



By order of the Court, Associate Judge Joseph N. Canacho

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FOR PUBLICATION

CLERK OF THE COURT  
SUPERIOR COURT  
FILED

2018 SEP 13 PM 1:20

BY: *[Signature]*

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

COMMONWEALTH OF THE  
NORTHERN MARIANA ISLANDS,

Plaintiff,

v.

NELSIN ANSON SAIMON,

Defendant.

CRIMINAL CASE NO. 18-0020 E

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)  
) **ORDER FINDING THAT BECAUSE A**  
) **DEFENDANT HAS THE RIGHT UNDER**  
) **6 CMC § 6303(c) TO CROSS-**  
) **EXAMINATION AT A PRELIMINARY**  
) **EXAMINATION HEARING TO WEED**  
) **OUT GROUNDLESS CLAIMS, THE**  
) **DEFENDANT IS ENTITLED TO**  
) **TANGIBLE MATERIALS, IF ANY, USED**  
) **BY LAW ENFORCEMENT TO**  
) **ESTABLISH PROBABLE CAUSE FOR**  
) **HIS ARREST TO FULLY AND**  
) **PROPERLY CROSS EXAMINE THE**  
) **GOVERNMENT'S WITNESS**  
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I. INTRODUCTION

**THIS MATTER** came before the Court on February 28, 2018 at 1:30 p.m., on May 2, 2018, at 9:00 a.m., and on July 16, 2018 at 1:30 p.m. The Commonwealth of the Northern Mariana Islands (“Commonwealth”) was represented by Assistant Attorney General Jonathan Wilberscheid. Defendant Nelsin Anson Saimon (“Saimon”) was represented by Assistant Public Defender Heather M. Zona. At issue is Saimon’s motion for police records and information forming the basis of the Commonwealth’s assertion of probable cause, and which were reviewed by the Commonwealth’s

1 witness prior to the preliminary examination to refresh his recollection and familiarize himself with  
2 the case.

3 On February 12, 2018, Defendant filed his Motion to Compel Production of Police Records  
4 and Information. On February 20, 2018, the Commonwealth filed its Opposition to Defendant's  
5 Motion to Compel Production of Police Records and Information. On February 26, 2018, Defendant  
6 filed his Reply Brief in Support of His Motion to Compel Production of Police Records and  
7 Information. Finally, on March 19, 2018, Defendant filed his Supplemental Reply Brief in Support  
8 of His Motion to Compel Production of Police Records and Information.

9 Based on the filings, the applicable laws, and arguments of counsels, the Court hereby  
10 issues the following Order.

## 11 II. STATEMENT OF FACTS

### 12 A. The Affidavit of Probable Cause

13 On or about January 26, 2018, Department of Public Safety Detective Daniel T. Joab  
14 ("Detective Joab") swore out an Affidavit of Probable Cause in Support of the Issuance of an Arrest  
15 Warrant ("Arrest Warrant"). The Arrest Warrant alleged the following:

- 16 1. Department of Public Safety Officer Daniel Maliuyaf ("Officer Maliuyaf")  
17 responded to a call for police assistance at LC Market in Gualo Rai, Saipan on  
18 December 26, 2017. Arrest Warrant ¶ 1.
- 19 2. At LC Market, Officer Maliuyaf interviewed Huang Guang Liang ("Mr. Liang"). *Id.*  
20 at ¶ 2.
- 21 3. Mr. Liang told Officer Maliuyaf that a male individual used a check in the amount of  
22 \$578.90 belonging to Kae Poong (Saipan) Corporation. *Id.*
- 23 4. The male individual told Mr. Liang that he works for Kae Poong Corporation. The  
24 male individual was allowed to cash the check at LC Market. *Id.*

- 1 5. A couple of days after the check was cashed at LC Market, Mr. Liang called the  
2 number listed on the check. Mr. Liang was informed that Kae Poong Corporation  
has been out of business since 2013. *Id.*
- 3 6. On December 26, 2017, Officer Maliuyaf reviewed video surveillance at LC Market  
4 and identified Saimon to be the male individual on the surveillance video that cashed  
the check at LC Market. *Id.* at ¶ 3.
- 5 7. A month later, on January 25, 2018, Detective Joab met with Mr. Liang, and Mr.  
6 Liang told him that Saimon entered the store, used a check belonging to Kae Poong  
(Saipan) Corporation, and told Mr. Liang that he (Saimon) works for Kae Poong  
7 Corporation. *Id.* at ¶ 4.

8 On January 26, 2018, a CNMI Superior Judge signed an Arrest Warrant for Saimon based  
9 on Detective Joab's Affidavit of Probable Cause in Support of the Issuance of an Arrest Warrant.

10 On Saturday, January 27, 2018, Detective Joab then executed the Arrest Warrant and  
11 arrested Saimon for the charges of Possession of Forged Writing or Forgery or Forgery Device in  
12 violation of Title 6, subsection 1702(a)(1)(2) and Theft in violation of Title 6, subsection 1601(a) of  
the Commonwealth Code.

### 13 **B. Initial Appearance**

14 On Monday, January 29, 2018, the Defendant Saimon was brought to the CNMI Superior  
15 Court for his initial appearance and bail hearing. The Court found the Defendant indigent and  
16 appointed an attorney from the Office of the Public Defender.

### 17 **C. Filing of Information**

18 On February 5, 2018, the Commonwealth filed an Information charging Saimon with Theft  
19 in violation of section 1601(a), Title 6 of the Commonwealth Code, and Forgery in violation of  
20 section 1701(c) and 4101, Title 6 of the Commonwealth Code.

### 21 **D. The Preliminary Examination**

22 On February 5, 2018, a preliminary examination hearing (also referred to as a preliminary  
23 hearing) was held to determine whether there is probable cause to charge Defendant Saimon with  
24 the crimes listed in the Information. The Office of the Attorney General did not provide the Defense

1 with any materials prior to the preliminary examination hearing, including the check Defendant  
2 Saimon allegedly cashed, or the video surveillance that allegedly identified Saimon as cashing the  
3 check, or any witness statements or police reports.

4 Defendant Saimon appeared in custody at the preliminary examination. The prosecution first  
5 conducted its direct examination. The prosecution's sole witness was Detective Joab – the officer  
6 who swore out the Affidavit of Probable Cause in Support of the Issuance of an Arrest Warrant to  
7 arrest Defendant Saimon.<sup>1</sup> No exhibits were used and none were moved into evidence at the  
8 preliminary examination hearing. A representative of LC Market did not testify. Officer Maliuyaf  
9 did not testify either, even though he was the officer who first went to LC Market in December  
10 2017, reviewed the video surveillance, and identified Defendant Saimon.

11 Detective Joab testified that he talked with Officer Maliuyaf and formed the basis of his  
12 knowledge of the case by reviewing Officer Maliuyaf's notes, Officer Maliuyaf's reports, and the  
13 alleged forged check. Detective Joab also testified that it was Officer Maliuyaf and not Detective  
14 Joab, who talked with a Jennalyn Cruz of Kae Poong Corporation regarding the alleged forged  
15 check. Detective Joab also was not present during the initial contact between Officer Maliuyaf and  
16 Mr. Liang and did not review the video footage.

17 Defendant then requested copies of those materials, which the Commonwealth refused to  
18 provide. Defense counsel argued, among other things, that failing to provide the requested materials  
19 constituted a due process violation.

20 The Court then continued the preliminary examination for the parties to brief the issue.

21 Defendant seeks materials on which the prosecution bases its probable cause, and materials  
22 which Detective Joab testified he used to refresh his recollection and familiarize himself with the

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23 <sup>1</sup> On February 12, 2018, a bail modification hearing was held, and Defendant Saimon was released from custody.  
24 Defendant has been out of custody while the Court took the motion under advisement.

1 case prior to testifying at the preliminary examination hearing. Defendant argues that the failure to  
2 provide the materials: 1) constitutes an interference with Defendant's right to effective assistance of  
3 counsel; 2) interferes with Defendant's right to cross-examine witnesses; and 3) violates the due  
4 process requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Defendant also  
5 argues that the materials referenced by Detective Joab must be produced to the extent they form the  
6 basis of his knowledge of the case and were used to refresh his recollection.

7 Defendant further argues that failing to provide these materials, which Defendant asserts are  
8 limited in scope, would render the preliminary examination hearing a sham proceeding as such a  
9 hearing will, in effect, result in the Court just simply rubber-stamping the Commonwealth's  
10 probable cause accusations. Without the necessary tangible materials to fully and properly cross-  
11 examine the Commonwealth's witness on how law enforcement established probable cause for the  
12 Defendant's arrest, the Defense Counsel's cross-examination would be reduced to ineffective  
13 attempts to guess and speculate. Without a full and proper cross-examination at a preliminary  
14 examination hearing to test the veracity of the allegations and credibility of the Commonwealth  
15 witnesses of how the Commonwealth established probable cause, the Court would not be able to  
16 obtain a full and robust record to rule whether or not there is probable cause that a crime has been  
17 committed and the Defendant is the person that committed the crime.

18 The Commonwealth argues that Defendant is not entitled to the requested materials because  
19 a) preliminary examination hearings do not secure fundamental rights and are not required by either  
20 the CNMI or United States Constitutions; b) due process does not include a right to avoid trial in  
21 the absence of probable cause; c) there is no constitutional right to pretrial discovery; d) there is no  
22 basis in Commonwealth rule or statute to compel pre-preliminary examination discovery; and e) the  
23 right to counsel at a preliminary examination includes only a limited right of cross-examination  
24 based on a finding of probable cause.

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### III. DISCUSSION

The United States Constitution requires two pretrial determinations to be made for all criminal defendants. *See Babauta v. Superior Court of N. Mar. I.*, 4 NMI 309, 310 (1995). First, the Fourth Amendment to the United States Constitution requires that a judicial officer make a probable cause, or *Gerstein*, determination if there is a “significant restraint on the accused’s liberty following arrest.” *Id.* However, a *Gerstein* hearing is not required if there is a warrant that supports the defendant’s arrest. *Id.* at 310-11.

Second, the Fifth and Fourteenth Amendments to the United States Constitution require that a suspect be brought before a judge for an initial appearance “without unreasonable delay,” following arrest. *Id.* at 311. “The purpose of this appearance is to advise the arrestee of the charges against her or him, and of her or his rights.” *Id.*

There is a third type of pretrial determination, known as a preliminary examination, the right to which has been expanded by statute and rules of procedure. *Id.*; NMI R. CRIM. P. 5.1. “The purpose of a preliminary examination is to determine whether there is probable cause to believe that a crime has been committed and that the accused committed it.” *Babauta*, 4 NMI at 311. However, there is no due process right to a preliminary examination where “the government commences prosecution through the filing of an information, and arrests the accused under a warrant.” *Id.*

Here, because the Commonwealth filed an information and arrested Defendant under a warrant, Defendant does not have a due process right to a preliminary examination hearing. However, Defendant does have such a right under Rule 5.1 of the Commonwealth Rules of Criminal Procedure. Though Defendant’s right to a preliminary examination is derived from Rule 5.1, Defendant has certain statutory rights at the preliminary examination hearing. For example, Defendant has a right to cross-examine adverse witnesses at the preliminary examination hearing pursuant to 6 CMC § 6303(c).

1 For the reasons stated below, the Court finds that because Defendant has the right to fully  
2 and properly cross-examine adverse witnesses at a preliminary examination hearing, Defendant is  
3 therefore entitled to the tangible materials, if any, used by law enforcement to establish probable  
4 cause.

5 The CNMI Legislature has mandated by statute that a defendant has a right to cross-examine  
6 at a preliminary examination hearing pursuant to 6 CMC § 6303(c) – which states that, at a  
7 preliminary examination hearing, “[t]he arrested person may cross-examine adverse witnesses and  
8 may introduce evidence in his or her own behalf.”<sup>2</sup> The right to cross-examine adverse witnesses  
9 under 6 CMC § 6303(c) is separate and distinct from a defendant’s right to cross-examine adverse  
10 witnesses at trial.<sup>3</sup>

11 To determine the scope of a defendant’s right to cross-examine adverse witnesses under 6  
12 CMC § 6303(c), the Court must determine what a defendant’s rights are under this statute based on  
13 the nature of preliminary examination hearings. The Commonwealth Supreme Court has made it  
14 clear that the role of the trial court at a preliminary examination hearing “is not simply to rubber  
15 stamp the prosecution’s complaint.” *In re Commonwealth of the N. Mar. I.*, 2018 MP 8 ¶ 17. Rather,  
16 a Rule 5.1 preliminary examination is a hearing in which the Commonwealth must show that there

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17 <sup>2</sup> The Commonwealth Supreme Court in *Babauta v. Superior Court of N. Mar. I.*, 4 NMI 309, 313 (1995), stated that  
18 “[t]he legislative history of 6 CMC § 6303 is devoid of evidence of an intent either to create a statutory right to a  
19 preliminary examination, or to codify any procedural rules that might supersede the Commonwealth Rules of Criminal  
20 Procedure.” The *Babauta* Court also found that the Trust Territory Code section that predated 6 CMC § 6303 “was  
inadvertently overlooked when the law governing criminal procedure was changed from statutory to rule-based form in  
1983.” *Id.* However, a more recent ruling by the Commonwealth Supreme Court appears to overrule its initial findings  
in *Babauta* in *In re Commonwealth of the N. Mar. I.*, 2018 MP 8 ¶ 16, in which the Commonwealth Supreme Court  
found that 6 CMC § 6303 was good law. Therefore, the Court finds that 6 CMC § 6303(c) creates a statutory  
preliminary examination procedure rule.

21 <sup>3</sup> In enacting 6 CMC § 6303(c), the Legislature did not statutorily apply the Confrontation Clause to preliminary  
22 examinations. This is evidenced by the fact 6 CMC § 6303(c) only gives defendants the right to cross-examine adverse  
23 witnesses and is silent with respect to the Confrontation Clause’s other rights. Compare 6 CMC § 6303(c) (“[t]he  
24 arrested person **may cross-examine adverse witnesses**”) (emphasis added), with NMI CONST. art. I, § 4(b) (“[t]he  
accused has the right to **be confronted with adverse witnesses**”) (emphasis added). Furthermore, it is important to  
note that 6 CMC § 6303(c) and NMI CONST. art. I, § 4(b) Confrontation Clause are different and distinct but are not  
inconsistent with each other. 6 CMC § 6303(c) focuses on probable cause at a preliminary examination hearing and  
NMI CONST. art. I, § 4(b) only applies at trial.

1 is probable cause to find that a crime has been committed and that the defendant committed the  
2 crime.. 6 CMC § 6303(f) (“If [...] it does not appear to the official that there is probable cause to  
3 believe that a criminal offense has been committed and that the arrested person committed it, the  
4 official shall discharge the arrested person.”); *see also Babauta*, 4 NMI at 311 (“The purpose of a  
5 preliminary examination is to determine whether there is probable cause to believe that a crime has  
6 been committed and that the accused committed it.”). The purpose of a Rule 5.1 preliminary  
7 examination is “to weed out groundless claims and thereby avoid . . . the imposition and expense of  
8 an unnecessary criminal trial . . . .” *In re Commonwealth of the N. Mar. I.*, 2018 MP 8 ¶ 16  
9 (quoting *Commonwealth v. Crisostimo*, 2005 MP 18 ¶ 14).

10 One of the vital mechanisms used to weed out groundless claims at the preliminary  
11 examination hearing stage is **cross-examination**, “**the greatest legal engine ever invented for the**  
12 **discovery of truth.**” *California v. Green*, 399 U.S. 149, 158 (1970) (citation omitted) (emphasis in  
13 bold). For cross-examination at a preliminary examination hearing to be effective, it is necessary for  
14 the party conducting the cross-examination to be privy to the documents that formed the basis of the  
15 opposing party’s testimony. *See Brandon v. Mare-Bear, Inc.*, No. 99-15312, 2000 U.S. App. LEXIS  
16 12585, at \*11 (9th Cir. June 5, 2000) (finding that one of the primary goals of discovery is to  
17 prevent trial by ambush and surprise). Therefore, to protect a defendant’s right to challenge the  
18 Commonwealth’s assertion that probable cause exists through the use of cross-examine, the Court  
19 finds that 6 CMC § 6303(c) gives a defendant the right to obtain the tangible materials, if any,<sup>4</sup> used  
20 by law enforcement to find probable cause for the arrest.

21 It is worth noting that 6 CMC § 6303(c) and NMI CONST. art. I, § 4(b) Confrontation Clause  
22 are different and distinct but are not inconsistent with each other. 6 CMC § 6303(c) applies to  
23

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24 <sup>4</sup> Some cases may not have any tangible materials.



1 probable cause at a preliminary examination hearing – a type of hearing where the Rules of  
2 Evidence do not apply,<sup>5</sup> hearsay testimony is allowed, Commonwealth witnesses are often not  
3 factual witnesses,<sup>6</sup> and a dismissal of a charge is without prejudice.<sup>7</sup> However, NMI CONST. art. I,  
4 § 4(b) Confrontation Clause applies at trial, which focuses on finding guilt beyond a reasonable  
5 doubt, where the NMI Rules of Evidence do apply, hearsay testimony is not allowed,<sup>8</sup> factual  
6 witnesses are called to prove (or disprove) the elements of the crime(s), and double jeopardy  
7 applies.

8         It is also important to note that because Defendant’s access to tangible materials, if any,  
9 flows from the Defendant’s right to cross-examine pursuant to 6 CMC § 6303(c), Defendant’s  
10 access to this information is limited to what would be relevant at a preliminary examination hearing  
11 – namely, the evidence used to formulate an opinion of probable cause. This is different from the  
12 information that is discoverable by Defendant to show reasonable doubt at trial – which would  
13 include the information discoverable under Rule 16, Rules 26.2, and *Brady*.<sup>9</sup> Furthermore, this 6  
14 CMC § 6303(c) right is distinct from a Defendant’s rights under NMI CONST. art. I, § 4(b), which  
15 only applies at trial.<sup>10</sup>

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17 <sup>5</sup> NMI R. EVID.1101(c)(2).

18 <sup>6</sup> Typically, the government calls the case agent/follow-up investigator to testify at the preliminary examination hearing.

18 <sup>7</sup> If the Court dismisses a charge for lack of probable cause, the prosecution can re-file the charges if new or additional evidence comes to light.

19 <sup>8</sup> NMI R. EVID.1101.

19 <sup>9</sup> Rule 16, Rule 26.2, and *Brady* are only trial rights. See *Commonwealth v. Jian Huang*, No. 03-0350 (CNMI Super. Ct. November 28, 2003) (finding that Rule 16 is a trial right); 1993 Advisory Committee Note to Rule 26.2 (“As noted in the 1983 Advisory Committee Note to Rule 12(i), the courts have generally declined to extend the Jencks Act, 18 U.S.C. § 3500, beyond the confines of actual trial testimony. That result will be obviated by the addition of Rule 26.2(g)”); *Commonwealth v. Campbell*, 4 NMI 11, 16 (1993) (finding that due process only requires “that the government produce exculpatory material in time for the defendant’s effective use of those materials *at trial*” (emphasis added)).

22 <sup>10</sup> In enacting 6 CMC § 6303(c), the Legislature did not statutorily apply the Confrontation Clause to preliminary examinations. This is evidenced by the fact that 6 CMC § 6303(c) only gives defendants the right to cross-examine adverse witnesses and is silent with respect to the Confrontation Clause’s other rights. Compare 6 CMC § 6303(c) (“[t]he arrested person **may cross-examine adverse witnesses**”) (emphasis added), with NMI CONST. art. I, § 4(b) (“[t]he accused has the right to **be confronted with adverse witnesses**”) (emphasis added).

1 To be absolutely clear, the Court is not suggesting that the Commonwealth call factual  
2 witnesses and/or put on a “mini-trial” at the preliminary examination hearing. The Court’s ruling in  
3 this Order is limited to the issue that the Defendant is entitled to the tangible materials, if any, that  
4 law enforcement used to establish probable cause so that the Defendant may exercise his 6 CMC §  
5 6303(c) statutory right to cross-examine the government witness on the issue of probable cause.

#### 6 IV. CONCLUSION

7 Based on the foregoing, the Court hereby finds that the CNMI Legislature enacted 6 CMC §  
8 6303(c) to ensure that defendants have a right to cross-examine at a preliminary examination  
9 hearing. FURTHER, the CNMI Supreme Court has ruled that the purpose of a preliminary  
10 examination hearing is to “weed out groundless claims”. THEREFORE, for Defendant to fully and  
11 properly exercise his right to cross-examine adverse witnesses at the preliminary examination  
12 hearing and to be able to weed out groundless claims, Defendant Saimon is entitled to the tangible  
13 materials, if any, that law enforcement used to establish the probable cause of his arrest.

14 As only Detective Joab testified, Defendant Saimon is entitled to the materials reviewed by  
15 Detective Joab when he swore out an Affidavit of Probable Cause in Support of the Issuance of an  
16 Arrest Warrant – more specifically, the tangible materials are Officer Maliuyaf’s notes, Officer  
17 Maliuyaf’s reports, and the alleged forged check.<sup>11</sup>

18 Accordingly, the Defendant’s Motion is hereby **GRANTED** as to Officer Maliuyaf’s notes,  
19 Officer Maliuyaf’s reports, and the alleged forged check.

20 **IT IS SO ORDERED** this 13 day of September, 2019.

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23 **JOSEPH N. CAMACHO**, Associate Judge

24 <sup>11</sup> Detective Joab testified that he did not review the surveillance video.



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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,	)	CRIMINAL CASE NO. 18-0020E
	)	
<b>Plaintiff,</b>	)	
	)	
v.	)	<b>ERRATA ORDER</b>
	)	
NELSIN ANSON SAIMON,	)	
	)	
<b>Defendant.</b>	)	

The Court is hereby correcting the Order Finding That Because A Defendant Has The Right Under 6 CMC § 6303(c) To Cross-Examination At A Preliminary Examination Hearing To Weed Out Groundless Claims, The Defendant Is Entitled To Tangible Materials, If Any, Used By Law Enforcement To Establish Probable Cause For His Arrest To Fully And Properly Cross Examine The Government's Witness issued on August 9, 2019.

**IT IS HEREBY ORDERED** that the Order Finding That Because A Defendant Has The Right Under 6 CMC § 6303(c) To Cross-Examination At A Preliminary Examination Hearing To Weed Out Groundless Claims, The Defendant Is Entitled To Tangible Materials, If Any, Used By Law Enforcement To Establish Probable Cause For His Arrest To Fully And Properly Cross Examine The Government's Witness Dated August 9, 2019, is amended to read **TANGIBLE** on page 1 line 11 in lieu of Tangible.

**IT IS ALSO HEREBY ORDERED** that on page 10 line 18 is amended to read **Defendant's** in lieu of Plaintiffs'.

The published opinion shall reflect these changes.

**IT IS SO ORDERED** this 13 day of September, 2019.

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**JOSEPH N. CAMACHO**, Associate Judge

By Order of the Court, Judge Joseph N. Camacho

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