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FOR PUBLICATION

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

BY: 
DEPUTY CLERK OF COURT

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,)	CRIMINAL CASE NO. 16-0069
)	
Plaintiff,)	ORDER FINDING NO PROBABLE
)	CAUSE AS TO COUNTS III AND VII,
v.)	CONSPIRACY TO COMMIT SEXUAL
)	ABUSE OF A MINOR IN THE FIRST
JAMES CAMACHO DELEON)	DEGREE IN VIOLATION OF 6 CMC §
GUERRERO, JESSE SALAS)	303(a), AS THE COMMONWEALTH
CONCEPCION,)	FAILED TO PROVE AN ESSENTIAL
)	ELEMENT OF THE OFFENSE
)	
Defendants.)	
)	
)	

I. INTRODUCTION

This matter came before the Court on April 22, 2016 at 1:30 p.m. and on May 9, 2016 at 1:30 p.m. in Courtroom 220 for a preliminary hearing. On April 22, 2016, the Commonwealth was represented by Assistant Attorney General Shannon Foley. On May 9, 2016, the Commonwealth was represented by Assistant Attorney General Shannon Foley and Assistant Attorney General Matthew Baisley. Defendant James Camacho Deleon Guerrero (“Defendant Guerrero”) was also present at both hearings and represented by Attorney Matthew Holley. Defendant Jesse Salas Concepcion (“Defendant Concepcion”) was present at both hearings and represented by Attorney Richard Pierce.

Based on a review of the filings, oral arguments, and applicable law, the Court makes the following order.

1 **II. BACKGROUND**

2 On April 18, 2016, the Defendants were charged by information with Sexual Abuse of a
3 Minor in the First Degree in violation of 6 CMC § 1306(a), Misconduct in Public Office in
4 violation of 6 CMC § 3202, and Conspiracy to Commit Sexual Abuse of a Minor in the First
5 Degree in violation of 6 CMC § 303(a).¹ The Defendants were not charged with any prostitution-
6 related offenses.

7 At the April 22, 2016 preliminary hearing, the Commonwealth called two witnesses:
8 Attorney General’s Investigation Division Investigator Vicente B. Babauta and Federal Bureau of
9 Investigation Special Agent Haejun Park. The Defendants called one witness: Office of the Public
10 Auditor Investigator Melissa Bauleong.

11 At the close of the April 22, 2016 preliminary hearing, the issue arose of whether the
12 Defendants could raise an affirmative defense at a preliminary hearing. Specifically, whether the
13 Defendants could raise the statutory mistake of age affirmative defense contained in 6 CMC §
14 1310(b). The Court heard arguments on the issue of whether the Defendants could raise an
15 affirmative defense at the preliminary hearing stage on May 9, 2016. On May 9, 2016, the Court
16 also heard arguments as to whether there was probable cause for Sexual Abuse of a Minor in the
17 First Degree, Misconduct in Public Office, and Conspiracy to Commit Sexual Abuse of a Minor in
18 the First Degree.

19 The Court issued a separate order as to the Defendants’ affirmative defense argument. *See*
20 *Commonwealth v. Deleon Guerrero*, Crim. No.16-0069 (NMI Super. Ct. May 18, 2016) (Order

21 _____
22 ¹ Defendant Guerrero was charged in Count I with Sexual Abuse of a Minor in the First Degree, in Count II with
23 Misconduct in Public Office, in Count III with Conspiracy to Commit Sexual Abuse of a Minor in the First Degree, in
24 Count IV with Misconduct in Public Office, and in Count VII with Conspiracy to Commit Sexual Abuse of a Minor in
the First Degree. Defendant Concepcion was charged in Count III with Conspiracy to Commit Sexual Abuse of a Minor
in the First Degree, in Count V with Sexual Abuse of a Minor in the First Degree, in Count VI with Misconduct in
Public Office, in Count VII with Conspiracy to Commit Sexual Abuse of a Minor in the First Degree, and in Count VIII
with Misconduct in Public Office.

1 Denying the Defendants from Presenting the Affirmative Defense of Mistake of Age Under 6 CMC
2 § 1310(b) at the Preliminary Hearing As That Issue Is Solely for The Ultimate Trier of Fact).

3 The Court also issued a separate order finding no probable cause as to Counts I and V,
4 Sexual Abuse of a Minor in the First Degree. *Commonwealth v. Deleon Guerrero*, Crim. No.16-
5 0069 (NMI Super. Ct. May 27, 2016) (Order Finding No Probable Cause as to Counts I and V,
6 Sexual Abuse of a Minor In the First Degree under 6 CMC § 1306(a), as the Commonwealth Failed
7 to Prove an Essential Element of the Offense).

8 The Commonwealth filed a Petition for Writ of Mandamus on June 14, 2016 as to the
9 Court's dismissal without prejudice of Counts I and V of the Information, which charged the
10 Defendants with Sexual Abuse of a Minor in the First Degree. A motion to stay has not been filed
11 with the Commonwealth Superior Court, nor has an order staying proceedings been issued by the
12 Commonwealth Supreme Court.

13 Thus, the Court will proceed in determining probable cause as to the remaining charges:
14 Conspiracy to Commit Sexual Abuse of a Minor in the First Degree in violation of 6 CMC §
15 303(a), and Misconduct in Public Office in violation of 6 CMC § 3202. The Court will address
16 Conspiracy to Commit Sexual Abuse of a Minor in the First Degree in this order. Misconduct in
17 Public Office will be addressed in a separate order.

18 **III. LEGAL STANDARD**

19 A defendant's right to a preliminary hearing is not guaranteed by the Commonwealth
20 Constitution, nor is it guaranteed by the United States Constitution. *Babauta v. Superior Court*, 4
21 NMI 309, 313-14 (1995). Rather, this right is provided for in the Commonwealth Rules of Criminal
22 Procedure and in the Commonwealth Code. Under Rule 5.1 of the Commonwealth Rules of
23 Criminal Procedure, defendants are entitled to a preliminary hearing, formally titled a "preliminary
24 examination," when he or she is "substantially deprived of his/her liberty." NMI R. Crim. P. 5.1.

1 303(a). The Defendants were both charged with Conspiracy to Commit Sexual Abuse of a Minor in
2 the First Degree in Counts III and VII of the Information. The Court will address the remaining
3 charges of Misconduct in Public Office in violation of 6 CMC § 3202 in a separate order.

4 **A. Probable Cause as to Conspiracy to Commit Sexual Abuse of a Minor in the First
Degree**

5 **a. Count III, Conspiracy to Commit Sexual Abuse of a Minor in the First
Degree**

6 Both Defendants are charged in Count III with Conspiracy to Commit Sexual Abuse of a
7 Minor in the First Degree, in violation of 6 CMC § 303(a). Specifically, the Defendants are charged
8 with conspiring to commit Sexual Abuse of a Minor in the First Degree, as defined by 6 CMC §
9 1306(a). The Information states that “[the Defendants], or one or more of the individuals with
10 which they so conspired, did commit an overt act in pursuance of the conspiracy” to commit Sexual
11 Abuse of a Minor in the First Degree. Information at 2.

12 To bind the Defendants over for trial, the Commonwealth must show that: the Defendants,
13 on or about June of 2013 in the Commonwealth of the Northern Mariana Islands, “agree[ed] with
14 one or more other persons that they, or one or more of them, will engage in or solicit the conduct or
15 will cause or solicit the result specified by the definition of” Sexual Abuse of a Minor in the First
16 Degree, and that the Defendants or another person “commit[ted] an overt act in pursuance of the
17 conspiracy.” 6 CMC § 303.

18 **1. The Commonwealth Produced Evidence that the Incidents Occurred
On or About June 2013**

19 First, the Commonwealth must show probable cause that the alleged incidents occurred on
20 or about June 2013. The Court heard testimony from Investigator Babauta and Special Agent Park
21 that the alleged incidents occurred on or about June 2013. The Defendants do not contest these
22 dates. Thus, there is probable cause for this element.

1 **2. The Commonwealth Produced Evidence that the Incident Occurred**
2 **on the Island of Saipan**

3 Second, the Commonwealth must show probable cause that the alleged incident occurred on
4 the Island of Saipan in the Commonwealth of the Northern Mariana Islands. Both Investigator
5 Babauta and Special Agent Park testified that an agreement, if any, occurred on the Island of
6 Saipan. Thus, there is probable cause for this element.

7 **3. The Commonwealth Produced Evidence that the Defendants are the**
8 **Individuals that Committed the Charged Offense**

9 Third, the Commonwealth must show probable cause that the Defendants are the individuals
10 that committed the charged offense. Special Agent Park identified Defendant Guerrero at the April
11 22, 2016 hearing. Investigator Babauta identified Defendant Concepcion at the April 22, 2016
12 hearing. Thus, there is probable cause for this element.

13 **4. The Commonwealth Failed to Produce Evidence that the Defendants**
14 **Agreed to Engage in, Solicit, or Cause Sexual Abuse of a Minor in the First**
15 **Degree**

16 Fourth, the Commonwealth must show probable cause that the Defendants agreed to engage
17 in, solicit, or cause Sexual Abuse of a Minor in the First Degree. Based on the testimony from
18 Special Agent Park, the Defendants agreed to arrange to have sexual contact with a female.
19 However, the Commonwealth has not produced any testimony or evidence that the Defendants
20 specifically sought to arrange to have sex with a minor under the age of 16, as is required for Sexual
21 Abuse of a Minor in the First Degree under 6 CMC § 1306(a)(3). The Court notes that the
22 Commonwealth is not charging any prostitution related offenses, nor is the Commonwealth
23 charging conspiracy to commit any prostitution related offenses.
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1 Even in the light most favorable to the Commonwealth, the testimony presented shows only
2 that there was an agreement to have sexual contact with a female.² The Commonwealth presented
3 no testimony or evidence that the Defendants had agreed to have sex specifically with a minor,
4 which would be required if the Defendants had agreed to commit Sexual Abuse of a Minor in the
5 First Degree. The Commonwealth's witnesses' testimony indicated that the Defendants were
6 surprised to discover the alleged victim was a minor.³ Further, there was no testimony indicating
7 that the alleged victim told either Defendant that she was a minor. Although the Commonwealth
8 presented evidence that there had been an agreement to have sexual contact with a female, no
9 evidence was presented that the Defendants specifically agreed to have sex with a minor, which is
10 required to show that the Defendants had agreed to commit Sexual Abuse of a Minor in the First
11 Degree. Thus, there is no probable cause as to this element.

12 **5. The Commonwealth Failed to Produce Evidence that the Defendants**
13 **or Any Coconspirators Committed an Overt Act in Pursuance of the**
14 **Conspiracy**

15 Fifth, the Commonwealth must show probable cause that the Defendants "or another person
16 with whom [they] conspired commit[ed] an overt act in pursuance of the conspiracy." 6 CMC §
17 303(a)(2). As discussed above in Section IV. A. a. 4., there was no agreement to specifically
18 commit Sexual Abuse of a Minor in the First Degree. It is not possible for any overt act to have
19 been committed in pursuance of it. As charged, the Commonwealth accuses the Defendants of
20 agreeing to commit Sexual Abuse of a Minor in the First Degree. Since there was no evidence
21 produced that the Defendants had specifically agreed to have sexual contact with a minor, the
22 Commonwealth cannot show that there had been an overt act taken in pursuance of the alleged

23 ² The Court notes that any findings as to any agreements made between the Defendants are solely for the purpose of the
preliminary hearing.

24 ³ The Commonwealth presented testimony that Defendant Concepcion had contacted Annette Basa on numerous
previous occasions to arrange meetings with women, and all of these women were adults.

1 conspiracy to commit Sexual Abuse of a Minor in the First Degree. Thus, there is no probable cause
2 for this element.

3 **b. Count VII, Conspiracy to Commit Sexual Abuse of a Minor in the First
4 Degree**

5 Count VII also charges the Defendants with Conspiracy to Commit Sexual Abuse of a
6 Minor in the First Degree. Count VII is identical to Count III, except that it is charging a separate
7 incident that also occurred on or about June of 2013.

8 To bind the Defendants over for trial, the Commonwealth must show that: the Defendants,
9 on or about June of 2013 in the Commonwealth of the Northern Mariana Islands, “agree[ed] with
10 one or more other persons that they, or one or more of them, will engage in or solicit conduct or
11 will cause of solicit the result specified in the definition of” Sexual Abuse of a Minor in the First
12 Degree, and that the Defendants or another person “commit[ted] an overt act in pursuance of the
13 conspiracy.” 6 CMC § 303.

14 Since the testimony and evidence produced by the Commonwealth as to Count III also
15 applies to Count VII, and the analysis is thus identical, the Court incorporates by reference its above
16 analysis in Section IV. A. a. above. Since the Commonwealth has produced no evidence that the
17 Defendants conspired to specifically have sexual contact with a minor, there is no probable cause as
18 to Count VII, Conspiracy to Commit Sexual Abuse of a Minor in the First Degree.

19 **V. CONCLUSION**

20 The Office of the Attorney General prosecutes crimes and decides what charges to file.
21 Every crime has elements or parts, and the Law requires a prosecutor to prove each and every
22 element. Like an airplane with missing wings will not fly or a car without wheels will not move
23 forward, when the prosecutor fails to prove an element of a crime then that particular charge fails.

24 In this case, the Commonwealth has failed to produce any evidence that the Defendant’s
specifically conspired to have sex with a minor. Even in the light most favorable to the

1 Commonwealth, the testimony presented shows only that there was an agreement to have sexual
2 contact with a female.⁴ The Commonwealth presented no testimony or evidence that the Defendants
3 had agreed to have sex specifically with a minor, which would be required if the Defendants had
4 agreed to commit Sexual Abuse of a Minor in the First Degree. The Commonwealth's witnesses'
5 testimony indicated that the Defendants were surprised to discover the alleged victim was a minor.

6 Further, there was no testimony indicating that the alleged victim told either Defendant that
7 she was a minor. Although the Commonwealth presented evidence that there had been an
8 agreement to have sexual contact with a female, no evidence was presented that the Defendants
9 specifically agreed to have sex with a minor, which is required to show that the Defendants had
10 agreed to commit Sexual Abuse of a Minor in the First Degree. The Court stresses that the
11 Commonwealth did not charge any prostitution-related offenses, nor did the Commonwealth charge
12 conspiracy to commit any prostitution-related offenses.

13 Accordingly, the Court finds that there is no probable cause as to Counts III and VII of the
14 information, charging Defendant Guerrero and Defendant Concepcion with Conspiracy to Commit
15 Sexual Abuse of a Minor in the First Degree in violation of 6 CMC § 303(a). These charges are
16 dismissed without prejudice.

17 When a charge is dismissed without prejudice at the preliminary hearing stage, double
18 jeopardy has not attached so the Office of the Attorney General may re-file charges.

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24 ⁴ The Court notes that any findings as to any agreements made between the Defendants are solely for the purpose of the preliminary hearing.

1 So that guilt shall not escape or innocence suffer,⁵ the Court encourages the Office of the
2 Attorney General to carefully review a case before filing any criminal charges to make sure all the
3 elements of a crime can be proven with facts and evidence.

4 The Court will issue a separate order as to whether there is probable cause for Misconduct in
5 Public Office.

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7 **IT IS SO ORDERED** this 30th day of June, 2016.

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11 JOSEPH N. CAMACHO
12 Associate Judge

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20 ⁵ The Court especially emphasizes the special role that a prosecutor has in our legal system, and finds the language
21 from *Berger v. United States* to be particularly instructive:

22 [A prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose
23 obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest,
24 therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is
in a peculiar and very definite sense the servant of the law, the two fold aim of which is that guilt shall not
escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while
he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper
methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just
one.

Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).