IN THE

SUPREME COURT

OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,

Plaintiff/Appellant,

v.

FRANCISCO AGUON PUA,

Defendant/Appellee.

Supreme Court Appeal No. CR-06-0035-GA
Superior Court Criminal Case No. 05-0132D

FOR PUBLICATION

OPINION

Cite as: *CNMI vs. Pua*, 2006 MP 19

Argued and submitted on August 1, 2006
Saipan, Northern Mariana Islands

Attorney for-Appellant:
Gregory Baka
Deputy Attorney Generals
Office of the Attorney General
2nd Floor, Juan A. Sablan Memorial Bldg.
Capitol Hill, Caller Box 10007
Saipan, MP 96950

Attorney for Appellee:
Edward C. Arriola, Esq.
Law Office of Edward C. Arriola
Third Floor, Bank of Guam Building
P.O. Box 501969
Saipan, MP 96950

BEFORE: ALEXANDRO C. CASTRO, *Acting Chief Justice*; JOHN A. MANGLONA, *Associate Justice*; JESUS C. BORJA, *Justice Pro Tempore*

PER CURIAM:

¶1 On petition for a writ of mandamus, the Commonwealth requests this Court to overturn the trial court's suppression of testimony regarding a lawful conversation between Defendant and law enforcement, which was excluded based on its relationship to an electronic recording of that conversation, which in turn was excluded pursuant to Article 1, Section 3, of the NMI Constitution. Finding that jurisdiction is proper, and that the trial court's decision to exclude percipient witness testimony of a lawful conversation was clearly erroneous, the Commonwealth's petition for a writ of mandamus is hereby GRANTED.

I.

¶2 The following facts are based on the lower court's pretrial orders and the uncontroverted factual assertions of each party:

¶3 On the morning of May 22, 2002, the body of Mostafa Faruk Parves (Parves) was found in Tanapag, Saipan with multiple stab wounds. After viewing surveillance video and interviewing local residents, detectives from the Department of Public Safety (DPS) identified Francisco Aguon Pua (Defendant) as the primary suspect. On May 25, 2002, a search warrant was executed at Defendant's residence in Tanapag, resulting in the discovery of a waist bag inside a trash bin on Defendant's property. This bag, along with other confiscated items, underwent forensic examination at the FBI laboratory in Quantico, Virginia. Test results showed a match between Parves's DNA and DNA found on the waist bag.

¶4 Three years later, on May 1, 2005, FBI Special Agent Joseph E. Auther and DPS Detective Juan M. Santos went to Defendant's residence to interview him. Defendant was informed that the two were members of law enforcement, that he was not in custody, and that he could end the interview at any time. Nevertheless, Defendant consented to the interview. During the course of the interview, Defendant allegedly admitted ownership of the waist bag that had been linked to Parves via DNA evidence. Unbeknownst to Defendant, Agent Auther was secretly recording the conversation, including the alleged admission of ownership of the waist bag.

¶5 Prior to trial, Defendant moved to suppress the recording as a violation of Article 1, Section 3(b) of the NMI Constitution, which protects against searches and seizures utilizing "wiretapping, electronic eavesdropping or other comparable means of surveillance … except pursuant to a warrant." The trial court agreed with Defendant, finding that "[b]ecause no warrant was obtained from a Commonwealth court to record the Defendant, and Defendant did not consent to the recording, the motion to suppress the recorded evidence is [granted]."[1]

¶6 At the jury trial the Commonwealth attempted to call Agent Auther as a witness to testify regarding his personal knowledge of the interview. Defendant moved to suppress that testimony. Again, the trial court agreed with Defendant and, presumably[2] based on fruit of the poisonous tree rationale, excluded Agent Auther's testimony to the extent it related to his and Detective Santos's interview of Defendant.

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[1] The Commonwealth did not appeal the suppression of the electronic recording at that time, and has conceded the point for purposes of this writ. We express no opinion as to the propriety of the recordings exclusion, or the general principle that such recordings are unconstitutional.

[2] We say "presumably" because we do not have the benefit of a written order suppressing this evidence or a transcript whereby we could determine the trial court's reasoning. Instead we rely on the record provided by counsel which consists of counsels' recollection of the trial court's oral suppression decision.

¶7 Immediately after the trial court suppressed Agent Auther's testimony, the Commonwealth requested the trial court stay the jury trial so that it could seek appellate review of the suppression order. The trial court denied the stay, and the Commonwealth immediately filed a notice of appeal in this Court, followed by a Com. R. App. P. 27(f) emergency motion to stay the jury trial pending resolution of the appeal. We granted the stay and ordered an expedited briefing schedule so that we might have adequate opportunity to consider the issues presented, while bearing in mind the time sensitive nature of a stayed jury trial where the jury has already been sworn.

¶8 Pursuant to the expedited schedule, the Commonwealth timely filed its opening brief, but captioned it as a petition for a writ of mandamus. In its brief/petition, the Commonwealth noted that the statute it originally cited in its request for a stay, which it relied upon for authority to appeal the suppression order, did not actually provide the necessary authority to appeal once a jury was empanelled and before a verdict was reached. At oral argument Defendant objected to this re-captioning as a thinly veiled attempt at circumventing our appellate rules. He argued that since the Commonwealth admitted its original basis to seek appellate review was invalid, and since no petition for mandamus was ever properly filed and accepted by this Court, we are without jurisdiction in this matter. The Commonwealth responds that in the interests of fairness we should invoke our Com. R. App. P. 2 authority to suspend the appellate rules, forgo the usual requirements for mandamus jurisdiction, and recast this matter as one utilizing our inherent supervisory power.

II.

A. Jurisdiction

1. Jurisdiction is not available under 6 CMC § 8101(b).

¶9 The Commonwealth initially filed for an emergency stay of the jury trial in order to seek an interlocutory appeal of the trial court's suppression of Agent Auther's testimony. In its motion seeking a stay, the Commonwealth appeared to find authority for such an interlocutory appeal based on 6 CMC § 8101 (b), which states in relevant part:

> An appeal by the Commonwealth government shall lie to the Supreme Court from a decision or order of the Superior Court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an information, if the Attorney General certifies to the Superior Court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
> …
> The provisions of this section shall be liberally construed to effectuate its purpose.

¶10 Aside from the fact that the Attorney General did not "certif[y] to the Superior Court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding" - which will not necessarily defeat jurisdiction, *see U.S. v. Becker*, 929 F.2d 422, 445 (9th Cir. 1991) (finding that failure to certify pursuant to analogous federal statute is correctable at the court's discretion) – this statute is clearly inapplicable to the present case. It has long been recognized by federal courts that any right of the government to appeal in criminal cases must be narrowly construed. *U.S. v. Gilchrist*, 215 F.3d 333, 335 (3rd Cir. 2000) (citing three U.S. Supreme Court decisions to this effect covering a time span of eight decades). This Court has also recognized the necessity of narrowly construing statutes that grant the Commonwealth a right to appeal in criminal cases. *Commonwealth v. Nethon*, 1 N.M.I.

458-60, 4621 (1990). Although it is interesting to note the seeming inconsistency of narrowly reading 6 CMC § 8101(b) when that statute expressly states it should be "liberally construed to effectuate its purpose," we need not address that here. 6 CMC § 8101(b) is clear that it only provides the Commonwealth a right of appeal when such an appeal is "not made after the defendant has been put in jeopardy and before the verdict or finding on an information …" In the present case, a jury has been sworn – thereby putting Defendant in jeopardy – but the jury has not yet rendered its verdict. Clearly the Commonwealth has no right to appeal based on this statute. If we were to "liberally construe" 6 CMC § 8101(b) in such a way as to negate its plain language, we would cause the exception to swallow the statute.

2. This Court may exercise its mandamus power when jurisdiction is otherwise lacking.

¶11 Apparently realizing that 6 CMC § 8101(b) did not provide authority for an appeal, the Commonwealth couched its opening brief – which it was ordered to file pursuant to this Court's expedited briefing schedule – as a petition for a writ of mandamus. The Commonwealth asks this Court to allow it to bypass the Rule 21 criteria for writs of mandamus by utilizing our inherent supervisory powers and by exercising our Rule 2 authority to suspend appellate rules in the interests of justice or economy. Defendant argues that this amounts to little more than a sleight of hand, and that since no proper petition for a writ of mandamus was filed, and thus no separate mandamus action docketed, this Court is without jurisdiction to proceed. We disagree. Without first looking to our broad Rule 2 authority, or relying exclusively on such sweeping principles as inherent supervisory powers, we first point out that this Court's discretionary administrative authority, as expressly provided in our appellate rules over appeals by

right, gives us adequate means to address the Commonwealth's claims under our mandamus jurisdiction.

¶12 The U.S. Supreme Court has noted that although appellate filing rules must be followed, compliance with their import, rather than technical perfection, is the controlling standard. *See Torres v. Oakland Scavenger Co*., 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988). This gives appellate courts latitude to effectuate the policy behind the rules. The importance of this latitude is evidenced by the fact that the U.S. Supreme Court highlighted the flexible nature of the appellate rules in the same decision where it interpreted the filing requirements under Rules 3 and 4 as amounting to jurisdictional prerequisites. *Id.* at 315-317, 108 S.Ct. at 2408 (finding compliance with Rule 3(c) to be necessary for jurisdiction, and noting the persuasive nature of an Advisory Committee Note that Rules 3 and 4, taken together, amount to "a single jurisdictional threshold"). Some state courts have held similarly. *See e.g. Stephenson v. Bartlett*, 628 S.E.2d 442, 443 (N.C. 2006) (court could "liberally construe notice of appeal" to see if jurisdiction was proper, even though "'[t]he provisions of Rule 3 are jurisdictional, and failure to follow the requirements thereof requires dismissal of an appeal.'") (citation omitted).

¶13 Our Appellate Rule 3(a) states: "[f]ailure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as this Court deems appropriate …" Com. R. App. Pro. 3(a). This language is extremely permissive.[3] Only in the instance of untimely filing is an appeal beyond the power of this Court to resurrect. Further, Rule 3(c) states, "[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal." Such

[3] In this regard, our appellate rules are similar to Civil Procedure Rule 8(f), which requires a court to construe pleadings so as to do substantial justice.

wording leads us to believe that our authority to waive procedural technicalities is broad, without need to resort to suspension of rules pursuant to Rule 2. Indeed, it is language such as this that led the U.S. Supreme Court to interpret their Rules 3 and 4 more as guideposts aiding judicial discretion rather than inviolable dictates, such that "if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the *functional equivalent* of what the rule requires. *Torres*, 487 U.S. at 316-17, 108 S.Ct. at 2408-09, 101 L.Ed.2d 285 (1988) (emphasis added).

¶14 Of course we are not dealing here with a technically flawed notice of appeal, but rather the change from an interlocutory appeal to a petition for a writ of mandamus. However, in this case, we believe the above reasoning provides us ample authority to waive the normal procedural steps required for filing a petition pursuant to Rule 21. It stands to reason that if this Court has broad authority to correct a party's missteps within the context of appeals, then that power should be at least as great when moving to mandamus jurisdiction; a jurisdiction predicated on this Court's duty to supervise lower courts and provide tailored remedies in unusual or extreme circumstances. The main purpose of the rules for filing a notice of appeal and a petition for mandamus – to apprise the Court and interested parties of the intent to raise certain issues in the Supreme Court and give the opportunity to be heard – are the same. And many of the requirements themselves, such as naming and serving interested parties with a statement of what order/issue is to be argued, are similar.

¶15 The requirements for a petition for mandamus under Rule 21 do include more detailed filings, such as "a statement of the facts necessary for an understanding of the

issues presented by the application; a statement of the issues presented and of the relief sought; [and] a statement of the reasons why the writ should issue …" but that does not change our decision here. The Commonwealth's filings, both the application for a stay of the jury trial and its opening brief/petition, contained all information necessary for a petition of mandamus pursuant to Rule 21(a). Additionally, this Court's order granting the stay and setting an expedited briefing schedule further distilled the issue to be addressed and gave each party adequate time to research and respond to that issue and to each other.

¶16 Furthermore, we are not the first court to find mandamus jurisdiction may be accorded even when appellate jurisdiction is lacking. In *U.S. v. Baker*, 878 F.2d 153 (1989), the Ninth Circuit held that where the Government had plead in the alternative for 1) jurisdiction pursuant to 18 U.S.C. § 3731 (the federal analog to our 6 CMC § 8101), or 2) mandamus relief, even though no jurisdiction could be had under 18 U.S.C. § 3731, mandamus relief was still available due to the gravity of issue. See also *U.S. v. Collamore*, 868 F.2d 24 (1st Cir. 1989) (holding similarly that mandamus was proper when 18 U.S.C. § 3731 jurisdiction was questionable.) Even more broadly, the Ninth Circuit has stated, "[w]e have jurisdiction to issue a writ of mandamus in any case for which we would have the power to entertain appeals at some stage of the proceedings." *Rosenfeld v. U.S.*, 859 F.2d 717, 722-23 (1989).

¶17 Finally, mandamus may also be had when, in situations similar to the present case, the trial court's actions radically depart from accepted norms. The Fifth Circuit, after expressing great reserve in utilizing mandamus to overturn a pretrial criminal order, nevertheless explained:

> The district court's … order in these circumstances was so plainly and substantially in excess of its authority, and so significantly contrary to the established rules and precedents governing depositions in criminal cases, as to constitute a clear and indisputable abuse of its more general discretion to control the incidents of trial and pretrial procedure in cases before it. There is no available remedy other than mandamus. This, then, is that most rare and exceptional case where relief by mandamus is appropriate respecting a criminal case … order.

In re United States of America, 878 F.2d 153, 159 (1989). As will be explained more fully below, we are faced here with a gross deviation from accepted norms governing exclusion of evidence. As the Fifth Circuit noted, it is only in such extreme cases that mandamus is appropriate.

¶18 We conclude that mandamus jurisdiction is proper here. We see no need to resort to a Rule 2 suspension of rules since there is clear authority that it is the substance and timeliness of pleadings, rather than strict adherence to procedure that controls jurisdiction. Although the U.S. Supreme Court's 'functional equivalent' standard is in specific reference to Rule 3 and 4 requirements, we see no reason not to extend it to mandamus jurisdiction as well. Since mandamus jurisdiction is permissive, it stands to reason that the court's discretion to hear such cases should not be held hostage to technical pleading rules. The Commonwealth's filings, taken as a whole, amount to the functional equivalent of a petition for a writ of mandamus.[4] However, even if this 'functional equivalent' doctrine was held not to extend to mandamus, we may still

[4] Defendant's claim, which he first raised at oral argument, that to proceed under this Court's mandamus jurisdiction would deprive him of due process is without merit. Defendant knew the issue to be addressed. Indeed, we had previously narrowed the proceeding to a single issue when we set the briefing schedule. The fact that the Commonwealth sought to change the basis of this Court's jurisdiction to hear that issue had no effect on the issue itself. The essence of due process is notice and the ability to be heard – both of which Defendant enjoyed. Defendant was given adequate time to brief both the issue of suppression and the issue of jurisdiction. Additionally, broad leeway was provided Defendant in oral argument, as time limits were not strictly enforced. It would be convenient for both the parties and this Court if we had more time, but it must be remembered that a jury has already been sworn and is waiting to resume the trial. We find that Defendant's due process rights are not violated by our decision to modify this action to one in mandamus.

entertain this case pursuant to Rule 2. Thus, to whatever extent – if any – that mandamus jurisdiction is not proper pursuant to such 'functional equivalent' reasoning, we find that we may still hear this case via our authority to suspend appellate rules.

B. Suppression of Agent Auther's Testimony was Clearly Erroneous

A. Tenorio Factors.

¶19 We analyze writs for mandamus according to the five factors described in *Tenorio v. Superior Court*, 1 N.M.I. 1. *Kevin Int'l Corp. v. Superior Court*, 2006 MP 3 ¶ 14. Those factors are:

1. The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief desired;
2. The petitioner will be damaged or prejudiced in a way not correctable on appeal;
3. The lower court's order is clearly erroneous as a matter of law;
4. The lower court's order is an oft-repeated error, or manifests a persistent disregard of applicable rules; and
5. The lower court's order raises new and important problems, or issues of law of first impression.

Id. These factors are not set against any objective standard, but are balanced and weighed against the costs of issuing a writ, such as interfering with trial court proceedings prior to final adjudication. "The considerations are cumulative, and proper disposition will often require a balancing of conflicting indicators." *Commonwealth v. Superior Court (Ada)*, 2004 MP 14 ¶ 8.

¶20 Tenorio factors (1) and (2) are clearly present. Because the underlying action is a criminal trial, and the Commonwealth has no means of seeking an interlocutory review of the trial court's suppression decision, the Commonwealth has no other option but a writ of mandamus. The suppression of Agent Auther's testimony will be unreviewable when

as the jury returns a verdict. If the jury convicts, the issue would be moot since it would not have prejudiced the prosecution's case. If the jury acquits, the issue would be moot because acquittals are not appealable. Thus, the people of the Commonwealth, who are the true plaintiffs in a criminal action, have no recourse other than a writ of mandamus.

¶21 Tenorio factor (4) is not present. It has not been brought to this Court's attention that mid-trial suppression motions are an oft-repeated error in the trial courts. Having no evidence to this effect we presume they are not.

¶22 Tenorio factor (5) is present. Although the rules of criminal procedure would seem to obviate our need to address mid-trial suppression orders, *see* Com. R. Crim. P. 12(b)(3), the fact that it is before this court in such an emergency posture indicates that the issue is one for which we have not provided adequate guidance on. It is surely a new and important matter that needs to be addressed.[5]

¶23 We mention Tenorio factor (3) last because it is where the crux of this case lies. Not only does the degree of error committed by the lower court tip the balance in favor of granting this writ, but it also requires a more thorough discussion to prevent the need for such writs in the future. Both procedurally and substantively, the trial court was in error. Although we are without the benefit of a written order or a transcript, we know from the parties' briefs that the trial court suppressed Agent Auther's testimony based on the exclusionary rationale embodied in the fruit of the poisonous tree doctrine. This is clearly erroneous.

2. The underlying conversation is not a 'fruit' of the electronic recording.

[5] This issue might also be one of first impression, but we need not determine this in order to exercise jurisdiction.

¶24 The well-known fruit of the poisonous tree doctrine stems from Justice Frankfurter's decision in *Silverthorne Lumber Co., v. U.S. Nix. v. Williams*, 467 U.S. 431, 441, 104 S.Ct. 2501, 2507-08, 81 L.Ed.2d 377 (1984). There, Justice Frankfurter stated:

> The essence of a provision forbidding the acquisition of evidence in a certain way is not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others …

Silverthorne Lumber Co., v. U.S., 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920). Thus, early in the twentieth century the beginnings of the present day exclusionary rule jurisprudence can be seen.

¶25 Over the following years, the U.S. Supreme Court extended the exclusionary rule to cover evidence which would not have been secured but for unlawful police conduct, *Wong Sun v. U.S.*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), as well Fifth and Sixth Amendment violations. *Nix*, 467 U.S. at 442, 104 S.Ct. at 2508. However, the fruit of the poisonous tree doctrine is not without exceptions. The independent source rule exempts evidence procured by means unrelated to the constitutional violation and the inevitable discovery rule exempts evidence when the prosecution can show by a preponderance of the evidence that its discovery by lawful means was inevitable. *Nix*, 467 U.S. at 443-44, 104 S.Ct. at 2509. Taken together, the policy behind the fruit of the poisonous tree doctrine is clear:

> The core rationale consistently advanced by [the Supreme] Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections. [The Supreme] Court has accepted the argument

> that the way to ensure such protections is to exclude evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes. On this rationale, the prosecution is not to be put in a better position than it would have been in if no illegality had transpired.

Id. at 442-43, 104 S.Ct. at 2508.

¶26 With this in mind, we turn to the present case. The trial court excluded Agent Auther's testimony due to that testimony's association with the recorded conversation which the trial court had previously suppressed based on N.M.I. Constitution, Article 1, Section 3(b). This is clear error and an abuse of discretion. Although there might be good reasons to exclude Agent Auther's testimony, finding it to be a 'fruit' of the suppressed recording – which was by necessity contemporaneous with the actual conversation – is not one of them. Agent Auther's testimony was offered by the Commonwealth to testify to the conversation he had with Defendant – a conversation in which Defendant was informed that Agent Auther was affiliated with law enforcement and a conversation in which Defendant was informed that he could end at any time. How anyone, much less a trial judge, could reach the conclusion that such a conversation would not have taken place *but for* the electronic recording of that conversation is beyond this Court. Because the conversation stands alone, it is not a fruit of the poisonous tree.

¶27 If any additional justification was necessary, we would need to look no further than the U.S. Supreme Court's statement in *Nix* cited above. There the Court made clear that the exclusionary rule was justified only to the extent that it "deter[s] police from violations of constitutional and statutory protections …" and prevents "the prosecution [from being] put in a better position than it would have been in if no illegality had transpired." The trial court's suppression of Agent Auther's testimony goes well beyond

mere prevention of police misconduct and wrongful prosecutorial gains, and instead punishes both the officers who committed the misstep and the Commonwealth public for whom justice would go unserved. There is a deterrent value to suppressing any evidence in response to a constitutional violation, just as there is a deterrent value in sentencing persons to prison for the commission of a crime. But unlike imprisonment, the exclusionary rule seeks only to negate advantages obtained through wrongful conduct, not punish the perpetrators for that conduct. Thus, in the absence of a causal relationship – a 'but for' relationship – between the unlawful act and obtaining the evidence, suppression is not available under the exclusionary rule.

¶28 Not only was suppressing Agent Auther's testimony clearly wrong from a substantive standpoint, it was also wrong procedurally. Com. R. Crim. P. 12(b)(3) states that motions to suppress evidence must be raised prior to trial. Defendant argues that because his motion to suppress the recorded conversation, which was timely brought, was successful in suppressing that recording, and all evidence "associated" with that recording, he complied with this rule. Further, Defendant argues, if the Commonwealth believed Agent Auther's testimony fell outside the pre-trial suppression order, then the burden was on it to bring a motion *in limine* to clarify whether Agent Auther's testimony would be allowed. We disagree.

¶29 We are sympathetic to the fact that there might be occasions in which a pre-trial suppression motion is ambiguous, and in those instances neither party may recognize the ambiguity until the trial has begun, thereby necessitating a motion to suppress during the course of the trial. This case, however, does not present such an ambiguity. It is hard to imagine how any trial judge or attorney could determine that the suppression of a

recorded conversation, which was excluded pursuant to an electronic eavesdropping provision, would thereby suppress percipient witness testimony regarding the underlying lawful conversation. This is especially true where, as here, the conversation was between an individual who identified himself as law enforcement to a suspect and told the suspect he could end the conversation at any time.

¶30 We hold that the trial court's decision to suppress Agent Auther's testimony as a fruit of the electronic recording of that conversation was an abuse of discretion.. We further note that this Court will not generally involve itself in deciding ambiguities in pre-trial suppression motions once the trial has begun. We prefer to yield to the trial court, but when the resulting injustice would be severe, the issue is an important or novel one that requires our consideration, or the legal issue is so one-sided as to permit of only one interpretation, we will not hesitate to intervene to make the correction.

III.

¶31 Although we generally will not interfere with a trial court's discretionary evidentiary orders after a criminal trial has begun, in this case, due to the gravity of the trial court's impropriety and the severity of the potential harm to the Commonwealth, we shall act. We find that we have the authority under our appellate rules to modify this action to one in mandamus. Additionally, we find that the trial court's suppression of Agent Auther's testimony regarding his and Detective Santos's interview of Defendant was in error. For these reasons, the Commonwealth's petition for a writ of mandamus is GRANTED. We, therefore, lift the stay and REMAND this case to the trial court and to conduct proceedings consistent with this opinion. The trial court is instructed that it may

not suppress Agent Auther's testimony based on it being a 'fruit' of the unlawful electronic recording.

SO ORDERED this 3rd day of August 2006.

/s/ Alexandro C. Castro
ALEXANDRO C. CASTRO
Acting Chief Justice

/s/ John A. Manglona
JOHN A. MANGLONA
Associate Justice

/s/ Jesus C. Borja
JESUS C. BORJA
Justice *Pro Tempore*

IN THE SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

IN THE MATTER OF DECISIONS TO BE PUBLISHED IN NORTHERN MARIANA ISLANDS REPORTER, VOLUME SEVEN.	**ERRATA ORDER** **2011-ADM-0003-MSC**

PER CURIAM:

I. DECISIONS REVISED BY THIS ORDER

The decisions listed below, all styled as opinions, require substantive revision. They are hereby revised by changes as set forth in section two of this order. The published decisions containing all revisions shall constitute the final versions of the decisions.

1. *Commonwealth v. Taitano*, 2005 MP 20
2. *Kevin Int'l Corp. v. Superior Court*, 2006 MP 3
3. *Liu v. CNMI*, 2006 MP 5
4. *Sattler v. Mathis*, 2006 MP 6
5. *Commonwealth v. Pua*, 2006 MP 19
6. *Bank of Saipan v. Martens*, 2007 MP 5
7. *Commonwealth v. Milliondaga*, 2007 MP 6
8. *Tan v. Younis*, 2007 MP 11
9. *Estate of Muna v. Commonwealth*, 2007 MP 16

10. *Commonwealth v. Blas,* 2007 MP 17

II. REVISIONS

1. *Commonwealth v. Taitano*, 2005 MP 20 ¶ 28 shall read as follows:

¶28 ...the trial court must consider the factors set forth in *United States v. Cook*, 608 F.2d 1175, 1185 n. 9 (9th Cir. 1979) (en banc). (*continuation omitted.*)

2. *Kevin Int'l Corp. v. Superior Court*, 2006 MP 3 Supreme Court Original Action Number shall read as follows:

Supreme Court Original Action No. 06-0009-GA.

Attorneys of Record shall read as follows:

For Plaintiff-Petitioner: Viola Alepuyo, Saipan.

For Defendant-Real Party in Interest: Steven Carrara, Saipan.

3. Liu v. CNMI, 2006 MP 5 ¶ 27 shall read as follows:

¶27 ...The Petitioner cites *Unites States v. Fanfan*, 2004 WL 1723114, 2004 U.S. Dist. LEXIS 18593 (D.Me. June 28, 2004)...Petitioner likens the grant of certiorari in *Fanfan*, which sought to review the effects of the *Blakely v. Washington*, 542 U.S. 296 (2004)...the *Blakely* decision... (*continuation omitted.*)

4. *Sattler v. Mathis*, 2006 MP 6 ¶ 8 shall read as follows:

¶8 Looking beyond our own decisions, to those we have relief on in the past, is more helpful. Our precedent stems primarily from an Idaho case, *Krebs v. Krebs*, 759 P.2d 77 (1988) (discussed below), and from a Ninth Circuit decision, *U.S. v. McConney*, 728 F.2d 1195 (9th Cir. 1984). (*continuation omitted.*)

5. *Commonwealth v. Pua*, 2006 MP 19 ¶ 10 shall read as follows:

¶10 Aside from the fact that the Attorney General did not "certif[y] to the Superior Court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of

a fact material in the proceeding" – which will not necessarily defeat jurisdiction, *see U.S. v. Becker*, 929 F.2d 442, 445 (9th Cir. 1991) (finding that failure to certify pursuant to analogous federal statute is correctable at the court's discretion) – this statute is clearly inapplicable to the present case. (*continuation omitted.*)

6. *Commonwealth v. Pua*, 2006 MP 19 ¶ 16 shall read as follows:

¶16 Furthermore, we are not the first court to find mandamus jurisdiction may be accorded even when appellate jurisdiction is lacking. In *U.S. v. Barker*, 1 F.3d 957, 959 (9th Cir. 1989), the Ninth Circuit held that where the Government had plead in the alternative for 1) jurisdiction pursuant to 18 U.S.C. § 3731 (the federal analog to our 6 CMC § 8101), or 2) mandamus relief, even though no jurisdiction could be had under 18 U.S.C. § 3731, mandamus relief was still available due to the gravity of issue. *See also U.S. v. Collamore*, 868 F.2d 24, 30 (1st Cir. 1989) (holding similarly that mandamus was proper when 18 U.S.C. § 3731 jurisdiction was questionable.) (*continuation omitted.*)

7. *Bank of Saipan v. Martens*, 2007 MP 5 ¶ 14 shall read as follows:

¶14 . . . The question in each case is whether under all the circumstances the remedy was pursued with reasonable dispatch. *See McDaniel v. U.S. Dist. Court*, 127 F.3d 886, 890 n.1 (9th Cir. 1997) (Rymer, Circuit Judge, concurring, *citing United States v. Olds*, 426 F.2d 562 (3rd Cir. 1970)). (*continuation omitted.*)

8. *Commonwealth v. Milliondaga*, 2007 MP 6 ¶ 6 shall read as follows:

¶6 . . . Two provisions are not the same offense if each contains an element not included in the other. *Hudson v. United States*, 522 U.S. 93, 107 (1997) (Stevens, J. concurring). (*continuation omitted.*)

9. *Tan v. Younis*, 2007 MP 11 ¶ 36 shall read as follows:

¶36 So strong is the Constitutional protection of free expression that it even contemplates and protects a degree of abuse. "[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'" *Brown v. Hartlage*, 456 U.S. 45, 60, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982) (citations omitted). Indeed, "[s]ome degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." *New York Times*, 376 U.S. at 271 (quoting James Madison, 4 *Elliot's Debates on the Federal Constitution* 571 (1856)).

10. *Estate of Muna v. Commonwealth*, 2007 MP 16 ¶ 13 shall read as follows:

¶13 The Fifth Amendment of the United States Constitution and the Constitution of the Commonwealth of the Northern Mariana Islands Constitution require that when private property is taken for public use by eminent domain, "just compensation" must be provided to the owner. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 9 (1984).

11. *Commonwealth v. Blas*, 2007 MP 17 ¶ 3 shall read as follows:

¶3 The Commonwealth charged Blas with vehicular homicide, reckless driving, and driving under the influence of alcohol. On October 18, 2004, the jury heard the vehicular homicide charge, while the trial court heard the reckless driving and driving under the influence charges. On November 2, 2004, the jury returned a verdict acquitting Blas on the vehicular homicide charge, but the trial court found him guilty of reckless driving and driving under the influence of alcohol. Blas timely appealed.

SO ORDERED.

Entered this 30th day March of 2011.

MIGUEL S. DEMAPAN, CHIEF JUSTICE

ALEXANDRO C. CASTRO, ASSOCIATE JUSTICE

JOHN A. MANGLONA, ASSOCIATE JUSTICE