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6 **IN THE SUPERIOR COURT OF THE**
7 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

8
9 **COMMONWEALTH OF THE**
10 **NORTHERN MARIANA ISLANDS,**

11 **Plaintiff,**

12 **v.**

13 **STEVEN VILLAGOMEZ MORI and HAI**
14 **SEN LI,**

15 **Defendants.**

16 **CRIMINAL CASE NO. 09-0011D**

17 **ORDER DENYING DEFENDANT LI'S**
18 **DEMAND FOR A JURY TRIAL**

19 THIS MATTER CAME FOR HEARING on June 29, 2009 in courtroom 217A. Assistant
20 Attorney General William Downer appeared on behalf of the Commonwealth of the Northern Mariana
21 Islands (the "Government"). Assistant Public Defender Richard Miller appeared on behalf of defendant
22 Hai Sen Li ("Defendant"). Having considered the arguments of counsel, the pleadings, materials on
23 record, and the relevant rules and case law, the Court is prepared to rule.

24 **I. FACTUAL AND PROCEDURAL BACKGROUND**

25 Defendant is charged by Information with two counts. Count I charges Defendant with
26 conspiracy to commit bribery in violation of 6 CMC § 303(a) and made punishable by 6 CMC §§ 304(b)
27 and 3201. (Information at 1-2.) Count III charges Defendant with bribery in violation of 6 CMC § 3201
28 and made punishable by 6 CMC § 3201. (*Id.* at 3.) The Information alleges that the bribes in question
consisted of at least one (1) and as many as five (5) payments, and that the amount of each payment was
between \$40.00 and \$60.00. (*Id.* at 2-3.)

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II. STANDARD

Pursuant to 7 CMC § 3101(a), any person “accused by information of committing a felony punishable by more than five years imprisonment or by more than \$2000 fine, or both, shall be entitled to a trial by a jury of six persons.”

III. DISCUSSION

A. Defendant Is Not Entitled To a Jury Trial Because the Requirements of 7 CMC § 3101(a) Have Not Been Met.

Defendant is not entitled to a jury trial because he is not accused by information of making bribes punishable by more than five years imprisonment or by more than a \$2000 fine. Pursuant to 7 CMC § 3101(a), only a defendant facing more than five years imprisonment and/or a fine of more than \$2000 is entitled to a jury trial. Under 6 CMC § 3201, a person convicted of bribery “may be imprisoned for a period of not more than five years, and shall be fined three times the value of the payment received; or, if the value of the payment cannot be determined in dollars, shall be imprisoned for a period of not more than five years, and fined not more than \$1000.” Because the fine for bribery is three times the value of the payment received, some defendants facing bribery charges will be entitled to a jury trial and some will not. This finding is consistent with our Supreme Court’s ruling in *CNMI v. Jong Hung Lee*, 2005 MP 19 (2004).¹ Here, Defendant is accused of making bribes of, at most, \$300. If convicted on these charges, Defendant would face a punishment of a \$900 fine and up to five years imprisonment. Defendant is therefore not entitled to a jury trial on the bribery count. With regard to the conspiracy count, a person convicted of conspiracy is subject to punishment “by not more than the same penalty provided for the underlying offense.” 6 CMC § 304(b). Here, the underlying offense is bribery. Accordingly, Defendant is also not entitled to a jury trial on the conspiracy count.

B. The Legislature Intended the Right to a Jury Trial in the Commonwealth to be Limited.

Defendant argues that the language of 7 CMC § 3101(a) is plain and unambiguous in conferring a jury trial right on all defendants facing bribery charges. (*See* Def.’s Reply at 2.) Because the statute

¹ Although *Lee* was decided on equal protection grounds, the court stated that “[b]ecause 6 CMC § 3201 conditions the amount of the criminal fine on the size of the bribe . . . some defendants accused of bribery would be entitled to a jury pursuant to 7 CMC § 3101(a) while others would not.” *Jong Hung Lee*, 2005 MP at 22.

1 is so clear, Defendant argues, the rules of statutory interpretation demand that the Court look no farther
2 than the express language of 7 CMC § 3101(a) in interpreting the statute. (*Id.*) The language of 7 CMC
3 § 3101(a), however, is unclear. The statute states the following:

4 Any person accused by information of committing a felony punishable
5 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.

6 7 CMC § 3101(a). Defendant argues that the word “punishable” directly modifies “felony,” and that
7 “felony” in this context is defined purely by statute, without resort to the information. (Def.’s Reply
8 at 2.) Under this interpretation, a defendant accused of bribery is always entitled to a jury trial,
9 regardless of the amount of the bribe alleged, because the evidence at trial could always show that the
10 defendant made a bribe of \$666.67 or more. \$666.67 is the threshold at which a defendant accused of
11 bribery is entitled to a jury trial because the fine for a bribe of \$666.67 would be \$2000.01. On the other
12 hand, the Government argues that the phrase “accused by information” directs that it is the charge, as
13 alleged in the information, that determines whether a particular defendant is entitled to a jury trial.
14 (Commonwealth’s Opp. at 2.) Under this interpretation, the amount of the bribe alleged in the
15 information controls whether a particular defendant is entitled to a jury trial.

16 Because the statute is unclear, the rules of statutory construction demand that the Court interpret
17 the statute with the goal of carrying out the general policy of the legislation. *Commonwealth v.*
18 *Magofna*, 919 F.2d 103, 105 (1990) (citing Sutherland, *Statutory Construction* § 45.09 (4th Ed.)). In
19 *Magofna*, the Ninth Circuit found that the right to a jury trial in the Commonwealth was a limited one.
20 *Id.* at 106. The Court came to this determination, in part, by reference to the legislature’s committee
21 debate in which the legislature considered and rejected adoption of a constitutional amendment
22 guaranteeing the right to a trial by jury in the Commonwealth. *Id.* The committee stated the following:

23 The Committee does not want to guarantee the right to trial by jury in all
24 cases in the Northern Mariana Islands because of the expenses associated
25 with juries, the difficulty of finding jurors unacquainted with the facts of
26 a case, and the fear that the small, closely-knit population in the
27 Northern Mariana Islands might lead to acquittals of guilty persons in
28 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.

Id., citing Report No. 4 of the Committee on Personal Rights and Natural Resources (Oct. 29, 1976),

1 reprinted in Vol. II, Journal of the Northern Mariana Islands Constitutional Convention 506 (1976).
2 In *Magofna*, the issue was whether a criminal defendant who is entitled to a jury trial on one count is
3 consequently entitled to a jury trial on all counts. The Court found that the interpretation of 7 CMC §
4 3101(a) that is more restrictive of the right to a jury trial was the correct interpretation and that the
5 defendant was only entitled to a jury trial on one of the three counts against him.

6 In this case, although the Court is faced with a different issue than was presented in *Magofna*,
7 the Court finds, in accordance with the Ninth Circuit, that the interpretation of 7 CMC § 3101(a) that
8 is more restrictive of the right to a jury trial is correct. In considering the right to a jury trial in the
9 Commonwealth, the legislature clearly intended the right to be a limited one given the unique social and
10 cultural conditions of the CNMI. This determination is consistent with *CNMI v. Atalig*, 723 F.2d 682
11 (9th Cir. 1984), in which the Court recognized that the imposition of Anglo-American jury trial
12 procedures may be “inappropriate in territories having cultures, traditions, and institutions different
13 from our own.” *Magofna*, 919 F.2d at 106 (quoting *Atalig*, 723 F.2d at 690). In *Atalig*, the Court
14 suggested a policy of deference in reviewing Commonwealth jury trial procedures in order to allow
15 “accommodation of the particular social and cultural conditions” of the Commonwealth. *Id.* (quoting
16 *Atalig*, 723 F.2d at 690). If the Court were to adopt Defendant’s interpretation of 7 CMC § 3101(a),
17 every person accused of bribery would be entitled to a jury trial, even if the value of the alleged bribe
18 was one cent. The right to a trial by jury even into non-serious criminal cases would be contrary to the
19 legislature’s intent in crafting the statutory framework for conferring the right to a jury trial.

20 **C. Adoption of the Government’s Position Does Not Result in the Unlawful Extra-Legislative**
21 **Creation of a Lesser Included Offense of “Bribery Under \$666.67.”**

22 Allowing the information to control whether a defendant is entitled to a trial by jury does not
23 result in the unlawful extra-legislative creation of a lesser-included offense of “Bribery Under \$666.67”
24 because lesser-included offenses are not defined by a defendant’s right to a trial by jury. In the
25 Commonwealth, an offense is a lesser-included offense of a charged offense if its elements are a
26 “subset” of the charged offense. *Commonwealth v. Kaipat*, 4 N.M.I. 300 (1995), *aff’d*, 91 F.3d 151 (9th
27 Cir. 1996). This determination is accomplished by a textual comparison of the pertinent statutes. *Id.*
28 Specifically, to be considered a lesser included offense under Com.R.Cr.P. 31(c), the elements of the

1 included offense must be fewer in number than the elements of the greater charged offense. *See Berra*
2 *v. United States*, 351 U.S. 131 (U.S. 1956) (interpreting the Federal Rules of Criminal Procedure after
3 which the Commonwealth Rules are modeled); *see also Gov't of V.I. v. Carmona*, 422 F.2d 95, 100 (3d
4 Cir. V.I. 1970) (“[T]he lesser included offence must be comprised solely of some but not all of the
5 elements of the offence charged.”).² With regard to the Commonwealth’s bribery statute, although some
6 defendants accused of bribery will be entitled to a trial by jury and some will not, the elements required
7 to prove every bribery case are exactly the same. In other words, the elements the Government must
8 prove in a bribery bench trial are not a “subset” of the elements required in a bribery case tried before
9 a jury. Furthermore, there are not two separate statutes by which to perform a textual comparison.
10 Therefore, denying the defendant the right to a trial by jury does not somehow create a new lesser
11 included offense of “Bribery Under \$666.67.”

12 Defendant argues that adoption of the Government’s position results in the creation of a lesser-
13 included offense of “Bribery Under \$666.67” because the legislature did not intend to treat defendants
14 accused of bribery differently according to the value of the bribe. Defendant reasons that when the
15 legislature intends to create lesser included offenses according to value, it does so clearly and expressly.
16 (Def.’s Reply at 3.) For example, there are three punishment grades for theft according to the value of
17 the property stolen. 6 CMC § 1601(b). Defendant asserts that these punishment grades express the
18 legislature’s view that the “*quantitative* differences in property value reflect *qualitative* differences in
19 the severity of particular acts of theft” (Def.’s Reply at 3.) Defendant further asserts that these
20 punishment grades direct and empower the Government “to attend to such differences when deciding
21 at what offense grade to bring charges.” (*Id.*) In contrast, in a bribery case, there are no punishment
22 “grades” according to value and the Government cannot charge the crime as a misdemeanor even if the
23 alleged value of the bribe is very small. Defendant’s point appears to be that allowing some bribery
24 cases to be tried to the bench instead of before a jury indicates a *qualitative* difference in the severity
25 of the crime based on the *quantitative* value of the bribe. Defendant argues that the legislature never
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27 ² Where CNMI case law has not addressed an issue of law, the Court applies “the rules of common law, as
28 expressed in the restatements of law . . . [and] as generally understood and applied in the United States” 7 CMC §
3401; *Ito v. Macro Energy, Inc.*, 4 N.M.I. 46, 55 (1993).

1 intended such *qualitative* differences in the way bribery is charged.

2 First, Defendant's argument erroneously assumes the truth of its own conclusion that "Bribery
3 Under \$666.67" is a lesser included offense to bribery simply because the defendant is not entitled to
4 a trial by jury. As discussed above, a lesser-included offense is not defined by whether a defendant is
5 entitled to a trial by jury. The Government must prove the same elements in a bribery case whether the
6 case is tried to the bench or before a jury. Second, insofar as Defendant is arguing that adoption of the
7 Government's position somehow results in the creation of "misdemeanor bribery," this result is
8 impossible because the difference between a misdemeanor and a felony is the possible length of
9 imprisonment a defendant faces, not the amount of a possible fine or whether the defendant is entitled
10 to a trial by jury. 6 CMC § 102(i). Moreover, unlike theft, where the value of the property taken is
11 linked to the possible imprisonment term, in a bribery case there is no statutorily prescribed link
12 between the value of a bribe and the possible imprisonment term. The defendant in a bribery case may
13 be imprisoned for up to five years, regardless of the amount of the bribe, making bribery a felony in all
14 cases. There simply cannot be misdemeanor bribery no matter what the amount of the bribe alleged.

15 **D. Fixing and Improving Statutes Are Matters for the Legislature.**

16 Despite the Court's decision on this issue, Defendant's argument highlights a deficiency with
17 the way the right to a jury trial currently works in the Commonwealth. Technically, the statutory
18 framework for conferring the right to a jury trial in bribery cases creates the risk, however slight, of a
19 mistrial. As discussed above, a person could be accused by information of making a bribe of less than
20 \$666.67 and the evidence at trial could show that the bribe was actually \$666.67 or more. If a jury had
21 not been empaneled in this situation, the Court would have to fine the defendant more than \$2000.
22 Because a defendant facing a fine of more than \$2000 is entitled to a trial by jury, the result would be
23 a mistrial, unless the right had been waived. This problem is an artifact of the way 7 CMC § 3101(a)
24 and 6 CMC § 3201 interact because the decision to empanel a jury must be made before the evidence
25 is presented, and the Court has no discretion with regards to fining the defendant three times the amount
26 of the proven bribe. The Court notes that the Commonwealth's the bribery statute is a legacy from the
27 Trust Territory Code and could perhaps use a revision. *See* 11 TTC § 301. Nevertheless, the Court
28 cannot interpret 6 CMC § 3201 contrary to legislature's intent. Fixing or improving statutes are matters

1 for the legislature, not the Court. See *Wright v. Sec'y for Dep't of Corr.*, 278 F.3d 1245, 1255 (11th Cir.
2 2002) ("[C]ourts ought not add to what the legislature has said is the law. . . . Our function is to apply
3 statutes, to carry out the expression of the legislative will that is embodied in them, not to 'improve'
4 statutes by altering them."); *Harris v. Garner*, 216 F.3d 970, 976 (11th Cir. 2000) (en banc) ("We will
5 not do to the statutory language what Congress did not do with it, because the role of the judicial branch
6 is to apply statutory language, not to rewrite it.")

7 **IV. CONCLUSION**

8 For the foregoing reasons, the Court hereby DENIES Defendant's demand for a trial to a jury.

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10 IT IS SO ORDERED this 6th day of September, 2009.

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Perry B. Inos, Associate Judge