Commonwealth of the Northern Mariana Islands,
Plaintiff/Appellee,
v.
Natalie M. **Suda**,
Defendant/Appellant.
Appeal No. 98-011
Traffic Case No. 97-7745
August 16, 1999

Argued and submitted December 9, 1998

Counsel for Appellants: Joseph E. Horey (O'Connor Berman Dotts & Banes), Saipan.

Counsel for Appellees: Colin M. Thompson, Assistant Attorney General, Saipan.

BEFORE: DEMAPAN, Chief Justice, CASTRO, Associate Justice, and TAYLOR, Justice *Pro Tem*.

CASTRO, Associate Justice:

¶1 **[1]** Defendant, Natalie M. Suda ("Defendant"), appeals the trial court's March 2, 1998 ruling denying her motion to suppress the results of two field sobriety tests and a breathalyzer test. The trial court held that neither Defendant's constitutional right to counsel under Article I, Section 4(a) of the Constitution of the Commonwealth of the Northern Mariana Islands ("Commonwealth Constitution") nor her statutory right to counsel under 6 CMC § 6105 were violated when police officers denied her requests to contact an attorney prior to the taking of the intoxication tests. We have jurisdiction pursuant to Article IV, Section 3 of the Commonwealth Constitution, as amended.[1] We affirm.

ISSUE PRESENTED AND STANDARD OF REVIEW

¶2 **[2]** The sole issue is whether the trial court erred in denying Defendant's motion to suppress the results of two field sobriety tests and a breathalyzer test. We review a motion to suppress *de novo*. *Commonwealth v. Ramangmau*, 4 N.M.I. 227, 235 (1995).

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[1] N.M.I. Const., art. IV, § 3 was amended by the passage of Legislative Initiative 10-3, ratified by the voters on November 1, 1997 and certified by the Board of Elections on December 13, 1997.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 On September 20, 1997, Defendant was involved in a traffic accident. The police officer who arrived at the scene of the accident briefly questioned Defendant and asked her to perform a field sobriety test (FST). The record does not reflect why the officer asked Defendant to perform the FST, but the parties do not dispute that the officer had cause to do so. Defendant requested that she be allowed to contact a lawyer, but the police officer replied that she must first take the FST. After Defendant took the test, the officer placed her under arrest and took her to the police station. En route to the station and after arrival, Defendant repeatedly requested to speak with a lawyer. However, the officers at the station told Defendant that she would have to take another field sobriety test and a breathalyzer test before she would be allowed to use the phone. Defendant accordingly performed the tests.

¶4 At some point during the investigation, Defendant was issued a traffic citation for violations of the Vehicle Code, Title 9 of the Commonwealth Code, Section 7105 (driving under the influence of alcohol), Section 7104 (reckless driving), and Section 2105 (failure to possess an auto registration card).

¶5 On October 2, 1997, Defendant appeared before the trial court and pleaded not guilty to all charges. On January 5, 1998, Defendant moved to suppress the results of two field sobriety tests and a breathalyzer test, which the Prosecution sought to introduce at the trial set for March 4, 1998. At the hearing on the motion on March 2, 1998, the trial court judge denied the motion from the bench. *See* Transcript of Proceedings, Court Ruling on Motion to Suppress ("Transcript"), Excerpts of Record ("E.R.") no. 2.

¶6 The trial court found that prior to arrest, neither the right to counsel under Article I, Section 4(a) of the Commonwealth Constitution nor the statutory right to counsel under 6 CMC § 6105 had attached. The court reasoned that the statutory right does not apply unless a person is being detained for a felony, defined as an offense punishable by more than one year (6 CMC § 102(i)). Transcript at 1. Since driving under the influence as charged in Defendant's case is punishable by less than one year, the court held that no statutory right to counsel was available. *Id.* Further, the court noted that the right to counsel under Article I, Section 4(a) of the Commonwealth Constitution had also not attached since the investigation of Defendant for intoxication was a general inquiry into a traffic offense rather than an investigation that had

focused on the Defendant. *Id.*

¶7 After Defendant was arrested, the trial court acknowledged that counsel must be provided to Defendant, if requested, prior to questioning. *Id.* However, the court noted that while all statements made by Defendant after her request for counsel would be inadmissible, any non-communicative evidence such as results of a field sobriety test are not the product of interrogation. *Id.* Thus, the court concluded that only verbal statements taken during custodial interrogation would be inadmissible. *Id.* In addition, the court stated that it would not disturb the holding of *Commonwealth v. Aulerio*, Crim. No. 93-0153 (N.M.I. Super. Ct. Jan. 11, 1994) (Order Denying Defendant's Motion to Exclude Evidence) ("Order"). The court therefore held that Defendant's right to counsel under the Commonwealth Constitution was not violated, even after she was arrested and advised of her rights, because it was not a critical stage of the proceedings. *Id.*

¶8 Two days later, pursuant to Rule 11(a)(2) of the Commonwealth Rules of Criminal Procedure, Defendant entered a conditional plea of guilty to the offense of driving under the influence of alcohol, reserving the right, on appeal from the judgment, to review of the denial of her motion to suppress. In return, the Prosecution agreed to dismiss all other charges against Defendant, but reserved the right to refile such charges should she prevail on appeal. *See* Conditional Plea Agreement, E.R. no. 3. The trial court accepted the conditional plea and found Defendant guilty of driving under the influence. *See* Judgment and Probation/Commitment Order, E.R. no. 4. The sentence was stayed pending this timely appeal.

ANALYSIS

I. Implied Consent

¶9 **[3,4]** The driving of a motor vehicle in the Commonwealth is heavily regulated by the Vehicle Code, Title 9 of the Commonwealth Code. We note that such regulation is justified since driving is a privilege as opposed to a right. *See Kansas v. Bristor*, 691 P.2d 1, 3 (Kan. 1984) ("The right to drive a motor vehicle on the public streets is not a natural right but a privilege, subject to reasonable regulation in the public interest.) (citation omitted). In addressing the problem of driving under the influence of alcohol or drugs, the Commonwealth Legislature has enacted what is known as the "implied consent law," which provides in relevant part:

> (a) Any person who operates a motor vehicle upon the highways within the Commonwealth shall be deemed to have given his or her consent . . . to a test of his or her breath . . . [or] to a test of his or her blood. . . .
>
> . . . .
>
> (c) A person required to submit to a test as provided above shall be warned by the police officer requesting the test that a refusal to submit to the test will result in revocation of his or her license to operate a motor vehicle for six months. . . .

9 CMC § 7106(a), (c). Accordingly, Defendant is deemed to have given her consent to submit to intoxication testing, and only had the power to revoke her implied consent.

II. Whether Defendant's Constitutional Right to Counsel Was Violated

¶10 **[5,6]** Article I, Section 4 of the Commonwealth Constitution provides that "[i]n all criminal prosecutions, certain fundamental rights shall obtain." Among these is that "[t]he accused has the right to assistance of counsel, and if convicted, has the right to counsel in all appeals." N.M.I. Const. art. I, § 4(a). This section is based on the Sixth Amendment to the United States Constitution. ANALYSIS OF THE CONSTITUTION OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS at 11 (1976) ("ANALYSIS"). The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right "to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

¶11 **[7]** It is well settled that the right to counsel under the Sixth Amendment does not attach until the initiation of adversary judicial proceedings. *United States v. Gouveia*, 467 U.S. 180, 187, 104 S. Ct. 2292, 2297, 81 L. Ed. 2d 146, 155 (1984). The initiation of such proceedings may be by way of formal charge, preliminary hearing, indictment, information, or arraignment. *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S. Ct. 1877, 1882, 32 L. Ed. 2d 411, 417 (1972).

> [This] interpretation of the Sixth Amendment right to counsel is consistent not only with the literal language of the Amendment, which requires the existence of both a "criminal prosecutio[n]" and an "accused," but also with the purposes which we have recognized that the right to counsel serves. We have recognized that the "core purpose" of the counsel guarantee is to assure aid at trial, "when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor."

Id. (*quoting United States v. Ash*, 413 U.S. 300, 309, 93 S. Ct. 2568, 2573, 37 L. Ed. 2d 619 (1973)).

¶12 Defendant does not dispute that the Sixth Amendment right to counsel only attaches at or after the initiation of adversary proceedings. Instead, relying on language in the ANALYSIS, Defendant contends that the right to counsel under Article I, Section 4(a) of the Commonwealth Constitution should attach at an

earlier point. The ANALYSIS states that the right to counsel "attaches when the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect." ANALYSIS at 11. Defendant maintains that the investigation had begun to focus on her at the time intoxication tests were administered, both by the roadside and at the station.

¶13 **[8]** This language in the ANALYSIS is taken from *Escobedo v. Illinois*, 378 U.S. 478, 490, 84 S. Ct. 1758, 1765, 12 L. Ed. 2d 977, 985 (1964). In *Escobedo*, the accused repeatedly requested and was denied access to counsel, prior to being formally indicted, but after being taken into police custody and subjected to interrogations aimed toward eliciting incriminating statements. The United States Supreme Court found that in these circumstances, the accused was denied the right to counsel since the investigation had ceased to be a general inquiry into an unsolved crime and had begun to focus on a particular suspect. *Id.*

¶14 *Escobedo*, however, is only one of two U.S. Supreme Court cases which appear to have deviated from the general rule that the Sixth Amendment right to counsel attaches after the initiation of adversary proceedings. *See Aulerio*,Crim No. 93-0153 (N.M.I. Super. Ct. Jan. 11, 1994) (Order at 9) (*citing United States v. Gouveia*, 467 U.S. 180, 188 n.5, 104 S. Ct. 2292, 2297 n.5, 81 L. Ed. 2d 146, 155 n.5 (1984)).

> Although there may be some language to the contrary in *United States v. Wade*, 388 U.S. 218 (1967), we have made clear that we required counsel in *Miranda* and *Escobedo* in order to protect the Fifth Amendment privilege against self-incrimination rather than to vindicate the Sixth Amendment right to counsel.

Gouveia, 467 U.S. at 188 n.5, 104 S. Ct. at 2297 n.5, 81 L. Ed. 2d at 155 n.5 (citations omitted). The U.S. Supreme Court has since limited the holding of *Escobedo* to its own facts. *Kirby*, 406 U.S. at 689, 92 S. Ct. at 1882, 32 L. Ed. at 417.

¶15 Here, Defendant urges this Court to hold that the right to counsel under Article I, Section 4(a) of the Commonwealth Constitution attaches earlier than the counsel guarantee under the Sixth Amendment because the drafters of the Commonwealth Constitution chose to follow *Escobedo*, as evidenced by the language contained in the ANALYSIS. Thus, Defendant contends that the trial court erred in following the

Aulerio case, which followed federal precedent contrary to the ANALYSIS.[2]

¶16 In refusing to interpret Article I, Section 4(a) differently than the Sixth Amendment simply due to the ANALYSIS's inclusion of language from *Escobedo*, the *Aulerio* court reasoned that the Commonwealth Constitution "is a living document and is not static in time. Since the decision in *Escobedo*, the case law interpreting the right to counsel of an accused has fully developed." *Aulerio*, Crim. No. 93-0153 (N.M.I. Super. Ct. Jan. 11, 1994) (Order at 10). Further, since the applicable law in *Escobedo* has been disavowed by the United States Supreme Court, the *Aulerio* court refused to adopt an erroneous interpretation of the law. *Id.* at 11.

¶17 **[9]** We agree with the *Aulerio* court that under Article I, Section 4(a) the right to counsel attaches no earlier than it attaches under the Sixth Amendment. Since *Escobedo*, the United States Supreme Court's cases have long recognized that the Sixth Amendment right to counsel attaches only at, or after, the initiation of adversary judicial proceedings. *See Gouveia*, 467 U.S. at 189, 104 S. Ct. at 2299, 81 L. Ed. 2d at 157.

> Although we have extended an accused's right to counsel to certain "critical" pretrial proceedings, we have done so recognizing that at those proceedings, "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both," in a situation where the results of the confrontation "might well settle the accused's fate and reduce the trial itself to a mere formality."

Id. (internal citations omitted).

¶18 **[10]** While the decision whether to submit to intoxication testing may be critical for the accused in the sense that it can have serious consequences at trial, it is not "critical" in the constitutional sense. *Kansas v. Bristor*, 691 P.2d 1 (Kan. 1984) (holding that decision by driver, arrested for driving under influence, of whether to take a blood-alcohol test is not "critical stage"where Sixth Amendment right to counsel attaches); *Maine v. Jones*, 457 A.2d 1116 (Me. 1983) (noting that accused is not entitled to Sixth Amendment right to counsel prior to blood-alcohol test because decision whether to take test is not critical

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[2] While courts may cite the ANALYSIS in support of its rulings, "the Analysis does not have the force of law." *Camacho v. Civil Serv. Comm'n*, 666 F.2d 1257, 1264 (9th Cir. 1982) (rejecting Analysis interpretation of article III, section 16).

> The Analysis is not the law. It was not voted on by the electorate. At most, it is an attempt to clarify what the law is as stated in the Constitution. To use the Analysis as authority to overcome the clear language of the Constitution is not permissible.

Camacho v. Camacho, 1 CR 620, 628-29 (N.M.I. Trial Ct. 1983).

in *Wade* sense). Thus, we conclude that no right to counsel under Article I, Section 4(a) attaches prior to intoxication testing.

¶19 Our holding is consistent with the majority of other U.S. jurisdictions which have held that there is no Sixth Amendment right to counsel before deciding whether to take such tests. Although some state courts have found the Sixth Amendment right to counsel attaches prior to deciding whether to take a chemical sobriety test, most state courts have reached a contrary conclusion. WILLIAM E. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 31.3(a)(2) (1988) ("SEARCHES AND SEIZURES") (listing cases finding no Sixth Amendment right to counsel prior to sobriety testing); *see also, e.g.*, *Sites v. Maryland*, 481 A.2d 192 (Md. 1984) (rejecting defendant's argument that breathalyzer test is "critical stage" of proceeding and therefore holding that Sixth Amendment right to assistance of counsel did not attach); *Wells v. Arkansas*, 684 S.W.2d (Ark. 1985) (finding no Sixth Amendment right to counsel before taking breathalyzer test).

¶20 **[11]** In the case at bar, we agree with the trial court's finding that on the roadside, prior to arrest, Defendant did not have a right to counsel under Article I, Section 4(a). It is undisputed that adversary proceedings had not commenced at this point. No complaint had been filed and Defendant had not even been placed under arrest. The investigation at this point was merely a general inquiry into the commission of a traffic offense.

¶21 **[12]** We also agree with the trial court's conclusion that no constitutional right to counsel was denied to Defendant after she was arrested. However, we do so using a partly different analysis. The trial court found that after Defendant was arrested, upon request, "[c]ounsel must be provided to the defendant *prior to questioning*." Transcript at 2 (emphasis added). While we agree with this statement, unlike the trial court, we do not find that the right to counsel available at the time of arrest in this case was based on Article I, Section 4(a). Adversary proceedings had not commenced simply because the Defendant had been placed under arrest at the time that intoxication tests were administered at the police station. *See Bristor*, 691 P.2d at 7 (concluding that arrest for DUI, alone, does not initiate adversary judicial criminal proceedings; rather subsequent filing of complaint triggers initiation of criminal proceedings).

¶22 **[13,14]** Hence, any right to counsel available to Defendant after she was arrested, prior to

intoxication testing, stemmed from another source. If Defendant had a right to counsel under the Commonwealth Constitution at the time of arrest, such right derived from Article I, Section 4(c) which states that "[n]o person shall be compelled to give self-incriminating testimony." N.M.I. Const. art. I, § 4(c). Section 4(c) is based directly on the Fifth Amendment of the U.S. Constitution (*see* ANALYSIS at 14), which provides in relevant part: "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. Accordingly, we may look to Fifth Amendment case law in interpreting the protections provided by Article I, Section 4(c).

¶23 **[15,16]** The United States Supreme Court, in the landmark decision of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966), summarized its holding regarding the Fifth Amendment privilege against self-incrimination as follows:

> [T]he prosecution may not use *statements*, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean *questioning* initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

Id., 384 U.S. at 444, 86 S. Ct. at 1612 (footnote omitted) (emphases added). The U.S. Supreme Court has subsequently noted that the "privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . . ." *Schmerber v. California*, 384 U.S. 757, 761, 86 S. Ct. 1826, 1830, 16 L. Ed. 2d 908 (1966).

¶24 **[17,18]** In this case, when Defendant was asked to submit to a field sobriety test and a breathalyzer test after she was arrested and taken to the station, the privilege against self-incrimination was not implicated because "the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Id.*, 384 U.S. at 764, 86 S. Ct. at 1832; *see also Montana v. Armfield*, 693 P.2d 1226, 1230 (Mont. 1984) (finding that defendant's blood alcohol level is unprotected "physical or real" evidence) (*citing Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1996)). In *Armfield*, the court reasoned:

> Defendant enjoys a right to counsel only where the assistance of counsel is required to protect other rights guaranteed him by law. The breathalizer test threatened no invasion of a protected right. [Defendant] was deemed, as a matter of law, to have consented to testing. Neither consent

> nor refusal is constitutionally protected, and no right to consult counsel attaches to a choice between the two.

Armfield, 693 P.2d at 1230.

¶25 **[19]** Thus, we agree with the trial court's analysis that non-communicative evidence, such as results of a field sobriety test, are admissible because they are not the product of interrogation. We simply disagree that the right to counsel under Article I, Section 4(a) was ever implicated when Defendant was asked to submit to intoxication testing at the police station. As shown by our preceding analysis, the right to counsel available to Defendant at the time of her arrest was that derived from the privilege against self-incrimination under Article I, Section 4(c).[3] Since the request to submit to intoxication testing, however, involved no compulsion to testify against herself, Defendant's privilege against self-incrimination was not violated.

¶26 We therefore find that the results of Defendant's intoxication tests were properly admitted over her constitutional objections.

III. Statutory Right to Counsel

¶27 Apart from any constitutional right to counsel, Defendant contends that her statutory right to counsel was violated. The statute relied upon provides in relevant part:

> (a) In any case of arrest or temporary detention for examination, as provided in 6 CMC § 6103(d), it is unlawful:
>
> (1) To deny to the arrested person the right to see at reasonable intervals, and for a reasonable time at the place of detention, the person's counsel, family members, employer, or a representative of the person's employer;
>
> (2) To refuse or fail to make a reasonable effort to send a message by telephone, cable, wireless, messenger or other expeditious means, to any persons mentioned in subsection (a)(1) of this section, provided that the arrested person so requests and the message can be sent without expense to the government or the arrested person prepays any expense there may be to the government;

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[3] The distinction between the right to counsel which is ancillary to the procedural safeguards of the Fifth Amendment and the Sixth Amendment right to counsel has been stated as follows:

> This "right to counsel" under *Miranda*, however, is not the right granted under the Sixth Amendment; rather, it is a procedural safeguard derived by the Court from the Fifth Amendment. Therefore, failure to inform a suspect of his right to counsel under *Miranda*, is not a violation of the Sixth Amendment, but only an indication that the waiver of the Fifth Amendment privilege against self-incrimination has not been voluntarily or knowingly made.

SEARCHES AND SEIZURES § 24.4. The *Miranda* "right to counsel" then represents the presumption that a confession is coerced if made without the advice of counsel while the Sixth Amendment right to counsel "has nothing to do with voluntariness, but is meant to preserve from outside interference the relationship between a defendant and his attorney." *Id.*

6 CMC § 6105(a)(1)-(2).

¶28 Defendant contends that the trial court erred in finding that her statutory right to counsel had not been violated because 6 CMC § 6105 does not come into play unless a person is being detained for a felony, as set forth in 6 CMC § 6103(d). Section 6103 provides in relevant part:

> § 6103. Authority to Arrest or Detain Without Warrant.
> Arrest without a warrant is authorized in the following situations:
> . . . .
> (d) Police officers, even in cases where it is not certain that a criminal offense has been committed, may, without a warrant, temporarily detain for examination persons who may be found under such circumstances as justify a reasonable suspicion that they have committed or intend to commit a felony.

6 CMC § 6103.

¶29 The trial court found that Defendant was not temporarily detained for examination "as provided in 6 CMC § 6103(d) because she was not detained for a felony. A felony is defined in 6 CMC Section 102(i) as "any offense or conduct proscribed by the Commonwealth law which is punishable by more than one year . . . " The trial court noted that "DUI as charged in this case is punishable by less than one year." Transcript of Proceedings, E.R. no. 2, at 1. Accordingly, the trial court concluded that Section 6103(d) did not apply.

¶30 **[20]** Defendant, however, contends that such an interpretation would lead to the absurd result of making a detainee's right to counsel dependent on factors which police officers do not know at the time of detention, to wit, whether the detainee will be charged with a felony. Defendant further maintains that the phrase "as provided in 6 CMC § 6103(d) is susceptible of two meanings. Where a statute is capable of more than one meaning, it is considered ambiguous. *Commonwealth v. Taisacan*, 1999 MP 8 ¶ 22, 5 N.M.I. 236, 237.

¶31 **[21]** Defendant acknowledges that one interpretation is the one followed by the trial court. On the other hand, Defendant contends that the phrase may also be read as merely referential, such as "which are provided for in 6 CMC § 6103(d)," or simply "see 6 CMC § 6103(d)." We do not agree that the phrase is capable of more than one meaning. The alternative meaning suggested by Defendant is not different from the trial court's interpretation. To make a reference to Section 6103(d) is the same as saying "as provided in" Section 6103(d). That is, the temporary detention must meet the specific requirements of Section

6103(d). Defendant's interpretation of the phrase is simply not supported by the language of Section 6105(a) as currently written.[4]

¶32 **[22]** Accordingly, we conclude that 6 CMC § 6105(a) is not ambiguous. The plain language of the statute provides that in the case of temporary detention for examination, the rights contained in Section 6105(a) attach only where a person is temporarily detained for a felony. Thus, the trial court did not err in finding that before Defendant was arrested, the statutory right to counsel under 6 CMC § 6105 did not attach.

¶33 After Defendant was arrested, the statute clearly applies. The trial court acknowledged that any statements made by Defendant after she requested counsel would be inadmissible at trial. However, the trial court then found "that any non-communicative evidence such as FST are not the product of interrogation and only verbal statements taken during custodial interrogation is [sic] inadmissible in this case." *Id.* at 2. We agree.

¶34 **[23,24]** Again, we need only look to the plain language of 6 CMC § 6105, which indicates that the rights of an arrested person are violated only where such rights are denied prior to interrogation. Section 6105(a)(4) provides that it is unlawful

> (4) For those having custody of one arrested, *before questioning* the arrested person about participation in any crime, to fail to inform that person of his or her rights and obligations under subsections (a)(1), (a)(2), and (a)(3) of this section.

6 CMC § 6105(a)(4) (emphasis added). It is therefore evident that an arrested person's rights under Section 6105 only attach prior to questioning. Since the results of a field sobriety test and a breathalyzer test are not the product of interrogation, the trial court correctly found them to be admissible.

IV. Whether Defendant's Constitutional Right to Due Process Was Violated

¶35 Finally, Defendant argues that the police officers' refusal to allow her reasonable access to counsel denied her due process of law guaranteed by Article I, Section 5 of the Commonwealth Constitution, which provides that "[n]o person shall be deprived of life, liberty or property without due process of law." N.M.I. Const. art. I, § 5. The record, however, does not reflect that Defendant raised the issue of due process

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[4] We express no view as to whether the statute could have been better written. This Court has previously noted that "[w]e will not act as a super legislature and strike down a statute or a regulation merely because it could have been better written." *King v. Board of Elections*, 2 N.M.I. 398, 406 (1991) (citation omitted).

before the trial court.

¶36 **[25]** Generally, this Court may not consider an issue raised for the first time on appeal. Only three narrow exceptions exist: (1) the issue is one of law not relying on any factual record; (2) a new theory or issue has arisen due to a change in law while the appeal is pending; or (3) plain error occurred and an injustice might otherwise result unless the Court considers the issue. *Commonwealth v. Santos*, 4 N.M.I. 348, 350 (1996).

¶37 **[26]** Here, Defendant did not address in her briefs her failure to raise the issue below. At oral argument, Defendant contended that the first exception, that this Court may consider a purely legal issue for the first time on appeal, should apply. This Court, however, will not automatically entertain an issue raised for the first time on appeal simply because it is purely legal. *Bolalin v. Guam Publications, Inc.*, 4 N.M.I. 176, 182 (1994) (citations omitted). "While it is incumbent upon a party to address its failure to raise an issue below, we may review an issue of law if, after reviewing for plain error, we conclude that an injustice to that party might result. *Id.*

¶38 **[27]** We decline to review Defendant's due process arguments which were not presented to the court below as we are not convinced that the trial court committed plain error. Further, we do not find Defendant's arguments persuasive. The due process guarantee of counsel has been limited to civil proceedings, quasi-civil proceedings, or appeals. *McCambridge v. Texas*, 778 S.W.2d 70, 74 (Tex. Crim. App. 1989) (finding no due process right to counsel under Fourteenth Amendment in driving while intoxicated prosecution, which is criminal prosecution).

CONCLUSION

¶39 For the foregoing reasons, the trial court's March 2, 1998 ruling denying Defendant's motion to suppress is hereby **AFFIRMED**.