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 DENYING MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTION FOR JURY TRIAL**
JOSEPH A. ARRIOLA,	)	
Defendant.	)	

I. INTRODUCTION

This matter originally came before the court on defendant Joseph A. Arriola's oral motion for jury trial on the criminal charges pending against him in this court. On September 15, 2000, this court ruled that denying Defendant a jury trial violates due process and his right to equal protection under the law, since the same conduct, committed under the same circumstances, merits a jury trial elsewhere in the Code and because the elements of proof essential to either conviction are exactly the same. The Government has moved for reconsideration of the court's September 15 Order and submitted additional points and authorities, including evidence of legislative history and case authority not previously presented to the court. The court has considered this additional information and now renders its decision on reconsideration.[1]

[p. 2]

II. BACKGROUND

On March 2, 2000, the Government filed an Information charging the Defendant, Joseph A. Arriola, with five counts of sexual abuse of a child in violation of 6 CMC § 1311(a). Since a

[1] 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). 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.

conviction for sexual abuse of a child carries with it a sentence of not more than five years imprisonment, or a fine of not more than $2,000, or both, an individual charged with sexual abuse of a child has no right to a jury trial under CNMI law. *See* 6 CMC § 1311(c).[2]

Under the law of the Commonwealth, "sexual molestation" is a form of child abuse. *See* 6 CMC § 5312(c). Unlike other forms of child abuse, however, the crime of sexual molestation contains no explicit requirement that the victim be in the custody of the perpetrator. Absent the custody requirement, the court ruled that the conduct prohibited by the crime of sexual molestation appeared to be identical to that prohibited by the offense of sexual abuse of a child. *See* 6 CMC § 5312(d).[3] Thus, although an individual charged with sexual molestation or child abuse is entitled to a jury trial, an individual charged with sexual abuse of a child has no such right.[4]

On March 20, 2000, the Defendant filed a motion for a jury trial, contending that he was charged with the offense of sexual abuse of a child, and not child abuse, in order to deny him a jury trial. Defendant further contended that because § 5312 punished conduct identical to § 1311, denying him a jury trial violated due process and his right to equal protection under law. In response, the Government initially argued that the Defendant had no right to a jury trial because he was not charged with committing any felony punishable by more than five years imprisonment, or more than $2,000 in fines. In its motion for **[p. 3]** reconsideration, the Government now takes the position that there is no equal protection violation because the two statutes at issue prohibit similar, but not identical, conduct. Even assuming that the conduct punished by the two statutes is identical, the Government maintains that the Defendant's equal protection and due process claims must fail

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[2] The offense of sexual abuse of a child, moreover, also calls for a mandatory minimum sentence of no less than one-third the maximum term of imprisonment which may otherwise be imposed upon conviction. The court may not suspend the sentence unless it first determines that unique circumstances exist in the light of which imprisonment would be inhumane, cruel or otherwise extremely detrimental to the interest of justice, and that imprisonment would not be necessary to protect the public or any witness. 6 CMC § 4102(d).

[3] "Sexual molestation" means "all conduct prohibited by 6 CMC § 1311 and by division 1, chapter 3, article 2 of this title [6 CMC § 1321 et seq.]." Conduct prohibited by 6 CMC § 1321 is child pornography.

[4] In contrast to the offense of sexual abuse of a child, moreover, a conviction for sexual molestation does not carry with it a mandatory term of imprisonment, and a court may instead direct that the perpetrator be provided with appropriate counseling "to cure, alleviate or prevent the psychological problems that are judged to be related to the child abuse and neglect incident." *See, e.g.* 6 CMC § 5312(c).

because he has not provided any evidence of disparate treatment, or of clear and purposeful discriminatory intent.

The Government insists that "a necessary element of Child Abuse and Neglect [and thus sexual molestation] is the presence of a custodial relationship between the perpetrator and his victim." Motion for Reconsideration at 4. According to the Government, a violation of the child abuse and neglect statutes requires a victim under the age of eighteen and in the defendant's custody at the time of the offense. Sexual Abuse of a Child, by contrast, requires that the victim be under the age of sixteen and not the spouse of the perpetrator, but does not require that the perpetrator have custody of the victim. Based on the assumption that the crime of sexual molestation requires a victim under the age of eighteen and a custodial relationship, the Government argues that there is a rational basis for denying those accused of sexual abuse of a child jury trials, and that limiting the Defendant to a bench trial for the same conduct prohibited by the offense of child abuse is no denial of due process.

To read the requirement of a custodial relationship into the crime of sexual molestation, moreover, the Government relies upon a litany of well-known precepts of statutory construction, including the plain meaning rule,[5] the practice of avoiding overly restrictive statutory interpretations,[6] and the canons of construing statutes as a whole and *in pari materia*,[7] while avoiding statutory interpretations that would **[p. 4]** render other statutory provisions inconsistent, absurd, or

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[5] *See, e.g., Commonwealth Ports Auth. v. Hakubotan Saipan Ent., Inc.*, 2 N.M.I. 212, 221 (1991) (The court must first look to the plain meaning of the statute; when it is clear, the court should not interpret it in a contrary fashion).

[6] *See, e.g.*, 3 N. Singer, SUTHERLAND STAT. CONSTRUCTION ("SUTHERLAND") § 65.03 at 329-30 (5th Ed. 1993).

[7] *See, e.g., Borja v. Goodman*, 1 N.M.I. 225, 260 & n. 33 (1990), *quoting* 2A SUTHERLAND § 45.10 at 47:

> ...[A]n examination of all legislation in a particular field is necessary for a full appreciation of any specific enactment. This consideration must be more inclusive than the literal inquir[y] of *in pari materia*; it must probe basic policy and the pattern and development of the means and procedures used to activate that policy. An inquiry of this character can disclose a legislative common law of surprising consistency and continuity. It not only may give meaning to the "legislative intent" of a particular statute but can also pave the way for constructive judicial use of legislative as well as case law precedents.

meaningless.[8] The Government failed to submit any of this authority in response to Defendant's original motion.

As a second line of argument, the Government suggests that if the court cannot give effect to or reconcile both statutes, then neither those accused of sexual abuse of a child nor those charged with sexual molestation should be entitled to trial by jury, since the Legislature's last word on the subject was to spare sexually abused children the emotional trauma that a jury trial would cause. Motion at 8, *citing Commonwealth v. Lizama*, Crim. No. 91-106 (Amended Order) (Super.Ct. Nov.1, 1991), *rev'd on other grounds*, 3 N.M.I. 402 (1992), *aff'd*, 27 F.3d 444 (9th Cir. 1991) (when an amendatory act cannot be reconciled with the requirements of the altered provision, the last expression of legislative will should be given effect). The presence of the custodial relationship, the Government stresses, differentiates the crime of sexual molestation from the crime of sexual abuse of a child. The Legislature's rationale for denying child abusers a jury trial, while granting the right to child molesters who engage in identical conduct, does not figure into the Government's discussion.

III. ISSUES

1. Whether the crime of sexual molestation requires a custodial relationship between the perpetrator and child victim and is thus distinguishable from the crime of sexual abuse of a child.
2. Whether, under *United States v. Batchelder*,[9] the Government's decision to charge the Defendant under one of two statutes with identical elements violates the Defendant's right to equal protection under law. **[p. 5]**

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[8] *See, e.g., Faisao v. Tenorio*, 4 N.M.I. 260, 265 (1995).

[9] 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755(1979).

IV. ANALYSIS

A. Legislative History

On March 13, 1978, the First Northern Marianas Commonwealth Legislature enacted Public Law 1-17 to prohibit indecent liberties with a child.[10] In material part, the statute provided that every person convicted of unlawfully engaging in indecent liberties with a child would face imprisonment for not more than 5 years and a fine of not more than $2,000, or both. Therefore, a person charged with taking indecent liberties with a child was not entitled to a jury trial. In April of 1983, however, the Legislature repealed Public Law 1-17 by enacting Public Law 3-62. In material part, Public Law 3-62 replaced the offense of indecent liberties with the current offense of sexual abuse of a child, redefined the prohibited conduct,[11] and increased the range of punishment to not more than five years imprisonment, a fine of not more than $10,000, or both. Consequently, and until the most recent amendment to the statute in December of 1983,[12] persons charged with sexual abuse of a child were entitled to trial by jury.

In December of 1983, the Legislature made the decision to lower the penalties that could be imposed on those charged with sexual abuse of a child for the express purpose of denying these individuals the right to trial by jury. *See* Pub. L. No. 3-88, § 4; House Standing Committee Report No. 3-153 (August 30, 1983) ["Standing Committee Report 3-153"]. In so doing, the legislature determined that it was "in the best interest of society to spare a sexually abused child and his family the emotional trauma that a jury trial would cause." As the statute currently stands, therefore, those charged with sexual abuse of a child are not entitled to jury trials. As set forth above, moreover, the singular reason provided by the Legislature for denying a jury trial to persons accused of sexual abuse of a child was to spare child victims the trauma of having to testify in front of a jury. **[p. 6]**

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[10] "Indecent Liberties" were defined as sexual intercourse or any fondling or touching of the person of either the child or the offender with the intent to arouse or satisfy the sexual desires of either or both parties. *See* S.B. 1-27, § 1.

[11] Public Law 3-62 made it unlawful to engage in "sexual contact," any act of "exhibitionism," or "sexual exploitation" with a child under 16 who was not the perpetrator's spouse.

[12] Public Law 3-88 (Dec. 12, 1983) reduced the penalties for sexual abuse of a child to not more than five years imprisonment and a fine of not more than $2,000. In so doing, Public Law 3-88 eliminated the right to a jury trial for sexual abusers of children.

Child abuse statutes did not appear in the Commonwealth until Public Law 3-18 was enacted in 1982. In their original incamation, the child abuse statutes criminalized only the physical or mental abuse committed upon children by those responsible for their custody, and punished those with custody who, through willful conduct, committed child neglect.[13] Although defined in the statute by reference to conduct prohibited by Public Law 1-17, the Child Abuse and Neglect Statute did not criminalize sexual molestation. Instead, the statute defined sexual molestation by reference to conduct prohibited by Publ L. 1-17 (taking indecent liberties with a child), and imposed a duty to report incidents of sexual molestation "by a parent or person responsible for the child's welfare" upon hospital personnel, medical examiners, teachers, law enforcement personnel, and a host of other professionals *See* Pub. L. No. 3-18, §3 (1982); *see also* § 2(d) (defining "sexual molestation" as conduct prohibited by P.L. No. 1-17). Like those charged with taking indecent liberties with a child, moreover, persons accused of child abuse or neglect were not entitled to a jury trial.[14]

One year later, and one month after amending the statute prohibiting sexual abuse of a child, the Third Legislature amended Public Law 3-18 to, among other things, increase the range of punishments for those convicted of child abuse. *See* Pub. L. No. 3-57 (May 23, 1983). As a result of Public Law 3-57, persons accused of child abuse, like those charged with sexual abuse of a child, were thereafter entitled to jury trials. Under Pubic Law 3-57, however, sexual molestation was still not a criminal offense. When, in 1984, the Fourth Commonwealth Legislature enacted Public Law 4-1 to conform existing child abuse laws to federal requirements and strengthen existing reporting and confidentiality measures, the Legislature also redefined the conduct constituting child abuse, and, for the first time, made sexual molestation a criminal offense. *See* Publ. L. No. 4-1, § 2. Public Law 4-1 also added a new provision specifically **[p. 7]** defining what the statute required as a

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[13] Section 2 of the Act provided that "A person commits the offense of child abuse if he willfully and intentionally strikes, beats, or in any other manner inflicts physical pain, injury, or mental distress upon a child under the age of eighteen *who is in such person's custody*, such pain or injury being clearly beyond the scope of reasonable corporal punishment, or through willful neglect fails to provide a child under the age of eighteen *who is in his custody* with adequate food, clothing, or shelter with the result that such child's physical or mental health and well-being is harmed or threatened" (emphasis added). The Act did not define what was meant by "in custody."

[14] Pub. L. 3-18, § 2(c) provided that a person convicted of child abuse faced imprisonment of not more than one year, a fine of not more than one thousand dollars, or both; however, the court, upon conviction, could order the defendant to be provided with appropriate counseling.

custodial relationship.[15] Contrary to other conduct constituting child abuse or neglect that expressly required a custodial relationship, however, the legislature did not specify an "in custody" element as part of the offense of sexual molestation.

In its motion for reconsideration, the Government takes the position that, notwithstanding the exclusion of any custodial requirement from the statutory offense of sexual molestation, and notwithstanding the inclusion of a custodial element attending sexual molestation in the duty to report section of the Act,[16] the Legislature clearly intended to define "sexual molestation" as requiring a custodial relationship between the perpetrator and the child victim. In support of its position, the Government first argues that the overall design of the statute is patently clear, and that the emphasis of the child abuse statutes is on families. Second, the Government asks the court to look at how the crime of sexual molestation is treated, arguing that because Child Abuse and Neglect statutes target crimes committed by families, and because sexual molestation has always been regarded as one of those crimes subsumed in child abuse, the custodial element is, or should be, common knowledge. *See, e.g.*, 6 CMC § 5313(b) (requiring DPS to notify Division of Youth Services of all reported cases of child abuse, neglect, and sexual molestation). The Government also highlights the significant differences in treatment and sentencing for those convicted of sexual molestation and sexual abuse to argue that the legislature obviously intended, in cases of sexual molesters, to reintegrate the perpetrators into the family unit. *See, e.g.*, 6 CMC § 5312(c) (providing for counseling in sentence of those convicted of child abuse and neglect). According to the Government, the inclusion of the offense with other "family" offenses, the differences in treatment and sentencing, along with **[p. 8]** statutes providing for wardship and protective custody of sexually molested children,[17] would make no sense.

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[15] *See, e.g.*, 6 CMC § 5312(e) defining "in the person's custody" as in the custody of the child's parent, guardian, foster parent, an employee of a public or private residential home or facility, or any other person over the age of 18 responsible for the child's welfare in a residential setting.

[16] *See* 6 CMC § 5312(a) (imposing a duty to report cases of child abuse, child neglect, and sexual molestation of a child "by a parent or a person responsible for the child's welfare").

[17] 6 CMC § 5321 permits the police or the Division of Youth Services to take a child into protective custody without the consent of his or her parents or custodians when there is reasonable cause to believe the child is in danger as a result of child abuse or neglect.

The difficulties with the Government's argument are, first, that while the interpretation of penal statutes are subject to the same principles governing the construction of other statutes,[18] criminal laws should be strictly construed against the Commonwealth and in favor of the Defendant. *Washington v. Wilson*, 125 Wash.2d 212, 216-17, 883 P.2d 320 (1994). Even when the statutory language is not clear on its face, the rule of lenity imposes another basic and necessary limitation on the court's power of statutory interpretation: a criminal statute that has two possible interpretations is to be strictly construed to resolve any ambiguity in favor of the defendant. *Commonwealth v. Manglona*, Appeal No. 96-030 (N.M.I. Sup.Ct. Nov, 24, 1997) (Slip Op. at 5). *See also People v. Robles*, 23 Cal.4th 1106, 99 Cal.Rptr.2d 120 (2000) (when the language of a penal law is reasonably susceptible of two interpretations, a court will construe the law as favorably to criminal defendants as reasonably permitted by the statutory language and circumstances of the application of the particular law in issue; this protects the individual against arbitrary discretion by officials and judges, and guards against judicial usurpation of the legislative function which would result from the enforcement of penalties that the legislative branch did not clearly prescribe). Since penal statutes should be strictly construed, moreover, it is not appropriate for the court to supply missing words or to read into a statute language it thinks the Legislature inadvertently left out. *Washington ex rel. Hagan v. Chinook Hotel, Inc.*, 65 Wash.2d 573, 579, 399 P.2d 8, 12 (1965) ("it matters not whether it was done intentionally or by inadvertence. Courts cannot cure such errors in legislation even if the legislature, by inadvertence, brought about the result described above."). *See also Huether v. District Court*, 2000 Mont. 158, 4 P.3d 1193 (Mont.2000) (court's role in statutory construction is to ascertain and declare what is in terms or in substance contained therein, not to insert what **[p. 9]** has been omitted or to omit what has been inserted by the legislature). Thus, even assuming that the Legislature intended either to add the words "in custody" to section 5312(c) or remove the spectre of a jury trial for all sexually abused children, the fact is that the legislature did neither.

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[18] 3 SUTHERLAND STAT. CONSTR.§ 59.08. The legislative history, other statutes *in pari materia*, titles and headings, committee reports, commentary, and contemporary or practical interpretation may weigh heavily upon what meaning should be given to a criminal statute. *Id*. at 142.

Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature. *Heckler v. Mathews*, 465 U.S. 728, 741- 742, 104 S.Ct. 1387, 1396, 79 L.Ed.2d 646 (1984). Article I, section 1 of the Commonwealth's Constitution provides that "the legislative power of the Commonwealth ... shall be vested in a Northern Marianas Commonwealth legislature composed of a senate and a house of representatives." This court will not insert, in legislative acts, words which were seemingly unintentionally omitted, nor disregard any words which may appear to have been inadvertently included. *Washington v. Chinook Hotel, Inc.*, 399 P.2d 8, 12 (1965) (en banc).

Thus, it makes no difference whether the omission of the "in custody" requirement was done intentionally or by inadvertence: courts have no power to cure such errors in legislation, even if the legislature, by inadvertence, simply left the "in custody" language out of the statute. Under the Commonwealth constitution, it is purely a legislative problem, since the court does not have the function of correcting legislative mistakes. Because this court does not sit as a "super legislature," its only function is to interpret vague or ambiguous language. *See, e.g., Commonwealth v. Island Amusement Corp.*, Appeal No. 97-024 (N.M.I. Nov. 16, 1998) (Slip Op. at 3) *citing King v. Bd. Of Elections*, 2 N.M.I. 398, 406 (1991) (court not empowered to act as "super-legislature"). When there is nothing ambiguous in a statute, moreover, there is no need for judicial interpretation, since its meaning is clear.

Equal protection of the law is a guarantee of like treatment of all those who are similarly situated. *See* U.S. CONST. amend. IV, § 1; N.M.I. CONST. Art. I § 6 (1976).[19] At a minimum, the equal **[p. 10]** protection clause demands that a government apply its laws in a rational and nonarbitrary way. *See In re Estate of Aquiningoc*, Civil Action No. 96-0220 (N.M.I. Super.Ct. Oct. 31, 1996) (Order Denying Administrator's Motion); *Pangelinan v. Castro*, 2 CR 429 (Dist. Ct. 1986). Classification of persons under the criminal law must, therefore, be under legislation that is

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[19] Article I, Section 6 of the Commonwealth Constitution, entitled "Equal Protection," provides as follows:

> No person shall be denied the equal protection of the laws. No person shall be denied the enjoyment of civil rights or be discriminated against in the exercise thereof on account of race, color, religion, ancestry or sex.

reasonable and not arbitrary. *Taitano v. Northern Mariana Islands Amateur Softball Assoc.*, C.A. No. 93-0356 (N.M.I. Super.Ct. Feb. 2, 1994) (Decision and Order). There must be substantial differences having a reasonable relationship to the persons involved and the public purpose to be achieved. A statute which conditions the right to a jury trial upon nonexistent distinctions between child victims and, at the same time, prescribes different degrees of punishment for the same acts, committed under like circumstances, by persons in like situations violates a person's right to equal protection of the laws.

B. Batchelder is Factually and Legally Inapposite

In his moving papers and in his response to the Motion for Reconsideration, Defendant focused upon the unusual discretion granted to the prosecution in this case. Since both statutory provisions prohibit identical conduct, Defendant claimed that the prosecutor's unfettered authority to select those persons who receive a jury trial violated his right to equal protection. The Government maintains, however, that in *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979), the United States Supreme Court rejected Defendant's argument in its entirety. The Government argues that because the Defendant has failed to make any showing of disparate treatment and purposeful intent, moreover, the presumption of a good faith, nondiscriminatory prosecution remains undisturbed.

Batchelder involved two federal firearms statutes prohibiting convicted felons from receiving firearms in interstate commerce. *See* 18 U.S.C. §§ 922(h), 924(a); 18 U.S.C. § 1202(a). Conviction under one, however, could result in five years' imprisonment, while conviction under the other could result in only two years' imprisonment. The defendant was convicted under 18 U.S.C. § 922(h) and § 924(a) which provided for penalties of not more than five years in prison or a $5,000 fine, or both. In contrast, section 1202 (a) set a maximum penalty of only two years imprisonment or a $10,000 fine, or both. Batchelder, who was sentenced to five years under § 924(a), challenged the harsher statute as a violation of his rights to equal protection and due process. **[p. 11]**

The United States Supreme Court ruled that duplicative statutes containing overlapping definitions of particular criminal conduct, but providing different penalties for that conduct did not

necessarily offend constitutional guarantees.[20] In the Court's view, the decision to prosecute and what to charge were decisions resting in the prosecutor's discretion. The Supreme Court reasoned that just as a defendant has no constitutional right to elect which of two applicable federal statutes would be the basis of his indictment and prosecution, neither was he entitled to choose the penalty scheme under which he would be sentenced. The Court cautioned, however, that such discretion could not be totally "unfettered." Selectivity in the enforcement of criminal laws, the Court emphasized, is subject to constitutional constraints. 442 U.S. at 124-125; 99 S.Ct. 2204-2205. One of these constraints is imposed by the equal protection clause of the Fourteenth Amendment and the equal protection component of the Fifth Amendment. *United States v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 1486, 134 L.Ed.2d 687 (1996); *Wayte v. United States*, 470 U.S. 598, 608 & n. 9, 105 S.Ct. 1524, 1531 & n. 9, 84 L.Ed.2d 547 (1985). Under the equal protection provisions, the decision whether to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification." *Batchelder*, 442 U.S. at 125, n.9; *Armstrong*, 517 U.S. at 464, 116 S.Ct. at 1486.

The Government argues that under *Batchelder*, a defendant claiming an equal protection violation based on arbitrariness must show that the governmental action has been intentional or purposeful; that is, a defendant must present proof that the prosecution was based on impermissible considerations such as race, religion or the desire to penalize the exercise of constitutional or statutory rights. Motion at 19. *Batchelder*, however, is inapposite. The Government's reliance is, therefore, misplaced.

As an initial matter, *Batchelder* did not involve identical statutes. The two federal statutes at issue in that case overlapped only to the degree of prohibiting some of the same conduct. In the case before this court, on the other hand, there is a total redundancy in terms of both the substance of the offense and the **[p. 12]** language employed in the two sections. In the case at bar, it would be impossible for this defendant to violate § 1311(a) without violating § 5312(d).

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[20] The Court specifically held that for purposes of constitutional doctrine, there is "no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of the two statutes with identical elements." *Batchelder*, 442 U.S. at 125, 99 S.Ct. at 2205.

In addition, a number of courts considering the question after *Batchelder* have adhered to the principle that, consistent with the more expansive equal protection guarantees afforded by state constitutions, a state may not employ identical statutes with different penalties to disparately punish those who commit identical acts.[21] The Colorado Supreme Court, for example, has articulated the guarantee of equal protection in this way:

> Equal protection of the law is a guarantee of like treatment of all those who are similarly situated. Classification of persons under the criminal law must be under legislation that is reasonable and not arbitrary. There must be substantial differences having a reasonable relationship to the persons involved and the public purpose to be achieved.

People v. Marcy, 628 P.2d at 74. The identical guarantee of equal protection appears in Article I, § 6 of the Commonwealth's constitution,[22] and this court has previously recognized the Commonwealth's sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution. *E.g.*, *CNMI v. Dado,* Case No. 98-0261 (N.M.I. Super. Ct. 2000). *See also CNMI v. Aldan,* Appeal No. 96-034 (N.M.I. Sup. Ct. Dec. 1, 1997); *Sablan*, Crim. Case No. 94-35F (Super.Ct. Nov. 1, 1994) (Article I, § 3 provides greater protection against unreasonable search and seizure than that guaranteed by the Fourth Amendment). In light of the additional protections afforded **[p. 13]** CNMI citizens by the Commonwealth's Constitution, this court concludes that the CNMI constitution provides greater protection in this context. The statutes at issue, by their terms, permit unequal punishment for those who commit the same act, even though the conduct of two citizens, both convicted of improper sexual contact, is the same. Although there may be no rational justification for treating these citizens differently,

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[21] *E.g.*, *Washington v. Jessup*, 31 Wash.App. 304, 307-308, 641 P.2d 1185, 1188 (1982)(equal protection of the laws is denied when the state is permitted to seek varying degrees of punishment when proving identical criminal elements); *Colorado v. Mumaugh*, 644 P.2d 299, 301 (Colo. 1982); *Colorado v. Marcy*, 628 P.2d; 69, 74-75 (Colo. 1981); *Colorado v. Estrada*, 601 P.2d 619, 620-621 (Colo. 1979) ("We are not persuaded by the Supreme Court's reasoning on this issue and expressly decline to apply it to our own State Constitution's due process equal protection guarantee...We find a penalty scheme that provides widely divergent sentences for similar conduct and intent to be irrational").

[22] *See* ANALYSIS OF THE CONSTITUTION OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS (Dec. 6, 1976) (hereinafter, "CONSTITUTIONAL ANALYSIS") Article I, § 6 at 35 ("This clause requires the government to treat all persons similarly situated in the same manner. It forbids classifications by the government that are irrational, unreasonable, or arbitrary"); Article I, § 5 at 25 ("Due process also means that only rational and necessary limitations can be placed on individual rights. The Commonwealth government may not act in an arbitrary or unreasonable manner in adopting legislation ....")

moreover, one of the statutes at issue allows for a person accused of impermissible sexual contact to have his case presented to a jury of his peers, while the other does not. Equally importantly, the statutes subject one class of child victims to the scrutiny of a jury trial, while the other class of child victims is automatically insulated. Such patently unequal treatment of identically situated persons violates the guarantee of equal protection of the law afforded all citizens by the Commonwealth's Constitution.

There is yet another constitutional infirmity in the manner in which the decision of whether to prosecute a given defendant in these matters rests with the prosecutor. On rehearing of this matter, the Government articulated the disturbing position that, although the Defendant in this case was clearly "guilty," Commonwealth juries would be reluctant to convict him because, presumably, he is Chamorro. To the extent that the Government 's prosecutorial choices may be guided by the Defendant's race or national origin, or its mistrust of Commonwealth citizens or the jury system, then these choices are improper. *See Wayte,* 470 U.S. at 608, 105 S.Ct. at 1531 (decision to prosecute also may not be based upon exercise of protected statutory and constitutional rights). Remarks such as these suggest to the court that the Defendant's fears of differential treatment may, regrettably, have some merit.

CONCLUSION

Trial by jury in serious criminal cases has long been regarded as an indispensable protection against the possibility of governmental oppression. The history of the jury's development demonstrates "a long tradition attaching great importance to the concept of relying on a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement." *Williams v. Florida*, 399 U.S. 78, 87, 90 S.Ct. 1893, 1899, 26 L.Ed.2d 446 (1970). "Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Id.*, at 100, 90 S.Ct., at 1906. **[p. 14]**

The court recognizes that the Legislature's general discretion to deal selectively with those acts which it deems to pose the most significant societal problems is especially broad in the realm

of criminal law. The sole limitation which the equal protection clause imposes upon the legislature in the exercise of this power, however, is that criminal statutes must not prescribe different punishments for the same acts committed under the same circumstances by persons in like situations. Contrary to what the Government contends, the court need not manufacture an inconsistency in two statutes to justify its decision to grant the Defendant a jury trial. The Motion for Reconsideration is DENIED.

Pursuant to the request of the parties, the Court further certifies its Order to permit the parties to appeal, and further GRANTS the Government's oral motion for stay of thirty (30) days to permit the parties to appeal this matter to the Commonwealth Supreme Court.

So ORDERED this 8 day of November, 2000.

/s/ Timothy H. Bellas

TIMOTHY H. BELLAS, Associate Judge