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FOR PUBLICATION

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

**COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS,**

Plaintiff,

v.

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

Defendants.

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

I. INTRODUCTION

This matter came before the Court on April 22, 2016 at 1:30 p.m. and on May 9, 2016 at 1:30 p.m. in Courtroom 220 for a preliminary hearing. On April 22, 2016, the Commonwealth was represented by Assistant Attorney General Shannon Foley. On May 9, 2016, the Commonwealth was represented by Assistant Attorney General Shannon Foley and Assistant Attorney General Matthew Baisley. Defendant James Camacho Deleon Guerrero (“Defendant Guerrero”) was also present at both hearings and represented by Attorney Matthew Holley. Defendant Jesse Salas Concepcion (“Defendant Concepcion”) was present at both hearings and represented by Attorney Richard Pierce.

Based on a review of the filings, oral arguments, and applicable law, the Court makes the following order.

1 **II. BACKGROUND**

2 On April 18, 2016, the Defendants were charged by information with Sexual Abuse of a
3 Minor in the First Degree in violation of 6 CMC § 1306(a), Misconduct in Public Office in
4 violation of 6 CMC § 3202, and Conspiracy to Commit Sexual Abuse of a Minor in the First
5 Degree in violation of 6 CMC § 303(a).¹ The Defendants were not charged with any prostitution-
6 related offenses.

7 At the April 22, 2016 preliminary hearing, the Commonwealth called two witnesses:
8 Attorney General’s Investigation Division Investigator Vicente B. Babauta and Federal Bureau of
9 Investigation Special Agent Haejun Park. The Defendants called one witness: Office of the Public
10 Auditor Investigator Melissa Bauleong.

11 At the close of the April 22, 2016 preliminary hearing, the issue arose of whether the
12 Defendants could raise an affirmative defense at a preliminary hearing. Specifically, whether the
13 Defendants could raise the statutory mistake of age affirmative defense contained in 6 CMC §
14 1310(b). The Court heard arguments on the issue of whether the Defendants could raise an
15 affirmative defense at the preliminary hearing stage on May 9, 2016. The Court issued a separate
16 order as to the Defendants’ affirmative defense argument. *See Commonwealth v. Deleon Guerrero*,
17 Crim. No.16-0069 (NMI Super. Ct. May 18, 2016) (Order Denying the Defendants from Presenting
18 the Affirmative Defense of Mistake of Age Under 6 CMC § 1310(b) at the Preliminary Hearing As
19 That Issue Is Solely for The Ultimate Trier of Fact).

20
21 _____
22 ¹ Defendant Guerrero was charged in Count I with Sexual Abuse of a Minor in the First Degree, in Count II with
23 Misconduct in Public Office, in Count III with Conspiracy to Commit Sexual Abuse of a Minor in the First Degree, in
24 Count IV with Misconduct in Public Office, and in Count VII with Conspiracy to Commit Sexual Abuse of a Minor
in the First Degree. Defendant Concepcion was charged in Count III with Conspiracy to Commit Sexual Abuse of a Minor
in the First Degree, in Count V with Sexual Abuse of a Minor in the First Degree, in Count VI with Misconduct in
Public Office, in Count VII with Conspiracy to Commit Sexual Abuse of a Minor in the First Degree, and in Count VIII
with Misconduct in Public Office.

1 On May 9, 2016, the Court also heard arguments as to whether there was probable cause for
2 Sexual Abuse of a Minor in the First Degree, Misconduct in Public Office, and Conspiracy to
3 Commit Sexual Abuse of a Minor in the First Degree.

4 III. LEGAL STANDARD

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

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

16 The preliminary hearing is an important "mechanism to weed out groundless claims and
17 thereby avoid for both defendants and the [Commonwealth] the imposition and expense of an
18 unnecessary criminal trial." *Commonwealth v. Crisostimo*, 2005 MP 18 ¶ 14 (quoting *Mills v.*
19 *Superior Court*, 728 P.2d 211, 214 (Cal. 1986)). Therefore, "a finding of no probable cause is
20 neither a conviction nor an acquittal." *Id.* (quoting *Illinois v. Harkness*, 339 N.E.2d 545, 547 (Ill.
21 App. Ct. 1975)). Since the Commonwealth must only show probable cause at a preliminary hearing,
22 evidentiary rules do not apply. NMI R. Evid. 1101(c)(2). In evaluating the evidence at a preliminary
23 hearing, the Court must "view all evidence in the light most favorable to the prosecution and draw
24

1 all reasonable inferences in favor of the prosecution.” *State v. Schmidt*, 2015 UT 65 ¶ 4 (Utah 2015)
2 (internal quotation marks omitted) (citation omitted).

3 IV. DISCUSSION

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

10 In this order, the Court will address whether there is probable cause for the charges of
11 Sexual Abuse of a Minor in the First Degree. Defendant Guerrero was charged with Sexual Abuse
12 of a Minor in the First Degree in Count I of the Information. Defendant Concepcion was charged
13 with Sexual Abuse of a Minor in the First Degree in V of the Information. Separate order(s) will be
14 issued as to the remaining charges of Misconduct in Public Office and Conspiracy to Commit
15 Sexual Abuse of a Minor in the First Degree.

16 **A. Probable Cause as to Sexual Abuse of a Minor in the First Degree as to Defendant 17 Guerrero, As Charged in Count I of the Information**

18 Defendant Guerrero is charged in Count I with Sexual Abuse of a Minor in the First Degree.
19 Sexual Abuse of a Minor in the First Degree, as charged against Defendant Guerrero, is detailed in
20 6 CMC § 1306(a)(3). To bind Defendant Guerrero over for trial, the Commonwealth must show
21 probable cause that: on or about June 2013, on the Island of Saipan, Defendant Guerrero, at the time
22 over the age of 18, engaged in sexual penetration with the alleged victim, who was at the time under
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1 the age of 16, and that Defendant Guerrero occupied a position of authority over her. 6 CMC §
2 1306(a)(3).²

3 The Court will address each of the elements of Sexual Abuse of a Minor in the First Degree
4 below. Some of these elements are not being contested by the Defendants.

5 **1. The Commonwealth Produced Evidence that the Incidents Occurred On or About**
6 **June 2013**

7 First, the Commonwealth must show probable cause that the alleged incidents occurred on
8 or about June 2013. The Court heard testimony from Investigator Babauta and Agent Park that the
9 alleged incidents occurred on or about June 2013. The Defendants do not contest these dates. Thus,
10 there is probable cause for this element.

11 **2. The Commonwealth Produced Evidence that the Incident Occurred on the Island of**
12 **Saipan**

13 Second, the Commonwealth must show probable cause that the alleged incident occurred on
14 the Island of Saipan in the Commonwealth of the Northern Mariana Islands. Both Investigator
15 Babauta and Agent Park testified that the alleged incidents occurred on the San Antonio beach on
16 the Island of Saipan. Thus, there is probable cause for this element.

17 **3. The Commonwealth Produced Evidence that Defendant Guerrero Is the Individual**
18 **that Committed the Charged Offense**

19 Third, the Commonwealth must show probable cause that Defendant Guerrero is the
20 individual that committed the charged offense. Agent Park identified Defendant Guerrero at the
21 April 22, 2016 hearing as one of the alleged abusers. Thus, there is probable cause for this element.
22

23 ² Section 1306(a)(3) states that Sexual Abuse of a Minor in the First Degree occurs when: “being 18 years of age or
24 older, the offender engages in sexual penetration with a person who is under 16 years of age, and...(B) the offender
occupies a position of authority in relation to the victim.” 6 CMC § 1306(a)(3).

1 **4. The Commonwealth Produced Evidence that Defendant Guerrero Was At the Time**
2 **Over the Age of 18**

3 Fourth, the Commonwealth must show probable cause that Defendant Guerrero was at the
4 time over the age of 18. Although the Defendants are not contesting Defendant Guerrero’s age, the
5 Court notes that the Commonwealth did not elicit testimony from the witnesses as to Defendant
6 Guerrero’s age. Although Investigator Babauta testified as to Defendant Concepcion’s age, no
7 similar testimony was elicited as to Defendant Guerrero. The Commonwealth did not ask the Court
8 to take judicial notice of Defendant Guerrero’s age, as deduced from other publicly known facts.

9 Despite this, the Court must “view all evidence in the light most favorable to the prosecution
10 and draw all reasonable inferences in favor of the prosecution.” *State v. Schmidt*, 2015 UT 65 ¶ 4
11 (Utah 2015) (internal quotation marks omitted) (citation omitted). Agent Park testified at the April
12 22, 2016 hearing that, at the time of the incident, Defendant Guerrero was the Commissioner of the
13 Department of Public Safety. Agent Park also testified that he had known Defendant Guerrero
14 professionally for quite awhile. Based on this testimony, it is a reasonable inference that the then-
15 Commissioner of the Department of Public Safety was over the age of eighteen³ at the time of the
16 alleged incident⁴. Thus, there is probable cause as to this element.

17 **5. The Commonwealth Produced Evidence that Defendant Guerrero Engaged in**
18 **Sexual Penetration with the Alleged Victim**

19 Fifth, the Commonwealth must show probable cause that Defendant Guerrero engaged in
20 sexual penetration with the alleged victim. The Court heard testimony from Agent Park that

21 _____
22 ³ Although this inference is a stretch, it is not an unreasonable stretch for the purposes of a probable cause hearing.
23 ⁴ The Court also notes that, in a prior civil case brought by Defendant Guerrero against the Department of Public Safety,
24 that Associate Judge David A. Wiseman described Defendant Guerrero as having “occupied the position of DPS
Sergeant for several years.” *Deleon Guerrero v. CNMI Department of Public Safety*, Civ. No. 09-0186 (NMI Super. Ct.
March 19, 2012) (Findings of Fact and Conclusions of Law at 15). It is not unreasonable to conclude that he was over
the age of 18 in 2013, when the alleged incident in this case occurred.

1 Defendant Guerrero engaged in both oral and vaginal sex with the alleged victim. Thus, there is
2 probable cause as to this element.

3 **6. The Commonwealth Produced Evidence that the Alleged Victim Was At the Time**
4 **Under the Age of 16**

5 Sixth, the Commonwealth must show probable cause that the alleged victim was at the time
6 under the age of 16. The Court heard testimony from Investigator Babauta that the alleged victim
7 was 15 years old at the time of the alleged incidents. Thus, there is probable cause for this element.

8 **7. The Commonwealth Failed to Produce Evidence that Defendant Guerrero Occupied**
9 **a Position of Authority Over the Alleged Victim**

10 Seventh, the Commonwealth must show probable cause that Defendant Guerrero occupied a
11 position of authority over the alleged victim. Defendant Guerrero is being charged as though his
12 position of authority over the alleged victim is that of then-Commissioner of the Department of
13 Public Safety. Information at 1.⁵ Agent Park testified that, at the time of the alleged incidents,
14 Defendant Guerrero was the Commissioner of the Department of Public Safety.

15 Sexual Abuse of a Minor in the First Degree requires that the defendant must “occup[y] a
16 position of authority in relation to” the alleged victim. 6 CMC § 1306(a)(3). The Commonwealth
17 argues that, although there is no evidence that the alleged victim knew of Defendant Guerrero’s
18 position, that there is no requirement that the alleged victim *actually know* of Defendant Guerrero’s
19 position of authority. In the alternative, the Commonwealth argued at the May 9, 2016 hearing that
20 Defendant Guerrero and Defendant Concepcion occupied a position substantially similar to a
21 babysitter in relation to the alleged victim. The Court will address both of these possible theories
22 for Defendant Guerrero’s position of authority in turn.

23 ⁵ The Information specifically states: “To wit, **JAMES CAMACHO DELEON GUERRERO**, then the Commissioner
24 of the Department of Public Safety, twice engaged in sexual penetration with a minor child at the San Antonio beach
site.” Information at 1.

1 **a. Since the Alleged Victim was Unaware of the Defendant’s Position of then-
2 Commissioner of the Department of Public Safety, This Position Was Not In Relation
3 to Her as Required in 6 CMC § 1306(a)(3)**

4 Sexual Abuse of a Minor in the First Degree requires that the defendant must “occup[y] a
5 position of authority in relation to” the alleged victim. 6 CMC § 1306(a)(3) (emphasis added). At
6 the May 9, 2016 hearing, the Commonwealth argued that there is no requirement that the alleged
7 victim actually *know* of the position of authority that the defendant allegedly holds in relation to
8 her. The Commonwealth is incorrect. The law requires that the alleged victim *know* of a defendant’s
9 position of authority as it plays a large role in the harm that the Commonwealth Legislature sought
10 to prevent by enacting 6 CMC § 1306(a)(3). The position of authority requirement has a “relational
11 component” due to the Commonwealth Legislature’s “deep concern about the inherent coerciveness
12 of sexual relationships between young adolescents and older adults possessing some level of
13 immediate authority over young people.” *Commonwealth v. Diaz*, 2013 MP 20 ¶ 18.⁶

14 The harm that the Commonwealth Legislature sought to prevent was adults using their
15 positions of authority over young people. This is especially evident in the types of positions of
16 authority that are outlined in Section 1317(5):

17 an employer, youth leader, scout leader, coach, teacher, counselor, school administrator,
18 religious leader, doctor, nurse, psychologist, guardian ad litem, babysitter, or a substantially
19 similar position, and a police officer or probation officer other than when the officer is
20 exercising custodial control over a minor.
21 6 CMC § 1317(5). These are all positions where an adult has authority over a minor due to their
22 position, and where there is a danger of that adult using the position of authority to coerce the minor
23 into sexual activity.

24 The Commonwealth Supreme Court has addressed the relational requirement in
Commonwealth v. Diaz, 2013 MP 20. In *Diaz*, the defendant was a junior high school teacher who

⁶ In analyzing the sex crime laws, the Commonwealth Supreme Court in *Diaz* noted that “[i]n construing a statute, [the Court] give[s] language its plain meaning, so long as that meaning is clear, unambiguous, and will not lead to a result that is absurd or defies common sense. We also consider legislative intent when the statute does not unequivocally answer a question.” 2013 MP 20 ¶ 17 (citations omitted).

1 engaged in a relationship with a high school student during the summer break, and the student knew
2 that he was a teacher at the campus she attended. *Diaz*, 2013 MP 20 ¶ 14. The defendant in *Diaz*
3 contended that he did not occupy “a position of authority *in relation to*” the minor victim since
4 school was not in session and the minor victim was not his student. *Id.* at ¶ 15. The Commonwealth
5 Supreme Court rejected this argument, holding that “under the right circumstances, § 1308(a)(2)
6 could encompass junior high teachers ‘in relation to’ high school students.” *Id.* at ¶ 18 (analyzing
7 the definition of “position of authority” required for Sexual Abuse of a Minor in the Third Degree
8 under 6 CMC § 1308(a)(2), which is identical to the definition applied to “position of authority” in
9 Sexual Abuse of a Minor in the First Degree under 6 CMC § 1306(a).)

10 Under *Diaz*, the test for determining whether a defendant occupied a position of authority
11 “in relation to” the alleged victim is whether a “reasonable adolescent would have believed a
12 defendant...had coercive power over him or her.” *Diaz*, 2013 MP 20 ¶ 18.⁷ Since the
13 Commonwealth put on absolutely no evidence showing that the alleged victim actually knew that
14 Defendant Guerrero was the then-Commissioner of the Department of Public Safety, there is no
15 evidence to indicate that a reasonable adolescent would have viewed Defendant Guerrero as having
16 “coercive power” over her. *Id.* For Defendant Guerrero to exercise *any* coercive power over the
17 alleged victim by virtue of his position in law enforcement, the alleged victim would have to
18 actually know his position.⁸

21 ⁷ *Diaz* was analyzing the definition of “position of authority” required for Sexual Abuse of a Minor in the Third Degree
22 under 6 CMC § 1308(a)(2). 2013 MP 20 ¶ 18. The definition of “position of authority” under Section 1308(a)(2) is
23 identical to the definition applied to “position of authority” in Sexual Abuse of a Minor in the First Degree under 6
24 CMC § 1306(a).

⁸ It is, of course, possible for a law enforcement officer to use his position to exercise coercive control over a minor
victim. In *Commonwealth v. Monkeya*, a Department of Public Safety Officer was accused of using his position in law
enforcement to sexually abuse his minor niece by “offer[ing] to dismiss her truancy charge if she would allow him to
enact the sexual acts detailed in the criminal investigations he was working on.” Crim. No. 13-0142 (NMI Super. Ct.
Nov. 29, 2013)(Pretrial Order Re Evidence of Other Acts of Defendant at 2).

1 It is, of course, possible for a law enforcement officer to use his position to exercise
2 coercive control over a minor victim. In *Commonwealth v. Monkeya*, a Department of Public Safety
3 Officer was accused of using his position in law enforcement to sexually abuse his minor niece by
4 “offer[ing] to dismiss her truancy charge if she would allow him to enact the sexual acts detailed in
5 the criminal investigations he was working on.” Crim. No. 13-0142 (NMI Super. Ct. Nov. 29,
6 2013)(Pretrial Order Re Evidence of Other Acts of Defendant at 2). The Court notes that the
7 allegations in the present case are far different from those in *Monkeya*—in this case, the
8 Commonwealth presented no evidence that would indicate that the alleged victim knew of
9 Defendant Guerrero’s position, and therefore the Commonwealth’s case fails to prove this essential
10 element because the Commonwealth has failed to show that a reasonable adolescent would view an
11 adult as having “coercive power” over her through a position she had no knowledge of. Since the
12 alleged victim did not know that Defendant Guerrero was the then-Commissioner of the
13 Department of Public Safety, then there was no coercion based on Defendant Guerrero’s position.

14 If the alleged victim did not know that Defendant Guerrero was the Commissioner of the
15 Department of Public Safety, then there is no probable cause for the essential element that
16 Defendant Guerrero occupy a position of authority *in relation* to her. If she did not herself know of
17 the position of authority, then it was not possible for Defendant Guerrero to use his position of
18 authority to coerce her into sexual contact. If sex did occur (for the purpose of this probable cause
19 determination), it was not based on the Defendant’s position at the Department of Public Safety.

20 **b. The Commonwealth Failed to Produce Evidence that Defendant Guerrero**
21 **Occupied a Position of Authority in Relation to the Alleged Victim via Annette Basa**
22 **Through a “Transferred Babysitter” Argument**

23 In the alternative, the Commonwealth argued that Defendant Guerrero and Defendant
24 Concepcion had authority over the alleged victim through a transferred babysitter status from
Annette Basa. The Commonwealth Criminal Code, as described above, outlines a range of positions

1 that constitute a “position of authority” over a minor, and also states that “a substantially similar
2 position” to those listed could also qualify as a position of authority. 6 CMC § 1317(5).⁹

3 The Commonwealth’s argument is that Annette Basa, the procurer of prostitution/madam
4 that the alleged victim was staying with, occupied a position of authority or “substantially similar
5 position” under 6 CMC § 1317(5). According to the Commonwealth, when Annette Basa dropped
6 the alleged victim off on a dark beach with the Defendants, that she was transferring her authority
7 to the Defendants.

8 A substantially similar position under Section 1317(5) “includes people a reasonable
9 adolescent would have believed...had coercive power over [the adolescent].” *Commonwealth v.*
10 *Francisco Guerrero*, 2014 MP 15 ¶ 22 (quoting *Commonwealth v. Diaz*, 2013 MP 20 ¶ 18) (internal
11 quotation marks omitted). A substantially similar person includes “virtually all possible persons
12 which could conceivably possess some responsibility over a minor.” *Id.*¹⁰

13 In both *Diaz* and *Francisco Guerrero*, a reasonable adolescent would view the defendant as
14 having coercive power over him or her: as a teacher who would substantially impact his or her
15 school grades, or as a familial elder. *Diaz*, 2013 MP 20 ¶ 22; *Francisco Guerrero*, 2014 MP 15 ¶
16 23. In *Diaz*, a middle school teacher was in a position of authority in relation to a high schooler
17 because of the inherent coercion that could occur both during the school year and during the
18 summer break, especially since the student would skip class to spend time in the defendant’s
19 classroom even though she was not his student. 2013 MP 20 ¶ 19, 22. In *Francisco Guerrero*, a

21 ⁹ These positions of authority include:

22 an employer, youth leader, scout leader, coach, teacher, counselor, school administrator, religious leader,
23 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.

23 6 CMC § 1317(5) (emphasis added).

24 ¹⁰ The Commonwealth Supreme Court has applied this reasonable adolescent standard both to determine whether a
position of authority was *in relation* to a minor, as well as whether a substantially similar position would qualify as a
position of authority over a minor victim. See *Diaz*, 2013 MP 20 ¶ 18; *Francisco Guerrero*, 2014 MP 15 ¶ 23.

1 familial elder who “also regularly housed, supervised, and transported” the alleged victim and thus
2 “possessed some responsibility over her” was found to hold a position of authority over the minor
3 victim. 2014 MP 15 ¶ 23.

4 The Commonwealth’s argument is that Annette Basa, the procurer of prostitution/madam
5 allegedly arranging prostitution liaisons for the Defendants, was acting as a “babysitter” or
6 “substantially similar position” under 6 CMC § 1317(5). According to the Commonwealth, when
7 Annette Basa dropped the alleged victim off at the San Antonio beach, she was transferring her
8 “babysitter” authority to the Defendants.

9 In essence, the Commonwealth is arguing that the two Defendants, who arranged a meeting
10 with an alleged prostitute, became the prostitute’s “babysitters” when she was dropped off by her
11 procurer of prostitution/madam. A babysitter is one who babysits, which is defined as “car[ing] for
12 children usually during a short absence of the parents.” *Merriam Webster Dictionary*, available at:
13 <http://www.merriam-webster.com/dictionary/babysitter>. Babysitters are typically family or family
14 friends, who look after and supervise younger siblings or other children. Babysitters can also be
15 people paid to care for children. The Defendants are customers who allegedly paid Annette Basa to
16 have sex with a prostitute, the alleged victim. The Defendants are not babysitters.

17 The Court does not make any findings as to whether Annette Basa held a position of
18 authority as a “babysitter” or a substantially similar position. Nothing in 6 CMC § 1317(5) indicates
19 that Annette Basa could transfer her alleged authority to the Defendants. The test for whether the
20 Defendants held a position of authority over the alleged victim is whether a “reasonable adolescent
21 would have believed” that the Defendants “had coercive power over” her. *Francisco Guerrero*,
22 2014 MP 15 ¶ 22.

23 The Commonwealth argues that the alleged victim would have viewed the Defendants as
24 having a position of authority over her since she was delivered to them on a dark beach at night.

1 The Commonwealth has not shown that this would lead a reasonable adolescent to view two
2 strangers as authority figures as required by *Francisco Guerrero*. 2014 MP 15 ¶ 22. Rubber bands
3 can stretch, but at some point, if stretched too far, they will break—just as the Commonwealth’s
4 argument, stretched too far, also breaks. Although *Francisco Guerrero* references “coercive power
5 over” the alleged victim, the facts in *Francisco Guerrero* that led to “coercive power” were far
6 more tangible than those here, since the defendant in *Francisco Guerrero* was a familial elder who
7 “regularly housed, supervised, and transported” the minor victim. *Id.* The Defendants were not
8 housing, taking care of, acting as a babysitter for, or supervising the alleged victim. The Defendants
9 are alleged customers of Annette Basa, a procurer of prostitution/madam. Again, the Court notes
10 that the Commonwealth is not pursuing any prostitution related charges.

11 When the sex crime laws were enacted, the Commonwealth Legislature’s concern was with
12 “the inherent coerciveness of sexual relationships between young adolescents and older adults
13 possessing some level of immediate authority over young people.” *Diaz*, 2013 MP 20 ¶ 18. Thus,
14 the primary concern is with adults using their positions of authority to coerce minor victims into
15 having sex. Using the Commonwealth’s flawed logic—that adult strangers an adolescent meets on a
16 beach at night automatically have positions of authority over the adolescent—would mean that
17 essentially every adult occupies a position of authority over an adolescent. If this was the proper
18 reading of Section 1306(a)(3) then there would be no purpose for the “position of authority over the
19 victim” language present in the statute. 6 CMC § 1306(a)(3).

20 If any adult could occupy a position of authority over the adolescent, then the
21 Commonwealth Legislature would have removed all of the subsections relating to sexual abuse of
22 minors and simply criminalize any and all sexual contact between adults and minors without
23 distinction. The Commonwealth Legislature instead chose to enact sex crime laws with categories.
24 *See* 6 CMC § 1301-1309. In this case, the Commonwealth chose to charge a type of sex crime for

1 which they cannot prove all of the essential elements. Sexual Abuse of a Minor in the First Degree
2 is meant to protect minors from adults using their positions of authority over them to coerce them to
3 have sex, and 6 CMC § 1306(a)(3) and 6 CMC § 1317(5) do not include any adult stranger that an
4 adolescent meets. The Court stresses that there are other types of sex crimes; however, the
5 Commonwealth chose specifically to charge Sexual Abuse of a Minor in the First Degree under 6
6 CMC § 1306(a).

7 Even taken in the light most favorable to the government, the Commonwealth failed to
8 produce any evidence that any position of authority existed here *in relation to* the alleged victim.
9 Accordingly, the Court cannot find probable cause as to this element.

10 **B. Probable Cause as to Sexual Abuse of a Minor in the First Degree as to Defendant**
11 **Concepcion, As Charged in Count V of the Information**

12 Defendant Concepcion is charged in Count V with Sexual Abuse of a Minor in the First
13 Degree. Sexual Abuse of a Minor in the First Degree, as charged against Defendant Concepcion, is
14 detailed in 6 CMC § 1306(a)(3). To bind Defendant Concepcion over for trial, the Commonwealth
15 must show probable cause that: on or about June 2013, on the Island of Saipan, Defendant
16 Concepcion, at the time over the age of 18, engaged in sexual penetration with the alleged victim,
17 who was at the time under the age of 16, and that Defendant Concepcion occupied a position of
18 authority over her. 6 CMC § 1306(a)(3).

19 The Court will address each of the elements of Sexual Abuse of a Minor in the First Degree
20 below. Some of these elements are not being contested by the Defendants.

21 **1. The Commonwealth Produced Evidence that the Incidents Occurred On or About**
22 **June 2013**

23 First, the Commonwealth must show probable cause that the alleged incidents occurred on
24 or about June 2013. The Court heard testimony from Investigator Babauta and Agent Park that the

1 alleged incidents occurred on or about June 2013. The Defendants do not contest these dates. Thus,
2 there is probable cause as to this element.

3 **2. The Commonwealth Produced Evidence that the Incident Occurred on the Island of**
4 **Saipan**

5 Second, the Commonwealth must show probable cause that the alleged incident occurred on
6 the Island of Saipan in the Commonwealth of the Northern Mariana Islands. The Court heard
7 testimony from Investigator Babauta and Agent Park that the alleged incidents occurred on San
8 Antonio beach on the Island of Saipan. Thus, there is probable cause as to this element.

9 **3. The Commonwealth Produced Evidence that Defendant Concepcion Is the**
10 **Individual that Committed the Charged Offense**

11 Third, the Commonwealth must show probable cause that Defendant Concepcion is the
12 individual that committed the charged offense. Investigator Babauta identified Defendant
13 Concepcion as one of the alleged abusers at the April 22, 2016 hearing. Thus, there is probable
14 cause as to this element.

15 **4. The Commonwealth Produced Evidence that Defendant Concepcion Was At the**
16 **Time Over the Age of 18**

17 Fourth, the Commonwealth must show probable cause that Defendant Concepcion was at
18 the time over the age of 18. Investigator Babauta testified he thinks Defendant Concepcion is
19 around 45 years of age, as he has known Defendant Concepcion for many years and they are close
20 to the same age. This is sufficient for preliminary hearing purposes, and thus there is probable cause
21 as to this element.

22 **5. The Commonwealth Produced Evidence that Defendant Concepcion Engaged in**
23 **Sexual Penetration with the Alleged Victim**

24 Fifth, the Commonwealth must show probable cause that Defendant Concepcion engaged in
sexual penetration with the alleged victim. The Court heard testimony from Investigator Babauta

1 that Defendant Concepcion engaged in vaginal intercourse with the alleged victim. Thus, there is
2 probable cause as to this element.

3 **6. The Commonwealth Produced Evidence that the Alleged Victim Was At the Time**
4 **Under the Age of 16**

5 Sixth, the Commonwealth must show probable cause that the alleged victim was at the time
6 under the age of 16. Investigator Babauta testified that the alleged victim was 15 years old at the
7 time of the alleged incident. Thus, there is probable cause as to this element.

8 **7. The Commonwealth Failed to Produce Evidence that Defendant Concepcion**
9 **Occupied a Position of Authority Over the Alleged Victim**

10 Seventh, the Commonwealth must show probable cause that Defendant Concepcion
11 occupied a position of authority over the alleged victim. In Count V of the Information, Defendant
12 Concepcion is charged as follows: “To wit: **JESSE SALAS CONCEPCION**, then a Department of
13 Public Safety officer, engaged in sexual penetration with a minor child at the San Antonio beach
14 site on numerous occasions.” Information at 3 (emphasis in original). The Defendant is being
15 charged as though his position of authority over the alleged victim is that of a then-Department of
16 Public Safety officer. *Id.* Investigator Babauta testified that, at the time of the alleged incidents,
17 Defendant Concepcion was a Police Officer 3 in the Department of Public Safety.

18 The Court incorporates by reference its analysis of “position of authority” as to Defendant
19 Guerrero above in Section IV. A. 7., and applies the same analysis to Defendant Concepcion. The
20 Commonwealth presented no evidence that the alleged victim knew *at the time* that Defendant
21 Concepcion was a Department of Public Safety officer. Further, the Commonwealth presented no
22 evidence that a reasonable adolescent would have viewed Defendant Concepcion as having a
23 position of authority over her through any kind of transferred authority via Annette Basa.
24 Accordingly, the Commonwealth has produced no evidence that Defendant Concepcion occupied a

1 position of authority in relation to the alleged victim as is required by 6 CMC § 1306(a)(3). Thus,
2 there is no probable cause as to this element.

3 V. CONCLUSION

4 The Office of the Attorney General prosecutes crimes and decides what charges to file.
5 Every crime has elements or parts, and the Law requires a prosecutor to prove each and every
6 element. Like an airplane with missing wings will not fly or a car without wheels will not move
7 forward, when the prosecutor fails to prove an element of a crime then that particular charge fails.

8 In this case the prosecutors filed charges of Sexual Abuse of a Minor in the First Degree that
9 Defendants committed *in their specific capacity as police officers*. However, at the April 22, 2016
10 and May 9, 2016 preliminary hearing the prosecutor failed to produce any evidence that the alleged
11 victim *knew Defendants were police officers*.

12 Instead, the prosecutor argued a strange and bizarre theory that Annette Basa was a procurer
13 of prostitution/madam, and as a procurer of prostitution/madam was acting like a babysitter. The
14 prosecutor further argues that in her capacity as a babysitter, Annette Basa somehow transferred her
15 babysitter authority to the Defendants, who were allegedly paying for sex. Rubber bands can
16 stretch, but at some point, if stretched too far, they will break—just as the Commonwealth’s
17 argument, stretched too far, also breaks.

18 First, the Court asked and the prosecutor stated that the Office of the Attorney General
19 chose not to charge any prostitution-related crimes. Second, the prosecutor’s arguments do not
20 make sense as the CNMI sex crime laws do not have such category as “transferred babysitter.”
21 Third, the prosecutor did not file charges that Defendants were acting in the capacity as babysitters.
22 Fourth, the prosecutor filed charges for one type of crime and then incorrectly argues and puts on a
23 case for another type of crime.

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

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

6 Accordingly, the Court finds that there is no probable cause as to Counts I and V of the
7 information, charging Defendant Guerrero and Defendant Concepcion with Sexual Abuse of a
8 Minor in the First Degree in Violation of 6 CMC § 1306(a). These charges are dismissed without
9 prejudice.

10 The Court will issue separate order(s) as to whether there is probable cause for Misconduct
11 in Public Office and Conspiracy to Commit Sexual Abuse of a Minor in the First Degree.

12
13 **IT IS SO ORDERED** this 27th day of May, 2016.

14
15
16 
17 JOSEPH N. CAMACHO
18 Associate Judge

19
20 ¹¹ The Court especially emphasizes the special role that a prosecutor has in our legal system, and finds the language
21 from *Berger v. United States* to be particularly instructive:

22 [A prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose
23 obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest,
24 therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is
in a peculiar and very definite sense the servant of the law, the two fold aim of which is that guilt shall not
escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while
he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper
methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just
one.

Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).