

1 **FOR PUBLICATION**

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

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

11 **Plaintiff,** )

12 **v.** )

13 **CALISTRO A. CRISOSTOMO,** )

14 **Defendant.** )  
\_\_\_\_\_ )

**CRIMINAL CASE NO. 10-0114D**

**ORDER**

15 **I. INTRODUCTION**

16 **THIS MATTER** came before the Court for a pre-trial motion hearing on September 7, 2011,  
17 at 2:30 p.m. in Courtroom 217A. The Commonwealth appeared through Assistant Attorney General  
18 Tiberius Mocano, Esq. The Defendant appeared with his counsel, Anthony Long, Esq., who appeared  
19 telephonically.

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21 **II. FACTUAL BACKGROUND**

22 On July 07, 2010, a Department of Public Safety (“DPS”) detective interviewed a DPS  
23 confidential source (“CS”). The CS told the detective that Defendant was actively engaged in selling  
24 crystal methamphetamine. Further, the CS stated that Defendant had recently sold the CS crystal  
25 methamphetamine and offered to sell the CS up to five hundred dollars (\$500.00) of crystal  
26 methamphetamine. On July 09, 2010, the detective included this information, along with a declaration  
27 that the CS was reliable and had assisted in numerous investigations in the past, in a Declaration of  
28 Probable Cause (“Application”) to obtain an eavesdropping search warrant. On the same day, this Court  
issued an eavesdropping search warrant to record interactions between the CS and Defendant.

1 On July 10, 2010, DPS officers used eavesdropping equipment to record an interaction between  
2 Defendant and CS in Koblerville, Saipan. On July 29, 2010, the Commonwealth filed a First Amended  
3 Information (“Information”) charging Defendant as follows:

4 Count I: Trafficking of Controlled Substance. On or about July 10, 2010, on Saipan,  
5 Commonwealth of the Northern Mariana Islands, the defendants, Calistro A.  
6 Crisostomo and Juan R. Tydingco, unlawfully manufactured, delivered or possessed  
7 with intent to manufacture, deliver or dispense, a controlled substance, to wit: sold fifty  
8 (\$50.00) dollars worth of Crystal Methamphetamine, in violation of 6 CMC §  
9 2141(a)(1), punishable by 6 CMC §§ 2142(b)(1) and 2150(a)(4);

10 ...

11 Count III: Conspiracy to Commit Trafficking of a Controlled Substance. On or about  
12 July 10, 2010, on Saipan, Commonwealth of the Northern Mariana Islands, the  
13 defendants, Calistro A. Crisostomo and Juan R. Tydingco, with the intent to promote  
14 and facilitate the commission of the crime of Trafficking of Controlled Substance (6  
15 CMC § 2141(a)(1)), defendants did unlawfully agree with one or more other persons  
16 that one or more of them would engage in conduct and solicit the conduct which was  
17 calculated to become, if completed, the offense of Trafficking of Controlled Substance  
18 (6 CMC § 2141(a)(1)), and that one or more of them committed an overt act in  
19 pursuance of such conspiracy, in violation of 6 CMC § 303(a), punishable by 6 CMC  
20 §§ 304(b), 2141(b) and 4101.

21 On February 16, 2011, Defendant filed three pre-trial motions: (1) Defendant’s Motion to Dismiss the  
22 Conspiracy Count asserts that the Information fails to allege a specific overt act and therefore the  
23 conspiracy count must be dismissed; (2) Defendant’s Motion to Strike the Sentence Enhancement  
24 asserts that the Information alleges that the substance was “crystal methamphetamine” and not  
25 “methamphetamine hydrochloride” as specified by the statute; finally, in (3) Defendant’s Motion to  
26 Suppress Evidence argues that wiretapping was improperly the first meaningful step in the investigation  
27 and the eavesdropping warrant was not supported by probable cause.

### 28 **III. ANALYSIS**

#### **A. Motion to Dismiss Conspiracy Count**

Count III of the Information charges Defendant with conspiracy to commit trafficking of a  
controlled substance. A person commits the offense of conspiracy when he (1) agrees to commit a crime  
with another person, (2) does so with the purpose of agreeing, and (3) an overt act is committed with  
the purpose of bringing about the target crime. *See* 6 CMC § 303(a). Defendant argues that Count III

1 of the Information, charging him with conspiracy, is invalid because it failed to allege the commission  
2 of an overt act as required by 6 CMC § 303(a).

3 Under the Sixth Amendment, a criminal defendant has “the fundamental right to be informed  
4 of the nature and cause of the charges made against him so as to permit adequate preparation of a  
5 defense.” *Gault v. Lewis*, 489 F.3d 993, 1002 (9th Cir. 2007); *see also* U.S. Const. amend. VI (“In all  
6 criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the  
7 accusation.”). “[T]he charging document . . . must in some appreciable way apprise the defendant of  
8 the charges against him so that he may prepare a defense accordingly.” *Gault*, 489 F.3d at 1004.

9 Pursuant to the Commonwealth Rules of Criminal Procedure, the requirements for an  
10 information are as follows:

11 The information shall be a plain, concise and definite written statement  
12 of essential facts constituting of the offense charged. It shall be signed  
13 by the attorney for the government. It need not contain a formal  
14 commencement, a formal conclusion, or any other matter not necessary  
15 to such statement. Allegations in one count may be incorporated by  
16 reference into another count. It may be alleged in a single count the  
17 means by which the defendant committed the offense are unknown or  
18 that he committed it by one or more specified means. The information  
19 shall state for each count the citation of the statute, rule, regulation or  
20 other provision of law which the defendant is alleged to have violated.

21 NMI R. Crim P. 7(c)(1). Thus, the purpose of an information is to apprise the defendant of the specific  
22 crime charged so that he may prepare his defense.

23 In Count I of the Information Defendant was specifically charged with trafficking of a controlled  
24 substance. Plainly, the overt act<sup>1</sup> in furtherance of the alleged conspiracy in Count III is the allegation  
25 in Count I that Defendant sold \$50.00 worth of Crystal Methamphetamine to the CS. Count III twice  
26 referenced 6 CMC § 2141(a)(1) in Count I giving further notice to Defendant of the overt act.  
27 Specifically, Count I contains (1) the language of the statutes Defendant allegedly violated, (2) the date  
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<sup>1</sup>“An overt act which completes the crime of conspiracy to violate federal law is something apart from  
conspiracy and is an act to effect the object of the conspiracy, and need be neither a criminal act, nor crime that is object  
of conspiracy, but must accompany or follow agreement and must be done in furtherance of object of agreement”  
Black’s Law Dictionary 1105 (6th ed. 1990).

1 he allegedly engaged in the criminal behavior, (3) the name of his co-conspirator, as well as (4) the type  
2 and amount of controlled substance that was trafficked.

3 The Information<sup>2</sup> did charge Defendant with an overt act which makes it clear that the  
4 Commonwealth intends to prove that the conspiracy was in process of being carried out. Accordingly,  
5 Defendant's Motion to Dismiss the Conspiracy Count is **DENIED**.

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7 **B. Motion to Strike Sentence Enhancement**

8 Under 6 CMC § 2141(b)(1), the mandatory term of imprisonment for possession of drugs with  
9 intent to distribute in violation of § 2141(a) increases if the drug is a substance classified in Schedule  
10 I or II which is a narcotic drug or methamphetamine hydrochloride.

11 Defendant makes two arguments as to why the sentence enhancement must be stricken: (1) the  
12 Information charges Defendant with trafficking of "crystal methamphetamine" and not  
13 "methamphetamine hydrochloride;" and (2) in order for the sentence enhancement statute to apply, the  
14 substance must be 100% pure. Defendant's arguments lack merit.

15 The Information charges Defendant with trafficking of a drug that is listed as a controlled  
16 substance, crystal methamphetamine. Title 6 Section 2116(c)(2) provides: "Any substance which  
17 contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers" is  
18 considered a Schedule II controlled substance. 6 CMC § 2116(c)(2). The statute is clear that a drug  
19 which contains any amount of methamphetamine is considered a Schedule II controlled substance.

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27 <sup>2</sup>While the Court finds in this case that the Information sufficiently meets the requirement under the Sixth  
28 Amendment notifying the Defendant of the charges against him so that he can properly mount a defense, the better  
pleading practice involving attempt or conspiracy charges is to clearly state the overt act in the respective count.

1 “Methamphetamine hydrochloride” is commonly known as “crystal methamphetamine.”<sup>3</sup> Thus,  
2 there is no meaningful difference between “methamphetamine hydrochloride” and “crystal  
3 methamphetamine” because both of these terms refer to the same drug for the purposes of charging and  
4 sentencing the Defendant.

5 Next, Defendant argues that only 100% pure methamphetamine hydrochloride triggers the  
6 sentence enhancement because the statute states “methamphetamine hydrochloride” and not “substance  
7 containing methamphetamine hydrochloride.” This “purity” argument has been rejected in numerous  
8 courts and Defendant has failed to cite any compelling authority for support. *See United States v. Blake*,  
9 116 F.3d 1202, 1202-1203 (7th Cir. 1997) (noting that “[f]our courts of appeals have rejected this  
10 contention, whether made directly or rephrased as a contention that the statute is ambiguous enough to  
11 activate the Rule of Lenity.”). Under Defendant’s reading of the statute, a crystal methamphetamine  
12 dealer could avoid the sentence enhancement by dropping one particle of contaminant into an otherwise  
13 pure drug. “Given the ability of gas chromatography to detect even the smallest impurities in a sample,  
14 we doubt that any substance will test as ‘pure’; there are bound to be a few stray atoms.” *Blake*, 116  
15 F.3d at 1203. Therefore, as a practical matter, the term “methamphetamine hydrochloride” refers to the  
16 controlled substance, itself, whether or not it is contained in a mixture or substance. For these reasons,  
17 Defendant’s Motion to Strike the Sentence Enhancement is **DENIED**.

### 18 19 **C. Motion to Suppress Evidence**

20 Finally, Defendant asserts several grounds for suppression of the eavesdropping warrant and all  
21 evidence derived as a result of the warrant. Defendant contends that the warrant is invalid because: (1)

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23 <sup>3</sup>During the process of making the drug, “crystals” are extracted from liquid methamphetamine by bubbling  
24 “hydrochloride” gas through the liquid. *See e.g., State v. Hepton*, 54 P.3d 233, 239 (Wash. Ct. App. 2002) (describing  
25 part of the process of making the drug as “extracting crystals from the liquid methamphetamine mixture by bubbling  
26 hydrochloride gas through the liquid.”); *United States v. Blake*, 116 F.3d 1202, 1203 (7th Cir. 1997)  
27 (“Methamphetamine is an amine derivative of amphetamine, C<sub>10</sub>H<sub>15</sub>N, in the form of its crystalline hydrochloride”);  
28 United States Department of Justice, National Drug Intelligence Center, *Information Bulletin: Crystal  
Methamphetamine*, at 1 (Aug. 2002) (describing the process of making the drug); available at  
<http://www.justice.gov/ndic/pubs1/1837/1837p.pdf>.

1 the application made in support of the warrant omitted material information concerning the veracity of  
2 the alleged informant; (2) the warrant served to initiate the investigation of criminal activity; and (3)  
3 there is no showing that the information sought by the eavesdropping warrant could not be obtained by  
4 any other means. (Mot. to Suppress at 3, 6.)

5 **1. The application for the eavesdropping warrant set forth sufficient facts establishing the**  
6 **existence of probable cause.**

7 The U.S. Constitution and the CNMI Constitution protect people from unreasonable searches  
8 and seizures. U.S. Const. amend. IV; NMI Const. art. I, § 3.

9 (a) No warrants shall issue except upon probable cause supported by  
10 oath or affirmation and particularly describing the place to be searched  
11 and the persons or things to be seized.

12 (b) No wiretapping, electronic eavesdropping or other comparable  
13 means of surveillance shall be used except pursuant to a warrant.

14 NMI Const. art. I, § 3 (1994).

15 The application for a warrant must set forth facts tending to establish the existence of probable  
16 cause. *Commonwealth v. Bowie*, 3 NMI 462, 467 (1993). Further, to secure an eavesdropping warrant,  
17 the application must establish “substantial evidence that a person whose conversations are about to be  
18 intercepted is committing, has committed or is about to commit a crime and that communications  
19 concerning the crime will be obtained through the wiretapping or electronic eavesdropping.” Analysis  
20 of the Constitution of the Commonwealth of the Northern Mariana Islands (December 6, 1976) at 9.

21 In determining whether a warrant was supported by probable cause, the Court looks to the  
22 totality of the circumstance. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The issuing judge

23 is simply to make a practical, commonsense decision whether, given all  
24 the circumstances set forth in the affidavit before him, including the  
25 “veracity” and “basis of knowledge” of persons supplying hearsay  
26 information, there is a fair probability that contraband or evidence of a  
27 crime will be found in a particular place.

28 *Id.* The issuing judge’s decision will be upheld where there is a substantial basis for finding probable  
cause. *Id.* at 238-239.

Defendant contends the eavesdropping warrant is invalid because the warrant application omitted  
material information concerning the CS’s criminal history, without which, the issuing judge could not

1 make an informed determination regarding probable cause. In support of this contention, Defendant  
2 relies on *U.S. v. Reeves*, 210 F.2d 1041 (9th Cir. 2000). The *Reeves* court held that “[a]ny crime  
3 involving dishonesty necessarily has an adverse effect on an informant’s credibility.” *Id.* at 1045.  
4 Moreover, where there is an “absence of countervailing evidence to bolster the informant’s credibility  
5 of the tip, and informant’s criminal past involving dishonesty is fatal to the reliability of the informant’s  
6 information, and his testimony cannot support probable cause.” *Id.*

7 The application sufficiently showed probable cause to issue the eavesdropping warrant. Hearsay  
8 may be used to support an application for a warrant (NMI R. Crim. P. 4(b)); however, the issuing judge  
9 must consider the “veracity” and “basis of knowledge” of the person supplying the information. *Gates*,  
10 462 U.S. at 238.

11 In this case, the circumstances of when and how the information was received by DPS officers  
12 was explained in the application to the issuing judge. The application explained:

13 1. On July 07, 2010, at approximately 1:30 p.m., Your Affiant interviewed a Department of Public Safety (DPS) Cooperating Source  
14 [hereinafter referred to as CS], on Saipan (CNMI). The CS informed your Affiant about a local male known to CS as “Calistro Cristostimo aka  
15 “Cal” (hereinafter referred to as Cal) that, he is actively selling Crystal Methamphetamine commonly known as ICE. CS stated that “Cal”  
16 offered to sell Crystal Methamphetamine/ICE to CS anytime CS wants to buy.

17 2. The CS stated that “Cal” had offered to sell CS up to five hundred  
18 dollars (\$500.00) worth of Crystal Methamphetamine/ICE, and that if CS  
19 was interested to just contact “Cal” on his cellular phone number (670-  
20 [xxx-xxxx]), or CS can go to his residence located in Kobler Ville  
(Saipan, CNMI) to purchase the Crystal Methamphetamine/ICE.

21 3. Further, CS stated that, CS had purchased Crystal  
22 Methamphetamine/ICE from “Cal” a week ago. CS also states that when  
23 CS is going to purchase Crystal Methamphetamine/ICE from “Cal”, CS  
would just call “Cal” on his cellular phone to verify if his [sic] at his  
residence in Kobler Ville (Saipan, CNMI) and that’s when “Cal” would  
set up the drug transaction.

24 4. This CS is reliable and has given reliable information in the past and  
25 has assisted Law Enforcement in other drug investigations that resulted  
in numerous arrest and conviction of other drug offenders.

26 (Application at 1-2.) It is clear that the CS told the detective that Defendant had been trafficking crystal  
27 methamphetamine to the CS in the past and had done so more recently within the prior week. In  
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1 addition, the CS provided the detective with Defendant’s phone number and location where the  
2 transactions occurred.

3 The application contained statements showing that the CS’s was reliable. The reliability of an  
4 informant may be established through independent police corroboration. *See Gates*, 462 U.S. at 284;  
5 *Chung v. City of L.A.*, 406 Fed. Appx. 207, 209 (9th Cir. 2010); *United States v. Jackson*, 470 F.3d 299,  
6 307 (6th Cir. 2006). Here, the application includes a statement by the detective that the CS “has given  
7 reliable information in the past and has assisted Law Enforcement in other drug investigations that  
8 resulted in numerous arrest and conviction of other drug offenders.” This is sufficient to provide  
9 countervailing evidence to bolster the CS’s credibility even if the CS’s criminal history provided  
10 evidence of dishonesty.

11 Viewing the totality of the circumstances, the Court concludes that there was a substantial basis  
12 for finding probable cause to issue the eavesdropping warrant.

13 **2. The eavesdropping warrant did not serve to initiate the investigation of criminal activity.**

14 Defendant contends the eavesdropping warrant is invalid because it was used to initiate a  
15 criminal investigation. Here, the criminal investigation began with an interview of the CS who told a  
16 detective of Defendant’s past drug transactions. Thereafter, DPS officers put into place a controlled  
17 buy operation where the CS would carry out a drug transaction with Defendant. The electronic  
18 eavesdropping was used as a means to record this transaction and provide evidence of the illegal  
19 transaction. Thus, the eavesdropping warrant was not the initial criminal investigation method used in  
20 this case.

21 **3. CNMI law does not require a showing of necessity to obtain an eavesdropping warrant.**

22 Finally, Defendant argues the warrant is invalid because the Commonwealth failed to make a  
23 showing regarding the necessity for an eavesdropping warrant. To support this contention Defendant  
24 points to federal law. Under 18 U.S.C. § 2518(3)(c), a judge may authorize a wiretap if the application  
25 demonstrates that “normal investigative procedures have been tried and have failed or reasonably appear  
26 to be unlikely to succeed if tried or to be too dangerous.” This “necessity requirement” is intended to  
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1 ensure that wiretapping is not resorted to in situations where traditional investigative techniques would  
2 suffice to expose the crime. *United States v. Kahn*, 415 U.S. 143, 153 n.12 (1974).

3       Regardless of this federal law, Defendant has not shown a similar provision in the CNMI statute  
4 with respect to electronic eavesdropping. As stated above, the warrant application set forth sufficient  
5 facts establishing the existence of probable cause. Accordingly, Defendant's Motion to Suppress  
6 Evidence is **DENIED**.

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**IV. CONCLUSION**

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Based on the foregoing, the Court rules as follows:

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(1) Defendant's Motion to Dismiss the Conspiracy Count is **DENIED**;

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(2) Defendant's Motion to Strike the Sentence Enhancement is **DENIED**; and

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(3) Defendant's Motion to Suppress Evidence is **DENIED**.

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**SO ORDERED** this 21<sup>st</sup> day of October, 2011.

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/s/  
PERRY B. INOS, Associate Judge

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