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FOR PUBLICATION

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

**COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS,**

Plaintiff,

v.

MELVIN MARATITA MANGLONA

Defendant.

) **CRIM. CASE NO. 17-0012R**
)
) **ORDER DENYING DEFENDANT'S**
) **MOTION TO CONDUCT A DEPOSITION**
) **PURSUANT TO NMI R. CRIM P. 15(a) AS**
) **DEFENDANT FAILED TO SHOW**
) **EXCEPTIONAL CIRCUMSTANCES**
) **SUCH AS THE MATERIALITY OF THE**
) **WITNESS'S TESTIMONY AND THE**
) **UNAVAILABILITY OF THE WITNESS**
) **AS DEFINED BY NMI R. EVID. 804(a)**
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I. INTRODUCTION

This matter came before the Court on June 13, 2017 for a pre-trial conference and motion hearing in the Saipan Courthouse. The Defendant, Melvin Maratita Manglona, was present and represented by Attorney Brien Sers Nicholas. The Commonwealth was represented by Assistant Attorney General Teri Tenorio.

The Court hereby makes the following order.

II. BACKGROUND

This matter is presently set for a jury trial on June 26, 2017 in the Rota Courthouse. On June 12, 2017, the Defendant filed his Notice of Taking of Dr. Hy's Deposition Testimony Per Com. R. Crim. Pro. 15. The Court heard arguments from the parties on June 13, 2017.

Dr. Maria Anna Hy works for the Commonwealth Health Center on Saipan. The Defendant represented, through counsel, that Dr. Hy's testimony is "crucial" to his case. The Defendant

1 represented to the Court that Dr. Hy will be off-island on June 22, 2017, but did not specify for how
2 long she would be off-island, nor whether she would still be within the Commonwealth of the
3 Northern Mariana Islands. The Defendant argued that Dr. Hy’s schedule and position at the
4 Commonwealth Health Center should be given special consideration. According to the parties, Dr.
5 Hy has been subpoenaed to testify in Rota during the jury trial. The Commonwealth represented to
6 the Court that it intends to call Dr. Hy during its case-in-chief and is coordinating with Dr. Hy for
7 her to testify in Rota.

8 The Defendant’s notice of deposition set the date of June 14, 2017 as the date of the
9 deposition of Dr. Hy. The Defendant’s notice of deposition further specified that the deposition will
10 be conducted before the undersigned judge in Courtroom 220 of the Saipan Courthouse.

11 III. DISCUSSION

12 Rule 15(a) of the Commonwealth Rules of Criminal Procedure provides in relevant part:

13 Whenever due to *exceptional circumstances* of the case it is in the interest of justice
14 that the testimony of a prospective witness of a party be taken and preserved for use
15 at trial, the court *may* upon motion of such party and notice to the parties, order that
16 testimony of such witness be taken by deposition...

17 NMI R. Crim. P. 15(a) (emphasis added). The Court has “broad discretion in granting a Rule 15(a)
18 motion.” *United States v. Dillman*, 15 F.3d 384, 389 (5th Cir. 1994) (citing *United States v. Bello*,
19 532 F.2d 422, 423 (5th Cir. 1976)).¹ Exceptional circumstances should be determined “on a case-
20 by-case basis, examining whether the particular characteristics of each case constitute ‘exceptional’
21 circumstances.” *Id.* The movant bears the burden of establishing exceptional circumstances. *United*
22 *States v. Drogoul*, 1 F.3d 1546, 1552 (11th Cir. 1993); *United States v. Cannon*, 475 F.3d 1013,
23 1022 (8th Cir. 2007).

24 ¹ “[I]nterpretations of the Federal Rules of Criminal Procedure are instructive, as the Commonwealth Rules of Criminal Procedure are patterned after the federal rules.” *Commonwealth v. Guiao*, 2017 MP 2 ¶ 9 n.1 (quoting *Commonwealth v. Ramangmau*, 4 NMI 227, 233 n.3 (1995)).

1 In determining whether extraordinary circumstances exist, courts turn to the following
2 factors: “(1) the materiality of the testimony; and (2) the unavailability of the witness to testify at
3 trial.” *United States v. Kelley*, 36 F.3d 1118, 1125 (D.C. Cir. 1994) (citing *United States v. Ismaili*,
4 828 F.2d 153, 159 (3d Cir. 1987). “There is typically some showing, beyond ‘unsubstantiated
5 speculation,’ that the evidence exculpates the defendant.” *Id.* (citing *Guam v. Ngirangas*, 806 F.2d
6 895, 897 (9th Cir. 1986); *United States v. Wilson*, 601 F.2d 95, 97 (3d Cir. 1979); *United States v.*
7 *Ontiveros-Lucero*, 621 F.Supp. 1037, 1039 (W.D. Tex. 1985)).

8 At trial, the deposition is admissible “so far as otherwise admissible under the rules of
9 evidence.” NMI R. Crim. P. 15(e). The deposition “may be used as substantive evidence if the
10 witness is unavailable, as unavailability is defined in Rule 804(a) of the Commonwealth Rules of
11 Evidence.” NMI R. Crim. P. 15(e).² To establish unavailability, the movant may “demonstrate the
12 probable unavailability of a prospective deponent ‘through affidavits or otherwise.’” *Drogoul*, 1
13 F.3d at 1553 (quoting *United States v. Alvarez*, 837 F.2d 1024, 1029 (11th Cir. 1988). “A more
14 concrete showing of unavailability . . . may be required at the time of trial before a deposition will
15 be admitted in evidence.” *Id.*

16 In *Commonwealth v. Namauleg*, the Commonwealth moved to admit a video deposition into
17 evidence during a jury trial. 2009 MP 13 ¶ 1. The Commonwealth provided a letter from a doctor to

18 ² A declarant is unavailable under Rule 804(a) of the Northern Mariana Islands Rules of Evidence if he or she:
19 (1) is exempted from testifying about the subject matter of the declarant’s statement because the court
20 rules that a privilege applies;
21 (2) refuses to testify about the subject matter despite a court order to do so;
22 (3) testifies to not remembering the subject matter;
23 (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity,
24 physical illness, or mental illness; or
(5) is absent from the trial or hearing and the statement’s proponent has not been able, by process or
other reasonable means, to procure:
(A) the declarant’s attendance, in the case of a hearsay exception under Rule 804(b)(1) or (5);
or
(B) the declarant’s attendance or testimony, in the case of a hearsay exception under Rule
804(b)(2), (3), or (4).

NMI R. Evid. 804(a). The Northern Mariana Islands Rules of Evidence replaced the Commonwealth Rules of Evidence
on February 22, 2015.

1 establish the declarant's unavailability for medical reasons. *Id.* ¶ 10. After the doctor wrote the
2 letter, the declarant was apparently well enough to return to China. *Id.* Later, the Commonwealth
3 provided no evidence that the declarant was *still* unable to travel to Saipan to attend the trial, thus
4 the declarant was not unavailable under NMI R. Evid. 804(a)(4). *Id.* Thus, the Commonwealth was
5 unable to present the video deposition to the jury. *Id.*

6 In *Commonwealth v. Calvo*, the Commonwealth moved to depose witnesses who would be
7 off-island attending college in the United States mainland. Crim. No. 08-0105 (NMI Super. Ct. July
8 27, 2009) (Order Denying Government's Motion for Deposition of Witness Pursuant to Com. R.
9 Civ. P. 15 at 3) [hereinafter "*Calvo* Deposition Order"]. Since the witnesses were still within the
10 subpoena power of the Commonwealth Superior Court, they were not unavailable for trial. *Id.* at 5.
11 In *Calvo*, the Commonwealth had "options to obtain the presence of its witnesses. While these
12 options are inconvenient to the [Commonwealth] in prosecuting the Defendant, these options need
13 to be fully explored before the 'exceptional circumstances' prerequisite of Rule 15(a) is satisfied."
14 *Id.*

15 Thus, the Court turns to whether the Defendant has established "(1) the materiality of the
16 testimony; and (2) the unavailability of the witness to testify at trial." *Kelley*, 36 F.3d at 1125. The
17 Defendant, through his counsel, represents that Dr. Hy's testimony is "crucial" to the Defendant's
18 case. The Defendant offers nothing other than a representation that Dr. Hy is a crucial defense
19 witness, thus for the purposes of this motion, the Defendant has not shown that Dr. Hy is a material
20 defense witness. Further, even taking the Defendant's statement as to the materiality of Dr. Hy's
21 testimony at face value, the Defendant has failed to show Dr. Hy's unavailability to testify at trial.

22 The Defendant argues that Dr. Hy's schedule and position at the Commonwealth Health
23 Center as a doctor should be taken into account. The Court notes that Dr. Hy's testimony could be
24 taken out of order if necessary to accommodate her schedule, since the trial will be held in Rota

1 with limited flights between Rota and Saipan. Further, while travel to Rota is an inconvenience, it is
2 not an extraordinary circumstance as defined by Rule 15(a). *Calvo* Deposition Order at 3
3 (“[P]otential inconvenience to the party requesting the Rule 15 deposition is not enough to fulfill
4 the exceptional circumstances requirement.”) (citing *Commonwealth v. Cabrera, et al.*, Crim No.
5 01-0477 (NMI Super. Ct. May 3, 2002) (Order Denying Deposition at 3)).

6 Dr. Hy has been served with a subpoena in this case, and since she is within the
7 Commonwealth of the Northern Mariana Islands, she is not beyond the subpoena power of the
8 Court, and she will not be unavailable within the meaning of Rule 804(a) of the Northern Mariana
9 Islands Rules of Evidence. *See supra Calvo* Deposition Order at 5. Further, the Commonwealth
10 represented to the Court that Dr. Hy will testify in Rota during the Commonwealth’s case-in-chief.
11 The Defendant has failed to make a showing that Dr. Hy will be unavailable at the time of trial
12 within the meaning of Rule 804(a) of the Northern Mariana Islands Rules of Evidence.

13 Since the Defendant has not met his burden of establishing extraordinary circumstances³
14 meriting a deposition under Rule 15(a), the Court denies his motion to depose witness.

15 IV. CONCLUSION

16 Accordingly, the Defendant’s motion to take testimony by deposition is **DENIED**.

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18 **IT IS SO ORDERED** this 15th day of June, 2017.

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22 JOSEPH N. CAMACHO
Associate Judge

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24 ³ Specifically, the Defendant failed to establish both that Dr. Hy’s testimony is material and that Dr. Hy will be
unavailable to testify at trial.