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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS Plaintiff, v. **LEO SABLAN PANGELINAN and GEORGE LITULUMAR TEREGEYO**, Defendants.	)	CRIMINAL CASE NO. 00-0200C **ORDER DENYING MOTION FOR JURY TRIAL AS TO GEORGE L. TEREGEYO**

THIS MATTER came before the court on October 31, 2000 at 8:30 a.m. on Defendant's renewed motion for trial by jury. George Litulumar Teregeyo ("Defendant") appeared with counsel, Joseph A. Arriola, Esq. Assistant Attorney General Kevin Lynch appeared for the Commonwealth of the Northern Mariana Islands ("Government"). Having reviewed the documents on file and having heard the arguments of counsels, the court now renders its decision.

I. FACTUAL AND PROCEDURAL BACKGROUND

On April 10, 2000, the Government filed an information charging the Defendant with two counts of sexual abuse of a child in violation of 6 CMC § 1311(a), made punishable by 6 CMC § 1311(c) and 6 CMC § 4102(d). Specifically, the Government alleged that on or about November 17, 1999, on Saipan, Commonwealth of the Northern Mariana Islands ("CNMI"), the Defendant did

engage in sexual contact with C.A.C. and L.K.B., both minors under the age of sixteen (16) and not the spouse **[p. 2]** of the Defendant. On May 17, 2000, Defendant, through counsel, orally moved this court for a trial by jury, which was denied for failure of counsel to state the legal basis for his motion. A bench trial was set for October 31, 2000 at 9:00 a.m.

On September 22, 2000, Defendant renewed his motion for trial by jury by merely attaching a Superior Court decision to his moving papers. On October 4, 2000, a hearing was held on Defendant's renewed motion for a jury trial but defense counsel again failed to articulate the legal basis of the motion. The court ordered Defendant to refile his motion no later than 4:30 p.m. on October 11, 2000 and the Government was given until October 18, 2000 to file its response. The court moved the bench trial to February 5, 2001 at 9:00 a.m.

II. ISSUE

A. Whether Defendant is entitled to a trial by jury when Defendant's conduct is a violation of two statutes, 6 CMC § 1311(a) and 6 CMC § 5312(a)(3), and he is charged with a violation of 6 CMC § 1311(a), which does not give rise to Defendant's statutory right to a trial by jury under 7 CMC § 3101(a)?

B. Whether Defendant's due process and equal protection rights under the Fourteenth Amendment are violated where Defendant is charged with the lesser offense, 6 CMC §1311(a) and Defendant fails to show that he is intentionally treated differently from others similarly situated?

III. ANALYSIS

In the CNMI, the right to a trial by jury is a statutory right, not a constitutional right as provided by the Sixth Amendment of the U.S. Constitution. Covenant § 501 states that neither a trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law except where required by local law. COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA, 48 U.S.C. § 1601 note, *reprinted in* Commonwealth Code at B-101 et seq. In *Commonwealth v. Atalig*, the Ninth Circuit of the U.S. Circuit of Appeals held that Covenant § 501 does not violate the Sixth or Fourteenth **[p. 3]** Amendments of the U.S. Constitution and ruled that the Sixth Amendment right to a trial by jury is not a fundamental right in unincorporated territories such as the CNMI. *See Commonwealth v. Atalig*, 723 F.2d 682 (9th Cir. 1984). Article. I, Section 8 of the CNMI Constitution empowers the legislature to provide for trial by jury in criminal or civil cases. *See* N.M.I. Const. art. I, § 8 (Trial by Jury).

The CNMI Legislature enacted 7 CMC § 3101(a), which states that "any person accused by information of committing a felony punishable by more than five years' imprisonment or by more than $2,000.00 fine, or both, shall be entitled to a trial by a jury of six persons." In this case, the information charged Defendant with two counts of sexual abuse of a child in violation of 6 CMC § 1311(a) and made punishable by 6 CMC § 1311(c) and § 4102(d). Title 6 CMC § 1311(c) states that "person convicted under this section may be punished by not more than five years imprisonment, or a fine of not more than $2,000.00 or both." Under 6 CMC § 4102(d), any person convicted of sexual abuse of a child pursuant to 6 CMC § 1311 must serve no less than one-third the maximum term of imprisonment. Although Defendant is charged with committing a crime whose punishment

does not fall within the category prescribed in 6 CMC § 3101(a), he nevertheless contends that he is entitled to a trial by jury for the reasons addressed in sub-sections A and B of the analysis.

A. Defendant is not entitled to a trial by jury when he is charged with a violation of 6 CMC § 1311(a), which is punishable by not more than five years' imprisonment or not more than $2,000.00 fine, or both.

Defendant is charged with two counts of sexual abuse of a child in violation of § 1311(a) and is faced with a maximum sentence of five years or up to $2,000.00 in fines or both. The same conduct in 6 CMC § 1311(a) is prohibited by 6 CMC § 5312(a)(3) and is punishable under 6 CMC § 5312(c) by not more than five years or not more than $5,000.00, or both. Defendant contends that because the two statutes prohibit the same conduct he is subject to the punishment prescribed in 6 CMC § 5312(c) and is therefore entitled to a trial by jury.[1] The Government contends that had Defendant been charged under 6 CMC § 5312(a)(3), he would have been entitled by statute to a trial by jury. However, Defendant was not charged under 6 CMC § 5312(a)(3), and is therefore not entitled to a trial by jury. **[p. 4]** The Government further contends that Defendant erroneously asserts that he can be charged under one statute, which explicitly states the maximum penalty upon conviction, and yet be sentenced under a different statute which he is not charged with and it is not mentioned in the information.

Although Defendant does not articulate his reasoning, his argument appears to stem from the notion of the applicability of the general sentencing statute, 6 CMC § 4101, to this case. Title 6 CMC § 4101 regarding fines states:

> A person who has been convicted of any offense under this title, unless a fine is elsewhere prescribed by law, in addition to any punishment authorized by law, may be sentenced to pay a fine not exceeding:

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[1] The difference in the penalties for a violation of 6 CMC § 1311(a) and 6 CMC § 5312(a)(3) is a difference of $3,000.00. A person charged with a violation of 6 CMC § 1311(a) faces up to $2,000.00 in fines and a person who violates 6 CMC § 5312(a)(3) faces up to $5,000.00 in fines.

. . . .

(g) Any higher amount specifically authorized by statute.

Defendant appears to read that 6 CMC § 4101(g) subjects him to the $5,000.00 fine provided by 6 CMC § 5312(c) even though he is charged with violating 6 CMC § 1311(a). This court disagrees with Defendant's assertion. The key phrase in 6 CMC § 4101, is "unless a fine is elsewhere prescribed by law," which by its terms indicate that this statutory provision is a substitute monetary fine and may not be used in cases where a fine is prescribed in the language of a criminal statute. Here, Defendant is charged with violating 6 CMC § 1311(a) made punishable by § 1311(c) and the statute is clear that Defendant faces up to five years' imprisonment or a fine of up to $2,000.00 or both.

B. Defendant's equal protection and due process rights are not violated when he is charged with the lesser offense and there is no showing that defendant was intentionally treated differently from others similarly situated.

Defendant further contends that denial of a trial by jury violates his Fourteenth Amendment right to equal protection and due process. First, Defendant claims that to allow the government to deny Defendant a trial by jury despite the provisions of 6 CMC § 5312(a)(3) and § 5312(c) would violate his equal protection rights. Secondly, he contends that the prosecutor's sole discretion to charge a person of violating either 6 CMC § 1311(a) or § 5312(a)(3), where the prohibited conduct is the same in both statutes but the punishment is different, constitutes arbitrary governmental action and denies him equal protection and due process under the law.

First, Defendant cites *State of Hawaii v. Hatori*, 990 P.2d 115 (Haw. App. Ct. 1999) to support his equal protection violation argument. In *Hatori*, the defendant was charged with violating a Class **[p. 5]** B felony punishable by a maximum sentence of ten years but his conduct (possession of marijuana) also fell within a Class C felony punishable by a maximum of five years imprisonment.

The Hawaii Appellate Court in *Hatori* quoting the *Modica* rule in *State v. Modica* 58 Haw. 249, 567 P.2d 420 (1977), held that when the same act committed under the same circumstances is punishable as either of two differently classed felonies, and the elements of proof essential to either conviction are exactly the same, conviction of the greater felony violates a defendant's due process and equal protection rights. The *Hatori* court further states that the rule applies equally to the possibility of prosecution and conviction under two differently classed felonies. 990 P.2d at 124. The court further held that the Class C felony statute is a lesser included offense of the Class B felony statute and that the only proper conviction would be the Class C felony.

In this case, the Government contends that *State v. Hatori* does not apply because Defendant is already charged with the lesser offense. Defendant was charged with violating 6 CMC § 1311(a), which carries a lower penalty as compared to 6 CMC § 5312(a)(3), which carries a greater penalty. This court concedes that had Defendant been charged with the criminal statute bearing the higher penalty, there would be an equal protection violation under *State v. Hatori.* Therefore, under the *Modica* rule quoted in *Hatori,* Defendant did not suffer any equal protection violation.

Second, Defendant cites the U.S. Supreme Court in *Village of Willowbrook v. Olech,* 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000), for the proposition that the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. *See Village of Willowbrook,* 528 U.S. at 564, 120 S.Ct. at 1075. In that case, the Court noted that U.S. Supreme Court cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that he or she has been intentionally treated differently from others similarly situated *and* that there is no rational basis for the difference in treatment. *Id.* Citing *Sioux City*

Bridge Co. v. Dakota County, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed 2d 688 (1989). In this case, in applying the equal protection analysis under *Village of Westbrook*, the court must first determine whether Defendant, as a class of one, has **[p. 6]** been intentionally treated differently from other similarly situated defendants. Although the Defendant contends the information charging him with sexual abuse of a child violates his equal protection rights under the Fourteenth Amendment, Defendant failed to produce evidence showing that he has been intentionally treated differently from other defendants charged with violating a statute that criminalizes sexual contact with a child under the age of sixteen and who is not a the spouse of that defendant. Nor does Defendant allege that he is a victim of vindictive government action or that he is individually targeted for selective prosecution. Furthermore, he makes no showing that he is the only defendant ever charged of sexual abuse of child [6 CMC § 1311(a)], while everyone else is charged with child abuse [6 CMC § 5312(a)(3)].

Even assuming Defendant, in this case, has been intentionally treated differently, Defendant failed to establish that there is no rational basis for the different treatment as set out by test set forth in *Village of Westbrook.* A review of the legislative history of 6 CMC § 1311(a) and § 5312(a)(3) shows that the prohibited conduct and the penalties associated with the conduct meet the rational basis test. In 1983, the CNMI Legislature amended the statute to lower the penalties that could be imposed on those charged with a violation of 6 CMC § 1311 with the purpose of removing the right to a trial by jury required by local law. *See* Pub. L. 3-88 § 4; House Standing Committee Report 3-153 (August 30, 1983). The CNMI Legislature determined that it was "in the best interest of society to spare a sexually abused child and his family the emotional trauma a jury trial would cause." *Id.* The CNMI Legislature further reasoned that the issues involved with sexual abuse of child would be better left to the sound discretion of a trial judge and that

testifying before a judge would be less traumatic for a child victim than testifying before a jury. In applying the rational basis test to this case, it appears that the CNMI Legislature's decision to remove the right to a trial by jury in cases of sexual abuse of a child is rationally related to the notion of protecting an injured and victimized child and his or her family from further scrutiny by a panel of jurors.

In the case of 6 CMC § 5312(a)(3), one of the stated purpose of the Child Abuse and Neglect Act enacted in 1984 was to ensure that children of the CNMI and their family receive care, preferable at home suitable to serve the emotional, mental and physical welfare of the minor. *See* PL 3-18, § 2: Standing Committee Report 3-45 (May 7, 1982) ("Standing Committee Report"). The Standing **[p. 7]** Committee Report further stated that the Child Abuse and Neglect Act would provide protection for children whose health, and welfare may be adversely affected through injury and neglect and strengthen the family and make the home safe for children by enhancing the parental capacity for good child care. *Id.* With these stated purpose in mind, it can be inferred that the theme surrounding 6 CMC § 1311 focuses on punishment of the perpetrator unlike 6 CMC § 5312(a)(3) where punishment of the custodian-perpetrator and protection of the child victim and family as well as rehabilitation and reconciliation of the whole family are factored into the disposition of the case. With the latter, it could be argued that the whole family are victims and therefore the rationale for a jury trial considered in 6 CMC § 1311(a) would not apply.

In the final analysis, however, the court finds *United States v. Batchelder*, 442 U.S. 115, 99 S.Ct. 2198 (1979) decisive on the issues raised by the Defendant. The U.S. Supreme Court in *United States v. Batchelder*, 442 U.S. 115, 99 S.Ct. 2198 (1979) addressed the issue of two criminal statutes that punish the same conduct but prescribe different punishment. In *Batchelder*, the defendant was charged with violating 18 U.S.C § 922(h), which prohibited convicted felons from receiving a firearm that has traveled in interstate commerce and carries five years' imprisonment. The same conduct was also prohibited by 18 U.S.C.App. § 1202(a), which imposes a two-year maximum sentence. The Court held that it is a fundamental tenet of

due process that no one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. A criminal statute is therefore invalid if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. *Batchelder*, 442 U.S. at 123, 99 S.Ct. at 2203. In *Batchelder*, the Court reasoned that although the statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative penalties. So long as overlapping criminal statutes clearly define the conduct prohibited and the punishment authorized, the notice requirements of the due process clause are satisfied. *Batchelder*, 442 U.S. at 123, 99 S.Ct. at 2204.

In this case, Defendant has not pointed to any ambiguity regarding the conduct prohibited in 6 CMC § 1311(a) and 6 CMC § 5312(a)(3). The two statutes prohibit the same conduct, which is that a person may not have sexual contact with a child under the age of 16 and who is not the spouse of that **[p. 8]** person. There is also no ambiguity as to the punishment for each crime. A violation under 6 CMC § 1311(a) carries a penalty of not more than five years or not more than $2,000.00 or both pursuant to 6 CMC § 1311(c), whereas a violation of 6 CMC § 5312(a)(3) carries a penalty of not more than five years or not more than $5,000.00 or both. The distinction between the two statutes lies in the prosecution of the prohibited conduct. According to the Government's moving papers, if the perpetrator is a person other than a parent, that person may be charged with a violation of 6 CMC § 1311(a), sexual abuse of a child. If the perpetrator is a parent, based on the intent of the Legislature and the stated purpose of the Child Abuse and Neglect Act, that person may be charged with a violation of 6 CMC § 5312(a)(3). Because the statutes are clear as to the prohibited conduct and the penalty, the Court finds no due process violation.

The U.S. Supreme Court in *Batchelder* further held that when an act violates more than one criminal statute, the government may prosecute under either so long as it does not discriminate under any class of defendants. *Batchelder*, 442 U.S. at 123-124, 99 S.Ct. at 2203. The prosecutor's discretion to choose

between the two statutes was not unfettered because selectivity in the enforcement of criminal laws is, of course, subject to constitutional constraints. Equal protection prohibits selective enforcement based upon unjustifiable standard such as race, religion, or other arbitrary classifications. *Batchelder,* 442 U.S. at 125, n.9, 99 S.Ct. at 2205. The Court in *Batchelder* further reasoned that a decision to proceed under 18 U.S.C. § 922(h) did not empower the Government to predetermine the ultimate criminal sanctions. Rather, it merely enables the sentencing judge to impose a longer prison sentence than 18 U.S.C. App. § 1202(a). 442 U.S. at 125, 99 S.Ct at 2205. Just as a defendant has no constitutional right to elect which of the two applicable statutes shall be the basis of his indictment and prosecution neither is he entitled to choose the penalty scheme under which he will be sentence. *Id.*

In this case, as stated *infra,* Defendant has made no showing suggesting that he is being charged with violating 6 CMC § 1311(a) instead of 6 CMC § 5312(a)(3) because of his race, religion, or other arbitrary classification. Accordingly, the Court finds no equal protection violation.

IV. CONCLUSION

Based on the foregoing reasons, the court finds that the right to a trial by a jury is a statutory, not a fundamental right. As such, the CNMI legislature, through its enactment of 7 CMC § 3103(a), created **[p. 9]** a statutory right to a trial by a jury in criminal cases where the defendant is charged with a felony punishable by more than five years imprisonment or by more than $2,000.00 or both. In this case, Defendant's equal protection and due process rights were not violated when he was charged with violating 6 CMC § 1311(a), which is punishable by not more than five years or not more than $2,000.00 or both. As such, Defendant is **NOT** entitled to a trial by jury. Accordingly, Defendant's motion for a trial by jury is hereby **DENIED**.

SO ORDERED this 14th February 2001.

/s/
VIRGINIA S. SABLAN-ONERHEIM, Associate Judge