

1 **FOR PUBLICATION**

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

10 **COMMONWEALTH OF THE** ) **CRIMINAL CASE NO. 12-0111D**  
11 **NORTHERN MARIANA ISLANDS,** )  
12 **Plaintiff,** )  
13 **v.** ) **ORDER ON REMAND**  
14 ) **FROM SUPREME COURT**  
15 **FRANCISCO Q. GUERRERO,** )  
16 **Defendant.** )  
17 \_\_\_\_\_ )

18  
19 **INTRODUCTION**

20 **THIS MATTER** came before the Court on February 12, 2014 at 9:00 a.m. for a hearing in  
21 response to the Commonwealth Supreme Court’s limited remand to the Superior Court. Assistant  
22 Attorney General Margo Badawy appeared for the government, and Brian Sers Nicholas, Esq., appeared  
23 for the Defendant.

24 **BACKGROUND**

25 On June 26, 2013, Defendant filed a Motion to Compel Discovery of any reports or statements  
26 from the victim or any potential witnesses. On July 1, 2013, the Commonwealth provided Defendant  
27 with a 1-page report prepared by the Attorney General Investigative Unit, dated June 24, 2013 (“Second  
28 Report”). The Second Report contained notes from interviews with two potential witnesses who did

1 not testify at trial, specifically Defendant’s siblings who contacted the victim and her mother in attempts  
2 to resolve the case outside of court in efforts to save the family from the stress and publicity of a trial  
3 and to save Defendant from the punishment he ultimately faced. Further, on July 3, 2013, the  
4 Commonwealth provided Defendant with additional information and one page of notes from a 2012  
5 interview. The notes disclosed to Defendant were not introduced at trial.

6 On November 19, 2013, Defendant was sentenced to six years imprisonment without the  
7 possibility of parole. On November 21, 2013, Defendant, by and through his counsel, Mr. Sers Nicholas,  
8 filed a Motion for Stay Pending Appeal, citing discovery issues before trial. Defendant claimed that the  
9 Commonwealth withheld discovery of a report made by the Attorney General Investigative Unit (“AGIU  
10 Report”), which Defendant claims contained statements from the victim’s mother that were material and  
11 exculpatory, and thus discoverable under *Brady* and its progeny. On November 29, 2013, this Court  
12 denied his Motion for Stay, further denying his motion to compel discovery, and declining to review the  
13 disputed evidence *in camera* because “the Government had assured the Court that all exculpatory  
14 material had been produced.” (Order Denying Defendant’s Motion for Stay, at 3.)

15 Defendant then filed an emergency motion with the Commonwealth Supreme Court seeking a  
16 stay of his sentence pending appeal. On December 17, 2013, the Supreme Court issued an order denying  
17 Defendant’s motion to stay his sentence pending an appeal regarding discovery issues at trial. *CNMI*  
18 *v. Guerrero*, 2013 MP 16, ¶ 13. In its order, the Supreme Court held that it could not issue a new trial  
19 based upon the alleged *Brady* violation because: (1) the Court did not know whether the alleged AGIU  
20 Report contained any *Brady* material; (2) Defendant received discovery documents created shortly after  
21 his arrest containing the victim’s statements, making the AGIU Report and other material moot; and (3)  
22 the Superior Court may remedy the government’s oversight by conducting an *in camera* review of the  
23 AGIU Report prepared at or around the time of Defendant’s arrest. *Id.* at ¶ 9. As a result, the  
24 Supreme Court remanded the present case to this Court for further proceedings to determine: (1) if an  
25 AGIU Report regarding Defendant’s sexual abuse charges exists; and (2) if that report exists, if it  
26 contains *Brady* material different from discovery already provided to Defendant.

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28 Following the Supreme Court’s order, a hearing was held in front of Judge Camacho of the

1 Superior Court, where Defendant claimed the Court had no jurisdiction and that the Supreme Court was  
2 mistaken in remanding the case to the Superior Court. Judge Camacho granted the request of defense  
3 counsel, with no objection from the Commonwealth, to delay this matter until the Supreme Court heard  
4 Defendant’s Motion for Reconsideration. This Court subsequently vacated the status conference  
5 previously set, finding no reason to delay the hearing, and held the present hearing on February 12, 2014.

6 At such hearing, the government submitted to defense counsel and the Court an AGIU Report  
7 dated March 14, 2013 (“Second Report”). Defense counsel argued to the court that this was not the  
8 report sought by the defense and referenced as the grounds for Defendant’s motion, while the  
9 government argued that the report regarded the same subject matter as the June 24, 2013 AGIU Report  
10 (“First Report”). The Court then ordered the parties to submit statement summarizing and reconciling  
11 discrepancies in the disputed discovery items before the Court for review. As a result, Ms. Badawy and  
12 Mr. Sers Nicholas submitted statements doing so on February 12<sup>th</sup> and 13<sup>th</sup>, 2014, respectively. Defense  
13 counsel argued and the Commonwealth admitted that the subject matter of the reports were essentially  
14 the same and could be construed as evidence of Defendant’s guilt, and are therefore discoverable under  
15 *Brady*.

16 Having reviewed the statements of the parties and the evidence submitted, the Court finds the  
17 following pursuant to the Supreme Court’s limited remand.

### 18 LEGAL STANDARD

19 Under *Brady*, the government violates a defendant’s right to due process if it withholds evidence  
20 that is: (1) favorable to the defense, and (2) material to the defendant’s guilt or punishment. *Brady v.*  
21 *Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L. Ed. 2d 215 (1963).

22 First, evidence is considered favorable to the defense if it is exculpatory or impeaching. *Bell v.*  
23 *Bell*, 512 F.3d 223, 232 (6th Cir. 2008) (citing *United States v. Bagley*, 473 U.S. 667, 676-77, 105 S.Ct.  
24 3375, 87 L. Ed. 2d 481 (1985)). When the “reliability of a given witness may well be determinative of  
25 guilt or innocence,” nondisclosure of evidence affecting credibility falls within *Brady*. *Giglio v. United*  
26 *States*, 405 U.S. 150, 154 (1972) (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

27 Second, the Supreme Court has explained that “evidence is ‘material’ within the meaning of  
28 *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the

1 proceeding would have been different.” *Smith v. Cain*, 132 S.Ct. 627, 181 L. Ed. 2d 571 (2012) (citing  
2 *Cone v. Bell*, 556 U.S. 449, 469-0, 129 S.Ct. 1769, 173 L. Ed. 2d 701 (2009)). Further, a “reasonable  
3 probability” does not mean that the defendant “would more likely than not have received a different  
4 verdict with the evidence,” only that the likelihood of a different result is great enough to “undermine[]  
5 confidence in the outcome of the trial.” *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.  
6 Ed. 2d 490 (1995).

7 Finally, in order to establish a *Brady* violation, the defendant must show: “(1) that the evidence  
8 in question [is] favorable [to the defense]; (2) that the state suppressed the relevant evidence, either  
9 purposefully or inadvertently; and (3) that the state’s actions resulted in prejudice.” *Bell*, 512 F.3d at  
10 231 (citing *Strickler*, 527 U.S. at 281-82).

## 11 DISCUSSION

### 12 **I. Favorable to the Defense**

13 The Court’s primary consideration in the present case is whether the AGIU Report produced at  
14 the February 12, 2014 hearing contained evidence that is favorable to the defense, as this is a threshold  
15 determination of whether a *Brady* violation has occurred.

16 First, after conducting an *in camera* review of the evidence submitted, the Court cannot find any  
17 evidence contained within both the First and Second Reports that could be considered favorable to the  
18 defense. While defense counsel and the Commonwealth are correct insofar as the subject matter of the  
19 reports goes toward Defendant’s guilt, it does not, however, include exculpatory information that would  
20 undermine confidence in the ultimate verdict. The subject matter of the Reports at issue rather involves  
21 inculpatory information the defense would not be able to use at trial to shed light on Defendant’s  
22 innocence.

23 Second, although defense counsel fails to argue that the subject matter of the Reports could be  
24 used as impeachment evidence for the witnesses who testified at trial, the Court finds that the First and  
25 Second Reports do not contain conflicting and inconsistent statements by any of the witnesses who  
26 testified at trial, such that they could be used to shed light on questions of testimonial credibility.  
27 Further, the subject matter of the reports was not mentioned at trial in any testimony by the victim, her  
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1 mother, or the persons interviewed in the reports, so Defendant could not have used the information  
2 contained within the Reports to impeach the credibility of any witness that testified at trial.

3 Accordingly, the Court finds that the Reports at issue are not favorable to the defense and thus  
4 are not automatically discoverable under *Brady*.

## 5 **II. Material Evidence**

6 Next, in the event that the subject matter contained in the Reports could be used by the defense  
7 at trial as exculpatory or impeachment evidence, the Court evaluates whether that evidence would be  
8 considered material under the standard set forth above.

9 As the Supreme Court noted in its opinion, considering the conviction is based solely on bench  
10 counts and this Court relied almost exclusively on the victim's testimony at trial for its verdict, the Court  
11 reexamines its guilty finding in light of the evidence presented within the Reports. Accordingly, the  
12 Court finds that there is no reasonable probability that the result would have been different had the First  
13 Report been disclosed to Defendant before trial.

14 The mere possibility of a different verdict is insufficient to establish a *Brady* violation. *See*  
15 *Strickler v. Greene*, 527 U.S. 263, 291, 119 S.Ct. 1936, 144 L. Ed. 2d 286 (1999); *see also United*  
16 *States v. Agurs*, 427 U.S. 97, 109-110, 96 S.Ct. 2392, 49 L. Ed. 2d 342 (1976) (“The mere possibility  
17 that an item of undisclosed information might have helped the defense, or might have affected the  
18 outcome of the trial, does not establish ‘materiality’ in the constitutional sense.”). As discussed above,  
19 the First Report did not contain any exculpatory information and Defendant could not have used it at  
20 trial to shed light on his innocence. Further, courts have held that a new trial is not automatically  
21 required whenever “a combing of the prosecutors’ files after the trial has disclosed evidence possibly  
22 useful to the defense but not likely to have changed the verdict. . . .” *United States v. Keogh*, 391 F.2d  
23 138, 148 (C.A. 2 1968). Here, Defendant does not claim how the evidence would be useful to his  
24 defense or even how it would have, with reasonable probability, changed the disposition of the case.  
25 Defendant merely attempts to use this discovery issue to prolong the appeal process and stay the  
26 sentence of his convictions, without any showing of the effect it would have on his handling of the case.

27 Accordingly, the evidence contained within the Reports could not be held to undermine the  
28 Court's confidence in its guilty finding based on the bench counts, and thus is not *Brady* material.

1 **III. Resulting Prejudice**

2 Lastly, the Court considers whether Defendant has been prejudiced by the Commonwealth's  
3 inadvertent nondisclosure of the evidence is question.

4 When evaluating prejudice, courts have held that a *Brady* violation does not occur "if the  
5 defendant knew or should have known the essential facts permitting him to take advantage of the  
6 information in question, or if the information was available to him from another source." *Carter v. Bell*,  
7 218 F.3d 581, 601 (6th Cir. 2000) (citing *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998) and *United*  
8 *States v. Clark*, 928 F.2d 733, 738 (6th Cir. 1991)). Here, the Commonwealth produced the Second  
9 Report before trial, which contained substantially the same information as the First Report, albeit in  
10 slightly less detail. No prejudice could have resulted where Defendant acquired the same information  
11 before trial via discovery which produced the Second Report.

12 Thus, Defendant has suffered no prejudice rising to level of a violation of his constitutionally  
13 guaranteed due process rights, and thus cannot establish a *Brady* violation under the *Bell* standard.

14 **CONCLUSION**

15 In conclusion, the Court finds that: (1) the Reports at issue are not *Brady* material because they  
16 do not contain evidence favorable to the defense and would not have any material effect on the verdict  
17 of the bench counts; and (2) no prejudice resulted from the Commonwealth's nondisclosure of the First  
18 Report where the Second Report containing substantially the same information was produced ahead of  
19 trial.

20  
21 **SO ORDERED** this 24<sup>th</sup> day of February 2014.

22  
23 /s/ \_\_\_\_\_

24 David A. Wiseman, Associate Judge

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