

1 FOR PUBLICATION

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

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**COMMONWEALTH OF THE  
NORTHERN MARIANA ISLANDS,** )

**CRIMINAL CASE NO. 10-0216**

9

**Plaintiff,** )

10

**vs.** )

**ORDER DENYING DEFENDANT'S  
MOTION TO VACATE BENCH TRIAL  
AND SET STATUS CONFERENCE**

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**DUANSHENG HONG, a.k.a. Peter Hong,** )

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**Defendant.** )

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**I. INTRODUCTION**

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**THIS MATTER** came before the Court for a status conference on April 27, 2011, at 9:00 a.m. The Government appeared through Assistant Attorney General Peter Prestley. Defendant appeared with his counsel Joseph Camacho, Esq. Presently before the Court is Defendant's Motion to Vacate Bench Trial and Set Status Conference pursuant to Commonwealth Rule of Criminal Procedure 16(c).

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**II. FACTUAL BACKGROUND**

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On July 8, 2011, the Government obtained possession of a cell phone allegedly involved in the case and invited Defendant to inspect it. (Opp'n at 2.) At that time the Government also

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1 discovered photographs of text messages, which were allegedly sent by Defendant, that were in the  
2 Government’s possession but which it had failed to provide to Defendant. (*Id.*) Realizing the  
3 oversight, the Government immediately sent copies thereof to Defendant via email, and served them  
4 as formal discovery on July 11, 2011. (*Id.*) Said photographs comprised thirteen pages of new  
5 discovery material. (Reply at 2.)

6 On July 11, 2011, the Government also furnished Defendant with an additional four letters  
7 sent by Defendant to the FBI which had been in the Government’s file. (Opp’n at 3.) On July 20,  
8 2011, the Government received two BMV records, which it promptly served on Defendant. (*Id.*)  
9 Additionally, the Government subpoenaed cell phone records for four IT&E cell phones, but it is  
10 still waiting for those records. (*Id.*)

11 Defendant claims that he will not have sufficient time to review the new discovery and  
12 prepare a defense. The Government contends that Defendant will not be prejudiced by any new  
13 discovery because the Commonwealth will have the same amount of time as Defendant to inspect  
14 and review any records.

### 15 III. DISCUSSION

16 Commonwealth Rule of Criminal Procedure 16(a)(1)(A) provides that the government, if so  
17 requested, must disclose to the defendant “any relevant written or recorded statements made by the  
18 defendant, or copies thereof, within the possession, custody, or control of the government, the  
19 existence of which is known, or by the exercise of due diligence may become known, to the  
20 attorney for the government . . . .” NMI R. Crim. P. 16(a)(1)(A). The duty of disclosure created by  
21 Rule 16(a) continues throughout the trial, so that “[i]f, prior to or during trial, a party discovers  
22 additional evidence or material previously requested or ordered, which is subject to discovery or  
23 inspection under this rule, such party shall *promptly* notify the other party or his/her attorney or the  
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1 court of the existence of the additional evidence or material.” NMI R. Crim. P. 16(c) (emphasis  
2 added). The duty to “promptly notify” is satisfied where the prosecutor tells the defendant about the  
3 evidence or material as soon as the prosecutor becomes aware of it. *United States v. Ferrer-Cruz*,  
4 899 F.2d 135, 140 (1st Cir. 1990).<sup>1</sup>

5 It is undisputed that the newly discovered photographs and documents are covered by Rule  
6 16 and should have been disclosed to Defendant when the Government first became aware of them.  
7 The withholding of the photographs of the text messages, which the Government admitted was an  
8 “oversight,” failed to comply with the mandates of Rule 16.

9 The Defendant has not, however, shown that the delay in releasing this material caused him  
10 prejudice. In *Adlaon*, our Supreme Court held that “with regard to discovery a continuance will  
11 cure any prejudice that might result due to the government’s delay,” indicating that such a  
12 continuance was appropriate where the government’s tardy disclosure was inexcusable.  
13 *Commonwealth v. Adlaon*, 4 NMI 171, 173 (1994) (noting that the disclosure was made  
14 immediately before trial). However, such claims are without merit “where the disclosure of  
15 material evidence ‘[does] not come too late to deprive the defendant of a fair trial.’” *Id.* at 175.

16 Defendant alleges that new and additional discovery will be prejudicial, but has failed to  
17 indicate why he would be unable to fully assess the discovery and properly mount a defense.  
18 Ordinarily, a showing of prejudice can be made where “failure to produce the documents . . . has  
19 prevented the defendants from reviewing and analyzing the material, effectively preparing for cross-  
20 examination of the prosecution’s expert, or challenging the admissibility . . . .” *United States v.*

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22 <sup>1</sup> Because the Commonwealth Rules of Criminal Procedure are modeled after the Federal Rules of Criminal Procedure,  
23 federal cases interpreting the counterpart Federal Rules are helpful in interpreting the Commonwealth Rules of Criminal  
24 Procedure. *Commonwealth v. Ramangmau*, 4 N.M.I. 227, 233 (1995). However, Federal Rule of Criminal Procedure  
16 was amended in 2002; therefore, the formatting and wording of Fed. R. Crim. P. 16 is no longer identical to NMI R.  
Crim. P. 16.

1 *Norita*, 808 F. Supp. 2d 1056, 1066 (D. N. Mar. I. 2010). In fact, the Ninth Circuit has indicated  
2 that even four days is a sufficient time to examine new testimony and prepare to cross-examine a  
3 witness. *See e.g. United States v. Baxter*, 492 F.2d 150, 174 (9th Cir. 1973) (holding that  
4 defendants had sufficient time to examine, and evaluate the contents of a bag provided two weeks  
5 prior to the conclusion of the trial).

6 Nothing in the facts presented suggests that the Defendant has been prejudiced by the  
7 Government's tardy response. In fact, Defendant admits "the Government was kind enough to  
8 quickly make copies and provide the Defense with these new and additional discovery materials."  
9 (Mot. at 3.) Even though late, the Government has willingly and in good faith provided the  
10 additional materials. Indeed, Defendant was furnished with said discovery materials on July 11,  
11 2011, nearly thirty days before trial. The Court finds that such time is more than sufficient to  
12 review the discovery documents in question.

13 Furthermore, nothing in the plain meaning of Rule 16(c) precludes additional discovery on  
14 the eve of trial. Therefore, the Court holds that the Government's discovery request regarding  
15 subpoenaed cell phone records is also timely.

16 **IV. CONCLUSION**

17 In light of the foregoing, this Court does not find good cause why a continuance should be  
18 granted. Accordingly, Defendant's Motion to Vacate Bench Trial and Set Status Conference is  
19 hereby **DENIED**.

20 **IT IS SO ORDERED** this 8<sup>th</sup> day of August, 2011.

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22 **PERRY B. INOS**, Associate Judge  
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