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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS **Plaintiff,** **vs.** **GUO LING ZHANG,** **Defendant.**	)	**Criminal Case No. 99-0341-B** **ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION FOR JURY TRIAL**

I. PROCEDURAL BACKGROUND

In the Commonwealth, any person accused by information of committing a felony punishable by more than five years imprisonment, by a fine greater than $2,000, or both, is entitled to a jury trial.[1] By order dated November 9, 1999, this court denied Defendant's motion for a jury trial on grounds that a $2,000 statutory assessment, which shall be assessed of persons either convicted or given a deferred sentence as a result of an arrest for promoting prostitution, did not qualify as a "fine." *See* Order Denying Defendant's Motion for Jury Trial (filed November 9, 1999) (the "November 9 Order"). Citing a recent ruling by another judge of this court and authority from the Ninth Circuit Court of Appeals, Defendant moves to reconsider the November 9 Order, arguing that because the $2,000 assessment acts, in virtually every respect, as a fine, the Defendant stands accused of committing a felony triable to a jury. **[p. 2]**

Trial courts have "inherent authority" to decide motions for reconsideration and rehearing of orders in criminal proceedings. *See, e.g., United States v. Barragan-Mendoza*, 174 F.3d 1024,

[1] *See* 7 CMC § 3101(a).

1028 (9th Cir.1999). The court, having reconsidered[2] the pleadings on file, the arguments of counsel, and the applicable law, denies the motion to reconsider its previous order. The following discussion sets forth the court's conclusions and rationale in support of its ruling.

II. FACTUAL BACKGROUND

On July 16, 1999, Defendant Guo Lin Zhang was charged by information with one count of promoting prostitution in the second degree, in violation of 6 CMC § 1344(a) and made punishable by 6 CMC § 1344(d)(2) and 1346(c).[3] In material part, section 1346(c) of the Criminal Code provides that every person found guilty of promoting prostitution in the second degree shall be subject to imprisonment for no more than five years, or a fine of not more than $1,000, or both, for each violation. Section 1346(e)(2) further provides that in addition to these penalties, a person convicted or given a deferred sentence as a result of an arrest for promoting prostitution "shall be assessed a fee of two thousand dollars ($2,000)."

On October 6, 1999, Defendant filed a motion for jury trial contending that the $2,000 mandatory fee assessment was actually a "fine" that, when combined with the statutory penalty of $1,000 set forth in 6 CMC § 1346(c), exceeded the threshold for a right to jury trial under 7 CMC § 3101. In determining that the assessment was not a fine, this court looked to a federal criminal statute imposing similar assessments upon defendants convicted of certain crimes and particularly the interpretation of that statute **[p. 3]** by the United States Court of Appeals for the Fifth Circuit. *See United States v. Hurtado,* 899 F.2d 371, 376 (5th Cir. 1990) (special assessment levied upon

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[2] In civil actions, the major grounds justifying reconsideration involve an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice. *See Camacho v. J.C. Tenorio Enter., Inc.*, 2 N.M.I. 408, 414, 416 (N.M.I. Sup.Ct. 1992); 18 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE: Jurisdiction § 4478 (1981). These standards also apply in a criminal proceeding. *See Commonwealth v. Lizama,* Crim. No. 94-0102 (N.M.I. Super. Ct. Sept.6, 1994) (Decision and Order on Defendant's Motion for Preliminary Examination) at 2.

[3] Under the law of the Commonwealth, a person is guilty of promoting prostitution in the second degree if he "advances prostitution." 6 CMC § 1334(d)(2). 6 CMC § 1344(a) provides that a person "advances prostitution" if, acting other than as a prostitute or as a customer of a prostitute, 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 house of prostitution or prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution."

convicted defendant contained in the Special Assessment on Convicted Persons Bill, codified at 18 U.S.C. § 3013, is not a fine).

On April 26, 2000, another judge of this court addressed the same question, only to reach the opposite conclusion. *See Commonwealth v. Wen Feng Chen*, Criminal Case 99-0339 (Order granting motion for jury trial). In support of his ruling that the mandatory fee assessment imposed by 6 CMC § 1346(e)(2) qualified as a "fine" entitling the defendant to a jury trial, that judge examined the same federal criminal statute but looked at the interpretation of that statute by the Ninth and Tenth Circuits, each of which ruled that the special assessment was punitive in nature. *See United States v. Smith*, 818 F.2d 687, 690 (9th Cir. 1987); *United States v. King*, 891 F.2d 780, 783 (10th Cir. 1989). While another judge's ruling and recent interpretations of comparable federal statutes carry significant weight and certainly warrant this court's taking a second look at the issue, a review of these authorities and the statute in question does not persuade this court to modify its decision.

III. ISSUE

Whether the $2,000 mandatory fee, assessed by Public Law 11-19 for conviction of prostitution-related offenses, can be classified as a "fine," entitling the Defendant to a jury trial.

IV. ANALYSIS

Although the right to a jury trial, guaranteed by the Sixth and Seventh Amendments to the United States Constitution, applies in the Commonwealth, "neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law." *See* COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA, § 503(a), 48 U.S.C. § 1601 note, *reprinted in* Commonwealth Code at B-101 *et seq.* (hereinafter, the "COVENANT"). Under the COVENANT, therefore, as well as N.M.I. Const. art. **[p. 4]** I, § 8, the right to a trial by jury in criminal

proceedings based on local law is statutory. *See* N.M.I. Const., art. I, § 8 (stating that "[t]he legislature may provide for trial by jury in criminal or civil cases").[4]

In determining whether the legislature intended for the special assessment to trigger the right to a jury trial for persons accused of promoting prostitution, therefore, the court looked first to the language of the statute. On its face, the statute offers little insight into its underlying purpose. The wording does not indicate explicitly whether the special assessment was meant to punish, nor is the placement of the special assessment in the "penalties" portion of the statute itself determinative. *See, e.g., United States v. La Franca*, 282 U.S. 568, 572, 51 S.Ct. 278, 280, 75 L.Ed. 551 (1931) (if the special assessment were intended to raise revenue for government use rather than to punish offenders, the name by which it is called is irrelevant); *United States v. Smith*, 818 F.2d at 690 (a punitive measure designed to raise revenue is still a punitive measure). The court notes, however, that on July 9, 1998, the Legislature enacted Public Law 11-19 to amend existing code provisions governing prostitution and to establish mandatory fees for defendants convicted of prostitution offenses. *See* PL 11-19, *amending* PL 8-14 *and codified at* 6 CMC § 1341 *et seq*. Prior to the enactment of Public Law 11-19, persons guilty of promoting prostitution in the second degree were clearly entitled to a jury trial, in that they faced imprisonment for not more than five years and payment of a fine of not more than $10,000, or both, for each statutory violation. *See* Public Law 8-14, § 7, *previously codified at* 6 CMC § 1346(c). In retaining the term of imprisonment while reducing the maximum allowable fine to $1,000, Public Law 11-19 effectively removes the offense from those triable to a jury under 7 CMC § 3101(a). Since it is presumed that the legislature was aware of the right to a jury trial under the original act, it follows that in reducing the penalty, the legislature deliberately intended to eliminate that right. *See , e.g., People v. Martinez*, 132 Cal.App 3d 119, 183 Cal Rptr 256 **[p. 5]** (1982) (a substantial change or deletion in the language of a statute

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[4] The limited right to a jury trial set forth in 7 CMC § 3101(a) has withstood constitutional scrutiny. *See Commonwealth v. Atalig*, 723 F.2d 682, 690 (9th Cir. 1984), *cert. denied.* 467 U.S. 1244, 104 S.Ct. 3518, 82 L.Ed.2d 826 (1984) (Northern Mariana Islands statutory provisions, providing that trial by jury is not required in any civil action or criminal prosecution based on local law except when required by local law, and which require jury trial only when offense is punishable by more than five years' imprisonment or $2,000 fine, do not violate either the Sixth or Fourteenth Amendments).

is presumed to change its meaning).[5] Construing the assessment as a fine would effectively ignore the import of the amendment and treat the reduction in penalty as nothing more than a typographical error. Since "a court should avoid interpretations of a statutory provision which would defy common sense [or] lead to absurd results,"[6] the court must select a construction of the assessment that comports most closely with the apparent intent of the Legislature: that is, to interpret the assessment as a fee or something other than a provision that would reinstate the right that the Legislature deliberately withdrew.

A number of additional considerations militate in favor of construing the assessment as a fee or revenue raising measure, rather than as a fine designed to trigger the right to a jury trial. First, the statute expressly differentiates between "fines," which it imposes as a consequence of the commission of specific offenses, and "fees," a term used only to apply to the assessment. When, as here, the legislature has used a term in one section of the statute but omits it in another section of the same statute, the court will not imply it where it has been excluded. *See PGE v. Bureau of Labor and Industries*, 317 Or. 606, 611, 859 P.2d 1143 (1993) (the use of a term in one section and not in another section of the same statute indicates a purposeful omission); *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So.2d 911, 914 (Fla.1995).[7] Second, in enacting Public Law No. 11-19, the Legislature expressly intended to provide additional funding for law enforcement. *See* H.B. No. 11-55, § 1 amending 6 CMC § 1341 *et seq.* In contrast to penalties collected from fines that are deposited into the general treasury, section 1346 (e)(2) requires "fees" **[p. 6]** assessed under the statute to be deposited into a special account, earmarked for the specific purpose of funding the

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[5] *See also Magnolia Petroleum Co. v. Carter Oil*, 281 F.2d 1 (10th Cir. 1955)("the mere fact that the legislature enacts an amendment indicates that it thereby intended to change the original act by creating a new right or withdrawing an existing one"); 1A N.J. Singer, STATUTES AND STATUTORY CONSTRUCTION (a.k.a. SUTHERLAND, STATUTORY CONSTRUCTION) [hereinafter, "SUTHERLAND STAT. CONST."] §§ 20.12 (5th ed. 1993) (once a statute has been amended, it is presumed that the legislature intended it to have a meaning different from that accorded to it before the amendment; therefore, any material change in the language of the original act is presumed to indicate a change in legal rights).

[6] *Commonwealth Ports Auth. v. Hakubotan Saipan Enter., Inc.*, 2 N.M.I. 214, 224 (1991).

[7] *See* 2A SUTHERLAND STAT. CONSTRUCT. §§ 46.07 (5th ed.1992 and Supp.1996) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.").

enforcement of anti-prostitution laws; restricts the appropriation of funds collected from the assessments to the Department of Public Safety; and specifies that funds collected from the assessments are not to be reprogrammed for any other purpose or to any other agency. *See* 6 CMC § 1346(e)(3). Thus, while the assessment places an additional burden on a defendant and can be imposed only following conviction for a crime, the principal purpose of the assessment appears to be to produce revenue for funding a particular governmental program. In contrast to procedures mandated by law for the collection of criminal fines, moreover, section 1346(e)(3) permits the court to suspend payment of all or part of the assessment, should it determine that the person does not have the ability to pay. *Compare* 6 CMC § 1346(e)(3) (permitting the court to suspend payment upon a finding of no ability to pay) *with* 6 CMC § 4107 (when an offense is made punishable by a fine, the court imposing the fine may not suspend payment but may impose directions for payment "that appear to be just"; in the event of a default in payment, moreover, "the court may [also] order the defendant to be imprisoned for such period of time as it may direct"). These distinctions persuade the court that the assessment was intended to be something other than a fine or penalty that would entitle the Defendant to a jury trial.

The court's previous order, moreover, along with the *Chen* and *Smith* decisions, turned largely upon federal criminal statutes imposing similar assessments upon defendants convicted of felonies and misdemeanors committed against the United States. *See Commonwealth v. Wen Feng Chen*, Criminal Case 99-0339 (Order granting motion for jury trial) at 4; *United States v. Smith*, 818 F.2d at 689-690. Where a state statute is patterned after a federal act, it is appropriate for courts to give due deference to interpretations given by the federal courts to comparable statutes.[8] *See, e.g.*. *Packaging Indust. Group, Inc. v. Cheney*, 380 Mass. 609, 611, 405 N.E.2d 106 (1980) (when Massachusetts statute adopts language of Federal statute, it is ordinarily given same construction as cognate Federal statute). In amending the prostitution statute so as to add the statutory assessment and, at the same time, reduce the **[p. 7]** fine that would guarantee the right to a jury trial, however,

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[8] *See, e.g., In re Cardizem CD Antitrust Litigation*, --- F.Supp.2d ----, 2000 WL 867676 (E.D.Mich. Jun 20, 2000).

the court finds no evidence that the Legislature relied upon or even referred to the federal statute.[9] Thus, while judicial interpretation of federal statutes may be useful in construing state statutes copied from federal acts, caution must be exercised where, as here, the statutes have different historical origins and obviously serve different purposes. *See* Sutherland, § 52.01.

At issue in this case is a matter of statutory interpretation that can and should be determined by reference to local law. A detailed examination of the language of the statute, the administrative enforcement scheme, and legislative intent suggest that in reducing the fine for promoting prostitution in the second degree, the Legislature deliberately eliminated the right to a jury trial. In concluding that the assessment was intended to provide funds for law enforcement and that the Legislature did not intend for the assessment to replace a right that it deliberately took away, the court has selected a statutory construction that comports most closely with the apparent intent of the Legislature. For the forgoing reasons, the motion for reconsideration of denial of trial by jury is DENIED.

So ORDERED this 21 day of August, 2000.

/s/ Timothy H. Bellas

TIMOTHY H. BELLAS, Associate Judge

[9] *See* PL 11-19, § 1 ("This legislation is modeled upon various provisions of the Seattle Municipal Code which has repeatedly withstood constitutional challenge...").