FOR PUBLICATION

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee

v.

YI XIOU ZHEN
Defendant-Appellant.

OPINION

Cite as: *CNMI v. ZHEN*, 2002 MP 004
Appeal No. 2000-12, Criminal Case No. 99-338-D

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BEFORE: MIGUEL S. DEMAPAN, Chief Justice, ALEXANDRO C. CASTRO, Associate Justice, VIRGINIA SABLAN-ONERHEIM, Justice *Pro Tempore*

CASTRO, Associate Justice:

¶1 Appellant Yi Xiou Zhen ("Zhen" or "Appellant") timely appeals her conviction and sentence on the charge of Promoting Prostitution in the Second Degree in February, 2000. We have jurisdiction pursuant to Article IV, Section 3 of the Constitution of the Commonwealth of the Northern Mariana Islands, as amended,[1] and 1 CMC § 3108(a). We affirm.

PROCEDURAL BACKGROUND

¶2 On July 16, 1999, the Commonwealth filed an Information charging Zhen with Promoting Prostitution in the Second Degree, in violation of 6 CMC § 1344(a) and 6 CMC § 1344(d)(2) and made punishable by 6 CMC § 1346(c). (Appellant's Excerpts of Record [hereinafter E.R.] at 6.) Following a bench trial, Zhen was convicted of Promoting Prostitution in the Second Degree on February 11, 2000. (E.R. at 14-15.) The trial court entered a sentencing and commitment order whereby Zhen was sentenced to two years imprisonment, a fine in the amount of one thousand dollars ($1,000.00), to be paid within thirty (30) days, and a mandatory fee assessment of two thousand dollars ($2,000.00) pursuant to 6 CMC § 1346(e)(2). (E.R. at 2-3.) Since the filing of her Opening Brief, Zhen has been released pending her appeal pursuant to an Order from the CNMI Superior Court. *See Commonwealth v. Yi Xiou Zhen*, Crim. No. 99-0338 (N.M.I. Super. Ct. July 25, 2000) (Order).

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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 BACKGROUND

¶3 During the early part of July 1999, the CNMI Department of Public Safety (DPS) conducted an investigation in western Garapan. (Trial Transcript [hereinafter T.Tr.] at 5-6.) The investigation concerned prostitution and related crimes and was known as Red Light II. *Id.* at 90. On the night of July 10, 1999, Zhen was working for the CU Night Club in western Garapan. *Id.* at 97. That same evening, DPS utilized an island resident, Mr. Yoichi Matsumura, to walk around western Garapan posing as a tourist. *Id.* at 8. DPS also used a video camera to conduct videotaped, but not audiotaped, surveillance of some clubs in western Garapan as part of the operation. *Id.* at 5-6.

¶4 Zhen was videotaped by DPS approaching Mr. Matsumura. (T.Tr. at 50-51.) According to Mr. Matsumura, Zhen informed him that CU Night Club had a room where he could select a girl for sex. *Id.* at 53. Mr. Matsumura testified that Zhen told him the price was $70.00 for one hour. *Id.* at 53-54. The conversation between Mr. Matsumura and Zhen was videotaped, but not audiotaped. *Id.* at 24.

¶5 A short time after Mr. Matsumura's encounter with Zhen, Mr. Matsumura was debriefed by DPS officers that same evening. (T.Tr. at 92.) Based on Mr. Matsumura's account of the conversation and the videotape of their encounter, Zhen was arrested five days later (T.Tr. at 23 & 92-93) and charged with Promoting Prostitution in the Second Degree (E.R. at 6).

¶6 The encounter between Zhen and Mr. Matsumura was videotaped by Edwin Tudela, a DPS officer. The video recording depicts Zhen approaching Mr. Matsumura as he walked along the street, stepping in his path and engaging him in conversation. While conversing, Zhen stood close to Mr. Matsumura and pointed up to CU Night Club several times. The video of the

encounter was shown in court during the trial. Officer Tudela also testified that he personally observed Zhen engage Mr. Matsumura in conversation.

¶7 At trial, a second police officer, David Hosono, testified that he also saw Zhen approach Mr. Matsumura and engage him in conversation. Both officers testified that several days prior to July 10, 1999, they had observed Zhen in front of CU Night Club at night approaching male passerby's and engaging them in conversation.

¶8 After hearing all the testimony and viewing the physical evidence, the trial court found Zhen guilty of Promoting Prostitution in the Second Degree.

ISSUES PRESENTED AND STANDARDS OF REVIEW

¶9 The seven issues raised by Appellant are:

I. Whether Appellant was denied her right under CNMI law to a trial by jury?

II. Whether the bench trial violated Appellant's right to a jury trial under the Sixth Amendment to the United States Constitution?

III. Whether the bench trial violated Appellant's right to due process of law and equal protection under the Fourteenth Amendment to the United States Constitution?

IV. Whether limiting Appellant's inquiry of the prosecution's principal witness violated Appellant's constitutional right of confrontation or otherwise prejudiced Appellant?

V. Whether the evidence was sufficient to convict Appellant of promoting prostitution?

VI. Whether the trial court possessed jurisdiction over the prosecution?

VII. Whether the sentence and imposition of the $1,000 fine and $2,000 "special assessment" should be set aside?

¶10 Issue 1 calls for the construction of a statute and is reviewed *de novo. See Commonwealth v. Abuy*, 2001 MP 8 ¶ 5; *Commonwealth v. Kaipat*, 2 N.M.I. 323, 328-29 (1991). Issues 2 and 3 are constitutional issues which are reviewed *de novo. Commonwealth v. Bergonia*, 3 N.M.I. 22, 35 (1992).

¶11 Issue 4, an alleged violation of the Confrontation Clause, is reviewed *de novo. See People of the Territory of Guam v. Ignacio*, 10 F.3d 608, 611 (9th Cir. 1993); *United States v. George*, 960 F.2d 97, 99 (9th Cir. 1992). However, the trial court is vested with discretion to limit questioning, and error exists only when that discretion has been abused. *See id.* As such, a trial court's restriction of cross-examination is reviewed for abuse of discretion. *Commonwealth v. Hanada*, 2 N.M.I. 343, 349 (1991); *United States v. Kennedy*, 714 F.2d 968 (9th Cir. 1983), *cert. denied*, 465 U.S. 1034, 104 S. Ct. 1305, 79 L. Ed. 2d 704 (1984).

¶12 Issue 5 is reviewed *de novo. See Commonwealth v. Yan*, 4 N.M.I. 334, 336 (1996); *Commonwealth v. Palacios*, 4 N.M.I. 330, 334 (1996). The test of sufficiency of evidence is whether, after examining the evidence presented at trial in a light most favorable to the Commonwealth, and then drawing all reasonable inferences in favor of the Commonwealth, the trier of fact could find that every element of the crimes charged had been proved beyond a reasonable doubt. *See id.*

¶13 Issue 6, a question of jurisdiction, is reviewed *de novo. Aquino v. Tinian Cockfighting Board*, 3 N.M.I. 284, 291-92 (1992). Issue 7, as it relates to the sentence, is a question of law and is reviewed *de novo*, *Commonwealth v. Oden*, 3 N.M.I. 186 (1992), whereas a court's sentencing discretion is reviewed for abuse of discretion, *United States v. Messer*, 785 F.2d 832, 834 (9th Cir. 1986). Issue 7, as it relates to the fine and "special assessment," is reviewed on appeal for plain error when not objected to at the trial court by the defendant. *See United States*

v. Kelly, 993 F.2d 702, 704 (9th Cir. 1993); *United States v. Lopez-Cavasos*, 915 F.2d 474 (9th Cir. 1990).

ANALYSIS

I. The Bench Trial Was Proper Based On The Charges Against Appellant

A. Statutory Right to Jury Trial

¶14 The right to a jury trial in the Commonwealth is provided by legislative enactment. *See* N.M.I. Const. art. I, § 8; *Commonwealth v. Peters*, 1 N.M.I. 466, 473-474 (1991). Under 7 CMC § 3101(a), a criminal defendant is entitled to a jury trial when an information charges a felony punishable by more than five years imprisonment or by more than a $2,000 fine, or both. The limited right to a jury trial has withstood constitutional scrutiny. *See Commonwealth v. Atalig*, 723 F.2d 682, 690 (9th Cir. 1984), *cert. denied*, 467 U.S. 1244, 104 S. Ct. 3518, 82 L. Ed. 2d 826 (1984)[2]; *Peters*, 1 N.M.I. at 471-74.

¶15 In this matter, Zhen was charged with Promoting Prostitution in the Second Degree, in violation of 6 CMC § 1344(a), and punishable by 6 CMC § 1344(d)(2) and § 1346(c). (E.R. at 6.) Pursuant to 6 CMC § 1346(c), "[e]very person who is found guilty of promoting prostitution in the second degree . . . shall be subject to imprisonment for no more than five years or a fine of not more than $1,000 or both, for each violation.". Additionally, pursuant to 6 CMC § 1346(e),

[2] The fact that the Commonwealth is no longer a trust territory does not affect the reasoning set forth in *Atalig*.

(e) Mandatory fees for conviction of prostitution-related offenses.

. . . .

(2) In addition to other penalties set forth in this article, a person who is either convicted or given a deferred sentence as a result of an arrest for promoting prostitution . . . shall be assessed a fee of $2,000.

¶16 Zhen contends that she was entitled to a jury trial because the $2,000 mandatory fee assessment imposed by 6 CMC § 1346(e)(2) is intended to be criminally punitive and constitutes a "fine," which when combined with the $1,000 fine set forth at 6 CMC § 1346(c), exceeds the "fine" required to be entitled to a jury trial under 7 CMC § 3101(a). (Appellant's Opening Brief at 4.) As discussed below, the dispositive inquiry as to whether the "special assessment" triggers the right to jury trial is not whether it is labeled as a "fee" or a "fine," but whether it is a civil or criminal penalty. We find that the "special assessment" in question is a civil penalty. As such, the bench trial was proper, based on the charges against Zhen.

B. The $2,000 Mandatory Assessment

¶17 In asserting her arguments, Zhen does not distinguish between what is a "fine" versus a "fee." Instead, Zhen merely asserts that the "special assessment" is a fine and is, thereby criminally punitive. (Appellant's Opening Brief at 4.) Additionally, neither the term "fine" nor "fee" is defined in the Commonwealth Code. Moreover, the Commonwealth trial court cases that have examined the issue of whether the $2,000 mandatory assessment is a "fine" or a "fee" have yielded contradictory results. *See CNMI v. Wen Geng Chen,* Crim. No. 99-0339, (N.M.I. Super. Ct. April 26, 2000) (Order)*; CNMI v. Guo Lin Zhang,* Crim. No. 99-0341, (N.M.I. Super. Ct. November 9, 1999) (Order). To resolve the issue of whether the $2,000 mandatory

fee assessment under Public Law 11-19 is a criminal or civil penalty, this Court looks at the statutory construction of 6 CMC § 1346(e)(2).

(1) Statutory Construction of 6 CMC § 1346(e)(2)

¶18 The question of whether a particular statutory penalty is civil or criminal is a matter of statutory construction. *See, e.g., U.S. v. Ward*, 448 U.S. 242, 248, 100 S. Ct. 2636, 2641, 65 L. Ed. 2d 742 (1980), *reh'g denied*, 448 U.S. 916, 101 S. Ct. 37, 65 L. Ed. 2d 1179 (1980); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237, 93 S. Ct. 489, 493, 34 L. Ed. 2d 438 (1972); *Helvering v. Mitchell*, 303 U.S. 391, 399, 58 S. Ct. 630, 633, 82 L .Ed. 917 (1938). Traditionally, the civil versus criminal penalty inquiry proceeds on two levels. First, we must determine whether the legislature, in establishing the "penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Ward*, 448 U.S. at 248, 100 S. Ct. at 2641; *see also One Lot Emerald Cut Stones*, 409 U.S. at 236-37, 93 S. Ct. at 492-93. Second, where the legislature has demonstrated the intent for a civil penalty, we must determine whether the statute is so punitive, either in purpose or effect, as to negate that intent. *Ward*, 448 U.S. at 249, 100 S. Ct. at 2641; *see also Flemming v. Nestor*, 363 U.S. 603, 617-21, 80 S. Ct. 1367, 1376-78, 4 L. Ed. 2d 1435 (1960). With regard to the second inquiry, "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." *Ward, 448 U.S.* at 249, 100 S. Ct. at 2641 (*quoting Flemming*, 363 U.S. at 617, 80 S. Ct. at 1376). *See also One Lot Emerald Cut Stones*, 409 U.S. at 237, 93 S. Ct. at 493; *Rex Trailer Co. v. United States*, 350 U.S. 148, 154, 76 S. Ct. 219, 222, 100 L. Ed. 149 (1956).

¶19 Initially, it is important to clarify whether the legislature intended the mandatory fee assessment to be criminally or civilly punitive. There are many instances where the legislature has provided, as a sanction for the violation of a statute, a remedy consisting only of civil penalties or forfeitures; in others it has provided the criminal sanctions of a fine, imprisonment, or both; in still others it has provided both criminal and civil sanctions. As previously stated infra, Part I.B, the distinction between "fine" and "fee" has not been established by the Appellant Court or the Commonwealth Code. While our analysis takes into consideration the word usage of "fine" and "fee" within the statute, the label itself is not dispositive, as Appellant and lower court case law suggests. *See CNMI v. Wen Geng Chen*, Crim. No. 99-0339, (N.M.I. Super. Ct. April 26, 2000) (Order)*; CNMI v. Guo Lin Zhang*, Crim. No. 99-0341, (N.M.I. Super. Ct. November 9, 1999) (Order). Rather, the proper analytical framework examines the usage of the words "fee" and "fine" within the larger context of evidence of legislative intent. Specifically, as an indication of whether the legislature intended the portion of the statute in question to be civilly or criminally punitive. This distinction is important since past Commonwealth jurisprudence has focused almost exclusively on defining what is a "fine" or a "fee" without considering the larger question of whether the penalty in question is civil or criminal in nature. *See cases cited supra.*

¶20 In our first inquiry of the present case, it is quite clear that the CNMI Legislature intended to impose a civil penalty by the mandatory fee outlined in 6 CMC § 1346(e)(2). Importantly, the Legislature labeled the sanctions authorized in § 1346(e) as "[m]andatory fees for conviction of prostitution-related offenses.", a label that takes on added significance when juxtaposed with the criminal penalties, repeatedly referred to as "fines," set forth in the immediately preceding subparagraphs, § 1346(a) through (d). The CNMI Legislature, therefore,

differentiated between the civil and criminal penalty provisions by not only using distinct language to describe the penalties, but also grouped the penalties into separate paragraphs based on whether they were, in fact, civil or criminal in nature.

¶21 Additionally, the legislative intent for a civil, rather than a criminal penalty, is clear when we look at the comments of Public Law 11-19, which took effect on July 9, 1998.[3] According to the pertinent portion of the findings and purpose of Public Law 11-19, § 1, "[i]t is therefore the purpose of this legislation to bolster enforcement of anti-prostitution laws, increase penalties *and provide additional funding for enforcement*." (emphasis added) Hence, the manifest goal of the CNMI Legislature in enacting the relevant provision was the funding of operations, an administrative civil penalty measure, rather than the deterrence of prostitution, as would befit a criminal penalty provision. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 567-68, 9 L. Ed. 2d 644 (1963).

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[3] PL 11-19, § 1 states, in pertinent part, as follows:

> Section 1. Findings and Purpose: The Legislature finds that it is in the interest of the Commonwealth to provide for the safety of the public by enforcing tighter controls on prostitution activity and by removing this activity from the streets. Prostitutes openly soliciting potential patrons in the streets, especially in areas frequented by tourists, harms other legitimate businesses in the area and contributes to an unsavory perception of the CNMI by outside observers.
>
> The Legislature further finds that prostitution provides an opportunity for foreign criminal organizations to establish an economic base in the Commonwealth. Law enforcement agencies have noted an increased presence of organized crime in the Commonwealth together with the rise of prostitution. Prostitution also contributes to the increased incidence of crimes of violence as prostitutes and their promoters compete for customers and territory. Prostitution also provides the opportunity for the transmission of diseases which can destroy lives and families and pose an incalculable hazard to public health in the Commonwealth.
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> For all these reasons it is imperative that the Legislature enact legislation to enhance the enforcement of anti-prostitution laws in the Commonwealth. It is therefore the purpose of this legislation to bolster enforcement of anti-prostitution laws, increase penalties and provide additional funding for enforcement.

¶22 The legislative intent for the fees in question to be a civil penalty is further demonstrated by the fact that the mandatory fees collected are only to be used by DPS in enforcing (anti-prostitution) operations. Specifically, 6 CMC § 1346 (e)(3) states as follows:

> Any fee assessed under this section shall [sic] collected by the clerk of court and deposited into a special account separate from the general fund for the specific purpose of funding enforcement of this article. These funds shall be appropriated annually by the legislature to the Department of Public Safety and shall not be reprogrammed for any other purpose or to any other agency.

¶23 As such, after review of the legislative intent behind 6 CMC § 1346 and analysis of the language utilized, we have no doubt that 6 CMC § 1346(e) was intended to be a civil, rather than a criminal, penalty.

¶24 We now turn to discussing whether the legislature, despite its clear intention to establish a civil penalty, nevertheless instituted sanctions "so punitive as to tranform what was clearly intended as a civil remedy into a criminal penalty." *Ward*, 448 U.S. at 249, 100 S. Ct. at 2641 (*quoting Rex Trailer Co.*, 350 U.S. at 154, 76 S. Ct. at 222). In considering this question, the United State Supreme Court has noted, as previously stated infra, Part I.B.1, "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." *See cases cited supra*. As such, this court will only reject the Legislature's manifest intent to establish a civil penalty through 6 CMC § 1346(e) if the party challenging the statute, Appellant, provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the intention to deem it civil. *See cases cited supra*.[4] No such proof has been offered by

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[4] To make the determination of whether the sanctions imposed, thought civil in intent, are so punitive as to transform what was clearly intended as a civil remedy into a criminal penalty, the Supreme Court in *Ward* found it useful to refer to the seven considerations listed in the case of *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 567-68, 9 L. Ed. 2d 644 (1963). *See Ward*, 448 U.S. at 249, 100 S. Ct. at 2641. The seven standards set forth in *Kennedy* were "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment - -

Appellant in her moving papers. Indeed, the extent of Appellant's argument is the assertion that the $2,000 "special assessment" is a fine. (Appellant's Opening Brief at 4.) Aside from this assertion, which has been rejected by this court based on the analysis of the relevant statute above, Appellant has not demonstrated the requisite "clear proof" that the penalty in question is punitive either in purpose or effect.

¶25 In sum, we find that 6 CMC § 1346(e) was intended by the CNMI Legislature to be a civil penalty. Therefore, Appellant is not entitled to a jury trial because the trial court criminally penalized her for less than $2,000.

II. The Bench Trial Did Not Violate Appellant's Sixth Amendment Rights

¶26 Under 7 CMC § 3101(a), a criminal defendant is entitled to a jury trial when an information charges a felony punishable by more than five years imprisonment or by more than a $2,000 fine, or both. As stated in Part I infra, the "special assessment" fee leveled against Appellant is a civil penalty, rather than a criminal penalty. As such, since the criminal penalty against Appellant was under the $2,000 fine threshold outlined in 7 CMC § 3101(a), she is not entitled to a jury trial.

¶27 Moreover, Appellant's citation of *United States v. Duarte Higareda*, 113 F.3d 1000, 1002 (9th Cir. 1997), to support the contention that she was entitled to a jury trial if she did not waive that right is factually inapplicable to her matter. In *Duarte*, defendant was convicted of conspiracy to possess methamphetamine and possession of methamphetamine with intent to

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retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in realtion to the alternative purpose assigned." *Kennedy*, 372 U.S. at 168-69, 83 S. Ct. at 567-68 (footnotes omitted). The *Kennedy* factors were considered to be merely helpful, but not exhaustive nor dispositive in determining whether the effect of a penalty is so punitive as to negate its legislative intent to be civil. *See Ward*, 448 U.S. at 249, 100 S. Ct. at 2641-42.

distribute following a bench trial. *Id.* Defendant appealed. *Id.* The Court of Appeals held that the district court was required to conduct colloquy with the non-English-speaking defendant in order to ensure that defendant's waiver of his right to jury trial was valid. *Id.* Clearly, Appellant's situation differs, in that she is not asserting that she waived her right to jury trial due to a failure to understand the proceedings,[5] but rather because the "special assessment" fee was actually a fine which entitled her to a jury trial under Commonwealth law. (Appellant's Opening Brief at 5.) Since we have established that Appellant was not entitled to a jury trial under Commonwealth law and that the bench trial was proper based on the charges against her, we find that her Sixth Amendment rights were not violated since a waiver of her jury trial rights was not necessary in this case.

III. The Bench Trial Did Not Violate Appellant's Fourteenth Amendment Rights To Equal Protection and Due Process

¶28 Appellant next argues that the denial of a jury trial violated her Fourteenth Amendment right to equal protection. To support her contention, Appellant cites the Supreme Court case of *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000). *Willowbrook* involved an equal protection challenge to a village's requirement that plaintiff grant the village a 33-foot easement as a pre-requisite to connecting plaintiff's property to the village's water supply. However, the village only required a 15-foot easement from other property owners. The Court held that the complaint had stated a recognizable equal protection claim by alleging that the village's requirement was irrational and arbitrary, especially because plaintiff was treated differently than others similarly situated. *See id.* at 563, 120 S. Ct. at 1074; *see also*, *American Fabricare v. Township of Falls*, 101 F. Supp. 2d 301 (E.D. Pa. 2000).

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[5] Appellant had the assistance of a translator at trial. (E.R. at 4.)

¶29 Contrary to the situation of *Willowbrook*, Appellant has not demonstrated that she has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Willowbrook*, 528 U.S. at 564, 120 S. Ct. at 1074. Namely, having been assessed a fine of less than $2,000, Appellant was properly provided a bench trial by the Commonwealth under 7 CMC § 3101(a). Appellant, therefore, received the same treatment as other individuals assessed such a penalty. No demonstration of disparate treatment has been provided by Appellant to substantiate her allegations of equal protection violation. We find that Appellant's Fourteenth Amendment equal protection rights were not violated by the Commonwealth.

IV. The Trial Court Did Not Abuse Its Discretion In Limiting Appellant's Recross-Examination of Mr. Matsumura

¶30 Appellant contends that the evidentiary ruling which limited her recross-examination of Mr. Matsumura regarding his alleged relationship with Mirage Massage violated her right to confront an adverse witness, guaranteed by Article I, Section 4(b) of the NMI Constitution and the Sixth Amendment of the U.S. Constitution.[6] (Appellant's Opening Brief at 8.) Appellant asserts that had she been allowed to do so, she could have demonstrated that Mr. Matsumura's association with the Mirage Massage, a competitor of Appellant's employer, CU Club, may have biased his testimony and undermined his credibility. *See id.* By limiting recross-examination, the trial court improperly limited Appellant's ability to show Mr. Matsumura's motive in testifying against her. *See id.*

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[6] The Sixth Amendment to the U.S. Constitution is made applicable to the CNMI by Section 501(a) of the COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA, 48 U.S.C. § 1601 note, *reprinted in* Commonwealth Code at B-101 et seq.

¶31 The government contends that the trial court did not abuse its discretion for a number of reasons. First, Appellant asked questions regarding Mr. Matsumura's association with Mirage Massage for the first and only time on recross-examination. Second, recross-examination on this issue was only limited after Appellant's trial counsel replied that he did not have an offer of proof when asked for one by the trial court. (E.R. at 12.) Thirdly, counsel for Appellant failed to object to the trial court's ruling limiting her re-cross examination of Mr. Matsumura on this issue. *See id.* Finally, Mr. Matsumura's testimony was thoroughly corroborated by physical evidence and by the testimony of witnesses.

¶32 In general, abuse of discretion review applies to limitations placed on counsel's questioning, but when the limitations directly implicate the core values of the Sixth Amendment right to confrontation, review is *de novo*. *See United States v. Given*, 164 F.3d 389 (9th Cir. 1999), *cert. denied*, *Hicks v. U.S.*, 528 U.S. 852, 120 S. Ct. 132, 145 L. Ed. 2d 112 (1999); *United States v. Neely*, 980 F.2d 1074, 1080 (7th Cir. 1992). A trial judge, however, does have discretion to limit cross-examination to avoid prejudice, repetition, confusion, or harassment. *See Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435, 89 L. Ed. 2d 674 (1986). Appellant's trial counsel did not object to the judge's ruling and made no offer of proof regarding the alleged bias of Mr. Matsumura. Aside from this problem, it's unclear why trial counsel would wait until recross-examination to explore the issue of Ms. Matsumura's potential bias if there was any substantiation at all that his competitive relationship with Mirage was a motive for his testimony. In light of the timing of this question and trial counsel's failure to object or offer proof, the trial court's decision to limit the questioning was not error.[7]

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[7] *See United States v. Given*, 164 F.3d 389 (9th Cir. 1999), *cert. denied*, *Hicks v. U.S.*, 528 U.S. 852, 120 S. Ct. 132, 145 L. Ed. 2d 112 (1999) (limitation on defendant's cross-examination of witness, who was defendant's secretary, preventing defendant from asking witness whether she had unrequited romantic interest in defendant, did not violate defendant's right of confrontation, where issue was not raised until recross-examination, and defense counsel failed to object or offer proof on the issue).

V. The Evidence Supports Appellant's Conviction

¶33 Appellant claims the government provided insufficient evidence to prove all of the elements of Promoting Prostitution in the Second Degree. (Appellant's Opening Brief at 10.) The evidence, however, included a videotape as well as oral testimony by two police officers and Mr. Matsumura regarding Appellant's prostitution proposition. Anyone claiming insufficiency of the evidence "faces a nearly insurmountable hurdle." *United States v. Teague*, 956 F.2d 1427, 1433 (7th Cir. 1992). Appellant must demonstrate that, viewing the evidence in the light most favorable to the government, no reasonable trier of fact could have convicted her. *See CNMI v. Seman*, 2001 MP 20 ¶ 9.

¶34 To support the contention that the government provided insufficient evidence to prove all of the elements of Promoting Prostitution in the Second Degree, Appellant argues that the government failed to prove that when Appellant stated to Mr. Matsumura that "you can have sex with a woman in the C.U. Club for $70.00 for one hour" that when she used the word "sex," Appellant meant "sexual conduct" as defined by 6 CMC § 1341(a). (T.Tr. at 53.) To support this reasoning, Appellant cites *United States v. Thomas*, 453 F.2d 141 (9th Cir. 1971), *cert. denied, Lucas v. U.S.*, 405 U.S. 1069 (1972), for the proposition that "mere suspicion or speculation cannot be the basis for the creation of logical inferences." *Id.* at 143.

¶35 The government argues, in response, that *Thomas* is clearly distinguishable from the instant matter. *Thomas* held that "mere presence or proximity to contraband in an automobile, without more, is insufficient to establish the guilt of a passenger for transporting." 453 F.2d at 143. As the government asserts, it does not rely solely on a suspicion or speculation that

Appellant was soliciting Mr. Matsumura for sex. Rather, the government shows that the combination of evidence - - the testimony of several witnesses, the video tape of Appellant in conversation with Mr. Matsumura, and Appellant's contradictory statements on the witness stand -- support the logical inference that Appellant was soliciting Mr. Matsumura for "sexual conduct". Because the government does not rely on mere suspicion or speculation regarding to support her conviction, we agree with the government that Appellant's reliance on *Thomas* is misplaced. Ample evidence supported the verdict.

VI. The Trial Court Had Jurisdiction Over Appellant

¶36 Appellant asks us to vacate her conviction on the ground that her prosecution was a nullity because it was commenced by an Acting Attorney General who had not been confirmed by the Senate pursuant to the requirements of N.M.I. Const. art. III, § 11.[8] Appellant also contends that because the Acting Attorney General appointment was not in accord with N.M.I. Const. art. III, § 11, the trial court lacked jurisdiction over her action. We find that Appellant's conviction was proper and that the trial court had jurisdiction over her action on the following grounds.

¶37 Rule 12 of the Commonwealth Rules of Criminal Procedure states, in pertinent part:

> (a) *Pleadings and Motions*. Pleadings in criminal proceedings shall be the complaint, information, and the pleas of not guilty, guilty, and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

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[8] The Attorney General Clause states in pertinent part that "[t]he governor shall appoint an Attorney General with the advice and consent of the Senate" and "[t]he Attorney General shall be responsible for providing legal advice to the governor and executive departments, representing the Commonwealth in all legal matters, and prosecuting violations of Commonwealth law." N.M.I. Const. art. III, § 11.

> (b) *Pretrial Motions*. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:
>
> > (1) Defenses and objections based on defects in the institution of prosecution; or
> >
> > (2) Defenses and objections based on defects in the complaint or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or
>
> . . . .
>
> (f) *Effect of Failure to Raise Defenses or Objections*. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

¶38 Appellant's challenges to the Acting Attorney General's appointment were capable of determination without a trial of the general issues (whether she was guilty of the charged offense). Because the challenges are based either "on defects in the institution of prosecution" Com. R. Crim. P. 12(b)(1), or "on defects in the complaint or information" Com. R. Crim. P. 12(b)(2)[9], Appellant was required to present these objection "prior to trial" or "at the time set by the court". She did neither, and therefore waived those challenges. Notwithstanding the waiver, she could have asked the trial court to entertain her challenges "for cause shown" Com. R. Crim. P. 12(f), but she did not. Arguably, she could have asked us to grant relief from the waiver, but she has not done so.[10] *See United States v. Suescun*, 237 F.3d 1284 (11th Cir. 2001).

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[9] Appellant fails to note the fact that unlike this post-trial appeal, the challenges to the Acting Attorney General's appointment discussed in the case of *Demapan v. Kara*, Civ. No. 99-0548, (N.M.I. Super. Ct. Jan. 20, 2000) (Decision and Order) were brought by a pre-trial motion for summary judgment.

[10] Because Appellant has not asked us to grant her relief from her waivers, we do not have to decide whether we have the authority under Com. R. Crim. P. 12(f) to do so.

¶39 Although she has made no mention of Com. R. Crim. P. 12(b) in her brief, Appellant apparently recognizes its application here, because, without citing the words in subsection (2) - - "fails to show jurisdiction in the court" - - she contends that we should dismiss the conviction against her for precisely that reason.[11] That is, she argues that the trial court lacked jurisdiction to entertain the prosecution against Appellant because the case was brought by an Acting Attorney General who had not been confirmed by the Senate pursuant to the requirements of N.M.I. Const. art. III, § 11.[12] (Appellant's Opening Brief at 13.) Because this issue is one of first impression before this Court, we find it helpful in reaching our result to examine the case law of other jurisdictions where the Government's power to prosecute has been challenged based on the analogous argument that the appointment of a United States Attorney which is not made as provided by the Appointment Clause of the Constitution, results in a lack of jurisdiction by the district court to hear a matter.

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[11] If the objection implicates the jurisdiction of the trial court to entertain the case, we must notice the issue. *See* Com. R. Crim. P. 12(b)(2).

[12] Appellant cites *United States v. Durham*, 941 F.2d 886 (9th Cir. 1991) to support the assertion that "[t]he Ninth Circuit adopted a similar principle for defects in appointments wherein it noted that the issue of whether the prosecution was instituted in conformity with law is a question of jurisdiction." (Appellant's Opening Brief at 13.) This Court notes that Appellant has somewhat misstated the principle expressed in *Durham.* Specifically, the *Durham* court stated that "[t]he lack of jurisdiction of the court shall be noticed by the court at any time during the pendency of the proceedings. *See* Fed. R. Crim. P. 12(b)(2)" 941 F.2d at 892. The *Durham* court examined whether the district court had jurisdiction to hear the case below solely in terms of the issue of whether or not the Special Assistant United States Attorney was operating under the direction and supervision of the United States Attorney's office. The court of appeals concluded that the issue was not properly presented for appeal and remanded to the district court for the purpose of making findings on the extent and direction and supervision of the Special Assistant United States Attorney by the U.S. Attorney's Office. *Id.* Significant for the purposes of this appeal, the *Durham* court rejected the argument that the Special Assistant's defective appointment rendered the indictment invalid and subject to dismissal, stating that "this alone would not be sufficient to upset the conviction" 941 F.2d at 892 (*citing United States v. Mechanik*, 475 U.S. 66, 72-73, 106 S. Ct. 938, 942-43, 89 L. Ed. 2d 50 (1986)). This issue was resolved by the district court finding that there was adequate supervision and control exercised by the U.S. Attorney's Office in the unpublished opinion of *U.S. v. Durham*, 990 F.2d 1262 (9th Cir. 1993). Certiorari was then denied by the Supreme Court in *Hanoum v. U.S.*, 510 U.S. 1018, 114 S. Ct. 617, 126 L. Ed. 2d 581 (1993).

¶40 A district court lacks jurisdiction to entertain a criminal case if it appears that the Government "lacked power to prosecute the defendant."[13] *United States v. Suescun*, 237 F.3d 1284, 1287 (11th Cir. 2001) (*citing United States v. Fitzhugh*, 78 F.3d 1326, 1330 (8th Cir. 1996)). Recent cases have held that an appointment of a United States Attorney that is not made as provided by the Appointments Clause does not affect the Government's power to prosecute. *See, e.g., United States v. Whitehead,* 200 F.3d 634, 641, *cert. denied,* 531 U.S. 885, 121 S. Ct. 202, 148 L. Ed. 2d 141 (2000) (rejecting the argument that the district court lacked jurisdiction over the appellant's case because the interim appointment of the U.S. Attorney in the matter by the judges of the district court pursuant to 28 U.S.C. § 546(d) violated the Appointments Clause of the Constitution, U.S. Const. art. II, § 2, cl. 2); *United States v. Gantt*[14], 194 F.3d 987, 998 (9th Cir. 1999) (holding that while an unconstitutional appointment of a United States Attorney would

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[13] Appellant cites *United States v. Providence Journal Co*., 485 U.S. 693, 108 S. Ct. 1502, 99 L. Ed. 785 (1988) as establishing the "general principle that a court lacks jurisdiction over an action commenced on behalf of the government by a person not authorized to do so." (Appellant's Opening Brief at 13.) However, the holding of *Providence* does not, as Appellant asserts, provide a broad and general reading of jurisdiction, but establishes a narrow holding that a federal statute deprives the special prosecutor of the authority to pursue litigation in the Supreme Court on behalf of the United States when the Solicitor General declines to petition for certiorari or to authorize the filing of such petition. 485 U.S. at 699, 108 S. Ct. 1506, 99 L. Ed. 785 (1988).

[14] In *United States v. Gantt*, 194 F.3d 987 (9th Cir. 1999), the Ninth Circuit held that an infirmity in the appointment of a United States Attorney affected the court's jurisdiction to consider an appeal brought by the government pursuant to 18 U.S.C. § 3731. In *Gantt*, the defendant questioned the court of appeals' jurisdiction to hear the appeal because an interim United States Attorney, who had been appointed under 28 U.S.C. § 546(d), had signed the section 3731 certificate. Section 3731 mandates that "the United States [A]ttorney certif[y] . . . that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding." 194 F.3d at 997 (*quoting* 18 U.S.C. § 3731). The court agreed that an interim United States Attorney is "the United States Attorney" for purposes of § 3731 appeal, but reasoned that if the interim United States Attorney's appointment were constitutionally invalid, the certificate would be invalid and the appeal would have to be dismissed. *Id.* at 998. Despite the fact that *Gantt* held that an unconstitutional appointment of a United States Attorney would affect its jurisdiction to entertain a § 3731 appeal, the court cautioned that such an appointment "would not generally affect the jurisdiction of this court so long as a proper representative of the government participated in the action . . . The constitutionality of § 546(d) would not affect the validity of indictments, by contrast, as indictments need only be signed by an 'attorney for the government.'" *Id.* (c*iting* Fed. R. Crim. P. 7(c)(1)). The Information in the instant case was signed by an Assistant Attorney General, an attorney for the Commonwealth Government. (E.R. at 6.)

affect its ability to hear an appeal based on 18 U.S.C. § 3731, such an appointment "would not generally affect the jurisdiction of this court so long as a proper representative of the government participated in the action"); *Fitzhugh*, 78 F.3d at 1329-30 (holding that an indictment obtained by an Independent Counsel who may have exceeded his authority did not affect the government's power to prosecute and thus did not deprive the district court of jurisdiction); *United States v. Easton*, 937 F.2d 160, 162 (5th Cir. 1991) (holding that the district court's jurisdiction was not impacted by the fact that the assistant United State's Attorney who signed the indictment had been directed to do so by a United States Attorney who was disqualified to participate in the prosecution of the case).

¶41 We conclude that even if we were to assume that the Acting Attorney General's appointment was invalid[15] - - because it was not made in conformance with N.M.I. Const. art. III, § 11 - - the appointment did not deprive the trial court of jurisdiction to entertain the case and to adjudicate Appellant guilty of the charged offense. Appellant waived her objection to the validity of the prosecution because she did not present it as required by Com. R. Crim. P. 12(b), and the jurisdictional exception does not apply.

VII. Appellant's Sentence Was Properly Imposed By The Trial Court

¶42 Appellant concludes her appeal by arguing that the sentence leveled against her by the trial court is illegal, constitutes an abuse of discretion, is plain error, and should, therefore, be set aside. After reviewing Appellant's sentencing arguments, we find them meritless and uphold the trial court's sentence against her for the reasons outlined below.

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[15] Nothing herein should be interpreted as expressing any opinion regarding the validity of the Acting Attorney General's appointment.

A. Appellant's Sentence Is Legal

¶43 Appellant argues that her sentence should be set aside because the trial court failed to make specific findings as to why her sentence "will or will not serve the interest of justice" pursuant to the requirements of 6 CMC § 4115. (Appellant's Opening Brief at 19.) The legality of a sentence is a question of law and is reviewed *de novo. Commonwealth v. Oden*, 3 N.M.I. 190, 191 (1991). Pursuant to 6 CMC § 4115, "[t]he court, in imposing any felony sentence, shall enter specific findings why a sentence, fine, alternative sentence, suspension of a sentence, community service or probation, will or will not serve the interests of justice." The trial court, at the sentencing hearing on February 14, 2000, orally provided several distinct reasons for the sentence imposed against Appellant. *(See* T.Tr. at 182-83.) As such, we find that the sentence imposed by the trial court was legal.

B. The Trial Court Did Not Abuse Its Discretion By Not Ordering A Presentence Investigation And Report

¶44 Appellant argues that the trial court's failure to order a presentence investigation and report pursuant to Com. R. Cr. Proc. 32(c)(1) constitutes an abuse of discretion. (Appellant's Opening Brief at 19.) Commonwealth Rules of Criminal Procedure 32(c)(1) states, in pertinent part:

> The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

Appellant cites *United States v. Turner*, 905 F.2d 300 (1990) to support her argument that a presentence investigation and report is mandatory in the Commonwealth. (Appellant's Opening Brief at 19.) We agree with Appellant that it is ordinarily desirable to obtain a presentence investigation and report. However, we note that the Appellant did not request a presentence investigation and report at any time prior to sentencing. (Appellee's Response Brief at 31.) As such, Appellant raises the issue of the presentencing investigation and report for the first time on appeal. When the court does not order a report the defendant has the burden of showing an abuse of discretion by the Court or actual prejudice to the defendant from the lack of the report. *See United States v. Latner*, 702 F.2d 947 (11th Cir. 1983), *cert. denied*, 464 U.S. 914, 102 S. Ct. 274, 78 L .Ed .2d 255 (1983). In *Latner*, the court found that the trial court did not abuse its discretion in imposing a sentence without the benefit of a presentence report, where there was sufficient record information to enable the court to make a fair sentencing determination. *See also, United States v. Whitworth*, 852 F.2d 1268 (9th Cir. 1988) (decision to dispense with investigation report prior to sentencing tax evasion and espionage defendant did not undermine sentencing in case in which trial involved production of materials relating to virtually every aspect of defendant's life, his career, his personality, and his beliefs). In this matter, the trial court heard extensive testimony about the crime and Appellant's background. (T.Tr. at 97-104, 109-10 & 135-39) *See* Com. R. Crim. Proc. 32(c)(2). As such, while Appellant has alleged an abuse of discretion and prejudice, she has not made a showing of either.

¶45 Indeed, the case which Appellant cites to support her argument, *Commonwealth v. Ahn*, 3 CR 35, 43 (Dist. Ct. App. Div. 1987), actually supports the fact that the trial court did not abuse its discretion in not ordering a pre-sentencing report. In *Ahn*, the defendant on appeal asserted that the lack of a presentence investigation was an abuse of discretion. The district court

examined the evidence presented regarding defendant and the fact that he was given an opportunity to present information to the trial court. The court found "no indication in [sic] record on appeal that defendant was denied the opportunity [sic] present anything he sought to present." *Id.* at 44. *Ahn*'s facts are similar to that of Appellant in this matter. The trial court gave Appellant the opportunity to present her case fully. As in *Ahn*, Appellant has not shown any prejudice. We find that, on the whole record, there was no abuse of discretion by the trial court in not ordering a presentencing investigation and report, and if error, it was harmess.

C. The Trial Court Based Appellant's Sentence On An Individualized Assessment

¶46 Appellant's argument that she was not individually assessed, prior to sentencing, is meritless. As the government points out, the trial court heard testimony regarding Appellant's culpability from witnesses, including Appellant herself. (Appellee's Response Brief at 32.) The trial court also reviewed physical evidence prior to rendering a sentence. In fact, Appellant's trial counsel was asked twice at the sentencing hearing whether Appellant had any questions regarding the penalties being imposed by the trial court. (Appellant's Excepts Of Record at 20.) No questions were forthcoming from Appellant. Instead, Appellant now asserts that the trial court abused its discretion. We disagree.

¶47 Moreover, the facts of the case cited to support her argument, *United States v. Baker*, 771 F.2d 1362, 1365 (9th Cir. 1985), are distinguishable from those of Appellant. Namely, *Baker* presents the case of five defendants who each receive the maximum sentence for the charged crimes, despite the fact that they had different degrees of culpability. In

this case, Appellant was the only defendant and was assessed an individualized penalty by the trial court after a careful consideration of the evidence presented.

D. The Trial Court Properly Imposed Penalties

¶48 Finally, Appellant challenges the imposition of the $1,000 fine and the $2,000 mandatory fee assessment by the trial court. Appellant, however, failed to raise this issue in the trial court and failed object at the sentencing hearing. Because Appellant failed to object to the penalties imposed in the trial court, we review their imposition for plain error. *See United States v. Kelly*, 993 F.2d 702, 705 (9th Cir. 1993)[16]; *United States v. Lopez-Cavasos*, 915 F.2d 474, 475-76 (9th Cir. 1990); *United States v. Anderson*, 850 F.2d 563, 566 n.2 (9th Cir. 1988) ("Imposition of an erroneous sentence may be reviewed for plain error."). Reversal under the plain error rule is only proper when two factors exist: (1) substantial rights of the defendant are affected, and (2) it is necessary to safeguard the integrity and reputation of the judicial process or to forestall a miscarriage of justice. *See Norita v. Norita,* 4 N.M.I. 381 (1996). We find no plain error by the trial court in imposing the penalties against Appellant.

¶49 Appellant raises two arguments relating to the imposition of the penalties. She first argues that Com. R. Crim. P. 32 requires knowledge of a defendant's financial condition prior to imposing a fine. (Appellant's Opening Brief at 20.) We have already determined infra

[16] In *United States v. Kelly*, 993 F.2d 702, 705 (9th Cir. 1993), appellant challenged the inclusion, in calculating his criminal history score, of a 1984 misdemeanor conviction obtained without the assistance of counsel. The court reviewed the issue for plain error and found none concluding that appellant had failed to prove the constitutional infirmity of his conviction.

that the trial court did not abuse its discretion in not ordering a pre-sentencing report. Moreover, the record below reflects that not only did the trial court hear testimony concerning Appellant's salary prior to sentencing (T.Tr. at 136-37), but Appellant asked the trial court, by and through counsel, to assess the maximum fees and fine against her (T.Tr. at 181). While this Court upholds the principle that an inability to pay a penalty by a defendant should be considered by the trial court in sentencing, *U.S. v. Rafferty*, 911 F.2d 227 (9th Cir. 1990), it is the Appellant who bears the burden of proof that she was financially incapable of paying the penalties imposed by the trial court, *U.S. v. Quan-Guerra*, 929 F.2d 1425 (9th Cir. 1991)[17].

¶50 Appellant' second argument is that "6 CMC § 1346(e)(3) conditions payment of the $2,000.00 'special assessment' *only if* the person possessed the ability to pay $2,000." (emphasis added). (Appellant's Opening Brief at 21.) Title 6 of the Commonwealth Code at section 1346(e)(3) states, in pertinent part, "[t]he court may not suspend payment of all or part of the fee unless it finds that the person does not have the ability to pay.". It is clear that the language of 6 CMC § 1346(e)(3) is mandatory, not permissive. As such, absent a showing of an inability to pay by Appellant, the trial court properly imposed the $2,000 mandatory fee. We find that no plain error in the trial court's assessment of the penalties against Appellant.

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[17] In *U.S. v. Quan-Guerra*, 929 F.2d 1425 (9th Cir. 1991), the court held that it is the defendant who has the burden of proof to demonstrate that he cannot pay fine imposed by court as part of sentence. *See also*, *U.S. v. Sager*, 227 F.3d 1138, 1147 (9th Cir. 2000).

CONCLUSION

¶51 We hereby AFFIRM the sentence and conviction of the trial court based on the foregoing.

SO ORDERED this 26th day of February 2002.

/s/
MIGUEL S. DEMAPAN, Chief Justice

/s/
ALEXANDRO C. CASTRO, Associate Justice

/s/
VIRGINIA SABLAN-ONERHEIM, Justice *Pro Tempore*