IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, v. GILBERT S. BORJA, Defendant	Crim. Case No. 99-0331T, 99-0398T **ORDER REJECTING PLEA AGREEMENT**

I. PROCEDURAL BACKGROUND

This matter came before the Court on February 23, 2000 in Courtroom 217A on a proposed plea agreement tendered to the court for approval. Kevin Lynch, Esq. appeared on behalf of the Government and Doug Hartig, Esq. appeared on behalf of Defendant. The Court, having reviewed the memoranda, declarations, and exhibits, having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its written decision. **[p. 2]**

II. FACTUAL BACKGROUND

1. On July 16, 1999, the Government filed an information charging the Defendant with assault with a dangerous weapon in violation of 6 CMC § 1204(a) and punishable by § 1204(b), kidnaping in violation of 6 CMC § 1421(a)(1) and punishable by § 1421(c)(2), and assault and battery in violation of 6 CMC 1202(a) and punishable under §§ 1202(b) and 4101(c). The Information asserts that on May 16, 1999, the Defendant did, among other things, unlawfully threaten to cause or offer to cause bodily injury to Eva Dela Cruz by means of a knife.
2. Prior to the trial in this case, the Government and the Defendant proposed a plea agreement providing, in material part, for the Defendant to plead guilty to one count of assault with a

dangerous weapon, in exchange for which he would receive a sentence of ten years probation, all suspended except for the first fifty-five days.

3. After taking the proposed plea agreement under advisement, the court reviewed the applicable penalty statutes *sua sponte* to note that 6 CMC § 1204(b) provides for a maximum jail term of ten years for the commission of assault with a dangerous weapon. 6 CMC § 4102 further provides in pertinent part:

> (a) Any person who is *armed with a dangerous weapon in the commission of an offense shall be sentenced to serve no less than one-third the maximum term of imprisonment* which may otherwise be imposed upon conviction of the offense, which sentence may not be suspended unless the court determines that unique circumstances exist in the light of which imprisonment of the convicted person is inhumane, cruel or otherwise extremely detrimental to the interest of justice, and is not necessary for the protection of the public or any witness.
>
> (c) No penalties pursuant to this section shall be imposed *unless being armed with a dangerous weapon is alleged and proved as an element of the underlying offense.* (Emphasis added)**[p. 3]**

4. In light of the requirements of 6 CMC § 4102, the court asked the parties to brief the issue of whether the trial court could permit the parties to depart from the statute by requesting court approval of a plea agreement permitting a defendant to serve less than one-third of the maximum term of imprisonment.

5. In response to the court's inquiry, the Government took the position that 6 CMC § 4102(a) requires a defendant to serve no less than one-third the maximum term of imprisonment. The Government contends that the Legislature's use of the word "shall" makes imposition of the minimum sentence mandatory.

6. Defendant, on the other hand, argued that the mandatory sentencing provisions of 6 CMC § 4102(a) did not apply to a sentence for assault with a dangerous weapon as section 4102(c) requires being "armed with a dangerous weapon" to be an element of the underlying offense. Since the Information did not include any allegation that the Defendant was "armed" with a dangerous weapon, nor did it even assert that the offense was punishable by section 4102(a),[1] the Defendant contended that the recommended sentence was permissible.

---

[1] The Information asserts only that the Defendant did unlawfully threaten to cause or offer to cause bodily injury to the victim by means of a dangerous weapon and that the offense is made punishable by 6 CMC § 1204(b).

7. Defendant conceded, however, that being "armed with a dangerous weapon" appeared to be a prerequisite to committing an assault with a dangerous weapon. According to the Defendant, section 1204 only requires the Government to prove, and the trier of fact to find, that a defendant did "cause, attempt to cause, or purposely cause" bodily injury *with* a dangerous weapon and imposes no proof requirement that a defendant be "armed." Defendant concluded, therefore, that the mandatory sentencing provision of § 4102(a) does not apply (Brief at 2).

II. QUESTION PRESENTED

Whether 6 CMC § 4102(a) restricts the court from approving a plea agreement that would permit a defendant to plead to the charge of assault with a dangerous weapon and serve less than **[p. 4]** one-third the maximum term of imprisonment, absent any of the unique circumstances specified by statute.[2]

III. ANALYSIS

1. The Criminal Code provides for four separate offenses involving assault: (1) simple assault (6 CMC § 1201)[3], (2) assault and battery (6 CMC § 1202),[4] (3) aggravated assault and battery (6 CMC§ 1203),[5] and (4) assault with a dangerous weapon (6 CMC § 1204).[6] Contrary to

---

[2] In pertinent part, section 4102(a) prohibits the suspension of any sentence imposed under that section to be suspended unless the court determines that "unique circumstances" exist "in the light of which imprisonment ...[would be] inhumane, cruel, or otherwise extremely detrimental to the interest of justice, and ...not necessary for the protection of the public or any witness."

[3] § 1201. Assault.
(a) A person commits the offense of assault if the person unlawfully offers or attempts, with force or violence, to strike, beat, wound, or to do bodily harm to another.
(b) A person convicted of assault may be punished by imprisonment for not more than six months.

[4] § 1202. Assault and Battery.
(a) A person commits the offense of assault and battery if the person unlawfully strikes, beats, wounds, or otherwise does bodily harm to another, or has sexual contact with another without the other person's consent.
(b) A person convicted of assault and battery may be punished by imprisonment for not more than one year.

[5] § 1203. Aggravated Assault and Battery.
(a) A person commits the offense of aggravated assault and battery if he or she causes serious bodily injury, purposely, knowingly or recklessly.
(b) A person convicted of aggravated assault and battery may be punished by imprisonment for not

what the Defendant appears to be arguing, the Criminal Code makes clear that assault with a dangerous weapon is a separate and distinct offense,[7] for it is the use of a **[p. 5]** dangerous weapon that distinguishes assault with a dangerous weapon from simple assault and aggravated assault and battery.[8] For the Government to prove the crime of assault with a dangerous weapon, it must show: (1) that the defendant threatens to cause, attempts to cause, or purposely causes bodily injury to another, (2) with a dangerous weapon.[9] Since the Code expressly requires different elements of proof for the crimes of assault and assault with a dangerous weapon, Defendant's initial argument, that being armed with a dangerous weapon is not an element of the offense, is incorrect. *See CNMI v. Kaipat*, Appeal No. 94-052 (N.M.I. Oct. 23, 1995) at 7-8 (assault and assault and battery are alternative lesser included offenses of assault with a dangerous weapon; *use* of dangerous weapon is element of assault with a dangerous weapon).

2. Defendant maintains that in contrast to § 4102(a), an offense committed under section 1204 does not require the perpetrator to be "armed," and thus the use of the word "armed" creates

---

more than 10 years.

[6] § 1204. Assault with a Dangerous Weapon.
(a) A person commits the offense of assault with a dangerous weapon if he or she threatens to cause, attempts to cause, or purposely causes bodily injury to another with a dangerous weapon.
(b) A person convicted of assault with a dangerous weapon may be punished by imprisonment for not more than 10 years.

[7] *See, e.g., Conyers v. State*, 693 A.2d 781, 796-97(Md. 1997) (robbery with a deadly weapon is not a separate substantive offense, but if state can prove that defendant used a deadly weapon during commission of robbery, defendant is subject to harsher penalties); *People v. Mancebo*, 77 Cal.App.4th 1253, 91 Cal. Rptr. 2d 587, 590 (Cal.App. 2000) (alternative sentencing scheme does not create a new crime but requires elements calling for specific sentence to be plead and proved to the trier of fact).

[8] *See ,e.g.*, Fed. Jury Practice and Instructions §23A.06 (Conviction for assault with a dangerous weapon under 18 U.S.C. § 113(c) requires proof of (1) an assault, (2) with a dangerous weapon, (3) with intent to do bodily harm); CALJIC 9.02 Instructions (6th ed.) (Crime of assault with a deadly weapon requires proof that person was assaulted, that the assault was committed with a deadly weapon or instrument, and that deadly weapon is any object, instrument or weapon which is used in such a manner as to be capable of producing, and likely to produce, death or great bodily injury); WPIC 35.02 (2d ed) (to convict defendant of assault in first degree, government must prove that; the defendant committed an assault and that the assault was committed with a firearm, deadly weapon, or by force or means likely to produce great bodily harm or death).

[9] 6 CMC § 102(f) defines a "dangerous weapon" as any automatic weapon, dangerous device, firearm, gun, handgun, long gun, semi-automatic weapon, knife, or other thing by which a fatal wound or injury may be inflicted.

an ambiguity. The court does not agree that any ambiguity exists. In reaching this decision, the court is guided by section 109 of the Criminal Code, 6 CMC § 104(b), which provides that the words and phrases used in the Criminal Code "shall be read within their context and shall be construed according to the common and approved usage of the English language." Section 104(d) of the Criminal Code further requires the court to construe "the provisions of this title ... according to the reasonable construction of their terms, with a view to effect the plain meaning of its object." With these precepts in mind, the court considers that the word "armed" simply means equipped, furnished fortified, or outfitted with a weapon. **[p. 6]** *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY; BLACK'S LAW DICTIONARY 138 (6th ed. 1990). Since the Defendant obviously had to be in possession of, or equipped with, the knife in order to threaten bodily injury in the first place, and it is the use of the dangerous weapon that section 1204 proscribes, the choice of the word "armed" instead of the word "use" or "cause" appears to be a distinction without a difference in this case.

3. Defendant nevertheless focuses on section 4102(a)'s "armed with" language, to argue that when the Legislature intended for the mandatory sentencing provisions of § 4102(a) to apply to an offense, it specifically employed the "armed with" language in the applicable penal statute. A review of CNMI statutes, however, does not support Defendant's position. Of the five statutes referencing sentencing enhancements for crimes committed with a "dangerous weapon," only one, the offense of burglary, provides for an increased sentence if the defendant or an accomplice is "armed with" a dangerous weapon.[10] With the exception of the assault statute at issue, which provides for an enhanced sentence if a defendant threatens to cause, attempts to cause or purposely causes bodily injury "with" a dangerous weapon, the

---

[10] *See* 6 CMC § 1204 (assault with a dangerous weapon); 6 CMC § 1801(b)(2)(B) (a person convicted under this section may be punished by imprisonment for not more than ten years if the defendant or an accomplice is "armed with" a dangerous weapon); 6 CMC § 1303(b)(3) (when a defendant "uses" a dangerous weapon with the intent to cause a victim to submit to sexual assault, special circumstances require punishment by imprisonment for a minimum term of 2 years and a maximum term of 20 years); 6 CMC § 1411 (when defendant or accomplice "uses" dangerous weapon to obtain property or inflict serious bodily injury in the course of a robbery, may receive punishment of imprisonment for not more than ten years); 6 CMC § 1431 (if a person convicted for criminal coercion "uses" a dangerous weapon to instill fear, may be punished by imprisonment for not more than five years); 6 CMC § 5434 ("use" of a deadly or dangerous weapon in connection with obstruction of justice shall receive a fine, imprisonment, or both).

remaining statutes for rape, robbery, criminal coercion and obstruction simply refer to "use" of a dangerous weapon.

4. Were there a slew of criminal statutes employing the "armed with" language -- or at least more than one, then perhaps Defendant's argument would be persuasive. In that only one statute employs the "armed with" language at all, it seems highly unlikely that the Legislature would enact section 4201, a separate mandatory sentencing statute, to apply to the crime of **[p. 7]** burglary alone. *See In re Smith*, 986 P.2d 981 (Wash 1999) (Courts avoid statutory interpretations that are forced, unlikely, or strained).

5. In addition to the rules of statutory construction set forth in the Criminal Code, general principles of statutory construction also suggest that section 4201(a)'s provision for mandatory sentencing was intended to apply to all criminal statutes referencing crimes committed with a dangerous weapon. To determine whether the language used by the legislature is indeed plain and unambiguous, a court examines the context surrounding a particular statute, such as its history, its apparent object, and other statutes in *pari materia. People v. Honig*, 48 Cal.App.4th 289, 55 Cal.Rptr.2d 555(1997).

6. Taking into consideration other CNMI penal statutes addressing offenses committed with a dangerous weapon – statutes that have the same general subject and the same general purpose, it appears that the plain meaning of 6 CMC § 4201(a) is to provide for stricter punishment for offenses committed with a dangerous weapon. While it may be true that section 1204 can be violated in ways that would not necessarily call into question the mandatory sentencing provisions of § 4201(a),[11] the facts at issue do not present such a case. Because the court concludes that being equipped or armed with a dangerous weapon is an element of assault with a dangerous weapon, it concludes that section 4102(a) requires a defendant to serve no less than one-third of the maximum term of imprisonment, so long as

---

[11] Section 1204 requires the person threatening to cause, attempting to cause, or purposely causing bodily injury with a dangerous weapon. Conceivably, one could aid and abet the assault without personally using the dangerous weapon and still violate the statute, or one could threaten or attempt to cause bodily injury with a knife or device incapable of inflicting a fatal wound or injury. Assault is a crime, moreover, requiring criminal intent. If a defendant presented evidence that he or she did not intend to injure or do violence to the victim and he or she in fact did not cause any injury, the defendant would not be guilty of the assault but could still conceivably violate the statute.

the Government alleges and proves that a defendant used a dangerous weapon to commit the offense.

7. When a defendant enters a guilty plea constituting his voluntary admission that he committed acts alleged in the indictment, that plea unequivocally establishes that the particular elements alleged were both raised and resolved. *People v. Hayes*, 6 **[p. 8]** Cal.App.4th 616, 623, 7 Cal.Rptr.2d 866, 870 (1992). Accordingly, were the Defendant in this case to plead guilty to assault with a dangerous weapon, the net effect of the plea would satisfy the requirements of 4201(c): that being armed with a dangerous weapon was alleged and proved as an element of the underlying offense.

8. Neither party is raising an issue as to whether the Defendant is entitled to a remedy for his reliance on the validity of the plea agreement. Therefore, the court finds Defendant should be permitted to withdraw his guilty plea and either proceed to trial on the criminal charges, or negotiate another plea agreement that does not violate § 4102(a). *People v. Jackson*, 121 Cal.App.3d 862, 176 Cal.Rptr. 166, 170 (1981) ("That portion of the plea bargain having become impossible for the court to perform, the trial court had no alternative but to permit defendant to withdraw his pleas of guilty. Even if a defendant, the prosecutor and the court agree on a sentence, the court cannot give effect to it if it is not authorized by law.").[12]

CONCLUSION

For all the reasons stated above, the court rejects the proposed plea agreement and ORDERS the matter to be set for a status conference on April 19, 2000 at 1:30 o'clock p.m. to determine further proceedings in accordance with this Order.

So ORDERED this 28 day of March, 2000.

/s/ Timothy H. Bellas
TIMOTHY H. BELLAS, Associate Judge

---

[12] *See also Chae v. Colorado*, 780 P.2d 481, 487 (Colo.1989) ("[W]e cannot uphold a plea bargain that has as its object an illegal sentence."); *Forbert v. Florida*, 437 So.2d 1079, 1081 (Fla.1983) ("a defendant should be allowed to withdraw a plea of guilty where the plea was based upon a misunderstanding or misapprehension of facts considered by the defendant in making the plea. Hence when a defendant pleads guilty with the understanding that the sentence he or she receives in exchange is legal, when in fact the sentence is not legal, the defendant should be given the opportunity to withdraw the plea when later challenging the legality of the sentence").