

1 **FOR PUBLICATION**

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9 **IN THE SUPERIOR COURT**  
10 **OF THE**  
11 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

11 **COMMONWEALTH OF THE**  
12 **NORTHERN MARIANA ISLANDS,**

13 **Plaintiff,**

14 **vs.**

15 **JOHN NAMAULEG,**

16 **Defendant.**

11 **CRIMINAL CASE NO. 08-0033A**

14 **ORDER GRANTING DEFENDANT'S**  
15 **MOTION TO STRIKE WITNESS FROM**  
16 **TESTIFYING AT TRIAL**

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21 **I. INTRODUCTION**

22 THIS MATTER came before the Court on August 31, 2009 at 10:30 a.m. on the  
23 Defendant's Motion to Strike Witness from Testifying at Trial. Defendant appeared with his  
24 counsel of record Adam Hardwicke. Assistant Attorney General Matthew Meyer appeared on  
25 behalf of the Commonwealth of the Northern Mariana Islands (Government).

26 The Court heard and then GRANTED this motion from the bench during a recess from  
27 jury selection on August 31, 2009. The Government later moved this Court to expand the record  
28 by issuing a written decision regarding the motion to strike witness from testifying. The Court

1 now enters the following written order: GRANTING Defendant's Motion to Strike Witness from  
2 Testifying at Trial.

### 3 II. STATEMENT OF FACTS

4 While attending a family barbeque in April 2008, Attorney General Investigations Unit  
5 (AGIU) Investigator Erwin Flores obtained a statement from family member Jessica Palacios  
6 concerning a conversation between Defendant and Ms. Palacios. Ms. Palacios told Investigator  
7 Flores that one day after the stabbing at the Una Moda Factory, Ms. Palacios asked Defendant if  
8 he knew what happened last night, to which Defendant replied, "If I did it, I am sorry." Ms.  
9 Palacios requested this statement remain confidential. Investigator Flores complied with her  
10 request, failing to notify Detective Juan Santos until June 2009, thirteen months after he  
11 obtained the evidence. Shortly after receiving this information, Detective Santos accompanied  
12 his wife to the Philippines because she was in need of medical care. Due to his wife's medical  
13 care, Detective Santos failed to notify the Attorney General's Office of Defendant's statement  
14 until August 25, 2009, even though he held the information for three months. On August 26,  
15 2009, five days before trial, the prosecuting attorney informed defense counsel by telephone of  
16 the new evidence. Defendant's Motion to Strike Witness from Testifying at Trial was filed on  
17 August 28, 2009. The Government's Opposition was filed later that same day. Trial was  
18 scheduled to commence on August 31, 2009.

### 19 III. STANDARD

20 Defendant has moved this Court to strike a Government witness from testifying at trial  
21 because the Government failed to disclose evidence requested by Defendant under  
22 Commonwealth Rule of Criminal Procedure 16(a)(1)(A). Rule 16(a)(1)(A), which governs the  
23 disclosure of a defendant's statements as evidence by the Government, provides:  
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25 Upon request of a defendant the government shall permit the defendant to inspect  
26 and copy or photograph: any relevant written or recorded statements made by the  
27 defendant, or copies thereof, *within the possession, custody, or control of the*  
28 *government, the existence of which is known, or by the exercise of due diligence*  
*may become known, to the attorney for the government; the substance of any oral*  
*statement which the government intends to offer in evidence at the trial made by*

1 the defendant whether before or after arrest in response to interrogation by any  
2 person then known to the defendant to be a government agent.

3 Com. R. Crim. P. 16(a)(1)(A). (Emphasis added).<sup>1</sup> In *Commonwealth v. Kaipat*, Crim. No. 05-  
4 0268 (N.M.I. Super. Ct. Jan. 4, 2006) (Order Granting in Part and Denying in Part Def.’s Mot. to  
5 Compel Disc.), the Commonwealth Superior Court, after reviewing *United States v. Bryan*, 868  
6 F.2d 1032 (9th Cir. 1989), held that “the extent of information to which the Commonwealth is  
7 deemed to have ‘possession, custody, or control’ [under Com. R. Crim. P. 16(a)(1)(A)] turns on  
8 whether the underlying agency, which possesses the documents sought by the defendant,  
9 participated in the investigation of the defendant leading to the current charges.” *Kaipat, supra*,  
10 at 4-5.

#### 11 IV. DISCUSSION

12 The Government’s disclosure of evidence under Com. R. Crim. P. 16 is not a new issue  
13 in the Commonwealth. In *Commonwealth v. Kaipat*, Crim. No. 05-0268 (N.M.I. Super. Ct. Jan.  
14 4, 2006), the Court reviewed the record of the case and the Government’s witness list to  
15 determine that both the Department of Public Safety (DPS) and the Office of the Attorney  
16 General (AGO) participated in the underlying investigation of the defendant. *Id.* at 5. The  
17 AGO’s witness list included the name of a DPS officer and a transcript of an interview of the  
18 alleged victim which was conducted by DPS. *Id.* Furthermore, the Court held that it was clear  
19 from the witness list and the DPS interview that the Department of Youth Services (DYS) also  
20 participated in the investigation of the defendant. *Id.* Taking this under consideration, the  
21 *Kaipat* Court held that “the Commonwealth should be deemed to have knowledge and access to  
22 those documents in the possession, control, or custody of DPS.” *Id.* The Court extended its  
23 ruling further and held that the Criminal Division of the AGO should be deemed to have access  
24 and knowledge to any documents possessed by the Civil Division of the AGO. *Id.* However,  
25 the Court did not extend its ruling to include the “constructive possession” of documents held by  
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27 <sup>1</sup> Since the Commonwealth Rules of Criminal Procedure are modeled after the Federal Rules of Criminal Procedure,  
28 interpretation of the federal rules is instructive. *Commonwealth v. Ramangmau*, 4 N.M.I. 227, 233 (1995).  
However, Federal Rule of Criminal Procedure 16 was amended in 2002, so the formatting and wording of Fed. R.  
Crim. P. 16 is no longer identical to Com. R. Crim. P. 16.

1 the Public School System (PSS) or the Department of Public Health (DPH), as neither of these  
2 agencies function as investigative agencies. *Id.* at 5-6.

3 In this case, the Government argues that it complied with Com. R. Crim. P. 16(a)(1)(A)  
4 because the new evidence was disclosed to Defendant one day after it was received by the  
5 attorney for the Government. The Government’s argument here is identical to the argument of  
6 the prosecution in *United States v. Bryan*, 868 F.2d 1032 (9th Cir. 1989). In *Bryan*, the  
7 prosecution argued that, under Fed. R. Crim. P. 16(a)(1)(C),<sup>2</sup> “in the possession of the  
8 government’ means in the possession of the *prosecutor*.” *Bryan*, 868 F.2d at 1035. In response,  
9 Bryan put forth the same defense that Namaleg now puts forth. Both defendants argue that “the  
10 government,” as it is used in Rule 16, includes both the prosecutor and closely connected  
11 investigative agencies. *Id.* In that case, Bryan was investigated by the Internal Revenue Service  
12 (IRS) nationwide, however he was only provided discovery generated from within the state  
13 where he was prosecuted. After noting the Court’s observation in *United States v. Robertson*,  
14 634 F. Supp. 1020 (E.D. Cal. 1986), that limiting “the government” to the prosecution alone  
15 unfairly allows the prosecution access to documents without making them available to the  
16 defense, the *Bryan* Court held that “the prosecutor will be deemed to have knowledge of and  
17 access to anything in the possession, custody, or control of any federal agency participating in  
18 the same investigation of the defendant.” *Id.* at 1036. Since the IRS had participated in the  
19 investigation against the defendant, the defendant was entitled to discovery in the possession of  
20 the IRS even outside of the state where defendant was prosecuted.

21 Furthermore, even if the new evidence is discovered by the attorney for the government  
22 during trial, the evidence must be excluded as a violation of Fed. R. Crim. P. 16(a)(1)(A). In  
23 *United States v. Bailleaux*, 685 F.2d 1105 (9th Cir. 1982),<sup>3</sup> the government argued that it had no  
24 obligation under Rule 16 to turn over the new evidence because the prosecuting attorney in  
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26 <sup>2</sup> The *Bryan* Court dealt with Fed. R. Crim. P. 16(a)(1)(C) regarding the disclosure of documents and tangible  
27 objects, however the words “in the possession, custody, or control of the government” are identical to those in Com.  
28 R. Crim. P. 16(a)(1)(A).

<sup>3</sup> *United States v. Bailleaux* was overruled only as to the clear and convincing standard on a Fed. R. Evid. 404(b)  
issue in *United States v. Kemper*, 1994 U.S. App. LEXIS 1931 (9th Cir. 1994).

1 charge of the case had only received the evidence the night before it was used at trial. *Bailleaux*,  
2 685 F.2d at 1113. That Court held that “*Rule 16* does not require that the statement be in the  
3 possession of the attorney for the Government; rather, the recorded statement is subject to  
4 disclosure if it is in the custody or control of ‘the government.’” *Id.* In *Bailleaux*, a tape of the  
5 defendant’s recorded conversations was in the possession of the FBI until it was turned over to  
6 the U.S. Attorney in charge of the case. *Id.* The Court reasoned that “it does not matter that the  
7 U.S. Attorney did not ‘receive’ the tape until the night before appellant’s testimony; it is enough  
8 for purposes of the custody requirement of *Rule 16* that it was in the possession of the FBI. *Id.*  
9 (citing *United States v. Scruggs*, 583 F.2d 238, 242 (5th Cir. 1978)). The Court concluded that  
10 the tape should have been disclosed to the defendant under Fed. R. Crim. P. 16 (a)(1)(A),  
11 however although an error was committed, it did not materially affect the verdict. *Bailleaux* at  
12 1115-16.

13 In the current case, AGIU Investigator Erwin Flores obtained a statement from Jessica  
14 Palacios concerning a communication between Defendant and her. Defendant’s statement, “If I  
15 did it, I am sorry,” was nearly a confession from Defendant and extremely inculpatory towards  
16 his defense. Investigator Flores, who held the information for thirteen months, failed to notify  
17 DPS Detective Juan Santos about this evidence until three months before trial and performed no  
18 follow up to make sure the AGO obtained the evidence. Detective Santos then held the  
19 information for three months, failing to notify the AGO until six days before trial. While neither  
20 Investigator Flores or Detective Santos informed the prosecuting attorney of the evidence until  
21 six days before trial, both work for investigative agencies of the Government and actively  
22 participated in the investigation of Defendant on behalf of the AGO, as evidenced by their  
23 inclusion on the Government’s witness list at trial.

24 Under the standard set forth in *Kaipat*, Investigator Flores and Detective Santos worked  
25 for underlying Government agencies that possessed the evidence requested by Defendant. Both  
26 also participated in the investigation of Defendant leading to the current charges. *See Kaipat*,  
27 *supra*, at 4-5. Furthermore, as in *Bryan* and *Bailleaux*, *Rule 16* does not require the statement to  
28 be in the possession of the prosecuting attorney for the Government, it is enough that the

1 statement was in the possession, custody, or control of “the government.” Here, Defendant’s  
2 statement was in the possession of Investigator Flores and Detective Santos until it was turned  
3 over to the Assistant Attorney General (AAG) prosecuting the case. Thus, it does not matter that  
4 the AAG did not receive the statement until six days before trial. It is enough for purposes of  
5 the possession, custody, or control requirement of Rule 16 that it was in the possession of  
6 Investigator Flores and Detective Santos. *See Bailleaux* at 1113.

7 Defendant’s statement falls under the parameters of Com. R. Crim. P. 16(a)(1)(A) and  
8 was requested by Defendant’s discovery requests. Since the statement was in the possession,  
9 custody, or control of the government for sixteen months, the statement should have been  
10 disclosed to Defendant. Disclosing such inculpatory evidence to Defendant, a mere five days  
11 before trial, when the Government had possession of the evidence for sixteen months, greatly  
12 prejudices Defendant and is a violation of Com. R. Crim. P. 16(a)(1)(A). Consequently, the  
13 evidence must be excluded and Jessica Palacios may not testify as to the statement at trial.  
14 Furthermore, as a general rationale regarding Com. R. Crim. P. 16(a)(1)(A), this Court believes  
15 that interpreting “the government” as meaning only the prosecutor would allow investigative  
16 arms of the Government to withhold evidence from the prosecuting attorney until six days  
17 before trial in every criminal case. Such a practice would be a blatant violation of a defendant’s  
18 Due Process rights under the Fifth and Fourteenth Amendments.

19  
20 **V. CONCLUSION**

21 For the foregoing reasons, Defendant’s Motion to Strike Witness from Testifying at Trial  
22 is GRANTED.

23  
24 **SO ORDERED** this 10<sup>th</sup> day of September, 2009.

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26  
27 /s/  
**ROBERT C. NARAJA,**  
28 Presiding Judge