FOR PUBLICATION

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,	**CRIMINAL CASE NO. 18-0099D**
Plaintiff,	**ORDER: 1) DENYING DEFENDANT'S MOTION TO DISMISS; 2) GRANTING DEFENDANT'S MOTION TO COMPEL DISCOVERY OF OFFENDER RECORDS; 3) DENYING DEFENDANT'S MOTION TO COMPEL DISCOVERY OF WITNESS STATEMENTS TO THE VICTIM'S ADVOCATE; 4) DENYING DEFENDANT'S MOTION TO EXCLUDE TESTIMONY OF CHILD WITNESS A.P.; AND 5) DENYING COMMONWEALTH'S MOTION TO INTRODUCE EVIDENCE OF FRESH COMPLAINT.**
v.	
BENJAMIN HATTORI	
Defendant.	

I. INTRODUCTION

THIS MATTER came before the Court on June 4, 2019, at 1:30 p.m. Marianas Business Plaza for a hearing on Defendant's four motions and one Commonwealth motion. Assistant Attorney General Samantha Vickery represented the Commonwealth of the Northern Mariana Islands ("Commonwealth"). Assistant Public Defender Stephanie Boutsicaris represented Benjamin Hattori ("Defendant"), who was present.

II. BACKGROUND

Defendant is charged with Count I: Sexual Abuse of a Minor in the Second Degree and Count II: Violation of Sex Offender Registry. It is alleged that on or about November 21, 2018,

Defendant engaged in sexual contact with A.P. (DOB: 4/7/2004) (14-years old), to wit: Defendant touched the inner thighs of A.P. with his hand, and had resided in the same household as A.P. and had authority over A.P., in violation of 6 CMC § 1307(a)(5)(A) and made punishable by 6 CMC § 1302(b).

In Count II, it is alleged that Defendant, while subject to the CNMI-SORA registration requirements as a Tier 2 or Tier 3 offender, shall not reside in or have contact with a residence while minors are present, to wit: Defendant, a convicted sex offender involving minors, lived in the same household with A.P., in violation of 6 CMC § 1366(c), and made punishable by 6 CMC § 1376(a).

III. DISCUSSION

Defendant has filed four separate motions, while the Commonwealth filed one motion: 1) Defendant's motion to dismiss Count II of the Complaint under the sex offender registry statute as unconstitutional; 2) Defendant's motion to compel discovery of offender records; 3) Defendant's motion to compel discovery of witness statements to the victim's advocate; 4) Defendant's motion to exclude testimony of child witness A.P.; and 5) Commonwealth's motion to introduce evidence of fresh complaint. The Court will address each motion in turn.

1. Defendant's Motion to Dismiss Count II of The Complaint Under the Sex Offender Registry Statute as Unconstitutional

FACTS

In 2002, Defendant, then aged 24, was convicted in Guam of engaging in sexual intercourse with a 15-year-old girl. His conviction resulted from a plea agreement in which he pleaded guilty to one count of third degree criminal sexual conduct. As a result of his conviction, Defendant was

required to register in the Guam Sex Offender Registry. When Defendant moved to the Commonwealth of the Northern Mariana Islands ("CNMI"), he was subject to the CNMI Sex Offender Registry Act ("CNMI-SORA"), 6 CMC §§ 1360–1380.

In the CNMI, Defendant was romantically involved and allegedly living with K.A.P. and her minor children, including victim A.P. On December 20, 2018, the Commonwealth charged Defendant with violating CNMI-SORA registration requirements as a Tier 2 or Tier 3 offender (Count II). Specifically, the Commonwealth accused Defendant of residing in or having contact with a residence while minors were present, in contravention of 6 CMC § 1366(c).

ANALYSIS

Defendant asks the Court to dismiss Count II because he claims the CNMI-SORA violates his rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, as well as Article I, §§ 3, 4, 5, and 10 of the CNMI Constitution.[1] The Court discusses Defendant's arguments below.

Before doing so, the Court notes that the Commonwealth did not address all of Defendant's arguments in its Opposition. When a party fails to raise an objection which must be made before trial, the court may treat that objection as waived. NMI R. CRIM. P. 12(f). Nevertheless, the Court considers the merits of the Defendant's claims because he raises important constitutional questions regarding the CNMI-SORA.

a. *Plea Agreement*

As a preliminary matter, the Commonwealth argues that the Court should not consider Defendant's motion because his obligation to register as a Tier 3 sex offender arises from a plea agreement he entered into in Guam. Based on that plea agreement, Defendant pleaded guilty to one

[1] Defendant does not explain how the CNMI-SORA violates the Fourth Amendment or Article I, § 3 of the CNMI Constitution, so the Court considers these arguments waived. NMI R. Crim. P. 12(f).

count of third degree criminal sexual conduct, knowing it would require his registering as a sex offender, in return for the government's dismissing various sexual conduct and criminal sexual conduct charges. In accepting the plea agreement, the Commonwealth argues, Defendant waived his right to challenge the CNMI-SORA.

Indeed, Defendant may have waived his right to challenge the Guam Sex Offender Registry, but whether he waived the right to challenge the CNMI-SORA is unfounded. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. *United States v. Ready*, 82 F.3d 551, 556 (2d Cir. 1996) (citing *Brady v. United States*, 397 U.S. 742, 748 (1970)). A defendant waives his constitutional rights knowingly if he fully understands the consequences of the waiver. *Id.* at 557 (citing *United States v. Rutan*, 956 F.2d 827, 830 (8th Cir. 1992)).

Here, the Commonwealth does not provide any evidence proving that Defendant knew he was also waiving his right to challenge the CNMI-SORA when he entered into the plea agreement. Given that Defendant was convicted in Guam, it is unlikely he knew of the CNMI-SORA registry requirements prior to accepting the plea agreement. Therefore, the Court disregards this argument and considers Defendant's constitutional claims next.

b. *CNMI-SORA*

A person who visits the CNMI for more than 24 hours and has been convicted of any sex offense committed in any jurisdiction that involves a sexual act whose elements include any type or degree of genital, oral, or anal penetration is subject to the CNMI-SORA. 6 CMC § 1361(d). A sex offender who resides within the Commonwealth, regardless of location, must register pursuant to the CNMI-SORA within three days of establishing residence, commencing employment, or becoming a student. *Id.* §§ 1363(d) & 1367(b). The CNMI-SORA requires that sex offenders

provide information such as their names, addresses, phone numbers, pictures, physical descriptions, criminal histories, dates of birth, and DNA samples. *Id.* § 1365.

Anyone convicted of a sex offense as an adult involving a minor while subject to the registration requirements of this article as a Tier 2 or Tier 3 offender, shall not: 1) enter onto or walk by or park a vehicle within 1,000 feet of a school, bus stop, or playground while minors are present; 2) attend events held primarily for minors; 3) reside in or have contact with a residence while minors are present; or 4) reside or maintain an address for residential purposes at any location within 1,000 feet of a playground, school, school bus stop, community center, or other location which is established or designated specifically for the use by or enjoyment of minors and such location is commonly used by minors. *Id.* § 1366. Tier 3 offenders are subject to these requirements for the rest of their lives unless they were adjudicated delinquent of an offense as a juvenile and maintained a clean record for 25 consecutive years. *Id.* § 1371(a)(3) & (c)(2).

c. *Due Process*

Defendant claims the CNMI-SORA violates his right to due process under the Fifth, Sixth, and Fourteenth Amendments,[2] as well as Article I, §§ 5 & 10 of the CNMI Constitution because the registry does not provide the necessary mechanism to assess a sex offender, either before or after registration, and because it infringes upon his right of privacy.

Defendant maintains that the CNMI-SORA is facially unconstitutional under the CNMI and the U.S. Constitutions because the law is not narrowly tailored to a compelling state interest

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[2] Defendant conflates the Fifth, Sixth, and Fourteenth Amendments, arguing they grant him a procedural due process right. Although certain provisions of the Fifth Amendment apply to the states through the Fourteenth Amendment, the Fifth Amendment's Due Process Clause is inapplicable here because it applies to the federal government. *Warren v. Government Nat. Mort. Ass'n.*, 611 F.2d 1229, 1232 (8th Cir. 1980); *Lee v. City of L.A.*, 250 F.3d 668, 687 (9th Cir. 2001) ("[t]he Due Process Clause of the Fifth Amendment . . . appl[ies] only to actions of the federal government--not to those of state or local governments."); *Dusenbery v. United States*, 534 U.S. 161, 167 (2002) ("[t]he Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of property without 'due process of law.'
Amendment applies to the states through the Fourteenth Amendment, Defendant does not explain how the CNMI-SORA violates any procedural due process rights under the Sixth Amendment. Therefore, the Court considers only the Fourteenth Amendment to determine whether the CNMI-SORA violates Defendant's due process rights.

pursuant to sex offenders' rights of privacy within their homes, and because it does not provide sufficient process to assess the dangerousness of sexual offenders. He also challenges the CNMI-SORA as-applied because the particular circumstances of its application infringe upon his due process rights.

"A plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' i.e., that the law is unconstitutional in all its applications." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). While the U.S. Supreme Court rarely applies such a strict standard,[3] it agrees that "a facial challenge must fail where the statute has a 'plainly legitimate sweep.' " *Washington State Grange*, 552 U.S. at 449 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 740 n. 7 (1997)) (Stevens, J., concurring in judgments). "Facial challenges . . . run contrary to the fundamental principles of judicial restraint" and "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Washington State Grange*, 552 U.S. at 450-51. "[A] 'longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.' " *Palacios v. Yumul*, 2012 MP 12 ¶ 1 n.2 (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988)).

Here, the Court does not consider whether the CNMI-SORA is facially unconstitutional because Defendant fails to demonstrate that no set of circumstances exists under which the registry would be valid, and because the registry has a plainly legitimate sweep. Defendant fails to consider, for example, that only certain Tier 3 offenders are required to register for life, 6 CMC § 1371(c)(2); that Tier 1 offenders may reduce their registration periods, 6 CMC § 1371(c)(1); or that

[3] *See Washington v. Glucksberg*, 521 U.S. 702, 740 (1997).

the registry prohibits the publication of certain information, 6 CMC § 1374(b). The CNMI Legislature specifically found that recidivism rates among sex offenders are high, so it established the CNMI-SORA to enhance the public safety by tracking sex offenders. P.L. 17-49. Accordingly, the Court examines Defendant's claims only as applied to his particular circumstances.

The Fourteenth Amendment to the United States Constitution and Article I, § 5 of the CNMI Constitution provide in relevant part that no person shall be deprived of "life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1; NMI Const. art. I, § 5. Article I, § 5 of the CNMI Constitution is intended to mirror the Fourteenth Amendment, including "the interpretation of that section by the United States Supreme Court." Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands 23-24 (1976).[4]

Due process claims are procedural and substantive. *Denney v. DEA*, 508 F. Supp. 2d 815, 833 (E.D. Cal. 2007). "Procedural due process provides 'a guarantee of fair procedure in connection with any deprivation of life, liberty, or property' by the government." *Id.* (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)). Whereas substantive due process " 'protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them.' " *Id.*

i. *Procedural Due Process*

Defendant first argues that the CNMI-SORA violates his procedural due process right because the registry does not have a pre-registration procedure to determine if registry is necessary, and because there is no procedure to remove oneself from the registry if the sex offender can demonstrate he or she is not a danger to society.

[4] "[T]he Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands . . . is an " 'extremely persuasive authority. . . .' " *Torres v. Manibusan*, 2018 MP 4 ¶ 16 (quoting *Rayphand v. Tenorio*, 2003 MP 12 ¶ 71).

"[A] fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *J.G. Sablan Rock Quarry, Inc. v. Dep't of Pub. Lands*, 2012 MP 2 ¶ 18 (citing *In re Hafadai Beach Hotel Extension*, 4 NMI 37, 45 (1993)). To determine if Defendant's constitutional right to procedural due process has been violated, the Court must first determine if a due process interest is implicated; second, it must determine what procedures protect that interest sufficiently to satisfy due process. *Id.*

Here, Defendant must first demonstrate he possesses a constitutionally protected liberty interest, and that the CNMI-SORA has deprived him of that interest. *See State v. Guidry*, 105 Haw. 222, 228 (2004). Defendant asserts that the CNMI-SORA violates a liberty interest because it does not assess individuals before it requires them to register. However, "registration alone does not involve a protected liberty interest." *Id.*; *see also State v. Bani*, 97 Haw. 285, 293 (2001); *Cutshall v. Sundquist*, 193 F.3d 466, 483 (6th Cir. 1999) (holding that registration alone does not implicate a protected liberty interest); *Patterson v. State*, 985 P.2d 1007, 1017 (Alaska Ct. App. 1999) (holding that the lack of a pre-registration hearing did not deprive defendant of procedural due process).

On the other hand, Defendant identifies the right to enter into contracts, to marry, to travel, or engage in lawful occupation as protected liberty interests. But the Hawaii Supreme Court more compellingly determined that lifetime sex offender registries implicated a protected liberty interest because the registration requirements permanently altered the legal status of all convicted sex offenders. *Guidry*, 105 Haw. at 228-30. Here, Defendant's Tier 3 classification subjects him to lifetime requirements, altering his legal status under CNMI law. Defendant, therefore, satisfies the first prong because the lifetime registry requirement implicates a protected liberty interest.

Given his protected liberty interest, Defendant must also demonstrate he was not afforded the requisite safeguards of due process. *Id.* at 230. He argues that the CNMI-SORA arbitrarily and unreasonably restricts his liberty interests because there is not a procedure for determining which

offenders present a future danger to society. However, the U.S. Supreme Court has determined that due process does not require the opportunity to prove a fact that is not material to the state's statutory scheme. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003). In other words, due process requires that the government accord a hearing to prove or disprove a particular fact or set of facts. *See Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goss v. Lopez*, 419 U.S. 565 (1975).

In *Connecticut Department of Public Safety v. Doe*, the U.S. Supreme Court addressed whether procedural due process entitled sex offenders to a pre-deprivation hearing. 538 U.S. at 4. The Court found that under Connecticut's statutory scheme, "individuals included within the registry are included solely by virtue of their conviction record and state law." *Id.* at 7. And because the registration requirement arose automatically based only on the offender's conviction, the Court reasoned that due process did not entitle sex offenders to a pre-deprivation hearing. *Id.* The Court also noted that challenges based on similar statutory schemes " 'must ultimately be analyzed' in terms of substantive, not procedural, due process." *Id.* at 8 (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989)).

The CNMI-SORA, like Connecticut's registry, requires sex offenders to register based upon previous convictions, not based on their current or future danger to society. *Compare* 6 CMC §§ 1360–1380 *with* Conn. Gen. Stat. §§ 54-250–54-261. Defendant cites *State v. Samples*, where the Montana Supreme Court determined that an individual placed on a sex offender registry must have an opportunity to explain, argue, and rebut any information used in the designation of his sexual offender risk level. 2008 MT 416 ¶ 34. But in *Samples* the court found that "if a judge does not set a sexual offender's risk level, 'the [DOC] shall designate the offender as level 1, 2, or 3 when the offender is released from confinement.' " *Samples*, 2008 MT 416 ¶ 25 (quoting Mont. Code Ann. § 46-23-509).

Here, unlike the Montana registry, the CNMI-SORA classifies sex offenders based upon their previous convictions, not based upon the individual's risk level. 6 CMC § 1361(d). Specifically, it requires anyone who has been convicted of any sex offense committed in any jurisdiction that involves a sexual act whose elements include any type or degree of genital, oral, or anal penetration to register under the CNMI-SORA. *Id.* Accordingly, the Court finds that the CNMI-SORA does not violate Defendant's procedural due process rights.

ii. *Substantive Due Process/Right of Privacy*

Defendant also argues the CNMI-SORA violates his substantive due process rights because his relationship with K.A.P. as a romantic partner, and with A.P. as a father figure are protected relationships that the Commonwealth cannot interfere with unless there is a compelling state interest.

A substantive due process analysis must begin with a careful description of the asserted right. *Reno v. Flores*, 507 U.S. 292, 302 (1993). Second, the Court must determine whether the asserted right is a fundamental right " 'deeply rooted in this Nation's history and tradition.' " *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977)). " 'If the statute implicates a fundamental right, the state must show a legitimate and compelling governmental interest for interfering with that right.' " *Doe v. Nebraska*, 734 F. Supp. 2d 882, 925 (D. Neb. 2010) (quoting *Gunderson v. Hvass*, 339 F.3d 639, 643 (8th Cir. 2003)). " 'If the statute does not implicate a fundamental right, . . . a less exacting standard of review [applies] under which the statute will stand as long as it is rationally related to a legitimate governmental purpose.' " *Id.*

The U.S. Supreme Court has determined in various cases that the "liberty" protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); to direct the education and

upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390 (1923); to marital privacy and to use contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965); to bodily integrity, *Rochin v. California*, 342 U.S. 165 (1952); and to abortion, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Glucksberg*, 521 U.S. at 720. However, the Court has not determined that any alleged infringement on privacy and liberty will be subject to substantive due process. *See Paul v. Davis*, 424 U.S. 693, 713 (1976) (finding that privacy rights include those that are fundamental or implicit in the concept of ordered liberty).

The rights at issue here are the right of a person—convicted of a sexual offense against a minor—to refuse to provide personal information to the government; to prevent him from associating with minors; to prevent him from having contact with children in his home, even if it is not harmful; and to prevent the public disclosure of his personal information.

The Court finds that Defendant's asserted rights regarding disclosing and publishing his information are not fundamental rights deeply rooted in this Nation's history or tradition. In fact, the Ninth Circuit considered this issue and found that a sex offender's registration and the publication of personal information do not violate any substantive due process rights. *See Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004) (finding that "persons who have been convicted of serious sex offenses do not have a fundamental right to be free from the registration and notification requirements . . . .").

In *Russell v. Gregoire*, the Ninth Circuit similarly found that Washington's Community Protection Act did not violate convicted sex offenders' privacy rights because the collection and dissemination of the information was carefully designed and narrowly limited. 124 F.3d 1079, 1094 (9th Cir. 1997). The court further explained that even if a privacy right existed, it would protect only personal information. *Id.* Because the information collected and disseminated by the Washington statute was already fully available to the public, it was not constitutionally protected.

Id.; *see Doe v. New York*, 15 F.3d 264, 268 (2d Cir. 1994). The court acknowledged the sensitivity of information regarding the general vicinity of the offender's residence (which was published) and the offender's employer (which was collected but not released to the public). *Id.* Still, it concluded that neither of those two items were generally considered "private." *Id.* (citing *Johnson v. Sawyer*, 47 F.3d 716, 732-33 (5th Cir. 1995)).

Here, Defendant has similarly divulged information already available to the public either through this case or the Guam Sex Offender Registry. Furthermore, the CNMI-SORA provides certain protections against the dissemination of all the information it collects. 6 CMC § 1374(b). For example, it requires that the following information be unavailable to the public: 1) any arrest that did not result in conviction; 2) the sex offender's Social Security number; 3) any travel and immigration documents; 4) the identity of the victim; and 5) internet identifiers. *Id.* Consequently, the Court finds that Defendant does not have a fundamental right to the collection and dissemination of his information.

Defendant's right to associate with minors or reside with them similarly does not implicate a fundamental right because family living arrangements apply to persons related by blood or marriage. *Doe v. Miller*, 405 F.3d 700, 710 (8th Cir. 2005). Defendant does not cite a single case to substantiate his assertion that the right to associate with an unrelated minor or reside with one is a fundamental right deeply rooted in this Nation's history or tradition. Instead, he claims that the U.S. Supreme Court recognizes a strong interest in protecting personal privacy in individuals' homes. But the Supreme Court has found that in the privacy context, fundamental rights arise in matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. *See Paul v. Davis*, 424 U.S. 693 (1976).

Yet, Article I, § 10 of the CNMI Constitution provides: "The right of individual privacy shall not be infringed except upon a showing of compelling interest." NMI Const. art. I, § 10.

Although the CNMI Constitution's drafters intended for the right of privacy to be a fundamental right, the "provision's text is ambiguous on the right's particular parameters." *Elameto v. Commonwealth*, 2018 MP 15 ¶ 16. In *Elameto*, the CNMI Supreme Court examined whether the right of privacy was implicated in a medical malpractice case. *Id.* ¶ 1. The court found the right of privacy was not implicated because Elameto consented to the medical procedure. *Id.* ¶ 24. In reaching its conclusion, the court looked to the Analysis to the Constitution of the Commonwealth of the Northern Mariana Islands ("Analysis"), which in relevant part provides:

> This section establishes the fundamental constitutional right to individual privacy. . . . The right to individual privacy incorporates the concept that each individual person has a zone of privacy that should be free from government or private intrusion. Each person has a right to be let alone. This right permits a person to refuse to give personal information or to prohibit the collection of that information *without consent*. . . . It allows a person to associate with whomever the individual chooses. . . . It guarantees privacy in a person's home to behave in any manner as long as the behavior does not harm others. . . . It prevents public disclosure *private* facts relating to an individual. . . . When an action is brought claiming an invasion of the right to individual privacy established by this section, and the individual bringing the action offers sufficient evidence to establish the intrusion, the defendant being sued must justify the intrusion by demonstrating a compelling government interest in the intrusion.

Analysis, 28-30. The court found that the Analysis' repeated references to consent indicated an intent to limit the right to serious violations that deliberately exceed one's zone of privacy. *Elameto*, 2018 MP 15 ¶ 18. The court also looked at other states with codified privacy rights for guidance. *See, e.g.,* Alaska Const. art. I, § 22 (' shall not be infringed."); Cal. Const. art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining safety, happiness, and privacy."); Mont. Const. art. II, § 10. The court ultimately used a California test to determine privacy rights, even though it "declined to adopt such a test verbatim." *Elameto*, 2018 MP 15 ¶ 20.

Because the court in *Elameto* did not establish a useful test to determine privacy rights, this Court, like the *Elameto* court, looks to other states for guidance. In Montana, a privacy interest is

protected under Article II, Section 10 of its constitution, if 1) the individual had a subjective or actual expectation of privacy; and 2) society is willing to recognize that expectation as reasonable.[5] *State v. Brooks*, 2012 MT 263 ¶ 14 (citing *Mont. Shooting Sports Ass'n v. State*, 2010 MT 8 ¶ 14). Although the CNMI Supreme Court has not explicitly adopted such a test, this Court finds it persuasive given the nature of this case.

Based on Defendant's arguments, he expects a right of privacy from disclosing his information and having it published, as well as a right to associate with minors and reside with them. However, while society may generally recognize an individual's right of privacy, Defendant is not an average individual—he is a convicted sex offender. The CNMI Legislature found:

> [M]any sex offenders are likely to repeat their crimes. The recidivism rate of sex offenders is high. The Legislature finds that the safety of our residents requires that we shield them from known sexual predators. Therefore, it is appropriate that we take the extraordinary measure of placing requirements on sexual offenders even after they have served their criminal sentence.

P.L. 17-49. The Court, therefore, finds that Defendant, as a sex offender, does not have a fundamental right—either through the Fourteenth Amendment or Article I, § 10 of the CNMI Constitution—to refuse to provide personal information to the government; to prevent him from associating with minors; to prevent him from having contact with children in his home, even if it is not harmful; and to prevent the public disclosure of his personal information. As a result, a rational basis review is appropriate in this case to assess the constitutionality of the CNMI-SORA.

A statute is constitutional under the rational basis test when there is any reasonably conceivable state of facts that could provide a rational basis for it. *FCC v. Beach Communications*, 508 U.S. 307 (1993). Where there are plausible reasons for the state action, the court's inquiry ends. *Id.*

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[5] The Court notes that Montana has already determined that the State has a compelling interest in enacting the Montana Sexual of Violent Offender Registration Act, and that its registration and disclosure requirements are narrowly tailored to affect only those interests. *State v. Mount*, 2003 MT 275 ¶ 98.

Here, the CNMI Legislature has a very strong interest in preventing sexual offenses. It found that a sex offender registration system can greatly enhance public safety by tracking sex offenders after incarcerated sentencing or non-incarcerated sentencing under non-supervision or agency supervision. P.L. 17-49. It found the registry would benefit the investigation of sex crimes to identify perpetrators if a sex molestation occurred within the area by making an immediate apprehension. *Id.* And it found that the registration law needed to meet the minimum mandatory requirements of the Adam Walsh Child Protection and Safety Act of 2006 (42 U.S.C. 16901). *Id.* Accordingly, the Court finds that the CNMI-SORA does not violate Defendant's substantive due process rights.

d. *Right Against Self-Incrimination*

Lastly, Defendant argues the CNMI-SORA violates his right against self-incrimination under the Fifth Amendment and Article I, §§ 4(c) & 10[6] because he is required to report personal information. Specifically, Defendant argues the government impermissibly compelled him to furnish self-incriminating information regarding where he resides.

The Fifth Amendment protects a person from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Article I, § 4(c) of the CNMI Constitution provides that "[n]o person shall be compelled to give self-incriminating testimony." NMI Const. art. I, § 4(c).

In *People v. Leroy*, the court rejected a similar argument against the Illinois sex offender registry. 357 Ill. App. 3d 530 (2005). There, the court reasoned that the U.S. Supreme Court had found registries violative of the Fifth Amendment in cases where disclosures were extracted from a " 'highly selective group inherently suspect of criminal activities.' " *Id.* 357 Ill. App. 3d at 542

[6] It is unclear if Defendant is also asserting a right of privacy from furnishing personal information. Nevertheless, the Court refers to its discussion above for its examination of Defendant's privacy rights.

(quoting *California v. Byers*, 402 U.S. 424, 430 (1971)). It also explained that the Supreme Court noted that when the privilege applied, "compliance with the statutory disclosure requirements would confront the individual so complying with substantial hazards of self-incrimination." *Id.* (quoting *Byers*, 402 U.S. at 430). The court then reasoned:

> Although at first blush convicted child sex offenders might appear also to be a highly selective group inherently suspect of criminal activities, that is not the case in terms of either the application or the effect of subsection (b-5). The residency prohibitions and the concomitant exemption of subsection (b-5) apply to all convicted child sex offenders, not just those in violation of the subsection. For the majority of these individuals, compliance with section 3 of the Sex Offender Registration Act vis-a-vis subsection (b-5) is a matter of routine and does not implicate illegal activity. Accordingly, this is not a case where compliance with the statutory disclosure requirements will in most cases confront the individual so complying with "substantial hazards of self-incrimination." Although the disclosure of inherently illegal activity is inherently risky and thus is protected by the privilege against self-incrimination, the disclosures required by section 3 do not implicate inherently illegal activity and so do not generate the same risks. . . . To determine whether a statute violates the privilege against self-incrimination, the issue must be resolved by balancing the public need for protection against the individual claim to constitutional protection. *Byers*, 402 U.S. at 427. We are mindful as well that "it is well[-]settled that the government need not make the exercise of the Fifth Amendment cost[-]free." *McKune v. Lile*, 536 U.S. 24, 41 (2002). For the reasons discussed above, we conclude that a careful balancing of the purpose of section 3 of the Sex Offender Registration Act against the claim that the privilege against self-incrimination should exempt an offender who is violating subsection (b-5) from having to provide the offender's address favors the public interest involved and weighs against extending the privilege against self-incrimination. For that reason, the defendant's fifth argument fails.

Leroy, 357 Ill. App. 3d at 542-43. The Court agrees with this analysis. As the Court explained above, the CNMI Legislature found that having a registry in the CNMI was important to ensure the public safety of the community. Therefore, the Court finds that the CNMI-SORA does not violate Defendant's Fifth Amendment right or Article I, § 4(c) of the CNMI Constitution.[7] Accordingly, the Court **DENIES** Defendant's Motion to Dismiss Count II.

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[7] Article I, § 4(c) "is taken directly from the Fifth Amendment to the United States Constitution. . . . No substantive change from the relevant provision of the Fifth Amendment or the interpretation of that provision by the United States Supreme Court is intended." Analysis, 16.

2. Defendant's Motion to Compel Discovery of Offender Records

In his motion to compel discovery of offender records, Defendant requests: 1) any and all documents from DPS, the CNMI Bureau of Investigation, or the CNMI Sex Offender Registry regarding the supervision or registration of Defendant as a sex offender, including documents related to mandated appointments, home visits, documents related to his registered residence, and any attempts to evaluate his threat level as a sex offender; and 2) any and all records related to the classification of Defendant as a Level 3 Sex Offender and any records related to the decision to classify him as a Level 3 Offender or any other level of sex offender.

A defendant is entitled to evidence favorable on substantive issues, as well as evidence that materially affects the credibility of the witnesses or the admissibility of evidence. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *United States v. Bagley*, 473 U.S. U.S. 667, 676 (1985); *Strickler v. Greene*, 527 U.S. 263 (1999). This includes both potentially exculpatory evidence and impeachment evidence regarding prosecution witnesses. *Bagley*, 473 U.S. at 676.

Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule. *See Giglio* v. *United States*, 405 U.S. 150, 154 (1972). Such evidence is "evidence favorable to an accused," *Brady*, 373 U.S., at 87, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. *Cf. Napue* v. *Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.")

Here, the parties disagreed over whether the materials that were requested from DPS constituted *Brady* materials. The Commonwealth had the materials on hand and submitted the documents to the Court for an *in camera* review. As discussed by the Commonwealth Supreme Court in *Commonwealth v. Campbell:*

> Where the parties disagree on whether certain information is *Brady* material, an *in camera* determination is the preferred means of resolving the dispute. While there is no duty to provide the defense unlimited discovery, if a general request is material or if a substantial basis for claiming materiality exists, then the prosecutor should provide the information or submit the issue to the trial judge for *in camera* determination. *United States v. Gardner,* 611 F.2d 770, 774-775 (9th Cir. 1980); *see also United States v. Agurs,* 427 U.S. 97, 107-08, (1976). A prosecutor may also respond to a specific request by submitting the matter to the trial judge. *Gardner,* 611 F.2d at 775, citing *United States v. Ross,* 511 F.2d 757, 765 (5th Cir. 1975), *cert. denied,* 423 U.S. 836, 96 S. Ct. 62, 46 L. Ed. 2d 54 (1975). Further "*in camera* inspection and excision is a sound approach to a *Brady* inquiry" should non-material information warrant protection from disclosure. *United States v. Jones,* 612 F.2d 453, 456 (9th Cir. 1979), *cert. denied,* 445 U.S. 966, 100 S. Ct. 1656 at 1656-1657, 64 L. Ed. 2d 242 (1980).

4 N.M.I. 11 at 5-6 (1993). This procedure for requesting an *in camera* review will ensure that defendants are afforded their due process rights and will assist in preventing the costly remedy of a *Brady* violation: a new trial for the defendant. *Id.*

After reviewing the materials submitted for *in camera* review, the Court hereby **GRANTS** Defendant's motion to compel discovery of Defendant's offender records. The documents here, or lack thereof, could potentially be used by Defendant to show whether the Commonwealth took measures to evaluate his threat level to society or to re-classify him as a different level of sex offender. Defendant has thus far advanced a constitutional argument against the Commonwealth's sex offender registry statute, as thus the documents may be exculpatory. Further, the documents here, or lack thereof, have the potential to be used by Defendant in attacking the credibility and impeach any law enforcement officers charged with monitoring Defendant. Finally, should Defendant be found guilty of Count II: Violation of Sex Offender Registry, this information may be potentially used as mitigation evidence. *Brady*, 373 U.S. 83, 87 (holding that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or *to punishment*) (emphasis added).

3. Defendant's Motion to Compel Discovery of Witness Statements to The Victim's Advocate

In his motion to compel discovery of witness statements to the Victim's Advocate, Defendant requests: 1) any and all handwritten notes, recordings or documents from interviews of witnesses A.P., K.A.P., or any other witnesses interviewed by the Victim's Advocate in regards to this matter; 2) a C.V. or documentation concerning the qualifications in the area of interviewing juvenile witnesses for any Victim's Advocate who interviewed a juvenile witness in this matter; and 3) any and all policies for the Victim's Advocate related to "forensic interviews" or interviews of juveniles.

As with the materials requested in the motion to compel discussed above, the Commonwealth had the materials on hand and submitted the documents to the Court for an *in camera* review.

After conducting an *in camera* review of the materials submitted to the Court, the Court hereby **DENIES** Defendant's Motion to Compel Discovery of Witness Statements Made to the Victim's Advocate. It is in this Court's view that nothing presented to the Court involves any exculpatory material. Further, as the Victim's Advocate has not interviewed the juvenile witness, there is no material to disclose in relation to Defendant's request for a C.V. or qualification documentation, or the policies for the Victim's Advocate related to "forensic interviews."

4. Defendant's Motion to Exclude Testimony of Child Witness A.P.

In his motion to exclude testimony of Child Witness A.P. Defendant argues that A.P.'s testimony should be excluded as irrelevant and unreliable because of A.P.'s age and the suggestive and coercive interview techniques that were used to obtain her statements. In the alternative, Defendant requests for an evidentiary hearing on this matter in advance of trial.

Specifically, Defendant argues that A.P.'s story evolved over the course of three (3) interviews with government officials, none of which were recorded or otherwise adequately documented. Defendant also argues that the government officials who conducted the interviews were either inexperienced or lacked qualifications in the area of child interview techniques. Both the lack of documentation and the lack of qualified experts in the area of child interview techniques demonstrate that the interviews with A.P. were unduly suggestive. Finally, Defendant argues that having the minor's family members present during interviews; conducting the interviews in a non-neutral location; using a questioner who is an authority figure; and repetitively interviewing A.P. when she was tired are all suggestive interview techniques that had an undue influence on the child witness's testimony.

The Commonwealth in its opposition argues that it is the trier of fact that must determine witness credibility under Commonwealth case law and that the majority of the jurisdictions support this notion. Holding a pretrial hearing on the child witness's competency would therefore encroach on the province of the jury.

The Commonwealth also argues that the investigative techniques used in this case to elicit information from A.P. were not improper or unduly suggestive. The government's interviews with A.P. were either memorialized in a report or transcribed and Defendant has already received copies of the reports and the transcript. The Commonwealth argues that A.P.'s testimony was consistent throughout the interviews, and that Defendant has not indicated any improper or suggestive interview techniques and has failed to identify any specific questions asked as being unduly suggestive or improper.

Finally, the Commonwealth argues that A.P. is competent to testify because, as other jurisdictions have held, a child's competency is not even in question if the child is above the age of

fourteen when he or she testifies. A.P. was fourteen at the time of the offense and will be fifteen at the time this case is set for trial.

In *State v. Michaels*, the New Jersey Supreme Court held that a defendant may be entitled to a pretrial evidentiary hearing on whether a child witness's memories are so tainted as to render them inadmissible. 642 A.2d 1372 (N.J. 1994). However, courts in other jurisdictions that have considered *Michaels* have rejected its holding, asserting that issues regarding a witness's credibility are in the sole province of the jury. *See, e.g, Reece v. State*, 103 A.3d 1089.

Regardless of the jurisdictional split, Defendant's present motion fails because Defendant has not met its burden to make an initial showing of evidence that A.P.'s statements were the product of suggestive or coercive interview techniques. *State v. Michaels*, 642 A.2d 1372, 1383 (N.J. 1994). The Court hereby finds that Defendant has failed to identify any specific examples of unduly suggestive or improper interview techniques in the government's interviews of A.P. Furthermore, at fourteen years old, the child witness's age weighs heavily against Defendant's motion. Although a child's memory is peculiarly susceptible to suggestibility, that concern becomes less relevant as the witness's age increases. *See Commonwealth v. Judd*, A.2d 1224, 1229 (Penn. Super. 2006).

The Court hereby **DENIES** Defendant's Motion to Exclude Testimony of Child Witness A.P.

5. Commonwealth's Motion to Introduce Evidence of Fresh Complaint

The Commonwealth filed its motion to introduce evidence of fresh complaint, particularly for the Court to permit Jordina Walker and Kinoria Pitt to testify to the conversations they each had with A.P. pursuant to the fresh complaint exception to the hearsay rule. Approximately three weeks

after the alleged sexual conduct in this matter, A.P informed her cousin, Jordina Walker, and mother, Kinoria Pitt, of what allegedly happened.

Under the fresh complaint doctrine, an "an out-of-court complaint seasonably made by the complainant in a sexual [offense] case [may] be admitted as part of the prosecution's case-in-chief." *Commonwealth v. Johnson*, 2015 MP 17 ¶ 26 (citing *Commonwealth v. Sanchez*, 2014 MP 3 ¶ 26 (quoting *Commonwealth v. King*, 834 N.E.2d 1175, 1189 (Mass. 2005)) (internal quotation marks omitted)). Such "evidence serves the narrow purpose of establishing that the victim complained at a certain time, rather than for corroboration purposes." *Id.* (citing *State v. W.B.*, 17 A.3d 187, 204 (N.J. 2011)). Courts permit fresh complaint evidence "to dispel any erroneous inference that the victim was silent, but not as proof of the truth of the content of the victim's statement." *Id.* (quoting *People v. Brown*, 883 P.2d 949, 955 (Cal. 1994)) (internal quotation marks omitted).

While the Commonwealth Supreme Court addressed the fresh complaint testimony in *Johnson*, the Court noted:

> [T]hat the traditional application of the fresh complaint doctrine "has been criticized by numerous legal scholars and commentators because modern thinking and empirical studies have discredited its underlying stereotypical rationale that each victim responds to sexual violations promptly and in the same manner." *Sanchez*, 2014 MP 3 ¶ 26 n.12 (citing *People v. Brown*, 883 P.2d 949, 950 (Cal. 1994)). Nevertheless, many jurisdictions retain the doctrine for various reasons. *Id.* Because the parties do not brief the issue, we decline to address whether fresh complaint evidence should be inadmissible altogether or whether the Commonwealth should adopt a modified fresh complaint doctrine.

2015 MP 17 ¶ 28 n. 5.

The Commonwealth has written law concerning the introduction of evidence, the hearsay rule, exceptions to the hearsay rule, special rules of evidence in cases of sexual assault and child molestation, and the introduction of prior consistent statements. *See* NMI R. EVID. 412-14, 801(d)(1)(B), 802-04. The fresh complaint doctrine seeks to introduce evidence in a way that is

barred by the Commonwealth Rules of Evidence. At its core, the fresh complaint doctrine is contrary to written law in the Commonwealth.

In support of its decision, the Court notes that the Commonwealth Rules of Evidence are patterned after the Federal Rules of Evidence, and the Federal Rules do not include a fresh complaint exception to the hearsay rule. *See Commonwealth v. Lucas*, 2003 MP 9 ¶ 9 (looking to Federal Rules of Evidence to interpret Commonwealth Rules of Evidence); and *Tome v. U.S.*, 513 U.S. 150, 154, 156-58 (1995) (testimony from third parties concerning prior consistent statements of the child sexual assault victim analyzed under Fed. R. Evid. 801(d)(1)(B)).

Under the Commonwealth Rules of Evidence, prior consistent statements of the victim witness may be introduced "to rebut an express or implied charge against [the victim witness] of recent fabrication or improper influence or motive." NMI R. EVID. 801(d)(1)(B). The Court agrees with Defendant that the Commonwealth has not shown how the Court will be unable to apply the Rules of Evidence to address any issues in this matter and because there is written law that squarely addresses the type of evidence the Commonwealth seeks to introduce under the fresh complaint doctrine, and because that written law is contrary to the common law doctrine, the Court **DENIES** the Commonwealth's motion to introduce evidence of fresh complaint.

IV. CONCLUSION

For the foregoing reasons, the court rules as follows:

1) Defendant's Motion to Dismiss Count II of The Complaint Under the Sex Offender Registry Statute as Unconstitutional is **DENIED**;
2) Defendant's Motion to Compel Offender Records is **GRANTED**;
3) Defendant's Motion to Compel Discovery of Witness Statements Made to the Victim's Advocate is **DENIED**;

4) Defendant's Motion to Exclude Testimony of Child Witness A.P. is **DENIED;** and

5) The Commonwealth's Motion to Introduce Evidence of Fresh Complaint is **DENIED**.

SO ORDERED this **9th** day of August, 2019.

TERESA KIM-TENORIO
Associate Judge