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**IN THE SUPERIOR COURT
FOR THE**

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

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**COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS,**

) **CRIMINAL CASE NO. 16-0069**

6

Plaintiff,

) **ORDER FINDING NO PROBABLE**

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v.

) **CAUSE AS TO COUNTS II, IV, VI, AND
VIII, MISCONDUCT IN PUBLIC OFFICE**

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**JAMES CAMACHO DELEON
GUERRERO, JESSE SALAS
CONCEPCION,**

) **IN VIOLATION OF 6 CMC § 3202, AS
THE COMMONWEALTH FAILED TO
PROVE ESSENTIAL ELEMENTS OF
THE OFFENSE**

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Defendants.

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I. INTRODUCTION

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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. The Court heard arguments
13 on the issue of whether the Defendants could raise an affirmative defense at the preliminary hearing
14 stage on May 9, 2016. On May 9, 2016, the Court also heard arguments as to whether there was
15 probable cause for Sexual Abuse of a Minor in the First Degree, Misconduct in Public Office, and
16 Conspiracy to Commit Sexual Abuse of a Minor in the First Degree.

17 The Court issued a separate order as to the Defendants’ affirmative defense argument. *See*
18 *Commonwealth v. Deleon Guerrero*, Crim. No.16-0069 (NMI Super. Ct. May 18, 2016) (Order
19 Denying the Defendants from Presenting the Affirmative Defense of Mistake of Age Under 6 CMC
20 § 1310(b) at the Preliminary Hearing As That Issue Is Solely for The Ultimate Trier of Fact).

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

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

11 On June 30, 2016, the Court issued an order finding no probable cause as to Counts III and
12 VII, Conspiracy to Commit Sexual Abuse of a Minor in the First Degree. *Commonwealth v. Deleon*
13 *Guerrero*, Crim. No.16-0069 (NMI Super. Ct. May 27, 2016) (Order Finding No Probable Cause as
14 to Counts III and VII, Conspiracy to Commit Sexual Abuse of a Minor in the First Degree in
15 Violation of 6 CMC § 303(a), as the Commonwealth Failed to Prove an Essential Element of the
16 Offense).

17 The Court will proceed in determining probable cause as to the remaining four counts,
18 which charge the Defendants with Misconduct in Public Office in violation of 6 CMC § 3202.

19 **III. LEGAL STANDARD**

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

3 The Commonwealth Criminal Code elaborates on the preliminary examination further
4 stating, that if there is no “probable cause to believe that a criminal offense has been committed and
5 that the arrested person committed it, [the Court] shall discharge the arrested person.” 6 CMC §
6 6303(f). In other words, the preliminary hearing ensures that there is probable cause both that a
7 crime was committed and that the defendant is the person who committed it.

8 The preliminary hearing is an important “mechanism to weed out groundless claims and
9 thereby avoid for both defendants and the [Commonwealth] the imposition and expense of an
10 unnecessary criminal trial.” *Commonwealth v. Crisostimo*, 2005 MP 18 ¶ 14 (quoting *Mills v.*
11 *Superior Court*, 728 P.2d 211, 214 (Cal. 1986)). Therefore, “a finding of no probable cause is
12 neither a conviction nor an acquittal.” *Id.* (quoting *Illinois v. Harkness*, 339 N.E.2d 545, 547 (Ill.
13 App. Ct. 1975)). Since the Commonwealth must only show probable cause at a preliminary hearing,
14 evidentiary rules do not apply. NMI R. Evid. 1101(c)(2). In evaluating the evidence at a preliminary
15 hearing, the Court must “view all evidence in the light most favorable to the prosecution and draw
16 all reasonable inferences in favor of the prosecution.” *State v. Schmidt*, 2015 UT 65 ¶ 4 (Utah 2015)
17 (internal quotation marks omitted) (citation omitted).

18 IV. DISCUSSION

19 The Defendants in this case were charged by information with three offenses: Sexual Abuse
20 of a Minor in the First Degree, Conspiracy to Commit Sexual Abuse of a Minor in the First Degree,
21 and Misconduct in Public Office. The Defendants were not charged with any prostitution-related
22 offenses. At the May 9, 2016 hearing, the Court inquired from the Commonwealth’s attorney
23 whether they were proceeding with prostitution-related theories, and he indicated that the
24 Commonwealth would not.

1 In this order, the Court will address whether there is probable cause for the charges of
2 Misconduct in Public Office in violation of 6 CMC § 3202. Defendant Guerrero was charged with
3 Misconduct in Public Office in Counts II and IV of the Information. Defendant Concepcion was
4 charged with Misconduct in Public Office in Counts VI and VIII of the Information. The Court will
5 address these charges in turn.

6 **A. Probable Cause as to Misconduct in Public Office**

7 **a. Count II as to Defendant Guerrero**

8 Defendant Guerrero is charged with Misconduct in Public Office in violation of 6 CMC §
9 3202. Count II alleges that Defendant Guerrero, “being a public official of the Commonwealth,
10 performed illegal acts under the color of his office as described in Count I of this Information.”
11 Information at 1-2. Count I of the Information charges Defendant Guerrero with Sexual Abuse of a
12 Minor in the First Degree. The Court found no probable cause as to Count I in its May 27, 2016
13 order. *Commonwealth v. Deleon Guerrero*, Crim. No.16-0069 (NMI Super. Ct. May 27, 2016)
14 (Order Finding No Probable Cause as to Counts I and V, Sexual Abuse of a Minor In the First
15 Degree under 6 CMC § 1306(a), as the Commonwealth Failed to Prove an Essential Element of the
16 Offense).

17 To show probable cause for Misconduct in Public Office, the Commonwealth must show
18 that, on or about June 2013 in the Commonwealth of the Northern Mariana Islands, Defendant
19 Guerrero was: “1. a public official who does 2. any illegal act 3. under color of office.”
20 *Commonwealth v. Atalig*, 2002 MP 20 ¶ 46 (citing 6 CMC § 3202).

21 **1. The Commonwealth Presented Evidence that the Alleged Misconduct**
22 **Occurred on or About June 2013**

23 The Commonwealth must show probable cause that the alleged incidents of misconduct
24 occurred on or about June 2013. The Court heard testimony from Investigator Babauta and Special

1 Agent Park that the alleged incidents occurred on or about June 2013. Defendant Guerrero does not
2 contest these dates. Thus, there is probable cause for this element.

3 **2. The Commonwealth Presented Evidence that the Alleged Misconduct**
4 **Occurred on the Island of Saipan**

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

9 **3. The Commonwealth Presented Evidence that the Alleged Misconduct**
10 **was Committed by Defendant Guerrero**

11 The Commonwealth must show probable cause that Defendant Guerrero is the individual
12 that committed the charged offense. Special Agent Park identified Defendant Guerrero at the April
13 22, 2016 hearing. Thus, there is probable cause for this element.

14 **4. The Commonwealth Presented Evidence that Defendant Guerrero**
15 **was at the Time the Commissioner of the Department of Public**
16 **Safety**

17 Special Agent Park testified that Defendant Guerrero was at the time the Commissioner of
18 the Department of Public Safety, a public official. Therefore, there is probable cause as to this
19 element.

20 **5. The Commonwealth Failed to Show Probable Cause that Defendant**
21 **Guerrero Committed Sexual Abuse of a Minor in the First Degree**

22 There are issues with the element of Misconduct in Public Office requiring that Defendant
23 Guerrero engage in an illegal act. 6 CMC § 3202. Although the Commonwealth Code describes the
24 illegal act as “any illegal act,” the Commonwealth specifically charges Misconduct in Public Office
as related to the allegation in Count I, Sexual Abuse of a Minor in the First Degree. The Court has,
as described above, found no probable cause as to Count I. *See Commonwealth v. Deleon Guerrero*,
Crim. No.16-0069 (NMI Super. Ct. May 27, 2016) (Order Finding No Probable Cause as to Counts

1 I and V, Sexual Abuse of a Minor In the First Degree under 6 CMC § 1306(a), as the
2 Commonwealth Failed to Prove an Essential Element of the Offense).

3 Further, the Court asked the Commonwealth’s attorney if they were proceeding under the
4 theory that Defendant Guerrero failed to act or “willfully neglect[ed] to perform the duties of his or
5 her office” 6 CMC § 3202. The Commonwealth’s attorney stated that the Commonwealth was not
6 prosecuting Defendant Guerrero for neglecting to perform his duties. Thus, if there is no probable
7 cause for the crime charged in Count I, the Commonwealth cannot provide probable cause as to
8 Misconduct in Public Office under Count II.

9 **6. The Commonwealth Failed to Produce Evidence that Defendant
10 Guerrero’s Alleged Crimes Occurred “Under Color of Office”**

11 Further, the Commonwealth failed to produce evidence that any alleged crimes occurred
12 “under color of office” as required by statute. *Atalig*, 2002 MP 20 ¶ 46; 6 CMC § 3202. In *Atalig*,
13 the defendant was found to have committed his crimes under color of office because the crimes of
14 disturbing the peace and assault and battery occurred while on a work trip, and since the defendant
15 was the victim’s workplace superior. 2002 MP 20 ¶ 3, 52. In essence, the crimes were related to the
16 defendant’s work and status as a government official.

17 In the present case, the Commonwealth has not presented evidence that the alleged sexual
18 abuse occurred under color of Defendant Guerrero’s office. The witnesses testified that the
19 incidents occurred in the back of a T-100 pick-up truck and the Commonwealth did not present
20 evidence showing that the truck was a DPS vehicle. Rather, the testimony presented at the
21 preliminary hearing showed that Defendant Concepcion owned a silver T-100 pick-up truck, and
22 that the Department of Public Safety owned a black T-100 pick-up truck. There was no testimony
23 that the Department of Public Safety vehicle was the vehicle used during the incidents. There was
24 no testimony as to the make, model, color, or license plate number of a specific Department of

1 Public Safety vehicle, nor was there any testimony about logbooks indicating use of the vehicle, gas
2 mileage, or days of use.

3 Further, there was no evidence that Defendant Guerrero presented any symbols of his office
4 during the alleged incident, including his badge, identification cards, gun, police lights, police
5 sirens, police report forms, or government vehicle stickers.

6 Thus, there was no testimony or evidence establishing that the offense occurred under color
7 of office. Further, because the Commonwealth specifically tied this Misconduct in Public Office to
8 Count I's charge of Sexual Abuse of a Minor in the First Degree, there is no probable cause as to
9 Count II's charge of Misconduct in Public Office. Like a house of cards falls when a card is
10 missing, so does this charge.

11 **b. Count IV as to Defendant Guerrero**

12 Defendant Guerrero is charged with a second count of Misconduct in Public Office, in
13 violation of 6 CMC § 3202. Count IV alleges that Defendant Guerrero, "being a public official of
14 the Commonwealth, performed illegal acts under the color of his office as described in Count III of
15 the Information." Information at 2-3. Count III of the Information charges Defendant Guerrero with
16 Conspiracy to Commit Sexual Abuse of a Minor in the First Degree. The Court found no probable
17 cause as to Count III in a previous order. *Commonwealth v. Deleon Guerrero*, Crim. No.16-0069
18 (NMI Super. Ct. June 30, 2016) (Order Finding No Probable Cause as to Counts III and VII,
19 Conspiracy to Commit Sexual Abuse of a Minor in the First Degree in Violation of 6 CMC §
20 303(a), as the Commonwealth Failed to Prove an Essential Element of the Offense at 5-7).

21 As a result, Count IV fails for the same reason Count II failed: there was no probable cause
22 found for the underlying offense as charged. The Court incorporates by reference its analysis of
23 Misconduct in Public Office discussed in Section IV A. a. above. In the case of Count IV, the Court
24 found no probable cause as to Count III, thus the Court cannot find probable cause as to Count IV.

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c. Count VI as to Defendant Concepcion

Defendant Concepcion is charged with Misconduct in Public Office in violation of 6 CMC § 3202. Count VI alleges that Defendant Concepcion, “being a public official of the Commonwealth, performed illegal acts under the color of his office as described in Count V of this Information.” Information at 3.

This charge for Misconduct in Public Office specifically relates to the allegations made in Count V of the Information. The Court found no probable cause as to Count V in its May 27, 2016 order. *Commonwealth v. Deleon Guerrero*, Crim. No.16-0069 (NMI Super. Ct. May 27, 2016) (Order Finding No Probable Cause as to Counts I and V, Sexual Abuse of a Minor In the First Degree under 6 CMC § 1306(a), as the Commonwealth Failed to Prove an Essential Element of the Offense).

To show probable cause for Misconduct in Public Office, the Commonwealth must show that, on or about June 2013 in the Commonwealth of the Northern Mariana Islands, Defendant Concepcion was: “1. a public official who does 2. any illegal act 3. under color of office.” *Commonwealth v. Atalig*, 2002 MP 20 ¶ 46 (citing 6 CMC § 3202).

1. The Commonwealth Presented Evidence that the Alleged Misconduct Occurred on or About June 2013

The Commonwealth must show probable cause that the alleged incidents of misconduct occurred on or about June 2013. The Court heard testimony from Investigator Babauta and Special Agent Park that the alleged incidents occurred on or about June 2013. Defendant Concepcion does not contest these dates. Thus, there is probable cause for this element.

2. The Commonwealth Presented Evidence that the Alleged Misconduct Occurred on the Island of Saipan

The Commonwealth must show probable cause that the alleged incident of misconduct occurred on the Island of Saipan in the Commonwealth of the Northern Mariana Islands. Both

1 Investigator Babauta and Special Agent Park testified that misconduct, if any, occurred on the
2 Island of Saipan. Thus, there is probable cause for this element.

3 **3. The Commonwealth Presented Evidence that the Alleged Misconduct**
4 **was Committed by Defendant Concepcion**

5 The Commonwealth must show probable cause that Defendant Concepcion is the individual
6 that committed the charged offense. Investigator Babauta identified Defendant Concepcion at the
7 April 22, 2016 hearing. Thus, there is probable cause for this element.

8 **4. The Commonwealth Produced Evidence that Defendant Concepcion**
9 **was at the Time a Police Officer 3 in the Department of Public Safety**

10 Investigator Babauta testified that Defendant Concepcion was a Police Officer 3 at the time
11 of the alleged incident. Police officers are public officials under 6 CMC § 3202. *Commonwealth v.*
12 *Kaipat*, 2 NMI 322, 332-3 (1991). Thus, there is probable cause as to this element.

13 **5. The Commonwealth Failed to Provide Probable Cause that**
14 **Defendant Concepcion Committed Sexual Abuse of a Minor in the**
15 **First Degree**

16 The Court found no probable cause as to Count V, Sexual Abuse of a Minor in the First
17 Degree. *Commonwealth v. Deleon Guerrero*, Crim. No.16-0069 (NMI Super. Ct. May 27, 2016)
18 (Order Finding No Probable Cause as to Counts I and V, Sexual Abuse of a Minor In the First
19 Degree under 6 CMC § 1306(a), as the Commonwealth Failed to Prove an Essential Element of the
20 Offense). Thus, there is no probable cause as to this element.

21 The Court asked the Commonwealth's attorney if they were proceeding under the theory
22 that Defendant Concepcion failed to act or "willfully neglect[ed] to perform the duties of his or her
23 office" 6 CMC § 3202. The Commonwealth's attorney stated that the Commonwealth was not
24 prosecuting Defendant Concepcion for neglecting to perform his duties. Thus, if there is no
probable cause for the crime charged in Count V, the Commonwealth cannot provide probable
cause as to Misconduct in Public Office under Count VI.

1 As a result, Count VI fails for the same reason Counts II and IV failed: there was no
2 probable cause found for the underlying offense as charged. The Court incorporates by reference its
3 analysis of Misconduct in Public Office discussed in Section IV A. a. above. In the case of Count
4 VI, the Court found no probable cause as to Count V, thus the Court cannot find probable cause as
5 to Count VI.

6 **6. Commonwealth Failed to Produce Evidence that Defendant**
7 **Concepcion's Alleged Crimes Occurred "Under Color of Office"**

8 Likewise, the Court incorporates by reference its analysis in Section IV A. a. 3. as to why
9 the Commonwealth has presented no evidence that the alleged offense occurred under color of
10 office.

11 **d. Count VIII as to Defendant Concepcion**

12 Defendant Concepcion is also charged with Misconduct in Public Office in violation of 6
13 CMC § 3202. Count VIII alleges that Defendant Concepcion, "being a public official of the
14 Commonwealth, performed illegal acts under the color of his office as described in Count VII of
15 this Information." Information at 4.

16 This charge for Misconduct in Public Office specifically relates to the allegations made in
17 Count VII of the Information. Count VII of the Information charges the Defendants with
18 Conspiracy to Commit Sexual Abuse of a Minor in the First Degree. The Court found no probable
19 cause as to Count VII in a previous order. *Commonwealth v. Deleon Guerrero*, Crim. No.16-0069
20 (NMI Super. Ct. June 30, 2016) (Order Finding No Probable Cause as to Counts III and VII,
21 Conspiracy to Commit Sexual Abuse of a Minor in the First Degree in Violation of 6 CMC §
22 303(a), as the Commonwealth Failed to Prove an Essential Element of the Offense at 8).

23 As a result, Count VIII fails for the same reason Counts II, IV, and VI failed: there was no
24 probable cause found for the underlying offense as charged. The Court incorporates by reference its
analysis of Misconduct in Public Office discussed in Section IV A. c. above. In the case of Count

1 VIII, the Court found no probable cause as to Count VII, thus the Court cannot find probable cause
2 as to Count VIII.

3 **V. CONCLUSION**

4 The Office of the Attorney General prosecutes crimes and decides what charges to file.
5 Every crime has elements or parts, and the Law requires a prosecutor to prove each and every
6 element. Like an airplane with missing wings will not fly or a car without wheels will not move
7 forward, when the prosecutor fails to prove an element of a crime then that particular charge fails.
8 Here, the Commonwealth failed to show probable cause for the element that the Defendants had
9 committed an illegal act under color of office, as charged in the Information.

10 The Commonwealth specifically linked each Misconduct in Public Office charge to other
11 alleged crimes charged in the information—charges that have since been dismissed for lack of
12 probable cause. Like a house of cards falls when a card is missing, so do these charges for
13 Misconduct in Public Office.

14 In addition, the Commonwealth has not presented evidence that the alleged sexual abuse
15 occurred under color of Defendant Guerrero or Defendant Concepcion's office. The witnesses
16 testified that the incidents occurred in the back of a T-100 pick-up truck and the Commonwealth did
17 not present evidence showing that the truck was a DPS vehicle. Rather, the testimony presented at
18 the preliminary hearing showed that Defendant Concepcion owned a silver T-100 pick-up truck,
19 and that the Department of Public Safety owned a black T-100 pick-up truck. There was no
20 testimony that the Department of Public Safety vehicle was the vehicle used during the incidents.
21 There was no testimony as to the make, model, color, or license plate number of a specific
22 Department of Public Safety vehicle, nor was there any testimony about logbooks indicating use of
23 the vehicle, gas mileage, or days of use.

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1 Further, there was no evidence that the Defendants presented any symbols of their offices
2 during the alleged incident, including their badges, identification cards, guns, police lights, police
3 sirens, police report forms, or government vehicle stickers.

4 Accordingly, the Court finds that there is no probable cause as to Counts II, IV, VI, and VIII
5 of the Information, charging Defendant Guerrero and Defendant Concepcion with multiple counts
6 of Misconduct in Public Office in violation of 6 CMC § 3202. These charges are dismissed without
7 prejudice.

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

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

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14 **IT IS SO ORDERED** this ^{30th} day of June, 2016.

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19 JOSEPH N. CAMACHO
Associate Judge

20 ² 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).