

1 FOR PUBLICATION

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4 **IN THE SUPERIOR COURT**  
5 **FOR THE**  
6 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

7 **COMMONWEALTH OF THE** )  
8 **NORTHERN MARIANA ISLANDS,** )

**CRIMINAL CASE NO. 04-0252C**

9 Plaintiff, )

**ORDER DENYING DEFENDANT'S**  
**DEMAND FOR JURY TRIAL**

10 vs. )

**AS TO ALL COUNTS**

11 **LORENZO OLAITIMAN,** )

12 Defendants. )

13 **I. INTRODUCTION**

14 THIS MATTER came before the Court for a hearing on January 26, 2005, at 9:00 a.m. in  
15 courtroom 220A, to consider Defendant Lorenzo Olaitiman's JURY TRIAL DEMAND AS TO ALL  
16 COUNTS. The Commonwealth was represented by Assistant Attorney General Jeffery Warfield,  
17 and Defendant Lorenzo Olaitiman ("Olaitiman") appeared with his counsel, Assistant Public  
18 Defender Angela Krueger. The Court, having reviewed the pleadings and the memoranda filed,  
19 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),

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

4 Any person accused by information of committing *a felony* punishable by more  
5 than five years imprisonment or by more than \$2,000 fine, or both, shall be  
6 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 7 CMC § 3101(a) (emphasis added). Because neither of the two counts against Olaitiman is a  
8 felony, under the statute, he is not entitled to a jury trial for either of the two charges.  
9 Accordingly, this Court set this matter for a bench trial, rather than a jury trial, for February 15,  
10 2005, at 9:00 a.m. Olaitiman has since filed his demand for a jury trial asserting that the denial  
11 of a jury trial violates his constitutional rights to due process and equal protection, as well as his  
12 constitutional right to a jury trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments  
13 to the U.S. Constitution and Article I, Sections 5 and 6 of the Commonwealth Constitution.

### 14 III. ANALYSIS

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

16 Although Defendant Olaitiman is aware of the case law precedent of Commonwealth v.  
17 Atalig, 723 F.2d 682 (9th Cir. 1984), *cert. denied*, 467 U.S. 1244, 104 S.Ct. 3518 (1984), on the  
18 issue of a Sixth Amendment jury trial demand in the Commonwealth for a non-felony charge, he  
19 asserts that the recent U.S. Supreme Court decision of *Blakely v. Washington*, 542 U.S. \_\_\_\_ ;  
20 124 S.Ct. 2531 (2004), now dictates that he is entitled to a jury trial in this case. Based on the  
21 following analysis, this Court disagrees.

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

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

2           In Defendant Olaitiman's Demand for Jury Trial, he argues that "Blakely's expression of  
3 the fundamental nature of the jury trial right mandates that a defendant receive a jury trial under  
4 the Sixth Amendment." Olaitiman's argument relies principally upon the language of the Atalig  
5 decision, and the earlier line of U.S. Supreme Court cases known as the Insular Cases on which  
6 Atalig was based. The Atalig case held, in part, that the only Constitutional rights that apply to  
7 unincorporated territories not intended for statehood are those that are considered "fundamental."  
8 See Atalig, supra, 723 F.2d at 688, citing, e.g., Examining Board v. *Flores de Otero*, 426 U.S.  
9 572, 599-600 n.30, 96 S. Ct. 2264 (1976). Olaitiman contends that because the U.S. Supreme  
10 Court in Blakely has identified the right to a jury trial as a "fundamental" right, that right applies  
11 ex proprio vigore to the CNMI, and the Commonwealth's restrictions on the right to a jury trial  
12 are therefore invalid.

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

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

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

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

8 To focus on the label "fundamental rights," overlooks the fact that the doctrine of  
9 incorporation for purposes of applying the Bill of Rights to the states serves one  
10 end while the doctrine of territorial incorporation serves a related but distinctly  
11 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.*

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

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20 <sup>2</sup> The *Duncan* Court also noted that there is no jury trial right for petty offenses, stating "there is a category of  
21 petty crimes or offenses which is not subject to the Sixth Amendment jury trial provisions and should not be subject  
22 to the Fourteenth Amendment jury trial requirement here applied to the states." *Duncan*, 391 U.S. at 159, 88 S.Ct. at  
23 1453. In its subsequent decision of *Baldwin v. New York*, 399 U.S. 66, 69, 90 S.Ct. 1886, 1888 (1970), the Supreme  
24 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.

<sup>3</sup> 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").

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

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

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

11 In identifying "fundamental rights" applicable to the NMI for purposes of territorial  
12 incorporation as set forth in the Insular Cases, the most recent case of *Rayphand v. Sablan*  
13 applied the following test: "whether the [asserted] right is 'the basis of all free government.'" 95  
14 F.Supp.2d 1133, 1139-1140 (D.N.M.I. 1999), *aff'd*, 528 U.S. 1110, 120 S.Ct. 928 (2000). In the  
15 1999 *Rayphand* case, the U.S. District Court for the Northern Mariana Islands, sitting as a three-  
16 judge court, faced the issue of whether the "one man, one vote" requirement applicable to the  
17 states by *Reynolds* is a right that is "the basis of all free government." The *Rayphand* court  
18 concluded that *Congress was exercising valid and lawful authority* when it agreed to the NMI  
19 negotiators' demands that Section 203(c) be included in the Covenant and that *the voters of*  
20 *Saipan be denied the guarantee, which would be deemed fundamental under the United States*  
21 *Constitution when applied to a state, of "one person, one vote."* *Rayphand*, supra, 95  
22 F.Supp.2d at 1140 (emphasis added). It therefore held that Covenant Section 203(c) is not  
23 unconstitutional. *Id.* In 2000, the *Rayphand* court's decision was affirmed by a unanimous vote  
24 of 9 to 0 by the U.S. Supreme Court with the clearest opinion, "[t]he judgment is affirmed."

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

3       In *Rayphand*, the court analyzed the *Atalig* and *Wabol*<sup>4</sup> Ninth Circuit case precedents  
4 involving the constitutionality of the Covenant and CNMI's Constitutional jury trial restriction  
5 and land alienation provisions, respectively, in light of the *Insular Cases*. The *Atalig* court  
6 relied on the *Insular Cases* and held that a criminal defendant does not have a Sixth Amendment  
7 right to a jury trial in the Commonwealth.<sup>5</sup> Six years after the *Atalig* decision, the Supreme  
8 Court relied on the *Insular Cases* when it held that the Fourth Amendment does not apply to the  
9 search and seizure by United States agents of property that is owned by a nonresident alien and  
10 located in a foreign country. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S.Ct.  
11 1056 (1990). In *Verdugo-Urquidez*, the Supreme Court majority recited their holding in the  
12 *Insular Cases* "that not every constitutional provision applies to governmental activity even  
13 where the United States has sovereign power." *Id.* at 268; 110 S.Ct. at 1062. As Justice  
14 Kennedy further stated in his concurring opinion, "[w]e have not overruled ... the so-called  
15 *Insular Cases* .... (Citations omitted). These authorities ... stand for the proposition that we  
16 must interpret constitutional protections in light of the undoubted power of the United States to  
17 take actions to assert its legitimate power and authority abroad." *Id.* at 277; 110 S.Ct. at 1067.

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21 <sup>4</sup> *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1992), cert. denied, 506 U.S. 1027, 113 S.Ct. 675 (1992).

22 <sup>5</sup> The *Atalig* court noted that to apply sweepingly *Duncan's* definition of "fundamental rights" to unincorporated  
23 territories would immediately extend almost the entire Bill of Rights to such territories, and would repudiate the  
24 *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.

1 The viability of the Insular Cases is evident from the more recent decision of *Rayphand v.*  
2 *Sablan, supra.*<sup>6</sup>

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

11 In reviewing the law of other "unincorporated territories" of the United States, this Court  
12 finds that the situation in the Virgin Islands does not support Olaitiman's contention that the  
13 federal government, *i.e.* the U.S. Congress, has impermissibly discriminated against him. As the  
14 Third Circuit found in the case cited by Olaitiman, the 1968 Amendment by Congress of the  
15 Revised Organic Act of the Virgin Islands conferred upon persons accused of crimes triable in  
16 the District Court of the Virgin Islands the right to trial by jury. *Government of the Virgin*  
17 *Islands v. Parrott*, 476 F.2d 1058, 1060 (3rd Cir. 1973), cert. denied, 414 U.S. 871, 94 S.Ct. 97  
18 (1973). The Third Circuit nevertheless found that the District Court's denial of a jury trial to  
19 Parrott was not error because of Section 26 the Revised Organic Act of the Virgin Islands, which  
20 procedurally required Parrott to invoke or demand the right. *Id.* Accordingly, the Third Circuit

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22 <sup>6</sup> Given the fact that the NMI is not an incorporated territory, the *Rayphand* Court concluded that the issue it had  
23 to determine was "whether the 'one man, one vote' requirement applicable to all the states by *Reynolds* is a right that  
24 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.*

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

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16 <sup>7</sup> Olaitiman argues that *Atalig* stands for the proposition that there is "cautious approach" to extending the Sixth  
17 Amendment jury trial right to the Commonwealth based on the social and cultural conditions prevailing in the  
18 Commonwealth. His argument is misplaced. In *Atalig*, the Ninth Circuit was reviewing the Supreme Court's  
19 cautious incorporation of the fundamental right incorporated in the Bill of Rights under the Due Process Clause of  
20 the Fourteenth Amendment when applying any of these rights to the States. 723 F.2 at 690. It then applied this  
21 approach *in restricting the power of Congress to administer overseas territories*, and evaluated how this power was  
22 exercised in the context of the NMI. *Id.* The Ninth Circuit recognized that the Commonwealth does not dispense  
23 entirely with trial by jury in all criminal cases, and that both the Covenant and the NMI Constitution both provide  
24 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.

<sup>8</sup> 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.

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

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

12               The right to jury trial in the NMI is manifestly a limited one. Before 1965, there  
13 was no right to trial by jury in the Trust Territory. In August of 1965, the First  
14 Congress of Micronesia enacted PL 1-7 which established the right to jury trial,  
15 conditioned on local adoption by district legislatures. In 1966, the NMI District  
16 Legislature adopted the jury trial provisions of the Trust Territory Code. See 7  
17 CMC § 3101 Commission Comment. Section 501(1) of the Trust Territory Code  
18 contained the same language as 7 CMC section 3101.

19               When the United States and the NMI entered into the covenant to establish a  
20 commonwealth (the "Covenant") in 1975, the question of the right to jury trial  
21 was expressly the subject of negotiations. These negotiations culminated in  
22 section 501(a) of the Covenant, which provides, in pertinent part: "(N)either trial  
23 by jury nor indictment by grand jury shall be required in any civil action or  
24 criminal prosecution based on local law, except where required by local law."

              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.**

              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:

              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

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

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

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21 <sup>9</sup> Section 505 of the Covenant provides that all laws existing under the Trust Territory and applicable to the NMI  
22 remained in full force and effect when the Covenant took effect. The NMI Legislature codified relevant parts of the  
23 TTC laws as the Commonwealth Code in Public Law 3-90, which took effect January 1, 1984. *See* 7 CMC §  
24 3101(a) Source.

<sup>10</sup> 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).

1 **IV. CONCLUSION**

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

6 SO ORDERED this 8<sup>th</sup> day of February, 2005.

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RAMONA V. MANGLONA, Associate Judge

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23 <sup>11</sup> This Court notes that were it to find that a clear constitutional violation would occur otherwise, it would not  
24 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).