

**UNITED STATES OF AMERICA
vs.
Jesus Pangelinan MAFNAS**

**Criminal Case No. 88-00003
District Court NMI**

Decided May 27, 1988

**1. Criminal Procedure -
Exclusion of Witnesses**

Federal agents, who investigated case for the government, are within exception to procedural rule requiring exclusion of witnesses from trial except during their testimony. Fed.R.Evid. 615.

2. Criminal Procedure - Trial

The court has wide discretion in deciding who shall be present at counsel table.

3. Evidence - Stipulations

Neither party can be required to stipulate to any item of evidence, but parties may stipulate to certain facts or resolve objections to exhibits and testimony prior to trial.

**4. Jury - Criminal Actions -
Qualifications of Grand Jurors**

Where a motion to dismiss an indictment based on the lack of the legal qualifications of one or more individual grand jurors was not brought within 7 days of date where, with due diligence, defendant could have discovered grounds supporting the motion, motion would be deemed waived. 28 U.S.C. §1867(e); Fed.R.Crim.P. 6(b)(2).

**5. Evidence - Affidavits -
Requirements**

An affidavit must be made upon personal knowledge, not information or belief and where it was not based on personal knowledge, it was not competent evidence.

**6. Criminal Law - Indictment and
Information**

Where: (1) indictment is valid on its face; (2) there was no showing of impropriety in the conduct of the grand jury; and (3) there was nothing to support counsel's attempt to breach the confidentiality to which grand jury proceedings are entitled, request for transcript of grand jury proceedings would be denied. Fed.R.Crim.Pro. 6(e)(3)(c).

7. Judges - Appointment

Criminal offenses under the laws passed by Congress may be prosecuted in courts other than those established pursuant to Article III of the U.S. Constitution before a judge enjoying lifetime tenure and protection against salary reduction; the enforcement of federal law has not been deemed the exclusive province of Article III courts. U.S. Const., Art. III.

**8. Jurisdiction - District Court -
Criminal Prosecutions**

The jurisdictional grant creating the District Court for the Northern Mariana Islands includes criminal prosecutions of federal offenses and this grant does not violate the United States Constitution nor the Covenant, even though the court does not have an Article III judge. U.S. Const., Art. III; U.S.C. §1694(a).

FILED
Clerk
District Court

MAY 27 1988

DISTRICT COURT FOR THE
NORTHERN MARIANA ISLANDS

For The Northern Mariana Islands

By [Signature]
(Deputy Clerk)

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3
4 UNITED STATES OF AMERICA,)
5 Plaintiff,)
6 v.)
7 JESUS PANGELINAN MAFNAS,)
8 Defendant.)
9

CR. NO. 88-00003

DECISION AND ORDER

10
11 THESE MATTERS came before the Court on May 26, 1988,
12 for hearing of the remaining pre-trial motions, filed by both
13 parties on May 23, 1988.

14 After considering the memoranda and arguments of
15 counsel, the Court makes the following decisions:

16
17 Plaintiff's Motion for Reciprocal Discovery

18 The United States, pursuant to Rules 16(b)(1),
19 subsections (A) and (B), and 26.2 of the Federal Rules of
20 Criminal Procedure, asks that defendant be required to permit
21 plaintiff to inspect, copy, or photograph books, papers,
22 documents, photographs, tangible documents or copies or portions
23 thereof, which are within the possession, custody, or control of
24 the defendant and which the defendant intends to introduce as
25 evidence in chief at trial. Plaintiff asks also that it be
26 permitted to inspect and copy or photograph any results or

1 reports of physical or mental examinations and of scientific
2 tests or experiments made in connection with this case, or copies
3 thereof, within the possession or control of the defendant, which
4 the defendant intends to introduce as evidence in chief at the
5 trial or which were prepared by a witness whom the defendant
6 intends to call at the trial when the results or reports relate
7 to his testimony.

8 Rule 16(b)(1), (A) and (B), provides for reciprocal
9 discovery of such material if defendant has first made the same
10 request upon the plaintiff and plaintiff has complied. The
11 record before the Court reveals that defendant has made such
12 request of plaintiff and, upon plaintiff's representation of
13 compliance, this portion of the motion is GRANTED. The Court
14 orders continuing reciprocal discovery during the trial.

15 Plaintiff also requests, pursuant to Federal Rule of
16 Criminal Procedure 26.2, that after each witness called by
17 defendant, other than defendant himself, has testified on direct
18 examination, that defendant or his attorney, as the case may be,
19 produce, for the examination and use of plaintiff, any statement
20 of the witness that is in defendant's possession and that relates
21 to the subject matter concerning which the witness has testified.

22 Because plaintiff's motion is based upon and complies
23 with the provisions of Rule 26.2, it is GRANTED. The procedure
24 outlined in the rule shall be followed at trial.

25 ///

26 ///

1 Plaintiff's Motion for Exclusion of Witnesses

2 Plaintiff moves, pursuant to Federal Rule of Evidence
3 615, that all witnesses, except Special Agents Tom Ernst and
4 Richard Morris, be excluded from the trial except during their
5 testimony, so that they cannot hear the testimony of other
6 witnesses.

7 Generally, this is a routine motion, routinely granted.
8 Here, however, plaintiff states that the two special agents are
9 officers or employees of the United States and are designated as
10 representatives of the United States, as provided in sub-part (2)
11 of the rule. Further, plaintiff argues that because of the
12 complexity of the case and the fact that primary responsibility
13 for investigation shifted to Morris after Ernst was re-assigned
14 to another office, their presence at counsel table is essential
15 to the presentation of plaintiff's case, which would also bring
16 the request within sub-part (3) of the rule.

17 The Notes of the Advisory Committee on Proposed Rules
18 state in part:

19 The efficacy of excluding or
20 sequestering witnesses has long been
21 recognized as a means of discouraging and
22 exposing fabrication, inaccuracy, and
23 collusion. (Citation omitted). The
24 authority of the judge is admitted, the only
25 question being whether the matter is
26 committed to his discretion or one of right.
The rule takes the latter position. * * *

24 Several categories of persons are
25 excepted. * * * (2) As the equivalent of
26 the right of a natural-person party to be
present, a party which is not a natural
person is entitled to have a representative
present. Most of the cases have involved

1 allowing a police officer who has been in
2 charge of an investigation to remain in court
3 despite the fact that he will be a witness.
4 (Citations omitted). * * * (3) The
category contemplates such persons as an
agent who handled the transaction being
litigated....

5 Further, the Notes of Committee on the Judiciary,
6 Senate Report No. 93-1277, provide:

7 Many district courts permit government
8 counsel to have an investigative agent at
9 counsel table throughout the trial although
10 the agent is or may be a witness. The
11 practice is permitted as an exception to the
12 rule of exclusion and compares with the
13 situation defense counsel finds himself
14 in--- he always has the client with him to
15 consult during the trial. The investigative
16 agent's presence may be extremely important
17 to government counsel, especially when the
18 case is complex or involves some specialized
19 subject matter. The agent, too, having lived
20 with the case for a long time, may be able to
21 assist in meeting trial surprises where the
22 best-prepared counsel would otherwise have
23 difficulty. Yet, it would not seem the
24 Government could often meet the burden under
25 rule 615 of showing that the agent's presence
26 is essential. * * *

The problem is solved if it is clear
that the investigative agents are within the
group specified under the second exception
made in the rule, for "an officer or employee
of a party which is not a natural person
designated as its representative by its
attorney." It is our understanding that this
was the intention of the House committee. It
is certainly this committee's construction of
the rule.

[1] The Court adopts the approach suggested and endorsed by
these Committees.

[2] As to the issue of allowing both men to join
plaintiff's counsel at counsel table, the Court relies on

1 Breneman v. Kennecott Corp., 799 F.2d 470, 474 (9th Cir. 1986),
2 and the cases cited therein, which acknowledge the Court's wide
3 discretion in deciding the matter. The Court, based upon the
4 record before it, will allow both agents to sit at counsel table.

5 This motion is GRANTED.

6
7 Stipulations

8 [3] The Court recognizes that neither party can be required
9 to stipulate to any item of evidence. However, in the interest
10 of perhaps expediting the trial, and pursuant to Local Rule 325,
11 subsections (d) and (k), the Court met with both parties in
12 chambers to discuss the possibility of stipulations. The parties
13 represented that they were attempting to agree upon certain
14 stipulations and the Court agreed that they should continue on
15 this course.

16
17
18 Plaintiff's Motion to Summon Additional Prospective Jurors

19 The Court sua sponte has determined that it is
20 advisable to summon additional jurors. Both parties concur and
21 it is so ordered.

22
23 Defendant's Motion to Dismiss - Qualifications of Certain Grand
24 Jurors

25 Defendant has moved to disqualify a number of grand
26 jurors due to ambiguities in their juror questionnaires which
might call into question their status as United States citizens

1 or possible exemption from grand jury service.

2 Federal Rule of Criminal Procedure 6(b)(2) provides
3 that a motion to dismiss an indictment may be based on the lack
4 of the legal qualifications of one or more individual grand
5 jurors. Such challenges are to be made in the manner provided by
6 28 U.S.C. §1867(e). Section 1867(e) states that the procedures
7 prescribed by §1867 shall be the exclusive means by which a
8 person accused of a federal crime may challenge a juror on the
9 ground he or she was not selected in conformity with the
10 provisions of Title 28.

11 Section 1867(a) provides that in a criminal case,
12 either "before the voir dire examination begins, or within seven
13 days after the defendant discovered or could have discovered, by
14 the exercise of diligence, the grounds therefor, whichever is
15 earlier, the defendant may move to dismiss the indictment...on
16 the ground of substantial failure to comply with the provisions
17 of this title in selecting the Grand... Jury." (Emphasis added).

18 The record in this case reveals that the indictment
19 against defendant was returned March 16, 1988. Defendant's
20 counsel appeared of record on March 25, 1988, when he accompanied
21 defendant to the arraignment and entry of plea.

22 The first inkling that defendant might question the
23 composition of the grand jury on the qualifications of the grand
24 jurors appears in a motion filed by defendant on May 4, 1988.
25 There is no indication in the record that any attempt to study
26 the grand jurors' questionnaires was made between March 25, 1988,

1 and May 4, 1988. In fact, it was only in open court on May 19,
2 1988, that such a request was actually made.

3 The information upon which defendant's challenge is
4 based appears on the face of the juror questionnaires. Such
5 questionnaires are and have been available for inspection (28
6 U.S.C. §1868) to any person ever since they were returned, prior
7 to the selection and convening of the grand jury in mid-December
8 of 1987. And, they were similarly available to defendant prior
9 to May 4, 1988.

10 [4] The Court finds that, at least since March 25, 1988,
11 defendant could have discovered, by the exercise of diligence,
12 the grounds supporting the motion. Defendant then had seven days
13 to file his motion. He did not. The motion is deemed waived and
14 is, therefore, DENIED.

15 However, the Court notes that defendant's motion would
16 have failed in any case. As stated earlier, defendant questioned
17 the legal qualifications of certain jurors, whose answers on
18 their questionnaires raised the issue of their U.S. citizenship
19 or the possibility they should have been exempt from service.

20 Title 28 U.S.C. §1865(a) allows this Court to enquire
21 whether a person is unqualified to be a juror. Section 1867(b)
22 requires that a grand juror, among other things, be a United
23 States citizen. On May 25, 1988, the Court submitted to six of
24 those grand jurors challenged on citizenship grounds (two were
25 not available due to illness) a questionnaire requiring them to
26 state, under penalty of perjury, if they were citizens of the

1 United States. All six answered in the affirmative.^{1/} Defense
2 counsel also challenged five grand jurors as being exempt from
3 service, pursuant to 28 U.S.C. §1863(b)(6)(ii) and (iii). The
4 Court has examined the challenged questionnaires and finds that
5 Juan Tenorio is a public official directly appointed by a person
6 elected to office (the Governor) and Edward S. Hocog is a member
7 of a governmental police department. Both are and should have
8 been exempt from service. Serafin P. Tudela, employed as a
9 revenue officer by the Department of Revenue and Taxation;
10 Shirley K. Olopai, employed as a secretary by the Division of
11 Customs; and Larry Hofschneider, employed as a messenger by the
12 Attorney General's office, do not fall within the exemptions set
13 out in 28 U.S.C. §1863(b)(6).

14 Accordingly, based upon the exemptions of Tenorio and
15 Hocog, and the uncertainty as to the citizenship of the two ill
16 grand jurors who did not fill out the Court's questionnaire on
17 May 25, 1988, there remain nineteen qualified grand jurors. The
18 public record in this case shows that nineteen of the twenty-
19 three grand jurors agreed in the return of the indictment. The
20 law requires that a quorum of at least sixteen grand jurors be
21 present when an indictment is returned.

22 Furthermore, Federal Rule of Criminal Procedure 6(b)(2)

23
24 ^{1/} A U.S. citizen or U.S. national may vote in CNMI elections.
25 The questionnaire submitted to the six challenged jurors also
3 asked them to indicate if they were U.S. nationals, rather
than U.S. citizens. No one indicated he or she was a U.S.
national, rather than a U.S. citizen.

1 provides that an indictment will not be dismissed, even if one or
2 more grand jurors is found to be disqualified, "if it appears
3 from the record kept...that 12 or more jurors, after deducting
4 the number not legally qualified, concurred in finding the
5 indictment." The qualifications of fifteen jurors were not
6 challenged. Since at least nineteen grand jurors are qualified,
7 and since nineteen concurred in the indictment, clearly, even if
8 the two exempt grand jurors, plus the two absent grand jurors (if
9 presumed, for purposes of this case, to be unqualified) are not
10 included, Rule 12(b)(2) still has been satisfied and the
11 indictment stands. The motion would fail, even if timely filed.

12
13 Defendant's Motion to Dismiss - Violation of the "Secrecy Rule"

14 Defendant also moved to obtain copies of the grand jury
15 transcript to support his motion to dismiss the indictment on the
16 ground that one or more grand jurors have violated the oath of
17 secrecy imposed upon them by Federal Rule of Criminal Procedure
18 6(e). This motion was withdrawn in open court, due to
19 defendant's professed inability to locate witnesses. However,
20 the Court makes the following observations:

21 [5] Initially, the Court notes that defense counsel
22 supported this motion with his affidavit alleging "on information
23 and belief" that certain members of the grand jury breached their
24 oath of secrecy. It is fundamental that an affidavit must be
25 made upon personal knowledge; affiant either does or does not
26 know sufficient facts. There was nothing competent before the

Court to support the assertion that one or more jurors violated the oath of secrecy.

Furthermore, even if it were shown that the oath of secrecy had been violated,^{2/} the remedy is not dismissal of the indictment but, rather, a contempt of court proceeding. This is made clear by Rule 6(e)(2). If defendant wishes to lodge contempt proceedings against one or more grand jurors, such a hearing may be held at the conclusion of trial.

During the course of his oral argument, defense counsel shifted the emphasis of his request for a transcript to requiring it for the purpose of determining whether the prosecutor correctly or incorrectly presented to the grand jurors the laws applicable to the facts of the case.

In Costello v. the United States, 350 U.S. 359 (1956), the Supreme Court held that:

An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The 5th Amendment requires no more. (Footnote omitted).

Rule 6(e)(3)(c) further provides:

Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made... (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. (Emphasis added).

^{2/} The record contains a copy of the Court's charge to the grand jury and a copy of the handbook given to each grand juror. In addition, the grand jurors viewed an instructional film. The obligation of secrecy was stressed in each.

1 [6] The indictment in this case is valid on its face.
2 Without any showing or allegation of impropriety in the conduct
3 of the grand jury proceeding there is nothing to support
4 counsel's attempt to breach the confidentiality to which grand
5 jury proceedings are entitled. The motion for grand jury
6 transcripts is DENIED.

7 Motion to Dismiss-Lack of Jurisdiction

8 Defendant has also moved to dismiss the indictment
9 against him based on the fact that the presiding judge of this
10 Court does not possess the attributes of an Article III judge,
11 namely life tenure and irreducible salary.

12 Congress established the District Court for the
13 Northern Mariana Islands in 48 U.S.C. §1694(a). The judge of the
14 Court is appointed by the President to a ten-year term pursuant
15 to §1694(b). The judge can be removed for cause and his salary,
16 though equivalent to that of a United States district judge, can
17 be reduced during his term.

18 According to defendant, he will be denied due process
19 if he is tried before a court not established pursuant to Article
20 III and by a judge not possessing the attributes of an Article
21 III judge.

22 At the outset, the Court notes that defendant's
23 argument citing Covenant Section 501, like defendant's argument
24 in support of his previous motion to dismiss, emphasizes the
25 importance of honoring the language and intent of the Covenant.
26 Section 501 of the Covenant (which section specifically

1 delineates, inter alia, those portions of the United States
2 Constitution which apply in the Commonwealth) does not include
3 Article III. Defendant's argument that the District Court should
4 be staffed by an Article III judge is contrary to the mandates of
5 the Covenant, which defendant has repeatedly asked this Court to
6 honor. The Court does so.

7 [7] Essentially, defendant's motion raises in issue whether
8 criminal laws passed by Congress may only be prosecuted in courts
9 established pursuant to Article III. This was precisely the
10 issue raised in Palmore v. United States, 411 U.S. 387 (1973).
11 Defendant in Palmore was arrested and charged with carrying an
12 unregistered pistol in the District of Columbia. The Criminal
13 Code of the District of Columbia was promulgated and enacted by
14 the United States Congress since the District of Columbia is a
15 territory of the United States. Palmore was scheduled to be
16 tried in the Superior Court of the District of Columbia. Judges
17 of the Superior Court are in essence federal judges, appointed by
18 the President and confirmed by the Senate. These judges,
19 however, are appointed to 14-year terms, their salaries can be
20 diminished during their tenure, and they are subject to removal
21 for cause. Palmore moved to dismiss the indictment urging that
22 he could only be tried for violating federal criminal laws in an
23 Article III court. The Superior Court, the District of Columbia
24 Court of Appeals, and the United States Supreme Court rejected
25 Palmore's argument. Justice White, speaking for the Court,
26 stated the issue precisely as it has been stated here: Whether

criminal offenses under the laws passed by Congress may be prosecuted in courts other than those established pursuant to Article III. Palmore, 411 U.S. at 400. The Court found no support for defendant's assertion that such could not be done. Rather, the Court determined that the enforcement of federal law has not been deemed the exclusive province of federal Article III courts. Id. at 402. Justice White concluded:

[N]either this Court nor Congress has read the Constitution as requiring...every federal criminal prosecution for violating an Act of Congress, to be tried in an Art. III court before a judge enjoying lifetime tenure and protection against salary reduction.

* * *

[T]he requirements of Art. III...must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment. Palmore v. United States, 411 U.S. 387, 408-09 (1973).

This same issue has been raised in a forum nearer to home in United States v. Santos, 623 F.2d 75 (9th Cir. 1980). Defendants in Santos were prosecuted and convicted in the District Court of Guam for committing criminal offenses under 18 U.S.C. §§3 and 242. They subsequently brought a habeas corpus petition seeking to have their sentences vacated "on the ground that the District Court of Guam was without jurisdiction to entertain criminal complaints." Id. at 76. The District Court of Guam and later the Ninth Circuit ruled that the court had jurisdiction. At issue in Santos was 48 U.S.C. §1424, which

1 states:

2 The District Court of Guam shall have the
3 jurisdiction of a district court of the
4 United States in all causes arising under the
5 Constitution, treaties and laws of the United
6 States, regardless of the sum or value of the
7 matter in controversy....

8 [8] This is essentially the same language used in 48 U.S.C.
9 §1694(a), which created the District Court for the Northern
10 Mariana Islands, and which is in part the jurisdictional grant of
11 this Court. The Ninth Circuit determined that this statute
12 conferred on the District Court of Guam jurisdiction to hear
13 criminal cases involving violations of federal law. Id. at 76.

14 For these reasons, this Court holds that the
15 jurisdictional grant of 48 U.S.C. §1694(a) includes criminal
16 prosecutions of federal offenses and, further, that such grant
17 does not violate the United States Constitution nor the Covenant.

18 IT IS SO ORDERED.

19 DATED this 27th day of May, 1988.

20 

21) Alfred Laureta
22 Judge