

1 violation of 6 CMC § 3202, and Conspiracy to Commit Sexual Abuse of a Minor in the First
2 Degree in violation of 6 CMC § 303(a).¹

3 At the close of the April 22, 2016 preliminary hearing, the issue arose as to whether the
4 Defendants could raise the statutory affirmative defense of mistake of age at a preliminary hearing.
5 In the Commonwealth of the Northern Mariana Islands (“CNMI”), mistake of age specifies that:

6 In a prosecution under 6 CMC §§ 1301-1309, whenever a provision of law defining an
7 offense depends upon a victim being under a certain age, it is an affirmative defense that, at
8 the time of the alleged offense, the defendant reasonably believed the victim to be that age
9 or older, unless the victim was under 13 years of age at the time of the alleged offense.
10 6 CMC § 1310(b).

11 The Court ordered supplemental briefing as to whether the Defendants could raise this
12 affirmative defense at a preliminary hearing. The Commonwealth filed its Opening Brief on April
13 27, 2016. Defendant Guerrero and Defendant Concepcion filed their Oppositions on May 2, 2016.
14 The Commonwealth filed its Reply in Support of Opening Brief on May 6, 2016. The Court heard
15 arguments on the issue of whether the Defendants could raise the affirmative defense of mistake of
16 age under 6 CMC § 1310(b) at the preliminary hearing stage on May 9, 2016. The Court also heard
17 arguments as to whether there was probable cause for Sexual Abuse of a Minor in the First Degree,
18 Misconduct in Public Office, and Conspiracy to Commit Sexual Abuse of a Minor in the First
19 Degree, on May 9, 2016.²

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

² Order(s) regarding whether there is probable cause as to Sexual Abuse of a Minor in the First Degree, Conspiracy to
Commit Sexual Abuse of a Minor in the First Degree, and Misconduct in Public Office will be issued separately.

1 **III. DISCUSSION**

2 In this order, the Court will be addressing the narrow question of whether it may consider
3 the affirmative defense of the mistake of age contained in 6 CMC § 1310(b) at a preliminary
4 hearing. The Court will issue separate order(s) on whether there is probable cause for any of the
5 offenses charged in the April 18, 2016 Information.

6 **A. The Preliminary Hearing Ensures That There is Probable Cause For Each Charged
7 Offense**

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

14 The Commonwealth Criminal Code elaborates on the preliminary examination further,
15 stating that if there is no “probable cause to believe that a criminal offense has been committed and
16 that the arrested person committed it, [the Court] shall discharged the arrested person.” 6 CMC §
17 6303(f). In other words, the preliminary hearing ensures that there is probable cause that a crime
18 was committed and that the defendant is the person who committed it.

19 The preliminary hearing is an important “mechanism to weed out groundless claims and
20 thereby avoid for both defendants and the [Commonwealth] the imposition and expense of an
21 unnecessary criminal trial.” *Commonwealth v. Crisostimo*, 2005 MP 18 ¶ 14 (quoting *Mills v.*
22 *Superior Court*, 728 P.2d 211, 214 (Cal. 1986)). Therefore, “a finding of no probable cause is
23 neither a conviction nor an acquittal.” *Id.* (quoting *Illinois v. Harkness*, 339 N.E.2d 545, 547 (Ill.
24 App. Ct. 1975)). At a preliminary hearing, a defendant is entitled to “cross-examine adverse
witnesses and may introduce evidence on his or her own behalf.” 6 CMC § 6303(c). Since the

1 Commonwealth must only show probable cause at a preliminary hearing, evidentiary rules do not
2 apply, so inadmissible evidence and testimony is allowed. NMI R. Evid. 1101(c)(2).

3 **B. Since the Rules of Evidence Do Not Apply at Preliminary Hearings, the Court**
4 **Declines to Consider the Affirmative Defense of Mistake of Age, Which Must be Proven by a**
5 **Preponderance of the Evidence**

6 The issue before the Court is whether the affirmative defense of mistake of age may be
7 raised at the preliminary hearing, especially since mistake of age must be proven by a
8 preponderance of the evidence. 6 CMC § 251(b)(2). At a preliminary hearing, the Commonwealth
9 must show probable cause. 6 CMC § 6303.³ At a preliminary hearing, evidentiary rules do not
10 apply, meaning that otherwise inadmissible evidence and testimony is allowed. NMI R. Evid.
11 1101(c)(2). The rules and procedures at a preliminary hearing are relaxed because of “the lesser
12 consequences of a probable cause determination [and] also by the nature of the determination
13 itself.” *Gerstein v. Pugh*, 420 U.S. 103, 121, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975). In particular,
14 since the probable cause determination “does not require the fine resolution of conflicting evidence
15 that a reasonable-doubt or even a *preponderance [of the evidence] standard* demands.” *Id.*
16 (emphasis added).

17 The Commonwealth Criminal Code allows an affirmative defense of mistake of age for
18 sexual offenses that depend on the age of the victim. Mistake of age, described in 6 CMC §
19 1310(b), provides that:

20 In a prosecution under 6 CMC §§ 1303-1309, whenever a provision of law defining an
21 offense depends upon a victim being under a certain age, it is an *affirmative defense* that, at
22 the time of the alleged offense, the defendant *reasonably believed* the victim to be that age
23 or older, unless the victim was under 13 years of age at the time of the alleged offense.
24 6 CMC § 1310(b) (emphasis added).

³ The probable cause determination at a preliminary hearing looks to “if from the evidence it appears...that there is probable cause to believe that a criminal offense has been committed and that the arrested person committed it.” 6 CMC § 6303(d).

1 If a defendant raises an affirmative defense, then “the defendant is entitled to an acquittal if
2 the *trier of fact* finds that the evidence, when considered in the light of any contrary prosecution
3 evidence, *proves by a preponderance of the evidence* the specified fact or facts which negate penal
4 liability.” 6 CMC § 251(b)(2) (emphasis added). Thus, the Defendants bear the burden of proving,
5 by a preponderance of the evidence, that they reasonably believed that the alleged victim was older
6 than 16, the age cited in 6 CMC § 1306(a)(3).

7 The key issue is whether the Court may consider this affirmative defense at the preliminary
8 hearing stage, rather than reserving this issue for the jury,⁴ the ultimate finder of fact in this case.
9 Since the Defendants bear the burden of proving mistake of age by a preponderance of the
10 evidence, allowing such a defense to be argued or proven in a preliminary hearing (which typically
11 applies the lower standard of probable cause), where the rules of evidence do not apply, is
12 *problematic*. In effect, inadmissible evidence and testimony would be used to establish whether the
13 Defendants reasonably believed that the victim was sixteen-years-old or older, despite the fact that
14 6 CMC § 251(b)(2) requires that affirmative defenses be proven by a preponderance of the
15 evidence.⁵

16 Further, the Court notes that the Commonwealth Criminal Code explicitly states that the
17 affirmative defense must be presented to the “trier of fact.” 6 CMC § 251(b)(2). In Black’s Law
18 Dictionary, “trier of fact” is synonymous with “fact-finder” and “finder of fact.” BLACK’S LAW
19 DICTIONARY 525 (Abridged 9th Ed.). A fact-finder is “[o]ne or more persons—such as jurors in a

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21 ⁴ The trier of fact for Sexual Abuse of a Minor in the First Degree is the jury. *See* 6 CMC § 1306(b) (“Sexual abuse of a
22 minor in the first degree is punishable by imprisonment for not more than 30 years, a fine of not more than \$50,000, or
23 both, and the mandatory sentencing provisions of 6 CMC § 4102.”); 7 CMC § 3101(a) (“Any person accused by
24 information of committing a felony punishable by more than five years imprisonment or by more than \$2,000 fine, or
both, shall be entitled to a trial by a jury of six persons.”).

⁵ At the May 9, 2016 hearing, the attorney for Defendant Concepcion argued that since the Commonwealth is held to
probable case at the preliminary hearing, that the Defendants must also be allowed to establish their affirmative defense
with the probable cause standard. The Court will not consider this argument as Defendant Concepcion has provided no
law that would override 6 CMC § 251(b)(2)’s requirement that affirmative defenses be proven by the higher standard of
proof of preponderance of the evidence.

1 trial or administrative law judges in a hearing—who hear testimony and review evidence to rule on
2 a factual issue.” *Id.* Thus, the affirmative defense of mistake of age must be proven with admissible
3 evidence, by a preponderance of the evidence, to the jury. 6 CMC § 251(b)(2).

4 **C. Although Some Jurisdictions Allow Affirmative Defenses to be Raised at a**
5 **Preliminary Hearing, Their Preliminary Hearings Follow Different Procedures and**
6 **Standards than the CNMI**

7 Although the Defendants’ highlight jurisdictions where affirmative defenses, including
8 mistake of age, may be raised at a preliminary hearing, these jurisdictions follow different
9 procedures from the CNMI with regard to preliminary hearings, as will be described below. The
10 jurisdictions cited by the Defendants’ follow different procedures and standards than the CNMI.⁶
11 Some jurisdictions cited by the Defendants also apply the rules of evidence to preliminary
12 hearings.⁷ Thus, the guidance provided by these jurisdictions is unpersuasive.

13 In Massachusetts, defendants may raise affirmative defenses at a probable cause hearing.
14 *Myers v. Commonwealth*, 363 Mass. 843, 852 (Mass. 1973). Massachusetts, however, imposes a
15 directed verdict standard on preliminary hearings, which is a higher standard than that of probable
16 cause. *Id.* at 850. Further, in Massachusetts, “probable cause at a probable cause hearing does not
17 mean probable cause to believe that the defendant has committed a crime but instead means proof
18 established by *admissible evidence* that is *legally sufficient to establish guilt beyond a reasonable*
19 *doubt.*” *Commonwealth v. Perkins*, 464 Mass. 92, 106 (Mass. 2013) (Gants, J., concurring)

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21 ⁶ Defendant Concepcion directed the Court’s attention to Utah’s *State v. Anderson*, for the proposition that an
22 affirmative defense may be raised at a preliminary hearing. 612 P.2d 778, 786 (Utah 1980). *Anderson* has since been
23 abrogated by statute. *State v. Timmerman*, 2009 UT 58 ¶¶ 14-15. Defendant Concepcion also directed the Court’s
24 attention to Nevada’s *Sheriff v. Roylance*, where “a district court may grant a pretrial writ of habeas corpus upon a
determination that an affirmative defense exists as a matter of law based solely on its review of the transcript, of a
preliminary hearing.” 110 Nev. 334, 338 (Nev. 1994). Despite this, the affirmative defense under *Roylance* must be
shown by “clear, uncontroverted evidence” on the record. *Id.*

⁷ For instance, Massachusetts requires admissible evidence at its preliminary hearings. *Commonwealth v. Perkins*, 464
Mass. 92, 106 (Mass. 2013) (Gants, J., concurring). Kansas also applies the rules of evidence to its preliminary
hearings. *State v. Cremer*, 234 Kan. 594, 600 (Kan. 1984).

1 requires that proof of the alleged offenses be proved with admissible evidence, and applies a
2 different statutory scheme to preliminary hearings. The CNMI's statutory scheme regarding
3 preliminary hearings is far different from Massachusetts's, and thus Massachusetts's approach is
4 unpersuasive.

5 Defendant Concepcion directed the Court's attention to *Commonwealth v. Lebron* for the
6 contention that Pennsylvania also allows affirmative defenses at the preliminary hearing. 2000 PA
7 Super 359 ¶ 6 (Penn. 2000). *Lebron*, however, merely pointed out that the government had failed to
8 prove the element of *mens rea* in that case. *Id.* ¶ 6. Further, Pennsylvania, like Massachusetts,
9 applies a directed verdict standard to preliminary hearings. *Perkins*, 464 Mass. at 110 (Gants, J.,
10 concurring).

11 Defendant Concepcion likewise directed the Court's attention to Kansas's *State v. Hardy*,
12 347 P.3d 222 (Ct. App. Kansas 2015). The *Hardy* court, however, was addressing the procedure for
13 addressing self-defense immunity claims. *Id.* at 225-226. Further, Kansas applies the rules of
14 evidence to preliminary examinations, making any guidance from Kansas unpersuasive. *Id.*; *State v.*
15 *Cremer*, 234 Kan. 594, 600 (Kan. 1984) (“[W]e have concluded that the rules of evidence contained
16 in the Kansas Code of Civil procedure (K.S.A. 60-401 *et seq.*) are to be applied to a preliminary
17 examination conducted pursuant to K.S.A. 22-2902, except to the extent that they may be relaxed
18 by other court rules or statutes applicable to a specific situation.”).

19 In California, defendants may choose to “elicit testimony or introduce evidence tending to
20 overcome the prosecution's case or establish an affirmative defense” at a preliminary hearing.
21 *Jennings v. Superior Court of California*, 66 Cal. 2d 867, 880 (Cal. 1967). California, however, also
22 follows different procedures with regard to preliminary hearings. California has an extensive
23 statutory scheme governing procedures in preliminary hearings. *See Cal Pen Code §§ 858-883.*
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1 Under California's extensive statutory scheme, for example, hearsay testimony is permitted
2 at a preliminary hearing, but only if it is testified to by a "law enforcement officer or honorably
3 retired law enforcement officer" who either has five years of experience or who has completed
4 specific training on testifying in preliminary hearings. Cal Pen Code § 872(b). The testifying officer
5 in California cannot merely read a report, but must be an investigating officer who "must have
6 sufficient knowledge of the crime or the circumstances under which the out-of-court statement was
7 made." *People v. Wimberley*, 5 Cal. App. 4th 439, 444 (Cal. Ct. App 2d Dist. 1992) (quoting
8 *Whitman v. Superior Court*, 54 Cal. 3d 1063, 1072 (Cal. 1991)). The CNMI has no such
9 requirement regarding hearsay, and the Court cannot follow California's approach to affirmative
10 defenses at preliminary hearings without similar evidentiary safeguards in place.

11 Another key difference is that in California the prosecution may request that defendants
12 make an offer of proof prior to calling witnesses in a preliminary hearing. Cal Pen Code § 866(a).
13 The offer of proof must show that "the testimony of the witness, if believed, would be reasonably
14 likely to establish an affirmative defense, negate an element of the crime charged, or impeach the
15 testimony of a prosecution witness or the statement of a declarant testified to by a prosecution
16 witness." *Id.*

17 The Court emphasizes that California has an extensive statutory scheme governing
18 procedures in preliminary hearings. *See* Cal Pen Code §§ 858-883. The CNMI's preliminary
19 hearings are governed solely by one rule of criminal procedure and one section of the
20 Commonwealth Criminal Code. NMI R. Crim. P. 5.1; 6 CMC § 6303. The CNMI differs from
21 California, since California has its own extensive statutory scheme guiding preliminary hearings
22 and providing specific evidentiary safeguards which the CNMI does not have at the preliminary
23 hearing stage.

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1 Thus, the Court declines to allow the Defendants to present the affirmative defense of
2 mistake of age, which must be proven by a preponderance of the evidence, at the preliminary
3 hearing stage, where the rules of evidence do not apply. Allowing the affirmative defense of
4 mistake of age to be argued at a preliminary hearing would in effect allow it to be argued using
5 inadmissible evidence and hearsay testimony.

6 **D. The Commonwealth's Comments on the Defendants' Failure to Testify at the**
7 **Preliminary Hearing**

8 Defendant Guerrero argued in his Opposition that the Commonwealth "improperly
9 commented on the Defendants' failure to testify." Guerrero Opp. at 7-8. In its Opening Brief, the
10 Commonwealth noted that neither of the Defendants testified at the preliminary hearing. Op. Br. at
11 16. In particular, the Commonwealth stated, "Both Defendants were present in court and available
12 to testify, but chose not to," and "Defendants assert through counsel, without testifying
13 themselves." *Id.* "Direct reference by a prosecutor to a defendant's decision not to testify is always
14 a violation of the defendant's Fifth Amendment right against self-incrimination." *Commonwealth v.*
15 *Rabauliman*, 2004 MP 12 ¶52 (citing *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 12 L. Ed.
16 2d 106 (1965)).

17 In *Griffin*, the prosecutor commented on the defendant's failure to testify during closing
18 arguments to the jury, telling the jury, "These things he has not seen fit to take the stand and deny
19 or explain. And in the whole world, if anybody would know, this defendant would know. Essie Mae
20 is dead, she can't tell you her side of the story. The defendant won't." 380 U.S. at 610-611. These
21 comments are easily distinguishable from those made in this case, which were references in the
22 close of a written brief submitted to the Court at the preliminary hearing stage of the proceeding.

23 *Griffin* only prohibits the prosecution (and judge) from "suggesting to the jury that it may
24 treat the defendant's silence as substantive evidence of guilt." *United States v. Robinson*, 485 U.S.
25, 32, 108 S. Ct. 864, L. Ed. 2d 23 (quoting *Baxter v. Palmigiano*, 425 U.S. 308, 319, 96 S. Ct.

1 1551, 47 L. Ed. 2d 810 (1976)) (emphasis added). In *Robinson*, defense counsel argued that the
2 prosecution denied the defendant the opportunity to explain himself. *Id.* at 27-29. The prosecution
3 responded by saying that the defendant could have explained himself by taking the stand, and the
4 trial court instructed the jury that it should not draw any inferences from the defendant's decision
5 not to testify. *Id.* The United States Supreme Court held that these statements did not violate the
6 defendant's Fifth Amendment rights. *Id.* at 31.

7 In the present case, the Commonwealth's remarks regarding the Defendants' failure to
8 testify were not made before a jury; rather, they were made in the context of a written brief related
9 to a preliminary hearing before a judge. Further, the Commonwealth's remarks were in the context
10 of illustrating that any evidence of the Defendants' defense was hearsay. *See* Op. Br. at 16
11 ("Defendants assert through counsel, without testifying themselves, that they thought a fifteen year
12 old girl was eighteen, nineteen, or twenty-four, depending on which of their statements is accepted.
13 Defendants should be required to present this defense, through admissible evidence, to a jury of
14 their peers."). Without more, the Court declines to find prosecutorial misconduct at this stage. In the
15 future, the Court encourages the Commonwealth to exercise caution with remarks regarding the
16 Defendants' decision not to testify. A defendant's constitutional right to remain silent is a
17 cornerstone of our criminal justice system and must be zealously adhered to by all, including
18 attorneys for the Commonwealth.

19 IV. CONCLUSION

20 As described above, the affirmative defense of mistake of age must be proven by the
21 Defendants by a preponderance of the evidence. 6 CMC § 251(b)(2). At a preliminary hearing, the
22 Commonwealth must show probable cause for the charged offenses. 6 CMC § 6303. Since the low
23 standard of proof of probable cause is required at the preliminary hearing, the rules of evidence do
24 not apply. *See* NMI R. Evid. 1101(c)(2); *Gerstein v. Pugh*, 420 U.S. at 121. The affirmative defense

1 of mistake of age must be proven by a preponderance of the evidence, which is a higher standard of
2 proof than probable cause. 6 CMC § 251(b)(2). Further, the law requires the defense of mistake of
3 age to be presented to the trier of fact according to 6 CMC § 251(b)(2). Thus, the affirmative
4 defense of mistake of age is one for the ultimate trier of fact, the jury.

5 Since mistake of age must be proven by a higher burden of proof than is ordinarily required
6 at a preliminary hearing, the Court will not consider this affirmative defense since any evidence of
7 this affirmative defense testified to during a preliminary hearing would not be subject to the rules of
8 evidence.⁸

9 Accordingly, the Court finds that the Defendants' affirmative defense of mistake of age
10 must be presented to the jury.⁹

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13 **IT IS SO ORDERED** this  day of May, 2016.

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17 JOSEPH N. CAMACHO
Associate Judge

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22 _____
23 ⁸ The Court limits its ruling to the affirmative defense of mistake of age. The Court is not considering the status of other
defenses.

24 ⁹ Order(s) regarding whether there is probable cause as to Sexual Abuse of a Minor in the First Degree, Conspiracy to
Commit Sexual Abuse of a Minor in the First Degree, and Misconduct in Public Office will be issued separately.