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**FOR PUBLICATION**

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

**COMMONWEALTH OF THE  
NORTHERN MARIANA ISLANDS,** )  
)  
**Plaintiff,** )  
)  
**vs.** )  
)  
**William Kaipat,** )  
)  
**Defendant.** )  
\_\_\_\_\_ )

**Criminal Action No. 05-0268E**

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION TO COMPEL DISCOVERY**

**I. INTRODUCTION**

THIS MATTER came for hearing on November 22, 2005 at 9:00 am. Counsel Elisa Long appeared for Defendant William Kaipat (“Defendant”). Assistant Attorney General Rebecca Warfield appeared for the Commonwealth of the Northern Mariana Islands (the “Commonwealth”).

**II. FACTUAL AND PROCEDURAL HISTORY**

On August 10, 2005, the Commonwealth charged Defendant with Sexual Abuse of a Minor in the Second Degree in violation of 6 CMC § 1307(a)(3). The matter is currently set for a jury trial on January 23, 2006. On August 16, 2005, counsel for Defendant mailed a form letter to the

1 Commonwealth generally requesting discovery relevant to the matter at hand. The Commonwealth  
2 responded by letter on September 29, 2005, which listed six witnesses. Defense counsel, believing that  
3 the Commonwealth possessed additional discoverable materials again requested further documentary  
4 discovery via e-mail. To this request, the Commonwealth responded that there were no documents.

5 The parties appeared before this Court on October 20, 2005 for a status conference, during  
6 which defense counsel mentioned that the Commonwealth failed to disclose any documents related to  
7 the underlying charges other than a list of witnesses and that the Commonwealth showed no intention  
8 of disclosing any further discoverable documents. In accordance with defense counsel's request the  
9 Court set a discovery motions schedule and a discovery motions hearing date. The following day,  
10 October 21, 2005, the Commonwealth delivered a transcript of an interview by Detective Patrick  
11 Maanao of K.W.K., dated May 25, 2005, to defense counsel.

12 According to defense counsel, the alleged victim, "was or is the subject of two wardship  
13 proceedings in the Superior Court" of the CNMI in 2003 and 2005. Defense counsel further alleged  
14 that "both proceedings were initiated, at least in part, as a result of K.W.K.'s allegations that Defendant  
15 had abused her" and that the Criminal Division of the Attorney General (AGO) and Civil Division of  
16 the AGO, the Department of Youth Services (DYS), the Department of Public Safety (DPS), the Public  
17 School System (PSS) and the Department of Public Health (DPH) were involved, in some manner, in  
18 the wardship proceedings.

19 It is undisputed that DPS and DYS were directly involved in the investigation of K.W.K.'s  
20 allegations against Defendant as shown by the interview conducted by Detective Maanao. However,  
21 Defendant further alleges that the Civil Division of the AGO filed the wardship petitions based on  
22 allegations of abuse similar to those for which he is currently charged. Further, Defendant alleges that  
23 DPH and PSS were involved in providing counseling, interviewing, evaluation and treatment of K.W.K.  
24 for similar instances of alleged abuse by Defendant. Lastly, Defendant alleges that the Commonwealth  
25 has access to information from the criminal matter and related wardship proceedings that bears upon  
26 K.W.K.'s credibility as a witness and that K.W.K. has previously recanted prior allegations of abuse.  
27 The Commonwealth denies having any such information in its physical possession or otherwise access  
28 to such information.

1 Defendant now requests this Court to compel the Commonwealth to disclose all “exculpatory”  
2 materials mandated for discovery by Commonwealth Rules of Criminal Procedure, Rule 16, and the  
3 United States Supreme Court’s holding in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). The  
4 Commonwealth opposes the motion, citing the fact that it neither physically possesses nor has access  
5 to exculpatory material within *Brady*.

### 6 III. ISSUES PRESENTED

- 7 I. Whether, and to what extent, documents incidental to the business of Commonwealth  
8 agencies, including the Civil Division of the AGO, DPS, DYS, PSS and DPH are within  
9 the “possession, custody, and control” of the Commonwealth for the purposes of  
10 mandatory pretrial disclosure to Defendant under Commonwealth Rules of Criminal  
11 Procedure, Rule 16 and *Brady* if found to be material?
- 12 II. Whether, in cases involving child abuse, a Defendant has a right to discover  
13 documentary evidence under Rule 16, *Brady*, or otherwise, when such information is  
14 protected by Commonwealth confidentiality laws?

### 15 IV. DISCUSSION

#### 16 A. Rule 16 and *Brady*

17 There is no comprehensive constitutional right to discovery in a criminal case, which requires  
18 the prosecution to disclose certain information at certain points in the proceedings. *Weatherford v.*  
19 *Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 846 (1977). However, Commonwealth Rules of Criminal  
20 Procedure, Rule 16 and the Supreme Court, through *Brady* and its progeny, requires the disclosure of  
21 various types of information in order to protect a defendant’s due process rights.

22 Rule 16 generally provides for the disclosure of evidence by the Commonwealth in a criminal  
23 case, including statements by the defendant, the defendant’s prior record, documents and tangible  
24 objects, and reports of examination in the “possession, custody, or control” of the Commonwealth, and  
25 that are “material to the preparation of [the defendant’s] defense, or... intended for use by [the  
26 Commonwealth] as evidence in chief at the trial.” Com. R. Crim. P. 16. Further, under *Brady* the  
27 Supreme Court articulated a due process obligation on the part of the prosecution to disclose  
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1 exculpatory evidence that is material to the issues of guilt and punishment. *Brady v. Maryland*, 373  
2 U.S. 83, 83 S. Ct. 1194 (1963).

3 The Court further developed *Brady*'s disclosure framework by expounding on some of its key  
4 elements. *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392 (1976) (finding a prosecutorial duty to  
5 disclose exculpatory evidence regardless of whether requested by the defense); *United States v. Bagley*,  
6 473 U.S. 667, 105 S. Ct. 3375 (1985) (including impeachment evidence as "exculpatory" under *Brady*);  
7 *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 1565-66 (1995) (elaborating on the "materiality"  
8 element: "The question is not whether the defendant would more than likely have received a different  
9 verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial  
10 resulting in a verdict worthy of confidence.").

11 However, unlike the present situation, the Supreme Court had the distinct advantage of looking  
12 at the procedural *history* of a trial since past, while in contrast, this Court owes an immediate and  
13 continuing duty to ensure the defendant a fair trial. But a defendant's right to favorable discovery is  
14 not absolute, and therefore, it is not incumbent on the prosecution to be his advocate. *See Bagley*, 105  
15 S. Ct. At 3380. Consequently, this Court will carefully construe what appears to be most at issue in this  
16 case, simply put, what constitutes "possession, custody, or control" of the prosecution within Rule 16  
17 and *Brady* to determine the scope of the Commonwealth's disclosure duty, and secondly how to balance  
18 Defendant's *Brady* rights with Commonwealth's interest regarding the confidentiality of certain agency  
19 documents.

## 20 **B. Possession, Custody, or Control**

21 Materials are within the "possession, custody, or control" of the government to the extent that  
22 the "prosecutor has knowledge and access to the documents sought by the defendant in each case."  
23 *United States v. Bryan*, 868 F.2d 1032, 1036. The Court in *Bryan* found that the prosecution  
24 constructively has "knowledge and access to anything in possession, custody or control of any... agency  
25 participating in the same investigation of the defendant." *Id.*<sup>1</sup> In sum, the extent of information to

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27 <sup>1</sup> Although the adjective "federal" is used to describe "agency" in *Bryan*, this Court will not draw a mechanical  
28 distinction between federal agencies and Commonwealth agencies because the Commonwealth Courts have consistently  
held federal court interpretations of Commonwealth Rules' federal counterpart to be instructive. *Commonwealth v.*

1 which the Commonwealth is deemed to have “possession, custody, or control” turns on whether the  
2 underlying agency, which possesses the documents sought by the Defendant, participated in the  
3 investigation of the defendant leading to the current charges. The Court will review Defendant’s  
4 request for documents under the auspices of each stated agency under this light.

5 According to the record of this case, and the government’s own witness submissions, it is clear  
6 that both DPS and the Office of the Attorney General participated in the underlying investigation of  
7 Defendant Kaipat. This is evidenced by the fact that the Attorney General’s Office produced a witness  
8 list, which included the name of a DPS officer and a transcript of an interview of the alleged victim  
9 conducted by DPS. Furthermore, the Attorney General’s Office, although divided into two divisions,  
10 criminal and civil, functions as one agency of the Commonwealth. Therefore, the Criminal Division,  
11 which is prosecuting this case, should be deemed to have access and knowledge to any documents  
12 possessed by their Civil counterpart. Such a construction, requiring the prosecution to examine all  
13 documents within the possession of its office, notwithstanding internal divisions, will not place any  
14 undue burden on the part of the prosecution as feared in *Bryan*. See *Bryan* 868 F.2d at 1036.

15 In addition, it is clear from the witness list and interview produced by DPS that DYS  
16 participated in the investigation of Defendant. DYS agent Julian Camacho was indicated on the  
17 Commonwealth’s witness list and both agent and agency were mentioned in the DPS interview as  
18 having contact with the alleged victim pursuant to the investigation. Therefore, the Commonwealth  
19 should be deemed to have knowledge and access to those documents in the possession, control or  
20 custody of DYS. Notwithstanding this finding, Defendant’s access to DYS files through normal  
21 discovery channels is not appropriate, and will be restricted in accordance with this Court’s discussion,  
22 *infra*.

23 Defendant further argues that the Commonwealth is also required to disgorge documents  
24 favorable to his defense within the possession of PSS and DPH based on his allegations that PSS  
25 provided counseling to K.W.K. relating to the allegations, and that DPH was involved in the  
26 interviewing, evaluation, or treatment of K.W.K. as a result of the allegations. However, there is no

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28 *Ramangmau*, 4 N.M.I. 227, 233 (1995)

1 evidence on the record, by virtue of the Commonwealth’s proposed witness list or otherwise, that the  
2 Commonwealth’s investigation of Defendant and his accuser’s allegations overlapped with PSS or  
3 DPH. Further, neither of these agencies function as “investigative agencies” similar to DPS or DYS,  
4 nor do they seem willing to relinquish such information to the prosecution without official subpoena.  
5 Therefore, this Court will not extend the Commonwealth’s constructive possession of agency  
6 documents to those agencies, whose investigative capacity and links to the underlying investigation are  
7 so attenuated.

8 This Court does not suggest by this ruling that Defendant should not have any access to  
9 documents material to its defense. But Defendant’s procedural grounds for obtaining such information  
10 falls outside the scope of what was intended by Rule 16 and *Brady*. Instead, the Defendant may  
11 subpoena the proper agency for such information directly.

12 **C. In Camera Review**

13 Although this Court has determined that DYS materials, which are found to be “exculpatory”  
14 within *Brady*, must be disclosed under Rule 16 because they are in the “possession, custody, or control”  
15 of the Commonwealth, Defendant’s right of access to these materials are restricted by Commonwealth  
16 law.

17 All written reports made as well as any other information obtained, or photographs or  
18 x-rays taken concerning alleged instances of child abuse or neglect shall be confidential  
19 and shall only be made available to: (1) A duly authorized official of the Division of  
20 Youth Services in the course of his or her duties; (2) A physician examining or treating  
21 a child whom the physician reasonably suspects may be abused or neglected; (3) A  
22 guardian ad litem for the child; (4) A court of competent jurisdiction . . . .  
23 6 CMC § 5325. See also *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989 (1987) (balancing the  
24 state’s compelling interest of maintaining the confidentiality of child abuse records with the defendant’s  
25 rights to exculpatory materials does not require the government to allow inspection of all records).

26 On its face § 5325 plainly restricts inspection of documents concerning child abuse to those  
27 enumerated above. Therefore, the Attorney General has no authorization to procure such materials  
28 even to comply with its obligations under *Brady* and Rule 16. However, the Defendant’s right to  
discover favorable evidence is not completely foreclosed by § 5325. Under § 5325 the information  
may be disclosed to a “court of competent jurisdiction.” This finding is consistent with the

1 Commonwealth Superior Court's ruling in *CNMI v. Hossain*, No. 03-0398 (N.M.I. Super. Ct. Oct. 15,  
2 2004) (Order: Granting Defendant's Motion for In Cameral Review of Victim's DYS File, and Denying  
3 Defendant's Motion for In Camera Review of Victim's PSS File), where the Court determined that an  
4 in camera review of the alleged victim's DYS file for *Brady* material was appropriate. Further, *in*  
5 *camera* review of records of child abuse was supported by the U.S. Supreme Court as a means of  
6 protecting the defendant's rights to obtain information favorable to his defense and protecting the  
7 government's interest in maintaining the crucially confidential nature of child abuse investigations.  
8 *Ritchie*, 480 U.S. at 1002-1003.

9 Consistent with the above-cited authority, this Court, although denying its request to compel  
10 the Commonwealth to produce the K.W.K.'s DYS file, does not bar Defendant from directly  
11 subpoenaing DYS to submit files related to the underlying investigation to this Court for *in camera*  
12 inspection to determine whether they contain information favorable to his defense within *Brady*, *Agurs*,  
13 and *Bagely*.

#### 14 V. CONCLUSION

15 For the foregoing reasons, Defendant's request to compel the Commonwealth to produce *Brady*  
16 materials in the possession of DPS and the Attorney General are GRANTED. Defendant's request to  
17 compel the Commonwealth to produce *Brady* materials in the possession of DYS, PSS, and DPH are  
18 DENIED. However, Defendant may directly subpoena DYS, PSS, and DPH to submit all relevant  
19 documents to the Superior Court for *in camera* review for exculpatory materials.

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22 So ORDERED this 4th day of January 2006.

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24 /s/  
David A. Wiseman, Associate Judge