FOR PUBLICATION

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

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, vs. **LORENZO OLAITIMAN,** Defendants.	**CRIMINAL CASE NO. 04-0252C** **ORDER DENYING DEFENDANT'S DEMAND FOR JURY TRIAL AS TO ALL COUNTS**

I. INTRODUCTION

THIS MATTER came before the Court for a hearing on January 26, 2005, at 9:00 a.m. in courtroom 220A, to consider Defendant Lorenzo Olaitiman's JURY TRIAL DEMAND AS TO ALL COUNTS. The Commonwealth was represented by Assistant Attorney General Jeffery Warfield, and Defendant Lorenzo Olaitiman ("Olaitiman") appeared with his counsel, Assistant Public Defender Angela Krueger. The Court, having reviewed the pleadings and the memoranda filed, and having heard the arguments of counsel, now renders its written decision.

II. PROCEDURAL HISTORY

In this criminal case, Olaitiman has been charged with the misdemeanor crimes of assault and battery (Count I), and disturbing the peace (Count II). The crime of assault and battery in this case is punishable by not less than 72 consecutive hours (for a first offense), and not more than one year of imprisonment, and a fine of not more than $1,000. 6 CMC §§ 1202(b), 4101(c),

and 4102(f). The crime of disturbing the peace is punishable by not more than six months imprisonment, and a fine of not more than $500. 6 CMC §§ 3101(b), and 4101(d)[1]. The Commonwealth Legislature has provided that:

> Any person accused by information of committing ***a felony*** punishable by more than five years imprisonment or by more than $2,000 fine, or both, shall be entitled to a trial by a jury of six persons. The Commonwealth Rules of Criminal Procedure apply, except that the jury shall be of six persons or such smaller number as the parties may stipulate with the approval of the court.

7 CMC § 3101(a) (emphasis added). Because neither of the two counts against Olaitiman is a felony, under the statute, he is not entitled to a jury trial for either of the two charges. Accordingly, this Court set this matter for a bench trial, rather than a jury trial, for February 15, 2005, at 9:00 a.m. Olaitiman has since filed his demand for a jury trial asserting that the denial of a jury trial violates his constitutional rights to due process and equal protection, as well as his constitutional right to a jury trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 5 and 6 of the Commonwealth Constitution.

III. ANALYSIS

A. Olaitiman's Sixth Amendment Demand for Jury Trial Based on *Blakely*.

Although Defendant Olaitiman is aware of the case law precedent of *Commonwealth v. Atalig*, 723 F.2d 682 (9th Cir. 1984), *cert. denied*, 467 U.S. 1244, 104 S.Ct. 3518 (1984), on the issue of a Sixth Amendment jury trial demand in the Commonwealth for a non-felony charge, he asserts that the recent U.S. Supreme Court decision of *Blakely v. Washington*, 542 U.S. ____ , 124 S.Ct. 2531 (2004), now dictates that he is entitled to a jury trial in this case. Based on the following analysis, this Court disagrees.

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[1] The Information filed on July 29, 2004, references 6 CMC § 4102(f) for the charge of disturbing the peace. However, the mandatory sentencing provision added by Public Law 14-9 ("Rosalia's Law") applies specifically to assault and battery only.

1. The Effect of *Blakely* on Defendant's Trial Right in the Commonwealth.

In Defendant Olaitiman's Demand for Jury Trial, he argues that "Blakely's expression of the fundamental nature of the jury trial right mandates that a defendant receive a jury trial under the Sixth Amendment." Olaitiman's argument relies principally upon the language of the *Atalig* decision, and the earlier line of U.S. Supreme Court cases known as the *Insular Cases* on which *Atalig* was based. The *Atalig* case held, in part, that the only Constitutional rights that apply to unincorporated territories not intended for statehood are those that are considered "fundamental." *See Atalig, supra*, 723 F.2d at 688, *citing, e.g., Examining Board v. Flores de Otero*, 426 U.S. 572, 599-600 n.30, 96 S. Ct. 2264 (1976). Olaitiman contends that because the U.S. Supreme Court in *Blakely* has identified the right to a jury trial as a "fundamental" right, that right applies *ex proprio vigore* to the CNMI, and the Commonwealth's restrictions on the right to a jury trial are therefore invalid.

In *Blakely*, the U.S. Supreme Court applied the rule it expressed in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348 (2000): "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely, supra,* 124 S.Ct. at 2536. It then concluded that because the State's sentencing procedure did not comply with the Sixth Amendment, Blakely's sentence was invalid. *Id.* at 2538. The *Blakely* decision was not the first time the U.S. Supreme Court held that the Sixth Amendment jury trial right is a fundamental right. The U.S. Supreme Court first made this assertion in 1968 in *Duncan v. Louisiana,* 391 U.S. 145, 149, 88 S.Ct. 1444, 1447 (1968).

In *Duncan*, the Supreme Court reasoned that "[b]ecause we believe that trial by jury in criminal cases *is fundamental* to the American scheme of justice, we hold that the Fourteenth Amendment *guarantees a right of jury trial in all criminal cases* which -- were they to be tried in

a federal court -- would come within the Sixth Amendment's guarantee."[2] *Id.* at 149, 88 S.Ct. at 1447 (emphasis added). The Ninth Circuit Court of Appeals addressed the *Duncan* decision in the *Atalig* case, in which it considered the question of whether either Section 501 of the Covenant[3] or 5 Trust Territory Code § 501(1) (now 7 CMC § 3101(a)) violate the Sixth and Fourteenth Amendments to the U.S. Constitution.

The *Atalig* Court rejected the conclusion that *Duncan* requires that Covenant Section 501 and 5 Trust Territory Code 501(1) be held to violate the Constitution. *Id.* at 689. It noted that:

> To focus on the label "fundamental rights," overlooks the fact that the doctrine of incorporation for purposes of applying the Bill of Rights to the states serves one end while the doctrine of territorial incorporation serves a related but distinctly different one. The former serves to fix our basic federal structure; ***the latter is designed to limit the power of Congress to administer territories under Article IV of the Constitution***.

Id. (emphasis added). As the *Atalig* court recognized, *Duncan* altered the basic federal structure by adopting a new definition of fundamental rights ***for the purpose of applying the Bill of Rights to the states***. *Id.* Therefore, *Blakely* does nothing more than *Duncan* did. Accordingly, this Court concludes that the Supreme Court's *Blakely* decision, and even the subsequent decision of *United States v. Booker*, 542 U.S. ___ , 2005 U.S. Lexis 628 (2005) (holding that the Sixth Amendment as construed in *Blakely* does apply to the Federal Sentencing Guidelines), does not change the constitutional landscape of the Commonwealth in regard to a Sixth

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[2] The *Duncan* Court also noted that there is no jury trial right for petty offenses, stating "there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provisions and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the states." *Duncan,* 391 U.S. at 159, 88 S.Ct. at 1453. In its subsequent decision of *Baldwin v. New York*, 399 U.S. 66, 69, 90 S.Ct. 1886, 1888 (1970), the Supreme Court concluded that "no offense can be deemed 'petty' for purposes of the right to a trial by jury where *imprisonment for more than six months* is authorized." (Emphasis added). Count II in this case is punishable by no more than six months, and so, even under *Baldwin*, Olaitiman would not be entitled to a jury trial.

[3] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, U.S. Public Law 94-241, 90 Stat. 263, 48 U.S.C. § 1801 (1976) ("Covenant").

Amendment jury trial right of criminal defendants. Olaitiman's jury trial demand on this basis is therefore denied.

B. Olaitiman's Jury Trial Demand Based on the Fifth and Fourteenth Amendments' Equal Protection and Due Process Clauses.

Defendant Olaitiman has also claimed that he is entitled to a jury trial based on his Federal fundamental rights to due process and equal protection. First, Olaitiman argues that the Commonwealth is the only United States jurisdiction that does not grant a criminal defendant the fundamental Sixth Amendment right to a jury trial. *See* MOTION at 12. Second, he argues that he is being treated differently from other criminal defendants in the Commonwealth because his charged offenses are not felony offenses.

In identifying "fundamental rights" applicable to the NMI for purposes of territorial incorporation as set forth in the *Insular Cases*, the most recent case of *Rayphand v. Sablan* applied the following test: "whether the [asserted] right is 'the basis of all free government.'" 95 F.Supp.2d 1133, 1139-1140 (D.N.M.I. 1999), *aff'd*, 528 U.S. 1110, 120 S.Ct. 928 (2000). In the 1999 *Rayphand* case, the U.S. District Court for the Northern Mariana Islands, sitting as a three-judge court, faced the issue of whether the "one man, one vote" requirement applicable to the states by *Reynolds* is a right that is "the basis of all free government." The *Rayphand* court concluded that ***Congress was exercising valid and lawful authority*** when it agreed to the NMI negotiators' demands that Section 203(c) be included in the Covenant and that ***the voters of Saipan be denied the guarantee, which would be deemed fundamental under the United States Constitution when applied to a state, of "one person, one vote."*** *Rayphand, supra,* 95 F.Supp.2d at 1140 (emphasis added). It therefore held that Covenant Section 203(c) is not unconstitutional. *Id.* In 2000, the *Rayphand* court's decision was affirmed by a unanimous vote of 9 to 0 by the U.S. Supreme Court with the clearest opinion, "[t]he judgment is affirmed."

Based on the U.S. Supreme Court's upholding of the *Rayphand* court's judgment, this Court concludes that the *Rayphand* test controls in this case.

In *Rayphand,* the court analyzed the *Atalig* and *Wabol* [4] Ninth Circuit case precedents involving the constitutionality of the Covenant and CNMI's Constitutional jury trial restriction and land alienation provisions, respectively, in light of the *Insular Cases.* The *Atalig* court relied on the *Insular Cases* and held that a criminal defendant does not have a Sixth Amendment right to a jury trial in the Commonwealth. [5] Six years after the *Atalig* decision, the Supreme Court relied on the *Insular Cases* when it held that the Fourth Amendment does not apply to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S.Ct. 1056 (1990). In *Verdugo-Urquidez*, the Supreme Court majority recited their holding in the *Insular Cases* "that not every constitutional provision applies to governmental activity even where the United States has sovereign power." *Id.* at 268; 110 S.Ct. at 1062. As Justice Kennedy further stated in his concurring opinion, "[w]e have not overruled ... the so-called *Insular Cases* .... (Citations omitted). These authorities ... stand for the proposition that we must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad." *Id.* at 277; 110 S.Ct. at 1067.

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[4] *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1992), *cert. denied*, 506 U.S. 1027, 113 S.Ct. 675 (1992).

[5] The *Atalig* court noted that to apply sweepingly *Duncan's* definition of "fundamental rights" to unincorporated territories would immediately extend almost the entire Bill of Rights to such territories, *and would repudiate the Insular Cases.* 723 F.2d at 690 (emphasis added). The *Atalig* court was not prepared to do so nor did it think it was required to do so." *Id.* It even disagreed with another court's decision that *Duncan* voided the premise of the *Insular Cases. Id.* at n. 25.

The viability of the *Insular Cases* is evident from the more recent decision of *Rayphand v. Sablan, supra.*[6]

In this case, in order to determine if Olaitiman's equal protection and due process rights were violated by Congress when it endorsed Section 501 of the Covenant, this Court concludes that based on the *Insular Cases* and *Rayphand*, this Court must address the issue of whether a jury trial right for any criminal defendant is the basis of all free government. Here, Olaitiman has not presented any data or facts supporting the contention that all free governments bestow the right to a jury trial upon all criminal defendants. Furthermore, as discussed below, there is evidence that not all U.S. jurisdictions mandate an automatic right to a jury trial. For these reasons, Olaitiman's Federal fundamental right claim fails.

In reviewing the law of other "unincorporated territories" of the United States, this Court finds that the situation in the Virgin Islands does not support Olaitiman's contention that the federal government, *i.e.* the U.S. Congress, has impermissibly discriminated against him. As the Third Circuit found in the case cited by Olaitiman, the 1968 Amendment by Congress of the Revised Organic Act of the Virgin Islands conferred upon persons accused of crimes triable in the District Court of the Virgin Islands the right to trial by jury. *Government of the Virgin Islands v. Parrott*, 476 F.2d 1058, 1060 (3rd Cir. 1973), *cert. denied*, 414 U.S. 871, 94 S.Ct. 97 (1973). The Third Circuit nevertheless found that the District Court's denial of a jury trial to Parrott was not error because of Section 26 the Revised Organic Act of the Virgin Islands, which procedurally required Parrott to invoke or demand the right. *Id.* Accordingly, the Third Circuit

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[6] Given the fact that the NMI is not an incorporated territory, the *Rayphand* Court concluded that the issue it had to determine was "whether the 'one man, one vote' requirement applicable to all the states by *Reynolds* is a right that is 'the basis of all free government." *Rayphand, supra.* Based on a finding that several countries that are considered to have "free governments" have a bicameral legislature in which one house is malapportioned, it concluded that the "one man, one vote" principle is not a right that is the basis of all free government and need not be applied to an unincorporated territory such as the Commonwealth. *Id.*

affirmed the District Court's denial of a jury trial right for Parrot's failure to invoke it properly. *Id.; see also, Government of the Virgin Islands v. Boynes*, 45 V.I. 195, 209 (2003); 2003 V.I. LEXIS 5, 26 (holding that the jury trial right in a criminal prosecution is not a fundamental right). The essence of the *Parrot* decision in relation to this case is that the Third Circuit upheld Congress's ability to limit a criminal defendant's jury trial right in the Virgin Islands. In *Atalig*, the Ninth Circuit upheld Congress's similar action in limiting a criminal defendant's jury trial right in the Commonwealth through the enactment of Section 501 of the Covenant.[7] Section 501 of the Covenant provides that except for the rights to jury trial and grand jury indictment, each of the first nine Amendments and Section 1 of the Fourteenth Amendment will apply in the NMI. Based on Section 501 of the Covenant and Olaitiman's failure to establish that a jury trial right for any criminal defendant is the basis of all free government[8], Olaitiman's federal equal protection right and due process claim fails and his demand for a jury trial must be denied.

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[7] Olaitiman argues that *Atalig* stands for the proposition that there is "cautious approach" to extending the Sixth Amendment jury trial right to the Commonwealth based on the social and cultural conditions prevailing in the Commonwealth. His argument is misplaced. In *Atalig*, the Ninth Circuit was reviewing the Supreme Court's cautious incorporation of the fundamental right incorporated in the Bill of Rights under the Due Process Clause of the Fourteenth Amendment when applying any of these rights to the States. 723 F.2 at 690. It then applied this approach *in restricting the power of Congress to administer overseas territories*, and evaluated how this power was exercised in the context of the NMI. *Id.* The Ninth Circuit recognized that the Commonwealth does not dispense entirely with trial by jury in all criminal cases, and that both the Covenant and the NMI Constitution both provide criminal defendants with other procedural safeguards guaranteed by the Bill of Rights citing Article I, section IV and V of the Commonwealth's constitution. *Id.* It also noted that the elimination of jury trials is applicable only to trials in commonwealth courts. Based on these findings, the Ninth Circuit concluded the Covenant and 5 TTC § 501(a) do not violate either the Sixth or Fourteenth Amendments to the Constitution. *Id.* The *Atalig* court did not engage into an inquiry of whether the social and cultural conditions then prevailing in the Commonwealth rendered a jury trial "impractical and anomalous." It merely reviewed the laws and legal procedures of the Commonwealth governing criminal defendants. Since the *Atalig* decision, Commonwealth laws affecting criminal defendants have not changed significantly, if at all, and so there is no reason to deviate from Atalig's conclusion that Section 501 of the Covenant is not unconstitutional.

[8] At the hearing on this motion, Olaitiman's counsel was unable to state whether all free governments bestow the jury trial right, or whether there are any that do not bestow this right.

C. Olaitiman's Equal Protection and Due Process Right Claim Under Article I, Sections 5 and 6 of the NMI's Constitution.

Olaitiman further argues that under the NMI's Constitution, he is still entitled to a jury trial because the NMI Legislature's classification of offenses which determines which criminal defendant receives a jury trial is arbitrary, and therefore, violates his equal protection right. Article I, section 5 of the NMI Constitution states, "No person shall be deprived of life, liberty or property without due process of law." Article I, Section 6 of the NMI Constitution states, in part, as follows: "No person shall be denied the equal protection of the laws." The history of the right to a jury trial in the NMI is summarized succinctly by the Ninth Circuit Court of Appeals in *Commonwealth v. Magofna*, 919 F.2d 103, 106 (9th Cir. 1990). The summary in *Magofna* is stated as follows:

> The right to jury trial in the NMI is manifestly a limited one. Before 1965, there was no right to trial by jury in the Trust Territory. In August of 1965, the First Congress of Micronesia enacted PL 1-7 which established the right to jury trial, conditioned on local adoption by district legislatures. In 1966, the NMI District Legislature adopted the jury trial provisions of the Trust Territory Code. *See* 7 CMC § 3101 Commission Comment. Section 501(1) of the Trust Territory Code contained the same language as 7 CMC section 3101.
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> When the United States and the NMI entered into the covenant to establish a commonwealth (the "Covenant") in 1975, the question of the right to jury trial was expressly the subject of negotiations. These negotiations culminated in section 501(a) of the Covenant, which provides, in pertinent part: "(N)either trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law."
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> The CNMI Constitution, which took effect on the same day as the Covenant, states: The legislature may provide for trial by jury in criminal or civil cases." CNMI Constitution, Art. I, § 8.
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> In 1976, the legislature considered adopting a constitutional amendment guaranteeing the right to trial by jury in the NMI. The committee debate which considered and rejected the amendment contains the most explicit statement of the policy concerns surrounding jury trials:
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> > The Committee does not want to guarantee the right to trial by jury in all cases in the Northern Mariana Islands because of the expenses

> associated with juries, the difficulty of finding jurors unacquainted with the facts of a case, and the fear that the small, closely-knit population in the Northern Mariana Islands might lead to acquittals of guilty persons in criminal cases. Nonetheless, the Committee believes that in some cases, especially in those where defendants face serious criminal charges and long terms of imprisonment, the right to jury trial should be guaranteed. Report No. 4 of the Committee on Personal Rights and Natural Resources (Oct. 29, 1976), reprinted in Vol. II, Journal of the Northern Mariana Islands Constitutional Convention 506 (1976).

Id. The Framers' reasoning in this passage is relevant to Olaitiman's argument that at the very least, there is *no rational basis* for the NMI Legislature's classification of offenses that entitles a defendant to a jury trial, and those that do not. As noted above, the Framers were concerned that, where a defendant is faced with "serious criminal charges and long terms of imprisonment, the right to jury trial should be guaranteed." Title 7, Section 3101(a), which is the exact same language of Section 501(1) of the Trust Territory Code existing at the time the Framers were contemplating a constitutional amendment,[9] functions to delineate between those offenses that the Framers considered "serious" enough to warrant the expense and difficulty of conducting jury trials in the CNMI, and those that it does not. This Court cannot hold that the Framers' delineation is any more or less reasonable than any alternative that any subsequent NMI Legislature may rationalize.[10]

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[9] Section 505 of the Covenant provides that all laws existing under the Trust Territory and applicable to the NMI remained in full force and effect when the Covenant took effect. The NMI Legislature codified relevant parts of the TTC laws as the Commonwealth Code in Public Law 3-90, which took effect January 1, 1984. *See* 7 CMC § 3101(a) Source.

[10] Olaitiman also argues that by the Prosecution's failure to address this Sixth Amendment argument in its Opposition, as well as Olaitiman's due process argument, the Prosecution waived the right to oppose the demand for a jury trial, and that this Court must, by default, issue a ruling in Olaitiman's favor on these grounds. This Court disagrees. Also, the Court notes that the case law offered in support of this argument does not support it. *See* REPLY at 8-9; *see also U.S. v. Vallejo*, 2001 U.S. App. LEXIS 7367, 45 (Court rendered an opinion as to a legal issue that it nevertheless considered "waived" by a party's failure to raise it).

IV. CONCLUSION

For the foregoing reasons, Defendant Olaitiman's demand for a jury trial based on his claim to a Sixth Amendment jury trial right and his claims to due process and equal protection under the Fifth and Fourteenth Amendments of the U.S. Constitution, as well as under Article I, Sections 5 and 6 of the Commonwealth Constitution, is DENIED.[11]

SO ORDERED this 8th day of February, 2005.

RAMONA V. MANGLONA, Associate Judge

[11] This Court notes that were it to find that a clear constitutional violation would occur otherwise, it would not hesitate to grant a jury trial. *See, e.g., Commonwealth v. Calvo*, 2004 MP 11 (jury trial right granted by Commonwealth Supreme Court which Defendant otherwise would not have been entitled under the statute) (unpublished decision).