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BY:   
DEPUTY CLERK OF COURT

1 **FOR PUBLICATION**

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3 **IN THE SUPERIOR COURT**  
4 **FOR THE**  
5 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

5 **COMMONWEALTH OF THE**  
6 **NORTHERN MARIANA ISLANDS,**

6 **Plaintiff,**

7 **v.**

8 **MELCHOR MENDIOLA,**  
9 **STACEY ATALIG,**  
10 **TINA ATALIG,**  
11 **ALFRED APATANG,**  
12 **BERNARD APATANG,**

12 **Defendants.**

) **CRIMINAL CASE NO. 15-0077**

) **ORDER DENYING**

) **COMMONWEALTH'S MOTION TO**

) **AMEND INFORMATION DUE TO AN**

) **"ADDITIONAL OR DIFFERENT"**

) **CHARGE AND PREJUDICE TO THE**

) **DEFENDANTS**

13 **I. INTRODUCTION**

14 This matter came before the Court on January 6, 2016 in Courtroom 220A on the  
15 Commonwealth's Motion for Leave to Amend Information. The Commonwealth was represented  
16 by Assistant Attorney General Matthew Baisley and Assistant Attorney General Shannon Foley.  
17 Defendant Melchor Mendiola appeared telephonically via the Rota Courthouse. His counsel,  
18 Joaquin DLG Torres, Esq., appeared. Defendant Alfred M. Apatang, Jr. appeared telephonically via  
19 the Rota Courthouse. His court-appointed counsel, Thomas E. Clifford, Esq., appeared. Defendant  
20 Stacey Ann M. Atalig appeared in the Saipan Courthouse. Her counsel, Assistant Public Defender  
21 Tillman Clark, appeared. Defendant Tina M. Atalig appeared telephonically via the Rota  
22 Courthouse. Her court-appointed counsel, Matthew Gregory, Esq., appeared telephonically.  
23 Defendant Bernard Apatang appeared telephonically via the Rota Courthouse. Benjamin  
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1 Petersburg, Esq., appeared on the behalf of Defendant Bernard Apatang's court-appointed counsel,  
2 Bruce Berline, Esq.

3 The Commonwealth filed its Motion for Leave to Amend Information, attaching a proposed  
4 Second Amended Information ("proposed SAI") on December 14, 2015. Defendant Stacey Atalig  
5 filed her opposition on December 28, 2015. Defendants Alfred Apatang, Melchor Mendiola and  
6 Bernard Apatang joined Defendant Stacey Atalig's written opposition. Defendant Tina Atalig orally  
7 joined Defendant Stacey Atalig's opposition at the January 6, 2015 hearing. The Commonwealth  
8 did not file a reply.

9 The jury trial in this case is currently set for January 25, 2016<sup>1</sup> in the Rota Courthouse.<sup>2</sup> The  
10 Court has blocked out two weeks on its calendar to accommodate the trial.

11 Based on a review of the filings, oral arguments, and applicable law, the Court **DENIES** the  
12 Commonwealth's Motion for Leave to Amend Information.

## 13 II. BACKGROUND

14 The Declaration of Probable Cause in this case was signed by the Honorable Judge  
15 Wiseman on April 7, 2015, and filed with the Court on April 9, 2015. In the Declaration of  
16 Probable Cause, affiant, OPA-Taskforce Officer JB K. Cepeda, alleged facts related to Theft in  
17 violation of 6 CMC § 1601, Theft by Unlawful Taking of Disposition in violation of 6 CMC §  
18 1602, Possession or Removal of Government Property by Conspiracy in violation of 6 CMC § 303,<sup>3</sup>  
19 and Misconduct in Public Office in violation of 6 CMC § 3202. Decl. of Prob. Cause at 5.

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21 <sup>1</sup> On May 6, 2015, the Court set this matter for a jury trial. The jury trial was initially set for November 2, 2015. Order  
22 Setting Jury Trial at 1. The parties later stipulated to move the jury trial to January 25, 2016.

23 <sup>2</sup> Although the jury trial is scheduled on the Island of Rota, the Judge, court staff, marshals, prosecutors, and defense  
24 attorneys are all located on the Island of Saipan. Of the five co-defendants, four are located on Rota, while one is on  
Saipan. Preparations for this trial have been under way for quite some time, since the Court and parties will have to  
travel by plane to Rota for the trial. As this is a jury trial, marshals and probation officers have already made several  
trips to Rota to serve jury summons.

<sup>3</sup> Possession or Removal of Government Property is under 6 CMC § 3401, while Conspiracy is under 6 CMC § 303.

1 Defendant Melchor Mendiola is the former Mayor of Rota. The complaining witness is  
2 Efraim Atalig, the current Mayor of Rota. Decl. of Prob. Cause at 1. The other four co-defendants  
3 were Rota government employees under Melchor Mendiola.

4 The Commonwealth filed the information in this case on April 27, 2015 as to Defendant  
5 Alfred Apatang, Defendant Bernard Apatang, Defendant Stacey Ann M. Atalig, and Defendant  
6 Tina M. Atalig. This Information charged the Defendants with Theft under 6 CMC § 1601(a). The  
7 Information did not charge any of the Defendants with Possession of Removal of Government  
8 Property under 6 CMC § 3401, nor with any of the other offenses outlined in Officer Cepeda's  
9 Declaration of Probable Cause.

10 On April 29, 2015, the Court issued a Case Management Order ("April Case Management  
11 Order"), which stated that the Commonwealth could amend the information without the Court's  
12 permission no later than twenty-one days after the date of that order. April Case Management Order  
13 at 2. On May 6, 2015, the Court set this matter for a jury trial.<sup>4</sup>

14 The Commonwealth filed its First Amended Information ("FAI") on May 26, 2015, adding  
15 Defendant Melchor Mendiola, who had since been served with the arrest warrant in this case. The  
16 FAI only added Defendant Melchior Mendiola and charged him with Theft under 6 CMC §  
17 1601(a). The FAI did not add any additional charges. The FAI did not charge the Defendants with  
18 Possession or Removal of Government Property under 6 CMC § 3401.

19 A second Case Management Order ("June Case Management Order") was issued on June 9,  
20 2015 as to Defendant Melchor Mendiola, which also imposed a twenty-one day deadline for  
21 amending the information without the Court's permission. June Case Management Order at 2.

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24 <sup>4</sup> The jury trial was initially set for November 2, 2015. Order Setting Jury Trial at 1. The parties later stipulated to move the jury trial to January 25, 2016.

1 On August 24, 2015, the Commonwealth filed proposed jury instructions that included  
2 Possession or Removal of Government Property as a lesser-included offense of Theft. The jury  
3 instructions were not addressed at the August 26, 2015 status conference. The Defendants objected  
4 to this instruction at the November 18, 2015 status conference.

5 The Commonwealth filed its Motion for Leave to Amend Information and its proposed SAI  
6 on December 14, 2015. The Commonwealth stated that it was amending the information to include  
7 Possession or Removal of Government Property “to avoid unnecessary briefing” related to the  
8 lesser-included offense instruction in the jury instructions, as to whether Possession or Removal of  
9 Government Property is a lesser-included offense of Theft. Mot. for Leave to Amend at 2.<sup>5</sup> The  
10 Commonwealth argues that the Defendants will not be prejudiced by the proposed SAI, and that  
11 any prejudice could be cured by continuing the jury trial, which is currently set for January 25,  
12 2015 in Rota.

13 Defendant Stacey Ann M. Atalig filed her opposition on December 28, 2015. Defendants  
14 Alfred Apatang, Melchor Mendiola and Bernard Apatang joined the opposition. Defendant Tina  
15 Atalig orally joined this motion at the January 6, 2016 hearing. The Defendants argue that granting  
16 such a late amendment is “highly prejudicial” and implicates the Defendants’ rights under the 4<sup>th</sup>,  
17 5<sup>th</sup>, 6<sup>th</sup>, and 14<sup>th</sup> amendments to the United States Constitution and the Commonwealth Covenant.  
18 Def.’s Opp. at 7.

19 The Commonwealth did not file a reply.  
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23 <sup>5</sup> At the January 6, 2016 hearing, the Commonwealth withdrew its jury instructions related to the lesser-included  
24 offense, as the Commonwealth’s own research indicated that Possession or Removal of Government Property was not a  
lesser-included offense of Theft.

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### III. LEGAL STANDARD

Under the Commonwealth Rules of Criminal Procedure, the information must “be a plain, concise and definite written statement of the essential facts constituting the offense charged.” NMI R. Crim. P. 7(c)(1). The information must also “state for each count the citation of the statute, rule, regulation, or other provision of law which the defendant is alleged to have violated.” *Id.* The Court may only allow an amendment if “no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.” NMI R. Crim. P. 7(e).

### IV. DISCUSSION

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#### A. The Court is Not Required to Allow the Commonwealth to Amend the Information

Under Rule 7(e), although the Court “may” allow the Commonwealth to amend the information, the Court is not **required** to allow such an amendment. NMI R. Crim. P. 7(e). In *Commonwealth v. Zhang*, the Court denied the Commonwealth’s motion to amend an information, when the initial information was filed on February 24, 2004, the Commonwealth filed its amended information on November 18, 2004, and finally filed a Request for Leave to Amend on February 7, 2005. Crim. No. 04-0083E (NMI Super. Ct. Apr. 22, 2005) (Order Denying Prosecution’s Motion to Amend). The trial in *Zhang* was scheduled for April 4, 2005. The Court denied the motion, stating that allowing the Commonwealth to amend its information beyond the date cited in the case management order without accounting for the delay would “undermine the Court’s ability to control its docket, as well as potentially disrupt the agreed-upon course of action, prejudice the Defendant, and reward the indolent.” *Id.* at 2. In *Zhang*, the Commonwealth waited nearly a year to request leave to amend the information. *Id.* at 1-2. In the present case, the jury trial in Rota is only two weeks away.

The Commonwealth filed the proposed SAI and their Motion for Leave to Amend Information on December 14, 2015, long after the twenty-one days in either case management

1 order. The jury trial in this case is currently set for January 25, 2016 in Rota. Despite the late hour  
2 of the Commonwealth's motion, Court will consider whether the proposed SAI is permissible under  
3 Rule 7(e).

4 **B. Possession or Removal of Government Property is an "Additional or Different" Offense**

5 The Commonwealth may only amend its information if there is "no additional or different  
6 offense" charged. NMI R. Crim. P. 7(e). *Gov't of Virgin Islands v. Bedford*, cited by both the  
7 Commonwealth and the Defendants, is instructive in determining whether an amended information  
8 adds an "additional or different" offense. 671 F.2d 758, 765 (3rd Cir. 1982).<sup>6</sup> In *Bedford*, the trial  
9 court allowed an amendment at the close of the prosecution's case in chief on the ground that one  
10 offense, assault with a deadly weapon, was a lesser-included offense of assault with intent to  
11 commit robbery. *Bedford*, 6 F.2d at 764. The Third Circuit disagreed, finding that assault with a  
12 deadly weapon was not a lesser-included offense of assault with intent to commit robbery. *Id.* at  
13 765. Despite this, the Third Circuit held that amending the information was permissible, since the  
14 original information, which used "detailed and particular language," contained the elements of both  
15 crimes, thus "[i]f the government had proved all it had alleged, the crime shown would have  
16 constituted both an assault with intent to rob and assault with a deadly weapon." *Id.* at 765. In the  
17 approach taken in *Bedford*, whether an offense is "an 'additional or different' offense for purposes  
18 of amending an information pursuant to Rule 7(e) is not coextensive with the question of whether a  
19 crime is a lesser-included offense of another." *Id.* at 765.

20 The key issue is whether, if the Commonwealth proves what it alleges in the FAI, the crime  
21 shown would have constituted **both** Theft and Possession or Removal of Government Property.  
22 *Bedford*, 671 F.2d at 765. The original information in *Bedford* alleged that the defendant "did with

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24 <sup>6</sup> Since the Commonwealth Rules of Criminal Procedure are patterned after the Federal Rules of Criminal Procedure, interpretations of the Federal Rules are "instructive." *Commonwealth v. Ramangmau*, 4 NMI 227, 233 n3.

1 intent to commit robbery assault another...by pointing a handgun at home and threatening to shoot  
2 and kill him and striking his face and finger.” *Bedford*, 671 F.2d at 764. The Third Circuit found  
3 that this language was “detailed and particular” enough that “it not only contained all the elements  
4 necessary to charge assault with intent to rob, but also all the elements of assault with a deadly  
5 weapon.” *Bedford*, 671 F.2d at 765.

6 In the FAI, Defendant Stacey Ann M. Atalig is charged in Count III with “unlawfully  
7 [taking] the property of the CNMI Government (Office of Finance-Rota), with intent to  
8 permanently deprive the owners of their rights to the property.” First Amended Information at 2.  
9 The FAI then describes the property allegedly taken. The other Defendants are all charged with  
10 Theft using similar language: Count I charging Defendant Alfred Apatang, Count II Charging  
11 Bernard Apatang, Count IV Charging Tina M. Atalig, and Count V Charging Melchior Mendiola.  
12 The only differences between the charges are the office the items were alleged to have been taken  
13 from, and the items themselves.

14 The two offenses have very different elements. Theft states: “[a] person commits the offense  
15 of theft if he or she unlawfully takes, uses or consumes the property or services of another with  
16 intent to permanently deprive the owner of his or her rights to the property or services.” 6 CMC §  
17 1601(a). The FAI clearly states all of the elements of Theft. Possession or Removal of Government  
18 Property, on the other hand, states that: “It is unlawful for any person, without proper authority, to  
19 have in his or her possession or remove from its location any property of any kind, wherever  
20 situated, of the government of the United States or its political subdivisions.” 6 CMC § 3401.

21 The FAI alleges that the owner of the property was the CNMI government, and that the  
22 Defendants “unlawfully took” this property “with intent to permanently deprive the owners of their  
23 rights to the property.” First Amended Information at 1-3. While this satisfies some of the elements  
24 of Possession or Removal of Government Property, it does not address whether the Defendants

1 allegedly took the property “without proper authority” as required by 6 CMC § 3401. Thus, the  
2 charge of Possession or Removal of Government Property would be an “additional or different”  
3 offense under Rule 7(e) and the Court will not allow the amendment.

#### 4 **C. The Proposed Second Amended Information Prejudices the Defendants**

5 The Commonwealth may not amend an information if it prejudices a defendant’s substantial  
6 rights. NMI R. Crim. P. 7(e). The Commonwealth argues that the Defendants would not be  
7 prejudiced, as they were on notice in August 2015 of the Commonwealth’s intent to pursue this  
8 charge when the Commonwealth filed its proposed jury instructions on August 25, 2015 containing  
9 Possession or Removal of Government Property as a lesser-included offense of Theft. Mot. for  
10 Leave to Amend. at 2. The Commonwealth also argues that the Defendants are not prejudiced, as  
11 both crimes involve allegations that the Defendants “took government property that they had no  
12 right to take.” *Id.*

13 The Defendants argue that they would be prejudiced by the proposed SAI, emphasizing the  
14 significant differences in defense strategy and preparation between the two charges. Def.’s Opp. at  
15 4. At the January 6, 2016 hearing, the Defendants pointed out that adding the charge of Possession  
16 or Removal of Government Property would require additional investigation and potentially  
17 additional motions related to whether or not Possession or Removal of Government Property is  
18 unconstitutionally vague.

19 The Commonwealth relies on *Gov’t of Virgin Islands v. Bedford* for the proposition that the  
20 Defendants will not be prejudiced by an amendment, as the Defendants were on notice of the Theft  
21 and Possession or Removal of Government Property charge. 671 F.2d at 765. In *Bedford*, the Third  
22 Circuit noted that “it is significant that the defendant could not claim surprise...it is not clear how  
23 defendant would have changed his defense in any way, as it consisted of a complete denial of all the  
24 allegations against him.” *Id.* at 766-67.



1           The same cannot be said for the Defendants in this case, as Possession or Removal of  
2 Government Property under 6 CMC § 3401 and Theft under 6 CMC § 1601 require quite different  
3 defense strategies. Possession or Removal of Government Property requires that the defendant not  
4 have “proper authority” to possess the property. 6 CMC § 3401. Further, Possession or Removal of  
5 Government Property is a strict liability offense, while Theft is not. 6 CMC § 3401, 6 CMC § 1601.  
6 In addition, the property in question under Possession or Removal of Government Property must be  
7 **government** property, while Theft only requires that the property have an “owner.” 6 CMC § 3401,  
8 6 CMC § 1601. The defense strategies required for these two offenses are quite different.

9           Further, in *Bedford*, facts alleging the new charge were included in the initial information. *Id.*  
10 at 766-67. Since the facts alleging the new charge were in the initial information, not only was the  
11 added charge in *Bedford* not “additional or different,” but the defendant could not claim surprise or  
12 lack of notice. *Id.* As discussed before, Possession or Removal of Government Property is an  
13 “additional or different offense” under Rule 7(e). The FAI did not allege enough facts to satisfy all  
14 of the elements of Possession or Removal of Government Property. The phrasing of the original  
15 information together with the fact that the defendant would not have had to change his defense  
16 strategy were key in the Third Circuit’s analysis in *Bedford*. 671 F.2d at 764-67.

17           The Commonwealth also argues that the Defendants had notice of the additional charge as  
18 early as August 2015 based on the Commonwealth’s proposed jury instructions. Mot. for Leave to  
19 Amend at 1-2. The Court notes that there is a vast difference between the mere possibility that the  
20 Commonwealth may someday charge a crime, and the Commonwealth actually bringing charges. In  
21 the Declaration of Probable Cause, Officer Cepeda alleged Theft as well as Possession or Removal  
22 of Government Property by Conspiracy. The Court finds it significant that the Commonwealth was  
23 aware of additional charges it could bring, and elected to pursue only the charge of Theft. The  
24 Commonwealth made a strategic decision not to charge all of the crimes alleged in the Declaration

1 of Probable Cause. If anything, the Defendants were on notice that the Commonwealth had elected  
2 **not** to pursue that charge. Further, when the Commonwealth amended its information on May 26,  
3 2015, it did so simply to add Defendant Melchor Mendiola, and did not add any additional offenses.

4 Adding the additional offense of Possession or Removal of Government Property, which  
5 requires a different defense strategy from Theft, so close to trial prejudices the Defendants. At the  
6 January 6, 2016 motion hearing, defense counsel stated that the new charge of Possession or  
7 Removal of Government Property would require additional investigation, witness interviews, and  
8 motions filing. Some counsel indicated that they would need to take additional trips to Rota to  
9 prepare, while others would require time for additional legal research related to the elements of the  
10 new charge. The jury trial is two weeks away, and it would be unrealistic to expect the Defendants  
11 to shift gears and adequately prepare for an additional charge this close to trial.

12 Thus, the Court will not allow the Commonwealth to amend the information at this time.

13 **D. Continuing A Jury Trial in Rota So Close to the Trial Date Poses Serious Logistical and**  
14 **Financial Challenges for the Parties and the Court**

15 The Commonwealth argues that any potential prejudice to the Defendants would be cured  
16 by a continuance. Mot. for Leave to Amend. at 2. In their opposition, the Defendants opposed a  
17 continuance, stating that they have “prepared for trial and should not be forced to wait another 3-6  
18 months for their day in court.” Def.’s Opp. at 6. At the January 6, 2016 hearing, the Defendants  
19 indicated that if the Court were to grant the Commonwealth’s Motion for Leave to Amend  
20 Information, they would move for a continuance, but that any continuance would still severely  
21 prejudice their clients, since it could take several months for this case to be heard if the jury trial is  
22 continued.

22 Granting a continuance is “traditionally within the discretion of the trial judge” and not  
23 every “denial of a request for more time that violates due process even if the party fails to offer  
24 evidence or is compelled to defend without counsel.” *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)

1 (citing *Avery v. Alabama*, 308 U.S. 444 (1940)). Trial courts have “broad discretion” in granting a  
2 continuance. *Morris v. Slappy*, 461 U.S. 1, 11 (1983). “Trial judges necessarily require a great deal  
3 of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses,  
4 lawyers, and jurors at the same place at the same time, and this burdens counsels against  
5 continuances except for compelling reasons.” *Id.*

6 Since this trial will be conducted in Rota, there are numerous considerations to take into  
7 account when deciding whether to continue a jury trial, especially since attorneys, witnesses, and  
8 court staff must fly down to Rota and secure accommodation for the duration of the trial. The Court  
9 has already blocked off two weeks on its calendar to accommodate this trial. Because this  
10 jurisdiction is remote and spread out across separate islands, conducting a jury trial outside of  
11 Saipan requires extra preparation, including flying marshals to Rota to serve jury summons.

12 Further, since this is a high profile case involving the former Mayor of Rota, Melchor  
13 Mendiola, additional preparations have already been undertaken. Jury summons for the **entire Rota**  
14 **jury pool** were issued. Marshals and probation officers have made multiple trips to Rota to serve  
15 the jury summons. Since one of the Defendants is the former Mayor of Rota, the Department of  
16 Public Safety and Department of Corrections are both sending officers from Saipan to Rota to assist  
17 with crowd control and securing the Rota Courthouse; these officers will also need to fly to Rota  
18 and secure accommodation.<sup>7</sup> A continuance would place a heavy logistical and financial burden on  
19 the Court and the parties.

20 In addition, since there are five defense counsel, some of whom are sole practitioners,  
21 continuing this trial would necessarily require finding a two week long time frame that would work  
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23 <sup>7</sup> The Mayor of Rota is the expenditure authority for the municipal government, which would include the Rota police  
24 force. Due to the sensitive nature of this case, officers from Saipan are flying to Rota to assist with securing the Rota  
Courthouse. The Chief Marshal has met with the Department of Public Safety and the Department of Corrections  
several times to coordinate and plan for the jury trial.

1 for their schedules, as well as that of the Court and the Commonwealth. Realistically and without  
2 exaggeration, it would be a year if not more before the Court, the Commonwealth, defense  
3 attorneys, and witnesses will all be available for a two-week long jury trial.

4 Thus, the Court will not be continuing this trial, and it will proceed as scheduled on January  
5 25, 2016.

6 **V. CONCLUSION**

7 Accordingly, the Commonwealth's Motion for Leave to Amend Information is **DENIED**.

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12 **IT IS SO ORDERED** this 8<sup>th</sup> day of January, 2016.

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JOSEPH N. CAMACHO  
Associate Judge