

1 FOR PUBLICATION

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3 IN THE SUPERIOR COURT BY   
4 FOR THE DEPUTY CLERK OF COURT  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

5 COMMONWEALTH OF THE ) CRIMINAL CASE NO. 15-0077R  
6 NORTHERN MARIANA ISLANDS, ) OPA CASE NO. 15-0523  
7 )  
8 Plaintiff, )  
9 v. ) ORDER DISMISSING CASE WITH  
10 ) PREJUDICE PURSUANT TO NMI. R.  
11 ) CRIM. P. 48(a)  
12 MELCHOR MENDIOLA, )  
13 STACEY ATALIG, )  
14 TINA ATALIG, )  
15 ALFRED APATANG, )  
16 BERNARD APATANG, )  
17 )  
18 Defendants. )  
19

## I. INTRODUCTION

20 This matter came before the Court on January 15, 2016 in Courtroom 220A at 3:30 p.m. on  
21 the Commonwealth's Motion to Dismiss Charges Without Prejudice. The Commonwealth was  
22 represented by Assistant Attorney General Matthew Baisley and Assistant Attorney General  
23 Shannon Foley. Defendant Melchor Mendiola appeared telephonically via the Rota Courthouse. His  
24 counsel, Joaquin DLG Torres, Esq., appeared. Defendant Alfred M. Apatang, Jr. appeared  
telephonically via the Rota Courthouse. His court-appointed counsel, Thomas E. Clifford, Esq.,  
appeared. Defendant Stacey Ann M. Atalig appeared in the Saipan Courthouse. Her counsel,  
Assistant Public Defender Tillman Clark, appeared. Defendant Tina M. Atalig appeared  
telephonically via the Rota Courthouse. Her court-appointed counsel, Matthew Gregory, Esq.,  
appeared. Defendant Bernard Apatang appeared telephonically via the Rota Courthouse. His court-  
appointed counsel, Bruce Berline, Esq., appeared.

1 The Commonwealth filed its Motion to Dismiss Charges Without Prejudice on January 11,  
2 2016. The Defendants did not file a written opposition; however, they orally opposed the motion at  
3 the January 15, 2016 motion hearing.

4 The jury trial in this case was set for January 25, 2016<sup>1</sup> in the Rota Courthouse. The Court  
5 blocked out two weeks on its calendar to accommodate the jury trial in this case.

6 Based on a review of the filings, oral arguments, and applicable law, the Court **DISMISSES**  
7 this case **WITH PREJUDICE**.

## II. BACKGROUND

This case has been before the Court since April 2015. Defendant Melchor Mendiola is the former Mayor of Rota. The complaining witness is Efraim Atalig, the current Mayor of Rota. Decl. of Prob. Cause at 1. The other four co-defendants, Defendant Alfred Apatang, Defendant Bernard Apatang, Defendant Stacey Ann M. Atalig, and Defendant Tina M. Atalig, were Rota government employees under Melchor Mendiola's administration.

14 The information in this case was filed on April 27, 2015 as to Defendant Alfred Apatang,  
15 Defendant Bernard Apatang, Defendant Stacey Ann M. Atalig, and Defendant Tina M. Atalig. This  
16 information charged the Defendants with Theft under 6 CMC § 1601(a). The Commonwealth filed  
17 its First Amended Information on May 26, 2015, adding Defendant Melchor Mendiola and charging  
18 him with 6 CMC § 1601(a). Neither information charged the Defendants with Possession or  
19 Removal of Government Property under 6 CMC § 3401.<sup>2</sup> On May 6, 2015, the Court set this matter

<sup>22</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 Setting Jury Trial at 1. The parties later stipulated to move the jury trial to January 25, 2016.

<sup>2</sup> Possession or Removal of Government Property was included in the Declaration of Probable Cause, but was not charged in the information in this case. Decl. of Prob. Cause at 5. The charge of Possession or Removal of Government Property was the charge that the Commonwealth sought to add in its proposed Second Amended Information in Crim. No. 15-0077R, and eventually charged by information in Crim. No. 16-0004R.

1 for trial. Although the jury trial was initially set for November 2, 2015, the parties later stipulated to  
2 move the jury trial to January 25, 2016.

3 On December 14, 2015, the Commonwealth filed a Motion for Leave to Amend Information  
4 and a proposed Second Amended Information, attempting to add the charge of Possession or  
5 Removal of Government Property in violation of 6 CMC § 3401. The Court heard arguments on the  
6 Motion for Leave to Amend on January 6, 2016, and issued an order denying the motion on January  
7 8, 2016. The Court denied the Motion for Leave to Amend since adding an “additional or different”  
8 charge so close to trial was prejudicial to the Defendants. *Commonwealth v. Mendiola*, Crim. No.  
9 17-0077 (NMI Super. Ct. Jan. 8, 2016) (Order Denying Commonwealth’s Motion to Amend  
10 Information Due to an “Additional Or Different” Charge and Prejudice to the Defendants at 6-10).

11 The Court’s Order Denying the Motion to Amend was issued on Friday, January 8, 2016.  
12 The Commonwealth filed the instant motion, its Motion to Dismiss Charges Without Prejudice, on  
13 the following Monday, January 11, 2016. The Commonwealth stated that the Crim. No. 15-0077R  
14 “should be dismissed in the interest of justice.” Mot. to Dismiss at 1.

15 On Tuesday, January 12, 2016, before the Court had ruled on the Motion to Dismiss in  
16 Crim. No. 15-0077R, the Commonwealth filed an information in Crim. No. 16-0004R, OPA Case  
17 Number 15-0523,<sup>3</sup> charging Defendant Melchor Mendiola, Defendant Alfred Apatang, Defendant  
18 Bernard Apatang, Defendant Stacey Ann M. Atalig, and Defendant Tina Atalig with Possession or  
19 Removal of Government Property under 6 CMC § 3401. The information in Crim. No. 16-0004R  
20 alleges that Defendant Melchor Mendiola was in possession of nine picnic tables, and alleged that  
21 the remaining Defendants were in possession of laptop computers with government tags. This is the  
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24 <sup>3</sup> This is the same OPA case number as the present case.

1 exact charge that the Commonwealth had attempted to add to Crim. No. 15-0077R in the Second  
2 Amended Information. *See* Proposed Second Amended Information.

3 On Tuesday, January 12, 2016, the Court issued an Order to Show Cause in Crim. No. 16-  
4 0004R as to Assistant Attorney General Matthew Baisley, ordering him to explain why the  
5 Commonwealth filed Crim. No. 16-0004R one day after moving to dismiss Crim. No. 15-0077R.  
6 The hearing as to the Order to Show Cause in Crim. No. 16-0044R was set for Friday, January 15,  
7 2016. The Commonwealth filed a response on Wednesday, January 13, 2016, indicating that the  
8 Commonwealth intended to pursue the charge of Possession or Removal of Government Property in  
9 violation of 6 CMC § 3401, rather than the charge of Theft in violation of 6 CMC § 1601. On  
10 Thursday, January 14, 2016, the Court vacated the hearing as to the Order to Show Cause in Crim.  
11 No. 16-0004R.

12 On Friday, January 15, 2016, the Court heard arguments on the Commonwealth's Motion to  
13 Dismiss Charges Without Prejudice in Crim. No. 15-0077R. Although the Defendants did not file  
14 an opposition,<sup>4</sup> they orally opposed the Motion to Dismiss Without Prejudice, arguing that this case  
15 must be dismissed with prejudice.

16 At the January 15, 2016 motion hearing, the Commonwealth initially stated that it is moving  
17 to dismiss the case without prejudice, and that it does not intend to pursue the Theft charge in Crim.  
18 No. 15-0077 due to insufficiency of the evidence. As the hearing progressed, it became increasingly  
19 clear that under some unspecified circumstances, the Commonwealth might again charge the  
20 Defendants with Theft. The Commonwealth declined to explain what those circumstances might be  
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23 <sup>4</sup> The Court is cognizant of the short time between the filing of the Motion to Dismiss Without Prejudice on January 11,  
24 2016, and the motion hearing date on January 15, 2016. The Court set the motion hearing date so close to the date the  
motion was filed, since the jury trial was scheduled for January 25, 2016. The Court intended to hear the motion and  
issue an order well enough in advance of the trial date to allow counsel and the parties to make adequate preparations if  
the trial was to go forward.

1       in the presence of defense counsel.<sup>5</sup> The Court is not aware of what situation would prompt the  
2 Commonwealth to re-file the theft charges. All the Court knows is that the Commonwealth claims  
3 that, although it does not currently want to pursue the Theft charge, some unspecified situation  
4 exists where it would consider bringing this charge in the future.<sup>6</sup>

5              The Defendants argued that Crim. No. 15-0077R should be dismissed with prejudice,  
6 arguing that the Commonwealth is in effect attempting to amend the charges by dismissing Crim.  
7 No. 15-0077R and filing Crim. No. 16-0004R. The Defendants highlighted the danger that the  
8 Commonwealth might begin a cycle of filing, amending, dismissing, and re-filing charges until a  
9 guilty verdict is obtained. Defense counsel at one point described the Commonwealth's actions as  
10 "sinister." The Defendants also emphasized their right to a speedy trial.<sup>7</sup>

11              The Commonwealth argues that dismissal with prejudice is an extreme remedy, and is  
12 unnecessary in this case.

13              Before diving into the analysis, the Court would like to point out that the jury trial was set  
14 for January 25, 2016<sup>8</sup> in Rota, hence the short time between the filing of the Motion to Dismiss and  
15 the motion hearing date. Since this case was so close to trial, a significant amount of funds had  
16 already been expended by the Judiciary and defense counsel. Court Marshals have flown from  
17 Saipan to Rota multiple times to serve jury summons<sup>9</sup> in this case. Taking into account the trips to  
18 Rota, the attorney's fees for the court-appointed private counsel, and the costs of making repairs to

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20              <sup>5</sup> Counsel for the Commonwealth indicated that he would prefer to tell the Court the circumstances under which the  
21 Commonwealth would potentially re-charge Theft in camera, and approached the bench. Defense counsel objected to  
anything the Commonwealth might say to the Court, and the Commonwealth indicated that it did not want to explain  
when, if ever, the Commonwealth would re-charge Theft in the presence of defense counsel.

22              <sup>6</sup> The Commonwealth claims that it is "95% sure" that it will not pursue a Theft charge against the Defendants, but it  
declined to state on the record the reason for the 5% chance that would re-file the Theft charge.

23              <sup>7</sup> A re-filing of the Theft charge would require rescheduling this case for a jury trial in Rota. Due to the number of  
attorneys in this case, it could realistically and without exaggeration take a year or more before the case could be heard.

24              <sup>8</sup> The Court blocked out two weeks on its calendar for this jury trial. Since January 25, 2016 is now only one working  
week away, there are two weeks of valuable Court time during which the Court will not be able to schedule meaningful  
motion hearings or trials.

<sup>9</sup> Jury summons for the entire Rota jury pool were issued.

1 the Rota Courthouse, the Judiciary has already spent upwards of \$50,000<sup>10</sup> on this case. To avoid  
2 expending additional money unnecessarily, and to allow everyone involved in this case<sup>11</sup> to change  
3 their plans accordingly, the Court heard the motion hearing as soon as it reasonably could following  
4 the filing of the Commonwealth's motion.

5 **III. LEGAL STANDARD**

6 Under the Commonwealth Rules of Criminal Procedure, “[t]he attorney for the government  
7 may *by leave of court* file a dismissal of an information or complaint and the prosecution shall  
8 thereupon terminate. Such dismissal may be filed during the trial without the consent of the  
9 defendant.” NMI R. Crim. P. 48(a) (emphasis added).

10 Since the Commonwealth Rules of Criminal Procedure are patterned after the Federal Rules  
11 of Criminal Procedure, interpretations of the Federal Rules are “instructive.” *Commonwealth v.*  
12 *Ramangmau*, 4 NMI 227, 233 n3 (1995). The main difference between the Federal Rule and the  
13 Commonwealth Rule is that under the Federal Rule the government cannot dismiss the case during  
14 trial without the defendant’s consent, while the Commonwealth rule allows this. See NMI R. Crim.  
15 P. 48(a); Fed. R. Crim. P. 48(a). Otherwise, the two rules are functionally the same.

16 **IV. DISCUSSION**

17 The Commonwealth moves to dismiss Crim. No. 15-0077R without prejudice, stating that  
18 dismissal is “in the interest of justice.” Mot. to Dismiss at 1. Although the Defendants agree that  
19 Crim. No. 15-0077R should be dismissed, they object to any dismissal without prejudice. If Crim.

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20 <sup>10</sup> The Court notes that the items alleged to have been taken in this case are four laptops with values ranging from \$975  
21 to \$2,049, as well as nine picnic tables. First Amended Information at 1-3. At the January 15, 2016 hearing, the Court  
22 inquired from the Commonwealth as to whether it had considered pursuing a civil collection action against the  
23 Defendants rather than a criminal prosecution, and the Commonwealth indicated that it did not.

24 <sup>11</sup> Since this is a high profile case taking place in Rota, the number of individuals working on this case in some capacity  
is quite large. Department of Public Safety and Department of Corrections were planning on sending officers from  
Saipan to Rota to assist with securing the Rota Courthouse. The Court Marshals needed to know whether to continue  
serving jury summons in Rota. The Defendants, defense counsel, the Attorney General’s Office, and jurors all needed to  
make necessary arrangements. Chambers staff and staff at the Rota Courthouse all needed to know whether this trial  
would be moving forward.

1 No. 15-0077R is dismissed without prejudice, the Defendants could be re-charged with Theft in  
2 violation of 6 CMC § 1601 by the Commonwealth at some future date.

3 **A. Motions to Dismiss Under Rule 48(a) Are Granted “By Leave of Court”**

4 Motions to dismiss are granted “by leave of court.” NMI R. Crim. P. 48(a). At common law,  
5 prosecutors had complete discretion in dropping charges through nolle prosequi. *United States v.*  
6 *Cowan*, 524 F.2d 504 (5th Cir 1975) (citing *Confiscation Cases* 87 U.S. 92, 20 Wall 92, 22 L. Ed.  
7 320, 22 L. Ed. 327 (1874)). The language “by leave of court” was added to Fed. R. Crim. P. 48(a)  
8 to “make a significant change in the common law rule by vesting in the courts the power and the  
9 duty to exercise discretion for the protection of the public interest.” *Id.*<sup>12</sup>

10 Requiring “leave of court” is meant to “protect a defendant against prosecutorial harassment,  
11 e.g., charging, dismissing, and recharging, when the Government moves to dismiss an indictment  
12 over the defendant’s objection.” *Rinaldi v. United States*, 434 U.S. 22, 30 n.15, 98 S. Ct. 81, 54 L.  
13 Ed. 2d 207 (1977). Requiring the Court’s permission “is also intended to allow courts to consider  
14 public interest, fair administration of criminal justice, and preservation of judicial integrity when  
15 evaluating motions to dismiss.” *United States v. Strayer*, 846 F.2d 1262, 1265 (10th Cir. 1988)  
16 (citing *United States v. Carrigan*, 778 F.2d 1454, 1463 (10th Cir. 1985)).

17 The decision of when and how to prosecute lies with the executive branch, and thus under  
18 separation of powers, “the Commonwealth exercises full discretion over the manner in which it  
19 lawfully prosecutes a particular matter.” *Commonwealth v. Evenile*, Crim. No. 07-0042 (NMI.  
20 Super. Ct. Nov. 28, 2007) (Order Denying Without Prejudice the Commonwealth’s Motion to  
21 Dismiss Information with Prejudice at 5) (citation omitted). Thus, “leave of court” only gives the  
22 Court limited discretion in deciding whether to grant a motion to dismiss under NMI R. Crim. P.

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24 <sup>12</sup> Tenth Circuit Senior Circuit Judge discussed the history of Fed. R. Civ. P. 48(a) at length in *United States v. Cowan*,  
524 F.2d 504, 505-512 (5th Cir. 1975).

1       48(a). *Id.* Trial courts grant motions to dismiss “unless the dismissal would be clearly contrary to  
2 manifest public interest, determined by whether the prosecutor’s motion to dismiss was made in bad  
3 faith.” *United States v. Sprofera*, 299 F.3d 725, 727 (8th Cir. 2002) (quoting *United States v. Rush*,  
4 240 F.3d 729, 731 (8 Cir. 2001)).

5           The Court has exercised it’s discretion under NMI. R. Crim. P. 48(a) in the past, including  
6 granting motions to dismiss made under Rule 48(a). *Commonwealth v. Brel*, 4 NMI 200, 203 (1994)  
7 (upholding the trial court’s order granting the motion to dismiss, where the Commonwealth moved  
8 to dismiss due to the unavailability of a witness who had travelled off island for medical care and  
9 was unable to return due to a typhoon); *Commonwealth v. Diaz*, Crim. No. 05-0141 (NMI Super.  
10 Ct. Aug. 5, 2005) (Order Granting Plaintiff’s Motion to Dismiss with Prejudice Pursuant to Com. R.  
11 Crim. P. 48(a) at 3) (granting the Commonwealth’s motion to dismiss with prejudice, where the  
12 Commonwealth requested dismissal with prejudice, where the Commonwealth’s noncompliance  
13 with discovery motions and a review of how to allocate Commonwealth resources motivated the  
14 motion to dismiss).

15           The Court has also denied motions to dismiss made under NMI R. Crim. P. 48(a).  
16 *Commonwealth v. Evence*, Crim. No. 07-0042 (NMI Super. Ct. Nov. 28, 2007) (Order Denying  
17 Without Prejudice the Commonwealth’s Motion to Dismiss Information with Prejudice at 5-6)  
18 (denying the Commonwealth’s motion to dismiss without prejudice where the Commonwealth did  
19 not present the Court with its reasons for seeking dismissal); *Commonwealth v. Benavente*, Crim.  
20 No. 02-0042 (NMI Super. Ct. Jan. 15, 2003) (Order Denying the Commonwealth’s Motion to  
21 Dismiss Information and Motion to Renew Commonwealth’s Request for Immunity at 4-6)  
22 (denying the Commonwealth’s motion to dismiss due to bad faith, where the motion to dismiss was  
23 a clear attempt to maneuver around an earlier court order regarding immunity).

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1        As the parties in this case seem to agree that Crim. No. 15-0077R should be dismissed, the  
2 Court will grant the dismissal, but must still determine whether this dismissal is with or without  
3 prejudice.

4        **B. Whether to Dismiss With or Without Prejudice**

5        In addition to allowing Courts limited discretion to deny motions to dismiss made under Rule  
6 48(a), the Rule also allows the Court to determine whether dismissal without prejudice is  
7 appropriate. *United States v. Poindexter*, 719 F. Supp. 6, 10 (D.D.C. 1989). Although dismissals  
8 under Rule 48(a) are generally without prejudice, “the Rule has the effect of granting authority to  
9 the court in exceptional cases to reject a dismissal without prejudice—which would allow re-  
10 prosecution—if this would result in harassment of the defendant or would otherwise be contrary to  
11 the manifest public interest.” *Id.* “[A]lthough there remains a strong presumption in favor of a no-  
12 prejudice dismissal, the ultimate decision in that regard depends upon the purpose sought to be  
13 achieved by the government and its effect on the accused.” *Id.* (citation omitted).

14        In *Poindexter*, counsel stated that although “he could not ‘foresee a renewal of those two  
15 counts’ he did want ‘to protect against a rigid barrier.’” *Id.* at 11. The government counsel in  
16 *Poindexter* sought to go forward with trial on some charges, while waiting on other charges, a  
17 situation that the court found to be unfair to the defendant. *Id.* at 12. The charges in *Poindexter*  
18 were then dismissed with prejudice since “[t]he Court has an obligation to protect [the  
19 defendant]...from what, objectively, would be harassment.” *Id.* In the present case, the  
20 Commonwealth claims it does not plan to pursue a Theft charge against the Defendants, except  
21 under some mysterious and supposedly unlikely circumstance where it would elect to re-charge the  
22 Defendants with Theft. The Defendants are left wondering whether the Commonwealth will simply  
23 amend the information in Crim. No. 16-0004R to add a Theft charge, or if the Commonwealth will  
24 re-charge Theft at a later date under Crim. No. 15-0077R or some other new case number.

1       In *Commonwealth v. Hui*, the Commonwealth moved to dismiss without prejudice, and the  
2 Court instead dismissed the case with prejudice. Crim. No. 04-0116T (November 15, 2004) (Order  
3 Granting the Commonwealth's Motion to Dismiss Information at 3). In *Hui*, the Commonwealth  
4 informed the Court on the day of trial that they were not ready to proceed. *Id.* at 1. To protect the  
5 defendant against prosecutorial harassment, or "charging, dismissing, and recharging," the Court  
6 dismissed the case with prejudice. *Id.* "A defendant charged in a criminal case should not have to be  
7 in an indefinite period of uncertainty as to whether or not he or she will be recharged some day." *Id.*  
8 at 3.

9       As discussed above, Rule 48(a) is designed to "protect a defendant against prosecutorial  
10 harassment, e.g., charging, dismissing, and recharging, when the Government moves to dismiss an  
11 indictment over the defendant's objection." *Rinaldi v. United States*, 434 U.S. 22, 30 n.15 (1977).  
12 This is exactly the situation occurring here. The Commonwealth promptly moved to dismiss this  
13 case after the Court ordered that it may not amend the information to include Possession or  
14 Removal of Government Property. The Commonwealth then immediately filed a new case charging  
15 Possession or Removal of Government Property. The Commonwealth claims that it does not intend  
16 to pursue a Theft charge against the Defendants, and yet the Commonwealth refuses to dismiss this  
17 case with prejudice since some mysterious set of circumstances exist where the Commonwealth  
18 might possibly decide to re-charge the Defendants with Theft.

19       It is obvious to the Court that this motion is a "Motion for Leave to Amend" and a "Motion  
20 to Continue" disguised as a "Motion to Dismiss." In essence, the Court's concern is that the  
21 Commonwealth will proceed with Possession or Removal of Government Property under Crim. No.  
22 16-0004R, and will move to amend the information in Crim. No. 16-0004R to include Theft, in  
23 effect circumventing the Court's earlier order in Crim. No. 15-0077R denying the Commonwealth's  
24 motion to amend. The Commonwealth should not be able to charge, dismiss, and re-charge cases

1 until it gets the outcome it wants—this sort of conduct is exactly the conduct Rule 48(a) seeks to  
2 prevent. *See Rinaldi v. United States*, 434 U.S. at 30 n.15. The Court reminds the Commonwealth  
3 that “while [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much  
4 his duty to refrain from improper methods to produce a wrongful conviction as it is to use every  
5 legitimate means to bring about a just one.” *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629,  
6 79 L. Ed. 1314 (1935).<sup>13</sup>

7 **V. CONCLUSION**

8 Accordingly, this case is **DISMISSED WITH PREJUDICE**.

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10 **IT IS SO ORDERED** this 16<sup>th</sup> day of January, 2016.

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14 JOSEPH N. CAMACHO  
15 Associate Judge  
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20 <sup>13</sup> The Court especially emphasizes the special role that a prosecutor has in our legal system, and finds the language  
from *Berger* to be particularly instructive:

21 [A prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose  
22 obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest,  
23 therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is  
24 in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not  
escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while  
*Berger*, 295 U.S. at 88.  
he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper  
methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just  
one.