. 243:21-25.

Ms. Cardin clarified that even though the charges against Mr. Barlow involved only alcohol-related offenses, Ms. Bullinger was interested in whether or not Mr. Barlow had engaged in any improper conduct of a sexual nature toward any of the young men, 6/26/14, Tr. 245:3-8. Ms. Cardin testified that not only had the juveniles informed Ms. Cardin that nothing sexual occurred, but also that Ms. Bullinger told her (Ms. Cardin) that the juveniles stated nothing sexual occurred, 6/26/24. Tr. 245:16-18.

Not only was the government in possession of undisclosed statements material to the defense and charges, but the Government also failed to disclose exculpatory information obtained on or about November/December 2011.

At all relevant times, Assistant Attorney General Terrie Bullinger acted as the juvenile prosecutor. 6/25/14, Tr. 220:11-25; 221:8-10. Terrie Bullinger, acting on her own accord and apparently not in her official capacity, "wondered" if the three juveniles were victims. 6/25/14, Tr. 221:20-24. Ms. Bullinger ventured to ask the juveniles' attorneys if the juveniles wanted to talk about "it". 6/25/14, Tr. 221:23-24.

Ms. Bullinger admitted to getting a response from the attorneys, 6/25/14, Tr. 222:1, but denied meeting with the juveniles herself, 6/25/14, Tr. 222:2-8.

As the juvenile prosecutor, Ms. Bullinger was aware of the juveniles' dispositional agreements, 6/25/14, Tr. 222:16-24, and admitted knowing that the juveniles were required to testify truthfully, 6/25/14, Tr. 222:16-20. She further admitted that she became suspicious of Mr. Barlow due to her personal knowledge of him, 6/25/14, Tr. 223:3-6, and due to the fact that her son had lived with Barlow for about ten days, 6/25/14, Tr. 224:14-16.

Armed with her suspicions, and using the color of her official authority to snoop into Mr. Barlow's personal matters, Ms. Bullinger asked the defense attorneys if anything sexual had happened. To her surprise, the defense attorneys stated that nothing happened. 6/25/14, Tr. 223:8-23, Tr. 225:15-17.

Even though Ms. Bullinger was certain she had not met with the boys or spoken personally with them 6/25/14, Tr. 222:2-8, Ms. Bullinger later changed her story to having "no recollection of talking to the boys." 6/25/14, Tr. 226:8-13.

There is no explanation for why the Government failed to disclose this information to the defense. Terrie Bullinger assisted in planning and preparing the dispositional agreements. Terrie Bullinger was then privy to the information that the juveniles would provide concerning Mr. Barlow. As a result, Terrie Bullinger was under an obligation to report this exculpatory evidence to the defense, including evidence that sometime between November of 2011 and March 2012, the juveniles denied sexual activity. Ms. Bullinger had possession of this exculpatory information well before the defense learned of similar information through the juveniles' defense attorneys.

It was not incumbent upon Mr. Barlow's defense attorneys to learn this information from the Office of the Public Defender in 2011, when Ms. Bullinger knew the information as early as 2011. The logical inference is that Ms. Bullinger's personal bias against Mr. Barlow, 6/25/14, Tr. 224:14-16, may have led Ms. Bullinger to deliberately conceal information favorable to Mr. Barlow. If Ms. Bullinger's personal prejudices caused her to shun her ethical obligations as an attorney, then at the very least Ms. Bullinger should have recused herself from this matter entirely.

Notwithstanding Ms. Bullinger's implied admissions that she failed to turn over exculpatory information, the Trial Court erroneously sided with the Government on the issue of discovery. In the Trial Court's Order Denying Defendant's Motion to Dismiss, dated May 30, 2013, the Court found that "prosecution was not aware of these statements." Order, 5/20/2013, p. 16. Clearly, the ASG and the prosecutors were very much aware.

Even assuming for the sake of argument that Ms. Jessop did not have personal knowledge of the discovery (and that is debatable based on her statements during at least one discovery motion) it is not an excuse that Ms. Jessop did not know, as "the prosecutor must answer for the Government" and has an obligation to conduct due diligence to locate exculpatory evidence, *ASG v. Whitney*, 20 A.S.R. 2d at 47.

There can be no justification for the Government's failure to disclose the denials to Counsel Bullinger. The Court found that, "...[i]t became clear on defense cross-examination that the subsequent sex related investigations by the police had less to do with the juveniles coming forward to complaint, but more to do with counsel Bullinger's suspicions about the Defendant, and his association with the juveniles." Opinion and Order, p. 11-12. The court then noted in a footnote that Ms. Bullinger was referred to by the defense as the juvenile "prosecutor." The court added "We take judicial notice of counsel Bullinger's familiar role in the High Court's Family Drug and Alcohol Division as child advocate for the neglected and abused." Opinion and Order, p. 12, fn. 1. The Court's findings are peculiar. On the one hand, the Court's finding admits that Counsel Bullinger had a role in the juveniles' disclosures; yet the Court fails to take into consideration that the juveniles actually spoke with Counsel Bullinger, either directly or indirectly, and outright denied sexual activity. The Court's footnote is peculiar because there was absolutely no evidence that Counsel Bullinger was a child advocate, and thus is not the type undisputed fact worthy of judicial notice. Quite the contrary: Counsel Bullinger herself testified that she was the juvenile prosecutor and prosecuted the complainants, 6/25/14, Tr. 220:11-25; 221:8-10.

c. Prejudicial Effect of Failure to Produce the Juveniles' Dispositional Agreements. The Dispositional Agreements Contained a Provision that the Juveniles Testify Truthfully Against Mr. Barlow

All three juveniles were required, as part of their dispositional agreements, to testify truthfully against Mr. Barlow. 6/25/14, Tr. 222:16-24. By implication, any indication that the juveniles were not being truthful could constitute a breach of the dispositional agreements. These dispositional agreements were in full force and effect in March of 2012 at the time that the juveniles

disclosed sexual activity to the Office of the Attorney General and/or the Department of Public Safety.

The above-referenced sequence of events is important. The sequence is important because prior to March of 2012, and subsequent to the initiation/finalization of the dispositional agreements, all three juveniles made clear denials concerning sexual activity. These denials were made not only to the juveniles' attorney(s), but also to an attorney and a non-attorney of the Attorney General's Office. The attorney at the Attorney General's Office, Ms. Terrie Bullinger, acted not in the capacity of a juvenile protection advocate but in her capacity as juvenile prosecutor negotiating, with an eye to enforcing prospective conditions of a dispositional agreement.

In March of 2012, at the moment that T.T. disclosed information to the attorney(s) at the Office of the Attorney General's Office that led the attorney(s) to believe Mr. Barlow engaged in inappropriate sexual activities (thus triggering the officers to re-interview all three juveniles), the juveniles' prior and unequivocal denials, combined with new information contradicting those denials, could be viewed as a breach of the "truthful" condition of their dispositional agreements. Whether the untruthful statement was the denial or whether the untruthful statement was the admission, the reality is that there was at least one material untruthful statement. An untruthful statement would constitute a breach of the dispositional agreements. Such a breach could have had consequences for the juveniles, whether it be incarceration at the juvenile facility, revocation of probation, or prosecution for giving false statements to law enforcement.

The Government's failure to produce the juveniles' dispositional agreements is unjustifiable. The Court exacerbated this error by prohibiting any cross-examination of the witnesses on matters concerning their dispositional agreements. This prohibition constitutes reversible error. In reversing the Supreme Court of Alaska for restricting the rights of cross-examination on the basis of the statute which afforded the same protection to a juvenile that our American Samoa statute offers, the Supreme Court of the United States declared:

"[D]efense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it. *Brookhart v. Janis*, 384 U.S. 1, 3, 86 S.Ct. 1245, 1246, 16 L.Ed.2d 314.' *Smith v. Illinois*, 390 U.S. 129, 131, 88 S.Ct. 748, 750, 19 L.Ed.2d 956 (1968)." *Davis v. Alaska*, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347, 355 (1974).

As Chief Justice Burger said in *Davis v. Alaska*:

"In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to [the witness] or his family by disclosure of his juvenile record the prosecution insisted on using him to make its case is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness." (Emphasis added.) *Davis v. Alaska*, 415 U.S. 308, 319, 94 S.Ct. 1105, 1112, 39 L.Ed.2d 347, 355 (1974).

The majority in *People v. Hinchman*, supra, concluded that the facts of that case permitted a limited restriction on the right of cross-examination.

Here, the factors weighed heavily in favor of cross-examination by defense counsel. All three juveniles admittedly participated in the crimes which were charged against the defendant. The juveniles were seeking leniency, and had already obtained a dispositional agreement which purportedly avoided imprisonment. One of the juveniles, T.T., was over 16 and could have been charged with facilitating the sexual actions and with conspiring to commit the sexual actions, serious felony counts which would have mandated imprisonment. No testimony tied the defendant to the alleged crime other than that of the juvenile witnesses.

Under these circumstances, the defendant's constitutional right to confrontation and cross-examination was paramount to the interests afforded a juvenile under the statute. The trial court's foreclosure of cross-examination under the facts of this case deprived the defendant of rights guaranteed by both the American Samoan and United States Constitutions and is contrary to the directions cited in several jurisdictions. See, e.g. *People v. King*, 179 Colo. 94, 498 P.2d 1142 (1972). See also, *People v. Bell*, 88 Mich.App. 345, 276 N.W.2d 605 (1979); *State v. Vaccaro*, 142 N.J.Super. 167, 361 A.2d 47 (1976).

In this case, however, the defense was never provided with the dispositional agreements. The Government never informed Barlow's defense team that the juveniles were required to give testimony as part of their dispositional agreement. The defense does not know what, if any, preferential treatment was given to the juveniles (for example, were the juveniles threatened with sex charges if they failed to testify against James Barlow?).

By the time James Barlow's prosecutors were preparing the juvenile witnesses, those prosecutors must have known that the juveniles were required to testify as a condition of their dispositional agreements. It was incumbent upon Barlow's prosecutors to turn that information over to the defense.

The representations of Counsel Bullinger, Counsel Jessop and the Officer, make clear that the first initial disclosures came on or about the first week of March 2012 and that the disclosures

were made to individuals at the Attorney General's Office. This coincides with Eldon Ane's testimony and the testimony of Leslie Cardin.

What is disturbing is that the nature, substance and content of the disclosures made to the Attorney General's Office were never disclosed to the defense. More disturbing is that even after John Ward "allowed" the disclosures referenced by Terrie Bullinger, the Government still did not turn over that information. Specifically, J. Ward stated, "All right. I'll let the government share that information with you, which I assume they have, and if not, you certainly are entitle[d] to that as to when." N.O.T. June 25, 2014, p. 11, lines 22-25.

Not only did the trial Court fail to order disclosure of the discovery, but the Court precluded the defense from cross-examination on the nature of the dispositional agreements. This preclusion, combined with the failure to disclose the discovery, deprived the Defendant of his right to meaningful confrontation and cross-examination:

For example, with regards to T.L.:

Q: "You were charged with underage drinking." 6/24/14, Tr. 44:9-11.
A: "Yeah". 6/24/14, Tr. 44:11.
Q: "Did you end up pleading guilty to that charge?"
ASG: "Objection"
ASG: "My objection is to relevance, to improper use under Rules of Evidence regarding juvenile cases...." 6/24/14, Tr. 45:12-14.
Q: "As part of your guilty plea, did you have any negotiations with the prosecution." 6/24/14, Tr. 46:8-9.
ASG: "Objection. My objection is that this client is a friend of the court. This goes to attorney-client privilege. He would need an attorney privilege to talk about any attorney-client privilege or anything that happened there. He's laid no foundation under Rule 609 how this information comes under and, excuse me, particularly Rule 609(d)." 6/24/14, Tr. 46:11-17.

DEF: How is disclosing a plea negation w/prosecution subject to attorney client privilege?

Defense Counsel added, "It is a question of whether or not the witnesses have any reason for bias or prejudice and also for purposes of establishing what happened for purposes of impeachment." 6/24/14, Tr. 47:24-48:2.

Defense Counsel: "The fact I'm trying to get out is the fact that he agreed to work with Mr. Barlow on this case, I guess against Mr. Barlow with the Government that he would testify to part of his agreement, dispositional agreement." 6/24/14, Tr. 48:19-23.

Defense Counsel: "Your honor, if it's part of the dispositional agreement and he agreed to work with the prosecution, the minute that information is disclosed to the prosecution that is the

minute that, that privilege is waived. It's no longer attorney-client's privilege." 6/24/14. Tr. 49:15-20.

Rather than disclose the discovery at that point, the prosecutor continued to argue against disclosure of discoverable evidence. "Your honor. I'll just note that J. Ward said this morning and I pass something that Terry Bullinger could provide me. And my understanding is that the agreement said to testify truthfully against James Barlow at the time there was no information regarding sexual acts. Mr. Meek was on the email as well as Terry Bullinger was on there, but my understanding also, J. Ward this morning said this information is sealed. So he gave us two statutes and talked about that everybody needs to be there including the parents of the juveniles.... and all the parties. .... If it is Brady material, it should go over, but I don't have it in my possession, so I can't give it." 6/24/14. Tr. 50:1-10.

This is absurd reasoning. Clearly Ms. Oldfield knew that the juveniles had a dispositional agreement and were required to testify as part of that agreement. There is no reason this could not have been turned over. It was not so sealed as to be shielded from Ms. Oldfield.

Indeed, defense Counsel urged the court to allow the evidence and examination. "I also think that in that case I cited earlier, Your Honor that cites directly on point. It really talks about cross-examining a juvenile witness in the exact same circumstances as this case as we're doing right now regarding bias and prejudice and negotiations ..... so it's a confrontation issue." 6/24/14. Tr. 50:18-25.

Counsel continued. "I'm trying to understand how the State has possession of the information that potentially shows bias or prejudice how the juvenile code can override my client's right to confrontation of a witness of those potential factors, bias, prejudice, impeachment." 6/24/14. Tr. 52:13-19.

Finally, the trial court judge acknowledged that certain provisions in the juvenile dispositional agreements may be discoverable for the purpose of showing bias. 6/24/14. Tr. 54:2-7. Despite the trial court's acknowledgement that Defendant may be entitled to the information, the Government did not disclose any relevant information contained in the dispositional agreements.

Not only did the trial court agree that disclosure may be warranted, but Family Drug and Alcohol Division of the High Court also stated that certain information concerning the dispositional agreements should be turned over. At the June 25, 2014 hearing before the Family Drug and Alcohol Court, counsel Bullinger admitted, "I do know from reviewing the files as well as being involved that after the disposition it was the week I believe of March 1st, in the preparation for the

D.U.I trial that the first revelations were made that caused the felonies to be brought over." 6/25/14, before Hon. John L. Ward, III, Tr. 11:16-21. Hon. John L. Ward, III agreed that the information attested to by counsel Bullinger could be turned over, "All right. I'll let the government share that information with you, which I assume they have, and if not, you certainly are entitled to that as to when." 6/25/14, before Hon. John L. Ward, III, Tr. 11:22-25.

There can be no doubt that the juveniles made statements in connection with their obligations vis-à-vis their dispositional agreements. Concerning the juveniles' conversations with Ms. Bullinger, at least one juvenile, T.L. admitted to a conversation:

Q: "Did you, after you were adjudicated, in your juvenile case, did you speak directly with the prosecutor, Terrie Bullinger?" 6/24/14, Tr. 57:20-23.
Q: "Did you talk about what you were testifying to today with her?"
A: "Yeah" 6/24/14, Tr. 58:2-5.
Q: "Was the facts that you told any different than how you have testified today?"
A: "No it's the same story" 6/24/14, Tr. 58:7.
Q: "Who else did you meet with to talk about what happened."
A: "No one else except the lawyer." 6/24/14, Tr. 58:10.

More important, the juveniles met with Ms. Bullinger before speaking to the police, 6/24/14, Tr. 60:7-9.

Giving the timing of the denials and disclosures, the Court's findings that the juveniles did not admit sexual activity until interviewed by police, and that the admissions of sexual activity would not affect their juvenile agreements, were incorrect.

More important, all of the above exchanges show that there were statements made, material to the allegations, and that statements were made to officials/individuals at the Office of the Attorney General "before" the police re-interviewed the complainants. These statements, which go to the heart of how the sexual allegations began, were critical to the defense. The Government had the obligation to disclose these statements, yet repeatedly failed to do so.

The combined failure to disclose the circumstances of the juveniles' initial disclosures to officers of the Attorney General's Office, failure to disclose the exculpatory denials in a timely fashion, and failure to provide timely disclosures of the natures of the dispositional agreements, amount to a denial of Defendant's rights to receive all applicable discovery. The Government's last-minute (indeed mid-trial) disclosures of exculpatory information did not and could not have given the defense adequate opportunity to utilize the exculpatory evidence.

The Government has a duty to disclose all material evidence favorable to a criminal defendant, *United States v. Madori*, 419 F.3d 159, 169 (2d Cir. 2005)(citing *Brady v. Maryland*, 373

U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154-155 (1972)(extending *Brady* to material that can be used to impeach prosecutions' witnesses; prosecutor must disclose an agreement not to prosecute a witness in exchange for the witness's testimony); *United States v. Sudikoff*, 36 F. Supp. 2d 1196 (C.D. Cal. 1999)(prosecutor must disclose leniency [or preferential treatment] agreements made with witnesses in exchange for testimony. *United States v. Jose Abonce-Barrera*, 257 F.3d 959 (9th Cir. 2001)(immigration status of confidential informant disclosed); *United States v. Bernal-Obeso*, 989 F.2d at 334(government has a duty to 'turn over to the defense in discovery all material information casting a shadow on a government witness's credibility.") A complainant's and/or a government witness's immigration status is also discoverable. See *United States v. Blanco*, 392 F.3d 382 (9th Cir. 2004)(prosecutor must turn over discovery relating to witness's immigration status as well as any preferential treatment given to the witness).

Prior inconsistent statements, possibly including inconsistent attorney proffers and, by implication, attorney promises, are discoverable. See *United States v. Triumph Capital Group*, 544 F.3d 149 (2d Cir. 2008). In *Triumph* case the court stated:

> "When the government violates this duty [Brady duty] and obtains a conviction, it deprives the defendant of his or her liberty without due process of law. Citing *United States v. Rivas*, 377 F.3d at 199-00 (new trial granted where suppressed evidence was inculpatory as well as exculpatory, because its exculpatory character harmonized with the theory of the defense case):

The court in *Triumph* stated:

> "A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused." *Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006). Evidence that is not disclosed is suppressed for Brady purposes even when it is "known only to police investigators and not to the prosecutor." *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). Evidence is favorable if it is either exculpatory or impeaching. See e.g., *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999). Evidence is material if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." Youngblood, 547 U.S. at 870. However, a 'showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." Id. (quoting *Kyles*, 514 U.S. at 434) but only a showing "that the favorable evidence could reasonably be taken to put the whole case in a different light as to undermine confidence in the verdict." *Youngblood*, 547 U.S. at 870 (quoting *Kyles* 514 S. at 435). The assessment of materiality is made in light of the entire record. *United States v. Agurs*, 427 U.S. 97, 112 (1976).

In *Triumph*, the court concluded that the Government had suppressed evidence that was both exculpatory and impeaching, when the Government failed to turn over differing witness statements in the Agent's possession. See also *U.S.A. v. Ted Stevens*, Cr. No. 08-321 (D.D.C. Apr. 7, 2009)(Order)(case dismissed post-conviction upon finding that prosecutors failed to turn over impeachment evidence gathered through undocumented, unrecorded witness interviews; specifically failed to turn over information in which witness gave materially differing statements in undocumented interviews and then at trial); *USA v. Aderoju* (prosecutors failed to turn over letter written by Defendant that was later used to impeach the Defendant); *United States v. Archibald* 2003 WL 561096 at *5 (E.D. Pa. Feb. 26, 2003) (mistrial declared when prosecutor repeatedly refused to turn contradictory statements and impeachment evidence over to the defense).

Applying the above principles to this case, Defendant's request to compel discovery should have been granted. The Government should have disclosed the exculpatory information at the first instance after Barlow's arrest on the sexual offenses. There was substantial showing that the complaining witnesses gave inconsistent statements to Government officials/attorneys. The particular statements at issue were the statements made to Terrie Bullinger, at the Office of the Public Defender. Terrie Bullinger had duty to disclose this information. Obviously, the prosecuting attorneys knew of the dispositional agreements and the provisions therein. Accordingly, the prosecutors should have disclosed the information to the defense. Similarly, any inconsistent statements made by the witnesses to the members of the Attorney General's Office should have been turned over. There were clearly statements made by T.T. on March 2, 2012. Those statements, made prior to T.T. executing his written statement, triggered the police investigation into the sexual assault cases. Those statements were not turned over. The fact that the statements were made to an attorney at the Office of the Attorney General's office does not shield such statements from disclosure. There is no privilege—a defendant who discloses the subject of a confidential attorney-client communication to a third party not only waives the privilege, but the defendant's attorney may be called to testify with respect to the disclosed communication. *U.S. v. Mendelsohn*, 896 F. 2d 1183, 1188-9 (9th Cir. 1990). The fact that the juveniles may have shared the information in the context of arranging a disposition agreement with the prosecutor does not change the waiver of the privilege. Communications by a defendant to a prosecuting attorney are not protected by attorney-client privilege, because an attorney-client relationship does not exist between a defendant and a prosecutor. 81 AM. Jur. 2d Witnesses, Section 371. When properly applied, the attorney-client privilege is not an obstacle to inquiry about communications between the

prosecution and its witnesses, such as possible plea bargains made by a prosecutor. 81 AM. Jur. 2d, Witnesses, Section 372.

The importance of the witness denials, as well as T.T.'s initial verbal disclosure to the Attorney General's Office, cannot be understated. For example, in the March 2, 2012 handwritten statement, T.T. did not mention observing any anal sex between L.B. and James Barlow. Ex. #10. T.T.'s story evolved and the anal sex was added in the next day, March 3, 2012. Even given the language of the statement, it was unclear what T.T. meant by "anal sex". If T.T.'s verbal statement made to the AG's Office on March 2, 2012 similarly failed to mention any anal sex, then that statement was material and needed to be disclosed. However, the prosecutor's office did not turn that information over.

The suppressed discovery is critical. Had the discovery been timely disclosed, defense would have had ample opportunity to develop the obvious theory that the government, more specifically individuals from the Attorney General's Office, led and/or pressured the juveniles into giving statements condemning Mr. Barlow. The government met with T.T. alone and in the absence of either an attorney or his parents, and after that conversation, the government contacted the police who subsequently picked up at least one other juvenile (which the juvenile referred to as an "arrest") and questioned the juveniles. The government had control over these juveniles due to the fact that a condition of their dispositional agreements required cooperation in prosecution of Mr. Barlow. Absent the timely disclosure of evidence, compounded by failure to disclose the dispositional agreements and conditions, the defense did not have ample opportunity or basis to develop this theory, which could have cast doubt on the juveniles' motives, bias or prejudice. Discovery concerning inconsistent statements was also important because in this case, there was no physical evidence or other evidence to corroborate the claims. Given the facts and circumstances as presented and shown at trial, the court's repeated denials of Defendant's multiple discovery motions constituted an abuse of discretion and was in error. Defendant was prejudiced and the error was not harmless.

C. James Barlow was denied his right to a speedy trial.

The constitutional right to a speedy trial falls under the Sixth Amendment of the U .S. Constitution as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed....

Under the Revised Constitution of American Samoa, art. I Section 6:
"In all criminal prosecutions, the accused shall have the right to a speedy and public trial……"

See Also, *A.S.G. v. Majhor*, 7 A.S.R. 3d 147 (Trial Div. 2003)(citing United States v. MacDonald, 102 S.Ct. 1497, 1502 (1982)). See also, A.S.C.A. Section 46.0502, "Every defendant in a criminal case before a court of American Samoa is entitled to a speedy, public and oral trial."

The constitutional right to a speedy trial is guaranteed. The pivotal case in determining whether that right has been violated is *Barker v. Wingo*, 407, U.S. 524 (1972). "Denial of the speedy trial right must be determined on a case by case basis. The Supreme Court's test for this determination balances the length of delay, the reasons for delay, timeliness and vigor of the defendant's assertion of the right and the degree of prejudice to the defendant…." *Barker v. Wingo, 407 U.S. 524, 530 (1972).* "A threshold showing that the length of delay is presumptively prejudicial to the defendant usually triggers the need to consider the remaining factors." *Id.* It has been said that in general one year is presumptively prejudicial." *Id.* (citing *Doggett v. United States*, 505 U.S. 647, 652 n. 1 (1992)(emphasis added)). None of the four factors is necessary or sufficient to the finding of a deprivation of the right to speedy trial. Rather, the four factors should be considered together with such other circumstances as may be relevant. *United States v. Gomez*, 67 F. 3d 1515, 152`1 (10th cir. 1995). See also, *Pene v. Am. Samoa Gov't*, 12 A.S.R. 2d 43, 45 (App. Div. 1989).

The right to speedy trial accrues after the accused has been arrested. *United States v. Loud Hawk*, 474, U.S. 302, 106, S. Ct. 648 (1986); *Unites States v. Lovasco*, 431 U.S. 7 83, 97 S. Ct. 2044 (1977). Mr. Barlow was arrested on October 25, 2011. He was charged with six counts in a charging document dated October 28, 2011, which consisted of three counts of Endangering the Welfare of a Child, and three counts of Aiding a Child to Possessor or Consume Alcohol. He made a Formal Request for a Jury Trial a few months later on January 23, 2012. Subsequently, Mr. Barlow was charged in a nineteen-count Information that charged a number of criminal acts relating to activities on the night of October 24-25, 2011. The nineteen-count information incorporated charges from the original six-count charging document.

His trial occurred on June 24-26, 2014. Approximately a year prior to trial, the Defendant brought motion to dismiss for lack of speedy trial and the court denied the motion. (See Motion to Dismiss, March 30th, 2013 and court's denial of motion, see Order Denying Motion to Dismiss, May 30th, 2013). The length of delay between his initial arrest on the original six charges and trial was

two years and eight months, well beyond what is considered "presumptively prejudicial" under U.S. or American Samoa law. Even considering his second arrest on March 16, 2012, the length of delay was still well over two years.

There is no excusable reason for why this delay occurred. The government's case was not complicated and involved mostly misdemeanors. Its evidence was obtained early on in the case. The investigation of the incident was not extensive. There was no forensic analysis required, no search warrants were obtained. No experts were obtained.

Mr. Barlow timely asserted his right to a speedy trial. Mr. Ude filed a "Formal Request for Jury Trial" on January 13, 2012, only a few months after Mr. Barlow's first arrest. Trial did not occur until over two years later. The delay cannot be blamed on Mr. Barlow's legal counsel; by the time Mr. Ude withdrew, Mr. Barlow had already been facing charges on the six initial counts for nearly two years. More important, the motions history in this case reveals that substantial and unnecessary delay occurred from the government's repeated failure to disclose necessary discovery.

When considering prejudice to Mr. Barlow, this court should consider three interests: "preventing oppressive pre-trial incarceration; minimizing concerns and anxiety to the defendant; and limiting the possibility that the defense will be impaired." *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686 (1992). In the recent decision of *A.S.G. v. Ripley*, HCCR: 117-09, Order Denying Motion for Dismissal Based on Denial of Right to Speedy Trial, December 17, 2014, this court noted that whether or not a defendant is in custody has a bearing on prejudice, citing *Barker* at 45 ("we also note that appellant was not substantially prejudiced by the delay; he was not incarcerated, and the documentary nature of the evidence minimized the danger of fading memories.") The court emphasized in *Ripley* that the defendant has "freedom of movement", Order at 11. Such was not the case with Mr. Barlow, who remained in custody for nearly three years. More important, memories did fade: For example, L.B. noted that it had been a long time and he didn't really remember, 6/24/14, Tr. 99:14, and Terrie Bullinger noted that she had "no recollection" of meeting with the boys 6/25/14, Tr. 226:8-13. Had the matter been tried in a timely fashion, individuals and witnesses would have had better recollection of the events.

Accordingly, Defendant's right to speedy trial was both implicated and violated.

D. Cumulative pre-trial and trial errors resulted in a prejudicial and fundamentally unfair trial.

Where multiple errors occurred at the trial level, a defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. Courts apply the cumulative error doctrine when several errors occurred at the trial court level, but none alone warrants reversal. Rather, the combined errors effectively denied the defendant a fair trial. See *State v. Rooth*, 129 Wn. App. 761, 75 (2005).

Should the court find that none of the errors alone warrants a new trial, this court should find that the errors combined rendered Mr. Barlow trial fundamentally unfair and order a new trial.

CONCLUSION

For all of the aforementioned reasons, Appellant asks this court to reverse the Trial Court's decision and vacate the convictions.

Dated: 9/30/15

Sharron Rancourt
Attorney for Appellant