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SUPERIOR COURT

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BY *[Signature]*
CLERK OF COURT

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

COMMONWEALTH OF THE NORTHERN)
MARIANA ISLANDS)

Plaintiffs,)

vs.)

FERNANDO QUITANO,)

Defendant.)

CRIMINAL ACTION NO: 09-0216

**ORDER DENYING DEFENDANT'S
MOTION IN LIMINE RE: EXCLUSION
OF A WITNESS' TESTIMONY**

I. INTRODUCTION

In December 2009, Defendant Fernando Quitano was charged with, *inter alia*, armed robbery, assault and battery, and attempted 1st degree murder. This matter came before the Court on February 28, 2011 on Defendant's oral Motion to Exclude Witness Testimony (hereafter, "Motion"). Defendant, by and through his Counsel, Stephen Woodruff, moves for an order precluding the Government from offering any testimony by Steven M. Suzuki. The Government is represented by assistant attorney general Russell Lorfing. Based on the papers submitted to date and oral arguments of counsel, the Court DENIES Defendant's motion to exclude Steven Suzuki as a witness.

By order of the Court, DENIED. Judge David A. Wiseman

1 **II. FACTUAL SUMMARY**

2 On or about October 24, 2009, Fernando Quitano, Marlon Martin, and Steven Suzuki
3 allegedly robbed a pawn shop in Chalan Kanoa. On November 2, 2009, pursuant to a signed
4 arrest warrant by this Court, Steven M. Suzuki ("Suzuki") was arrested. Prior to his appearance
5 in court, Suzuki entered into an agreement with the Government (hereafter, "Stipulation").
6 Pursuant to the Stipulation, Suzuki would be released from custody on his own recognizance. In
7 exchange, Suzuki agreed to cooperate with law enforcement in on-going investigations,
8 including providing substantial assistance and accurate information to officials. Suzuki also
9 agreed that he would keep constant communication with law enforcement officials by making at
10 least two phone calls a day to his law enforcement contact person. Suzuki also agreed to appear
11 before this Court upon notice or summons. The Stipulation was signed by the lead prosecutor on
12 the case at the time, George Hasselback. The Stipulation and Order for Release of Suzuki were
13 both filed under seal.

14 Since the signing of the Stipulation, Suzuki's law enforcement contact person was
15 arrested on federal charges. Furthermore, the Attorney General's Office experienced continuous
16 turnover and constant shortage of staff in 2009 and 2010, including the resignation of George
17 Hasselback as the chief prosecutor. The case was with assistant attorney general Brian Gallagher
18 until recently, when he too left the criminal division to join the civil division. Assistant attorney
19 general Russell Lorfing has been the lead prosecutor on this case for only four weeks. At some
20 point, the Attorney General's Office lost track of utilizing Suzuki as the key cooperating source
21 in this case.

22 On February 22, 2011, assistant attorney generals Russell Lorfing and Tiberius Mocanu
23 met with co-defendant Marlon Martin. During their conversation, Mr. Martin overtly stated that
24 a man named Steve Suzuki was "the guilty party" and that he had heard rumors that Suzuki was
25 the one that had "ratted them out." This was the first notice of any kind to Mr. Lorfing of
26 Suzuki's involvement in the case. Mr. Lorfing immediately notified opposing counsel and met
27 with lead detective Jesse Stole regarding Suzuki's involvement. It was at this time that Mr.
28 Lorfing first became aware of a Stipulation entered into by Suzuki and the Government. Upon
29 confirmation, Mr. Lorfing disclosed this information to opposing counsel. Mr. Lorfing also
30 provided opposing counsel with Suzuki's prior criminal history and told opposing counsel that
31 he would make himself available if he had any questions or concerns regarding the witness.

1 The Court's pretrial order required the exchange of witness lists to occur by February 9,
2 2011. However, with only a few days left before the start of trial, the Government amended its
3 witness list to add four names, including Suzuki. Included in the amendment was a brief
4 summary of what Suzuki and the other witnesses would testify to. On February 28, 2011, the
5 first day of trial, Defendant made an oral objection to the introduction of testimony by Suzuki.
6 The Government filed its written response the same day. (Response to Defendant's Motion in
7 Limine Re: Exclusion of Witness Testimony and Suppression of Evidence, hereafter,
8 "Opposition"). No reply was filed. The Court heard counsel's argument on the matter on March
9 1, 2011.

11 III. STANDARDS

12 A defendant does not have a due process right to discover the government's witness list.
13 *Commonwealth of Northern Mariana Islands v. Adlaon*, 4 NMI 171, 176 (1994). Similarly, no
14 right is provided by our rules of criminal discovery. *See* NMI R. Crim. P. 16. However, the
15 court has the inherent power to order disclosure of witnesses to promote the efficient
16 administration of our criminal justice system. *Adlaon*, 4 NMI at 176.

18 IV. DISCUSSION

19 Defendant moves to exclude Suzuki's testimony on the basis that the Government failed
20 to timely disclose the witness as required by the Court's pretrial order and therefore violated
21 Defendant's right to due process.

22 **A. Timeliness**

23 Although it is true that in non-capital cases, a defendant has no right to a list of
24 prospective government witnesses, *see United States v. Dischner*, 974 F.2d 1502, 1522 (9th Cir.
25 1992) (*cert. denied*), in the instant case, the pretrial scheduling order required the Government to
26 produce a witness list before trial. The Court's pretrial order specifically states that "the parties
27 shall exchange witness lists no later than the date of the Com.R.Cr.P 17.1 conference [set for
28 February 9, 2011]." (Amended Pretrial Order at 3.) The order further states that "Except for

1 **good cause shown, the parties will be precluded from offering substantive evidence through**
2 **any person not so listed . . .” *Id.* (emphasis added).**

3 The Court finds that Suzuki’s testimony will be substantive evidence in the case. The
4 Government did not amend its witness list to add Suzuki until after February 9, 2011.

5 Accordingly, the Government’s disclosure is untimely and Suzuki may be stricken as a
6 witness except for good cause shown.

7
8 **B. Good Cause**

9 Although a court can strike a witness who is not properly disclosed, the decision is left to
10 the court’s discretion. *See United States v. Talbot*, 51 F.3d 183, 187-88 (9th Cir. 1995). Where
11 the Government offers a credible reason for its failure to identify a witness in its earlier
12 disclosures and has acted in good faith, it is not an abuse of discretion for a trial court to allow
13 the witness to testify. *See United States v. Aglia*, 198 Fed.Appx. 638 (9th Cir. 2006).

14 First, the Court is well aware that the Attorney General’s Office has, in the last year and a
15 half, suffered a great deal of turmoil due to staff and attorney turnover. However, the Court
16 considers losing track of a key cooperating source witness egregious misconduct on the part of
17 the Attorney General’s Office. This type of negligence and inability to keep the office organized
18 cannot be tolerated. Such misconduct will not go without adverse consequences in the future.

19 However, the Court understands that there are unique circumstances in this case. First,
20 although Suzuki was required to call his law enforcement contact person twice a day, this contact
21 person was subsequently arrested on federal charges and became unavailable. Second, the
22 prosecutor who negotiated and entered into the Stipulation with Suzuki, Mr. George Hasselback,
23 resigned from his position soon after filing the Stipulation under seal. Third, the current lead
24 prosecutor in this case, Mr. Russell Lorfing, had only been assigned to the case merely four
25 weeks before the trial date. Under the totality of these circumstances, the Court finds this to be a
26 rare situation justifying the Government’s failure to follow-up on Suzuki.

27 Furthermore, the Court finds that assistant attorney general Russell Lorfing has at all
28 times acted diligently and in good faith. Both Mr. Lorfing and Mr. Mocanu were only recently
29 appointed to this case. The Court believes that Mr. Lorfing did not become aware of Suzuki’s
30 involvement in the case until the week before the trial. Upon confirmation of the existence of a

1 Stipulation between the Government and Suzuki, Mr. Lorfin immediately notified Defendant's
2 counsel. Mr. Lorfin provided Defendant's counsel with Suzuki's prior criminal history and also
3 provided a brief summary as to what Suzuki would be testifying to. Mr. Lorfin also made every
4 effort to disclose any other information that he had with regard to Suzuki by making himself
5 available to Defendant's counsel for questions up until the date of trial.

6 The Court finds that the Government has acted in good faith and has presented a credible
7 reason for its failure to identify the witness earlier.
8

9 **C. Notice by Defendants**

10 Furthermore, after hearing oral argument by Defendant's counsel, the Court is convinced
11 that Defendant was not completely surprised by Suzuki's possible testimony. Defendant was
12 aware that Suzuki was one of the original defendants in the case and that the charges were
13 subsequently dropped. Defendant's counsel admitted that he knew of Suzuki and suspected that
14 Suzuki was the Government's cooperating source although he was not positive of this fact.

15 Thus, the Court finds that Defendant was on notice of Suzuki's possible testimony and
16 would not be unduly prejudiced by the Government's noncompliance with the Court's pretrial
17 order.
18

19 **D. Mitigation of Prejudice**

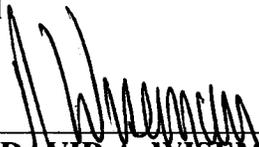
20 Generally, with regard to discovery a continuance will cure any prejudice that might
21 result due to the government's delay. *Adlaon*, 4 NMI at 175.

22 While it is possible to strike Suzuki as a witness, under these circumstances, the Court
23 finds that imposing a less severe sanction will be more appropriate. In order to mitigate any
24 possible prejudice to Defendant in this case, the Court will allow a continuance for a reasonable
25 time in order for Defendant's counsel to meet with Suzuki, if necessary, to further prepare his
26 defense.

V. CONCLUSION

Based on papers submitted to date and oral arguments of counsel, and upon consideration of relevant legal authority, the Court hereby DENIES Defendant's motion to exclude the witness testimony of Steven M. Suzuki.

SO ORDERED this 2nd day of March, 2011



DAVID A. WISEMAN
Associate Judge