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3 **FOR PUBLICATION**

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5 **IN THE SUPERIOR COURT**  
6 **FOR THE**  
7 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

8 COMMONWEALTH OF THE NORTHERN  
9 MARIANA ISLANDS,

10 Plaintiff,

11 v.

12 SHI XUAN LIU and GUO LONG WANG,

13 Defendants.

**Criminal Case No. 02-0156**

**ORDER GRANTING MEDICAL  
HISTORY RECORDS REQUEST**

14 **I. INTRODUCTION**

15 **THIS MATTER** came before this Court for a hearing on Defendant Wang's request Regarding  
16 Release of Medical Records, on July 30, 2003. The Commonwealth was represented by Assistant  
17 Attorney General Grant Sanders. Defendant Shi Xuan Liu was represented by Tim Farrell. Defendant  
18 Guo Long Wang was represented by Jennifer Ahnstedt. This case was originally presided over by Judge  
19 Onerheim. This Court having read the pleadings and heard the arguments of counsel now renders its  
20 decision.

21 **II. FACTS**

22 The Information in this case alleges varied counts of assault and battery, including aggravated  
23 assault and battery, as well as other connected offenses. Per written order by Presiding Judge Naraja, the  
24 parties were ordered to submit findings of law and conclusions of fact. *See* Reply to Objection to Request  
25 for Court Order Regarding Waiver of Medical Privilege (hereafter "Reply") at 3. In response to that  
26 Order, Defendant Wang submitted a Brief Regarding the Release of Medical Health Information on July  
27 14, 2003.

28 On May 5, 2003, the alleged victims, Zhong Li and Liu Ying, were served with subpoenas to

1 appear at a hearing on May 7, 2003. *Id.* Judge Naraja advised each individual of their rights regarding  
2 a request for access to their medical records. *Id.* They were advised specifically that the Commonwealth  
3 did not represent them in this matter, that they could hire an attorney to aid them in preventing access to  
4 their records, and the next court date where an appearance was required in order to prevent access to  
5 those records. *Id.* at 4.

6 Ms. Liu obtained the services of Anthony Long, who informed Defense Counsel that access to her  
7 medical records would be permitted. *Id.* Mr. Li could not be located, but was served with notice at his  
8 place of business and at an address provided in discovery information. *Id.* Supplemental notice was also  
9 provided to Ms. Liu, who as Mr. Li's girlfriend, had frequent contact with him. *Id.* Mr. Li has either  
10 refused to acknowledge the notice, or does not want the information released.

11 The records in question are held at the Commonwealth Health Center (hereafter "CHC"). Through  
12 the Attorney General's Office, CHC has asserted that privacy interests prevent the release of medical  
13 record information.

### 14 III. DISCUSSION

15 The Defendants' purpose for seeking the information in question is the relation of injuries sustained  
16 by Mr. Li during the incident, to previous injuries. The Defendant seeks the following: release of medical  
17 records specifically related to treatment for injuries sustained in the incident, release of medical records  
18 revealing pre-existing injuries which impact the victims' claims, and an order allowing the Defendant to  
19 interview hospital personnel connected to the incident without violating any privilege or privacy concerns.  
20 *See Reply* at 1-2.

21 There are two central issues present in the arguments submitted by the parties. Does  
22 Commonwealth law recognize a physician-patient evidentiary privilege, such that it prevents release of the  
23 information? Do Commonwealth and Federal privacy law prevent CHC, as custodian of the health  
24 records, from releasing the information? As a subsidiary question, can this Court protect Mr. Li's privacy  
25 interest by reviewing the records *in camera* and determining their relevance to the situation without  
26 disclosing inappropriate information?

27 There is only one Rule of Evidence dealing with testimonial privilege, which states:

28 Except as otherwise required by law or the rules of the Commonwealth Court, the

1 privilege of a witness, person, government or political subdivision thereof shall be governed  
2 by the principles of the common law as they may be interpreted by the courts of the United  
State and of the Commonwealth in the light of reason and experience.

3 Com. R. Evid. 501. Rule 501 is essentially identical to its counterpart federal rule. Consultation of federal  
4 rule counterpart interpretations can be highly persuasive. *Tudela v. Marianas Pub. Land Corp.*, 1 N.M.I.  
5 179, 184 (1990).

6 The question then becomes, does either the Federal Rules of Evidence or federal common law  
7 recognize a physician-patient privilege? The United State Supreme Court dealt with the issue in an ancillary  
8 manner in *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996). *Jaffee*  
9 concerned the recognition of the psychotherapist-patient privilege relying heavily on the Advisory  
10 Committee Report to FED. R. EVID. 501.

11 [The] question is whether a physician-patient privilege can or should be recognized  
12 as a matter of federal law after *Jaffee*. On the one hand, the Court distinguished the  
13 physician-patient relationship from the psychotherapist-patient relationship on the ground  
14 that confidential communications are more critical to the latter relationship than to the  
15 former. On the other hand, virtually every state has legislatively recognized a physician-  
16 patient privilege and this factor was important to the Court's recognition of the  
psychotherapist-patient privilege in *Jaffee*. But then again, the physician-patient privilege  
was not one of those recommended by the Advisory Committee, and the Court found this  
factor relevant in *Jaffee* as well. In the end, it seems unlikely that *Jaffee* can be used as  
a springboard to establish a federal physician-patient privilege, which has not yet been  
recognized by any Federal Court.

17 . . . .

18 A final question about the scope of *Jaffee* revolves around the fact that the Court  
19 adopted the psychotherapist-patient privilege in a civil case. In a criminal case, where a  
20 prosecution witness has made statements in therapy, the analysis might have to be different  
21 due to the criminal defendant's constitutional rights to confrontation and an effective  
22 defense. The Second Circuit, before *Jaffee*, adopted a psychotherapist privilege but held  
23 that the star prosecution witness' records of psychiatric commitment were nonetheless  
subject to disclosure and use by the criminal defendant in cross-examination. *In re Doe*,  
964 F.2d 1325 (2d Cir. 1992). That Court was clearly concerned that the privilege would  
unduly restrict the defendant's ability to cross-examine the witness. Thus, the *Jaffee*  
Court's promulgation of an absolute privilege must be tempered by constitutional  
considerations in criminal cases.

24 STEPHEN A. SALTZBURG ET AL., COMMENTARY TO FED. R. EVID. 501, *Psychotherapist-patient and*  
25 *related privileges* (2003). A balance between the need for the privilege and the defendant's need for the  
26 evidence will have to be made, especially when elements of the crime charged relate specifically to the type  
27 of injury alleged. Here, the Defendants are charged with Aggravated Assault and Battery, which requires  
28 "[a] person commits the offense of aggravated assault and battery if he or she **causes serious bodily**

1 **injury**, purposely, knowingly or recklessly.” 6 CMC § 1203(a) (emphasis added). The Defendants must  
2 have access to the medical information in order to properly prepare a defense in the situation. Information  
3 is the cornerstone to preparation, denial of which would be tantamount to ignoring constitutional process.  
4 “In [the American] adversary system for determining guilt or innocence, it is rarely justifiable for prosecution  
5 to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by clearest  
6 and most compelling considerations.” *Dennis v. United States*, 384 U.S. 855, 843, 86 S. Ct. 1840,  
7 1851, 16 L. Ed. 2d 973, 985 (1966).

8 The Commonwealth has not yet created a statutory grant of the physician-patient privilege. Without  
9 a clear common law justification for that testimonial privilege, the privilege should not be extended where  
10 the Defendants’ interests are potentially severely harmed. While the common law may eventually create  
11 a testimonial privilege, one cannot be employed here to prevent disclosure of relevant medical information.  
12 Common law justification as stated by the Commonwealth is focused on privacy law, rather than the  
13 existence of a privilege. The discussion therefore turns to the question of whether a privacy interest can  
14 sufficiently prevent disclosure of medical information material in a criminal case?

15 The CNMI Constitution guarantees a right to privacy for individuals in the Commonwealth. N.M.I.  
16 Const. art. I, § 10; *see also* 1 CMC § 9903. As evidence of this right and support for its proposition, the  
17 Commonwealth cites the 1976 analysis of the Commonwealth Constitution. That analysis states that any  
18 such right, while guaranteed, is not absolute and should be appropriately balanced against the public interest  
19 in protecting the health, safety and welfare of the community. ANALYSIS OF THE CONSTITUTION OF THE  
20 COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS (Dec. 6, 1976) at 24-26. To overcome the  
21 right of privacy, a compelling interest must be established. This Court has difficulty ascertaining a more  
22 compelling right than a defendant’s right to access to information in a criminal prosecution. Defendants in  
23 criminal prosecutions have a long-standing right to access of medical information. Com. R. Crim. P.  
24 16(a)(1)(D).<sup>1</sup> The purpose of this disclosure requirement is to ensure that the defendant has adequate

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26 <sup>1</sup> Rule 16 provided in pertinent part:

27 Upon request of the defendant the government shall permit the defendant to inspect and copy or  
28 photograph results or reports of physical or mental examinations, and of scientific tests or  
experiments, or copies thereof, which are within the possession, custody, or control of the

1 notice so that the defense may obtain its own expert or conduct its own tests to check the findings and  
2 conclusions of the Government's experts or to develop an effective strategy for cross-examination of  
3 government witnesses. Medical records information in this instance would not be solely limited to the  
4 immediate examination surrounding the incident. If there are pre-existing injuries, those too would be  
5 relevant.

6 The Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 300gg, *et seq.*,  
7 (hereafter "HIPAA") dictates certain guidelines concerning the release of personal medical health  
8 information. The HIPAA Privacy Rule gives individuals a fundamental new right to be informed of the  
9 privacy practices of their health plans and of most of their health care providers, as well as to be informed  
10 of their privacy rights with respect to their personal health information. As part of the HIPAA extension  
11 of federally protected privacy rights, the individual in question is to receive appropriate notice of such  
12 disclosure prior to that action. Defense counsel made several attempts to serve Mr. Li personally. Notice  
13 was also twice afforded to the Commonwealth through two separate hearings. The Privacy Rule generally  
14 permits covered entities to disclose protected health information in the course of any judicial or  
15 administrative proceeding in response to a court order, subpoena, or other lawful process. *See* 45 C.F.R.  
16 § 164.512(e) (2003). CHC, for the purposes of the HIPAA, is a covered entity. Any privacy interest  
17 must yield to an order of this Court.

18 While certainly a privacy interest exists in the Commonwealth, and that right is one that this Court  
19 affords the utmost regard, privacy interests must yield in criminal cases, as they do in civil cases when  
20 medical conditions are at issue, to the countervailing interest of defendant's need for information. That  
21 information is potentially exculpatory, or conversely inculpatory. From either determination would spring  
22 a defendant's theory on how to defend his or her case.

23 To properly protect Mr. Li's privacy interests, this Court orders that the relevant documents be  
24 turned over to this Court for *in camera* review. This Court will provide a determination as to its findings.  
25 Upon that determination, if the reviewed documents are relevant to this prosecution, the Defendants will

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28 government . . . which are material to the preparation of the defense . . .  
Com. R. Crim. P. 16(a)(1)(D).

1 have the opportunity to review the documents themselves.

2 As regarding the issue of the waiver of privilege, the Defendants are entitled to interview medical  
3 personnel relating to the specific incident in question. The Defendants are not entitled to interview any  
4 medical personnel regarding pre-existing injuries until this Court has made a determination that those  
5 documents are in fact relevant to this prosecution.

6 **IV. ORDER**

7 CHC, through counsel, Assistant Attorney General Deborah Knapp, is ordered to submit to the  
8 Court any documents relating to pre-existing injuries connected to, or relevant to, Mr. Zhong Li's injuries  
9 arising from the incident on or about January 21, 2002, within seven (7) days after receipt of this Order.  
10 Upon review of those documents, *in camera*, the Court will make a determination as to their relevancy and  
11 inform the parties as to those findings. The Defendants are entitled to interview medical personnel involved  
12 in the preparation of the report previously submitted to the Defendants. The Defendants at this stage are  
13 limited to interviewing medical personnel relating only to those documents. Once a determination is made  
14 the parties will be notified and may proceed accordingly.

15  
16 SO ORDERED this 9th day of October 2003.

17  
18 /s/ \_\_\_\_\_  
19 David A. Wiseman  
20 Associate Judge  
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