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FOR PUBLICATION

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

**COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS,**

Plaintiff,

v.

ALLAN APATANG TAITANO

Defendant.

CRIMINAL CASE NO. 13-0111E

**ORDER GRANTING
COMMONWEALTH'S MOTION TO
STAY PENDING APPEAL PURSUANT
TO 6 CMC § 8101 AS IT HAS SHOWN
THE SERIOUSNESS OF THE
QUESTIONS RAISED AND THE
BALANCE OF HARDSHIPS TIPS
SHARPLY IN THE
COMMONWEALTH'S FAVOR**

I. INTRODUCTION

This matter came before the Court on February 17, 2016 on the Commonwealth's Motion to Stay in Courtroom 220A. Assistant Public Defender Cindy Nesbit and Chief Public Defender Douglas Hartig ("CPD Hartig") appeared for the Defendant, Allan Apatang Taitano. The Commonwealth was represented by Assistant Attorney General Shannon Foley.

Based on a review of the filings, oral arguments, and applicable law, the Court **GRANTS** the Commonwealth's Motion to Stay Pending Appeal.

II. BACKGROUND

This case has a complicated and convoluted procedural history leading to the Commonwealth's filing of a Motion to Stay. On May 13, 2013, the Defendant was charged by information with Attempted Sexual Assault in the Second Degree in violation of 6 CMC § 1301(a)(1), Assault and Battery in violation of 6 CMC § 1202(a), False Arrest in violation of 6

1 CMC § 1422(b), and Disturbing the Peace in violation of 6 CMC § 3101(a).¹ Many of the motions
2 and orders in this case involve the defense team’s access to vital witnesses, in particular: Nukey
3 Manglona, the alleged victim, and Cathy Manglona, his mother.

4 On October 22, 2014, the Court issued an order excluding Nukey Manglona’s testimony due
5 to prosecutorial misconduct.² The Commonwealth filed a motion to reconsider that order, which the
6 Court subsequently denied.³ The Commonwealth appealed the Court’s exclusion of Nukey
7 Manglona’s testimony, and the present Motion to Stay arises out of that appeal.

8 Since this case involves a number of interconnecting motions and orders spanning two
9 courtrooms, the Court will break down the procedural history leading up to the present motion
10 below.⁴

11 **A. Defendant’s Motion to Exclude Testimony of Nukey Manglona, Regarding the Initial Rota
12 Interview Between Nukey Manglona and the Defense Team**

13 In August 2014, the alleged victim in this case, Nukey Manglona, refused to meet with
14 Assistant Public Defender Eden Schwartz (“APD Schwartz”) and the Public Defender’s Office’s

15 ¹ The alleged incident occurred on the island of Saipan, after the alleged victim and the Defendant had been drinking.
16 Allegedly, while seated in a parked vehicle with the alleged victim, the Defendant attempted to reach for the alleged
17 victim’s genital area. The alleged victim was in the driver’s seat and the Defendant was in the passenger seat. Decl. of
18 Prob. Cause (Rule 5(a) CRCrP) at 1-2. The alleged victim and the Defendant are both adult males.

17 ² *Commonwealth v. Taitano*, Crim. No. 13-0111 (NMI Super. Ct. Oct. 22, 2014) (Order Granting Defendant’s Second
18 Motion to Exclude Testimony of Nukey Manglona Based on Due Process Right to Access Witnesses Without
19 Government Interference (Prosecutorial Misconduct)).

18 ³ *Commonwealth v. Taitano*, Crim. No. 13-0111 (NMI Super. Ct. Aug. 27, 2015) (Order Denying Commonwealth’s
19 Motion to Reconsider the Court’s Order Granting Defendant’s Second Motion to Exclude Testimony of Nukey
20 Manglona Based on Due Process Right to Access Witnesses Without Government Interference (Prosecutorial
21 Misconduct)).

20 ⁴ There are a number of events and motions involved in the present case. Among the key events are: the August 2014
21 meeting between the defense team and the alleged victim; the October 2, 2014 incident where AAG Badawy argued
22 with CPD Hartig in front of the alleged victim and called CPD Hartig a “little bitch;” and incidents in September 2014
23 where a defense investigator attempted to speak with the alleged victim’s mother, Cathy Manglona. Among the key
24 motions and orders are: the initial Defendant’s Motion to Exclude Testimony of Nukey Manglona, filed August 19,
2014; the Court’s denial of this motion on September 12, 2014; the Court’s subsequent minute order on September 23,
2014 ordering that the witness be available on Saipan for a defense interview; the Defendant’s Second Motion to
Exclude Testimony of Nukey Manglona in Light of New Evidence filed on October 7, 2014; the Court’s denial of the
Defendant’s second motion to exclude on October 9, 2014; the Defendant’s Motion to Reconsider, filed on October 14,
2014; the Court’s order granting the Defendant’s Motion to Reconsider on October 22, 2014; the Commonwealth’s
Motion to Reconsider, filed on October 23, 2014; the Court’s denial of the Commonwealth’s Motion to Reconsider on
August 27, 2015; and the Commonwealth’s Motion to Stay, filed on October 13, 2015.

1 Investigator, Ulysses Kapileo (“Mr. Kapileo”). APD Schwartz and Mr. Kapileo had travelled to
2 Rota to meet with Nukey Manglona; although the incident occurred in Saipan, the alleged victim
3 lives in Rota. Nukey Manglona was initially willing to meet with the defense team; however, before
4 he could meet with the defense team, he spoke with an attorney from the Office of the Attorney
5 General (“OAG”). Nukey Manglona indicated that he did not attend the appointment, as he had
6 spoken with someone from the OAG and he was advised not to speak with the defense team as “it
7 was not good for [his] case.” Aff. Ulysses Kapileo (Aug. 19, 2014).

8 On August 19, 2014, APD Schwartz filed Defendant’s Motion to Exclude Testimony of
9 Nukey Mangona. At that time, this case was in Courtroom 223 before the Honorable Judge David
10 A. Wiseman. The Court ordered Assistant Attorney General Badawy (“AAG Badawy”) to submit
11 an affidavit explaining what had happened. In her affidavit, AAG Badawy stated that, “I told him,
12 ‘You’re an adult. You make the choice to speak to whomever you want . . . [h]owever, that person
13 will be working on Defendant’s case, and it is not in your best interest to speak with them, if you
14 don’t want to speak with them, because they represent the Defendant.” Aff. Margo Badawy (Aug.
15 20, 2014). OAG Investigator Babauta (“Babauta”) also indicated that, “[W]e are not telling him not
16 to talk to the defense counsel but as AAG Badawy said, it wouldn’t be in the best interest for the
17 case because they represent the defendant.” Aff. Urbano D. Babauta (Aug. 20, 2014).

18 The Court denied the Defendant’s motion to exclude on September 12, 2014.⁵ The Court
19 found that the statements made by AAG Badawy and Babauta were not “affirmative advice not to
20 talk with opposing counsel.” *Commonwealth v. Taitano*, Crim. No. 13-0111 (NMI Super. Ct. Sept.
21 12, 2014) (Order Den. Def.’s Mot. to Exclude Test. at 5) (“September 12, 2014 Order”). The Court
22 found the facts of this case to be similar to *United States v. Black*, 767 F.2d 1334 (9th Cir. 1985).

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⁵ This order was issued by Associate Judge David A. Wiseman.

1 The Court did not find prosecutorial misconduct, but reminded the OAG that “prosecutors and other
2 officials must ‘maintain a posture of strict neutrality when advising witnesses of their duties and
3 rights . . . [as t]heir role as public servants and protectors of the integrity of the judicial process
4 permits nothing less.” *Taitano*, Crim. No. 13-0111 (Order Den. Def.’s Mot. to Exclude Test. at 6)
5 (quoting *United States v. Rich*, 580 F.2d 929, 934 (9th Cir. 1978)).

6 The Court did not exclude Nukey Manglona’s testimony in the September 12, 2014 Order.
7 *Id.* Rather, the Court ordered an alternative remedy based on the Defendant’s right to equal access
8 to the witnesses and to prepare his defense. *Id.* The Court first granted a deposition of Nukey
9 Manglona in the September 12, 2014 Order, but then revised that decision in a subsequent order on
10 September 23, 2014, ordering Nukey Manglona to be available for an interview with defense
11 counsel. The Court ordered that Nukey Manglona appear on Saipan for an interview, but left the
12 ultimate decision about whether or not to proceed with the interview to Nukey Manglona.
13 *Commonwealth v. Taitano*, Crim. No. 13-0111 (NMI Super. Ct. Sept. 23, 2014) (Minute Order).⁶

14 **B. Defendant’s Second Motion to Exclude Testimony of Nukey Manglona, Regarding the
15 Heated Argument Between AAG Badawy and CPD Hartig**

16 The Defendant filed a Second Motion to Exclude Testimony of Nukey Manglona in Light of
17 New Evidence on October 7, 2014. The Defendant argued that the remedy ordered by the Court on
18 September 12, 2014 and September 23, 2014—that Nukey Manglona be available for an interview
19 with defense counsel—did not successfully protect the Defendant’s due process rights. In particular,
20 the Defendant cited a heated incident between AAG Badawy and CPD Hartig that occurred within
21 earshot of Nukey Manglona on October 2, 2014.

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⁶ This order was issued by Associate Judge David A. Wiseman.

1 The Court denied this motion on October 9, 2014,⁷ and the Court found that no prejudice
2 resulted from the circumstances surrounding Nukey Manglona's interview. There was no
3 evidentiary hearing held on this issue.

4 **C. Transfer of the Case to Courtroom 220**

5 The jury trial in this case was originally scheduled for June 2, 2014, but was continued
6 multiple times until a trial date was set for October 27, 2014. On October 13, 2014, this case was
7 reassigned to the undersigned Judge Joseph N. Camacho in Courtroom 220. On October 14, 2014,
8 after this case had been transferred to Judge Camacho in Courtroom 220, the Defendant filed his
9 Motion to Reconsider.

10 **D. Defendant's Motion to Reconsider**

11 The Defendant's Motion to Reconsider, filed on October 14, 2014, was related to the
12 Court's October 9, 2014 decision denying the Defendant's Second Motion to Exclude, finding that
13 no prejudice had resulted from the circumstances surrounding Nukey Manglona's interview. This is
14 the first of the two Motions to Reconsider filed on this issue. In his Motion to Reconsider,⁸ the
15 Defendant made several arguments: that there was clear error in that the Court did not apply
16 controlling ethical standards to determine whether there had been prosecutorial misconduct; that the
17 Court did not order an evidentiary hearing to determine the factual disputes; and, that the Court did
18 not give any weight to the evidence offered by the Defendant in support of the Defendant's Second
19 Motion to Exclude Testimony of Nukey Manglona.

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⁷ This order was issued by Associate Judge David A. Wiseman.

23 ⁸ The Court granted the Defendant's Motion to Reconsider, as it was "clear error to rule that the events surrounding Mr.
24 Manglona's interview did not prejudice Defendant Taitano without holding an evidentiary hearing and applying the
standard to the facts determined from that hearing." *Commonwealth v. Taitano*, Crim. No. 13-0111 (NMI Super. Ct.
Oct. 22, 2014) (Order Granting Defendant's Second Motion to Exclude Testimony of Nukey Manglona Based on Due
Process Right to Access Witness Without Government Interference (Prosecutorial Misconduct) at 7).

1 **1. The Evidentiary Hearing at the Rota Courthouse, When Nukey Manglona Left the**
2 **Hearing and Could Not Be Located**

3 On October 21, 2014, Judge Camacho held an evidentiary hearing to determine whether any
4 representatives from the Commonwealth discouraged Nukey Manglona from speaking with defense
5 counsel. At the evidentiary hearing, the Court heard testimony from Keola Fitial, a victim advocate
6 and employee of the OAG, and Ulysses Kapileo, an investigator with the OPD.

7 Based on the October 21, 2014 evidentiary hearing, the Court made a number of findings of
8 fact related to the events of October 2, 2014. These findings were outlined in the Court's Order
9 Granting Defendant's Second Motion to Exclude Testimony of Nukey Manglona Based on Due
10 Process Right to Access Witnesses Without Government Interference (Prosecutorial Misconduct),
11 issued on October 22, 2014. The Court found that there had been a heated argument between AAG
12 Badawy and CPD Hartig within earshot of Nukey Manglona on October 2, 2014, when Nukey
13 Manglona had flown to Saipan from Rota to meet with the Defense team. During this argument,
14 AAG Badawy made disparaging remarks about the Office of the Public Defender ("OPD"),
15 indicated that the OPD office would not be a "neutral" place for a witness interview, and called
16 CPD Hartig a "little bitch." A full description of these findings can be found in the Court's October
17 22, 2014 Order, which the Court incorporates by reference into this order. *Commonwealth v.*
18 *Taitano*, Crim. No. 13-0111 (NMI Super. Ct. Oct. 22, 2014) (Order Granting Defendant's Second
19 Motion to Exclude Testimony of Nukey Manglona Based on Due Process Right to Access
20 Witnesses Without Government Interference (Prosecutorial Misconduct) at 9-11).

21 The Court did not hear testimony from Nukey Manglona at the October 21, 2014
22 evidentiary hearing. Nukey Manglona appeared briefly at the Rota Courthouse on October 21, 2014
23 for the evidentiary hearing and stayed in the building for about thirty minutes; he left the
24 Courthouse before the other witnesses had finished testifying. Rota Court staff stayed at the
25 Courthouse in case Nukey Manglona returned, but he did not return. Neither OAG staff nor Court

1 Marshals were able to locate Nukey Manglona. All efforts to contact Nukey Manglona through
2 friends or family were unsuccessful. Nukey Manglona clearly did not want to be found.

3 On Wednesday, October 22, 2014, the Court granted the Defendant's Motion to Reconsider
4 in its Order Granting Defendant's Second Motion to Exclude Testimony of Nukey Manglona Based
5 on Due Process Right to Access Witnesses Without Government Interference (Prosecutorial
6 Misconduct).

7 **E. The Commonwealth's Motion to Reconsider**

8 On Thursday, October 23, 2014, one day after the Court issued its order as to Nukey
9 Manglona's testimony, AAG Badawy filed the Commonwealth's Motion to Reconsider Order
10 Granting Defendant's Second Motion to Exclude Testimony of Nukey Manglona and/or Motion to
11 Stay Jury Trial for Purpose of Filing an Appeal. The Defendant filed his Opposition to
12 Commonwealth's Motion for Reconsideration/Stay Pending Appeal on Friday, October 24, 2014.

13 The Commonwealth Supreme Court issued a stay on Friday, October 24, 2014.⁹ The stay
14 was transmitted and filed in the Commonwealth Superior Court on Monday, October 27, 2014. On
15 the morning of October 27, 2014, jury selection had already begun in this case. The Court
16 dismissed the jurors as a result of the stay in the proceedings ordered by the Commonwealth
17 Supreme Court. One week later, on November 3, 2014, the Commonwealth Supreme Court lifted
18 the stay.¹⁰ The Court did not hear arguments on the Commonwealth's Motion to Reconsider until
19 April 2, 2015.¹¹

21 ⁹ The Commonwealth Supreme Court issued its stay on October 24, 2014. *Commonwealth v. Taitano*, No. 2014-SCC-
22 0021-CRM (NMI Sup. Ct. Oct. 24, 2014) (Order Granting Stay).

23 ¹⁰ In the Supreme Court's Order Lifting Stay, Chief Justice Castro stated that "[t]he Court is concerned about (1) the
24 demeanor of the parties and urges that they maintain civility while zealously representing their clients; and (2) the
Commonwealth's notice of appeal, notwithstanding that the trial court's order excluding Manglona's testimony is not a
final order." *Commonwealth v. Taitano*, No. 2014-SCC-0021-CRM (NMI Sup. Ct. Nov. 3, 2014) (Order Lifting Stay).

¹¹ The motion hearing was heard several months after the motions were filed, due to confusion over whether the
Commonwealth Supreme Court or the Commonwealth Superior Court held jurisdiction over the case.

1 The Court ultimately denied the Commonwealth's Motion to Reconsider on August 27,
2 2015.¹²

3 **F. The Court's Order as to Cathy Manglona**

4 In considering the Commonwealth's conduct towards Nukey Manglona, the Court also took
5 into account the wider context of AAG Badawy's actions. In particular, the Court had also excluded
6 the testimony of Cathy Manglona, Nukey Manglona's mother. The Court issued a separate order on
7 October 23, 2014 regarding the exclusion of the testimony of Cathy Manglona, Nukey Manglona's
8 mother.¹³ In particular, Cathy Manglona declined to speak with OPD staff, saying, "I think I better
9 talk to Ms. Brown first," referring to AAG Badawy by her maiden name. *Id.* at 3, 5. Cathy
10 Manglona also told OPD staff, "I don't want to talk to you because I don't wanna jeopardize my
11 case." *Id.* at 5. The Court, in its October 23, 2014 order, found that Cathy Manglona declined to
12 speak with OPD staff in September 2014 because the advice from AAG Badawy to Nukey
13 Manglona that speaking to the OPD was not in his best interest had spilled over to Cathy Manglona.
14 *Id.* at 6. The Court hereby incorporates by reference its October 23, 2014 order regarding Cathy
15 Manglona's testimony.¹⁴

16 **G. The Commonwealth's Motion to Stay**

17 On October 13, 2015, the Commonwealth filed its Motion to Stay, pending their appeal of
18 the exclusion of Nukey Manglona's testimony. The Defendant filed his opposition on November 9,
19 2015. The Commonwealth filed its reply on November 16, 2015. Among the issues raised on appeal
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21 ¹² See *Commonwealth v. Taitano*, Crim. No. 13-0111 (NMI Super. Ct. Aug. 27, 2015) (Order Denying
22 Commonwealth's Motion to Reconsider the Court's Order Granting Defendant's Second Motion to Exclude Testimony
of Nukey Manglona Based on Due Process Right to Access Witnesses Without Government Interference (Prosecutorial
Misconduct)).

23 ¹³ *Commonwealth v. Taitano*, Crim. No. 13-0111 (NMI Super. Ct. Oct. 23, 2014) (Order Granting Exclusion of Cathy
Manglona's Testimony Due to Spill-Over Effects of Prosecutorial Misconduct at 2).

24 ¹⁴ *Commonwealth v. Taitano*, Crim. No. 13-0111 (NMI Super. Ct. Oct. 23, 2014) (Order Granting Exclusion of Cathy
Manglona's Testimony Due to Spill-Over Effects of Prosecutorial Misconduct).

1 are what statements made by a prosecutor to a witness rise to prosecutorial misconduct, as well as
2 whether a less drastic remedy was available to the court and whether the Court should have ordered
3 a lesser remedy than exclusion.

4 III. LEGAL STANDARD

5 Under Commonwealth Supreme Court Rule 8(a)(1), the party seeking a stay must first seek
6 relief in the Superior Court.¹⁵ As the Commonwealth Supreme Court has not addressed the factors
7 for issuing a stay in a criminal case, the Court will turn to the standard in civil cases. *See State v.*
8 *Robles-Nieves*, 306 P.3d 399, 402-402 (Nev. 2013) (applying civil factors for granting a stay in a
9 criminal case). An appellant is entitled to a stay if they show either: “(1) a combination of probable
10 success on the merits and the possibility of irreparable injury or (2) that serious questions are raised
11 and the balance of hardship tips sharply in the appellants’ favor.” *Mangona v. Aldan*, 1998 MP 5 ¶
12 3 (citing *Vaughn v. Bank of Guam*, 1 NMI 318, 321 (1990)).¹⁶

13 The movant bears the burden of establishing that they are entitled to a stay by “show[ing]”
14 that these factors apply in their case. *Manglona*, 1998 MP 5 ¶ 3 (citing *Vaughn*, 1 NMI at 321);
15 *Clinton v. Jones*, 520 U.S. 681, 708 (1997) (“The proponent of a stay bears the burden of
16 establishing its need.”). In *Vaughn*, the Commonwealth Supreme Court emphasized that the
17 appellant either did not address some factors, or admitted that those factors did not apply. *Vaughn*,
18 1 NMI at 321-323.

21 ¹⁵ Although Supreme Court Rule 8(c) states that Rule 38 of the Commonwealth Rules of Criminal Procedure govern
22 stays in a criminal case, the procedure outlined in Supreme Court Rule 8(a)(1) still applies in criminal cases. Further,
23 NMI R. Crim. P. Rule 38 only covers stays of execution of sentences, and does not discuss the factors to be considered
24 in granting a stay. The present motion seeks a stay pending the appeal of an order excluding evidence, rather than
seeking the stay of the execution of a sentence.

¹⁶ In *Commonwealth v. Blas*, the Commonwealth Supreme Court stated that *Vaughn* is not the proper standard in
motions to stay execution of a sentence pending appeal. 2004 MP 26 ¶ 1 n.3. However, the present motion for a stay is
not a motion for a stay of execution. Rather the Commonwealth seeks to stay the proceedings pending appeal on an
order excluding evidence.

1 IV. DISCUSSION

2 A. The Commonwealth’s Right to Appeal and the Final Judgment Rule

3 The Commonwealth Code describes the Commonwealth’s right to appeal in criminal cases
4 in 6 CMC § 8101. The Commonwealth may appeal:

5 a decision or order of the Superior Court suppressing or excluding evidence...in a criminal
6 proceeding, not made after the defendant has been put in jeopardy and before the verdict or
7 finding on an information, if the Attorney General certifies to the Superior Court that the
8 appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact
9 material in the proceeding.

10 6 CMC § 8101. The Commonwealth correctly argues that the Superior Court has the ability to issue
11 a stay due to the Superior Court’s inherent power “to issue all writs necessary to complete the
12 exercise of its duties and jurisdiction under this constitution and the laws of the Commonwealth.”
13 NMI Const. art. IV § 2. Courts have “broad discretion to stay proceedings as an incident to its
14 power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 707 (1997).

15 The Defendant argues that the orders excluding Nukey Manglona’s testimony are not final
16 judgments, and thus that the Court cannot issue a stay.¹⁷ The Commonwealth’s right to appeal is
17 limited by the final judgment rule. *Commonwealth v. Crisostimo*, 2005 MP 18 ¶ 12 (applying the
18 final judgment rule to 6 CMC § 8101). Under the final judgment rule, “only final decisions and
19 orders [of the Commonwealth Superior Court] are appealable.” *Friends of Marpi v.*
20 *Commonwealth*, 2012 MP 9 ¶ 5 (quoting *Commonwealth Brown v. Kumagai*, 2006 MP 20 ¶ 8).

21 Although appeals under 6 CMC § 8101 are subject to the final judgment rule,
22 “[i]nterlocutory appeals are permitted where expressly allowed by statute, rule, or constitutional
23 provision.” *Friends of Marpi*, 2012 MP 9 ¶ 7 (citing *Commonwealth v. Hasinto*, 1 NMI 377, 384

24 ¹⁷ The Defendant states that 6 CMC § 8101 is subject to the final judgment rule in his written opposition; however, he does not seem to explicitly argue that the Commonwealth’s motion for a stay is improper due to the final judgment rule. Opp. at 5-6. The Defendant did fully argue this point at the motion hearing on February 17, 2016.

1 (1990)). Here, the Commonwealth Code explicitly provides for interlocutory appeals of orders
2 suppressing or excluding evidence. 6 CMC § 8101.¹⁸

3 **B. The First Set of *Vaughn* Factors: Probability of Success on the Merits and Possibility of**
4 **Irreparable Injury**

5 An appellant is entitled to a stay if they show either: “(1) a combination of probable success
6 on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the
7 balance of hardship tips sharply in the appellants’ favor.” *Mangona v. Aldan*, 1998 MP 5 ¶ 3 (citing
8 *Vaughn*, 1 NMI at 321). The Court will address the first of these two sets of factors below.

9 **1. Probability of Success on the Merits**

10 The Court is not persuaded by the Commonwealth’s argument that they have a strong
11 probability for success on the merits. The Commonwealth argues that they have a strong probability
12 for success on the merits since the Court did not order a Rule 15 deposition of Nukey Manglona.
13 The exclusion of witness testimony is a “severe sanction.” *United States v. Finley*, 301 F.3d 1000,
14 1018 (9th Cir. 2002). The Commonwealth relies on *United States v. Peter Kiewet Sons’ Co.*, 655
15 F.Supp. 73 (D. Colo. 1986), to argue that a Rule 15 deposition, rather than exclusion, would be the
16 appropriate remedy in this case. Memo. in Supp. of Mot. to Stay at 9-10.

17 The Commonwealth relies upon *Peter Kiewet* for the proposition that the Court should have
18 ordered a Rule 15 deposition rather than exclusion. The Court notes that the misconduct in *Peter*
19 *Kiewet*, which was “the prosecution’s ‘advice’ and conduct [that] at least strongly implied that the
20 witnesses should decline the requested defense interviews,” is far less severe than the misconduct in
21 the present case. *Peter Kiewet*, 655 F.Supp. at 77-78. In this case, AAG Badawy made it clear that
22 she disapproved of the witness interview, indicated that the OPD office would not be a neutral

23 ¹⁸ The Commonwealth also argues the collateral order doctrine; however, since 6 CMC § 8101 explicitly allows the
24 Commonwealth to appeal interlocutory orders related to the suppression or exclusion of evidence, the Court need not
reach this issue.

1 location for the witness interview, called CPD Hartig a “little bitch” within earshot of the witness,
2 and had an OAG victim advocate accompany the witness to the interview.¹⁹

3 In fashioning a remedy, the *Peter Kiewet* court ordered that the witnesses be deposed by the
4 defense. 655 F.Supp. at 78. The *Peter Kiewet* court considered dismissal as a possible sanction, but
5 found this to be “overly harsh.” *Id.* With regard to the ultimate remedy ordered, the depositions, the
6 *Peter Kiewet* court noted that, “[w]hile the remedy provided probably cannot fully undo the
7 damage, it may at least provide defense counsel an opportunity to speak with these vital witnesses
8 in a neutral atmosphere where both the interests of the witnesses and of the government can be
9 protected by the presence of counsel.” *Id.*

10 The Court again emphasizes that numerous lesser remedies had already been tried by the
11 Court. Judge Wiseman, in his September 23, 2014 order, ordered that Nukey Manglona “appear on
12 Saipan on or before October 3, 2014 at which time he shall decide on whether or not he chooses to
13 be interviewed by Defense counsel.” *Commonwealth v. Taitano*, Crim. No.13-0111 (NMI Super.
14 Ct. Sept. 23, 2014) (Minute Order). Instead of heeding the cautionary language in Judge Wiseman’s
15 order, the order seems to have instead emboldened AAG Badawy, leading to further misconduct. At
16 the October 2, 2014 meeting, AAG Badawy proceeded to create an atmosphere that would pre-
17 dispose Nukey Manglona to refuse a defense interview. AAG Badawy also argued with APD
18 Schwartz and CPD Hartig within earshot of Nukey Manglona, calling CPD Hartig a “little bitch”
19 and indicating that the OPD office would not be a “neutral place” for a witness interview. Judge
20 Wiseman’s order intended Nukey Manglona’s interview with the defense team to be free of OAG

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23 ¹⁹ This incident is described in full in the Court’s October 22, 2014 Order. *Commonwealth v. Taitano*, Crim. No. 13-
24 0111 (NMI Super. Ct. Oct. 22, 2014) (Order Granting Defendant’s Second Motion to Exclude Testimony of Nukey
Manglona Based on Due Process Right to Access Witnesses Without Government Interference (Prosecutorial
Misconduct) at 9-11).

1 interference, and AAG Badawy insisted upon repeatedly interfering with the defense team’s access
2 to the witness.

3 Although exclusion is severe, it is the appropriate remedy in this case, as lesser remedies
4 have already been tried by the Court and have failed. Ordering Nukey Manglona to Saipan to
5 participate in a witness interview did not free this interview from OAG interference. AAG
6 Badawy’s actions at the October 2, 2014 meeting caused Nukey Manglona to shut down completely
7 and refuse to work with any party involved with this case, be it the Court, the prosecution, or the
8 defense. At the October 22, 2014 evidentiary hearing, Nukey Manglona appeared at the Rota
9 Courthouse briefly, and left without testifying. Neither Court Marshals nor OAG staff were able to
10 locate Nukey Manglona. At this point, a deposition would not undo the damage done by AAG
11 Badawy.²⁰

12 **2. Possibility of Irreparable Injury**

13 The Court finds that the Commonwealth has met their burden to show that they would face
14 irreparable injury, since absent the requested remedy, the Commonwealth would be forced to
15 dismiss this case. Irreparable injury is “traditionally defined as harm for which there is no adequate
16 legal remedy.” *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (defining
17 irreparable harm).

18 The Commonwealth may not appeal the suppression or exclusion of evidence in a criminal
19 case if jeopardy has attached, or before the verdict or finding on the information. 6 CMC § 8101(b).

21 ²⁰ The Court notes that ordering Nukey Manglona to appear—and then imposing jail time on him for contempt if he
22 does not—would only serve to cause Nukey Manglona to further shut down. Making an uncooperative alleged sexual
23 assault victim face jail time would only serve to further victimize the alleged victim. In the present case, the alleged
24 victim has already shut down as a result of AAG Badawy’s actions. The Court declines to put an alleged sexual assault
victim in jail, as to do so would punish the alleged victim. This would turn the whole justice system upside down –
where defendants are on pre-trial release but victims are locked up. This is especially true in a situation like this, where
OAG interference, in particular from AAG Badawy, caused the alleged victim to completely shut down with regard to
speaking with anyone about this case.

1 Further, the Commonwealth Supreme Court cannot reverse an acquittal on appeal. 6 CMC §
2 8101(c). Without the testimony of the sole eyewitness, the Commonwealth would be forced to
3 proceed to trial and face a possible acquittal, which would in turn impact their ability to appeal the
4 suppression issue. The Commonwealth has shown irreparable harm should this case be forced to
5 proceed to trial pending appeal.

6 Despite this, a stay under the first set of *Vaughn* factors requires that the appellant show
7 both “a combination of probable success on the merits **and** the possibility of irreparable injury.”
8 *Mangona v. Aldan*, 1998 MP 5 ¶ 3 (citing *Vaughn*, 1 NMI at 321) (emphasis added). Although the
9 Commonwealth has shown a possibility of irreparable injury, the Court is not convinced of the
10 Commonwealth’s probability of success on the merits. Accordingly, the Commonwealth is not
11 entitled to a stay on these grounds.

12 **C. The Second Set of *Vaughn* Factors: Serious Questions Raised and the Balance of
13 Hardships**

14 An appellant may also be entitled to a stay if they show: “(2) that serious questions are
15 raised and the balance of hardship tips sharply in the appellants’ favor.” *Mangona v. Aldan*, 1998
16 MP 5 ¶ 3 (citing *Vaughn*, 1 NMI at 321). The Court will address this second set of factors below.

17 **1. Serious Questions Raised**

18 The issues raised on appeal are which types of statements made by a prosecutor to a witness
19 constitutes prosecutorial misconduct, and whether the Court should have used a less drastic remedy
20 than the exclusion of Nukey Manglona’s testimony. Memo. in Supp. of Mot. to Stay at 12. The
21 Commonwealth argues that serious questions are raised since these questions are matters of first
22 impression before the Commonwealth Supreme Court, and since two different judges reached
23 different conclusions in this case. *Id.*

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a. The Trial Court “Split”

The Court is not persuaded by the Commonwealth’s argument that serious questions are raised simply because two judges reached different conclusions regarding AAG Badawy’s actions. Although the undersigned Associate Judge Camacho and Associate Judge Wiseman took different approaches to AAG Badawy’s actions, the Court notes that Associate Judge Wiseman did not hold an evidentiary hearing to determine the facts. *See Commonwealth v. Taitano*, Crim. Case No. 13-0111 (NMI Super. Ct. Oct 9, 2014) (Order Denying Defendant’s Motion to Exclude Testimony of Cathy Manglona, Nukey Manglona, and Moses Charfauros).

After this case was transferred to Judge Camacho, he held an evidentiary hearing on October 22, 2014 to determine exactly what happened during the October 2, 2014 between AAG Badawy and CPD Hartig within earshot of Nukey Manglona. Judge Camacho then made factual findings as a result of the evidentiary hearing.²¹

b. Statements Made by Prosecutors and Whether Lesser Remedies Should Have Been Used

The Court agrees with the Commonwealth that the legal issues of which statements by a prosecutor to a witness constitute prosecutorial misconduct, and whether a less drastic remedy should have been ordered, are important legal issues, which should be addressed by the Commonwealth Supreme Court. The Commonwealth Superior Court is duty-bound to follow mandates of the Commonwealth Supreme Court. A ruling from the Commonwealth Supreme Court will add to the ever-growing CNMI body of law and give guidance to the Commonwealth Superior Court, attorneys, parties, and the general public.

²¹ *See Commonwealth v. Taitano*, Crim. No. 13-0111 (NMI Super. Ct. Oct. 22, 2014) (Order Granting Defendant’s Second Motion to Exclude Testimony of Nukey Manglona Based on Due Process Right to Access Witnesses Without Government Interference (Prosecutorial Misconduct) at 9-11).

1 **2. Balance of Hardships**

2 The balance of hardships must “tip sharply in the appellants’ favor.” *Mangona v. Aldan*,
3 1998 MP 5 ¶ 3 (citing *Vaughn*, 1 NMI at 321). The Commonwealth argues that the balance of
4 hardships tips sharply in their favor, since “the Commonwealth will be unable to prosecute this case
5 without the excluded testimony, and the Commonwealth will take all efforts to expedite the
6 appeal.” Memo. in Supp. of Mot. to Stay at 13. As described above, the Commonwealth may not
7 appeal the suppression or exclusion of evidence in a criminal case if jeopardy has attached, or
8 before the verdict or finding on the information. 6 CMC § 8101(b). Further, the Commonwealth
9 Supreme Court cannot reverse an acquittal on appeal. 6 CMC § 8101(c).

10 The key issue is whether the harm faced by the Commonwealth outweighs the Defendant’s
11 right to a speedy trial. The Sixth Amendment right to a speedy trial is a vital safeguard in cases
12 where there is a delay due to “an unduly long appellate process.” *United States v. Loud Hawk*, 574
13 U.S. 302, 312 (1986). However, “there are important public interests in the process of appellate
14 review,” especially with regard to the suppression of evidence. *Id.* at 313. In particular, “[t]he
15 assurance that motions to suppress evidence or dismiss an indictment are correctly decided through
16 orderly appellate review safeguards both the rights of defendants and the ‘rights of public justice.’”
17 *Id.* at 313 (quoting *Beavers v. Haubert*, 198 U.S. 77, 87 (1905)).

18 **a. The Four Barker Factors as to a Defendant’s Speedy Trial Right**

19 In determining whether a defendant’s speedy trial right has been violated, courts apply a
20 balancing test which weighs the “length of the delay, the reason for the delay, the defendant’s
21 assertion of his right, and prejudice to the defendant.” *Barker v. Wingo*, 407 U.S. 514, 530 (1972).
22 Two of these factors are fluid: the length of the delay, as well as the prejudice to the defendant.
23 *Robles-Nieves*, 306 P.3d at 405. Since this is a balancing test, the Commonwealth “takes the risk
24 that at some point the balance may tip against it.” *Id.*

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1. Length of Delay

First, the Court must examine whether the length of the delay is “presumptively prejudicial,” since “until there is a delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.” *Barker*, 407 U.S. at 530. The length of the delay is the threshold factor in the speedy trial analysis. *Loud Hawk*, 574 U.S. at 314. Since the right to a speedy trial is a moving target, “the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case.” *Barker*, 407 U.S. at 530-531.

Delays attributable to appeal of “around one year are considered presumptively prejudicial, and the presumption that the delay prejudices the defendant ‘intensifies over time.’” *United States v. Carpenter*, 781 F.3d 599, 610 (1st Cir. 2015) (quoting *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992)). This threshold of presumptive prejudice “does not necessarily indicate a statistical probability of prejudice,” rather it is the threshold for determining when “courts deem the delay unreasonable enough to trigger a *Barker* enquiry.” *Doggett*, 505 U.S. at 652 n.1.

Sixteen months have elapsed from the filing of the Notice of Appeal on October 24, 2014.²² Thus, the threshold first *Barker* factor is met and the Court will turn to the remaining three factors.

2. Reason for the Delay

The second factor, the reason for the delay, is a vital factor and is “[t]he flag all litigants seek to capture.” *Loud Hawk*, 474 U.S. at 315. Under *Barker*, “different weights should be applied to different reasons” for a delay. 407 U.S. at 531. If the Commonwealth is engaged in “a deliberate

²² The initial information in this case was issued on May 10, 2013. The Commonwealth filed their Notice of Appeal on October 24, 2014. When the Commonwealth filed its present motion to stay on October 13, 2015, nearly twelve months had elapsed from the Notice of Appeal. As of the Defendant’s opposition, filed on November 9, 2015, transcripts had not yet been produced in this case, which the Commonwealth Supreme Court requires to begin deliberations. Opp. at 15-16. On January 6, 2016, a Notice of Filing was filed with the Clerk of Court, indicating that transcripts in this matter had been filed with the Clerk of Court of the Commonwealth Superior Court. When this matter came before the Court for a hearing on the Motion to Stay on February 17, 2016, nearly sixteen months had elapsed from the Notice of Appeal.

1 attempt to delay the trial in order to hamper the defense,” this would be weighed against the
2 Commonwealth. *Id.* On the other hand, “negligence or overcrowded courts should be weighed less
3 heavily but nevertheless should be considered since the ultimate responsibility for such
4 circumstances must rest with the government rather than with the defendant.” *Id.*

5 Because of the “important public interests in appellate review, it hardly need be said that an
6 interlocutory appeal by the Government ordinarily is a valid reason that justifies delay.” *Loud*
7 *Hawk*, 474 U.S. at 315 (citation omitted). In weighing a delay caused by an interlocutory appeal,
8 courts look to “the strength of the Government’s position on the appealed issue, the importance of
9 the issue in the posture of the case, and—in some cases—the seriousness of the crime.” *Id.* (citing
10 *United States v. Herman*, 576 F.2d 1139, 1146 (5th Cir. 1978)). A “clearly tangential or frivolous”
11 appeal would weigh heavily against the prosecution, and “the charged offense usually must be
12 sufficiently serious to justify restraints that may be imposed on the defendant pending the outcome
13 of the appeal.” *Id.*

14 The Commonwealth²³ has stated that this appeal is not taken for purposes of delay.
15 Commonwealth’s Mot. to Reconsider at 2. The issue of the exclusion of Nukey Manglona’s
16 testimony is an “issue in the posture of the case,” as the exclusion of the testimony of a sole
17 eyewitness is determinative of whether the Commonwealth may even prove its case. *Loud Hawk*,
18 474 U.S. at 315. Further, allegations of attempted sexual assault are serious accusations.²⁴ Although

20 ²³ Pursuant to 6 CMC § 8101, “the Attorney General” must certify “to the Superior Court that the appeal is not taken for
21 purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.” The Court questions
22 whether “the Attorney General” under Section 8101 should be taken to mean that the Honorable Attorney General
23 Edward Manibusan himself must certify that appeals are not taken for the purpose of delay, or if any Assistant Attorney
24 General may make this certification. Despite these concerns, the failure to certify with the Superior Court is not fatal to
eventual appellate jurisdiction. *Commonwealth v. Pua*, 2006 MP 19 ¶ 10 (citing *United States v. Becker*, 929 F.2d 442,
445 (9th Cir. 1991)).

²⁴ The alleged incident occurred on the island of Saipan, after the alleged victim and the Defendant had been drinking.
Allegedly, while seated in a parked vehicle with the alleged victim, the Defendant attempted to reach for the alleged
victim’s genital area. The alleged victim was in the driver’s seat and the Defendant was in the passenger seat. Decl. of
Prob. Cause (Rule 5(a) CRCrP) at 1-2. The alleged victim and the Defendant are both adult males.

1 the Defendant argues that the Commonwealth’s misconduct in this case cannot be overlooked, the
2 misconduct in this case did not itself cause a delay in the appellate process. Rather, a significant
3 portion of the delay appears to be attributable to the amount of time necessary to produce transcripts
4 for this case.²⁵ The second factor under *Barker*, the reason for the delay, weighs in favor of the
5 Commonwealth.

6 **3. The Defendant’s Assertion of his Speedy Trial Right**

7 The third factor under *Barker* is the Defendant’s assertion of his speedy trial right. 407 U.S.
8 at 530. The Defendant invoked his right to a speedy trial in October 2014, in both Commonwealth
9 Supreme Court filings and Commonwealth Superior Court filings. Opp. at 17. This factor weighs
10 against the Commonwealth.²⁶

11 **4. Prejudice to the Defendant**

12 The fourth factor under *Barker* is the prejudice to the defendant. 407 U.S. at 530. In *Loud*
13 *Hawk*, the United States Supreme Court held that the “possibility of prejudice is not sufficient to
14 support [the defendants’] position that their speedy trial rights were violated.” 474 U.S. at 315. In
15 particular, the passage of time is a “two-edged sword” and the deterioration of witness memories of
16 an event would harm the prosecution as well as the defense. *Id.* Since the Commonwealth “bears
17 the burden of providing its case beyond a reasonable doubt,” a delay could “make it difficult or
18 impossible” for the Commonwealth to meet this burden. *Id.*

19 The Court recognizes the Defendant’s concerns regarding delays in this case, especially
20 considering the delays resulting from an interlocutory appeal. Despite this, the delay attributable to
21 appeal harms both parties—the passage of time will make it difficult for both parties to obtain

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23 ²⁵ Although the Notice of Appeal was filed on October 24, 2014, the transcripts in this case do not seem to have been
completed until January 6, 2016.

24 ²⁶ The Defendant is out of custody, subject to bail conditions. See *Commonwealth v. Taitano*, Crim. No. 13-0111 (NMI
Super. Ct. Apr. 29, 2013) (Bail Order).

1 witness testimony, not solely the Defendant or the Commonwealth. Further, the Commonwealth
2 states that it is willing to agree to an expedited appellate briefing schedule to minimize any
3 prejudice to the Defendant. This factor weighs in favor of the Commonwealth.

4 **5. Summary of the Four *Barker* Factors as to a Defendant’s Speedy Trial
Right**

5 In summation, the *Barker* factors weigh in favor of the Commonwealth. The threshold first
6 factor of a “presumptively prejudicial” delay is met, allowing the Court to address the remaining
7 three factors. *Barker*, 407 U.S. at 530. The Court emphasizes that presumptive prejudice “does not
8 necessarily indicate a statistical probability of prejudice,” rather it is the threshold for determining
9 when “courts deem the delay unreasonable enough to trigger a *Barker* enquiry.” *Doggett*, 505 U.S.
10 at 652 n.1.

11 The second factor, the reason for the delay, weighs in favor of the Commonwealth. The
12 Court emphasizes that the second factor is vital in the *Barker* analysis, as it is “[t]he flag all litigants
13 seek to capture.” *Loud Hawk*, 474 U.S. at 315. The third factor, that the Defendant asserted his
14 speedy trial right, weighs against the Commonwealth. *Barker*, 407 U.S. at 530. The fourth factor,
15 the prejudice to the Defendant, tips in favor of the Commonwealth since the risk of witnesses losing
16 memory²⁷ of the events cuts against the Commonwealth and could potentially make it difficult or
17 impossible for the Commonwealth to meet its burden. *Id.*²⁸ As a whole, the analysis of the *Barker*
18 factors favors the Commonwealth, especially since the vital second factor, the reason for delay,
19 favors the Commonwealth. *Loud Hawk*, 474 U.S. at 315.

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23 ²⁷ The Commonwealth has the burden to prove each and every element of the crime. Defendants are presumed innocent
and need not call any witnesses or put on a case in chief unless a defendant chooses to do so.

24 ²⁸ The Court notes that Nukey Manglona and his mother are witnesses for the Commonwealth, and it was the Defendant
who moved to have these Commonwealth witnesses excluded. Of course, it is possible that a Commonwealth witness
may have exculpatory information.

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3. Conclusion Under the Second Set of *Vaughn* Factors

A stay under the second set of *Vaughn* factors requires that the appellant show “that serious questions are raised and the balance of hardship tips sharply in the appellants’ favor.” *Mangona v. Aldan*, 1998 MP 5 ¶ 3 (citing *Vaughn*, 1 NMI at 321). The Commonwealth has shown that serious questions are raised on appeal. Further, the balance of hardship tips sharply in the Commonwealth’s favor, with the hardship from the Commonwealth’s inability to try this case pending appeal outweighing the prejudice to the Defendant under *Barker*. Thus, the Commonwealth is entitled to a stay under the second set of *Vaughn* factors.

V. CONCLUSION

Accordingly, the Commonwealth’s Motion to Stay Pending Appeal is **GRANTED**.

IT IS SO ORDERED this 7th day of March, 2016.



JOSEPH N. CAMACHO
Associate Judge