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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

MINTO MINTO,
Defendant-Appellant.

SUPREME COURT NO. 2008-SCC-0034-CRM
SUPERIOR COURT NO. 07-0088 E

Cite as: 2011 MP 14

Decided December 16, 2011

Joseph E. Horey, O'Connor Berman Dotts & Banes, Saipan, MP for Defendant-Appellant.
Tiberius Mocanu, Assistant Attorney General, Saipan, MP for Plaintiff-Appellee.

BEFORE: ALEXANDRO C. CASTRO, Acting Chief Justice; JOHN A. MANGLONA, Associate Justice; JESUS C. BORJA, Justice Pro Tem.

CASTRO, J.:

¶ 1 Defendant Minto Minto ("Minto") appeals his convictions for conspiracy and solicitation to commit marriage fraud on the grounds that: (1) the Commonwealth marriage fraud statute at issue was preempted by federal law; (2) Commonwealth immigration statutes were unconstitutional as applied to Minto; (3) it was legally impossible for Minto to solicit marriage fraud; and (4) evidence was insufficient for the jury to find beyond a reasonable doubt that Minto had committed the crimes alleged. In addition, Minto argues that he wins by default because the Commonwealth filed an inadequate brief that did not address and thus waived most issues raised in his opening brief.

¶ 2 We hold that: (1) the doctrine of waiver did not apply to the Commonwealth as the responding party even though it neglected to address several of Minto's substantive arguments; (2) federal law did not preempt the Commonwealth immigration statutes underlying Minto's convictions until after judgment was entered against him; (3) the marriage fraud statute did not violate Minto's constitutional rights to due process and equal protection because the statute was narrowly tailored to serve the Commonwealth's compelling interest in controlling immigration to the Commonwealth; (4) clerical errors did not make the statute at issue unconstitutionally vague because it gave a person of ordinary intelligence a reasonable opportunity to know what conduct was prohibited; (5) it was legally possible for Minto to solicit a United States citizen to commit marriage fraud; and (6) evidence was sufficient for any rational trier of fact to have found the essential elements of conspiracy and solicitation to commit marriage fraud beyond a reasonable doubt. Accordingly, Minto's convictions are AFFIRMED.

I

¶ 3 This appeal arises from the attempted marriage of Alsilynn Mallens ("Mallens") to MD. Saiful Islam ("Islam"). The participants in the attempted marriage included Minto, his wife Maria "Trina" Aurelio Ray ("Trina"), Severene Kosam ("Severene"), Phoebe Kosam ("Phoebe"), and Islam's unnamed and unidentified friend. During March 2007, Minto and his wife approached Severene in person to inquire whether she would be interested in marrying a Bangladeshi man. When told that Severene was ineligible for marriage because she was already married to another Bangladeshi, Minto asked if Severene had a friend who could marry. Based on her initial conversation with Minto, Severene then relayed the inquiry to Mallens, who in turn became the intended bride in the marriage fraud underlying Minto's conviction. Mallens was not contemplating marriage in March 2007 when Severene made her inquiry. During the relevant events, Mallens had lived with her boyfriend for over three years and they still lived together during the trial in August 2008.

¶ 4 Several days after Minto and his wife first approached Severene, they drove her and Mallens from their respective homes to a meeting at Minto's apartment. Present at that meeting were Minto, his wife, Severene, Mallens, Islam, and Islam's friend. During the meeting, Islam offered to pay Mallens to marry him. Several days later, Minto drove Severene, Mallens, Phoebe, and his wife to a second meeting where they met Islam and Islam's unidentified friend. At that second meeting, the parties negotiated a price for Mallens to marry Islam. There was also a discussion as to what documents were necessary for the arranged marriage. No part of the conversation included discussions of love, children, or the married couple living together.

¶ 5 Minto played an active role in the negotiations by translating for Islam and participating in the discussions of his own accord. When the parties were discussing price, Minto responded that Mallens would only get $3,000 if Islam obtained a green card. The final agreement was for Mallens to receive $150 for turning in a marriage application, $1,000 to marry Islam, and $3,000 should Islam receive a green card. In addition, Islam was to pay Minto $1,000 for his part in the transaction.

¶ 6 The day after the second meeting, the same group met at Minto's apartment in As Lito, Saipan, to assemble the documents required to complete the fraudulent marriage application. The entire group traveled to several different locations to obtain a birth certificate and identification for Mallens, notarize the marriage application, and submit the application to the Saipan Mayor's Office. Again, Minto took an active role by identifying the documents needed to complete the marriage application and directing the group around Saipan. In addition, Minto served as a witness when the documents were notarized. Severene submitted the application on behalf of Mallens and Islam because Mallens was too afraid to submit it. Afterward, Islam paid Mallens $150 in Minto's presence despite knowing Severene had been the one to submit the application.

¶ 7 Mallens never married Islam. At trial, Mallens acknowledged she attempted to marry Islam to solve some of her financial troubles and to help Islam stay on Saipan. Investigator Erwin Flores testified that Islam would have received an immigration benefit had he married Mallens. Evidence submitted also showed that Islam did not have a valid right to be in the Commonwealth in 2007 when he attempted to marry Mallens because his entry permit to the Commonwealth had expired in May 2005. Mallens further testified that she never intended to live with Islam and did not love him. About a month after Severene submitted the marriage application, Minto demanded Mallens give him the $150 Islam had paid Mallens. Minto told Mallens he needed to pay Islam back because Mallens had not married Islam. Mallens did not pay Minto any money.

¶ 8 Minto was charged in April 2007 after Severene reported the attempted Islam-Mallens marriage to the Attorney General's Investigative Unit. A jury convicted Minto of one count each of conspiracy to

commit marriage fraud and solicitation of marriage fraud. Minto filed a Notice of Appeal on November 3, 2008.

¶ 9 During the relevant events, the United States Congress debated a bill that fundamentally altered Commonwealth immigration law including the laws underlying Minto's conviction. In May 2008, President George W. Bush signed into law the Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, 122 Stat. 754 ("CNRA"), which applies United States federal immigration laws to the Commonwealth. CNRA §§ 701-05. Federal immigration law became effective in the Commonwealth on the "transition effective date," November 28, 2009. *Commonwealth v. United States*, 670 F. Supp. 2d 65, 73 (D.D.C. 2009). In March 2010, the Commonwealth Legislature removed Commonwealth immigration law from the Commonwealth Code, retroactive to November 28, 2009. PL 17-1. Public Law 17-1 revoked 3 CMC §§ 4366 and 4371, two of the statutory provisions under which Minto was convicted.

II

¶ 10 The Supreme Court has appellate jurisdiction over judgments and orders of the Superior Court of the Commonwealth. 1 CMC § 3102(a).

III

A. Waiver

¶ 11 Minto argues the Commonwealth waived certain issues raised in his opening brief because it failed to respond to them. "The applicability of a legal doctrine is a question of law that is reviewed de novo." *People v. Thousand*, 631 N.W.2d 694, 697 (Mich. 2001); *cf. Sonoda v. Villagomez*, 4 NMI 34, 35-36 (1993) ("Each of the three issues raises a question of law which we review de novo."). Waiver is a legal doctrine, and the applicable standard of review is thus de novo.

¶ 12 NMI Supreme Court Rule 31(c) provides that "[a]n appellee who fails to file a brief will not be heard at oral argument unless the Court grants permission." Although the NMI Supreme Court Rules specify what happens when an appellee fails to file a brief, they are silent as to what happens when an appellee fails to address specific issues raised in the appellant's brief. To resolve this issue, we must therefore look to the interpretation of Federal Rule of Appellate Procedure 31(c), the federal counterpart to NMI Supreme Court Rule 31(c). *See Ishimatsu v. Royal Crown Ins. Corp.*, 2010 MP 8 ¶ 60 (citing *Ishimatsu v. Royal Crown Ins. Corp.*, 2006 MP 9 ¶ 7 n.3) ("[W]hen our rules are patterned after the federal rules it is appropriate to look to federal interpretation for guidance.").

¶ 13 Federal Rule of Appellate Procedure 31(c) "require[s] that the answering brief address every relevant, non-frivolous issue presented by the appellant or petitioner." *Leslie v. Att'y Gen. of the United States*, 611 F.3d 171, 175 n.2 (3d Cir. 2010). In *Leslie*, the Third Circuit stated that "we construe the word 'brief' [in Federal Rule of Appellate Procedure 31(c)] to require that the answering brief address every

relevant, non-frivolous issue presented by the appellant or petitioner." *Id.* Here, the Commonwealth's brief neglected to address several of Minto's substantive arguments. Pursuant to *Leslie*, we treat the Commonwealth as if it failed to file a brief with regard to each non-frivolous argument made by Minto. Therefore, the greatest sanction available against the Commonwealth for failing to address issues in its responsive brief would be to restrict its oral argument to the issues it briefed, as provided for by NMI Supreme Court Rule 31(c).

¶ 14 Moreover, "it is for the Court to evaluate the issues presented by the appellant or petitioner." *Leslie*, 611 F.3d at 175 n.2. Minto's waiver argument would result in legal absurdities as criminal defendants would automatically win their appeals if the Commonwealth filed non-responsive briefs. While Minto is correct that the Commonwealth does apply a waiver doctrine, this doctrine is limited to appellants or cross-appellants who attempt to raise issues for the first time on appeal. *See, e.g.*, *Commonwealth v. Castro*, 2008 MP 18 ¶¶ 24-26 (concluding a criminal appellant waived his double jeopardy argument by failing to preserve it for appeal during trial and again failing to argue the issue in his opening brief); *Commonwealth v. Arriola*, 2002 MP 8 ¶¶ 4-8 (concluding the Commonwealth, as the appellant, waived its right to appeal an order because it failed to properly raise the issue in its opening brief).

¶ 15 Furthermore, Minto does not provide adequate justification for his assertions. The four cases he primarily relies upon do not apply. In the first case, *Rose v. United States*, 629 A.2d 526, 532-33 (D.C. 1993), the government-appellee expressly waived its rights to argue issues. The remaining three cases all relate to issues raised for the first time on appeal. In *United States v. Rodriguez*, 888 F.2d 519, 524 (7th Cir. 1989), the court denied the government-appellee's attempt to raise an issue for the first time during oral argument. Similarly, *State v. Jones*, 771 A.2d 407, 437 (Md. Ct. Spec. App. 2001) and *Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990), involve government-appellants who failed to raise issues in an opening appellant brief and instead raised new issues later in the appeals process after the adverse party was not in a position to respond. Unlike the opposing parties in *Rodriguez*, *Jones*, and *Wilson*, Minto has not suffered any prejudice as a result of the Commonwealth's briefing. Minto was able to fully brief and argue the issues and remained in a position to respond throughout the briefing phase of his appeal.

B. Preemption

¶ 16 Minto argues that 3 CMC § 4366, the Commonwealth marriage fraud statute underlying both of his convictions, was preempted by CNRA and, as a result, his conviction must therefore abate. "[P]reemption is . . . a question of law reviewed de novo." *Associated Builders & Contractors v. Local 302 IBEW*, 109 F.3d 1353, 1355 (9th Cir. 1997) (citing *Maynard v. City of San Jose*, 37 F.3d 1396, 1405 (9th Cir. 1994)). Minto's preemption argument turns upon the date Commonwealth immigration law was

preempted by CNRA. Preemption analysis "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990) (quoting *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985)).

1. *Preemption Raised for the First Time on Appeal*

¶ 17 As a general rule, we do not hear an issue raised for the first time on appeal, such as Minto's preemption argument, unless it is subject to one of three narrow exceptions:

> (1) a new theory or issue arises because of a change in the law while the appeal was pending; (2) the issue is only one of law not relying on any factual record; or (3) plain error occurred and an injustice might otherwise result if the appellate court does not consider the issue.

Camacho v. N. Marianas Ret. Fund, 1 NMI 362, 372 (1990)). The second exception applies here. "[P]roper resolution of [this] issue does not rely on or affect the factual record developed by the parties, nor does it depend on any complex . . . analysis." *Telco Leasing, Inc. v. Transwestern Title Co.*, 630 F.2d 691, 694 (9th Cir. 1980). Thus, we examine Minto's preemption argument.

2. Preemption of 3 CMC § 4366 does not Apply to Minto's Convictions

¶ 18 CNRA became "effective on the first day of the first full month commencing 1 year after the date of enactment of the Consolidated Natural Resources Act of 2008." CNRA § 702(a). On that date, "United States immigration laws . . . shall apply to the Commonwealth of the Northern Mariana Islands." *Id.* (internal punctuation omitted).[1] This issue already was litigated and decided in the United States District Courts. The effective date of CNRA is November 28, 2009.[2] *See Commonwealth v. United States*, 670 F. Supp. 2d at 73 (quoting CNRA) ("The CNRA provides that federal immigration law shall apply in the CNMI beginning on the transition program effective date (November 28, 2009)."). Final judgment was entered against Minto on October 8, 2008, more than a year before CNRA became law in the Commonwealth. Thus, unless Minto could establish that Congress intended CNRA to have a retroactive

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[1] (a) APPLICATION OF THE IMMIGRATION AND NATIONALITY ACT . . .

> (1) . . . effective on the first day of the first full month commencing 1 year after the date of enactment of the Consolidated Natural Resources Act of 2008 . . . the provisions of [United States] 'immigration laws' (as defined in . . . the Immigration and Nationality Act (8 U.S.C. § 1101(a)(17))) shall apply to the Commonwealth of the Northern Mariana Islands . . . .

CNRA § 702(a).

[2] Pursuant to CNRA § 702(f), the federal marriage fraud statute superseded and replaced section 4366 because the latter was regarded by the Commonwealth Legislature as one of the Commonwealth laws relating to the admission and removal of aliens from the Commonwealth. *See* PL 15-17, § 2 (enacting section 4366 as an amendment to the Commonwealth Entry and Deportation Act); PL 3-105, § 2 ("[The Commonwealth Entry and Deportation Act of 1983] regulate[d] the entry of non-immigrating aliens into the Commonwealth and provide[d] entry and deportation procedures.").

effect, Minto's convictions were valid because CNRA did not preempt section 4366 until well after his convictions.

¶ 19 The United States Supreme Court has stated on more than one occasion that "[t]he first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . ." *Greene v. United States*, 376 U.S. 149, 160 (1963) (quoting *Union Pac. R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)) (internal punctuation omitted); *see also Gioda v. Saipan Stevedoring Co.*, 855 F.2d 625, 630 (9th Cir. 1988) ("Ordinarily, a court is to apply the law in effect at the time it renders its decision."); *Torres v. Commonwealth Utils. Corp.*, 2009 MP 14 ¶ 29 (holding that statutes and constitutional amendments are presumed to give only prospective application). Minto points to no "unequivocal and inflexible import of the terms [of CNRA] and the manifest intention of the [United States Congress]" to suggest CNRA had retroactive effect. *Laramie Stock Yards*, 231 U.S. at 199. In light of these authorities, CNRA was not retroactive.

¶ 20 Moreover, despite Minto's insistence, this is not one of the limited circumstances where a conviction must abate if the conduct in question becomes lawful during the appeals process. *Hamm v. Rock Hill*, 379 U.S. 306, 312 (1964) ("[C]onvictions on direct review at the time the conduct in question is rendered no longer unlawful by statute[] must abate."). The rule of abatement from *Hamm* does not apply to Minto's conviction. First, the *Hamm* Court inferred Congress had implicitly intended to abate ongoing prosecutions. 379 U.S. at 313-14. It did not alter the general rule that "legislation must be considered as addressed to the future . . . ." *Greene*, 376 U.S. at 160. Second, *Hamm* stands for the proposition that federal laws protecting federally granted rights automatically have retroactive application with regard to criminal prosecutions in state court. 379 U.S. at 315-16. In that regard, *Hamm* can be differentiated from this case. The state statutes in *Hamm* were in direct conflict with the federal Civil Rights Act of 1964, which legalized conduct that the criminal defendants were prosecuted for committing. *Id.* at 315. As the United States Supreme Court stated, the Civil Rights Act of 1964 substituted a federal right for what previously had been criminalized by the state. *Id.* In contrast, CNRA did not grant new federal rights to Minto or any other participant in the marriage fraud. Federal immigration law prohibits marriage fraud through a provision that is analogous to section 4366.[3] For that reason, it would be absurd to infer Congress intended to abate prosecution under Commonwealth immigration law for marriage fraud that occurred before CNRA passed.

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[3] "Any individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, or fined not more than $ 250,000, or both." 8 U.S.C. § 1325(c).

C. Constitutionality of Commonwealth Marriage Fraud Statutes

¶ 21 Minto makes three challenges to the constitutionality of the Commonwealth marriage fraud statutes. First, Minto asserts 3 CMC § 4366 violated his rights to substantive due process under Article I, section 5 of the Commonwealth Constitution and under the Fourteenth Amendment of the United States Constitution by interfering with his fundamental right to marry. Second, Minto asserts section 4366 violated his right to equal protection under Article I, section 6 of the Commonwealth Constitution and under the Fourteenth Amendment of the United States Constitution. Finally, Minto challenges 3 CMC § 4371 as unconstitutionally vague due to a clerical error later corrected by the Law Revision Commission. "[C]onstitutional issues are subject to de novo review on appeal." *Office of the Att'y Gen. v. Estel*, 2004 MP 20 ¶ 10 (citing *Office of Att'y. Gen. v. Rivera*, 3 NMI 436, 441 (1993)).

1. Title 3 CMC § 4366 did not Violate Minto's Rights to Substantive Due Process

¶ 22 Article I, section 5 of the Commonwealth Constitution is taken directly from section 1 of the Fourteenth Amendment to the United States Constitution. *See Commonwealth v. Hossain*, 2010 MP 21 ¶ 9 (Slip Opinion, Dec. 31, 2010) (quoting Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands at 20 (Dec. 6, 1976)). As such, federal case law interpreting the Fourteenth Amendment is analogous to Article I, section 5 and directly applicable to the Commonwealth. *Id.*; *accord Office of the Att'y Gen. v. Honrado*, 1996 MP 15 ¶ 15 (citing *Rivera*, 3 NMI at 445 n.3) ("[T]he protections of Art. I, § 5 of the Commonwealth Constitution are coextensive with the due process clauses of the U.S. Constitution."). Moreover, the Fourteenth Amendment applies to the Commonwealth as if it were one of the several states. Covenant § 501.[4] Thus, all CNMI residents, including aliens "are afforded the same Fourteenth Amendment Due Process protections as mainland U.S. citizens." *Hossain*, 2010 MP 21 ¶ 13; *see also Sagana v. Tenorio*, 384 F.3d 731, 740 (9th Cir. 2004) (citations omitted) ("[a]liens who are in the jurisdiction of the United States under any status, even as illegal entrants or under a legal fiction, are entitled to the protections of the Fourteenth Amendment.").

¶ 23 "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men[]" and is a fundamental right protected by the Fourteenth Amendment. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (declaring Virginia antimiscegenation statutes unconstitutional under the Fourteenth Amendment Due Process and Equal Protection clauses); *see also Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (striking down a state statute that blocked access to contraception because it interfered in the marital relationship). Because the right to marry is a

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[4] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, § 501 (48 U.S.C. § 1801 note) ("To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: . . . Amendment 14.").

fundamental right, any interference by the government with the right to marry is subject to strict scrutiny analysis, *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978), and must be "narrowly tailored to serve a compelling state interest." *Washington. v. Glucksberg*, 521 U.S. 702, 721 (1997); *see also In Re Seman*, 3 NMI 57, 67 (1992) (citations omitted) ("[W]hen the individual interest restricted by statute is a fundamental right, the appropriate test, in determining the constitutionality of the statute, is the compelling state interest test--i.e., is there a compelling need or justification for the state action, by statute or otherwise, to override the personal right asserted.").

a. Compelling Government Interest

¶ 24 "[C]ontrolling immigration is a compelling state interest . . . ." *Estel*, 2004 MP 20 ¶ 1. "For reasons including the population and size disparity between the CNMI and the rest of the U.S. and preservation of the CNMI's unique Chamorro and Carolinian ethnic and cultural heritage, the CNMI [was] permitted to exercise plenary authority over its own immigration." *Tran v. Commonwealth*, 780 F. Supp. 709, 713 (D. NMI 1991) (citing Covenant § 503(a)); *see also Office of the Att'y Gen. v. Sagun*, 1999 MP 19 ¶ 8.

b. Narrowly Tailored

¶ 25 The Commonwealth narrowly tailored section 4366 to serve its compelling interests in controlling immigration. On its face, the statute prohibited marriages whose sole purpose was to obtain a labor or immigration benefit, or to evade Commonwealth or United States immigration laws. 3 CMC § 4366. "We give statutory language its plain meaning." *Marianas Eye Inst. v. Moses*, 2011 MP 1 ¶ 11 (citing *Villanueva v. Tinian Shipping & Transp., Inc.*, 2005 MP 12 ¶ 14). In that regard, section 4366 clearly prohibits only marriages intended to obtain a labor or immigration benefit or evade immigration laws. Thus, the Legislature limited the reach of the statute to exclude a person who had any additional reason to marry. Moreover, the statute does not broadly infringe on the rights of large groups of people to marry. It did not identify specific groups of people who could not marry, such as was the case in *Loving*, 388 U.S. at 6. There, Virginia "prohibit[ed] and punish[ed] marriages on the basis of racial classifications." *Id.* Under section 4366, aliens could still marry citizens, permanent residents, or other aliens. They simply could not marry for the sole purpose of receiving a labor or immigration benefit. Moreover, section 4366 did not criminalize the behaviors of married couples in the personal choices they made regarding family planning or their conduct in the bedroom. *See Griswold*, 381 U.S. at 479. Ultimately, the enactment of section 4366 did not violate "basic values implicit in the concept of ordered liberty." *Id.* at 500 (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)) (internal quotations omitted). Therefore, 3 CMC § 4366 was narrowly tailored to protect the Commonwealth's compelling interests as a sovereign over immigration and does not constitute a violation of Minto's substantive due process rights.

2. Title 3 CMC § 4366 did not Violate Minto's Rights to Equal Protection Under the Law

¶ 26 The Equal Protection Clause of the Commonwealth Constitution, Article I, section 6, is taken directly from section 1 of the Fourteenth Amendment to the United States Constitution. Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands at 21. Article I, section 6 commands that "[n]o person shall be denied the equal protection of the laws." It "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (superseded by statute on other grounds) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). "Traditional equal protection analysis under the United States Constitution scrutinizes laws which (a) affect a 'suspect class,' or (b) violate a fundamental right." *In Re Blankenship*, 3 NMI 209, 219 (1992) (citations omitted) (applying the rational basis test after determining applicants to the Commonwealth bar are not a protected class and admission to the Commonwealth bar is not a fundamental right). "Suspect classes are groupings based on factors such as race or national origin . . . ." *id.*, while marriage is protected as a fundamental right. *Loving*, 388 U.S. at 12.

¶ 27 Assuming section 4366 is subject to strict scrutiny because it affects a fundamental right, it would "be sustained only if [the statute was] suitably tailored to serve a compelling state interest." *City of Cleburne*, 388 U.S. at 440; *cf. Glucksberg*, 521 U.S. at 721 (internal quotations omitted) ("[T]he Fourteenth Amendment forbids the government to infringe fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."). In which case, an analysis under the Equal Protection Clause is identical to that provided for due process because both apply strict scrutiny. With that in mind, the Commonwealth narrowly tailored 3 CMC § 4366 to accomplish its compelling interest in controlling immigration in the Commonwealth. Thus, Minto's equal protection challenge fails.

3. Title 3 CMC § 4371 was not Vague

¶ 28 Minto asserts 3 CMC § 4371 was impermissibly vague because it failed to properly identify the correct conspiracy and solicitation statutes, 6 CMC § 303(a) and 6 CMC § 302(a), respectively. When first enacted, section 4371 referred to Title 9 instead of Title 6 of the Commonwealth Code. Thus, Minto argues the reference to "Title 9" rendered the entire section unconstitutionally vague at the time he was convicted.

¶ 29 "A penal statute is unconstitutional and violates due process guarantees if its terms are vague." *Commonwealth v. Lin*, 2010 MP 2 ¶ 14 (citing *Commonwealth v. Bergonia*, 3 NMI 22, 36 (1992)). However, this rule only applies when "persons of common intelligence must guess at its meaning or differ as to its application." *Pac. Saipan Tech. Contractors v. Rahman*, 2000 MP 14 ¶ 16 (quoting *Delta Sales Yard v. Patten*, 892 P.2d 297, 299 (Colo. 1995)). In other words, "[s]tatutes must give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited so that he or she may

choose between lawful and unlawful conduct." *Commonwealth v. Mundo*, 2004 MP 13 ¶ 16 (citations omitted).

¶ 30 When first passed by the Legislature, Section 4371 stated:

> Except to the extent otherwise prescribed in any section of this Article 7, any solicitation, attempt, or conspiracy to commit any of the offenses listed in this Article 7 shall be punishable pursuant to and in accordance with *Title 9*, Chapter 3 of the Commonwealth Code governing *inchoate crimes*.

3 CMC § 4371 (emphasis added). As Minto correctly points out, section 4371 initially did not match the pertinent crime with the correct title number. Title 9 of the Commonwealth Code contains laws pertaining to vehicles, while laws regarding inchoate crimes are contained in Title 6, chapter 3 of the Commonwealth Code. After the statute was enacted, the Law Revision Commission "changed the reference in [section 4371] from Title 9 to Title 6 to correct a manifest error pursuant to the authority granted by 1 CMC § 3806(g)." 3 CMC §4371 (Commission Comment).

¶ 31 When a statute contains a clerical error, it may still give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited if the "language is unambiguous and gives sufficient notice of the prohibited conduct." *Commonwealth v. Kaipat*, 2 NMI 322, 331 (1991). For example, in *Kaipat*, the statute at issue provided, in pertinent part, that a person who "unlawfully tampers with witnesses or payment [sic] or attempts to prevent their attendance at trials is guilty of obstructing justice . . . ." *Id.* (quoting 6 CMC § 3302). The Court upheld the statute because "unlawfully tampers with witnesses" is independent from "unlawfully tampers with payment." *Id.*

¶ 32 Here, section 4371 correctly referenced the governing law, inchoate crimes, but incorrectly identified its corresponding title number. A person of reasonable intelligence would have realized Title 9 contains laws pertaining to vehicles and not laws pertaining to inchoate crimes. This is especially true because, on its own, inchoate crimes means more to the general public than the title number. Thus, the error in section 4371 did not render the statute unconstitutionally vague.

D. Impossibility

¶ 33 Minto argues it was legally impossible for him to solicit a United States citizen to violate 3 CMC § 4366. According to Minto, only aliens could violate section 4366, and therefore Mallens could not violate section 4366 because she is a United States citizen. "The applicability of a legal doctrine is a question of law that is reviewed de novo." *Thousand*, 631 N.W.2d at 697 (citation omitted). In addition, determining whether impossibility is a cognizable defense under the Commonwealth's solicitation statute presents a question of statutory construction, which is reviewed de novo. *Id.* (citations omitted).

¶ 34 The plain text of section 4366 demonstrates that Minto's argument is specious.[5] "We give statutory language its plain meaning." *Marianas Eye Inst.*, 2011 MP 1 ¶ 11 (citing *Villanueva*, 2005 MP 12 ¶ 14). We must read a statute "with an aim to effect the plain meaning of [its] object." *Marianas Eye Inst.*, 2011 MP 1 ¶ 11 (quoting *Commonwealth v. Crisostomo*, 2005 MP 9 ¶ 39). In addition, "[a] court should avoid interpretations of a statutory provision which would defy common sense [or] lead to absurd results . . . ." *Commonwealth Ports Auth. v. Hakubotan Saipan Enter.*, 2 NMI 212, 224 (1991) (quoting *Office of the Att'y Gen. v. Cubol*, 3 C.R. 64, 78 (1987)).

¶ 35 Title 3 CMC § 4366 consists of two independent clauses. The second clause is a catch-all that defeats Minto's argument. Section 4366 reads: "[a]ny individual who knowingly enters into a marriage . . . for the purpose of evading any provision of Chapter 3 [(Commonwealth Entry & Deportation Act)], Chapter 4 [(Non-residents Workers' Act)]or Chapter 6 [(Moratorium on Non-resident Alien Worker Hiring)] of this Title, or any United States immigration law, shall be guilty of marriage fraud." 3 CMC § 4366(a).

¶ 36 The plain meaning of section 4366 is that *any person* who intentionally enters into a marriage to violate a Commonwealth or federal immigration law commits marriage fraud. It does not require the person entering the marriage actually receive a benefit, only that the goal of the marriage be to evade labor or immigration laws. The Legislature was clearly concerned marriage fraud was occurring and wanted it to end. *See* PL 13-49, § 1 ("The Legislature finds that it is in the best interest of the people of the Commonwealth to deter [marriage fraud], to prevent unqualified persons from becoming permanent residents by subverting the institution of marriage within the Commonwealth."); PL 15-17, § 1 (enacting section 4366 and other code revisions to more "adequately punish the full scope of undesirable activities that may be committed in connection with attempts by aliens to enter into, remain in, or exit from the Commonwealth."). Toward that end, the Legislature made the law apply to all Commonwealth citizens, not just aliens. Moreover, it is absurd to argue the Legislature would want to deter aliens from entering into sham marriages, but not United States citizens. The Legislature intended this statute to apply to both persons who marry for fraudulent purposes. Such interpretation would more adequately achieve the results of the plain meaning.

¶ 37 Federal jurisprudence supports this interpretation of section 4366, which appears patterned after its federal counterpart, 8 U.S.C. § 1325(c). First, federal courts routinely convict United States citizens for violating the federal marriage fraud statute. *See United States v. Tagalicud*, 84 F.3d 1180, 1182-83 (9th Cir. 1996) (holding evidence was sufficient for jury to find a U.S. citizen had conspired to commit

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[5] This argument comes close to defining frivolous. "[N]o justiciable question has been presented and the appeal is readily recognizable as devoid of merit in that there is little prospect it can ever succeed." *Pac. Amusement, Inc. v. Villanueva*, 2006 MP 8 ¶ 20.

marriage fraud, while reversing judgments on other grounds). Federal courts also convict third parties for aiding and abetting marriage fraud under 8 U.S.C. § 1325(c). *United States v. Anwar*, 428 F.3d 1102, 1108-09 (8th Cir. 2005) (affirming conviction of person who solicited citizens to marry aliens). Second, federal courts interpret "any individual" to mean one or both persons who marry for fraudulent purposes, including the citizen. Federal courts find that "[t]he language of 8 U.S.C. § 1325(c) makes plain that it is intended to punish 'any individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws.' " *United States v. Rashwan*, 328 F.3d 160, 164 (4th Cir. 2003) (emphasis omitted) (quoting 8 U.S.C. § 1325(c) (West Ann. 2003)).

E. Sufficiency of the Evidence

¶ 38 Minto argues the evidence was insufficient for the jury to find beyond a reasonable doubt he had committed conspiracy and solicitation to commit marriage fraud. "Anyone claiming insufficiency of the evidence 'faces a nearly insurmountable hurdle.' " *Commonwealth v. Zhen*, 2002 MP 4 ¶ 33 (quoting *United States v. Teague*, 956 F.2d 1427, 1433 (7th Cir. 1992)). In considering the sufficiency of the evidence, the Court must "consider the evidence in the light most favorable to the government and [then] determine whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Commonwealth v. Andrew*, 2007 MP 25 ¶ 4; *Kaipat*, 2 NMI at 329. "[R]eview must encompass all of the evidence, direct or circumstantial . . . ." *Commonwealth v. Shao Yong Wu*, 2007 MP 29 ¶ 6 (quoting *Commonwealth v. Ramangmau*, 4 NMI 227, 237 (1995)). In construing evidence, "[a]ll reasonable inferences must be drawn in favor of the government, and conflicts in the evidence are to be resolved in favor of the verdict." *Commonwealth v. Camacho*, 2002 MP 6 ¶ 108 (citation omitted). The Court cannot "weigh conflicting evidence or consider the credibility of witnesses." *Id.* Moreover, "[w]e are not at liberty to disturb factual findings which hinge on the trial court's assessment of a witness's credibility." *Commonwealth v. Cabrera*, 4 NMI 240, 246 (1995). "[W]e will not reverse the finding unless after reviewing all the evidence we are left with a firm and definite conviction that a mistake has been made." *Tropic Isles Cable TV Corp. v. Mafnas*, 1998 MP 11 ¶ 3.

¶ 39 Minto challenges his conviction for conspiracy to commit marriage fraud, claiming the Commonwealth failed to provide sufficient evidence that: (1) Minto forged an agreement to conspire with others to commit marriage fraud; (2) Minto had specific intent to commit marriage fraud;[6] (3) Minto knew marrying for money was illegal; and (4) Mallens and Islam sought an immigration benefit.

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[6] Minto focuses only on the intent of his co-conspirator Islam in participating in the marriage fraud; however 6 CMC § 303(a) unambiguously refers to the intent of the person charged with committing conspiracy. "It is not sufficient to assert there was error; the appellant must support his claim by citations to the record." *People v. Mays*, 55 Cal. Rptr. 3d 356, 371 (Cal. Ct. App. 2007) (internal citations omitted). Minto failed to point where in the record the Commonwealth failed to address his intent in joining the conspiracy. Thus, his challenge fails.

1. There Was Sufficient Evidence of Agreement

¶ 40 There was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt Minto made an explicit agreement to join the conspiracy. Jurors heard testimony that Islam explicitly agreed to pay Minto $1,000 for his part in the marriage transaction.[7] This is further supported by Minto's insistence that Mallens pay Minto $150. Minto told Mallens that, after she failed to complete the marriage as promised, he had to pay Islam the $150 Islam had paid Mallens.

¶ 41 Even if there was no explicit agreement between Minto, Islam, and Trina, there is still sufficient evidence for a jury to infer an implied agreement. "The agreement need not be shown to have been explicit. It can instead be inferred from the facts and circumstances of the case." *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975) (citing *Direct Sales Co. v. United States*, 319 U.S. 703, 711-13 (1943)). "[B]ecause most conspiracies are clandestine in nature, the prosecution is seldom able to present direct evidence of the agreement." *United States v. Iriarte-Ortega*, 127 F.3d 1200, 1200 (9th Cir. 1997) (quoting 2 Wayne R. LaFave & Austin Scott, Jr., Substantive Criminal Law § 6.4(d) at 71 (1986)); *see also Blumenthal v. United States*, 332 U.S. 539, 557 (1947) ("Secrecy and concealment are essential features of successful conspiracy."). As such, "most conspiracy convictions are based on circumstantial evidence, and [courts] allow juries to draw inferences as to the existence of an agreement from the defendants' conduct." *Iriarte-Ortega*, 127 F.3d at 1200.

¶ 42 Here, the record shows that Minto played an active role in all stages of the attempted marriage fraud. Minto served as an escort and drove participants around the island during each of the relevant events told to the jury. He picked up Mallens and transported her to a meeting at his apartment to meet the groom, Islam. Likewise, Minto drove participants to Lower Base Beach for negotiations and again the next day when the group assembled necessary documents to submit the marriage application. Minto also played an active role in negotiations. He translated for Islam and apparently made his own suggestions. Minto told Mallens that Islam would only pay $3,000 if he acquired a green card. Minto took part in logistical planning necessary to carry out the marriage fraud. He helped identify the documents Mallens needed to provide with the marriage application, identified where she needed to go for the documents, and helped direct the group while in process of acquiring and submitting those documents. Taken together, Minto's actions in furtherance of the Islam-Mallens marriage demonstrates a level of participation the

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[7] Minto takes issue with the fact that this evidence was admitted to the jury; however no objection was made at the time and he further fails to develop this as a separate issue. Thus, the argument was not properly raised for review. *See Peretz v. United States*, 501 U.S. 923, 936-37 (1991); *Yakus v. United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to [a court] than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.").

jury may have reasonably relied upon when deciding whether Minto and his co-conspirators had an implicit agreement to take part in the Islam-Mallens marriage fraud.

2. There Was Sufficient Evidence Regarding Knowledge of Illegality

¶ 43 Title 3 CMC § 4366 shares a similar knowledge requirement with an analogous federal marriage fraud statute, 8 U.S.C. § 1325(c). The individual must knowingly enter into a marriage to evade immigration laws. Under the federal interpretation, "it is enough that the government prove that 'the defendant acted with an evil-meaning mind, that is to say that he acted with knowledge that his conduct was unlawful.' " *United States v. Chowdhury*, 169 F.3d 402, 407 (6th Cir. 1999) (quoting *Bryan v. United States*, 524 U.S. 184, 193 (1998)). In adopting the analysis from *Bryan*, the *Chowdhury* court reasoned that "the danger of convicting individuals engaged in apparently innocent activity was mitigated . . . by the required finding that the defendant know that his conduct was unlawful." *Chowdhury*, 169 F.3d at 406.

¶ 44 Applying the *Chowdhury* rule, the Commonwealth was required to "prove [beyond a reasonable doubt] that the defendant knew that his conduct was unlawful." *Id.* at 407. The Commonwealth has satisfied its burden. First, the jury received evidence Minto knew Islam was willing to pay substantial sums of money to Mallens for the marriage. Islam was willing to pay Mallens $150 just to submit the marriage application, $1,000 to marry Islam, and $3,000 should Islam receive a green card as a result of the marriage. In addition, Islam was willing to pay Minto $1,000 for his part in arranging the marriage. Second, evidence presented suggested Minto did not spend an inordinate amount of time or labor to earn the $1,000 he was promised by Islam. Minto spent small amounts of time on four different occasions. Third, as Islam's translator, Minto was keenly aware of the justifications and arguments used to convince Mallens to marry Islam. As Mallens testified, should she marry him, Islam could stay on Saipan and Mallens would receive a much needed cash benefit. Based on the evidence presented, a reasonable trier of fact could infer Minto knew or had reason to know a law was being broken.

3. There Was Sufficient Evidence of an Immigration Benefit

¶ 45 The jury heard direct evidence that Islam would receive an immigration benefit when Investigator Flores testified that Islam would benefit from marrying a United States citizen. The jury also heard that Islam would benefit because his entry permit to the Commonwealth had expired on May 6, 2005 and he did not have a valid right to be in the Commonwealth in 2007 when he attempted to marry Mallens. In addition, the jury learned Mallens was born on Saipan and, as a result, is a United States citizen. Moreover, the record contains adequate evidence that Islam was willing to pay a substantial sum of money for the marriage, an amount that would triple had he received a green card.

¶ 46 Furthermore, once the Commonwealth established its case, Minto remained quiet at his peril. *Holland v. United States*, 348 U.S. 121, 138-39 (1954) ("The Government must still prove every element

of the offense beyond a reasonable doubt . . . . Once the Government has established its case, the defendant remains quiet at his peril."). Minto did not challenge or raise contemporaneous objections to the evidence the Commonwealth presented to demonstrate an immigration benefit. Nor did he produce evidence to the contrary to establish reasons why Islam attempted to marry Mallens for any purpose other than receiving an immigration benefit. For example, Minto did not provide evidence showing Bangladeshi culture required Islam to pay substantial amounts of money to the bride and a match maker. As a result, the jury had no reason to doubt the evidence the Commonwealth presented or to believe Islam had any justification for the marriage other than to gain an immigration benefit or evade immigration laws.[8] Thus, there was sufficient evidence for a reasonable trier of fact to determine beyond a reasonable doubt Islam would have received an immigration benefit had he married Mallens.

4. There Was Sufficient Evidence to Convict Minto of Solicitation to Commit Marriage Fraud

¶ 47 The solicitation statute has two elements. First, the person must have "intent to promote or facilitate the commission of an offense." 6 CMC § 302(a). The intent element is equivalent to the intent required for conspiracy. As with the conspiracy charge, Minto's actions in furtherance of the marriage fraud demonstrates acts and a level of participation on which a jury may reasonably rely on in deciding Minto intended to promote or facilitate marriage fraud. The second element contains two independent clauses. "A person commits . . . solicitation if that person commands, *encourages*, or requests another person to engage in the acts or cause the result . . . ." *Id.* (emphasis added). Alternatively, "[a] person commits . . . solicitation if that person . . . engages in conduct which would establish complicity in the specified conduct or result." *Id.*

¶ 48 We need only consider the first clause. "We give statutory language its plain meaning." *Marianas Eye Inst.*, 2011 MP 1 ¶ 11 (citing *Villanueva*, 2005 MP 12 ¶ 14). The language of section 302(a) makes it plain that it was sufficient for Minto to encourage the acts that would have lead to the fraudulent marriage. Solicitation could have occurred at any point up until the marriage. The fact Minto was not the first person to contact Mallens does not matter. Although Mallens had engaged in acts in furtherance of marriage fraud by agreeing over the phone to marry for money, agreed again during the Lower Base

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[8] Minto also failed to properly raise a challenge to the jury instructions. First, he failed to "lodge a contemporaneous objection to preserve [the] issue for appeal." *United States v. Vontsteen*, 950 F.2d 1086, 1089 (1992); s*ee also Hossain*, 2010 MP 21 ¶ 28; *Commonwealth v. Rabauliman*, 2004 MP 12 ¶ 23. Second, he does not sufficiently develop the argument with adequate legal analysis and citations to appropriate legal authority. *People v. Freeman*, 882 P.2d 249, 265 n.2 (Cal. 1994) ("[We] consider only those arguments sufficiently developed to be cognizable."). "[T]he art of advocacy is not one of mystery." *Saipan Achugao Resort Members' Ass'n v. Wan Jin Yoon*, 2011 MP 12 ¶ 50 (quoting *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929-30 (9th Cir. 2003)). "Our adversarial system relies on advocates to inform the discussion." *Indep. Towers*, 350 F.3d at 929-30. It is Minto's "burden on appeal to present the court with legal arguments to support [his] claims" and failure to do so amounts to waiver of that argument. *Id.*

Beach meeting, and then filled out paperwork, she did not actually commit marriage fraud until the application was submitted. For his part, Minto escorted Mallens around the island during each of the events relevant to the attempted Islam-Mallens marriage, translated for Mallens and Islam during negotiations regarding how much Mallens would earn for marrying Islam, and served as a witness for notarization of relevant documents. It was reasonable for the jury to have inferred that Minto's presence and actions served as encouragement for Mallens to engage in the marriage fraud. Thus, there was sufficient evidence for a reasonable trier of fact to find beyond a reasonable doubt Minto solicited Mallens to violate 3 CMC § 4366.

IV

¶ 49 For the foregoing reasons, the Superior Court judgment finding Minto guilty of the crimes of conspiracy and solicitation to commit marriage fraud is hereby AFFIRMED.

SO ORDERED this 16th day of December, 2011.

/s/
ALEXANDRO C. CASTRO
Acting Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
JESUS C. BORJA
Justice Pro Tem