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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
Plaintiff-Appellee,

v.

JONATHAN M. DIAZ,
Defendant-Appellant.

SUPREME COURT NO. 2012-SCC-0002-CRM
SUPERIOR COURT NO. 10-0198E

OPINION

Cite as: 2013 MP 20

Decided December 31, 2013

Bruce Berline, Saipan, MP, for Defendant-Appellant Jonathan M. Diaz
James B. McAllister, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee Commonwealth of the Northern Mariana Islands

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; PERRY B. INOS, Associate Justice.

CASTRO, C.J.:

¶ 1 On appeal, Defendant-Appellant Jonathan M. Diaz ("Diaz") challenges three aspects of his three convictions for sexual abuse with a minor in the third degree. 6 CMC § 1308(a)(2). First, he argues there was insufficient evidence for any reasonable fact-finder to conclude he "occupie[d] a position of authority in relation to the victim." *Id.* Second, he contends there was insufficient evidence for any reasonable trier-of-fact to find sexual penetration occurred during the third charged count of sexual abuse with a minor in the third degree. Third, he believes his federal constitutional right to a jury trial was violated when he was tried and convicted following a bench trial. For the reasons below, we reject these arguments and AFFIRM the judgment of the trial court.

I. Facts and Procedural History

¶ 2 Tinian Junior and Senior High School, which share the same campus, hired Diaz as a junior high teacher in March 2010. He taught a leadership course for junior high students. As a condition of his employment, he agreed not to engage in "immoral conduct," which included having a sexual relationship with any student. He remained a teacher until he resigned in October 2010. During the 2010 summer academic break, he apparently did not have any responsibilities at the school.

¶ 3 In June 2010, Diaz met J.B.,[1] a 16-year-old student who had recently graduated from Tinian Junior High School and was scheduled to attend Tinian Senior High School the following fall. They met at another person's residence and a romantic relationship developed between them. When their relationship began, according to J.B.'s testimony, Diaz told J.B. to keep their relationship a secret, otherwise he might "go to jail." Trial Tr. at 121:25-122:2. The two continued their liaison through early September.

¶ 4 Once the school year began in mid-September 2010, the sexual nature of their relationship apparently ceased, but they continued to spend time with one another, including when J.B. would skip classes to spend time in Diaz's classroom. Sometime during this month, J.B. discovered she was pregnant, and the age of the fetus suggested conception occurred in August. J.B. testified that when Diaz heard the news, he responded by saying he was "scared" he might "go to jail." Trial. Tr. at 124:19-20. Eventually, word of their relationship spread to the principal. When the principal confronted Diaz about his relationship with J.B., Diaz denied its existence beyond a normal student-teacher relationship. At that time, however, Diaz did admit J.B. would sometimes skip her other classes to spend time in his classroom.

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[1] We use initials J.B. to preserve the anonymity of the minor victim.

¶ 5 A few days later, the principal saw J.B. using a computer in Diaz's classroom and discovered J.B. was skipping class. Later that day, Diaz confessed to the principal that he shared a sexual relationship with J.B. Diaz resigned from his position, and J.B. subsequently dropped out of school.

¶ 6 Originally, a jury trial was set for Diaz. The Commonwealth sought a bench trial, arguing the penalty provisions of the charged offenses did not meet statutory requirements under 7 CMC § 3101(a) for the matter to be tried by jury. During a hearing on the matter, Diaz lodged an oral objection but the trial court granted the Commonwealth's motion for a bench trial.

¶ 7 In another pre-trial motion, Diaz sought to dismiss the information because, as a matter of law, he was not in a "position of authority in relation to" J.B., a legal requisite to convict a person under 6 CMC § 1308(a)(2). The trial court denied this motion.

¶ 8 During a bench trial, the trial court convicted Diaz of three counts of sexual abuse of a minor in the third degree under 6 CMC § 1308(a)(2). Diaz received a sentence of four years imprisonment, two years of which were suspended. He was also ordered to register as a sex offender.

¶ 9 Diaz timely appeals each of his three convictions for sexual abuse of a minor.

II. Jurisdiction

¶ 10 The Superior Court issued a final sentence and commitment order, and Diaz filed a timely notice of appeal. The Supreme Court has appellate jurisdiction over final judgments and orders of the Superior Court of the Commonwealth. 1 CMC § 3102(a). Thus, we have jurisdiction.

III. Standards of Review

¶ 11 In considering the sufficiency of the evidence, we "'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. Islam*, 2013 MP 4 ¶ 7 (quoting *Commonwealth v. Minto*, 2011 MP 14 ¶ 38). We review constitutional issues de novo. *Commonwealth v. Mundo*, 2004 MP 13 ¶ 13.

IV. Discussion

A. Whether Sufficient Evidence was Presented to Convict Diaz of Three Counts of Sexual Abuse of a Minor in the Third Degree

¶ 12 The trial court convicted Diaz of three counts of sexual abuse with a minor in the third degree. 6 CMC § 1308(a)(2). Diaz raises one argument for why sufficient evidence was not presented at trial for all of the counts, in addition to a separate argument for why sufficient evidence did not exist for the third count.[2] We address each of these arguments in turn.

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[2] In Diaz's reply brief, he asserts, for the first time, that sufficient evidence did not exist at trial to prove sexual penetration occurred during the first two incidents of sexual contact charged. Appellant's Reply Br. 6. Since he did not raise this argument until his reply brief, it is waived. *Bank of Saipan v. Superior Court*, 2002 MP 17 ¶ 20.

1. Whether Diaz Stood in a "Position of Authority in Relation to" J.B.

¶ 13 Under § 1308(a)(2), a person 18 years or older is prohibited from "[e]ngag[ing] in sexual penetration with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a *position of authority in relation to* the victim. *Id.* § 1308(a)(2) (emphasis added). The criminal code specifically defines a "position of authority," as:

> "an employer, youth leader, scout leader, coach, *teacher*, counselor, school administrator, religious leader, doctor, nurse, psychologist, guardian ad litem, babysitter, or a substantially similar position, and a police officer or probation officer other than when the officer is exercising custodial control over a minor."

Id. § 1317(5) (emphasis added).

¶ 14 Diaz contends he did not occupy a "position of authority in relation to the victim" in this case. *Id.* § 1308(a)(2). This claim rests on the following undisputed facts. Diaz exclusively served as a teacher for junior high students at Tinian Junior and Senior High School. J.B. and Diaz did not meet until the summer months when the school year was in recess. Their sexual relationship ended a couple months later in early September, immediately prior to the beginning of the school year.

¶ 15 This issue turns on what the phrase, "in relation to a victim," means. *Id.* Diaz claims that since school was not in session during the summer months, or because J.B. could have never been his student (she would enter the ninth grade in September 2010), he never held a "position of authority *in relation to*" J.B. *Id.* (emphasis added). Essentially, Diaz contends this statutory provision only criminalizes sexual contact when the person in authority has some level of custodial responsibility over J.B., which he believes was not present here. The Commonwealth disagrees, arguing we should broadly construe this phrase.

¶ 16 Both parties cite to various cases from other jurisdictions supporting their preferred reading of the phrase at issue. Diaz rests much of his argument on *Hallberg v. State*, a case where the Florida Supreme Court narrowly construed the phrase "custodial relationship" under somewhat analogous circumstances. 649 So.2d 1355, 1358 (Fla. 1994) (vacating several convictions after concluding a teacher did not have a "custodial relationship" during the summer with a junior high student). The Commonwealth directs our attention to a few other state appellate courts who have reached the opposite conclusion interpreting similar language. *Anderson v. State,* 812 A.2d 1016, 1019-24 (Md. 2002) (construing "responsibility for the supervision of a child" to include circumstances where a teacher provided transportation to a minor student after school before proceeding to seduce this student at the teacher's home); *State v. Tanner,* 221 P.3d 901, 904-05 (Utah. Ct. App. 2009) (interpreting the phrase, "by reason of that position [of authority] is able to exercise undue influence," to include a bus driver); *State v. Pasteur*, 9 S.W.3d. 689, 698 (Mo. Ct. App. 1999) (finding a "person . . . otherwise charged with the care and custody" of a minor student

encompassed a minor student's band teacher, even when some of the sexual contact occurred off-campus).

¶ 17 In construing a statute, we give language its plain meaning, so long as that meaning is clear, unambiguous, and will not lead to a result that is absurd or defies common sense. *Aurelio v. Camacho*, 2012 MP 21 ¶ 15. We also consider legislative intent when the text of a statute does not unequivocally answer a question. *Villagomez v. Manibusan*, 2013 MP 6 ¶¶ 23-28 (reviewing legislative intent to construe a statute). Here, we consider what level of custody or responsibility a person in authority must have "in relation to the victim" to violate § 1308(a)(2).

¶ 18 The text, purpose, and nature of this statute reflects a considered judgment by the legislature to answer this inquiry by objectively looking at how an adolescent would view the defendant under the circumstances. This conclusion flows from an initial textual observation: § 1308(a)(2) does not require that the person-in-authority have custody over a minor. Instead, it has a relational component, which is at issue in the case-at-bar. This component indicates an express rejection by the legislature of the formalistic approach advocated by Diaz. Additionally, the capacious definition of an authority figure in § 1317(5) underscores the legislature's particular concern about virtually anyone who a minor would view as a figure who could exercise immediate authority over them. After all, § 1317(5)'s definition captures virtually all possible positions that could conceivably possess some responsibility over a minor, e.g., a nurse or babysitter; and just in case a position was missed by this exhaustive list, the legislature also included any person who is in "a substantially similar position" to any of the categories of persons already listed in § 1317(5). This judgment by the legislature reveals its deep concern about the inherent coerciveness of sexual relationships between young adolescents and older adults possessing some level of immediate authority over young people. Because inherent coercion is ultimately what is at issue here, the factual circumstances of the individuals' relationship control. Thus, to determine whether a defendant "occupie[d] a position of authority in relation to [a] victim" under § 1308(a)(2), courts must ask whether a reasonable adolescent would have believed a defendant – who, under § 1317(5), "occupie[d] a position of authority" – had coercive power over him or her. Accordingly, under the right circumstances, § 1308(a)(2) could encompass junior high teachers "in relation to" high school students.

¶ 19 We find these circumstances present here because the junior high and high schools share the same small campus. Indeed, J.B. periodically skipped class to spend time in Diaz's classroom during September 2010. This proximity ensured that Diaz possessed some responsibility for J.B. while school was in session, even if J.B. was a high school student and Diaz did not teach high school students. Diaz, then, who unquestionably occupied a position of authority, possessed such a position "in relation to" J.B. with school in session. § 1308(a)(2).

¶ 20 The salient question is whether a fact-finder could reasonably conclude Diaz held a position of authority in relation to J.B. during the summer academic break. *Minto*, 2011 MP 14 ¶ 38. Diaz contends there was not enough evidence to establish this connection. He points out how all aspects of the relationship began off-campus and remained off-campus until school resumed – at which time the sexual relationship ceased. He also emphasizes how he did not have any campus responsibilities during the summer months.

¶ 21 But these formalistic arguments do not change the fact that, as a salaried teacher, he still had some responsibilities related to students, including J.B. For instance, his legal responsibility as a mandatory reporter of sexual abuse would also not cease during the summer. 6 CMC § 5313. And, most importantly, a reasonable adolescent student would still view him as an authority figure with coercive power over her, even if Diaz could not exercise that power until the summer ended; as a teacher on the same campus come fall, a reasonable adolescent would believe Diaz could exact some sort of significant punishment if J.B. did not comply with his sexual demands during the summer (e.g., perhaps by persuading other teachers to grade J.B. harshly).

¶ 22 This lopsided power-dynamic gave rise to inherent coercion. So while all of the sexual encounters between Diaz and J.B. occurred during the summer break from school, the inherent coercion that existed in the relationship could not dissipate in a meaningful way with the beginning of the academic year looming on the horizon. In other words, if the relationship between Diaz and a 16-year-old would be inherently coercive with school-in-session, it follows that a relationship would also be inherently coercive during the preceding summer months. And here, J.B. and Diaz's sexual relationship occurred immediately before both J.B. and Diaz planned to attend or work at the same small campus that fall as a high school student or junior high school teacher, respectively – two facts which Diaz does not dispute.[3] As a consequence, it takes no straining for us to conclude a reasonable fact-finder could have found Diaz "occupie[d] a position of authority in relation to the victim." 6 CMC § 1308(a)(2).

¶ 23 Diaz also argues the Court should apply the rule of lenity to narrowly construe § 1308(a)(2) in his favor. To support his argument, Diaz cites *Commonwealth v. Manglona*, 1997 MP 28: the only decision in which a majority of this Court has addressed the rule of lenity. The *Manglona* Court "invoke[d] the

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[3] Diaz also presses the argument that because the record does not indicate whether J.B. attended Tinian Junior and Senior High School prior to September 2010, he could not have been in a "position of authority in relation to" J.B. during all of the incidents of sexual intercourse for which he was convicted. Even assuming the record is silent as to this fact, it is irrelevant under these circumstances. Section 1308(a)(2), as we explained above, is concerned with whether a reasonable adolescent in J.B.'s shoes would view Diaz as someone in authority over her. The fact both J.B. and Diaz planned to attend or work at the same small campus after the sexual encounters as a high school student or junior high school teacher, respectively – and J.B. knew of these two facts – establishes the requisite relational connection under § 1308(a)(2).

common law 'rule of lenity'" to narrowly construe a criminal statute as a last resort. 1997 MP 28 ¶ 13. Crucially, it only did so after exhausting other means of resolving statutory ambiguity. *See id.* ¶¶ 5-11.

¶ 24 The U.S. Supreme Court has also recognized this hierarchy. In particular, it has repeatedly held: "'the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what [the legislature] intended.'" *Maracich v. Spears*, 133 S. Ct. 2191, 2209; 186 L. Ed. 2d 275, 298 (2013) (quoting *Barber v. Thomas*, 560 U.S. 474, 488; 177 L. Ed. 2d 1, 12 (2010).

¶ 25 Thus, application of the rule of lenity established in *Manglona* requires this Court to first utilize other interpretative tools to distill ambiguity prior to application of the rule of lenity.

Because we can resolve any potential ambiguity in § 1308(a)(2) by using ordinary tools of statutory construction, as explained above, Diaz encounters a fatal analytical problem with his assertion of the rule of lenity: it only applies as a measure of last resort. *Maracich*, 133 S. Ct. at 2209. As a consequence, the rule of lenity simply has no function to perform here.

¶ 26 Because the rule of lenity does not apply and J.B. could have reasonably believed Diaz was an authority figure who held coercive authority over her (due to the upcoming school year), we believe a reasonable fact-finder could have concluded, based upon the evidence, that Diaz "occupie[d] a position of authority in relation to the victim." 6 CMC § 1308(a)(2).

2. Whether Diaz Sexually Penetrated J.B. During Early September 2010

¶ 27 That leaves the issue of whether a reasonable trier-of-fact could have concluded that sexual penetration occurred during the third charged incident, which occurred in September.[4] Diaz argues there was no evidence presented to establish sexual penetration occurred, as defined in 6 CMC § 1317(8). More specifically, he points to the testimony of J.B., in which she (only) said they had "sex." Trial Tr. at 128. He argues there was no other evidence introduced to establish "sexual penetration" during this incident, and that J.B. was not asked about, nor did she elaborate on, exactly what she meant. Appellant's Opening Br. at 8-9. Therefore, Diaz asserts no reasonable fact-finder could convict him of this offense. The Commonwealth disagrees, asking us to read J.B.'s testimony reasonably and in context. The government also directs our attention to J.B.'s testimony during cross examination, in which J.B. specifically stated in the affirmative that "sexual intercourse" occurred. After viewing her answer of "sex" in light of her later answer, the Commonwealth believes this testimony was adequate for any reasonable fact-finder to conclude "sexual penetration" occurred beyond a reasonable doubt. § 1317(8). We agree.

¶ 28 This question is resolved by looking to the content of J.B.'s remarks. During J.B.'s direct examination, the prosecutor used the verb "sex" in his questioning without elaboration. J.B. also uses the

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[4] *See supra* note 2.

same term without any additional explanation. But during cross-examination, Diaz's counsel explicitly asked whether Diaz and J.B. had "sexual intercourse" during early September, to which J.B. responded affirmatively. Trial Tr. at 137.

¶ 29 Diaz, in his reply brief,[5] attempts to import ambiguity into an otherwise unambiguous phrase: sexual intercourse. While it is possible this term could mean something other than its widely-understood meaning when it is used interchangeably with the term "sex," that possibility does not make the term ambiguous. Nor would any fair construction of "sex" and "sexual intercourse," when viewed in the light most favorable to the government, put the act outside the broad scope of "[s]exual penetration" as defined in § 1317(8). As a result, because Diaz points to nothing that shows J.B. meant to use this term in a manner that would put the prohibited acts outside the statute, we are satisfied that sufficient evidence supports the trial court's finding of "sexual penetration" regarding the third count of sexual abuse with a minor in the third degree. 6 CMC § 1308(a)(2).

B. Whether Diaz Was Entitled to a Jury Trial Under the Federal Constitution

¶ 30 We move next to Diaz's constitutional challenge. Diaz argues his federal constitutional right to a jury trial was violated when he was convicted of serious felony charges following a bench trial. He vigorously submits he never waived this purported right to a jury trial. The Commonwealth, in contrast, contends Diaz did not properly contest this issue below, and therefore did not properly preserve it. Appellee's Resp. Br. at 6.

¶ 31 Despite Diaz's less-than-clear articulation for the basis of his objection to the government's motion for a bench trial, as well as the opaque colloquy with the trial court judge that ensued, Pretrial Conference Tr. at 1-2 (Jan. 26, 2011), his objection revolves around a pure legal issue. Because we review constitutional questions de novo, *Commonwealth v. Peter*, 1 NMI 466, 470 (1991), and this issue was raised below, we think Diaz sufficiently opposed the government's motion to preserve this issue for de novo review.

¶ 32 Diaz argues we should overturn controlling precedent.[6] In *Commonwealth v. Atalig*, 1 CR 552 (Dist. Ct. App. Div. 1983), *rev'd*, 723 F.2d 682 (9th Cir. 1984), the Appellate Division of the United

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[5] Notably, Diaz failed to include the monumentally important fact in his opening brief that J.B. had indicated what "sex" meant (or at least included) in her testimony during cross examination: "sexual intercourse." Trial Tr. at 156. He only attempted to address it after the Commonwealth pointed out this fact in their response brief. Whatever the reason for that omission, Diaz's counsel missed the mark here.

[6] Neither Diaz nor the Commonwealth cited to controlling precedent of this Court. For example, we addressed this precise issue in *Peter*, 1 NMI at 471-75 (holding no federal constitutional right to a jury trial existed). We also discussed this issue, even if somewhat briefly, in *In re Pangelinan*, 2008 MP 12 ¶¶ 58-67, and *Commonwealth v. Yi Xiou Zhen*, 2002 MP 4 ¶¶ 14-16. Yet the parties only mentioned *Atalig*, a decision by the United States Court of Appeals for the Ninth Circuit. This is sanctionable conduct. *Commonwealth v. Quemado*, 2013 MP 13 ¶ 19 n.2. Additionally, counsel for Diaz, by failing to cite to *Peter*, may have breached his ethical duties to this Court regarding disclosure of legal authority. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) ("A lawyer

States District Court for the Northern Mariana Islands held that the federal constitutional right to a jury trial applied in Commonwealth courts. *Id.* at 589. But the United States Court of Appeals for the Ninth Circuit reversed, relying on the *Insular Cases*, which held that the right to a jury trial was not a fundamental right when applied to unincorporated territories. *Commonwealth v. Atalig*, 723 F.2d 682, 688, 691 (9th Cir. 1984). In so doing, the Ninth Circuit Court of Appeals upheld § 501(a) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ("Covenant"), 48 U.S.C. 1801 note (recognizing that "neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law"), as well as § 501(1) of the Trust Territory Code (an analogous provision to 7 CMC § 3101(a) (establishing trial by jury for a "felony punishable by more than five years imprisonment")), which implemented § 501(a) of the Covenant. *Atalig*, 723 F.2d at 690.

¶ 33 *Atalig* continues to bind this Court because previous dispositions of the Ninth Circuit Court of Appeals reviewing Commonwealth court decisions are respected in the same manner as the decisions of this Court. *See Commonwealth v. Superior Court*, 1 NMI 287, 291 (1990) (observing that regarding the Appellate Division of the United States District Court for the Northern Mariana Islands, "[w]e are entitled, and indeed duty-bound, to affirm, modify, or reverse decisions of a predecessor court just as we are so obligated and entitled with regard to our own decisions"). Of course, "we are bound to follow previous decisions only by the doctrine of stare decisis, which is not mandatory. Where facts or circumstances change, the opinion of a court may also change." *Roberto v. Roberto*, 2004 MP 7 ¶ 3.

¶ 34 Diaz asks us to overrule *Atalig* and its progeny for two reasons. First, he claims that factual circumstances undergirding *Atalig* have changed such that a reversal is appropriate. Second, he quotes from *Boumediene v. Bush*, 553 U.S. 723 (2008), a recent U.S. Supreme Court decision, which he believes compels reversal.

¶ 35 We have discussed this important issue three times since *Atalig*. *In re Pangelinan*, 2008 MP 12 ¶¶ 58-67 (summarizing the jurisprudence surrounding the applicability of federal constitutional provisions to the Commonwealth); *Commonwealth v. Yi Xiou Zhen*, 2002 MP 4 ¶¶ 14-16 (concluding defendant only received a civil penalty, which obviated the defendant's argument regarding entitlement to a jury trial); *Peters*, 1 NMI at 472-74 (holding no federal constitutional right to a jury trial existed). While we did not pass on the question in *In re Pangelinan* or *Yi Xiou Zhen*, we did note in *Yi Xiou Zhen* that the Covenant's restriction of the federal constitution's right to a jury trial has "withstood constitutional scrutiny," and approvingly cited to both *Atalig* and *Peters*. *Yi Xiou Zhen*, 2002 MP 4 ¶ 14.

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shall not knowingly: fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."). Counsel for both parties are advised to properly apprise the Court of our binding precedent in the future or risk sanctions.

¶ 36 All of the factual circumstances Diaz suggests have changed since *Atalig* were persuasively addressed and rejected in *Peter*. For instance, Diaz argues the change in the political relationship between the Commonwealth and the United States mandates rejection of *Atalig*. But this relationship has not changed in over three decades. And the legal system, while it has undoubtedly grown and matured since the *Atalig* decision, still resembles that which was considered in *Peter*. Diaz points to nothing else in his brief that has changed since the *Peters* decision. While the federalization of our immigration system, in addition to the extension of federal labor laws has drawn the Commonwealth and the United States into a closer political union, the relationship remains substantially similar to what it was when *Atalig* and *Peters* were decided. As a result, Diaz fails to show any significant changes in either the political or legal systems here that mandate a different decision than the one reached in both *Atalig* and *Peters*, and recognized again in *Zhen*.

¶ 37 Diaz also asserts *Boumediene v. Bush*, 553 U.S. 723 (2008), necessitates our extension of the federal constitutional right to trial by jury. More specifically, he grounds this argument in a passage of *Boumediene*, where the U.S. Supreme Court, in addressing the extraterritoriality of the United States Constitution, casted doubt on the application of the *Insular Cases*.[7] This is important because the *Insular Cases* served as the foundation for the holding in *Atalig*.

¶ 38 To sort out whether *Boumediene* compels reversal of *Atalig* and its progeny, a brief survey of the *Insular Cases* is appropriate. The *Insular Cases*, in addressing the extraterritoriality of the United States Constitution, created a formalistic two-step test. The first step asks whether the territory-at-issue intends to become a state, which is also the first question the *Atalig* Court asked. *Examining Bd. of Engineers, Architects & Surveyors v. Flores De Otero*, 426 U.S. 572, 599 n.30 (1976); *Dorr v. United States*, 195 U.S. 138, 142-43 (1904). If a territory anticipates statehood, the Court has concluded the United States Constitution applies in its entirety. *Dorr*, 195 U.S. at 142-43. If it does not, then courts must determine whether the federal constitutional right at issue is "fundamental." *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922).

¶ 39 Diaz argues *Boumediene* undermines the first inquiry's formalistic premise – that only anticipation of statehood provides that the United States Constitution is in full force – by indicating that this question may inaccurately assess the nature of the political relationship between the United States and a territory or commonwealth – the strength of which is ultimately at issue. 553 U.S. at 756 ("It may well

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[7] The *Insular Cases* consisted of a series of opinions addressing the question of whether the Constitution, by its own force, applies in a United States territory that is not a state. *E.g.*, *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii* v. *Mankichi*, 190 U.S. 197 (1903); *Downes* v. *Bidwell*, 182 U.S. 244 (1901); *Armstrong* v. *United States*, 182 U.S. 243 (1901); *Dooley* v. *United States*, 182 U.S. 222 (1901); *De Lima* v. *Bidwell*, 182 U.S. 1 (1901).

be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance.").

¶ 40 In particular, Diaz contends that because many of the *Insular Cases* dealt with territories where, at the time of their decisions, the status of a future political union with the United States was unclear, *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion) (finding that the territories covered in the *Insular Cases* possessed "wholly dissimilar traditions and institutions" that Congress intended to govern "temporarily"), they should not be extended to dissimilar political unions. For instance, these territories included Puerto Rico, the Hawaiian Islands, as well as the Philippine Islands at the beginning of the twentieth century. Among these three examples, one became a state—Hawaii; one remains a territory, Puerto Rico; and one was granted independence, the Philippines. The U.S. Supreme Court finally settled on its formalistic test in the case addressing the Philippines, *Dorr*, 195 U.S. 142-43, but the "particular historical environment" of *Dorr* and other *Insular Cases* may undermine the contemporary applicability of this test. *E.g., Torres v. Puerto Rico*, 442 U.S. 465, 475-476 (1979) (Brennan, J., concurring). In other words, Diaz contends that the stability and strength of contemporary relationships between the United States and its territories or commonwealths suggest statehood anticipation may not adequately measure the nature of these political unions – and whether the United States Constitution applies in full force.

¶ 41 While this argument has some intellectual appeal, *see Consejo de Salud Playa Ponce v. Perdomo*, No. 06-1260 (GAG) & No. 06-1524 (GAG), 2008 U.S. Dist. LEXIS 107905 (D.P.R. Nov. 10, 2008) (adopting this argument regarding the territory of Puerto Rico) *claim dismissed per stipulation* 705 F. Supp. 2d 163 (D.P.R. 2010), it is not one that has been accepted by the U.S. Supreme Court at this time. Therefore, we decline to apply it here to overrule more than a century of U.S. Supreme Court precedent.

¶ 42 Diaz also asserts that the federal constitutional right to a jury constitutes a "fundamental" right – a characteristic that is the subject of the second step under the doctrine of territorial incorporation. *Balzac*, 258 U.S. at 312-13. Under this second step, courts must examine whether a particular constitutional provision has particular significance such that it applies even in unincorporated territories. If we accepted his argument, this right (and only the right to a jury trial) would extend to the Commonwealth. The U.S. Supreme Court explained the analysis this way:

> The Constitution, however, contains grants of power and limitations which in the nature of things are not always and everywhere applicable, and the real issue in the Insular Cases was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements. The guaranties of certain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law, had from the beginning full application in the Philippines and Porto Rico, and, as this guaranty is one of the most fruitful in causing litigation in our own country, provision was naturally made for similar controversy in Porto Rico.

Id. at 312-13. That raises the question of how to determine what constitutional provisions constitute "certain fundamental person rights." *Id.*

¶ 43 *Boumediene*, without deciding the issue, noted the important role that "practical necessities" played in considering this question. 553 U.S. at 759-60. In cataloguing numerous examples within the *Insular Cases*, the U.S. Supreme Court recognized what even the Ninth Circuit pointed out in *Atalig*: legal doctrines "'derive meaning and content from the circumstances that gave rise to them and from the purposes they were designed to serve.'" 723 F.2d at 689 (quoting *Reid*, 354 U.S. at 50 (Frankfurter, J., concurring)). For instance, *Boumediene* carefully lays out the various tests proposed by former U.S. Supreme Court justices in *Reid*, which is the last U.S. Supreme Court case deciding this specific point. In so doing, *Boumediene* observed how the fractured majority in *Reid* agreed in principle on the need to consider the specific circumstances of a territory or commonwealth at the time of decision. *See Reid*, 354 U.S. at 14 (plurality) (finding that the intention to govern territories for a limited time, as well as the difference between their civil law legal system and the adversarial process used in the United States as bearing on the results in the *Insular Cases*); 354 U.S. at 54 (Frankfurter, J., concurring) (contending that "specific circumstances of each particular case" were decisive in the *Insular Cases*); 354 U.S. at 74-75 (Harlan, J., concurring) (finding that the extraterritoriality of a constitutional provision turns on whether application of the provision would be "impracticable and anomalous," which is determined by looking to the "particular circumstances, the practical necessities, and possible alternatives which Congress had before it"); *see also Dorr*, 195 U.S. at 148; *Balzac*, 258 U.S. at 312.

¶ 44 But as we examined the "particular circumstances" of the Commonwealth earlier in this opinion, *supra* ¶ 36, we cannot agree with Diaz that the right to a jury trial is "fundamental." *Balzac*, 258 U.S. at 312. Certainly, our legal system has matured under the adversarial process and more closely mirrors the legal systems of the states. Likewise, immigration and labor law have recently become federalized. But cooperation between political sovereigns is not the legal test. The extraterritoriality of a constitutional provision turns on whether application of the provision would be "impracticable and anomalous," as determined by the "particular circumstances, the practical necessities, and possible alternatives which Congress had before it." *Reid*, 354 U.S. at 75; *see also Boumediene*, 553 U.S. at 759 (citing with approval to the "impracticable and anomalous" test). The specific circumstances of the Commonwealth, which include a historical tradition of eschewing jury trials for less serious felonies and misdemeanors, informs our conclusion that applying such a right would be "impracticable and anomalous." Moreover, because the U.S. Supreme Court, when presented with this question, has twice found this right non-fundamental, *Balzac*, 258 U.S. 298 (1922); *Dorr*, 195 U.S. 138 (1904) – and *Atalig* and *Peters* drew the same conclusion – there is no persuasive legal authority for Diaz's admonition to reverse decades, if not centuries, of precedent.

¶ 45 As a result, we are left only with Diaz's description of the *Insular Cases* at oral argument as "outdated" and "offensive." Oral Arg. at 3:12:26-3:12:33, *Commonwealth v. Diaz*, 2012-SCC-0002-CRM (NMI Sup. Ct. Nov. 8, 2013). These characterizations, whether correct or not, do not overcome the presumption of stare decisis.

V. Conclusion

¶ 46 For the reasons expressed herein, we hold there was sufficient evidence that Diaz "occup[ied] a position of authority in relation to the victim." § 1308(a)(2). We also find there was sufficient evidence to establish sexual penetration occurred during the third charged count of sexual abuse with a minor in the third degree. Additionally, we conclude that under the circumstances, Diaz did not possess a federal constitutional right to a jury trial. Therefore, we AFFIRM Diaz's convictions.

SO ORDERED this 31st day of December, 2013.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
PERRY B. INOS
Associate Justice