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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

AMBROSIO T. OGUMORO,
Defendant-Appellant.

Supreme Court No. 2016-SCC-0016-CRM

Superior Court No. 12-0134

OPINION

Cite as: 2017 MP 17

Decided December 26, 2017

Daniel T. Guidotti, Saipan, MP, for Defendant-Appellant.

George Lloyd Hasselback, Saipan, MP, for Plaintiff-Appellee.

BEFORE: JOHN A. MANGLONA, Associate Justice; ROBERT J. TORRES, Justice Pro Tempore; ELYZE M. IRIARTE, Justice Pro Tempore.

MANGLONA, J.:

¶ 1 Defendant-Appellant Ambrosio T. Ogumoro ("Ogumoro") appeals his convictions for Conspiracy to Commit Theft of Services, Theft of Services, and Misconduct in Public Office.[1] He asks us to vacate these convictions, arguing that: (1) the trial court erred by failing to instruct the jury on the lesser included offenses of misdemeanor Theft of Services and Conspiracy to Commit Theft of Services; (2) there was insufficient evidence to convict him of felony Conspiracy to Commit Theft of Services and Theft of Services; and (3) there was no violation of 6 CMC § 6101(a) to warrant conviction for Misconduct in Public Office as the statute imposes no duty to serve an invalid penal summons. For the following reasons, we AFFIRM Ogumoro's convictions.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 Ogumoro was charged with fifteen criminal counts for his role in a conspiracy to prevent former Attorney General Edward Buckingham ("Buckingham") from being served with penal summons on August 3 and 4, 2012. In particular, Ogumoro was charged with appropriating the services of the Department of Public Safety ("DPS"), including the use of DPS personnel and government vehicles, to provide Buckingham an armed escort to the airport, thereby preventing him from being served with penal summons.

¶ 3 At trial, Juanette David-Atalig ("David-Atalig"), a former investigator for the Office of the Public Auditor ("OPA"), testified that she estimated the value of services Ogumoro appropriated as exceeding $250. According to David-Atalig, DPS does not generally provide armed escorts to evade penal summons; therefore, she considered the pay rate of the two DPS officers for four hours each and the daily rental value of the three SUVs used in the escort. She provided inconsistent testimony as to the availability of car rentals for periods of less than one day; first she noted that one of three vendors offered half-day rentals, but later she testified that no vendors offered rentals for less than one day. However, she concluded that the value of services certainly exceeded $250.

¶ 4 The jury convicted Ogumoro of Theft of Services and Conspiracy to Commit Theft of Services and the court convicted him of five counts of Misconduct in Public Office and one count each of Obstructing Justice and Criminal Coercion.[2]

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[1] Vacating Ogumoro's convictions for Conspiracy to Commit Theft of Services and Theft of Services would also vacate his convictions for two counts of Misconduct in Public Office, which are predicated on the underlying offenses.

[2] The aforementioned facts are taken from our order in *Commonwealth v. Ogumoro*, 2016 MP 9 ¶¶ 2–5. The parties and factual background are unchanged.

¶ 5 Ogumoro appeals his convictions.

II. JURISDICTION

¶ 6 The Supreme Court has jurisdiction over final judgments and orders of the Commonwealth Superior Court. NMI CONST. art. IV, § 3.

III. STANDARDS OF REVIEW

¶ 7 There are three issues on appeal. First, Ogumoro argues that the court failed to instruct the jury on the lesser included charges of misdemeanor Theft of Services and Conspiracy to Commit Theft of Services. Generally, we review the court's failure to provide lesser included offense instructions under the abuse of discretion standard. *Commonwealth v. Kaipat*, 4 NMI 300, 302 (1995). However, "[w]hen a party fails to preserve its objections for appeal, we are left with the option of exercising our discretion to review for plain error." *Commonwealth v. Hossain*, 2010 MP 21 ¶ 28. Although there was no error at the time of trial, we review for plain error because the possibility for error arose due to a subsequent change in law. *Johnson v. United States*, 520 U.S. 461, 466–67 (1997). Second, he claims there was insufficient evidence to support a conviction for felony Theft of Services and Conspiracy to Commit Theft of Services. We review his sufficiency of the evidence argument for plain error. *See Commonwealth v. Fitial*, 2015 MP 15 ¶ 15 (noting appellate review of a sufficiency of the evidence claim is subject to plain error review when a party fails to file a judgment of acquittal). Third, Ogumoro challenges the court's interpretation of 6 CMC § 6101(a) as imposing a duty to serve a judicial document subsequently deemed invalid. As a question of statutory interpretation, we review de novo. *Reyes v. Reyes*, 2001 MP 13 ¶ 3.

IV. DISCUSSION

A. Lesser Included Offense Instruction

1. Subsequent Change in Law

¶ 8 Ogumoro argues that, although the court did not plainly err by failing to instruct the jury on lesser included offenses at the time of trial, this subsequently became plain error. He asserts that at least five federal circuits allow appellate review for "retrospective plain error" when an action was not error at the time of trial but subsequently became error due to a change in the law.[3]

¶ 9 We agree with Ogumoro's formulation of the retrospective plain error rule. Typically, when a party fails to preserve an objection for appeal, the reviewing court may only exercise discretion to review for plain error. NMI R. CRIM. P. 52(b). However, a court may also conduct a plain error review when the law is settled at the time of trial but subsequent changes in the law create the potential

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[3] In support of his assertion, Ogumoro cites to *United States v. Ross*, 77 F.3d 1525, 1539 (7th Cir. 1996); *United States v. Kramer*, 73 F.3d 1067, 1074 (11th Cir. 1996);*United States v. Retos*, 25 F.3d 1220, 1223 (3rd Cir. 1994); *United States v. Viola*, 35 F.3d 37, 42 (2nd Cir. 1994); and *United States v. Washington*, 12 F.3d 1128, 1138 (D.C. Cir. 1994).

for plain error while the case is on appeal. *Johnson v. United States*, 520 U.S. at 466–67; *see Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past.").

¶ 10 A court may retroactively review for plain error when a new rule for criminal prosecutions is decided while a case is pending on appeal. *Johnson*, 520 U.S. at 467. In *Johnson*, while the defendant's case was on trial, then-extant Eleventh Circuit precedent held that the issue of materiality in a perjury prosecution was a question for the judge. *Id.* at 464. While the defendant's appeal was pending, the Supreme Court reversed its course, holding that the materiality of a false statement must be submitted to a jury. *Id.* The United States Supreme Court applied the new rule retroactively, reviewing the defendant's case for plain error because he did not object at trial. *Id.* at 466. The Supreme Court found "there is no doubt that if [defendant's] trial occurred today, the failure to submit materiality to the jury would be error . . . ." *Id.* at 467. The judgment was upheld, however, because the error did not affect the proceedings' fairness as evidence supporting the defendant's conviction was overwhelming. *Id.* at 470.

¶ 11 A similar change of law occurred in *Commonwealth v. Guiao*, 2017 MP 2 ("*Guiao II*"). In *Commonwealth v. Guiao*, ("*Guiao I*"), we held that 7 CMC § 3101(a)[4] only required that a jury try felonies punishable by over five years imprisonment. 2015 MP 1 ¶ 11. Meanwhile, the judge was not obligated to provide a lesser included offense instruction if the lesser offense was before the bench. *Id.* "In construing Section 3101(a), the Court, in effect, bifurcated the trial so that a jury can never decide on a lesser included offense if the offense is before the bench and not the jury." *Id.* ¶ 13. While Ogumoro's appeal was pending, however, we decided *Guiao II*, creating a new rule for the conduct of criminal prosecutions. There, we explained that regardless of whether bench and jury counts were separated, due process considerations dictated that the court "*must* instruct the jury on a lesser included offense if (1) 'the elements of the lesser offense are such that one cannot commit the greater offense without committing the lesser' and (2) 'a rational jury could find the defendant guilty of the lesser offense while acquitting him of the greater.'" *Id.* ¶ 14 (quoting *Commonwealth v. Camacho*, 2002 MP 6 ¶ 67).

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[4] Section 3101(a) provides in relevant part:

> Any person accused by information of committing a criminal offense punishable by five years imprisonment or more, or by a fine of $2,000 or more, or both, shall be entitled to a trial by a jury of six persons. Provided however, that the person shall further have the right, in his or her jury trial, to also have the same jury and not the trial judge consider all other non-jury count(s) charged in the information.

¶ 12 We adopt the retrospective plain error rule. At the time of Ogumoro's trial, the judge had no obligation to provide a lesser included offense instruction to the jury if the lesser count was before the bench. *Guiao*, 2015 MP 1 ¶ 11. Following then-extant law, Ogumoro's trial was bifurcated, with the judge deciding the lesser included offense of misdemeanor theft.[5] Because *Guiao I* was the law at the time of trial, Ogumoro's objection to the judge's failure to instruct the jury on lesser included offenses would have been fruitless. However, *Guiao II* instructed that if the two-prong test is met, even offenses that would normally be before the bench must be decided by the jury. 2017 MP 2 ¶ 14. It follows that although the court did not commit plain error at the time of trial, there is potential for plain error due to the subsequent change in the law. We thus review the court's failure to instruct on the lesser included offense of misdemeanor theft for plain error.

2. Retrospective Plain Error

¶ 13 Ogumoro argues that in light of the change in law in *Guiao II*, the court committed "retrospective plain error." Specifically, he asserts the court erred in failing to instruct the jury on the lesser included offenses of misdemeanor Theft of Services and Conspiracy to Commit Theft of Services. Ogumoro claims this error was obvious and affected his substantial right to due process.

¶ 14 Plain error review is stringent. *Commonwealth v. Rabauliman*, 2004 MP 12 ¶ 38. The standard requires the appellant to prove: "(1) there was error; (2) the error was plain or obvious; (3) the error affected the appellant's substantial rights . . . ." *Hossain*, 2010 MP 21 ¶ 29 (internal quotation marks omitted). "Reversal is proper only if . . . necessary to safeguard the integrity and reputation of the judicial process or to forestall a miscarriage of justice." *Id.* (internal quotation marks omitted). For us to find error, both prongs of the *Guiao II* test must be met, namely: (1) "the elements of the lesser offense are such that one cannot commit the greater offense without committing the lesser," and (2) "a rational jury could find the defendant guilty of the lesser offense while acquitting him of the greater." 2017 MP 2 ¶ 15 (internal quotation marks omitted).

¶ 15 Under *Guiao II's* first prong, the elements of misdemeanor theft are a subset of the elements of felony theft. *See* 6 CMC § 1601(a)–(b)(3). The only distinguishing factor between the two offenses is the value of the theft—a person cannot commit a felony theft of over $250.00 without also committing the offense of misdemeanor theft under $250.00. *See* 6 CMC §§ 1601(b)(2)–(3). Thus, the first prong of the test is met.

¶ 16 As to the second prong, we review whether a rational jury could find Ogumoro guilty of the lesser offense of misdemeanor theft while acquitting him of the greater offense of felony theft. "To warrant such an instruction, there must

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[5] "You may have heard evidence and argument during the trial . . . that relates to the other charges with which [Ogumoro] is charged but your duties are limited to deciding only those two counts on which I gave you instructions." Tr. 443–44.

be substantial evidence of the lesser included offense, that is, evidence from which a rational trier of fact could find beyond a reasonable doubt that the defendant committed the lesser offense [but not the greater]." *Guiao*, 2017 MP 2 ¶ 17 (alteration in original) (citing *Camacho*, 2002 MP 6 ¶ 66). Furthermore, "the United States Supreme Court has made it clear that a lesser included offense instruction is required only when warranted by the evidence." *Camacho*, 2002 MP 6 ¶ 66 (citing *Hopper v. Evans*, 456 U.S. 605, 611 (1982)); *see People v. Breverman*, 960 P.2d 1094, 1106 (Cal. 1998) (quoting *People v. Flannel*, 603 P.2d 1, 13 n.2 (Cal. 1979) ("existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury.")).

¶ 17 In *Guiao II*, we considered the substantial evidence requirement in light of whether a defendant required an instruction for the lesser included offense of assault and battery on a charge of assault with a dangerous weapon. 2017 MP 2 ¶¶ 19–22. There, the distinguishing element between the two offenses was the use of a dangerous weapon. *Id.* ¶ 21. Thus, "[w]hether a rational jury could acquit [defendant] of assault with a dangerous weapon then, boil[ed] down to whether a hot frying pan constitute[d] a 'dangerous weapon.'" *Id.* ¶ 21. At trial, the defendant presented multiple pieces of evidence casting doubt on the intent with which the pan was used. *See id.* ¶ 22 ("[Defendant] swung the pan slowly, the strike was 'not that hard,' and [the victim] was able to block the pan with his arm, and disarm [the defendant]."). "Because there [was] substantial evidence casting doubt on whether the frying pan in question was a dangerous weapon, a rational jury could acquit [defendant] of assault with a dangerous weapon" while convicting her of assault and battery. *Id.* ¶ 22. Thus, we concluded the court erred by not giving the lesser included offense instruction. *Id.*

¶ 18 Here, our determination hinges on whether substantial evidence was presented at trial such that a rational jury could find Ogumoro guilty of misdemeanor theft while acquitting him of felony theft. Two witnesses provided testimony as to the value of services taken—former OPA investigator David-Atalig and Ogumoro himself. Prior to trial, David-Atalig had conducted an investigation to determine a value for the protective detail. She prepared a spreadsheet in which she calculated the two components of the escort. First, she calculated the cost of the manpower, multiplying the hourly wages of the three officers involved by the number of hours spent executing the services. Next, she calculated the cost of renting the three SUVs used in the escort, collecting price quotes from three rental companies. Although David-Atalig could not recall some figures exactly, she maintained that the total cost of services taken by Ogumoro was over the $250.00 threshold. When the prosecution asked if she had determined a grand total, David-Atalig responded: "[y]es, I did and it was definitely over $250.00." Tr. 185. Ogumoro's testimony as to the value of the services, on the other hand, consisted of inconsistent, unsupported testimony. When his attorney asked him how much escort services cost, he responded: "[f]or Mr. Buckingham it's $100.00." Tr. 347. However, he quickly clarified on cross-

examination that "it varies for every different escort, different amount. There are some, if you look at it's $1,000.00." Tr. 357. While Ogumoro testified that he believed Buckingham's escort service would cost $100.00, he acknowledged that some escorts cost $1,000.00. His single statement of self-serving, unsupported testimony that Buckingham's escort cost $100.00 does not constitute substantial evidence.

¶ 19 Accordingly, we find Ogumoro did not produce substantial evidence of misdemeanor theft. His single line of unsupported, self-serving testimony was not substantive enough to warrant a lesser included offense instruction. On the contrary, classifying Ogumoro's statement as substantial evidence would render our analysis in *Guiao II* meaningless. Furthermore, although the facts present a close call, we only correct egregious errors on plain error review. *Guiao*, 2015 MP 1 ¶ 9; *see Hopper*, 456 U.S. at 611 (explaining "due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction").

¶ 20 Since there was not substantial evidence demonstrating that the value of the services was under $250, a rational jury could not have found Ogumoro guilty of misdemeanor theft while convicting him of felony theft. Thus, we conclude the court did not err in failing to instruct the jury on the lesser included offense of misdemeanor theft. Because we find no error occurred, we further conclude that there was no retrospective plain error.

B. Insufficient Evidence

¶ 21 Ogumoro argues that the Commonwealth did not provide sufficient evidence regarding the Theft of Services and Conspiracy to Commit Theft of Services charges such that a reasonable jury could have convicted him of the felony offenses. He claims David-Atalig's testimony was ambiguous and that her conclusion that the amount of services taken was "definitely over $250.00" was unreasonable and should not have been considered in calculating his punishment.

¶ 22 Because Ogumoro failed to file a motion for a judgment of acquittal under NMI Rule of Criminal Procedure 29(a), he failed to preserve his sufficiency of evidence issue for appellate review. Thus, we review his challenge for plain error. *Commonwealth v. Fitial*, 2015 MP 15. "Anyone claiming insufficiency of the evidence faces a nearly insurmountable hurdle." *Commonwealth v. Minto*, 2011 MP 14 ¶ 38 (internal quotation marks omitted). When reviewing such a challenge, "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. Taman*, 2014 MP 8 ¶ 17. "We do not weigh conflicting evidence or consider the credibility of witnesses." *Id.* (internal quotation marks omitted).

¶ 23 Theft of services occurs if, "having control over the disposition of services of others to which the person is not entitled, that person knowingly diverts those services to . . . to the benefit of another not entitled to it." 6 CMC § 1607(b). The

amount of punishment for theft increases with the value of services stolen. *See, e.g.*, 6 CMC § 1601(b)(3) (imprisonment up to one year for theft under $250); 6 CMC § 1601(b)(2) (imprisonment up to five years for theft ranging $250–$20,000). The amount of the theft is the "*highest value, by any reasonable standard* . . . ." 6 CMC § 1601(c) (emphasis added). 6 CMC § 1601(c) provides wide latitude for determining the highest value, contemplating any standard fair under the circumstances, including market value, original cost, or replacement cost.

¶ 24 David-Atalig's testimony was central to the jury's determination of the escort's value. Because such escorts are illegal, she approximated the market value for the service. First, David-Atalig calculated the cost of labor, multiplying the four hours spent transporting Buckingham to the airport by the hourly minimum wage of $5.05 and the three officers' hourly wages of $8.06. Next, David-Atalig calculated the cost of renting three SUVs. None of the rental companies provided rentals for less than a full day, and all of the companies charged approximately $80.00 per day.[6] Even at minimum wage, David-Atalig's calculation totaled $300.60. Thus, David-Atalig's investigation provided the market value of the services, a fair standard especially considering DPS was unable to provide a price for an illegal service. Her conclusion that the total cost was "definitely over $250.00" was well-supported. Tr. 185.

¶ 25 Ogumoro fails to meet the "insurmountable hurdle." Based on the evidence presented at trial, a trier of fact, whether judge or jury, would be reasonable in finding beyond a reasonable doubt the value of services taken by Ogumoro exceeded $250.00, implicating him of the felony offense. Thus, we find the court did not err in concluding there was sufficient evidence to convict Ogumoro of felony theft. It follows that no plain error occurred.

C. Duty to Serve Penal Summons

¶ 26 Ogumoro argues the court erred in convicting him of Misconduct in Public Office due to his failure to serve a penal summons on Buckingham. Misconduct in Public Office requires a public official to "willfully neglect[] to perform the

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[6] Although David-Atalig mentioned a potential half-day rental, she later clarified that none of the businesses rented for less than a full day:

> [Attorney]: Were you able to get an hourly rate for the rental of SUVs from these places?
> [David-Atalig]: No, I wasn't. At that time they weren't renting out cars by the hour. It was either—I know one vendor was doing it for half day and then—and then they all had just the rates for a full day.
> . . . . .
> [Attorney]: And you weren't able to find a place that would rent it for any less than a day?
> [David-Atalig]: That's correct.

Tr. 184–85.

duties of his or her office as provided by law . . . .” 6 CMC § 3202. The Commonwealth based the misconduct charge on 6 CMC § 6101(a), which makes service of process obligatory on police officers. In relevant part, the statute states:

> All process in any criminal proceeding . . . issued in accordance with law and the rules of procedure prescribed in accordance with law, shall be obligatory upon all police officers . . . and any police officer . . . to whom process is given shall promptly make diligent effort to execute or serve it either personally or through another police officer . . . .

At the time the summons was issued, NMI Rule of Criminal Procedure 9(b)(2) required a penal summons issued pursuant to an information, such as Buckinghams, to be signed by a judge.

¶ 27 Ogumoro claims the court erred in holding he violated Section 6101(a) while also finding the penal summons was void. Because the underlying process was deemed void, he argues the summons was not “issued in accordance with law and the rules of procedure prescribed in accordance with law” as required by Section 6101(a)’s plain language. Thus, Ogumoro asserts that he had no duty to serve the summons pursuant to Section 6101(a) and did not willfully neglect to perform his duties as a public official.

¶ 28 Statutory interpretation issues are subject to de novo review. *Reyes*, 2001 MP 13 ¶ 3. “[L]ike all matters of statutory interpretation, our analysis begins with the language of the statutory text.” *Kabir v. CNMI Pub. Sch. Sys.*, 2009 MP 19 ¶ 33 (citation omitted). When interpreting a statute, we aim “to effect the plain meaning of [its] object”; our principal responsibility is to effectuate the legislature’s intent. *Commonwealth v. Crisostomo*, 2005 MP 9 ¶ 39; *In re Commonwealth*, 2015 MP 7 ¶ 11.When reading the text, however, we are “guided not by ‘a single sentence or member of a sentence, but [by] looking to the provisions of the whole law, and to its object and policy.’” *Commonwealth v. Sablan*, 2016 MP 12 ¶ 10 (quoting *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94–95 (1993)).

¶ 29 Plainly construed, Section 6101(a) makes service of process mandatory on any police officer when it is given to them, creating a duty to serve or execute the process. This is evidenced by the statute’s use of the words “obligatory,” which means required or mandatory, and “shall,” which is unambiguous and means must. 6 CMC § 6101(a); Black’s Law Dictionary 926 (9th ed. 2010); *see Calvo v. N. Mar. I. Scholarship Advisory Bd.*, 2009 MP 2 ¶ 25 (explaining that “[u]se of the term ‘shall’ is mandatory and has the effect of creating a duty.”). Thus, the statute plainly indicates that once the penal summons was given to Ogumoro, he had a duty to promptly make diligent effort to serve the penal summons on Buckingham.

¶ 30 Ogumoro’s argument, however, hinges on being excused from performing the duty created by Section 6101(a). He asserts that because the penal summons was later found invalid, he had no duty to serve it and, as such, there was no

violation upon which to base the Misconduct in Public Office charge. Ogumoro claims the plain meaning of the phrase "issued in accordance with law and the rules of procedure prescribed in accordance with law" indicates service is only obligatory if the penal summons is valid. We thus assess whether Ogumoro was excused from serving the penal summons under Section 6101(a) due to the fact the summons was signed by the Superior Court Clerk of Court instead of a judge.

¶ 31 We have not had occasion to interpret Section 6101(a) and find nothing in the Commonwealth Code governing criminal procedure instructive as to the Legislature's intent regarding "law and the rules of procedure prescribed in accordance with law." Because our law and precedent do not address the interpretation of this terminology, 7 CMC § 3401 instructs us to look to the common law "as generally understood and applied in the United States." 7 CMC § 3401; *see Commonwealth v. Quitano*, 2014 MP 5 ¶ 13 n.11 ("[W]e acknowledge that § 3401 is located in the Commonwealth Code's civil procedure section . . . . [h]owever there is clear legislative intent that § 3401 applies to criminal proceedings . . . ."). Thus, we find guidance from United States Supreme Court jurisprudence.

¶ 32 Where the previous judgment of a neutral magistrate is available, the United States Supreme Court has interpreted policies underlying constitutional protections as disfavoring the injection of on-the-scene determinations of the validity of judicial process by police officers. *See Johnson v. United States*, 333 U.S. 10, 13–14 (1948) ("The point of the Fourth Amendment . . . consists in requiring that [] inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."); *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (noting the advance scrutiny of a detached and neutral judge is "a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer"). This jurisprudence instructs that determinations resulting in loss of freedom or privacy "be decided by a judicial officer, not by a policeman or government enforcement agent." *Johnson*, 333 U.S. at 14; *cf. Mass. v. Sheppard*, 468 U.S. 981, 990 (1984) (holding evidence should not be suppressed where police conduct was objectively reasonable and the warrant form was only defective due to a judge's mistake).

¶ 33 In *United States v. Leon*, the Supreme Court elaborated on the parameters of a police officer's duty to serve process that is somehow deficient in the context of the good faith exception to the exclusionary rule. 468 U.S. 897 (1984).[7] There, the Supreme Court indicated three circumstances where an officer would not be justified in relying on process. *Id.* at 923. First, an officer should not rely on a warrant "so lacking in indicia of probable cause as to render official belief in its

[7] The Commonwealth refers to cases discussing warrants in its Response Brief, and we find this analogy compelling. Thus, although *Leon* discusses the parameters of a warrant's validity, we analogize these exceptions to evaluating the validity of a penal summons.

existence entirely unreasonable." *Id.* (internal quotation marks omitted). Next, process may be so facially deficient "that the executing officers cannot reasonably presume it to be valid." *Id.* Additionally, "no reasonably well-trained officer should rely on [a] warrant" where the judge wholly abandons their impartial judicial role. *Id.* More broadly, the Court explained that an officer's reliance on a document's technical sufficiency must be objectively reasonable; there may be limited circumstances where the officer has no reasonable grounds for believing process was properly issued. *See id.* at 918, 922–23. But, the *Leon* Court concluded, "[i]n the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *Id.* at 921. "Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." *Id.* (internal quotation marks omitted).

¶ 34 In *Groh v. Ramirez*, the United States Supreme Court based the standard for a police officer to receive qualified immunity on the duty described in *Leon*. 540 U.S. 551, 556 (2004). The *Groh* Court similarly held the officer must only "read the warrant and satisfy [himself] that [he] understand[s] its scope and limitations, and that it is not defective in some obvious way." *Id.* (alteration in original) (internal quotation marks omitted). The search team must also give a copy to the person whose property is being searched, checking that it "has no missing pages or other obvious defects." *Id.*

¶ 35 We consider these policies in determining whether the penal summons was "issued in accordance with law and the rules of procedure prescribed in accordance with law" such that Ogumoro had a duty to serve it under Section 6101(a). Giving Ogumoro a penal summons to serve upon Buckingham triggered his duty to "promptly make diligent effort to execute or serve [the process]." 6 CMC § 6101(a). Nothing in the record indicates any of the three exceptions described by the *Leon* court were present such that Ogumoro would have reason to doubt the penal summons was validly issued so as to excuse him from serving it.

¶ 36 First, Ogumoro had no reason to doubt the substantive contents of the penal summons or suspect it was lacking in indicia of probable cause. In his testimony, Ogumoro admitted he did not read the summons. Moreover, one of his partners, Special Agent Haejun Park ("Park"), testified as to the law enforcement officers' affirmative belief in the penal summons's legitimacy:

> [Attorney]: You made an interesting remark, you said that you reviewed the penal summons and you said it was a legitimate penal summons issued by the Superior Court?
> [Park]: Yes, correct.
> . . . . .
> [Attorney]: How do you know that it's a legitimate penal summons?
> [Park]: Well, I work with Juanette and Juan, CNMI sworn law enforcement officers on many occasions. When they told me that it

> was a legitimate penal summons issued by the Superior Court, I have no reason to doubt that they would lie to me or—partners don't work that way.

Tr. 299–300. Thus, the record shows Ogumoro had no reason to garner suspicion as to the penal summons's substantive contents.

¶ 37 Next, Ogumoro had no reason to suspect the penal summons was facially deficient. The penal summons was subsequently deemed invalid because it was signed by the Superior Court Clerk of Court instead of by a judge. It is unlikely that an incorrect signature is the type of facial deficiency envisioned by the United States Supreme Court, as *Leon* and its progeny stand for the proposition that constitutional protections are aimed at deterring unlawful searches by police, not errors by magistrates. *See Leon*, 468 U.S. at 913–14 (noting the Court has expressed a "strong preference for warrants" because they "provide[] the "detached scrutiny of a neutral magistrate, which is a more reliable safeguard" for constitutional protections than police officers' "hurried judgments"). However, we need not decide whether an incorrect signature is a form of facial deficiency, as Ogumoro never saw the signature at issue. Ogumoro admits to his lack of scrutiny of the summons in his testimony:

> [Attorney]: When the penal summons was served, when you first saw Haejun Park, did Haejun Park show you the penal summons?
> [Ogumoro]: Yes, sir.
> [Attorney]: Did you read the penal summons?
> [Ogumoro]: I did not read the penal summons.
> [Attorney]: So, did he give you a copy?
> [Ogumoro]: No, sir.
> [Attorney]: So, did you have an opportunity to read whether or not it's a penal summons or not?
> [Ogumoro]: He showed me the title flashing over saying this is the penal summons for Mr. Buckingham.
> . . . . .
> [Attorney]: So, you stopped Haejun Park?
> [Ogumoro]: No, I did not.

Tr. 375. Because Ogumoro did not read the penal summons, he had no reason to question its facial validity.[8] Thus, none of the exceptions contemplated by the United States Supreme Court in *Leon* are applicable.

¶ 38 The decision made by Ogumoro resembles the type of hurried judgment the United States Supreme Court has repeatedly deemed to be disfavored in service of process. *See Leon*, 468 U.S. at 913–14; *Chadwick*, 433 U.S. at 9; *Johnson*, 333 U.S. at 13–14. The policy expressed in the United States

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[8] Additionally, because Ogumoro received the penal summons after it had been issued, he had no knowledge of or reason to believe it was issued by a judge who had wholly abandoned their impartial judicial role. *See Leon*, 468 U.S. at 923.

Constitution and furthered by the Supreme Court is one that attempts to minimize officers' second-guessing decisions as to whether to follow through with courts' neutral determinations. *See Leon*, 468 U.S. at 913–25. Thus, in reading § 6101 in connection with the "law" regarding service of process, we recognize narrow exceptions in which an officer may refuse to complete service. As discussed, Buckingham's penal summons does not meet these exceptions.

¶ 39 Our interpretation of the statute's reference to the rules of criminal procedure leads to similar results. At the time of Ogumoro's trial, NMI Criminal Rule of Procedure 9(b)(2) required a penal summons to be signed by a judge. The federal rules contemplate a summons or warrant issued upon a complaint to be signed by a judge, while a summons or warrant issued upon an information is to be signed by a clerk.[9] "Because the Commonwealth Rules of Criminal Procedure are patterned after the Federal Rules of Criminal Procedure, [we have] long held that it is appropriate to consult interpretations of the federal rules when interpreting the Commonwealth Rules of Criminal Procedure." *Commonwealth v. Attao*, 2005 MP 8 ¶ 9 n.7. We find the United States Supreme Court's interpretation of policies underlying process requirements in *Shadwick v. Tampa* instructive. 407 U.S. 345 (1972).

¶ 40 In *Shadwick v. Tampa*, the United States Supreme Court determined that warrant requirements focused on the detachment and neutrality of the judicial officer issuing the warrant, not their title. *Id.* at 350–51. The *Tampa* Court noted that "[c]ommunities may have sound reasons for delegating the responsibility of issuing warrants to competent personnel other than judges . . . . Many municipal courts face stiff and unrelenting caseloads." *Id.* at 352–53. Importantly, the Supreme Court recognized:

> The substance of the Constitution's warrant requirements does not turn on the labeling of the issuing party. . . . [A]n issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search. This Court long has insisted that inferences of probable cause be drawn by 'a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' . . . [T]he Court last Term voided a search warrant issued by the state attorney general 'who was actively in charge of the investigation and later was to be chief prosecutor at the trial.' If, on the other hand, detachment and capacity do conjoin, the magistrate has satisfied

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[9] Federal Rule of Criminal Procedure 4(b) indicates a warrant must "be signed by a judge" and a summons "must be in the same form as a warrant." Federal Rule of Criminal Procedure 9(b) indicates a warrant "must be signed by the clerk" and a summons "must be in the same form as a warrant."

the Fourth Amendment's purpose.

Id. at 350 (citations omitted). The *Tampa* Court found a municipal court clerk to be a judicial officer who fulfilled these requirements. *Id.* at 350–52. It concluded by emphasizing that states are allowed flexibility in determining who makes determinations as to process, "so long as all are neutral and detached and capable of the probable-cause determination required of them." *Id.* at 354.

¶ 41 Interpreting our rules consistently with the Supreme Court's interpretation in *Tampa*, we find the policies underlying the criminal procedure rules to be satisfied. Although the penal summons at issue was not signed by a judge, it was signed by the Superior Court Clerk of Court, a position similar to the municipal court clerk discussed in *Tampa*. The Superior Court Clerk of Court is a judicial officer, capable of meeting the aforementioned two tests. Thus, the penal summons was issued by a detached and neutral judicial officer, fulfilling the policies underlying our criminal procedure rules.

¶ 42 We limit the circumstances excusing an officer from service of process to the exceptions discussed. Allowing officers unfettered discretion in scrutinizing penal summonses and warrants would allow the law to be carried out according to on-the-scene determinations of police officers as opposed to calculated decisions by neutral and detached judicial officers. Accordingly, we interpret 6 CMC § 6101(a) in accordance with long-held policies as to the duties of police officers and conclude Ogumoro was not excused from serving the penal summons. Ogumoro therefore willfully neglected to perform the duties of his office as provided by law and instructed in 6 CMC § 6101(a).

V. CONCLUSION

¶ 43 For the foregoing reasons, we hereby AFFIRM Ogumoro's convictions.

SO ORDERED this 26th day of December, 2017.

/s/
JOHN A. MANGLONA
Associate Justice

/s/
ROBERT J. TORRES
Justice Pro Tempore

/s/
ELYZE M. IRIARTE
Justice Pro Tempore