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**IN THE SUPERIOR COURT OF GUAM  
TERRITORY OF GUAM**

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<b>PEOPLE OF GUAM,</b>	)	CRIMINAL CASE NO.: <b><u>CF0421-15</u></b>
	)	
vs.	)	
	)	<b>MEMORANDUM OF POINTS AND</b>
<b>MARK A. TORRE JR.,</b>	)	<b>AUTHORITIES IN SUPPORT</b>
	)	<b>MOTION <i>in limine</i> TO EXCLUDE</b>
Defendant.	)	<b>PRIOR TESTIMONY</b>
	)	
	)	

**INTRODUCTION**

The People of Guam (“People”) have given notice that certain witnesses who testified at the 2017 trial of this matter “might not be available” to testify during the People’s case in chief in the currently anticipated re-trial of this matter. However, the People bear the burden of showing that those witnesses are unavailable for the purposes of assuring of Mark A. Torre’s (“Defendant”) right to confrontation under the Sixth Amendment Confrontation Clause, and under Rule 804 of the Guam Rules of Evidence (GRE). The People have not met their burden of demonstrating such unavailability. Their notice is devoid of any evidentiary showing. Thus, the Court should Order that the People are precluded from presenting the prior testimony of such witnesses at a trial of this matter, at this time.

**BACKGROUND**

On July 24, 2015, a Superior Court of Guam Grand Jury returned an Indictment charging the Defendant with Murder (As a 1<sup>st</sup> Degree Felony), Manslaughter (As a 1<sup>st</sup> Degree Felony), Aggravated

Assault (As a 2<sup>nd</sup> Degree Felony), and Aggravated Assault (As a 3<sup>rd</sup> Degree Felony). Indictment 1-3 (July 24, 2015). Each charge also included certain special allegations. Id. The charges were brought to a trial in January 2017. Dr. Aurelio Espinola, Guam Police Department Officer Shawn Meno, FBI Examiner Josh Friedman, FBI Examiner Jeremy Fletcher, and FBI Examiner Brett Mills testified during the People's case in chief in the 2017 trial.

The jury subsequently found the Defendant guilty of Negligent Homicide (As a 3<sup>rd</sup> Degree Felony) as a lesser included charge to Manslaughter (As a 1<sup>st</sup> Degree Felony), and Aggravated Assault (As a 3<sup>rd</sup> Degree Felony). People v. Torre, 2019 Guam 9 ¶ 5. The Court entered a Judgment of Conviction on each charge on December 5, 2017. J. 1-3 (Dec. 4, 2017).

The Supreme Court subsequently vacated the Judgment of Conviction entered on the two charges, and remanded this matter. See v. Torre, 2019 Guam 9 at ¶ 20; Mandate (July 31, 2019); Supr. Ct. Gu. J. in CRA17-09 (July 9, 2019).

On October 4, 2019, the People filed an Amended Indictment charging the Defendant with Aggravated Assault (As a 3<sup>rd</sup> Degree Felony) and Negligent Homicide (As a 3<sup>rd</sup> Degree Felony); both charges include the special allegation of possession and use of a deadly weapon in the commission of a felony. Am. Indictment at 1-2 (Oct. 4, 2019).

On December 27, 2019 the People filed a document captioned "People's Notice of Potentially Unavailable Witnesses." The document states that Dr. Aurelio Espinola, Guam Police Department Officer Shawn Meno, FBI Examiner Josh Friedman, FBI Examiner Jeremy Fletcher, and FBI Examiner Brett Mills "might not be available to testify in person" during the People's case in chief. Not. 1 (Dec. 27, 2019). The Notice is not supported by a declaration or any other evidence.

## LAW & ARGUMENT

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As discussed below, the People's terse and conclusory notice does not satisfy their burden of showing the witnesses are unavailable for Sixth Amendment Confrontation Clause Purposes, or as required by Rule 804 of the GRE.

*I. Allowing the prior testimony in lieu of live testimony violates Mr. Torre's Sixth Amendment right to confront witnesses against him unless the People show the witnesses are 'unavailable'.*

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him." U.S. Const. Amend. VI. The Sixth Amendment Confrontation Clause is applicable to Guam by virtue of the Guam Organic Act. 48 U.S.C.A.; People v. Jesus, 2009 Guam 2 ¶ 23. A Defendant's right to a witness' live testimony in the courtroom serves many important purposes, including allowing the jury to observe closely the witness's demeanor, expressions, and intonations, and thereby determine witness's credibility." U.S. v. Smith, 928 F.3d 1215, 1226 (11th Cir. 2019); see also, U.S. v. Burden, 934 F.3d 675, 685 (D.C. Cir. 2019) (reasoning "[l]ive witness testimony gives the jury the opportunity to assess the witness' demeanor and allows counsel to adjust examination to other evidence and to the jury's apparent reactions as the witness testifies.").

For prior testimonial statements to be admitted at a trial, two conditions must be met. First, that the witness is unavailable to testify and second, that the defendant had a prior opportunity for cross-examination. Smith, 938 F.3d at 1226-27. Unavailability and prior opportunity to cross-examine are separate and "independent criteria." The proponent of the witness must establish both criteria for testimony to be admitted without offending the Confrontation Clause. See Ohio v. Roberts, 448 U.S. 56 at 74-75 Burden, 934 F.3d at 685-86.

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A witness is 'unavailable' for purposes of the Confrontation Clause if the witness does not appear and the Government has made *a good faith effort* to obtain the witness's presence at trial. Smith, 928 F.3d at 1227. There is no bright line and what constitutes whether a good faith effort has been made is a question of reasonableness and is a case-specific, contextually driven inquiry. Id. at 1227-28, 1230 (citing Roberts, 448 U.S. at 74-75).

Where the government "seeks to rely on prior recorded statements of a witness on the ground that the witness is unavailable, it bears the burden of establishing that its unsuccessful efforts to procure the witness's appearance were "as vigorous as that which the government would undertake to secure a critical witness if it has no prior testimony to rely upon in the event of unavailability." Burden, 934 F.3d 675 at 686 (internal citation, brackets and punctuation omitted).

Here, the People's terse and conclusory notice does not detail the specific efforts to locate the witnesses they state "might not be available." The use of the permissive "might" demonstrates the People are not even sure whether they can locate the witnesses. Therefore, without a demonstration of reasonable efforts to locate and produce the witnesses named in the Notice for Trial, the Defendant respectfully requests the Court preclude the People from introducing the prior testimony of such witnesses at this time. The Defendant reserves the right to further object to the Government's efforts to contact the witnesses or to use any witness' prior testimony at trial, once those efforts, if any, materialize.

II. Unavailability of Witnesses under the Guam Rules of Evidence.

Under the GRE, if a witness is unavailable, his former testimony is not excluded by the hearsay rule if the "[t]estimony was given as a witness at another hearing of the same or a different proceeding . . . taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop

the testimony by direct, cross or redirect examination.” Guam R. Evid. 804(b) (2006). For Rule 804 purposes, a witness is unavailable if *inter alia* the witness is unable to be present or testify because of then existing mental illness or infirmity or is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance by process or other reasonable means.” Guam R. Evid. 804(a)(4)-(5).<sup>1</sup>

The burden of showing the witness’ unavailability rests with the party seeking to introduce the evidence. See United States v. Acosta, 769 F.2d 721, 733 (11th Cir. 1985); see also, U.S. v. McGowan, 590 F.3d 446, 454 (7th Cir. 2009).

Here, similar to the arguments advanced in support of the Defendant’s rights under the Confrontation Clause above, the Government has not made a sufficient showing that the witnesses they deem “might not be available” are in fact unavailable as required under Rule 804 of the GRE. Therefore, the Court should enter an Order precluding the Government from offering such testimony at trial, at this time.

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<sup>1</sup> Rule 804(a) and (b) of the Guam Rules of Evidence (“GRE”) uses language that is substantially similar to Rules 804(a) and (b) of the Federal Rules of Evidence (“FRE”). Compare Guam R. Evid. 804(a)-(b) with Fed. Rules Evid. 804(a)-(b). Therefore, federal authorities interpreting Rule 804(a)-(b) of the FRE are persuasive to the interpretation of Rule 804(a)-(b) of the GRE. See People v. Jesus, 2009 Guam 2 ¶ 25 (looking to federal authorities in determining when a witness is unavailable under one of the alternative grounds in GRE 804(a)); see also, Sumitomo v. Zhong Ye Inc., 1998 Guam 8 ¶ 7 (reasoning “[g]enerally, when a legislature adopts a statute which is identical or similar to one in effect in another jurisdiction, it is presumed that the adopting jurisdiction applies the construction placed on the statute by the originating jurisdiction”).

**CONCLUSION**

For the foregoing reasons, Mark A. Torre Jr. respectfully requests the Court enter an Order precluding the Government from using prior trial testimony of any witness from the trial of this matter in 2017. The Government has not met its burden of demonstrating that the witnesses are in fact unavailable for Confrontation Clause and Rule 804 of the Guam Rules of Evidence purposes.

Dated at Hagåtña, Guam: December 31, 2019.

**ARRIOLA LAW FIRM**  
Counsel for Defendant

  
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