FOR PUBLICATION

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Commonwealth of the Northern Mariana Islands, Plaintiff, v. Jian Huang, Defendant.	**Criminal Case No. 03-0350** **ORDER DENYING MOTION FOR DISCOVERY PRIOR TO PRELIMINARY HEARING**

I.

INTRODUCTION

THIS MATTER came before this Court for a hearing on Defendant's *Motion to Compel Discovery Prior to a Preliminary Hearing* on November 19, 2003. Karen Severy, Assistant Attorney General, represented the Commonwealth. Jennifer Ahnstedt, Assistant Public Defender, represented the Defendant, Jian Huang.

II.

DISCUSSION

The Defendant's motion in this case challenges this Court's practice of not affording Rule 16 discovery prior to or at the preliminary hearing stages. This motion, filed with nearly identical motions in multiple cases, seeks access to discovery materials in the possession of the Attorney Generals Office prior to preliminary hearing. The factual basis of the underlying allegations in this matter are not relevant to the disposition of the motion. What is relevant is the question of whether a defendant is entitled to access to discovery in possession of the Attorney General's office prior to a preliminary hearing, upon a request made pursuant to Com.R.Crim.P. 16 that triggers a

responsibility to provide discovery?

The Defendant provides the following bases for her argument that she is entitled to discovery at the preliminary stage. First, that any Rule 16 request triggers an automatic responsibility on the part of the prosecution to provide discovery in their possession. Second, that under the Model Rules of Professional Responsibility prosecutors have an undeniable ethical responsibility to provide discovery to defendants. While both statements may be accurate, their application at this stage of the proceedings is premature.

Trial courts have the inherent power to control their own docket. *Ito v. Macro Energy, Inc.*, 4 N.M.I. 46, 49 (1993). Entwined within that power is the ability to set schedules and determine a proper course of proceeding through cases, including aspects of discovery. The normal practice of this Court is to allow discovery to proceed pursuant to Rule 16, once probable cause at a preliminary hearing has been found. Such procedure is supplemented by the Court's pre-trial order delineating the course of discovery. It is important to note that there is no constitutional right to discovery. *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977). Once the defendant is charged, the timing of discovery motions is generally governed by Rule 12, which vests the trial judge with the authority to set the time for the making of pretrial motions for discovery. *See* Com.R.Crim.P. 12. An analysis of the treatment of discovery prior to a preliminary hearing is necessary to determine the appropriate stage at which discovery should be afforded.

Interpretation of federal rule counterparts to our own Commonwealth procedural rules can be highly persuasive. *See Tudela v. Marianas Public Land Corporation*, 1 N.M.I. 179, 184 (1990). Both Fed.R.Crim.P. 5.1 and Com.R.Crim.P. 5.1 provide the basis for preliminary hearings.[1] There is no right to discovery prior to the preliminary hearing in the federal system. *See, e.g., U.S. v. Coley*, 441 F.2d 1299, 1301 (5th Cir. 1971) (inevitable discovery that occurs during preliminary

[1] The federal system is somewhat distinct in that indictments coexist with preliminary hearings. Further, Fed.R.Crim.P 5.1 has been amended twice (1998 and 2002) since the adoption of Commonwealth Criminal Procedure Rules on July, 15, 1996. However, early legislative history indicates that discovery was not intended at the preliminary stage. Congress refused to accept the recommendation that preliminary examinations be held in all cases because the examination functions as a probable cause determination, not as a discovery tool. *See* S. REP. No. 90-371, at 34-35 (1967).

hearing is "incidental to the true purpose of the proceeding"); *Coley*, 441 F.2d at 1300-01(claim that restriction of right to cross-examine witnesses at preliminary hearing denied defendant due process fails because "the primary function of a preliminary hearing is not to expedite discovery"); *Coleman v. Burnett*, 477 F.2d 1187, 1200 (D.C. Cir. 1973) (evidence offered by government to establish probable cause and evidence obtained on cross-examination of government witnesses may provide incidental discovery for defendant); *Coleman*, 477 F.2d at1201(magistrate judge correct in barring responses to cross-examination unrelated to probable cause issue because cross-examination cannot stray from that issue to "impermissible quest for discovery"). *Morrissey v. Brewer*, 408 U.S. 471, 486-87 (1972) (magistrate not required to allow defendant to cross-examine government informant at preliminary examination where magistrate determines that informant would be subject to risk of harm if identity disclosed); S. REP. No. 90-371, at 34-35 (1967) (discovery should remain separate from preliminary examination because examination often occurs before counsel is prepared to pursue effective discovery, and amount of evidence discoverable at examination will depend on how much evidence needed to establish probable cause. However, some incidental discovery may occur at the preliminary hearing itself. See Fed. R. Crim. P. 5.1(h), 26.2(g)(1). Beyond the incidental advantage to discovery, the state is not required to produce it at the federal level.

Nor, upon further examination, is discovery required as a matter of principle in the majority of state jurisdictions. Preliminary hearings are a statutory, not constitutional right, where discovery should remain separate from the preliminary hearing. *Janklow v. Talbott*, 231 N.W.2d 837, 839-840 (S.D. 1975). There is no right to discovery prior to a preliminary hearing in a criminal case. *State v. Leighton*, 616 N.W.2d 126, 139 (Wis. 2000); *Diamond v. Howd*, 288 F.3d 932, 936 (6th Cir. 2002). It is error to order discovery prior to a preliminary hearing. *State v. Justice Court*, 919 N.W.2d 126, 139 (Nev. 1996); *State v. Berger*, 536 P.2d. 1042, 1043-44 (Ariz. 1975); *Almada v. State*, 994 P.2d 299, 303-04 (Wyo. 1999). Defendant's are not entitled to conduct discovery prior to preliminary hearings. *Harris v. District Court of Denver*, 843 P.2d 1316, 1319 (Colo 1993).

A preliminary hearing is "essentially a screening device to ferret out groundless and improvident prosecutions and to prevent the accused's detention without probable cause." *Walker v. Schneider*, 477 N.W.2d 167, 172 (N.D. 1991) The purpose of a preliminary hearing is to

determine probable cause that the defendant committed the offense charged, not for the defendant to conduct discovery. *Lebedun v. Commonwealth*, 501 S.E.2d 427, 434-135 (Va. App. 1998).

The focus of the preliminary hearing is to determine whether there is probable cause sufficient to bind a defendant over for trial. Whereas the purpose of discovery is to allow the defendant to prepare for that trial. The Defendant is correct that a Rule 16 motion triggers the prosecutorial responsibility to produce discoverable evidence. Such discovery will be provided should the Defendant be bound over for trial, however not in or prior to a preliminary hearing.

Com.R.Crim.P. 2 states that the "rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay." For purposes of fairness, where the proceeding is based on or initiated with an affidavit of probable cause, the Defendant will be entitled to that document for the purposes of the preliminary hearing. Finally, the Court believes it's position, as stated above, is in keeping with the principles of simplicity, fairness and expediency, and its responsibility to determine the progression of any proceeding.

III.

ORDER

The Defendant's motion is hereby **DENIED**.

SO ORDERED this 28th day of November 2003.

/s/_____
David A. Wiseman
Associate Judge