FOR PUBLICATION

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, **Plaintiff,** **v.** **CHEYENNE SABLAN,** **Defendant.**	**CRIMINAL CASE NO. 16–0162** **CRIMINAL CASE NO. 16–0166** **ORDER REGARDING CONSIDERATION OF DEFENDANT'S UNCHARGED ARRESTS WHEN SENTENCING, MEDICAID ELIGIBILITY WHILE INCARCERATED, AND THE APPLICATION OF THE MERGER DOCTRINE**

I. INTRODUCTION

THIS MATTER came before the Court on April 10, 2018 at 9:30 a.m. in Multipurpose Room 1 for a sentencing hearing. Assistant Attorney General Heather Barcinas represented the Commonwealth of the Northern Mariana Islands ("Commonwealth"). Assistant Public Defender Nancy Dominski represented Cheyenne Sablan ("Defendant"), who appeared under the custody of the Department of Corrections.

On January 10, 2017, Defendant entered a "guilty" plea to two (2) counts of Burglary, in violation of 6 CMC § 1801(a). Pursuant to the Plea Agreement, Defendant shall be sentenced to a term of imprisonment of zero (0) to five (5) years for each count to be determined by this Court at the sentencing hearing on May 3, 2018. The parties further agreed that whether the sentences should run consecutively or concurrently shall also be determined by this Court.

The Court must decide a number of issues, including: (A) whether the Court should consider uncharged acts in sentencing Defendant, (B) determining the length of Defendant's incarceration

and its effect on his Medicaid eligibility, and (C) whether the merger doctrine is applicable to this case.

II. BACKGROUND

On August 10, 2016 at 8:41 a.m., Department of Public Safety ("DPS") Officers responded to a reported theft incident at CK Internet located in Chalan Kanoa Village. Upon their arrival at CK Internet, Taixia Chen, the victim in this case, informed the officers that her purse had been stolen while she was in the shower the night before. The responding officers reviewed the surveillance camera footage from the night in question and observed that, on August 09, 2016 at 10:19 p.m., the Defendant entered from the backdoor of CK Internet's kitchen, took the purse located on the kitchen table, and walked out through the same back door.

Several weeks later, on August 29, 2016, DPS responded to a reported burglary in progress in Koberville Village. The responding DPS detectives were greeted by the owners of the home, Mr. Ko In Hag and his wife Ms. Ji Hye Lee. The couple informed the detectives that Defendant was intruding in their home after breaking in through a window. The detectives announced their presence to the Defendant, who did not respond. The DPS detectives then kicked down the door and arrested Defendant.

III. DISCUSSION

A. Consideration of Alleged Prior Criminal Conduct and Underlying Facts.

The Court first addresses the question of whether the Court can, at sentencing, consider alleged prior criminal conduct for which Defendant has not been convicted, namely Defendant's

arrest record in the Presentence Investigation (PSI) Report. Rule 32(c) of the CNMI Rules of Criminal Procedure provides:

> The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his/her characteristics, his/her financial condition and the circumstances affecting his/her behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

Defendant's PSI included eleven (11) arrests, six (6) of which led to no charges or convictions, and six (6) criminal convictions/dismissals. Defendant is facing between zero (0) and ten (10) years of imprisonment—up to five (5) years for each count of Burglary in this case. Defendant argues Defendant's arrest record from the PSI that did not lead to convictions should not factor into any increase within that range.

1. *Apprendi v. New Jersey* is Distinguishable from this Case.

Defendant first points to *Apprendi v. New Jersey*, 530 U.S. 466 (2000) when considering sentence enhancements. In *Apprendi*, Defendant fired several shots into the home of an African-American family in his neighborhood. While in custody, Defendant stated that he did not want the family in his neighborhood because of their race, but later retracted this statement. Apprendi was charged with second-degree possession of a firearm for an unlawful purpose—a charge which carries a prison term of five to ten years.

New Jersey allows for an enhanced sentence under its hate crime statute if a trial judge finds, by a preponderance of the evidence, that the defendant committed the crime with the purpose to intimidate a person because of their race. The prosecution filed a motion to enhance the sentence after Apprendi pled guilty to the second-degree possession of a firearm for an unlawful purpose

charge. The court subsequently found, by a preponderance of the evidence, that the shooting was racially motivated and sentenced Apprendi to a 12-year sentence on the firearm charge.

Upon appeal to the United States Supreme Court, the Court found "other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. (emphasis added).

The present case is distinguishable from *Apprendi*. Pursuant to 6 CMC § 1801(b)(2)(A), a person convicted of Burglary may be punished by imprisonment for not more than ten years if the dwelling is entered during the period between thirty minutes past sunset and thirty minutes before sunrise. In the case at hand, Defendant entered the house of Mr. Ko Jin Hag and Ms. Ji Hye Lee at approximately 1:30 a.m. and in Case 16-0166, Defendant entered CK Internet at approximately 10:19 p.m.,—both instances well within the 30 minutes past sunset and 30 minutes before sunrise timeframe. Both charges carry a 10-year maximum sentence and, if sentenced consecutively, could result in a 20-year sentence. Any sentence up to 20 years, then, is not an enhancement beyond the prescribed statutory maximum.

Pursuant to the plea agreement, Defendant pleaded guilty to both counts of Burglary and the parties agreed to a sentence range of zero (0) to five (5) years for each count, which if sentenced consecutively is only half of the 20-year maximum sentence. The current sentencing is therefore distinguishable from *Apprendi* because *Apprendi* was enhancing beyond the maximum, but the Court here is only considering aggravating factors and mitigating factors to determine a sentence within the proscribed minimum and maximum sentences. The Defendant's arrests that did not result

in convictions may be considered when sentencing without violating Defendant's Sixth Amendment rights. *United States v. Raygosa-Esparza*, 566 F.3d 852, 855 (9th Cir. 2009).

2. Federal Sentencing Guidelines.

Defendant next sought to make a comparison between the Federal Sentencing Guidelines and the Commonwealth's individualized sentencing.

It is well established that sentencing courts are afforded wide latitude when considering a defendant's background at sentencing. *United States v. Berry*, 553 F.3d 273, 279 (3rd Cir. 2009) (quoting *United States v. Paulino*, 996 F.2d 1541, 1547 (3rd Cir. 1993). "Prior to the Sentencing Guidelines, the principle that sentencing judges could consider evidence at sentencing that would not be admissible at trial was firmly established." (citing *Williams v. New York*, 337 U.S. 241, 246-47, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949))).

This discretion has been codified at 18 U.S.C. § 3361, which provides: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." As elaborated on in the Federal Sentencing Guidelines, "In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." U.S.S.G. § 1B1.4.

A sentencing court's discretion is not entirely unfettered, but requires "sufficient indicia of reliability to support its probable accuracy." *Berry*, 553 F.3d at 280 (quoting *United States v.*

Warren, 186 F.3d 358, 364-65 (3rd Cir. 1999). The United States Supreme Court has held that any facts considered at sentencing must be proven by a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148, 156 (1997).

In *Berry*, the court discussed the use of arrest records in enhancing the sentence of the defendant beyond the appropriate federal guideline range. *See United States v. Dixon*, 318 F.3d 585, 587-88 (4th Cir. 2003) (the sentencing court considered four arrests in three different states in a period of approximately four and a half years); *United States v. Hawk Wing*, 433 F.3d 622, 628 (6th Cir. 2006) (the court stated that before an arrest record can be considered in imposing an upward departure, the Presentencing Report "must also provide specific facts underlying the arrests," rather than a "mere record of arrest[s].") The court in *Berry* concluded "a bare arrest record – without more – does not justify an assumption that a defendant has committed other crimes and it therefore cannot support increasing his/her sentence in the absence of adequate proof of criminal activity." 553 F.3d at 284.

Here, Defendant's arrest record in the PSI contains facts underlying each of Defendant's eleven arrests, rather than simply a record of each arrest. This differs from the defendant in *Berry*, who had one previous arrest of marijuana possession and defendant was facing one armed robbery charge. In addition, the PSI contains Defendant's convictions and the facts underlying these convictions. The combination of this information, combined with the underlying facts of this case, may be considered when determining Defendant's sentence within the proscribed range.

3. 6 CMC § 4106

Moreover, 6 CMC § 4106 makes clear "before imposing or suspending the execution of sentence upon a person found guilty of a criminal offense, ... , evidence of good or bad character,

including *any* prior criminal record of the defendant, may be received and considered by the court." (emphasis added).

Defendant's prior arrests—even arrests that did not result in convictions—are part of his criminal record. Thus, the Court may consider these arrests when imposing Defendant's sentence.

B. **Consideration of Early Release and Home Confinement.**

The Court also heard arguments on the issue of whether home confinement may be considered for a portion of Defendant's sentence and whether home confinement would affect Defendant's Medicaid eligibility.

1. Permissibility of Home Confinement.

6 CMC § 4112(a) allows for home confinement by stating:

> Any court upon sentencing a person to imprisonment may designate in the commitment order a place of confinement within the Commonwealth. The place of confinement may be changed or otherwise designated, either within or without the Commonwealth, on motion by the Director of Public Safety as may be necessary to protect the person and the public welfare.

In addition to the Legislature allowing for home confinement, other Judges at the CNMI Superior Court have sentenced defendants to home confinement. *See e.g.*, *CNMI v. Rose DLG Mondala*, Crim. No.15-0174-CR, *CNMI v. Ana Cepeda*, Crim. No.15-0199-CR.

2. Consideration of Home Confinement & Medicaid Eligibility.

Under Medicaid regulations, Federal Financial Participation is not available in expenditures for services provided to individuals who are inmates of public institutions.[1] An inmate of a public institution is defined as "a person who is living in a public institution" and a public institution is

[1] 42 CFR § 435.1009(a)(1).

defined as "an institution that is the responsibility of a governmental unit or over which a governmental unit exercises administrative control."[2]

In a 2016 letter from the Director of the Centers for Medicare & Medicaid Services (CMS) to State Health Officials and State Medicaid Directors, including the Association of State Territorial Health Officials, Director Vikki Wachino provided guidance on Medicaid eligibility for incarcerated individuals. CMS considers an individual to be an inmate if "the individual is in custody and held involuntarily through operation of law enforcement authorities in a public institution" and that public institutions include correctional facilities such as state or federal prisons, local jails, detention facilities, or other penal settings.[3] Currently, Defendant is an inmate under the custody of the Department of Corrections and because of this, is ineligible to receive Medicaid covered services, including dialysis.

At the April 10, 2018 sentencing hearing, Defendant's counsel suggested the possibility of home confinement for the entirety or a portion of Defendant's sentence. Prosecution responded that home confinement would still fit the definition of incarceration, thus remaining ineligible for Medicaid services. However, despite the involuntary nature of home confinement, a person is still eligible for Medicaid funds should they be sentenced to home confinement.[4] As Director Wachino clarified: an individual's private residence generally would not meet the definition of "public institution."[5]

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[2] 42 CFR § 435.1010.
[3] Vikki Wachino, State Health Official Letter RE: To Facilitate successful re-entry for individuals transitioning from incarceration to their communities (April 28, 2016), https://www.medicaid.gov/federal-policy-guidance/downloads/sho16007.pdf.
[4] *Id.*
[5] *Id.*

After review of the Medicaid regulations, and Director Wachino's guidance letter to State Health Officials; it appears that Defendant may be enrolled in Medicaid while in the custody of the Department of Corrections. However, he would not be eligible to receive Medicaid benefits unless he was serving the sentence under home confinement conditions. In addition, individuals who are on parole or probation are eligible to receive Medicaid benefits because they are not considered inmates.

C. Consideration of the Merger Doctrine

A final issue that arose at the April 10, 2018 sentencing hearing was whether the charge of Theft should merge into the Burglary charge.

In criminal law, the merger doctrine occurs when a defendant commits an act that simultaneously fulfills the definition of two offenses, meaning the lesser of the two offenses will drop, and the defendant will be charged with only the greater offense.[6]

During arguments, Defendant raised the argument that the charges of Theft and Burglary should merge. However, shortly after, Prosecution clarified that Defendant pleaded guilty to two separate charges of Burglary, not Theft and Burglary. Thus, the matter was resolved.

IV. CONCLUSION

This Court finds that previous arrests that do not result in convictions may be considered when determining Defendant's sentence, as there is no upward departure from the prescribed statutory maximum. Therefore, the Court **DENIES** Defendant's motion to strike portions from the

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[6] Merger Doctrine, LII/ Legal Information Institute (2015), https://www.law.cornell.edu/wex/merger_doctrine (last visited April 19, 2018).

PSI. Further, the Court finds that should Defendant serve a portion or the remainder of his sentence under home confinement, he may be eligible to receive Medicaid benefits. Finally, though the issue of whether the merger doctrine applied to these cases arose at the sentencing, it was quickly resolved as a misunderstanding.

IT IS SO O DE ED this 16th day of April, 2018.

ROBERTO C. NARAJA
Presiding Judge