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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, v. WEN HUI LIU, Defendant.	)	Criminal Case No. 99-0536 **ORDER**

I. PROCEDURAL BACKGROUND

This matter came before the Court on March 8, 2000, in Courtroom 223A at 9:00 a.m. on Defendant's motion to dismiss and motion to compel discovery. Assistant Attorney General Marvin J. Williams, Esq., appeared on behalf of the Commonwealth. G. Anthony Long, Esq., appeared on behalf of the Defendant, Wen Hui Liu. The court, having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its decision.

II. FACTS

On November 12, 1999, the Commonwealth filed an Information charging Defendant with one count of promoting prostitution in the second degree, in violation of 6 CMC § 1344(a).

On February 18, 2000, Defendant filed a motion to dismiss and a motion to compel discovery. Defendant asserts that the Information must be dismissed because the definition of "sexual services"

[p. 2] found at 6 CMC § 1341(c) is unconstitutionally vague and overbroad. Defendant also asserts that the court lacks jurisdiction to hear the present matter because the Information was filed without the consent or approval of a lawfully appointed Attorney General. Defendant also moves the court to compel the Commonwealth to provide discovery of photographs and

videotape of Defendant taken on October 31, 1999, the date on which Defendant is alleged to have engaged in illegal activity.

III. ISSUES

1. Whether the court shall grant Defendant's motion to dismiss the Information on the ground that the definition of the term "sexual services" found at 6 CMC § 1341(c) is unconstitutionally vague in violation of the Due Process Clause and unconstitutionally overbroad in violation of the First Amendment.

2. Whether the court shall grant Defendant's motion to dismiss the Information for lack of jurisdiction because the Information was filed without the consent or approval of a lawfully appointed Attorney General.

3. Whether the court shall grant Defendant's motion to compel the Commonwealth to provide discovery of photographs and videotape of Defendant taken on October 31, 1999.

IV. ANALYSIS

A. Constitutionality of "Sexual Services" Definition.

Defendant is charged with one count of promoting prostitution in the second degree, in violation of 6 CMC § 1344, which states that "[a] person is guilty of promoting prostitution in the second degree if he knowingly . . . advances prostitution." 6 CMC § 1344(d). Pursuant to 6 CMC § 1344(a):

> A person "advances prostitution" if, acting other than as a prostitute or as a customer thereof, he causes or aids a person to commit or engage in prostitution, procures or solicits customers for prostitution purposes, operates or assists in the operation of a **[p. 3]** house of prostitution or prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.

6 CMC § 1344(a). Here, Defendant allegedly "advanced prostitution" by soliciting customers for prostitution purposes and by engaging in conduct designed to facilitate and aid an act of prostitution. Specifically, Defendant is alleged to have"offered sexual services for money."

Defendant asserts that the present criminal matter must be dismissed because the statutory definition of "sexual services" has been held unconstitutional in *Commonwealth v. Liarta*, Cr. Case Nos. 93-133, 93-125, 93-126, 93-127, 93-128, 93-129, 93-131, 93-132, 93-155 (N.M.I. Super. Ct. Jan. 20, 1994) (Decision and Order). In *Commonwealth v. Liarta*, the court examined the same definition of "sexual services" cited in Defendant's motion to dismiss. This definition was codified at 6 CMC § 1341(e), which stated:

> "Sexual services" means any form of sexual contact including intercourse, penetration, or any touching of any person, by oneself or another, for the purpose of sexual arousal or gratification, aggression, degradation or other similar purpose.

Id. at 5, *see also* Defendant's Motion to Dismiss at 2. The *Liarta* decision found the definition of "sexual services" to be unconstitutionally vague because "it sweeps so broadly that it confers unfettered discretion on law enforcement officers and gives citizens almost no guidance as to what is prohibited." *Id*., at 16. The *Liarta* decision also found the definition of "sexual services" to be unconstitutionally overbroad because its prohibition on "any touching of any person, by oneself or another . . . clearly encompasses many forms of performing art." *Id*., at 10.

Perhaps in light of the *Liarta* decision, the Commonwealth Legislature amended the definition of "sexual services" with the passage of Public Law 11-19, which now defines "sexual services" at

6 CMC § 1341(c) as:

> [A]ny form of sexual conduct including intercourse, penetration, or any touching of any person, by oneself or another, for the purpose of sexual arousal or gratification, aggression, degradation or other similar purpose. **This does not include sexual conduct engaged in as part of any stage performance, play or other entertainment open to the public**.

6 CMC § 1341(c), as amended by Public Law 11-19 § 2 (emphasis added). **[p. 4]**

1. Definition of "Sexual Services" as Unconstitutionally Vague.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits a state from depriving a person of life, liberty or property without due process of law.

Commonwealth v. Bergonia, 3 N.M.I. 22, 36 (1992). The Fourteenth Amendment to the United States Constitution has been made applicable to the Commonwealth pursuant to Section 501(a) of the Covenant. *In re "C.T.M.,"* 1 N.M.I. 410, 413 (1990), *citing* COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA, *reprinted in* CMC at B-101. Due process provisions of the Commonwealth Constitution afford the same protections as the Due Process Clause of the United States Constitution. *Office of the Attorney General v. Rivera*, 3 N.M.I. 436, 445 (1993). It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-2299, 33 L.Ed.2d 222 (1972), *see also, United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996) (a statute is void for vagueness when it does not sufficiently identify the conduct that is prohibited). This doctrine protects two due process interests. First, it requires "that the laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id*. Second, it prevents arbitrary and discriminatory enforcement by requiring that "laws . . . provide explicit standards for those who apply them." *Id*., *see also United States v. Wunsch, supra*, at 119. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id*. at 2299. Here, the court finds that the additional language in the amended definition at 6 CMC § 1341(c) excluding "sexual conduct engaged in as part of any stage performance, play or other entertainment open to the public" acts to give guidance as to what conduct is prohibited and does not sweep so broadly that it confers unfettered discretion on law enforcement officers. As such, the court finds that the definition of "sexual services" at 6 CMC § 1341(c) is not unconstitutionally vague. **[p. 5]**

2. Definition of "Sexual Services" as Unconstitutionally Overbroad.

In analyzing whether a criminal statute is unconstitutionally overbroad, "a court's first task is to determine whether the enactment reaches a substantial amount of constitutional conduct." *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 102 S. Ct. 1187, 71 L.Ed.2d 362

(1982), *see also Grayned, supra* at 408 U.S. 104, 115-116. If the terms of a statute prohibit a substantial range of conduct protected by the First Amendment, that statute can be challenged as overbroad, even by someone whose own conduct is not protected by the First Amendment. *See Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L.Ed.2d 903 (1980), *see also Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S. Ct. 2561, 45 L.Ed.2d 648 (1975). Here, the new definition of "sexual services" found at 6 CMC § 1341(c) specifically excludes "sexual conduct engaged in as part of any stage performance, play or other entertainment open to the public." *See* 6 CMC § 1341(c), as amended by Public Law 11-19, § 2. A statute is not unconstitutionally overbroad where it contains exceptions for "proper purposes." *See Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L.Ed.2d 98 (1990) (statute prohibiting nude photos not overbroad where it contained numerous exceptions for "proper purposes"). The court finds that the amended definition of "sexual services" contains an adequate exception for "proper purposes." As such, the court finds that the amended definition of "sexual services" at 6 CMC § 1341(c) is not unconstitutionally overbroad.

For the foregoing reasons, the court finds that the additional language in the amended definition of "sexual services" excludes sexual conduct protected by the First Amendment, gives guidance as to what conduct is prohibited, and does not sweep so broadly that it confers unfettered discretion on law enforcement officers. As such, Defendant's motion to dismiss the Information on the ground that the definition of "sexual services" is unconstitutionally vague and overbroad is **DENIED**.

B. Motion to Dismiss for Lack of Jurisdiction.

On November 12, 1999, the Commonwealth filed an Information charging Defendant with one count of promoting prostitution in the second degree, in violation of 6 CMC § 1344(a). Assistant Attorney General Marvin J. Williams, Esq., signed and filed the Information on behalf of the Office of **[p. 6]** the Attorney General and the Commonwealth. May Kara, Esq., was the "Acting Attorney General" at the time the Information was filed.

Defendant asserts that the Information must be dismissed for lack of jurisdiction because the Superior Court held in *Demapan v. Kara* that Maya Kara's designation as "Acting Attorney

General" was unlawful and unconstitutional. *See Demapan v. Kara,* Civil Action No. 99-0547 (N.M.I. Super. Ct. Jan. 20, 2000) (Decision and Order at 17-18) (there is no statutorily or constitutionally created position of "Acting Attomey General"). Defendant then cites *United States v. Providence Journal Co.* for the proposition that a court lacks jurisdiction over an action commenced on behalf of the government by a person not authorized to do so. *See United States v. Providence Journal Co.* 485 U.S. 693, 198 S.Ct. 1502, 99 L.Ed.2d 785 (1988). The Ninth Circuit outlined the reasoning for finding a lack of jurisdiction in such matters in *United States v. Navarro*:

> [W]here the prosecutor is not authorized to represent the United States, the government has not appeared, and since only the government may bring a criminal suit asserting violation of federal law, the case brought must be dismissed for lack of a party having a case or controversy with the defendant, i.e. the court is without jurisdiction.

United States v. Navarro, 972 F.Supp 1296, 1305 (9th Cir. 1997). In *United States v. Providence Journal Co.* and *United States v. Navorro*, however, the Ninth Circuit was interpreting a federal statute, 28 U.S.C. § 516, which states:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

28 U.S.C. § 516. The cited provision is a jurisdictional statute governing federal courts, it has no impact on the power of the Attorney General and no effect on the jurisdiction of the Superior Court. Also, the Ninth Circuit has held that "[a]n infirmity in the United States Attorney's appointment would not generally affect the jurisdiction of this court so long as a proper representative of the government participated in the action." *United States v. Gantt,* 194 F.3d 987, 998 (9th Cir. 1999), *citing United States v. Plesinski,* 912 F.2d 1033 (9th Cir. 1990). Here, Assistant Attorney General Marvin J. Williams, Esq., appeared on behalf of the Commonwealth and filed the Information. **[p. 7]** As there has been no challenge to Assistant Attorney General Williams' qualifications or his authority to act as the proper representative of the Commonwealth in this matter, the court finds that it has jurisdiction.

The court, having found Defendant's jurisdictional argument to be untenable, notes that the Superior Court has previously addressed the same jurisdictional issue and reached the same conclusion. *See Commonwealth v. Rabauliman et al.*, Cr. Case No. 98-0083 (N.M.I. Super. Ct. May 15, 2000) (Order). In *Rabauliman*, the defendant moved to dismiss the Information for lack of jurisdiction on the ground that the Information was improperly filed under the authorization of Sally Pfund, Esq., the "Acting Attorney General" at the time. The *Rabauliman* court held that "[t]he power to prosecute is an executive function and the [Commonwealth] is not divested of this power given a vacancy in the Attorney General's Office." *Id.* at 5. The court finds *Rabauliman* to be persuasive. Accordingly, the court finds that it has jurisdiction over the present matter regardless of the status of Maya Kara as "Acting Attorney General" at the time the Information was filed. As such, Defendant's motion to dismiss the Information for lack of jurisdiction is **DENIED**.

C. Defendant's Motion to Compel Discovery.

Defendant moves the court to compel the Commonwealth to provide discovery of photographs and videotape of Defendant taken on October 31, 1999, the date on which Defendant is alleged to have engaged in illegal activity. The Commonwealth notes in its response to Defendant's motion to compel discovery that it has provided Defendant with photographs taken on October 31, 1999. The Commonwealth also notes that a copy of the requested videotape was being prepared for Defendant. The court finds that Defendant is entitled to production of the requested materials and hereby orders the Commonwealth to produce copies of the photographs and videotape for Defendant if it has not already done so.

V. CONCLUSION

For the foregoing reasons, the court finds that the amended definition of "sexual services" found at 6 CMC § 1341(c) is neither unconstitutionally vague nor overbroad. As such, Defendant's motion to dismiss the Information is **DENIED**.

For the foregoing reasons, the court finds that it has jurisdiction over the present matter regardless of the status of Maya Kara as "Acting Attorney General" at the time the Information was filed. As such, Defendant's motion to dismiss the Information for lack of jurisdiction is **DENIED**.

For the foregoing reasons, the court finds that Defendant is entitled to production of the requested discovery materials. As such, Defendant's motion to compel discovery is **GRANTED** and the Commonwealth is ordered to produce copies of any photographs or videotape made of Defendant.

So ORDERED this 17 day of May, 2000.

/s/ Juan T. Lizama
JUAN T. LIZAMA, Associate Judge