

1 **FOR PUBLICATION**

2
3
4 **IN THE SUPERIOR COURT FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

5 **COMMONWEALTH OF THE NORTHERN) CRIMINAL CASE NO. 16-0040**
6 **MARIANA ISLANDS,)**
7 **Plaintiff,)**
8 **v.) ORDER GRANTING MOTION TO QUASH**
9 **JOSEPH SEMAN EPINA,) SUBPOENAS DUCES TECUM OF THE**
10 **Defendant.) OFFICE OF THE ATTORNEY**
11 **GENERAL'S PROSECUTORS AND**
12 **EMPLOYEES AS SUBPOENAS LACK**
13 **SPECIFICITY AS REQUIRED BY NMI R.**
14 **CRIM. P. 17(c)**
15)
16)
17)
18)
19)
20)
21)
22)
23)

24 **I. Introduction**

This matter came before the Court on February 15, 2019 in the Marianas Business Plaza Courtroom on the Commonwealth's Motion to Quash Subpoenas. The Defendant, Joseph Seman Epina, was present in custody and represented by Assistant Public Defender Heather Zona. The Commonwealth was represented by Assistant Attorney General Robert "Charlie" Lee.

The Commonwealth originally filed three motions ("Commonwealth's Motions"): Commonwealth's Motion to Quash Subpoenas on January 30, 2019; Commonwealth's Motion to Quash Subpoena Duces Tecum for AAG Tenorio on February 1, 2019; and Commonwealth's Amended Motion to Quash Subpoenas Duces Tecum on February 1, 2019. Defendant filed his Opposition to Commonwealth's Motions to Quash Subpoenas Validly Issued And Served; Declaration of Counsel on February 8, 2019. The Commonwealth then filed Commonwealth's Reply to Defendant's Response RE: Motions to Quash Subpoenas on February 11, 2019.¹

¹ This issue stems from Defendant's Motion to Compel Discovery; Request for an Evidentiary Hearing filed on September 26, 2018. The Defendant's Motion to Compel was continued to October 17, 2018. On October 17, 2018, the

1 Based on a review of the filings, oral arguments, and applicable law, the Court grants the
2 Commonwealth's Motions.²

3 II. Background

4 This matter stems from the Defendant's alleged sexual abuse of the minor V.R. on or about
5 March 12, 2016. The Defendant is charged with sexual abuse of a minor in the first degree pursuant to 6
6 CMC § 1306(a)(1); assault and battery pursuant to 6 CMC § 1202(a); and disturbing the peace pursuant
7 to 6 CMC § 3101(a).

8 The Defendant alleges that the questioning techniques used by the Commonwealth during
9 investigation interviews resulted in inaccurate reporting by V.R. and irreparably tainted her memory of
10 the events surrounding this case. The Court held an evidentiary hearing ("Memory Taint Hearing") to
11 determine whether the accuser's memory had been tainted. During the Memory Taint Hearing, the
12 alleged victim testified that she was interviewed or met with Assistant Attorneys General and other
13 Office of the Attorney General employees on numerous occasions. The Commonwealth turned over
14 additional discoverable material during the Memory Taint Hearing. These included a several month old
15 written report by an investigator of the Office of the Attorney General and two video recordings of
16 interviews conducted by Assistant Attorney General Elizabeth Weintraub.

17 On January 25, 2019, Defendant, Joseph Seman Epina, filed five subpoenas *duces tecum*
18 ("Defendant's Subpoenas") on five employees of the CNMI Office of the Attorney General: Dixie Inos-
19 Camacho, Lawrence Pangelinan, Urbano Babauta, Gerrilyn Dela Cruz, and Assistant Attorney General

20
21 Court set an Evidentiary Hearing for Defendant's Motion to Compel on December 3, 2018. However, the Evidentiary
22 Hearing was rescheduled to February 15, 2019 because of Typhoon Yutu. Furthermore, this Order Granting the
23 Commonwealth's Motion to Quash is a separate proceeding rooted in Defendant's Motion to Compel Discovery;
24 Request for an Evidentiary Hearing (filed September 26, 2018) from the Memory Taint Hearing held on August 6, 2018
(which is under advisement, pending the Parties' submission of their Proposed Findings of Facts and Conclusion of
Law due March 11, 2019)

² After the February 15, 2019 Motion Hearing, the Commonwealth's Assistant Attorney General Teri Tenorio filed a
Motion to Quash or, in the alternative, to Appear Telephonically on February 22, 2019. Also, on February 22, 2019,
Defendant filed his Motion to Strike Commonwealth's Cumulative Motion to Quash; Motion to Deny Commonwealth's
Request for Telephonic Appearance; Request For Order to Show Cause Hearing.

1 Teri Tenorio. Defendant's Subpoenas seek documents to assist Defendant in arguing that the
2 Commonwealth tainted the accuser's memory.

3 Defendant's Subpoenas request:

- 4 1. Documents indicating dates you met with [Mr. Epina's] accuser concerning the case
- 5 2. All communications between you and [Mr. Epina's] accuser concerning the case
- 6 3. All audio, video, and written recordings of meetings between you and [Mr. Epina's]
7 accuser concerning the case to the extent not already produced.³
- 8 4. All reports drafted, edited, reviewed or received by you referring to meetings
9 between you and [Mr. Epina's] accuser concerning the case.
- 10 5. All notes, whether handwritten or captured electronically, you drafted or otherwise
11 created, concerning meetings between you and [Mr. Epina's] accuser concerning the
12 case.⁴

13 III. Discussion

14 NMI Rule of Criminal Procedure 17(c) allows a party to issue a subpoena *duces tecum*. The
15 *subpoena* requires the person served to produce "books, papers, documents or other objects"⁵ However,
16 a subpoena *duces tecum* is not a discovery tool in criminal cases⁶ and can only be allowed if the
17 subpoena "clear[s] three hurdles: (1) relevancy; (2) admissibility; (3) specificity."⁷ Furthermore:

18 the moving party must show: (1) that the documents are evidentiary and
19 relevant; (2) that they are not otherwise procurable reasonably in advance of
20 trial by exercise of due diligence; (3) that the party cannot properly prepare
for trial without such production and inspection in advance of trial and that
the failure to obtain such inspection may tend unreasonably to delay the trial;

21
22 ³ Only requested from the Custodian of Records

23 ⁴ Only requested from Dixie Inos-Camacho

⁵ NMI R. Crim. P. 17(c).

24 ⁶ *United States v. Nixon*, 418 U.S. 683, 698 (1974) (finding that "the subpoena *duces tecum* in criminal cases [...] was not intended to provide a means of discovery for criminal cases").

⁷ *Id.* at 700.

1 and (4) that the application is made in good faith and is not intended as a
2 general 'fishing expedition.'⁸

3 Should a party's subpoena violate any of the above limitations, Rule 17(c) also allows the Court
4 to quash the subpoena *duces tecum* as "unreasonable or oppressive."⁹

5 Here, the Commonwealth moved to quash Defendant's Subpoenas because it alleges that the
6 subpoenas are not specific, not necessary for the Defendant's trial preparation, exempted from
7 disclosure under Rule 16(a)(2), and exempted from disclosure under Rule 17(h).¹⁰ Based on a review of
8 the filings and arguments of counsel, the Court finds that Defendant did not satisfy the specificity
9 requirement. Therefore, the Court will examination the specificity requirement before turning to any
10 constitutional due process rights Defendant may have under *Brady/Giglio*.¹¹

11 **A. DEFENDANT'S REQUESTS ARE NOT SUFFICIENTLY SPECIFIC**

12 For many subpoenas, specificity is the hurdle on which many of them fail.¹² The specificity
13 requirement for Rule 17(c) subpoenas is much narrower than what is permitted in a civil-style discovery
14 request.¹³ This rule requires that subpoenas be "used only to secure for trial certain documents or
15 sharply defined groups of documents."¹⁴ A request will not be sufficiently specific "[i]f the moving
16 party cannot reasonably specify the information contained or believed to be contained in the documents

17
18 ⁸ *Id.* at 699-700.

19 ⁹ NMI R. Crim. P. 17(c).

20 ¹⁰ The Government also argued that Rule 16 is a "shield" and not a "sword." *United States v. Armstrong*, 517 U.S. 456,
462 (1996). However, the United States Supreme Court in *Armstrong* only addressed the question of whether Rule
21 16(a)(1)(C) applies to selective prosecution claims, which is not the case here. *See id.* at 471 (Ginsberg, J., concurring)
22 ("The Court was not called upon to decide here whether Rule 16(a)(1)(C) applies in any other context, for example, to
affirmative defenses unrelated to the merits.").

23 ¹¹ *Commonwealth v. Laniyo*, 2012 MP 01 ¶ 6 ("Because the Commonwealth Rules of Criminal Procedure are patterned
after the Federal Rules of Criminal Procedure, this Court has long held that it is appropriate to consult . . . the federal
rules when interpreting the Commonwealth Rules of Criminal Procedure.") (quoting *Commonwealth v. Attao*, 2005 MP
8 ¶ 9 n.7).

24 ¹² *United States v. Ruedlinger*, 172 F.R.D. 453, 456 (D. Kan. 1997).

¹³ *United States v. Weisberg*, No. 08-CR-347 (NGG) (RML), 2010 U.S. Dist. LEXIS 128107, at *3-4 (E.D.N.Y. Dec. 3,
2010) (finding that "[d]efendant's subpoena requests are phrased in language that resembles civil discovery requests,
rather than the *specific* requests for actual evidence that are allowed under *Rule 17(c)*") (emphasis added).

¹⁴ *United States v. Wittig*, 247 F.R.D. 661, 663 (D. Kan. 2008).

1 sought but merely hopes that something useful will turn up.”¹⁵ Generally, an open-ended request for
2 documents that includes phrases such as “any and all documents” or “includes, without limitation,” will
3 be quashed as an improper fishing expedition.¹⁶

4 Here, Defendant’s Subpoenas constitute an improper fishing expedition. The language
5 Defendant uses in Defendant’s Subpoenas, “[all] documents,” “all communications,” “all [...]”
6 recordings,” “all repots,” and “all notes,” is similar to the language used in other subpoenas that have
7 been quashed for not being specific. *See supra* note 16. By requesting “all documents”¹⁷ the
8 Defendant’s Subpoenas resemble a civil discovery request. These “requests do not identify specific
9 documents or sufficiently narrow categories of specific documents as required to survive a motion to
10 quash.”¹⁸ Instead, Defendant’s Subpoenas improperly cast their net wide in the hope to discover
11 something useful. Therefore, Defendant’s subpoenas do not satisfy the specificity requirement of Rule
12 17(c).

13 **B. DEFENDANT’S CONSTITUTIONAL DUE PROCESS RIGHTS ENTITLE
14 DEFENDANT TO BRADY/GIGLIO MATERIAL**

15 Though Defendant’s Subpoenas are quashed, Defendant should receive the evidence it is
16 entitled to under the due process clause of the Fourteenth Amendment of the United States

17 ¹⁵ *Weisberg*, 2010 U.S. Dist. LEXIS 128107, at *5; *see also*, *United States v. Noriega*, 764 F. Supp. 1480, 1493 (S.D. Fla. 1991).

18 ¹⁶ *United States v. Shanahan*, 252 F.R.D. 536, 541 (E.D. Mo. 2008) (“As a general rule, requests for ‘any and all documents’ are emblematic of a discovery request or of a fishing expedition.”); *Wittig*, 247 F.R.D. at 664 (“Defendant’s proposed subpoenas clearly resemble discovery requests, employing such terms as ‘any and all’ documents or communications, or ‘includes, without limitation.’ Defendant’s admission that he needs time to receive and analyze these records, ‘if they exist,’ further indicates that he is on an improper fishing expedition”). There have been many cases that found that subpoenas that use similar language are not sufficiently specific. *See Id.* at 540 (“Copies of any and all documents relating to ESSI stock options [...]”); *Weisberg*, 2010 U.S. Dist. LEXIS 128107, at *4 (“all documents, including, but not limited to, all calendars, appointment logs, diaries, and travel and meeting records of Martin E. Weisberg . . . concerning meetings or teleconferences with representatives of SIAM, JMV, Jon M. Knight or Thomas Hackl”); *Unites States of Am. v. Zhuta*, No. 09CR357A, 2011 U.S. Dist. LEXIS 37708, at *3-4 (W.D.N.Y. Apr. 6, 2011); *Ruedlinger*, 172 F.R.D. at 455 (“any and all audit reports prepared by the Internal Revenue Service pertaining to DRI (Doug Ruedlinger, Inc.) and/or Wheatland Group Holdings, Inc. during the 1990’s time period”); *Wittig*, 247 F.R.D. at 662 (“Any and all communications (including emails), correspondence, notes or other documents by and between John T. Siffert, Charles T. Spada, and/or Lankler Siffert & Wohl, LLP in their capacity as counsel for Westar Energy, and the United States Attorney’s Office for the District of Kansas and/or the Department of Justice, between July 1, 2002 and December 3, 2003.”).

23 ¹⁷ *See* Defendant’s Subpoenas (defining “All” as “any and all” and “each and every”).

24 ¹⁸ *Weisberg*, 2010 U.S. Dist. LEXIS 128107, at *5.

1 Constitution.¹⁹ The Due Process Clause requires that the Commonwealth disclose exculpatory and
2 impeachment evidence that is favorable to the defendant and material to his guilt or punishment,
3 regardless of whether the defendant requests the information. *See Brady v. Maryland*, 373 U.S. 83, 87
4 (1963) (holding that, under the due process clause of the Fourteenth Amendment, “the suppression by
5 the prosecution of evidence favorable to an accused [...] violates due process where the evidence is
6 material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution”);
7 *Giglio v. U.S.*, 405 U.S. 150, 154 (1972) (finding that the *Brady* rule applies to evidence that could be
8 used to impeach a prosecution witness); *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (reiterating that the
9 prosecution must disclose *Brady/Giglio* material regardless of whether the defendant requests it).²⁰
10 Because the Fourteenth Amendment’s due process clause is applicable within the CNMI,²¹ defendants
11 have a right to receive *Brady/Giglio* material independent of what is stated in the CNMI Rules of
12 Criminal Procedure.²² Furthermore, defendants are entitled to *Brady/Giglio* material even if the relevant
13 material constitutes work product,²³ so long as it is not opinion work product.²⁴
14

15 ¹⁹ § 501(a) of the Covenant expressly states that Amendment 5 and Amendment 14, Section 1 of the United States
16 Constitution “will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the
17 several States.” Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the
18 United States of America, 48 U.S.C. § 1801 note. Furthermore, the Due Process clause of the CNMI Constitution
19 mirrors the Due Process Clauses of the United States Constitution. *Compare* NMI CONST. art. I, § 5 (“Due Process. No
20 person shall be deprived of life, liberty or property without due process of law”), *with* U.S. CONST. amend. V (“No
21 person shall be [...] deprived of life, liberty, or property, without due process of law”), *and* U.S. CONST. amend. XIV, §
22 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law”).

23 ²⁰ *See also*, *U.S. v. Bagley*, 475 U.S. 667, 676 (1985); *Commonwealth v. Hong*, 2013 MP 19, ¶ 11 (noting that “a
24 defendant does not have to request [*Brady*] evidence”) (citing *United States v. Agurs*, 427 U.S. 97, 106-07 (1976)).

²¹ *See supra* note 19.

²² *See United States v. Williams*, 998 F.2d 258, 269 (5th Cir. 1993) (finding that “[e]ven though the FBI Forms 302 are
not discoverable under the Jencks Act, they would be discoverable if they would be exculpatory or tend to reduce the
defendant’s sentence, or if they would help the defendant to impeach a government witness”); *United States v. Pac. Gas
& Elec. Co.*, No. 14-cr-00175-TEH, 2016 U.S. Dist. LEXIS 75467, at *24 (N.D. Cal. June 8, 2016) (finding that
exculpatory in facts documents exempt from discovery under Federal Rule of Criminal Procedure 16(a)(2) must still be
disclosed under *Brady*).

²³ *See United States v. Kohring*, 637 F.3d 895, 908 (9th Cir. 2011) (finding that “while the prosecution did not have a
duty to disclose the e-mail itself or the opinion work product in the e-mail, it did have a duty to disclose the non-
cumulative ‘underlying exculpatory facts’ in the e-mail”); *see also*, U.S. Department of Justice, Issues Related to
Discovery, Trials, and Other Proceedings § 9-5.002 (2008) (stating that during an interview, “[m]aterial variances in a
witness’s statements should be memorialized, even if they are within the same interview, and they should be provided
to the defense as *Giglio* information”).

1 Here, Defendant is entitled to any *Brady/Giglio* material not already turned over to him.²⁵ Due
2 to the difficulty in determining whether the evidence is material, the Commonwealth should err on the
3 side of disclosure.²⁶

4 V. CONCLUSION

5 For the above stated reasons, the Commonwealth's Motion to Quash Subpoenas is hereby
6 GRANTED.

7
8 IT IS SO ORDERED this 26th day of February, 2019.

9
10 

11 JOSEPH N. CAMACHO
12 Associate Judge
13
14
15
16
17
18

19 ²⁴ See *Morris v. Ylst*, 447 F.3d 735, 742 (9th Cir. 2006) (finding that “a prosecutor's opinions and mental impressions of
20 the case are not discoverable under *Brady* unless they contain underlying exculpatory facts”).

21 ²⁵ The Commonwealth stated in Reply to Defendant's Response Re: Motions to Quash Subpoenas that Defendant's
22 requests for *Brady/Giglio* material are vague. Notwithstanding, the Commonwealth still has a duty to disclose
23 *Brady/Giglio* material. See *United States v. Jordan*, 316 F.3d 1215, 1252 n.81 (11th Cir. 2003); see also, *Kyles v.*
24 *Whitley*, 514 U.S. 419, 433, 115 S. Ct. 1555, 1565 (1995) (stating that “regardless of request, favorable evidence is
material, and constitutional error results from its suppression by the government, ‘if there is a reasonable probability
that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’”) (quoting
Bagley, 473 U.S. at 682); *Commonwealth v. Guerrero*, 2014 MP 4, ¶ 14 (finding that “[under the *Brady* rule], due
process is violated if the government withholds evidence that is both favorable to the accused and material to either
guilt or sentencing”). Furthermore, the *Brady/Giglio* constitutional doctrine are not inconsistent with what the Supreme
Court of the Northern Mariana Islands stated in *Commonwealth v. Guerrero*, 2014 MP 2 ¶ 7, as the CNMI Supreme
Court in *Guerrero* noted that the requirements under *Brady* are different from those under Rule 16(a)(2).

²⁶ *Kyles*, 514 U.S. at 439.