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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS	)	**Criminal Case No. 00-127-C**
Plaintiff,	)	
vs.	)	**ORDER ON MOTION TO DISMISS INFORMATION**
JOSEPH A. ARRIOLA,	)	
Defendant.	)	

I. INTRODUCTION

By Information, the Government charged the defendant, Joseph A. Arriola, with five counts of sexual abuse of a child, in violation of 6 CMC § 1311(a) and made punishable by 6 CMC § 4102(d). Defendant has moved to dismiss the Information, contending that the crime of sexual abuse of a child is a specific intent crime, and the Information is fatally flawed for failing to allege a specific *mens rea*. Defendant also asks the court to dismiss Counts III, IV, and V of the Information on grounds that each of these Counts is exactly the same.

This matter came before the court on May 3, 2000. At the hearing on this matter, Anthony G. Long, Esq. appeared on behalf of the Defendant, Joseph A. Arriola. Assistant Attorney General James J. Benedetto appeared on behalf of the Commonwealth. The court, having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its decision. **[p. 2]**

FOR PUBLICATION

II. BACKGROUND

On February 29, 2000, the Government charged the Defendant with five counts of sexual abuse of a child, in violation of 6 CMC § 1311(a) which prohibits "sexual contact, any act of exhibitionism, or sexual exploitation with any child under the age of 16 years who is not the spouse of the perpetrator." Counts I and II of the Information charge Defendant with sexual contact with J.C.M. on January 4 and January 24 or 25, 1998, respectively, while Counts III, IV, and V of the Information allege the Defendant engaged in sexual contact with the victim "on or about January 4, 1998, through July 26, 1998." Although Section 1311(b)(3) of the Code defines "sexual contact" as "any fondling or touching of the person of either the child or the perpetrator done or submitted for the purpose of sexual arousal or gratification, aggression, degradation, or other similar purposes," the Information does not define sexual contact or refer to section 1311(b)(3).

In March of 2000, the Defendant filed a Motion for Jury Trial which this court addressed by separate order. *See* Order Granting Motion for Jury Trial (September 15, 2000). To challenge the sufficiency of the Information, Defendant also filed a Motion for Bill of Particulars which the court granted on May 3, 2000. In the instant motion, Defendant raises two additional concerns about the validity of the Information in this case. Defendant first contends that in simply charging him with "sexual contact" and failing to include the language of 6 CMC § 1311(b)(3), the Information omits an essential element of the offense and indeed fails to allege any criminal offense at all. Motion at 2. The second concern targets the adequacy of the factual allegations that the Government has charged as separate crimes. Defendant contends that Counts III, IV, and V are multiplicitous, in part because it is impossible to tell whether they overlap with or replicate other charges.

III. QUESTIONS PRESENTED

1. Whether the use of the term "sexual contact," when strictly construed, apprises the Defendant of the intent element necessary to be convicted of the crime of sexual abuse of a child.

2. Whether Counts III, IV and V of the Information must be dismissed on grounds of multiplicity.

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III. ANALYSIS

A. Mens Rea Requirement

Fundamental principles of criminal law require an accusatory instrument to inform the person charged of the essential elements of the offense in adequate detail.[1] In addition to constitutional notice requirements, due process guarantees that the accused will have a fair opportunity to defend against the charges brought.[2] To satisfy constitutional requirements, therefore, an information must (1) contain the elements of the offense charged; (2) provide adequate notice to the defendant of the crime charged, and (3) be sufficiently detailed and specific so that a defendant can prepare a defense and, if appropriate, plead double jeopardy as a defense to a future prosecution for the same offense. *Hamling v. United.States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). Charging instruments that fail to set forth the essential elements of a crime in such a way that the defendant is notified of both the illegal conduct and the crime with which he is being charged are constitutionally defective, and require dismissal. *See, e.g., United States v. Bo*, 186 F.3d 1177, 1180 (9th Cir. 1999) (pre-verdict challenge to indictment that fails to contain elements of a crime requires reversal *per se*); *Washington v. Taylor*, 140 Wash.2d 229, 236 996 P.2d 571, 575 (Wash. 2000) *(en banc*) (remedy for insufficient charging document is reversal and dismissal of charges without prejudice to the government).

A criminal accusatory instrument that tracks the language of a statute ordinarily comports with constitutional standards unless the statute omits an essential element of the offense. *See United States v. Morrison*, 536 F.2d 286, 287-88 (9th Cir. 1976); *Commonwealth v. Camacho*, Crim. No. 95-0226 (N.M.I. Super. Ct. Jan. 24, 1996) (Order Denying Defendant's Motion to Dismiss Information). Criminal **[p. 4]** intent, or *mens rea*, is an essential element of an offense. *Morrison*,

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[1] *See* U.S. Const. amend VI ("In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation..."). The Sixth Amendment to the U.S. Constitution is made applicable to the CNMI by Section 501(a) of the Covenant between the Commonwealth and the United States. *See* COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA (hereinafter, "Covenant") § 501(a), 48 U.S.C. § 1601 note, *reprinted in* Commonwealth Code at B-101 et seq.

[2] *See* U.S. Const. amend. V and XIV. Although the Fifth and Fourteenth Amendments to the U.S. Constitution also apply with full force in the Commonwealth, *see* Covenant § 501(a), the guarantee of due process embraced by the United States Constitution has been specifically incorporated into the Commonwealth Constitution at Article I, section 5 ("No person shall be deprived of life, liberty, or property without due process of law").

536 F.2d at 287. When a defendant mounts a pre-verdict challenge to a charging document for the failure to include a required element, courts construe the indictment or the information strictly.[3] When an element such as intent is omitted, moreover, the court examines the charging document to determine whether there is "language clearly suggesting the requisite criminal intent." *Washington v. Johnson*, 119 Wash.2d 143, 149-50, 829 P.2d 1078 (1992).

Even essential elements not explicitly set forth in a charging document may, when strictly construed, be found to have been included in an offense. *E.g., Taylor*, 140 Wash.2d at 239-40, 996 P.2d at 576-77 (when strictly construed, complaint alleging that defendant committed assault by "pushing, kicking and punching the victim in the face" was sufficient to implicitly indicate the intent element of assault in the fourth degree, based upon common understanding of the term "assault"). Thus when the activity at issue is one that inherently encompasses the *mens rea*, the description of the act may itself be sufficient to allege the necessary mental element. *See, e.g. Hamling*, 418 U.S. at 118; 94 S.Ct. at 2908 (since "obscenity" is a legal term of art, "various component parts of the definition of obscenity need not be alleged in the indictment"); *Morrison*, 546 F.2d at 288 (when words appearing in charging instrument have historical meaning, either in statutory history or in common law, allegation of *mens rea* may be implied). *See also Tennessee v. Hill*, 954 S.W.2d 725, 729 (Tenn. 1997) (indictment charging the defendant with aggravated rape by unlawfully penetrating a person less than thirteen years of age was valid despite its failure to allege **[p. 5]** specific *mens rea*, as language of required mental state could be inferred from nature of criminal conduct alleged and language of indictment provided adequate notice to defendant and trial court of offense alleged while protecting the defendant from subsequent re-prosecution for same offense). Similarly, the Maryland

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[3] *E.g., Washington v. Vangerpen*, 125 Wash.782, 788, 888 P.2d 1177 (1995). The standard used to evaluate the sufficiency of a charging document is determined by the time at which the motion challenging its sufficiency is made. When a challenge is made for the first time after a verdict, the charging documents must be construed liberally in favor of validity. *Taylor*, 996 P.2d at 575. Under the liberal standard of construction, a court has "considerable leeway to imply the necessary allegations from the language of the charging document." *Id.* When, as here, a defendant challenges the sufficiency of a charging document before the verdict, the charging language must be strictly construed. *Id., citing Washington v. Johnson*, 119 Wash.2d 143, 149-50, 829 P.2d 1078 (1992); *see also Bo*, 186 F.3d at 1180 & N.3. The two distinct standards of review "encourage prosecuting attorneys to file sufficient complaints, and also encourage defendants to make timely challenges to defective charging documents to discourage 'sandbagging.'" *Taylor*, 996 P.2d at 575, *citing Johnson*, 119 Wash.2d at 150, 829 P.2d 1078; *Washington v. Kjorsvik*, 117 Wash.2d 93, 103, 812 P.2d 86 (1991).

Court of Appeals upheld an indictment charging the defendant with unlawful possession of certain controlled paraphernalia in violation of a Maryland statute, even though the indictment failed to specifically allege the element of intent. *Russell v. Maryland*, 518 A.2d 1081 (Md.App. 1987). The court held that the reference to the applicable statute effectively incorporated by reference elements of the statutory offense, including intent, so that indictment was constitutionally sufficient.[4]

In the instant case, the parties agree that sexual abuse of a child is a specific intent crime, and that to sustain a conviction, the Government must prove that the Defendant engaged in the prohibited conduct for the specific purpose of aggression or degradation, or arousing or gratifying sexual desire. *See* Motion at 2, Opposition at 4. The CNMI Supreme Court, moreover, has previously ruled that the specific intent required to sustain a conviction in this case is necessary to provide adequate notice to the defendant of the prohibited conduct, and to distinguish the offense charged from other crimes such as assault or non-criminal touching. *Commonwealth v. Bergonia*, 3 N.M.I. 22, 37-38 (1992). The Government asserts that even though the Information omits the specific intent language and contains no reference to its definition in the statute, there can be no doubt that it is included by reference, since there is a definition of "sexual contact" set forth in 6 CMC § 1311(b)(3).

The court must therefore determine whether a charging document which substantially but imperfectly charges the Defendant with the crime of sexual abuse of a child is fundamentally deficient: that is, whether the use of the term "sexual contact," when strictly construed, apprises the defendant of the intent element necessary to be convicted of the crime. N. J. Singer, Sutherland Statutory Construction § 22.30 (5th ed. 1993) In the case at bar, Defendant does not contend, nor can we imagine, that he does not **[p. 6]** understand the charges against him, or that he was misled. Indeed, by moving to dismiss the information for failing to allege the element of guilty knowledge, he shows that he is aware of that element and must defend against it at trial. In the case at bar, moreover, the charging document tracks the language of the statute and thus by reference to 6 CMC

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[4] *See United States v. Dixon*, 596 F.2d 178 (7th Cir. 1979) (indictment using the words of the statute sufficiently charges the offense, including the doing of the act with knowledge); *Ruff v. Tennessee*, 978 S.W.2d 95 (Tenn.1998) (upholding sufficiency of indictment for aggravated kidnaping when the indictment referenced the appropriate statute but failed to include the *mens rea* required under the statute; Court held that reference to the aggravated kidnaping statute placed the defendant on notice of the mental state required to commit the offense).

§ 1311(a), the Defendant has been informed that he cannot be convicted unless the Commonwealth proves: (1) that he engaged in sexual contact, (2) with the victim, a child under the age of sixteen years, (3) who was not his spouse. After examining the Information, therefore, the court is persuaded that the reference to "sexual contact" adequately informs the Defendant of the charges against him, so as to enable him to prepare a defense and to plead double jeopardy as a bar to further prosecution on the same offense. The motion to dismiss the Information for failure to define "sexual contact" in the accusatory document, is, therefore, DENIED.

B. Multiplicity

The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., amend. V; N.M.I. Const. art .I, § 4(e). Thus, the clause protects against multiple punishments for the same offense. *Simpson v. United States*, 435 U.S. 6, 11 n. 5, 98 S.Ct. 909, 912 n. 5, 55 L.Ed.2d 70 (1978). Accordingly, the doctrine of multiplicity prohibits the Government from charging a single offense in several counts. *United States v. Hurt*, 795 F.2d 765, 774 (9th Cir.1986), *amended on other grounds*, 808 F.2d 707 (9th Cir.), *cert. denied*, 484 U.S. 816, 108 S.Ct. 69, 98 L.Ed.2d 33 (1987). In determining multiplicity, the court considers whether each count of the charging instrument requires proof of a fact that the other does not. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932); *United States v. Wylie*, 625 F.2d 1371, 1381 (9th Cir.1980), *cert. denied*, 449 U.S. 1080, 101 S.Ct. 863, 66 L.Ed.2d 804 (1981).[5] If not, then the charges are multiplicitous. **[p. 7]**

In the Information at issue, Count III contends that "on or about January 4, 1998 through July 26, 1998, on Saipan," the Defendant engaged in sexual contact with J.C.M., a child under the age of sixteen years, who was not his spouse. Counts IV and V of the Information allege the exact same thing. The Counts do not differ in time frame from each other, nor are they distinguished by the alleged act. As currently plead, therefore, each Count is exactly the same. As drafted, moreover,

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[5] The "proof of a fact" referred to in *Blockburger* does not simply relate to whether the same evidence is used at trial to prove the two charges. So long as each offense requires the proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. *Iannelli v. United States*, 420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 1293 n. 17, 43 L.Ed.2d 616 (1975); *United States v. Gann*, 732 F.2d 714, 719 (9th Cir.1984), *cert. denied*, 469 U.S. 1034, 105 S.Ct. 505, 83 L.Ed.2d 397 (1984).

Counts III, IV, and V also appear to overlap with conduct charged in Counts I and II, and from the charging instrument, there is no way for the court to determine whether the acts alleged in Counts III, IV, and V are distinct or separate instances.

Although the Government insists that Counts III, IV, and V complain of unlawful sexual contact that occurred on three separate occasions, the Information makes no such distinction. While the court is aware that sexual abuse over a long period of time involving children may cause them to have difficulty recalling the specific dates of their abuse,[6] this does not excuse the Government's obligation to insure that an accused is not charged repeatedly for the same offense. The court notes, moreover, that the trial in this case stands to commence in early November, and notwithstanding its order of May 3, 2000 granting Defendant's motion for a bill of particulars, the Government has not yet seen fit to comply. The court finds Counts III, IV and V of the Information to be multiplicitous. The Defendant's motion to dismiss Counts III, IV, and V is, therefore, GRANTED and these counts are dismissed without prejudice.

So ORDERED this 21 day of September, 2000.

/s/ Timothy H. Bellas
TIMOTHY H. BELLAS, Associate Judge

[6] *See, e.g., Commonwealth v. Oden*, 19F.3d 26 (9th Cir. 1994) (unpublished disposition); *Erickson v. Colorado*, 951 P.2d 919, 922 (1998).