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FOR PUBLICATION

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

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| COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, |) | CRIMINAL ACTION NO. 16-0080 |
| |) | DPS CASE NO. 16-003235 |
| |) | |
| Plaintiff, |) | ORDER GRANTING THE |
| |) | COMMONWEALTH'S MOTION TO |
| v. |) | RECONSIDER; AND |
| |) | ORDER DENYING DEFENDANT'S |
| ANDRES BORJA ROBERTO, |) | MOTION FOR DISMISSAL |
| d.o.b. 08/15/1966, |) | |
| |) | |
| Defendant. |) | |
| |) | |

I. INTRODUCTION

This matter came before the Court on November 15, 2016, at 2:00 p.m. in Courtroom 202A. The Commonwealth was represented by Assistant Attorney General J. Robert Glass, Jr. Defendant Andres Borja Roberto was represented by attorney Joaquin DLG. Torres. The Court heard arguments on (1) Defendant's motion for judgment of acquittal under NMI R. Crim. P. 29(a); (2) the Commonwealth's motion to reconsider the Court's evidentiary ruling sustaining Defendant's hearsay objection, pertaining to a declarant-witness's prior consistent statements, made admissible under NMI R. Evid. 801(d)(1)(B);¹ and (3) Defendant's motion to dismiss based on the

*AW
J. Torres*

¹ Counsel for the Commonwealth submitted a sworn affidavit as to the accuracy of a number of his citations to the audio transcript, but did not make his oath under the penalty of perjury, as required by 7 CMC § 3305 (Declaration Under Penalty of Perjury).

1 Government's non-disclosure of evidence under NMI R. Crim. P. 16(d)(2) and violation of
2 constitutional due process under *Brady v. Maryland*, 373 U.S. 83 (1963).

3 After the Commonwealth rested after presenting its case-in-chief on October 12, 2016, the
4 Court allowed the parties to submit three written motions: (1) Defendant's motion for judgment of
5 acquittal; (2) the Commonwealth's motion to reconsider the Court's evidentiary ruling sustaining
6 Defendant's hearsay objection, pertaining to a declarant-witness's prior statements made admissible
7 under NMI R. Evid. 801(d)(1)(B); (3) Defendant's written motion to dismiss based on the
8 Government's non-disclosure of certain evidence.

9 Defendant did not file a written motion for judgment of acquittal. The Commonwealth filed
10 a timely motion to reconsider. Defendant did not file a written opposition to the Commonwealth's
11 motion. Defendant filed a timely written motion to dismiss, and the Commonwealth filed a timely
12 opposition to Defendant's motion.

13 Despite Defendant having failed to submit a written motion for judgment of acquittal, the
14 Court entertained Defendant's oral motion for judgment of acquittal at the hearing. The motion was
15 argued and denied at the conclusion of the motion hearing. A judgment of acquittal is granted to a
16 defendant only when the evidence viewed in the light most favorable to the prosecution is not
17 sufficient for a rational trier of fact to sustain the elements of an offense beyond a reasonable doubt.
18 *Commonwealth v. Pua*, 2009 MP 21 ¶ 24.

19 The Court concluded that, taking the admitted evidence in the light most favorable to the
20 Commonwealth, sufficient evidence was admitted for the Court to conclude that all the elements for
21 the three crimes charged in the information could be met beyond a reasonable doubt: (Count I)
22 Disturbing the Peace, in violation of 6 CMC § 3101(a); (Count II) Assault & Battery, in violation of

1 1202(a); and (Count III) Sexual Abuse of a Minor in the Third Degree, in violation of 6 CMC §
2 1308(a)(1).

3 As to the Commonwealth's motion to reconsider, based on the Commonwealth's
4 submissions, the lack of a written opposition by Defendant, the parties' oral arguments, and the
5 applicable law, the Court grants the Commonwealth's motion and re-admits prior consistent
6 statements made by J.C., alleged child victim, to two witnesses, Cecelia Repeki and Marsha Calvo,
7 as substantive and rehabilitative evidence.

8 As to Defendant's motion to dismiss, based on the parties' filings, materials submitted under
9 seal, oral arguments, and the applicable law, his motion is denied.

10 **II. BACKGROUND**

11 **A. Testimonies as to Defendant's Alleged Acts**

12 On October 11, 2016, the Commonwealth sought to admit testimonies from three witnesses,
13 Cecilia Repeki, Julian S. Calvo Jr., and Marsha Calvo, each describing what J.C. told them
14 regarding the incident that allegedly took place on the evening of April 19, 2016.

15 Cecilia Repeki testified that J.C. told her that Defendant kissed and touched her all over the
16 body, on either April 19 or 20, 2016. Julian S. Calvo, Jr. testified that J.C. told him that the
17 defendant made a pass at her, hugged her, touched her buttocks, and kissed her, on either April 18,
18 19, or 20.² Marsha Calvo testified that J.C. told her that the defendant tried to kiss her,³ touched her
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22 ² Tr. (Oct. 11, 2016) 10:31:17–10:34:13 (providing three possible dates for when the alleged child victim could have
told Mr. Calvo, Jr. about the alleged incident, including the day before the alleged incident).

23 ³ Tr. (Oct. 11, 2016) 1:12:36 p.m.–1:12:43 p.m. ("MS. CALVO: And he grabbed me, he tries to kiss me, and touched
my breasts, and he touched my ass . . . my butt.") (referring to alleged child victim's alleged encounter with Defendant).

1 breasts, and touched her buttocks, on April 20 or 21, 2016. J.C. testified that she spoke to the
2 three witnesses about the alleged incident within days after the event.⁴

3 **B. Rulings under NMI R. Evid. 801(d)(1)(B)**

4 On October 11, 2016, J.C.'s prior consistent statements, as testified to by Cecilia Repeki and
5 Marsha Calvo were admitted under NMI R. Evid. 801(d)(1)(B), over the objections raised by
6 defense counsel.⁵ The Court concluded that the statements were offered to rebut the implied charges
7 by Defendant's counsel that J.C., the 'declarant,' fabricated her own testimony that Defendant kissed
8 her on the lips and touched her breasts and buttocks.

9 The next day, on October 12, 2016, before recommencement of the bench trial, the Court
10 reconsidered the previous evidentiary ruling sua sponte; and sustained Defendant's objections to
11 admitting J.C. prior consistent statements as made to Cecilia Repeki and Marsha Calvo. At the time,
12 the Court concluded that the Commonwealth did not meet its burden of proof as to the foundational
13 elements of NMI R. Evid. 801(d)(1)(B). The Commonwealth had not identified a point in time
14 where the improper motive to fabricate testimony arose; and, for that reason, could not identify a
15 statement made before that time. Therefore, J.C.'s prior consistent statements were inadmissible as
16 substantive evidence under NMI R. Evid. 801(d)(1)(B). The Court subsequently ordered further
17 briefing on the issues.

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21 ⁴ *E.g.*, Tr. (Oct. 11, 2016) 9:37:00 a.m.–9:37:40 (testifying that Cecilia Repeki was told by the alleged child victim of
the alleged incident on Wednesday, April 20, 2016, the day after the alleged incident); *id.* 9:38:31 a.m.–9:38:58 a.m.
(testifying that Julian S. Calvo, Jr. was told by the alleged child victim about the incident the evening of April 20,
2016); *id.* 9:39:54 a.m.–9:40:00 a.m. (testifying that Marsha Calvo was told by the alleged child victim about the
incident on the evening of April 20, 2016) (J.C.'s testimony).

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23 ⁵ Defense counsel did not object to admission J.C. prior consistent statements raised during Mr. Calvo Jr.'s testimony.

1 **C. Additional Discovery**

2 The bench trial held in this matter was continued twice to allow for additional discovery
3 materials to be reviewed by Defendant. The first continuance was ordered on August 23, 2016.
4 During cross-examination of J.C., the parties became aware that J.C. spoke to additional witnesses
5 about the case before trial. The Court ordered continuance of the proceedings until October 3,
6 2016,⁶ ordered the Commonwealth to submit a list of witnesses to Defendant, and allowed time for
7 Defendant's investigator to interview the witnesses.

8 The second continuance was ordered on October 12, 2016. During cross-examination of
9 Division of Youth Services (DYS) case worker, Benylin Mettao, that took place the day before, on
10 October 11, 2016, it came to the Court's attention that the reports prepared by DHS case workers
11 after they spoke to J.C. were not disclosed to Defendant. The Court again ordered a continuance of
12 the proceedings until November 15, 2016,⁷ ordered the Commonwealth to submit the reports to
13 Defendant, and allowed time for Defendant to review the reports before the recommencement of
14 trial.

15 **III. DISCUSSION**

16 The Court hereby issues its rulings, granting the Commonwealth's motion and denying
17 Defendant's motion, for the following reasons.

18 **A. Prior Consistent Statements Admitted as Substantive Evidence**

19 In the Commonwealth's motion to reconsider, the prosecution seeks to admit J.C.'s prior
20 consistent statements as both substantive and rehabilitative evidence.

21 _____
22 ⁶ The Court subsequently continued the bench trial until October 11, 2016. Therefore, Defendant had over 49 days to
receive the witness list from the Commonwealth and have his investigator interview the witnesses.

23 ⁷ Here, Defendant had over 34 days to receive the DHS reports from the Commonwealth and to review them.

1 In *Tome v. United States*, the United States Supreme Court held that prior consistent
2 statements under FRE 801(d)(1)(B)(i)⁸ are admitted as substantive evidence only when the
3 statements were "made before the charged recent fabrication or improper influence or motive." 513
4 U.S. 150, 167 (1995) (pre-motive rule). The purpose of allowing the admission of the prior
5 consistent statement as substantive evidence is to rebut an express or implied charge that the
6 declarant changed their incourt testimony because of an improper motive. *See id.* at 156; *e.g.*,
7 *United States v. Rodriguez*, 452 F.2d 1146, 1148 (9th Cir. 1972) ("In [*Rodriguez*], a charge of
8 recent fabrication was implied in defense counsel's cross-examination of Miss James concerning the
9 possibility that she might have made a deal: her testimony incriminating Rodriguez in exchange for
10 leniency."); *De Carlo v. United States*, 6 F. 2d 364, 366 (2d Cir. 1925) (concluding that improper
11 motive was found in the possibility that the testimony was given to obtain commutation of
12 declarant's sentence).

13 Accordingly, prior consistent statements under NMI R. Evid. 801(d)(1)(B) must meet these
14 three foundational elements to be admissible: (1) the declarant must be subjected to cross-
15 examination about the prior consistent statement; (2) a point in time must be identified when the
16 improper motive to fabricate the trial testimony arose; and (3) a consistent statement made before
17 that point in time must be identified. *Tome*, 513 U.S. at 158. These safeguards are necessary
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19 ⁸ Compare FRE 801(d)(1)(B)(i) (2014) ("The declarant testifies and is subject to cross-examination about a prior
20 statement, and the statement: (B) is consistent with the declarant's testimony and is offered: (i) to rebut an express or
21 implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so
22 testifying;"), with NMI R. Evid. 801(d)(1)(B) (2015) ("The declarant testifies and is subject to cross-examination about
23 a prior statement, and the statement: (B) is consistent with the declarant's testimony and is offered to rebut an express
24 or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so
testifying;"). Despite being enacted in 2015, the NMI Rules of Evidence do not reflect FRE 801(d)(1)(B)(ii), which
allows prior consistent testimony to "rehabilitate the declarant's credibility as a witness when attacked on another
ground . . .").

1 because there is a high chance that a jury may evaluate a prior consistent statement for its
2 substantive value, as opposed to a rehabilitative purpose, even if the court issues a limiting
3 instruction. *See Tome*, 513 U.S. at 171 (Breyer, S., dissenting). In addition, even if a prior
4 consistent statement is admitted for a substantive purpose, the evidence has minimal probative
5 value because the simple fact that a statement was repeated to many others does not make the
6 original statement anymore believable. *Id.* at 176.

7 Here, it is undisputed that J.C. was subject to cross-examination about her statement that
8 Defendant allegedly made unwanted sexual advances. The Commonwealth alleges that J.C. was
9 implied to have an improper motive to fabricate her testimony as to her incourt testimony about
10 Defendant's alleged acts on two occasions.

11 The first occasion was when J.C. was cross-examined by defense counsel as to whether
12 representatives from the Commonwealth told her what to say on the stand. *See, e.g.*, Tr. (Aug. 22,
13 2016) 9:22:23 a.m.–9:22:56 a.m. ("MR. TORRES: How many times have you met with . . . um . . .
14 Attorney Glass⁹ to prepare this for case? . . . Just one time? . . . And when was this? J.C.: This was
15 last week . . . I don't know . . ."). The second occasion was when J.C. was asked by defense counsel
16 whether Marsha Calvo told her what to say on the stand before recommencement of the bench trial
17 on October 11, 2016. *E.g.*, Tr. (Oct. 11, 2016) 9:22:10 a.m.–9:22:43 a.m. ("MR. TORRES: Did you
18 guys discuss about what you were going to talk about today? . . . She didn't tell you what to say
19 today? She didn't try to tell you or influence you what your testimony was before? J.C.: No. MR.
20 TORRES: Didn't tell you what [inaudible] said was wrong? J.C.: She wouldn't have because she
21 wasn't here? MR. TORRES: I'm asking you . . . J.C.: Oh . . . no.").

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23 ⁹ The Commonwealth's prosecutor assigned to the instant bench trial.

1 Both lines of questioning raise the specter that J.C. harbored an improper motive to fabricate
2 her testimony at trial. Questioning J.C. about whether the prosecutor spoke to her to prepare her for
3 trial implies an improper bias toward the Commonwealth's prosecution of the case, establishing an
4 improper motive for J.C. to fabricate her in-court testimony. Second, questioning J.C. about
5 whether her mom spoke to her about what to say on the stand establishes an improper motive for
6 J.C. to falsify her incourt testimony to satisfy her mother's desires — as opposed to telling the truth.
7 *See, e.g., Tome*, 513 U.S. at 165 (considering that the alleged child victim's "rather weak charge" for
8 an improper motive to fabricate arose so "the child could remain with her mother."). Defendant has
9 not challenged these arguments through a written opposition by the court-ordered due date. In
10 addition, J.C.'s statements made to Cecilia Repeki and Marsha Calvo were made before any
11 discussions with the prosecutor, as late as around one week before trial,¹⁰ establishing that the prior
12 consistent statements satisfy the pre-motive rule.

13 Therefore, the Court concludes that the prior consistent statements made by J.C. to Cecilia
14 Repeki and Marsha Calvo about Defendant's alleged wrongful acts are admitted as substantive
15 evidence.

16 **B. Prior Consistent Statements Admitted as Rehabilitative Evidence**

17 Moreover, because J.C.'s prior consistent statements meet the standard of being admitted for
18 substantive evidence, the prior consistent statements are also admissible as rehabilitative evidence,
19 so long as the statements have "more probative force bearing on credibility apart from mere
20 repetition." *U.S. v. Miller*, 874 F.2d 1255, 1274 (9th Cir. 1989); *see Tome*, 513 U.S. at 169 ("If the

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22 ¹⁰ Or, if the motive was to please her mother, the improper motive for J.C. to fabricate her incourt testimony arose after
23 the first continuance of trial, on August 23, 2016.

1 witness's accuracy of memory is challenged, it seems clear common sense that a consistent
2 statement made shortly after the event and before he had time to forget, should be received in
3 support." (quoting E. Clearly, McCormick on Evidence § 49, at 105, n.88 (2d ed. 1972)) (Brennan,
4 W., dissenting).

5 On cross-examination, Defendant attacked J.C.'s credibility by alleging that she had a
6 deficient memory. Here, the prior consistent statements serve a rehabilitative purpose beyond the
7 purpose of mere repetition because those statements were made near in time to the alleged incident.
8 There was testimony that Cecilia Repeki and Marsha Calvo were told about Defendant's alleged
9 acts on either April 19, 20, or 21, 2016,¹¹ shortly after the alleged incident, which allegedly took
10 place on April 19, 2016. Therefore, J.C.'s prior consistent statements are also admitted as
11 rehabilitative evidence.¹²

12 **C. Motion to Dismiss Pursuant to NMI R. Crim. P. 16(d)(2)**

13 NMI R. Crim. P. 16(d)(2) provides that:

14 If, at any time during the course of the proceedings, it is brought to the attention of the court
15 that a party has failed to comply with this rule, the court may order such party to permit the
16 discovery or inspection, grant a continuance or prohibit the party from introducing the
17 evidence not disclosed, or it may enter such order as it deems just under the circumstances.
18 The court may specify the time, place, and manner of making the discovery and inspection
19 and may prescribe such terms and conditions as are just.

20 The Court has continued the present bench trial twice to allow for additional discovery by
21 Defendant under NMI R. Crim. P. 16(d)(2). The first continuance was to allow additional time for

22 ¹¹ The Court assumes, without finding, that the prior consistent statements were not given on April 18, 2016, the day
23 before the alleged incident.

24 ¹² The Court declines to rule on the Commonwealth's argument that the 2014 federal amendments to the Federal Rules
of Evidence should control interpretation of the NMI Rules of Evidence, which does not reflect the federal amendments
to FRE 801(d)(1)(B)(i) and (ii).

1 Defendant's investigator to interview a number of potential witnesses that discussed the case with
2 J.C. The second continuance was to allow for additional time for Defendant to review materials that
3 DYS case workers prepared after conducting their interviews with J.C.¹³ The Court has also had an
4 opportunity to review the additionally disclosed material submitted under seal *in camera*.
5 Therefore, the Court's review is limited to whether dismissal of the case is "just" under the
6 circumstances of this case.

7 **1. Improper Shift of Burden to the Defense**

8 Defendant argues that additional discovery materials were of the nature that would
9 improperly shift the burden of production and persuasion to Defendant. This argument is not
10 persuasive. Throughout the trial in a criminal case, the prosecution has the burden to prove all the
11 elements of the crime beyond a reasonable doubt. *See Commonwealth v. Camacho*, 2002 MP 6 ¶
12 108. The burden may improperly shift to the defendant, for example, when the prosecutor
13 comments about the defendant's failure to call witnesses or present evidence. *E.g., State v. Race*,
14 383 N.W.2d 656, 664 (Minn. 1986).

15 Here, the proceedings have not been completed and the prosecutor has not made any
16 comments that suggest that Defendant failed to call witnesses or to present evidence. Therefore,
17 Defendant's motion to dismiss on this ground is denied.

18 **2. Prosecutorial Misconduct under NMI R. Crim. P. 16(a)(1)(C)**

19 Defendant also argues that dismissal is warranted because of prosecutorial misconduct
20 under the Commonwealth's legal disclosure obligations under NMI R. Crim. P. 16(a)(1). The

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22 ¹³ The Court notes, however, that materials protected under the patient-therapist privilege would not have been
23 admissible absent at least an *in camera* review. *See, e.g., People v. District Court*, 719 P.2d 722, 726-27 (Colo. 1986)
24 (psychotherapist-patient privilege).

1 Commonwealth has not disclosed two categories of evidence to Defendant before trial: (1) the name
2 of 14 additional witnesses disclosed through cross-examination of J.C.; and (2) all reports prepared
3 by DYS case workers. The Court finds that Defendant specifically requested for all written DYS
4 reports in the Commonwealth's possession.

5 A criminal defendant has no constitutional right to discovery in a criminal case. *See*
6 *Commonwealth v. Adloan*, 4 NMI 171, 176 (1994) (citing *Weatherford v. Bursey*, 429 U.S. 545,
7 559 (1977)). Similarly, a defendant has no right to discovery under the Commonwealth's Rules of
8 Criminal Procedure, unless the rules enumerate an exception. *See id.* (holding that a defendant has
9 no right to discovery of the government's witness list under NMI R. Crim. P. 16).

10 Accordingly, the Court concludes that Defendant has no ground under NMI R. Crim. P.
11 16(a)(1) to fault the prosecution for the state's inability to discover the names of 14 additional
12 witnesses before trial. However, the Court also concludes that the Commonwealth's failure to
13 disclose the specifically requested DYS reports to Defendant before trial amounted to prosecutorial
14 misconduct. The state has a legal obligation to disclose all papers and documents "which are within
15 the possession, custody, or control of the government, which are material to the preparation of [the
16 defendant's] defense" NMI R. Crim. P. 16(a)(1)(C). The Commonwealth concedes that the
17 requested DYS reports were not provided to Defendant before trial.

18 The Court concludes, therefore, that Defendant suffered prejudice by the delayed discovery
19 of the DYS reports. However, the Court is not convinced that a remedy other than a continuance
20 was necessary to cure such prejudice. Defendant had more than a month to review the discovery
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1 materials; and also maintains the power to recall the Commonwealth's witnesses for its case-in-
2 chief.¹⁴ Accordingly, Defendant's motion to dismiss is denied on this ground.

3 **D. Motion to Dismiss Pursuant to Violation of Constitutional Due Process**

4 Defendant also argues that the delayed disclosure of the DYS reports was a violation of his
5 due process rights under the *Brady* rule. Under *Brady*, the prosecution has a constitutional
6 obligation to disclose exculpatory or impeachment evidence that is material to the defense —
7 evidence that creates a 'reasonable probability' that the result of the proceeding would have been
8 different. *Commonwealth v. Guerrero*, 2014 MP 2 ¶ 7 (articulating the *Brady* rule); *Commonwealth*
9 *v. Guerrero*, 2013 MP 16 ¶ 6 (defining materiality under *United States v. Bagley*, 473 U.S. 667, 682
10 (1985)). Courts have also recognized that a delayed disclosure of *Brady* evidence may result in a
11 mistrial in a pending trial, where "earlier disclosure would have created a reasonable doubt of
12 guilt." *United States v. Burke*, 571 F.3d 1048, 1054 (10th Cir. 2009); *accord Leka v. Portuondo*,
13 257 F.3d 89, 101 (2d Cir. 2001); *United States v. Devin*, 918 F.2d 280, 290 (1st Cir. 1990).

14 If a court concludes that the delayed disclosure of *Brady* material resulted in prejudice to the
15 defense, it may determine an appropriate remedy depending on the delayed disclosure's seriousness
16 and any prejudice suffered by the defense: (1) exclusion of the witness, (2) limitations on the scope
17 of permitted testimony, (3) instruction to the jury, or (4) mistrial. *Burke*, 571 F.3d at 1054.

18 The Court's review of the DYS reports submitted under seal did not reveal any exculpatory
19 or impeachment evidence considered material under the *Brady* rule, obligating mandatory
20 disclosure. Defendant argued in open court at the motion hearing that one DYS report mentions that

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22 ¹⁴ Generally, a party may not recall a witness for the sole purpose of impeachment. *United States v. Webster*, 734 F.2d
23 1191, 1192 (7th Cir. 1984). But an exception applies if a party seeks to recall and impeach a witness based on new
24 information. *United States v. Vasquez*, 653 F.3d 889, 897 (7th Cir. 2011).

1 Defendant allegedly kissed J.C., but did not mention whether Defendant allegedly touched her
2 breasts or her buttocks. Defendant argues that those omissions are potential impeachment evidence
3 against J.C., who testified that Defendant allegedly engaged in all three acts on her person. The
4 Court addresses Defendant's argument, and finds it unpersuasive for the following reasons.

5 The Court confirms that one report omits mention that J.C. informed the DYS case worker
6 that Defendant touched her breasts or buttocks, but is not persuaded that such information is
7 material impeachment evidence under *Brady* for two reasons. First, that evidence is not admissible
8 as substantive evidence of a prior inconsistent statement under NMI R. Evid. 801(d)(1)(A) because
9 there is no indication that the prior inconsistent statement was given under penalty of perjury.¹⁵
10 Second, while extrinsic evidence of J.C.'s prior inconsistent statement is admissible under NMI R.
11 Evid. 613(b), J.C. must be given an opportunity to explain or deny the statement, dulling the
12 beneficial impact of the impeachment evidence to the defense.¹⁶ Therefore, the Court concludes
13 that, while the alleged omission of a two crucial facts by J.C. in the DYS report is impeachment
14 evidence, it does not meet the threshold level of materiality required under the *Brady* rule.

15 Even if the Court were to conclude that the impeachment evidence should have been
16 disclosed under the *Brady* rule, the Government promptly delivered the requested materials well
17 before the recommencement of the bench trial, curing any prejudice resulting from the
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20 ¹⁵ NMI R. Evid. 801(d)(1)(A) ("A statement that meets the following conditions is not hearsay: (1) A Declarant-
21 Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the
22 statement: (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or
23 other proceeding or in a deposition . . .") (emphasis added).

24 ¹⁶ NMI R. Evid. 613(b) ("Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness
is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the
witness about it, or if justice so requires.").

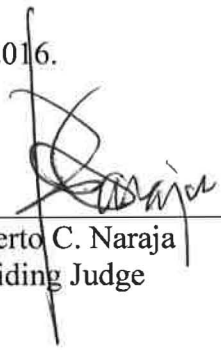
1 Commonwealths' failure to timely provide Defendant with the DYS reports. Therefore, Defendant's
2 motion to dismiss is also denied on this ground.

3 **IV. CONCLUSION**

4 For the foregoing reasons, the Commonwealth's motion to reconsider the court's evidentiary
5 ruling is **GRANTED**. J.C.'s prior consistent statements made to Cecilia Repeki and Marsha Calvo
6 are hereby admitted as substantive and rehabilitative evidence.

7 Defendant's motion to dismiss, made pursuant to NMI R. Crim. P. 16(d)(2), is **DENIED**.

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9 **IT IS SO ORDERED** this 18th day of November, 2016.

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13 Roberto C. Naraja
14 Presiding Judge
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