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

IN RE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Petitioner.

Supreme Court No. 2016-SCC-0020-PET
Superior Court Crim. No. 16-0069

SLIP OPINION

Cite as: 2018 MP 8

Decided October 11, 2018

Edward E. Manibusan, Attorney General, and Matthew C. Baisley, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Petitioner.

Matthew J. Holley, Saipan, MP, for Respondent James Camacho Deleon Guerrero.

Charity R. Hodson, Saipan, MP, for Respondent Jesse Salas Concepcion.

BEFORE: JOHN A. MANGLONA, Associate Justice; F. PHILIP CARBULLIDO, Justice Pro Tempore; TIMOTHY H. BELLAS, Justice Pro Tempore.

CARBULLIDO, J.P.T.:

¶ 1 The Commonwealth of the Northern Mariana Islands ("Commonwealth" or "Petitioner") seeks a writ of mandamus to order the trial court to reinstate the charge of Sexual Abuse of a Minor in the First Degree ("SAM 1") in violation of 6 CMC § 1306(a) against Respondents James Camacho Deleon Guerrero ("Guerrero") and Jesse Salas Concepcion ("Concepcion") (collectively "Respondents"). It additionally requests that we order the presiding judge to recuse the trial court from further consideration of this case. For the following reasons, we DENY the petition.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 In 2016, Respondents were arrested and each charged with one count of SAM 1.[1] The charging documents alleged that in 2013, Respondents engaged in sexual penetration with a minor child who at the time was under sixteen years old, while holding a position of authority in relation to the victim. In particular, Respondents were alleged to have arranged a sexual encounter through Annette Basa ("Basa"), a convicted sex trafficker, who delivered the minor child ("minor") to Respondents at San Antonio beach at night in exchange for payment. At the time of the encounter, Guerrero was the Commissioner of the Department of Public Safety ("DPS") and Concepcion was a DPS officer.

¶ 3 The court held preliminary hearings on April 22 and May 9 of 2016. At the April hearing, three witnesses were presented, with the hearing largely focused on exhibiting the witnesses' testimony. The May hearing, however, mostly contained argument, centering around whether probable cause was met for each element of SAM 1 and concentrating in particular on whether Respondents occupied "a position of authority in relation to the victim" pursuant to 6 CMC § 1306(a)(3)(B). The Commonwealth advanced two arguments in support of this requirement: 1) that Respondents being police officers at the time of the offense "satisfie[d] the element as a matter of law"; and 2) that Basa's exchange of the minor imparted upon Respondents authority that was substantially similar to that of a babysitter. Tr. 6.

¶ 4 The court's 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 ("Order") rejected both arguments. As to the second argument, the Order noted that 6 CMC § 1317(5), the section defining position of authority, included a list of positions and also allowed for substantially similar positions to be included. *See* 6 CMC § 1317(5) ("'Position of authority' means an employer, youth leader, scout leader, . . . babysitter, or a substantially similar position, and a police officer or probation

[1] Respondents were also charged with Misconduct in Public Office in violation of 6 CMC § 3202 and Conspiracy to Commit SAM 1 in violation of 6 CMC § 303(a).

officer . . . ."). It compared the definition and duties of a babysitter to that of Respondents, determining Respondents' position during the events at issue was not substantially similar to that of a babysitter. Highlighting the disconnect, the court noted that a decision finding that "adult strangers an adolescent meets on the beach at night automatically have positions of authority over the adolescent," would cause an adult to occupy a position of authority under almost any set of facts, eviscerating the distinction created by the legislature. *Commonwealth v. Guerrero*, No. 16-0069 (NMI Super. Ct. May 27, 2016) (Order at 13). Accordingly, the court found no probable cause as to the position of authority element, dismissing Respondents' SAM 1 charges.[2]

¶ 5 The Commonwealth subsequently filed its petition for mandamus relief.

II. JURISDICTION

¶ 6 We have original jurisdiction to issue writs of mandamus. *See* NMI CONST. art. IV, § 3 ("The supreme court shall have all inherent powers, including the power to issue all writs necessary to the complete exercise of its duties and jurisdiction under [the] constitution and the laws of the Commonwealth."); *see also* 1 CMC § 3102(b) ("The Supreme Court has original but not exclusive jurisdiction to issue writs of mandamus . . . .").

¶ 7 Guerrero challenges our jurisdiction, claiming a finding of no probable cause has no preclusive effect, and therefore is not a final judgment. He also argues that although appellate review is proper where a trial court bases its findings on an erroneous interpretation of the law, such a circumstance is not present here. On the contrary, he claims the court's finding of probable cause was based on insufficient evidence as to whether he occupied a position of authority, in particular that of a police officer.

¶ 8 In general, a finding of no probable cause is not a final judgment, and thus unreviewable on appeal. *See Commonwealth v. Crisostimo*, 2005 MP 18 ¶ 17. However, because our jurisdiction to issue writs is distinct from our jurisdiction to decide appeals, our review is not prohibited simply because a judgment is not final. *See In re Commonwealth*, 2015 MP 7 ¶ 6 n.2; *see, e.g.*, *Woerner v. Justice Court*, 1 P.3d 377, 380 (Nev. 2000) (finding request for mandamus was properly before the court because the lower court's order was "not a final judgment from which an appeal may be taken and there is no other remedy at law available to petitioner"). Indeed, the fact that a probable cause determination cannot be remedied on appeal weighs in favor of the writ, especially where the determination is premised on an erroneous interpretation of law and is unlikely to be remedied by simply re-filing charges. *See In re Commonwealth*, 2015 MP 7 ¶ 19.

¶ 9 Here, our review stems from our jurisdiction over writs of mandate, and therefore is not prohibited simply because it stems from a probable cause

[2] Since the charges against Respondents were dismissed without prejudice, the Commonwealth was free to re-file them. *See In re Commonwealth*, 2015 MP 7 ¶ 19.

determination. Further, as in *In re Commonwealth*, the Commonwealth presents issues of law which, if incorrectly determined, may prevent it from effective prosecution of future SAM 1 charges. Specifically, the Commonwealth alleges the trial court incorrectly: 1) performed its role in a probable cause hearing, and 2) determined Respondents' position was outside the scope of Section 1306(a)(3)(B) as a matter of law. Unlike a factual determination, such issues are unlikely to be remedied by re-filing charges, and thus warrant our review.

III. DISCUSSION

A. Failure to Attach Transcript

¶ 10 As a threshold issue, Respondents argue the Commonwealth's failure to provide relevant transcripts prevents us from intelligent review. Respondents assert that although preliminary hearings were held on both April 22 and May 9, the Commonwealth did not attach the April transcript containing the testimonial record. Moreover, Guerrero notes that not only does this oversight violate NMI Supreme Court Rule 21(a)(3)(C) ("Rule 21(a)(3)(C)"), but it prevents the facts from being properly preserved and verified.

¶ 11 Rule 21(a)(3)(C) provides that a petition "must include a copy of any order, opinion, or parts of the record that may be essential to understand the matters set forth in the petition." NMI SUP. CT. R. 21(a)(3)(C). In construing Rule 21(a)(3)(C), we have found that a failure to include copies of relevant orders or transcripts may "prevent us from providing sound legal analysis" or impede us from finding the court committed clear error. *Health Prof'l Corp. v. Superior Court*, 2004 MP 25 ¶¶ 14–15. However, we have also acknowledged that "although appellate filing rules must be followed, compliance with their import, rather than technical perfection, is the controlling standard." *Commonwealth v. Pua*, 2006 MP 19 ¶ 12 (citing *Torres v. Oakland Scavenger Co.*, 487 U.S. 312); *cf.* NMI SUP. CT. R. 10(e)(2) ("If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected . . . by th[e] Court."). Thus, rather than a ground for immediate dismissal, contravention of Rule 21(a)(3)(C) requires a determination of whether we may appropriately review the petition. *See Health Prof'l Corp.*, 2004 MP 25 ¶ 13.

¶ 12 We first note that here, although the Commonwealth failed to include the April preliminary hearing transcript with its petition, its omission was likely in good faith. Not only did the Commonwealth attach the May preliminary hearing transcript and Order to its petition, but it also stated that its position at the time of filing was that "the transcript containing testimony was unnecessary for review," as none of the facts relied upon by the court were in dispute. Reply Br. 3. Moreover, even if the Commonwealth's accidental failure to attach the April transcript were to impede our ability to understand the petition, particularly to review its assertions as to the Order's factual accuracy, the issue was cured through the Commonwealth's subsequent submission of the transcript. Further, because Respondents had the opportunity to file a sur-reply, they were not prejudiced by the late filing. We thus find the Commonwealth complied with the

rule's import and the current record is sufficient for our review. We now turn to the merits of the petition.

B. Tenorio Factors

¶ 13 "Writs, whether of mandamus or prohibition, are extraordinary relief granted only in the most dire of circumstances." *In re Ogumoro*, 2015 MP 9 ¶ 9 (citation and internal quotation marks omitted). We analyze writs of mandamus according to the factors established in *Tenorio v. Superior Court*, 1 NMI 1 (1989) ("*Tenorio* factors"). *Commonwealth v. Pua*, 2006 MP 19 ¶ 19. There, we described the five factors that guide whether a writ is proper:

> 1. The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief desired;
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> 2. The petitioner will be damaged or prejudiced in a way not correctable on appeal;
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> 3. The lower court's order is clearly erroneous as a matter of law;
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> 4. The lower court's order is an oft-repeated error, or manifests a persistent disregard of applicable rules; and
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> 5. The lower court's order raises new and important problems, or issues of law of first impression.

Id. "While we weigh all the factors, the absence of factor three is dispositive; a writ is not appropriate if the petitioner has not shown clear error." *Commonwealth v. Commonwealth Util. Corp.*, 2014 MP 21 ¶ 9 (citation omitted). We thus consider the third *Tenorio* factor first, as this factor is a prerequisite to writ relief. *In re Commonwealth*, 2015 MP 7 ¶ 9.

1. Clearly Erroneous as a Matter of Law

¶ 14 In applying the third *Tenorio* factor, we accord high deference to the lower court's decision. *In re Buckingham*, 2012 MP 15 ¶ 10 (citing *Liu v. Commonwealth*, 2006 MP 5 ¶ 17). A clearly erroneous finding requires that we be "firmly convinced that the [Superior] Court has erred." *Id.* Under *Tenorio*, "a writ is not appropriate if 'a rational and substantial legal argument can be made in support of the questioned . . . ruling even though on normal appeal a reviewing court may find reversible error.'" *Liu*, 2006 MP 5 ¶ 19. "The question we ask, therefore, is whether the lower court rationally could have found as it did"—not whether we would have found differently. *Id.*

a. Role at Preliminary Hearing

¶ 15 Petitioner first asserts that the court committed clear error in improperly deciding a question of fact for the jury as a matter of law. It claims that because none of the facts were in dispute, the judge was prevented from weighing the credibility of testimony. Further, the Commonwealth argues that "it is settled" that the element of position of authority is a question for the trier of fact, Pet'r's Br. 9, and that in determining that Respondents were not in a position of authority, the court did not follow the law applicable to a preliminary hearing.

¶ 16 We have little jurisprudence regarding preliminary hearings. Our sole statute governing pretrial procedure states in relevant part that: "[i]f the arrested person does not waive preliminary examination, the official shall hear the evidence within a reasonable time." 6 CMC § 6303(a); *see also* NMI R. CRIM. P. 5.1 ("A defendant is entitled to a preliminary examination, unless waived, if he/she is substantially deprived of his/her liberty."). The statute proceeds to explain that if, from the evidence, "it does not appear to the official that there is probable cause to believe that a criminal offense has been committed and that the arrested person committed it, the official shall discharge the arrested person." *See* 6 CMC § 6303(f); *see also Babauta v. Superior Court*, 4 NMI 309, 311 (1995) ("The purpose of a preliminary examination is to determine whether there is probable cause to believe that a crime has been committed and that the accused committed it.").[3] Further, we have described the purpose of a preliminary hearing as "a mechanism to weed out groundless claims and thereby avoid . . . the imposition and expense of an unnecessary criminal trial . . . ." *Commonwealth v. Crisostimo*, 2005 MP 18 ¶ 14 (citation omitted). However, beyond these general parameters, our law governing preliminary hearings is unestablished. We thus look to other jurisdictions' discussions of the relevant principles surrounding preliminary hearings, in particular those with similar probable cause requirements. *See Syed v. Mobil Oil Mariana Islands, Inc.*, 2012 MP 20 ¶ 11 (analyses of analogous laws persuasive).

¶ 17 "[C]ourts in many jurisdictions have not spoken with clarity on the question of exactly what the term probable cause is intended to mean in the context of a preliminary hearing." *Williams v. Kobel*, 789 F.2d 463, 468 (7th Cir. 1986) (citation and internal quotation marks omitted). However, it is established that a judicial officer's role at a preliminary hearing is not simply to rubber stamp the prosecution's complaint, but rather to make a judgment that probable cause exists. *See Jaben v. United States*, 381 U.S. 214, 218 (1965). Such a judgment requires the prosecution to produce "believable evidence of all the elements of the crime charged . . . ." *State v. Virgin*, 137 P.3d 787, 792 (Utah 2006). But where facts are disputed, the standard principally leaves factfinding to the jury: "a judge in a preliminary hearing has jurisdiction to consider the credibility of witnesses only when, as a matter of law, the testimony is implausible or incredible." *Id.* ¶ 21; *Johns v. Dist. Ct.*, 561 P.2d 1, 3 (Colo. 1977).

¶ 18 Where the facts are undisputed, however, "[courts] treat probable cause for a bindover determination as a question of law." *State v. Leist*, 414 N.W.2d 45, 47 (Wis. App. Ct. 1987); *cf. Sanders v. Palmer*, 55 F. 217, 220 (2nd Cir. 1893) ("[W]hether the circumstances alleged to show probable cause, or the contrary, are true, and existed, is a matter of fact; but whether, supposing them

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[3] Notably, Section 6303 also states that if, during the preliminary examination, it appears to the official that "although not guilty of the offense specified there is probable cause to believe the person arrested has committed some other offense, the official may not discharge the person but shall forthwith hold the person to answer for the offense shown by the evidence." 6 CMC § 6303(e).

to be true, they amount to a probable cause, is a question of law."). It follows that where facts are undisputed, a court may find a lack of probable cause to bind the defendant over for trial where the facts presented are insufficient to satisfy the elements of an offense as a matter of law. *See State v. Cotton*, 668 N.W.2d 346, 352 (Wis. Ct. App. 2003); *Frazzini v. Superior Court*, 87 Cal. Rptr. 32, 39 (Cal. Ct. App. 1970). Moreover, such a determination is distinguishable from an improper credibility determination. *See Stewart v. Abraham*, 275 F.3d 220, 236, (3rd Cir. 2001) (McKee, J., concurring) (distinguishing improper credibility determination from judge's conclusion "that the testimony was insufficient as a matter of law to sustain a conviction for aggravated assault even if the testimony were true"); *see, e.g.*, *People v. Ramirez*, 198 Cal. Rptr. 3d 318, 330 (Cal. Ct. App. 2016) (evidence insufficient as a matter of law to show defendant actively participated in a street gang where evidence, at most, showed nominal involvement). As illustrated by *Alvarado v. Superior Court*, the determination of a question of law may occur at a preliminary hearing where the defendant has been charged with a statute that involves terms of art or otherwise requires statutory interpretation. 53 Cal. Rptr. 3d 416 (Cal. Ct. App. 2007)

¶ 19 In *Alvarado*, the petitioner sought writ relief of a trial court's preliminary hearing determination holding him to answer to an enhancement allegation requiring that he used a firearm in the commission of a burglary. *Id.* at 417. Petitioner's claim focused on two statutes in which "the Legislature drew a distinction between being *armed* with a firearm in the commission of a felony and *using* a firearm in the commission of a felony, and it made firearm *use* subject to more severe penalties." *Id.* at 421. Highlighting this distinction, the legislature included definitions, designating using a firearm as "to display a firearm in a menacing manner, to intentionally fire it, … or to use it in any manner that qualifies under [the statute]," while being armed with a firearm meant "to knowingly carry or have available for use a firearm as a means of offense or defense." *Id.* Using the applicable statutes, precedent applying the statutes, and acknowledging that "whether a gun is 'used' in the commission of an offense . . . is broadly construed within the factual context of each case," the *Alvarado* court found the evidence in the preliminary hearing, assuming it to be true, insufficient as a matter of law on the allegation of the use of the firearm. *See id.* at 422–26. It explained that given that "there was no evidence of any conduct or action with regard to the shotgun . . . [t]o hold otherwise would eliminate the distinction between 'armed' and 'use,' a distinction the Legislature clearly intended to make." *Id.* at 423–26. The superior court was thus ordered to vacate its ruling. *Id.* at 426.

¶ 20 Nothing in our decisions interpreting the SAM 1 statute warrants a deviation from the reasoning in *Alvarado* or the general principle that a court treats a factually undisputed probable cause determination as a question of law. In *Diaz*, although a position of authority was still required, there "[t]he issue turn[ed] on what the phrase, 'in relation to a victim,' mean[t]." *Commonwealth*

v. Diaz, 2013 MP 20 ¶ 15.[4] As a question of statutory construction, we interpreted the statute's text, purpose, and nature, and also considered other jurisdictions' readings. *Id.* ¶ 17. We instructed that "to determine whether a defendant 'occupie[d] a position of authority in relation to [a] victim' . . . courts must ask whether a reasonable adolescent would have believed a defendant" occupying a position of authority had coercive power over him or her, separating the determination of the individuals' relationship from the position of authority inquiry under Section 1317(5). *Id.* ¶ 18. Furthermore, in *Guerrero*, we similarly analyzed the position of authority requirement as a "question of statutory interpretation," departing from the factual circumstances at issue to construe the definition of substantially similar position according to legislative intent. *Commonwealth v. Guerrero*, 2014 MP 15 ¶ 21–22.[5]

¶ 21 We review our guidance regarding the proper probable cause determination for SAM 1's position of authority requirement in light of the circumstances before us. At the May preliminary hearing, the Commonwealth asserted arguments regarding the position of authority element defined in Section 1317(5), claiming in particular that the inquiry required "the court to evaluate the issue as a babysitter or a substantially similar position . . . ." Tr. 6. As demonstrated by counsels' lines of argument, the hearing focused on the proper interpretation of the position of authority element, rather than disputed facts. *See, e.g.*, tr. 24 (government "rewriting the statute"); tr. 34 (inherent coercion "is not what the statute requires"); tr. 35 (what the "judgment by the legislature" reveals). Counsel for Guerrero even acknowledged that the "position of authority must be stated and there is none here. Not any inferences to be drawn, no facts in dispute, none whatsoever." Tr. 35.

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[4] Notably, whether the offender occupied a position of authority was not at issue; rather, he claimed that "since school was not in session during the summer months, or because [the victim] could have never been his student . . . he never held a 'position of authority in relation to' [her]." *Id.*

[5] Moreover, nor does *Wurthmann v. State*, relied upon by the Commonwealth for the proposition that "the position of authority inquiry is a fact-bound inquiry appropriately left to the jury," necessitate a different result. Pet'r's Br. 10. In *Wurthmann*, the defendant moved for acquittal on two counts of Sexual Abuse of a Minor in the Third Degree ("SAM 3"). 27 P.3d 762, 763 (Alaska Ct. App. 2001). In distinguishing the degrees of offenses, the *Wurthmann* Court discussed the legislative history of the sexual abuse statutes. *See id.* at 764–65. It noted that in Alaska, SAM 1 could be proven by showing the child resides in the same household as the offender and the offender has authority over the child. *See id.* at 765. Distinguishing from the first-degree offense, the court stated that SAM 3 "punishes sexual conduct with older children, reaches only offenders who by virtue of their position in relation to the child irrespective of the level of authority they actually exercise have undue influence over a child . . . . [T]his is a fact-bound inquiry appropriately left to the jury." *Id.* at 765–66. This statement from *Wurthmann* can reasonably be read to require a finding of a position of authority prior to the determination of the offender's "position *in relation to* the child," which will, indeed, often be a fact-laden inquiry for the jury. *Id.* at 765 (emphasis added).

¶ 22 Unsurprisingly, the Order followed suit. It accepted all of the facts alleged by the Commonwealth as true, stating that "[e]ven taken in the light most favorable to the government, the Commonwealth failed to produce any evidence that any position of authority existed here . . . ." Order at 14. Specifically, the Order purported to analyze whether Respondents, "customers who allegedly paid [Basa] to have sex with a prostitute," could be viewed as substantially similar to a babysitter as a matter of law. *Id.* at 12. It contrasted the position of a babysitter with that of Respondents, finding Respondents' role was just too remote under the statute: "using the Commonwealth's flawed logic . . . would mean that every adult occupies a position of authority over an adolescent." Order at 13. Thus, instead of weighing facts or expressing doubts as to the accuracy of the facts alleged, the court simply found the facts insufficient as a matter of law to show that Respondents were in a position of authority substantially similar to that of a babysitter. Notably, had the facts as to Respondents' position been disputed, it would have been inappropriate for the court to rule on the factual dispute at the preliminary hearing—but such was not the case here. As such, because the Order reflects the determination of a question of law, rather than a weighing of evidence, we are not firmly convinced the court has erred and deem the probable cause determination not to be clearly erroneous. We now consider the Commonwealth's second, closely related, claim of error.

b. Position of Authority Interpretation

¶ 23 Petitioner asserts two arguments in support of its second claim of error. First, it argues the court clearly erred in rejecting the Commonwealth's 'transferred authority' theory, as almost all authority is derived from an independent source. It claims it is irrelevant where Respondents obtained their authority, as Section 1317(5) does not place a restriction on the authority's source; rather, "the relevant question . . . is simply whether a reasonable adolescent would have viewed the defendant as standing in a position of authority in relation to the victim . . . ." Pet'r's Br. 13. Second, Petitioner claims the court clearly erred in misunderstanding its argument as to Respondents' authority exceeding that of a "mere babysitter." Tr. 8. It asserts its argument—that Respondents' authority features were not only substantially similar, but also greater than the authority features of a typical babysitter—correctly applied Sections 1306(a)(3)(B) and 1317(5). Petitioner states that "[t]he analysis is not about matching mere 'duties;' it is about comparing the authority features of a listed position with the authority features of an unlisted position to determine if the latter should be covered." Pet'r's Br. 16. It argues that, reviewed under such an analysis, it alleged sufficient facts to satisfy the applicable probable cause standard.

¶ 24 We summarily dismiss Petitioner's first argument, since, as Concepcion notes, "the [Commonwealth] is requesting [we] rule on a hypothetical." Concepcion Br. 4. Indeed, although Petitioner goes to great lengths to highlight the court's supposed error, the contested language simply states: "[t]he Court does not make any findings as to whether [Basa] held a position of authority as a 'babysitter' or a substantially similar position. *Nothing in 6 CMC § 1317(5)*

indicates that [Basa] could transfer her alleged authority to [Respondents]." Order at 12 (emphasis added). Rather than holding that "an individual with authority can never transfer that authority to another individual in the eyes of a reasonable adolescent," Pet'r's Br. 2, we read the Order as finding that Respondents do not acquire the characteristics of Basa's relationship with the victim merely due to the victim's transfer. Further, the court was silent on whether the source of Respondents' association with the victim played any role in the attributes of their relationship to her, expressly refusing to make pronouncements as to Basa's position. Instead, the court acknowledged that it was irrelevant where Respondents obtained their authority, reiterating that rather than the Commonwealth's emphasis on a transfer of authority, Section 1306 required Respondents occupy a position of authority in relation to the victim. As such, the court sought to apply the proper standard. The contested language was dicta at most and insignificant to the court's ultimate ruling.

¶ 25 Petitioner's second argument requires our examination, and statutory interpretation, of Sections 1306(a)(3)(B) and 1317(5). When engaging in statutory construction, "[o]ur principal responsibility . . . is to discern and give effect to the intent of the legislature." *In re Commonwealth*, 2015 MP 7 ¶ 11 (citing *Commonwealth v. Saburo*, 2002 MP 3 ¶ 12). "To ascertain the legislature's intent, we first look to the plain language of the statute." *Id.* (citing *Pac. Fin. Corp. v. Sablan*, 2011 MP 19 ¶ 9). "If the statute contains an undefined term, the term is given its ordinary meaning." *Id.* (citation omitted). If the statute is ambiguous, however, we interpret it to effectuate legislative intent. *See Town House, Inc. v. Saburo*, 2003 MP 2 ¶ 10. We thus begin with the statutes' text.

¶ 26 Section 1306 provides that an offender is guilty of SAM 1 if "being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age, and . . . the offender occupies a position of authority in relation to the victim." 6 CMC § 1306(a)(3). Section 1306(a)(3)(B) contains two independent clauses. The second clause requires an examination of the relational component between the victim and the offender. The first clause, at issue here, requires the offender to occupy a position of authority, which Section 1317(5) defines as either a position explicitly listed in the statute or one that is "substantially similar" to those listed. *See* 6 CMC § 1317(5) (defining position of authority as "an employer, youth leader, scout leader, coach, teacher, counselor, school administrator, religious leader, doctor, nurse, psychologist, guardian ad litem, babysitter, or a substantially similar position, and a police officer or probation officer other than when the officer is exercising custodial control over a minor"). 'Substantially similar' does not appear to be a term of art in the criminal context; in its regular use, substantially is defined as "being largely but not wholly that which is specified." Webster's Dictionary (10th ed. 1174). Thus, positions of authority not listed in Section 1317(5) must be largely similar to those specified. Although the statute's plain meaning does instruct us that unlisted positions must be closely related to those included in Section 1317(5), it does not tell us how. Namely, it leaves unanswered whether an unlisted position must be substantially similar to those listed in its duties or its

level of authority. We will resolve this ambiguity in such a way to effectuate the intent of the legislature.

¶ 27 Our two prior decisions contemplating the phrase 'position of authority in relation to the victim' are of limited guidance. In *Diaz*, we focused on the relational component of Section 1306(a)(3)(B), interpreting the statute's second clause. *See Diaz*, 2013 MP 20 ¶ 15–18. In particular, we considered "what level of custody or responsibility a person in authority must have 'in relation to the victim' . . . ." *Id.* ¶ 17. Because the offender in *Diaz* undisputedly served as a teacher—a position explicitly listed in Section 1317(5)—our analysis did not require a review of the statute's first clause. *Id.* ¶ 14. We did, however, mention the position of authority element in the context of the relational component, albeit briefly:

> [T]he capacious definition of an authority figure in [Section] 1317(5) underscores the legislature's particular concern about virtually anyone who a minor would view as a figure who could exercise immediate authority over them. After all, [Section] 1317(5)'s definition captures virtually all possible positions which could conceivably possess some responsibility over a minor, e.g., a nurse or babysitter; and just in case a position was missed by this exhaustive list, the legislature also included any person who is in 'a substantially similar position' to any of the categories of persons already listed in [Section] 1317(5).

Id. ¶ 18. In *Guerrero*, we echoed our sentiment from *Diaz*, explaining Section 1317(5)'s "definition captures 'virtually all possible positions which could conceivably possess some responsibility over a minor'" and analyzing the offender's responsibilities over the victim pursuant to such a definition. *Guerrero*, 2014 MP 15 ¶ 22. Notably, we used the offender's duties to categorize his position. *See id.* ¶ 23 (describing roles of offender as a "homeowner," "supervisor," and "transporter"). Although these decisions are useful to our determination, we look further as to the substantial similarity requirement of Section 1317(5).

¶ 28 Because our SAM 1 statute mirrors Alaska's law for Sexual Abuse of a Minor in the First Degree, we look to Alaska's interpretation of its statute for guidance. *See In re Estate of Roberto*, 2010 MP 7 ¶ 13 ("The statute, however, virtually mirrors repealed California Probate Code § 1240. . . . Therefore, we will examine California jurisprudence for guidance in this matter.").[6] In *Thompson v.*

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[6] Alaska's statute provides that "[a]n offender commits the crime of sexual abuse of a minor in the first degree if . . . being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age, and . . . *the offender occupies a position of authority in relation to the victim*." ALASKA STAT. § 11.41.434 (2018) (emphasis added). The definition for position of authority also mirrors our own: "'position of authority' means an employer, youth leader, scout leader, coach, teacher,

State, Alaska's appellate court reviewed a SAM 1 conviction, determining whether the jury had been properly instructed as to the meaning of position of authority. 378 P.3d 707, 712 (Alaska Ct. App. 2016). At the end of the defendant's trial, the court instructed the jury as to the position of authority requirement in Alaska's SAM 1 statute. *Id.* After the jury began deliberating, it requested clarification of the statute:

> We the jury would like to pose this question to you: Does "substantially similar position" pertain to the listed titles, or does it leave ... open to our consideration ... a broader list of authority figures/roles?
>
> After consulting the attorneys, the trial judge answered the jurors as follows:
>
> The jury may consider a broader list of authority figures/roles in its deliberation[s,] but the roles must be substantially similar, not slightly similar, to the list in Instruction #31.

Id. Despite defendant's contention that the court "improperly allowed the jurors to consider whether [his] position *vis-a-vis* [the victim] resembled *any type* of authority figure or authority role, even if that role was not listed in the statute," the reviewing court disagreed. *Id.* It found the judge properly allowed the jury to consider a position "only if that other authority role was 'substantially similar'" to the statute, just as the statute stated. *Id.* at 713.[7]

¶ 29 Alaska's legislative history further illuminates the proper interpretation of 'substantially similar position,' with a letter of intent accompanying the original version of the bill explaining:

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counselor, school administrator, religious leader, doctor, nurse, psychologist, guardian ad litem, babysitter, *or a substantially similar position*, and a police officer or probation officer other than when the officer is exercising custodial control over a minor . . . ." ALASKA STAT. § 11.41.470 (2018) (emphasis added).

[7] *Simants v. State* is also relevant to our decision, clarifying that a position of authority and the use of that authority to exert undue influence over a minor are separate inquiries. *See* 329 P.3d 1033, 1037 (Alaska Ct. App. 2014) (upholding ruling which found that although the victim lived with the offender and considered her a nonfamilial aunt, her position of authority "was never connected with their sexual relationship. . . . [T]he State failed to demonstrate that [the defendant] used her position of authority, either explicitly or implicitly, to commit or facilitate the sexual offense"); *cf. State v. Watkins*, 309 P.3d 209, 210 (Utah 2013) (interpreting similar requirement in Utah's statute and explaining: "[t]he fact that a defendant occupies one of the positions listed . . . is insufficient, standing alone . . . . [T]he State must establish that the defendant occupies 'a position of authority' . . . and must further establish that 'by reason of that position [the defendant] is able to exercise undue influence . . .'") (citation omitted).

> Persons other than those specifically listed are included within the definition only if they are in a position substantially similar to a position specifically included in the definition.
>
> For example, the definition includes the term "babysitter." Positions substantially similar to "babysitter" include a person who is temporarily caring for a minor while the minor's parents are out of town, or an adult who takes a minor along on a camping trip, or an adult who allows a minor to sleep in the adult's home overnight as the guest of the adult's own child. Other examples of positions that are substantially similar to those specifically listed within the definition are parents who volunteer to work with children in schools or youth groups. These adults are in positions substantially similar to youth leaders and scout leaders.

ALASKA STAT. § 11.41.470 (1978). Moreover, the legislature provided further clarification when passing the 1990 amendments to the statute: "[e]mployers are specifically included in the definition of position of authority. . . . [A]n employer is a natural person who owns a business or operates an agency. A direct job supervisor with hiring and firing authority is in a position substantially similar to that of an employer." ALASKA STAT. § 11.41.470 (1990).

¶ 30 We interpret the requirement of a 'substantially similar position' in light of this guidance. First, our decision in *Guerrero*, although not comprehensive, based our finding of the offender's position of authority on his responsibilities or duties in taking care of the victim. Such a stance is supported by Alaska's interpretation of the requirement, with its focus on roles, positions, duties, and responsibilities. The legislative history's detailed discussion of positions substantially similar to a babysitter, in particular, illustrates that it is the attributes of the authority figure in the abstract that constitute the inquiry as to whether a figure constitutes a substantially similar position to those listed in the statute. These attributes are what impart on the offender the ability to abuse their position of authority over the victim. Moreover, as alluded to in *Diaz* and explicitly exemplified in *Simants*, it is the statute's second clause which requires examination of the factual circumstances between the victim and authority figure. Stated differently, the second clause points to whether the figure indeed abused their position of authority so as to exert undue influence over the victim. Such an interpretation of Sections 1317(5) and 1306 effectuates the legislative intent of inflicting heightened punishment on those who use their positions of trust and security in a child's life to commit a sexual act.

¶ 31 With this guidance, we review the Order. Finding that the Commonwealth was essentially asserting an argument relating Respondents' positions to that of a babysitter, the court stated as follows:

> In essence, the Commonwealth is arguing the two [Respondents] who arranged a meeting with an alleged prostitute, became the prostitute's "babysitters" when she was dropped off by her procurer

> of prostitution/madam. A babysitter is one who babysits, which is defined as "car[ing] for children usually during a short absence of the parents." Babysitters are typically family or family friends, who look after and supervise younger siblings or other children. Babysitters can also be people paid to care for children. The [Respondents] are customers who allegedly paid [Basa] to have sex with a prostitute, the alleged victim. The [Respondents] are not babysitters.

Order at 12 (citation omitted). Precisely as indicated in Alaska's legislative guidance, the court engaged in an analysis of Respondents' duties or role in the abstract. In particular, in order to determine whether a customer of a prostitute is substantially similar to a babysitter, the court listed typical attributes of a babysitter. After a comparison of Respondents' position to that of a babysitter, the court concluded their position was simply not substantially similar. The court further found that attributes such as interacting on a dark beach at night were qualities that were simply too general to assert any position of authority, as such a comparison would allow "any adult [to] occupy a position of authority . . . ." Order at 13. Additionally, the court based its analysis on a reasonable interpretation of the legislature's intent: addressing "adults using their positions of authority to coerce minor victims into having sex." Order at 13.

¶ 32 We find the court's determination logical. Although the Order admittedly does not embody a pinnacle of clarity, it purported to analyze the Commonwealth's unique argument under our limited guidance as to these statutes. It keenly hinted at the instruction we now provide: that an authoritative role is a requirement separate from the requirement of undue influence or coercion within the incident's factual circumstances. Here, regardless of how much coercion, intimidation, or force was present, there was no role or position abused by the Respondents.[8] Rather, Respondents encountered the victim solely for the purpose of receiving sexual services, with no other pretext to their relationship. The court's interpretation effectuated all parts of the statute and instilled meaning into the substantial similarity requirement, two aspects in which the Commonwealth's interpretation was lacking. *See Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973) ("[A] well-settled rule of statutory construction [is] that all parts of a statute, if at all possible, are to be given effect."); *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) ("[A] cardinal principle of statutory construction is . . . 'to give effect, if possible, to every clause and word of a statute' . . . ."). As such, the court's reasoning was

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[8] The concurring opinion interprets Sections 1317(5) and 1306 (a)(3)(B) as creating strict liability anytime a police officer has sex with a minor solely because the offender is a police officer. Under this interpretation, the phrase 'in relation to the victim' is read out of the statute. There is no support in the legislative history or the statute creating such a distinction in the meaning of 'position of authority' between police officers and the other offenders listed in the statute. Therefore, we must respectfully disagree with this interpretation.

reasonable, and certainly not clearly erroneous. Moreover, because the Commonwealth's failure to demonstrate clear error as to either claim is fatal to its petition, *see In re Commonwealth*, 2015 MP 7 ¶ 9, we need not consider the remaining *Tenorio* factors.

IV. CONCLUSION

¶ 33 For the foregoing reasons, we DENY the petition for a writ of mandamus.

SO ORDERED this 11th day of October, 2018.

/s/
F. PHILIP CARBULLIDO
Justice Pro Tempore

/s/
TIMOTHY H. BELLAS
Justice Pro Tempore

MANGLONA, J., concurring:

¶ 34 I join the majority opinion as to the two issues submitted for our review but write further on the element of position of authority as it relates to Respondents' position as police officers. I highlight Respondents' role in law enforcement as the case before us involves serious allegations in which none other than the Commissioner of DPS and a DPS officer engaged in sexual acts with a minor victim. And such an incident did not just occur once—Guerrero was alleged to have had sexual contact with the minor victim on two occasions, while Concepcion had sexual encounters with the minor victim on "*at least four occasions*." Tr. 74 (emphasis added).

¶ 35 Section 1317(5) defines what is included in the position of authority element required by Section 1306. It states: "'[p]osition of authority' means an employer, . . . babysitter, or a substantially similar position, *and a police officer or probation officer other than when the officer is exercising custodial control over a minor* . . . ." 6 CMC § 1317(5) (emphasis added). Notably, the statute's instruction as to police and probation officers is included separately from the other categories in the list. In drafting Section 1317(5) in such a manner, the legislature intended law enforcement officers to be treated differently from the other listed positions. *See Guerrero v. Dep't of Pub. Lands*, 2011 MP 3 ¶ 11 (noting "basic canon of statutory construction" is to give meaning and effect to all provisions in an enactment). Not only would such an interpretation incorporate meaning into the statute's structure, but it would also be commensurate with the level of authority provided to law enforcement officers in society. Police officers are given greater authority and responsibility than other figures in society, as the very core of their 'position of authority' is to protect all persons and work to ensure the community's safety. Although I do not dispute that employers, babysitters, and other positions included in Section 1317(5) may have a moral responsibility in their interactions with minors, even when not recognizable as such, I believe a distinction for law enforcement officers is warranted. Thus, due to the statute's construction and heightened standards police officers are charged with upholding, I would construe Section 1317(5) as according law enforcement officers a per se position of authority. In other words, I find Sections 1317(5) and 1306 prohibit police officers' sexual involvement with minors as a matter of law—regardless of whether the minor is aware of the officer's occupation.

/s/
JOHN A. MANGLONA
Associate Justice