

1 **FOR PUBLICATION**

2  
3 **IN THE SUPERIOR COURT**  
4 **FOR THE**  
5 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

6 **COMMONWEALTH OF THE**  
7 **NORTHERN MARIANA ISLANDS,**

8 Plaintiff,

9 vs.

10 **EDGARDO MACABALO,**

11 Defendant.

) **CRIMINAL CASE NO. 06-0110C**

)  
)  
) **ORDER DENYING DEFENDANT’S**  
) **MOTION TO INCLUDE NON-CITIZENS**  
) **IN THE JURY ARRAY**

12 **I. Introduction**

13 THIS MATTER came before the Court on November 8, 2007, at 2:00 p.m. in Courtroom 220A  
14 for a hearing on Defendant Eduardo Macabalo’s motion to include noncitizens in the jury array.  
15 Defendant appeared and was represented by Assistant Public Defender Richard C. Miller. The  
16 Commonwealth opposed the motion and was represented by Assistant Attorneys General Mike  
17 Nisperos, Jr. and Joseph L.G. Taijeron, Jr. After considering the oral and written arguments of the  
18 parties and based upon its review of the relevant legal authorities, the Court issued its ruling from the  
19 bench denying Defendant’s motion and stating the reasons for its decision. The Court hereby issues its  
20 written order to fully set forth the basis of its ruling on this matter.

21 **II. Factual and Procedural Background**

22 On May 15, 2006, the Commonwealth filed a twelve-count Information charging Macabalo with  
23 theft by deception in violation of 6 CMC § 1603(a), followed the next day by a First Amended  
24 Information that added a separate thirteenth count of theft by deception. On May 26, 2006, the

1 Commonwealth filed a Second Amended Information substituting thirteen counts of theft by unlawful  
2 taking or disposition in violation of 6 CMC § 1602(a), in place of the previously-alleged counts of theft  
3 by deception. The Commonwealth alleges that in December of 2004, while employed by Marianas  
4 Pacific Distributors (“Marpac”), Macabalo stole approximately \$120,000 from his employer by  
5 collecting cash payments for goods delivered to Marpac’s customer Ming Li Store on Saipan and never  
6 delivering these payments to Marpac’s Saipan office.

7 Macabalo is an ethnic Filipino and a citizen of the Republic of the Philippines. He was  
8 employed by Marpac for over ten years as a non-resident worker and now lives in Saipan as the  
9 immediate relative of a U.S. citizen. On October 10, 2007, Macabalo filed a Motion to Include  
10 Noncitizens in the Jury Array, requesting the Court to establish procedures to allow aliens legally living  
11 on Saipan to be included in the jury pool. Macabalo argues that his right to a fair trial, particularly his  
12 right to a trial by an impartial jury drawn from a fair cross-section of the community, requires the  
13 inclusion of non-citizens in the jury array when all present circumstances are considered. By its  
14 opposition filed October 19, 2007, the Commonwealth argues that no legal authority supports the  
15 inclusion of non-citizens in the jury array and that the issue of juror qualification presents a political  
16 question that should not be determined by the Court.

### 17 **III. Analysis**

#### 18 **1. The Political Question Doctrine is Inapplicable to Defendant’s Motion**

19 “The political question doctrine is a policy of judicial abstention wherein the judiciary declines to  
20 adjudicate a case, so as not to violate the separation of powers by interfering with a coequal branch of  
21 government.” *Rayphand v. Tenorio*, 2003 MP 12, ¶ 40, 6 N.M.I. 575, 588, *citing*, *Sablan v. Tenorio*, 4  
22 N.M.I. 351, 363 (1996). The court should consider abstaining from ruling on a matter if the controversy  
23 (1) involves a decision made by a branch of the government coequal to the judiciary, and (2) concerns a  
24 political matter. *Sablan*, 4 N.M.I. at 363. The determination of whether or not a particular controversy

1 represents a nonjusticiable political question is made by considering the unique facts of the case  
2 presented in light of the factors articulated by the U.S. Supreme Court in *Baker v. Carr*, 369 U.S. 186,  
3 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962):

4 A number of factors may be considered in this analysis: whether there is a textually  
5 demonstrable commitment of the issue to a coordinate branch of government; whether  
6 judicially discoverable and manageable standards for assessing the dispute are lacking;  
7 whether a court could render a decision without also making an initial policy  
8 determination that clearly should be left to another branch; whether it would be possible  
9 for a court independently to resolve the case without undercutting the respect due to  
10 coordinate branches of government; whether there is an unusual need to adhere to a  
11 political decision already made; or whether an embarrassing situation might be created by  
12 various governmental departments ruling on one question.

13 *Sablan v. Tenorio*, 4 N.M.I. at 363.

14 The Commonwealth argues that the question of which qualifications are to be required of  
15 potential jurors is inextricably included within the question of Defendant's right to a trial by jury in the  
16 first instance, and that article I, section 8, of the N.M.I. Constitution provides a textually demonstrable  
17 commitment of this issue to the N.M.I. Legislature. The Commonwealth argues that statutory juror  
18 qualifications are immune from judicial review because "decisions pertaining substantively to the right  
19 of a jury trial are the sole and exclusive province of the Legislature, not the Judiciary," so that any  
20 judicial abrogation of the statutory juror qualifications would require the Court to substitute its own  
21 policy decision for that of the Legislature. *Opp'n to Mot.*, p. 3.

22 Defendant agrees that his right to a trial by jury in the Commonwealth is a statutory right that is  
23 *not* guaranteed by article III of the U.S. Constitution.<sup>1</sup> *See*, COVENANT TO ESTABLISH A

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24 <sup>1</sup> Article III provides that the trial of all crimes, except in cases of impeachment, shall be by jury. U.S. CONST. art. III, § 2, cl. 3. The Sixth Amendment provided specific assurances of due process in criminal prosecutions by adding that the criminal defendant shall have the right "to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence." The Sixth Amendment is made applicable to the CNMI by Section 501(a) of the Covenant. *Commonwealth v. Zhen*, 2002 MP 04, ¶ 30, n. 6; *Commonwealth v. Hanada*, 2 N.M.I. 343, 348 (1991).

1 COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES  
2 OF AMERICA, § 501, 48 U.S.C. § 1601 note, *reprinted in* Commonwealth Code at B-101 *et seq.* (“neither  
3 trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution  
4 based on local law”); *also*, N.M.I. Const., art. I, § 8 (“The legislature may provide for trial by jury in  
5 criminal or civil cases.”). The authority of the Commonwealth Legislature to permit or deny the right to  
6 a jury trial in civil or criminal cases has been confirmed on review. *Commonwealth v. Peters*, 1 N.M.I.  
7 466, 471-473 (1991); *Commonwealth v. Atalig*, 723 F.2d 682, 690 (9<sup>th</sup> Cir. 1984), *cert. denied*, 467 U.S.  
8 1244, 104 S.Ct. 3518, 82 L.Ed.2d 826 (1984). Defendant’s right to a trial by a jury of six persons is  
9 provided for in this case by 7 C.M.C. § 3101(a) because each of the thirteen counts alleged in the  
10 Information are punishable by up to a \$5,000 fine, as well as up to five years imprisonment. 6 C.M.C. §  
11 1601(b)(2), §1602(a). Defendant also agrees that the qualifications for jurors prescribed by the  
12 Legislature at Title 7, Section 3103 of the Commonwealth Code is reasonably interpreted as an  
13 exclusive set of qualifications that includes the requirement that jurors hold U.S. citizenship.<sup>2</sup>

14 Defendant’s contention is simply that, in the particular context of the present case, the  
15 application of the requirement that jurors be selected from among U.S. citizens will conflict with and  
16 impair Defendant’s constitutional right to a fair trial and equal protection of the laws as guaranteed by  
17 the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 5, 6, and 8

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19 <sup>2</sup> 7 CMC § 3103, entitled “Qualifications of Jurors,” provides:

20 Any citizen of the Trust Territory or of the United States who has attained the age of 18 years and who has resided  
21 in the Commonwealth for a period of one year immediately prior to jury service is competent to serve as a juror  
unless he or she:

- 22 (a) Has been convicted in a court of record in any jurisdiction of a crime punishable by imprisonment for more than  
23 one year and his or her civil rights have been restored by pardon or amnesty; or  
(b) Is unable to read, write, speak, and understand either English, Chamorro or Carolinian; or  
(c) Is incapable by reason of mental or physical infirmities to render efficient jury service; or  
(d) Is exempted from service as a juror by any law of the Commonwealth.

24 (Source: 5 TTC § 503)

1 of the N.M.I. Constitution. It is beyond question that the authority to interpret and construe a legislative  
2 enactment and to review that law and its application for conformity with constitutional requirements is  
3 an authority that is constitutionally committed to the judiciary. *Marbury v. Madison*, 1 Cranch 137, 177-  
4 180, 2 L.Ed. 60, 1803 WL 893 (1803); *Tenorio v. Superior Court*, 1 N.M.I. 1, 16 (1989). The standards  
5 for determining the issue raised by Defendant are well established within the judiciary and do not  
6 compel the Court to intrude upon province of legislative decision-making. *Rayphand, supra*, 2003 MP  
7 12, ¶¶ 38-50, 6 N.M.I. at 588-590. In fact, the Commonwealth Supreme Court has already considered  
8 the question of a civil defendant's constitutional right to a fairly selected jury array and concluded that  
9 the right to a fair trial in either civil or criminal cases "necessarily contemplates an impartial jury drawn  
10 from a cross-section of the community." *Guerrero v. Tinian Dynasty Hotel and Casino*, 2006 MP 26, ¶  
11 17, quoting *Theil v. Southern Pac. Co.*, 328 U.S. 217, 220, 66 S.Ct. 984, 985, 90 L.Ed. 1181 (1946).  
12 The fact that the right to a jury trial in the Commonwealth has been granted by a decision of the  
13 Legislature provides no basis for assuming that the right, once conferred, carries no less than the full  
14 guarantees of fairness provided by the N.M.I. Constitution. *Id.* The Commonwealth's argument that this  
15 issue presents a nonjusticiable political question is untenable and is rejected by this Court.

16 2. Defendant Is Not Entitled to a Jury Array That Includes Noncitizens.

17 Defendant contends that, as a noncitizen long-term resident of Saipan, he is a member of a  
18 distinctive and readily identifiable group within the community living on Saipan. He stresses the  
19 undeniable fact that at this point in the history of the Commonwealth the total number of noncitizens  
20 residing on Saipan is quite large in relation to the number of residents who are U.S. citizens and also  
21 asserts that the ratio of noncitizens to citizens in the local community is higher than that within any other  
22 U.S. jurisdiction. Based upon these unique demographics, Defendant forcefully argues that a jury  
23 selection process which by law excludes members of Defendant's distinctive group, i.e., noncitizens,  
24 does not operate to draw jurors from a fair cross-section of today's local community and cannot

1 guarantee him a jury free from the taint of prejudice.<sup>3</sup> The Commonwealth disputes the proposition that  
2 noncitizens are a distinctive group within the community such that their lack of representation on jury  
3 venires could be unfair, contending also that Defendant's right to have a fairly drawn jury array can only  
4 arise with respect to the set of individuals that the Legislature has previously determined to be qualified  
5 to serve as jurors. (Pl.'s Opp'n, pp. 10-12).

6 Although a criminal defendant's right to a jury trial as contained in the Sixth Amendment to the  
7 U.S. Constitution does not apply to the Commonwealth, the remaining guarantees of procedural fairness  
8 found in the Sixth Amendment have been expressly incorporated into the N.M.I. Constitution. N.M.I.  
9 CONST. art. I, § 4. The Commonwealth Supreme Court has also concluded that a defendant's right to an  
10 impartial jury is mandated by the due process protection of Article I, Section 5, of the N.M.I.  
11 Constitution, and that federal cases addressing the issue under the Sixth Amendment may be persuasive  
12 for determining the requirements for an impartial jury. *Guerrero, supra*, 2006 MP 26, ¶¶ 17-18. In  
13 *Guerrero*, the Court adopted the standard expressed by the U.S. Supreme Court in *Taylor v. Louisiana*

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15 <sup>3</sup> Defendant's factual assertions are supported by references to public documents, including official C.N.M.I. government  
16 publications and published newspaper articles. For example, the 2002 CNMI Statistical Yearbook published by the CNMI  
17 Department of Commerce contains the following report:

18 In 2000, 42 percent of the total population was born in the CNMI while  
19 58 percent was born elsewhere and migrated here; of these, 90 percent  
20 came from Asian countries, particularly, from China (39%) and the  
21 Philippines (also about 39%). Compared to 1980, over 71 percent of the  
22 CNMI population were born in the Commonwealth. This shift in birthplaces  
23 of persons in the Commonwealth was more pronounced in Saipan than in  
24 Rota and in Tinian. [¶] In 2000, as it was in 1995 and 1990, the Filipino ethnic  
group was the largest single ethnic group in the Commonwealth.  
2002 CNMI STATISTICAL YEARBOOK, p. 16, available at <http://www.commerce.gov.mp>.

20 The same report indicates that by the year 2000 the foreign-born residents of Saipan who had become naturalized  
21 U.S. citizens were only 940 in number, out of a total foreign-born population of over 37,000. *Id.*, Table 1.38, p. 30.  
22 Defendant also cites congressional testimony related to pending federal legislation that would phase out the Commonwealth's  
23 nonresident worker program, as well as local newspaper reports of alien workers organizing to advocate for a common  
24 position on the issue. H.R. 3079, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1634 (2007). These references are advanced in support of his  
argument that noncitizens on Saipan are a distinctive group with shared interests and/or viewpoints and that, in the present  
political climate, there is a risk of prejudice from a jury drawn only from U.S. citizens residing on Saipan. The Court takes  
judicial notice of the congressional hearings and the official publications of the C.N.M.I. government. Com. R. Evid. 201.  
Without making a finding as to the truth of any particular statements contained in the various published sources, the Court  
assumes for the purpose of Defendant's motion that noncitizens outnumber citizens on Saipan and that the question of the  
future status of nonresident workers has been a source of widespread and spirited debate in the community.

1 that the right to an impartial jury requires that jurors be drawn from a source representing “a fair cross-  
2 section of the community,” and approved a three-part test established in *Duren v. Missouri* to prove a  
3 prima facie violation of the “fair cross-section” requirement. *Id.*, ¶ 19; *Duren v. Missouri*, 439 U.S. 357,  
4 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 530, 95 S.Ct. 692,  
5 697, 42 L.Ed.2d 690 (1975).

6 The test set forth in *Duren* allows a defendant to establish a prima facie violation of the fair-  
7 cross-section requirement if the defendant can show:

- 8 (1) that the group alleged to be excluded is a “distinctive” group in the community;
- 9 (2) that the representation of this group in venires from which juries are selected is not  
10 fair and reasonable in relation to the number of such persons in the community; and
- 11 (3) that this underrepresentation is due to systematic exclusion of the group in the jury-  
12 selection process.

*Duren*, 439 U.S. at 364, 99 S.Ct. at 668.

13 Once such a prima facie case is demonstrated, the government may justify the exclusion by  
14 showing that one or more significant state interests will “be manifestly and primarily advanced by those  
15 aspects of the jury-selection process, such as exemption criteria, that result in the disproportionate  
16 exclusion of a distinctive group.” *Id.*, at 367-368, 99 S.Ct. at 670-671.

17 Several federal circuits, including the Ninth Circuit, have adopted an additional three-part test for  
18 determining whether a group is “distinctive” under the first element of the *Duren* test. To establish that  
19 a group qualifies as “distinctive” under *Duren*, the test requires the defendant to show:

- 20 (1) that the group is defined and limited by some factor (i.e., that the group has a definite  
21 composition such as by race or sex);
- 22 (2) that a common thread or basic similarity in attitude, ideas, or experience runs through  
23 the group; and
- 24 (3) that there is a community of interests among members of the group such that the  
group's interest cannot be adequately represented if the group is excluded from the jury  
selection process.

*Willis v. Zant*, 720 F.2d 1212, 1216 (11th Cir.1983), *cert. denied*, 467 U.S. 1256, 104 S.Ct. 3546, 3548,  
82 L.Ed.2d 849, 851 (1984); *Accord, United States v. Fletcher*, 965 F.2d 781, 782 (9<sup>th</sup> Cir. 1992).

1 The federal Jury Selection and Service Act was enacted by Congress in 1968 expressly to  
2 comply with the fair-cross-section requirement for the selection of jury venires. 28 U.S.C. §§ 1861-  
3 1867; H.R. REP. NO. 1076, *see*, 1968 U.S. CODE CONG. AND ADMIN. NEWS, p. 1792. Like the  
4 Commonwealth’s juror qualification statute, the Act prohibits an individual from serving on a jury if he  
5 or she is not a citizen of the United States. 28 U.S.C. § 1865(b)(1).<sup>4</sup> The Act’s exclusion of noncitizens  
6 has withstood direct constitutional challenges under the equal protection and due process clauses of the  
7 Fifth and Fourteenth Amendments to the U.S. Constitution. *Perkins v. Smith*, 370 F.Supp. 134  
8 (D.C.Md.1974) (“[T]he state has a compelling interest in the restriction of jury service to those who will  
9 be loyal to, interested in, and familiar with, the customs of this country.”), *aff’d*, 426 U.S. 913, 96 S.Ct.  
10 2616, 49 L.Ed.2d 368 (1976); *United States v. Toner*, 728 F.2d 115, 130 (2d Cir.1984) (“neither due  
11 process nor equal protection of the law is involved in the time-honored federal system of drawing petit  
12 and grand jurors only from citizens of this country”). *See, also*, *United States v. Gordon-Nikkar*, 518  
13 F.2d 972, 976 (5<sup>th</sup> Cir. 1975) (defendants of Cuban origin not entitled to have resident aliens on jury  
14 although 30% of Miami’s population were resident aliens of Cuban descent).

15 Defendant, however, bases his request to include noncitizens in the jury array directly on his  
16 right to a criminal trial by “impartial jury” under the Sixth Amendment and the due process guarantees  
17 of the N.M.I. Constitution. (Def.’s Mot., p. 4). Defendant argues that the broader scope of the Sixth  
18 Amendment protections together with the unique circumstances of Saipan’s noncitizen residents compel  
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20 <sup>4</sup> Pursuant to Covenant § 1004(a), the application of 28 U.S.C. § 1865(b)(1) to the CNMI was suspended in 1978 by  
21 President Jimmy Carter until the dissolution of the Trust Territories of the Pacific Islands. Proclamation No. 4568 (May 9,  
22 1978). The reason for this was that “[t]he vast majority of the inhabitants of the Northern Mariana Islands are not citizens of  
23 the United States and consequently may not participate as jurors in proceedings before the United States District Court for the  
24 Northern Mariana Islands. They may also be deprived of the right to have their cases heard before juries selected at random  
from a fair cross section of their community.” *Id.* Section 501 of Title 5 of the Trust Territory Code, providing that a  
“citizen of the Trust Territory” may be competent to serve as a juror was incorporated verbatim into 7 CMC § 3103. The  
U.S. Trusteeship was formally dissolved on November 4, 1986. Proclamation No. 5564, 51 Fed. Reg. 40,399 (Nov. 3, 1986).  
Defendant points to a 1974 report indicating that only 12.2% of the residents of the Marianas at that time were either non-  
U.S. or non-Trust Territory citizens. *Preliminary Report on Population: Marianas District*, Office of the District Planner,  
June 24, 1974, App. B, p. 30 (CNMI Dept. of Commerce).



1 the recognition of these noncitizens as comprising a “distinctive” group under *Duren* and support the  
2 primacy of Defendant’s fair trial rights in this particular case.<sup>5</sup> Some courts have taken the position that  
3 because the statutory exclusion of noncitizens from jury venires has been upheld as facially valid on due  
4 process and equal protection challenge under the Fifth and Fourteenth Amendments, the fair-cross-  
5 section requirement of *Taylor* and *Duren* cannot arise in such cases. *United States v. Gordon-Nikkar*,  
6 518 F.2d at 976 (“The ‘truly representative cross-section’ requirement encompasses only individuals  
7 qualified to serve as jurors.”); *United States v. Armsbury*, 408 F.Supp. 1130, 1135 (D.Or.1976) (“Groups  
8 based solely on language, residency, or citizenship are not cognizable.”). The Commonwealth urges the  
9 same position; that Defendant is only entitled to a jury drawn from an array comprised of a fair cross-  
10 section of U.S. citizens residing on Saipan.

11         Simply restricting the fair-cross-section requirement to the class of statutorily qualified jurors,  
12 however, appears to conflict with *Duren*’s emphasis that “the fair-cross-section requirement involves a  
13 comparison of the makeup of jury venires or other sources from which jurors are drawn with the makeup  
14 of the *community*.” 439 U.S. at 365 n. 23, 99 S.Ct. 664; *See, also, Teague v. Lane*, 489 U.S. 288, 301, n.  
15 1, 109 S.Ct. 1060, 1070, n. 1, 103 L.Ed.2d 334 (1989). Although a distinct analysis may apply, on one  
16 hand, to the question of a noncitizen’s equal protection right to serve as a juror, and on the other, to the

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18 <sup>5</sup> The identification of groups as “suspect classes” under equal protection analysis is independent of their recognition as  
19 “distinctive” for inclusion in the fair-cross-section requirement of the Sixth Amendment. Therefore, it is conceivable that the  
20 exclusion of a set of potential jurors based upon an irrational criterion may violate the equal protection rights of those  
potential jurors without resulting in a violation of the criminal defendant’s right to have a jury drawn from a source that is  
representative of the community. An opinion by the Supreme Judicial Court of Massachusetts noted the converse possibility:

21         Comparing the equal protection and Sixth Amendment tests, distinctions appear. The focus of the equal  
22 protection clause has been on classes that have historically been saddled with disabilities or subjected to  
23 unequal treatment. Sex, race, color, religion, or national origin are the prime examples. Central to the Sixth  
24 Amendment, on the other hand, is the broader principle that juries should be drawn from a source fairly  
representative of the community. It is conceivable, therefore, that a group might constitute a “distinctive”  
group in the community for Sixth Amendment purposes but not an “identifiable” group for equal protection  
purposes.  
*Commonwealth v. Bastarache*, 414 N.E.2d 984, 992 (Mass. 1980)

1 question of a criminal defendant's Sixth Amendment right to an impartial jury, the courts that have  
2 considered the issue have reached a consistent result even upon the assumption that noncitizens  
3 comprise a "distinctive" group under *Duren*. See, e.g., *Commonwealth v. Acen*, 487 N.E.2d 189, 195, n.  
4 19 (Mass. 1986). To date, no federal or state court has found that a criminal defendant's constitutional  
5 right to an impartial jury has been violated by the exclusion of noncitizens from jury venires. See,  
6 *United States v. Wood*, 299 U.S. 123, 145, 57 S.Ct. 177, 185, 81 L.Ed. 78 (1936); 47 AM. JUR. 2D *Jury* §  
7 162 (1995).<sup>6</sup>

8 Defendant acknowledges this absence of persuasive authority, but argues that the  
9 Commonwealth's unique demographics support a contrary conclusion. In this case, Defendant  
10 persuasively argues that resident noncitizens comprise a distinctive group within the population because  
11 the vast majority have entered and remained within the CNMI as nonresident workers under the  
12 Nonresident Workers Act (3 CMC §§ 4411-4452). This gives them a distinct social status within the

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15 <sup>6</sup> The requirement that jurors must be citizens of the United States is found in neither the N.M.I. nor U.S. Constitutions. In  
16 fact, the right of a foreign resident to a trial by jury *de medietate linguae* ("of mixed tongue"), or trial by a jury composed  
17 one-half of natives and one-half of foreigners, existed by statute for approximately 700 years in England and was not  
repealed until 1870. 28 Edw. III, c. 13 (1354); See, *Commonwealth v. Acen*, *infra*, 487 N.E.2d at 191-193. The practice was  
initially adopted by a number of states and employed in early federal trials, including trials involving Native Americans. See,  
*Respublica v. Mesca*, 1 U.S. (1 Dall.) 73 (1783); *People v. McLean*, 2 Johns. 380 (N.Y. Sup. Ct. 1807); *United States v.*  
*Cartacho*, 25 F. Cas. 312 (C.C.D. Va. 1823).

18 Thomas Jefferson and James Madison both advocated unsuccessfully for the inclusion in the Constitution of the right to trial  
19 by mixed jury during the Constitutional Convention of 1788. In a letter to Madison, Jefferson wrote that: "[i]n disputes  
20 between a foreigner and a native, a trial by jury may be improper. But if this exception cannot be agreed to, the remedy will  
21 be to model the jury, by giving the mediatas lingua, in civil as well as criminal cases." Kevin R. Johnson, *Why Alienage*  
*Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving*  
*Noncitizens*, 21 Yale J. Int'l L. 1, p. 9, n. 48 (1996), quoting, Letter to James Madison (July 31, 1788), in THE LIFE AND  
22 SELECTED WRITINGS OF THOMAS JEFFERSON, pp. 450-451 (Adrienne Koch & William Peden eds., 1944); See, also, Deborah  
23 A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury de Medietate Linguae: A History and a Proposal for*  
*Change*, 74 B.U. L. Rev. 777, 791-792 (1994).

24 It was not until the practice had generally been repealed by the states and had long faded into disuse that the U.S. Supreme  
Court pronounced in dicta that trial by jury *de medietate linguae* was *not* a right found in the U.S. Constitution. *Wood, supra*,  
299 U.S. at 145, 57 S.Ct. at 185. Neither, however, does the Constitution define "trial by jury" to *preclude* noncitizens from  
qualifying as jurors. *Id.*, 299 U.S. at 142, 57 S.Ct. at 183-184.

1 Commonwealth, where they are also ethnically distinct from the native population, are placed second in  
2 line behind local residents for job opportunities, and where local law provides no path toward citizenship  
3 or permanent residency. 3 CMC § 4201. The common experiences of nonresident workers undoubtedly  
4 give rise to shared perspectives and interests that are inadequately reflected by the relatively few  
5 naturalized citizens residing in the community. *Cf., Rubio v. Superior Court*, 593 P.2d 595, 599-600  
6 (Cal. 1975) (plurality opinion). The Court agrees that these factors combine to show that noncitizens  
7 residing on Saipan constitute a distinctive group within the community. *Fletcher, supra*, 965 F.2d at  
8 782.

9         When noncitizens are considered as a distinctive subset of the community, Defendant’s prima  
10 facie showing under the remaining *Duren* factors become virtually self-evident. The exclusion from the  
11 jury array of a group constituting the majority of residents cannot be “fair and reasonable” in relation to  
12 their numbers in the community, and their exclusion is “systematic” because it is prescribed by law. 439  
13 U.S. at 364, 99 S.Ct. at 668. Under a strict Sixth Amendment analysis, therefore, Defendant has shown  
14 a prima facie violation of the fair-cross-section requirement of *Taylor v. Louisiana. Id.* The burden  
15 shifts to the Commonwealth to show a “significant” government interest that is “manifestly and  
16 primarily advanced” by the exclusion. *Id.*, at 367-368, 99 S.Ct. at 670-671.

17         Under the previously-cited authority, both the federal and state governments have well  
18 established that the exclusion of aliens from jury service is justified to serve the important government  
19 interest of ensuring that the individuals who are selected to perform the vital function of jurors  
20 sufficiently understand and are sufficiently committed to our government’s laws and institutions to be  
21 entrusted with that responsibility. *Gordon-Nikkar, supra*, 518 F.2d at 976-977, citing, *Perkins v. Smith*,  
22 *supra*, 370 F.Supp. at 142 (concurring opinion). The U.S. Supreme Court upheld the holding in *Perkins*,  
23 and in a later case acknowledged in dicta the rationale that:

1 It is no more than recognition of the fact that a democratic society is ruled by its people.  
2 Thus, it is clear that a State may deny aliens the right to vote, or to run for elective office,  
3 for these lie at the heart of our political institutions.... Similar considerations support a  
4 legislative determination to exclude aliens from jury service.

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Foley v. Connelie, 435 U.S. 291, 296, 98 S.Ct. 1067, 1071, 55 L.Ed.2d 287 (1978).

The Commonwealth is entitled to rely upon the government's established interest in maintaining a system of justice that is administered by its own citizens to rebut Defendant's claim of prejudice from a jury that is drawn from an array that excludes noncitizens. Defendant argues that the sheer imbalance in the ratio of noncitizens to citizens in the local community mandates a different result, particularly when there is an insignificant pool of naturalized citizens in the community who may "share the viewpoint" of noncitizens. This may be an unfortunate difficulty faced by a criminal defendant in a proceeding that must take place in his or her host country, but it is insufficient to outweigh the democratic sovereign's interest in ensuring that its institutions of justice are administered by its citizens.

*Perkins, supra*, 370 F.Supp. at 138. In this regard, the court in *Perkins* stated:

Resident aliens by definition have not yet been admitted to citizenship. Until they become citizens, they remain in most cases legally bound to the country of their origin. Nothing is to prevent their return to that country, or a move to yet a third nation... Therefore, although the presumption that all aliens owe no allegiance to the United States is not valid in every case, *no alternative to taking citizenship for testing allegiance can be devised, so that we conclude that the classification is compelled by circumstances, and that it is justifiable.*

*Id.* (emphasis added).

Although the proportionate numbers and distinctive circumstances of noncitizens residing in the local community lend weight to Defendant's argument to include noncitizens in the jury array, the Court is not persuaded that any potential prejudice to Defendant's Sixth Amendment right to trial by an impartial jury is sufficient to outweigh the government's substantial interest in maintaining a jury comprised of United States citizens.

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1 **IV. Conclusion**

2 Defendant raises legitimate concerns that the number of citizens compared to the number of  
3 noncitizens who presently reside in the local community negatively impacts his right to a jury array that  
4 represents a fair cross-section of the community when noncitizens are statutorily excluded from jury  
5 service. The Court concludes, however, that the Commonwealth's interest in ensuring that members of  
6 its juries are full citizens of the United States is of greater importance. Defendant may rely upon other  
7 available means, such as voir dire and challenges for cause, to obtain an impartial jury in this case. For  
8 these reasons, Defendant's motion to include noncitizens in the jury array is DENIED.

9 SO ORDERED this 27th day of December, 2007.

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12 RAMONA V. MANGLONA, Associate Judge  
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