

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,)
)
 Plaintiff,)
)
 vs.)
)
 MARK DEORIO,)
)
 Defendant.)
_____)

CRIMINAL CASE NO. 2020-504

ORDER DISMISSING THREE COUNTS

Larry Wentworth
Associate Justice

Hearing: January 20, 2021
Decided: February 15, 2021

APPEARANCES:

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HEADNOTES

Criminal Law and Procedure – Obstruction

The Model Penal Code was the primary source for the Criminal Code, and Section 501(1) of Title 11, Obstructing Administration of Law or Other Government Function, is virtually identical to Model Penal Code § 242.1, which was designed to cover a broad range of behavior that impedes or defeats the operation of government. FSM v. DeOrio, 23 FSM R. 153, 158 (Pon. 2021).

Criminal Law and Procedure – Obstruction

In order to establish that a defendant obstructed the administration of law or other governmental function, the prosecution must establish that: 1) the defendant had the intent to obstruct the administration of law; and 2) the defendant used force or violence, or breached an official duty or committed an unlawful act. Further, the word "obstructs" has an expansive meaning. The crime is not limited to interference with the administration of justice but also applies to any other governmental function. FSM v. DeOrio, 23 FSM R. 153, 158 (Pon. 2021).

Criminal Law and Procedure – Obstruction

A civil action – a lawsuit – cannot be the direct interference with the a government official's duties for which a defendant could be held criminally liable for obstructing the administration of law or other governmental function. FSM v. DeOrio, 23 FSM R. 153, 158 (Pon. 2021).

Criminal Law and Procedure – Information; Criminal Law and Procedure – Obstruction

The government must plead sufficient facts for the accused to know which actions might be the adverse action alleged or to understand how he might be held criminally liable for obstructing the administration of law or other governmental function for that adverse action. FSM v. DeOrio, 23 FSM R. 153, 158 (Pon. 2021).

Criminal Law and Procedure – Aiding and Abetting; Criminal Law and Procedure – Conspiracy; Criminal Law and Procedure – Solicitation

Under 11 F.S.M.C. 301(1)(d), a person can be treated as a principal to a crime and held criminally liable for the acts of another if the person, whether or not being present during the commission of the crime, intentionally aids, abets, advises, solicits, counsels, encourages, commands, threatens, menaces or coerces another to commit a crime, or conspires with or otherwise procures another to commit a crime. FSM v. DeOrio, 23 FSM R. 153, 158 (Pon. 2021).

Criminal Law and Procedure – Information

An information is sufficient if: 1) it is a plain, concise and definite written statement of the essential facts constituting the crime charged; 2) it sufficiently apprises the defendant of the charges against which the defendant must be prepared to defend; and 3) it is sufficiently detailed to enable the defendant to plead the case as a bar to future prosecutions for the same crime. The information must charge all the essential elements of the crime, with, for matters of form but not of substance, liberality being the guide in testing the information's sufficiency. FSM v. DeOrio, 23 FSM R. 153, 158-59 (Pon. 2021).

Criminal Law and Procedure – Dismissal; Criminal Law and Procedure – Information

The test for an information's sufficiency is whether it is fair to the defendant to require him or her to defend on the basis of the charge as stated therein. An information that, as a practical matter, is not sufficiently certain and unambiguous so as to permit the defendant to prepare his or her defense, or to inform the court of which of the defendant's alleged acts or omissions result in criminal liability, is defective, and may be dismissed without prejudice. FSM v. DeOrio, 23 FSM R. 153, 159 (Pon. 2021).

Criminal Law and Procedure – Conflict of Interest

The only fair reading of 11 F.S.M.C. 512(1)'s statutory language is that a defendant must have participated in the matter in some manner either as a public official or by relying on or using his or her authority or status as a public official because criminal liability under criminal conflict-of-interest statutes is usually limited to public officials acting through the authority of their office. FSM v. DeOrio, 23 FSM R. 153, 159-60 (Pon. 2021).

Criminal Law and Procedure – Conflict of Interest

When the only permissible inference the court can draw from the information and affidavit is that, when the public official signed off on the project control document, he was unaware that it included, or might later include, a project that could benefit his wife's family, the public official did not violate 11 F.S.M.C. 512(1) by signing the project control document. FSM v. DeOrio, 23 FSM R. 153, 160 (Pon. 2021).

Criminal Law and Procedure – Conflict of Interest

Since a government official's mere physical presence at a government office does not constitute that government official acting through the authority of his office, the court concludes that the official's alleged taking of a letter that had not been given to him did not constitute a violation of the conflict-of-interest statute. FSM v. DeOrio, 23 FSM R. 153, 160 (Pon. 2021).

Criminal Law and Procedure – Theft

Once the President receives a letter, it becomes either his personal property or the government's property, whichever would be properly considered the letter's proper recipient, and when the letter's subject matter concerned an official government project, it must have been to the President in his official capacity, and therefore the letter became the government's property on receipt. FSM v. DeOrio, 23 FSM R. 153, 161 & n.2 (Pon. 2021).

Criminal Law and Procedure – Theft

A person commits theft if he or she unlawfully takes or exercises unlawful control over movable property of another with the purpose to deprive him thereof, and deprive means to withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value. FSM v. DeOrio, 23 FSM R. 153, 161 (Pon. 2021).

Copyright; Criminal Law and Procedure – Theft; Property – Personal

A letter's recipient is the owner of all property rights to the letter, except for any copyright rights. FSM v. DeOrio, 23 FSM R. 153, 161 (Pon. 2021).

Criminal Law and Procedure – Theft; Property

Once the President wrote a comment on a letter and sent it to another government official, the physical letter – became, if it was not already, an official government document and official government property. It also became an official record of the receiving department. FSM v. DeOrio, 23 FSM R. 153, 161 (Pon. 2021).

Criminal Law and Procedure – Defenses; Criminal Law and Procedure – Theft

It is an affirmative defense to prosecution for theft that the defendant was unaware that the property was that of another; or that the defendant acted under an honest claim of right to the property involved or that he or she had a right to acquire or dispose of it as he did. FSM v. DeOrio, 23 FSM R. 153, 161 (Pon. 2021).

Criminal Law and Procedure – Defenses

An affirmative defense places the burden squarely on the defendant to establish, by a preponderance of the evidence, the facts that negate liability, but affirmative defenses do not relieve the government of the

burden of establishing all of the crime's essential elements beyond a reasonable doubt. FSM v. DeOrio, 23 FSM R. 153, 161-62 (Pon. 2021).

Criminal Law and Procedure – Defenses; Criminal Law and Procedure – Standard of Proof

While the ultimate burden of persuasion remains the government's, a defendant, asserting an affirmative defense, has the burden of proof or of going forward with sufficient evidence to raise the defense as an issue at trial. FSM v. DeOrio, 23 FSM R. 153, 162 (Pon. 2021).

Criminal Law and Procedure – Defenses

After trial, if a defense is designated an affirmative defense by Title 11 or another statute, the defendant is entitled to an acquittal if the defense evidence presented, when considered in the light of any contrary evidence, proves by a preponderance of the evidence the specified fact or facts, which facts remove or mitigate penal liability. FSM v. DeOrio, 23 FSM R. 153, 162 (Pon. 2021).

Criminal Law and Procedure – Defenses; Criminal Law and Procedure – Motions

A pretrial motion to dismiss based on an affirmative defense will usually be denied as premature because affirmative defenses are rarely capable of determination without a trial. FSM v. DeOrio, 23 FSM R. 153, 162 (Pon. 2021).

Criminal Law and Procedure – Defenses; Criminal Law and Procedure – Theft

That the letter allegedly stolen had no monetary value cannot be a ground for a pretrial dismissal because it has some monetary value, even if only measured by the cost of the paper and ink to create it or by the cost to the government to recreate it or replace it in the government's records once it became a missing government document and because Congress has neither adopted the de minimis defense found in the Model Penal Code nor any provision comparable to it, a de minimis defense is not available. FSM v. DeOrio, 23 FSM R. 153, 162 (Pon. 2021).

Criminal Law and Procedure – Defenses

Whether an allegedly stolen government document had "privilege" status is not an element of a theft charge, but may have a bearing on the document's value and thus affect the sentence imposed if there is a guilty finding. FSM v. DeOrio, 23 FSM R. 153, 162 (Pon. 2021).

Criminal Law and Procedure – Theft; Criminal Law and Procedure – Unauthorized Possession

An unauthorized-possession-or-removal-of-property charge appears to be a lesser included offense to a theft charge because, unlike theft, which presumes (and implicitly charges) that the accused intended to permanently withhold – deprive another of the another's property – permanent withholding is not necessary for this charge. It is only necessary that the prosecution prove that the accused knew he or she lacked the authority to remove another's property, or the proper authority to have it in his or her possession. FSM v. DeOrio, 23 FSM R. 153, 163 (Pon. 2021).

Criminal Law and Procedure – Dismissal; Criminal Law and Procedure – Theft; Criminal Law and Procedure – Unauthorized Possession

Denial of dismissal of the greater offense, theft, must, for the same reasons, also result in the denial of dismissal of a lesser included offense of unauthorized removal or possession of property. FSM v. DeOrio, 23 FSM R. 153, 163 (Pon. 2021).

Criminal Law and Procedure – Civil Rights Offenses; Criminal Law and Procedure – Dismissal

When neither the information nor the accompanying affidavit of probable cause identify the right, privilege, or immunity secured by the FSM Constitution or laws that the defendant allegedly deprived someone of, or who was actually deprived of those rights, and when none of the rights in the FSM Declaration of Rights, nor any statutory right, are implicated, the court must dismiss the civil rights charge.

FSM v. DeOrio, 23 FSM R. 153, 163 (Pon. 2021).

Civil Rights – Acts Violating; Criminal Law and Procedure – Civil Rights Offenses

Governments do not have civil rights that can be violated. The civil rights statute's purpose is to protect private parties and create remedies for them, not to protect government bodies. FSM v. DeOrio, 23 FSM R. 153, 163 (Pon. 2021).

* * * *

COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

On January 20, 2021, the court heard defendant Mark DeOrio's Motion to Dismiss, filed December 14, 2020; the government's Response to Defendant's Motion to Dismiss, filed December 21, 2020; and DeOrio's Response to Government's Opposition to Motion to Dismiss, filed December 28, 2020. DeOrio moves to dismiss all five of the Information's counts. The court concludes that the motion should be granted for three of the five counts and denied for the other two. The reasons follow.

I. CRIMES CHARGED

The Information charges DeOrio with committing five crimes: 1) obstructing the administration of law or other governmental function, 11 F.S.M.C. 501(1); 2) conflict of interest, 11 F.S.M.C. 512(1); 3) theft, 11 F.S.M.C. 602(1); 4) unauthorized possession or removal of property, 11 F.S.M.C. 604; and 5) deprivation of rights, 11 F.S.M.C. 701(1).

These charges are all based on the following factual allegations: DeOrio's wife, Norleen Oliver, wrote a letter to President David Panuelo about a government road paving project on a road that crossed land in Sokehs ostensibly owned by Oliver's family. The President received the letter and then wrote an instruction on it and sent it to a cabinet official. DeOrio later found the letter with the President's comment, lying on a table in the FSM Department of Transportation, Commerce, and Infrastructure ("TC&I") office, where DeOrio then worked, and took it and gave it to his wife.

II. ANALYSIS

DeOrio contends that the Information is defective and must be dismissed because it fails to allege sufficient facts to either constitute the crimes charged or to allow DeOrio to adequately or intelligently prepare a defense to each charge or count. The court will consider each charge in turn.

A. *Obstructing Administration of Law or Other Government Function*

The Information charges that DeOrio committed the crime of obstructing administration of law or other government function

by removing a privilege document from his office and disclosing it to another, namely Norleen Oliver, who uses the said document to institute an adverse action against the government, and as a result directly interferes with the duty of the contracting officer or the Secretary of the Department of Transportation, Commerce, & Infrastructure in discharge of his duties, namely the full implementation of the Sokehs Road Pavement Project.

Information para. 5 (Oct. 13, 2020). DeOrio contends that this allegation is defective because it does not

set out how his removal of the letter and his disclosure of it to his wife directly interfered with the Secretary's or the contracting officer's duty to fully implement the Sokehs Road Pavement Project by his wife instituting an adverse action against the government or even what his wife's alleged adverse action was, and therefore cannot adequately prepare a defense. The government responds that the Information does sufficiently appraise DeOrio of the charges against him.

The statute provides that: "[a] person commits a crime if he or she wilfully interferes with, delays, or obstructs a public official in the discharge or attempted discharge of any duty of his or her office." 11 F.S.M.C. 501(1). The Model Penal Code was the primary source for the Criminal Code [Title 11]. Doone v. FSM, 2 FSM R. 103, 106 (App. 1985); Laion v. FSM, 1 FSM R. 503, 511 (App. 1984); FSM v. Edwin, 8 FSM R. 543, 548 (Pon. 1998); see also Alouis v. FSM, 6 FSM R. 83, 86 (App. 1993). Section 501(1) of Title 11 is virtually identical to Model Penal Code § 242.1. "This provision is designed to cover a broad range of behavior that impedes or defeats the operation of government." Model Penal Code § 242.1 cmt. 2 (1980); see also People v. Perez, 2000 Guam 15, ¶ 9 (2000) ("Beginning with the American Law Institute's comments to the corresponding provision of the Model Penal Code, it was observed that the purpose of the statute was to prohibit a broad range of behavior that impedes or defeats the operation of government."); Commonwealth v. Johnson, 100 A.3d 207, 215 (Pa. Super. 2014) (citing Commonwealth v. Trolene, 397 A.2d 1200, 1202 (Pa. Super. 1979)).

In order to establish that a defendant obstructed the administration of law or other governmental function, the prosecution "must establish that: (1) the defendant had the intent to obstruct the administration of law; and (2) the defendant used force or violence, [or] breached an official duty or committed an unlawful act." Commonwealth v. Goodman, 676 A.2d 234, 235 (Pa. 1996) (construing a Pennsylvania statute drawn from the Model Penal Code § 242.1). "Further, 'the word "obstructs" has an expansive meaning.' 'The crime is not limited to interference with the administration of justice but also applies to any other governmental function.'" State v. Holloway, 992 S.W.2d 886, 889 (Mo. 1999) (quoting Model Penal Code § 242.1 cmt. 2).

The Information charges that DeOrio directly interfered with the duty of the contracting officer or the Secretary in the discharge of his duties to fully implement the Sokehs Road Pavement Project by both removing the letter ("privilege document") from his office and by disclosing it to Oliver. It does not charge that DeOrio interfered with these officials' duties solely by removing the letter so that the officials were delayed or obstructed from proceeding with the project because they did not have or could not find the President's written instructions to do so. The alleged obstruction to the road project is Oliver's "adverse action." What this "adverse action" was, is not stated.

If it was a civil action – a lawsuit – by Oliver, that supposed direct interference with the Secretary's or the contracting officer's duties cannot be an action by Oliver for which DeOrio could be held criminally liable, regardless of whether it was pled. If the government intends to hold DeOrio criminally liable for some other "adverse action" by Oliver, the government did not plead sufficient facts for DeOrio to know which of Oliver's actions might be the "adverse action" alleged or to understand how he might be criminally liable for that "adverse action."

Under 11 F.S.M.C. 301(1)(d), a person can be treated as a principal to a crime and held criminally liable for the acts of another if the person, "whether or not being present during the commission of the crime, intentionally aids, abets, advises, solicits, counsels, encourages, commands, threatens, menaces or coerces another to commit a crime, or conspires with or otherwise procures another to commit a crime." The Information does not allege that DeOrio committed any particular one or more of these acts.

An information is sufficient if: 1) it is a plain, concise and definite written statement of the essential facts constituting the crime charged; 2) it sufficiently apprises the defendant of the charges against which the defendant must be prepared to defend; and 3) it is sufficiently detailed to enable the defendant to plead

the case as a bar to future prosecutions for the same crime, and the information must charge all the essential elements of the crime, with, for matters of form but not of substance, liberality being the guide in testing the information's sufficiency. FSM v. Kimura, 20 FSM R. 297, 303 (Pon. 2016); FSM v. Meitou, 18 FSM R. 121, 127, 129 (Chk. 2011); FSM v. Sorim, 17 FSM R. 515, 519 (Chk. 2011); FSM v. Sippa, 16 FSM R. 247, 249 (Chk. 2009). The test for an information's sufficiency being whether it is fair to the defendant to require him or her to defend on the basis of the charge as stated therein. FSM v. Itimai, 20 FSM R. 232, 234 (Pon. 2015); FSM v. Sato, 16 FSM R. 26, 29 (Chk. 2008); FSM v. Xu Rui Song, 7 FSM R. 187, 189 (Chk. 1995). An information that, as a practical matter, is not sufficiently certain and unambiguous so as to permit the defendant to prepare his or her defense, or to inform the court of which of the defendant's alleged acts or omissions result in criminal liability, is defective, and may be dismissed without prejudice. Xu Rui Song, 7 FSM R. at 190.

The government has not pled sufficient facts to show how DeOrio's alleged actions caused an "adverse action" by Oliver for which he should somehow be held criminally liable or what that "adverse action" was. Or, alternatively, the government has not pled sufficient facts to show how DeOrio's alleged actions directly, without any action by Oliver, interfered with the Secretary's or the contracting officer's duties. Therefore, this charge is not sufficiently certain and unambiguous so as to permit the defendant to prepare a defense, or to inform the court of what alleged acts or omissions would result in DeOrio's criminal liability. The court accordingly dismisses this charge without prejudice.

B. *Conflict of Interest*

The Information charges that DeOrio committed the crime of conflict of interest because DeOrio, "while [he was] a public official, wilfully participate[d] in a matter in which he knows or reasonably should know there exists a conflict of interest . . . by divulging privilege government document to another, namely Norleen Oliver, whose interests is [sic] adverse with the Government." Information para. 6 (Oct. 13, 2020). The conflict of interest statute, in pertinent part, provides that:

(1) A public official who willingly participates in a matter in which he or she knows or reasonably should know there exists a conflict of interest commits a crime.

(2) A public official has a conflict of interest in a matter if the public official or a family member could benefit directly or indirectly from a decision on a matter over which that public official has influence or control

11 F.S.M.C. 512.

DeOrio's divulging of the President's handwritten instruction to his wife could likely benefit his wife directly or indirectly. DeOrio's wife could benefit from having her family's property improved and having it increase in value because a paved road, instead of a dirt road, traverses it. She, or her family, might even benefit if compensation has to be paid because the paving project cannot be completed without the construction equipment or work crew trespassing on Oliver's family's property outside the roadway.

DeOrio questions whether his action in taking the letter could be considered "participating in a matter" as a public official under 11 F.S.M.C. 512(1) and further asserts that the letter is his wife's property. DeOrio argues that the Information states a conclusion of law and not the essential facts needed for the charge. The government responds that the case is not about a conflict between the government and DeOrio's wife but, as the Information and Affidavit of Probable Cause show, the government seeks to hold DeOrio criminally liable for his acts because some sort of conflict existed.

The court concludes that the only fair reading of 11 F.S.M.C. 512(1)'s statutory language requires that

a defendant must have participated in the matter in some manner either as a public official or by relying on or using his or her authority or status as a public official. Criminal liability under criminal conflict-of-interest statutes is usually limited to public officials acting through the authority of their office. See, e.g., Commonwealth v. Stetler, 95 A.3d 864, 883 (Pa. Super. 2014); Commonwealth v. Habay, 934 A.2d 732, 735 (Pa. Super. 2007), *appeal denied*, 954 A.2d 575 (Pa. 2008).

DeOrio is not charged with trying to use his position as a public official to influence any decisions regarding the road-paving project. Nor does the Information allege that DeOrio made any decisions affecting the his wife's family's road or attempted to influence any of those decisions.

The probable cause affidavit does state that DeOrio did sign off on the project control document for the Sokehs road paving project. Aff. of Probable Cause para. 7 (Oct. 13, 2020). That affidavit further states that neither the letter nor the specific road project was shared with DeOrio because the Department's personnel were aware of the potential conflict between the project and DeOrio's family. *Id.* para. 9. The Information does not allege that DeOrio's signing off on the project control document violated 11 F.S.M.C. 512(1). Thus, the only permissible inference the court can draw from the Information and affidavit is that, when DeOrio signed off on the Sokehs project control document, DeOrio was unaware that it included, or might later include, his wife's family's road.¹

The Information alleges that DeOrio's acts violating the conflict-of-interest statute were: 1) the taking of the letter he found on a workplace tabletop and 2) his giving it to his wife, thus divulging its contents to her. The court cannot conclude that this constitutes participating in the matter under Section 512(1) or DeOrio's acting through the authority of his TC&I office.

The government could argue that, if it were not for the authority of whatever office DeOrio held at TC&I, DeOrio would not have been present at TC&I and would not have found the letter lying on a tabletop and been able to take it and give it to his wife. But the court cannot conclude that DeOrio's mere physical presence at TC&I constitutes acting through the authority of his office at TC&I. The court therefore concludes that the facts as alleged and charged do not constitute a violation of the conflict-of-interest statute. This charge is accordingly dismissed.

C. *Theft*

The Information charges that DeOrio committed the crime of theft "by taking or removing a privilege government document in which the government has legal possessory interest." Information para. 7 (Oct. 13, 2020). Under 11 F.S.M.C. 602(1), "[a] person commits the crime of theft if he or she commits theft of any property or service in which another person has any legal, equitable, or possessory interest." Based on the Information's factual allegations, the relevant statutory description of theft is that "[a] person commits theft if he unlawfully takes or exercises unlawful control over movable property of another with the purpose to deprive him thereof," 11 F.S.M.C. 601(12)(a), and "[d]eprive means: (a) to withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value. . . ." 11 F.S.M.C. 601(1).

1. *Whose Property Was the Letter?*

DeOrio contends that his taking of the letter cannot be a theft because it was his wife's letter that he took. He asserts that the letter was not government property, but was his wife's property because she wrote

¹ If the Information had instead alleged that DeOrio was aware that the Sokehs road project included his wife's family's road when he signed the project control document, that would have stated a conflict-of-interest crime.

it, and that therefore sharing his wife's letter with his wife cannot possibly be a crime. DeOrio also asserts that the letter was written about a private matter to President Panuelo in his personal capacity and not in his capacity as a government official.

The court cannot agree. Regardless of whether the letter was written to President Panuelo in his private or his official capacity, the letter was written and sent to President Panuelo. He received it at his office on May 28, 2020. Once President Panuelo received the letter, it became either his personal property or the government's property, whichever would be properly considered the letter's proper recipient.²

A letter's recipient is the owner of all property rights to the letter, except for any copyright rights.³ See, e.g., Salinger v. Random House, Inc., 811 F.2d 90, 94-95 (2d Cir. 1987) (letter writer retains copyright over letter's contents but recipient becomes owner of physical document); Knights of the Ku Klux Klan v. International Mag. Co., 294 F. 661, 664 (2d Cir. 1923) (unqualified delivery of a letter is gift of all of the author's right to it except publication; author and recipient do not hold joint title in a letter; and a letter's recipient is not a letter's bailee); Sinkler v. Goldsmith, 623 F. Supp. 727, 732 (D. Ariz. 1985) (letter writer retains ownership of the copyright or literary property in the letter but the letter's recipient "acquires ownership of the tangible physical property of the letter itself").

Once President Panuelo wrote a comment on the letter and sent it to another government official, the letter with President Panuelo's note on it – the physical letter – became, if it was not already, an official government document and official government property. It also became an official record of TC&I, the receiving department.⁴ The Information therefore states sufficient facts to constitute the crime of theft and for DeOrio to be able to adequately prepare a defense to it.

2. *DeOrio's Apparent Affirmative Defense*

DeOrio further argues that since he had the genuine belief and honest claim that the letter belonged to his wife, he believed he had the right to take the letter and give it to his wife and therefore he cannot be prosecuted for theft. What DeOrio asserts with this argument is an affirmative defense for theft. The theft statute provides that:

It is an affirmative defense to prosecution for theft that the defendant:

(a) was unaware that the property . . . was that of another; [or]

(b) acted under an honest claim of right to the property . . . involved or that he had a right to acquire or dispose of it as he did

11 F.S.M.C. 602(3).

An affirmative defense places the burden squarely on the defendant to establish, by a preponderance

² Since the letter's subject matter concerns an official government project – the Sokehs road paving project – the court must conclude that it was written to President Panuelo in his official capacity as President, and therefore the letter became the government's property on receipt.

³ There are no copyright issues in this case.

⁴ The government did not charge DeOrio with tampering with public records or information, 11 F.S.M.C. 529(1)(c), by purposefully removing this document or record from TC&I's possession, although it might well have.

of the evidence, the facts that negate liability, but affirmative defenses do not relieve the government of the burden of establishing all of the crime's essential elements beyond a reasonable doubt. Runmar v. FSM, 3 FSM R. 308, 312 (App. 1988). While the ultimate burden of persuasion remains the government's, a defendant, asserting an affirmative defense, has the burden of proof or of going forward with sufficient evidence to raise the defense as an issue at trial. FSM v. Aliven, 16 FSM R. 520, 534 (Chk. 2009). Thus, after trial,

if a defense is designated an affirmative defense by this act [Title 11] or another statute, the defendant is entitled to an acquittal if the defense evidence presented, when considered in the light of any contrary evidence, proves by a preponderance of the evidence the specified fact or facts, which fact(s) remove or mitigate penal liability. . . .

11 F.S.M.C. 107(2)(b).

A pretrial motion to dismiss based on an affirmative defense will usually be denied as premature because affirmative defenses are rarely capable of determination without a trial. Kosrae v. Charley, 14 FSM R. 470, 472 (Kos. S. Ct. Tr. 2006); see also FSM v. Semwen, 18 FSM R. 222, 225 (Chk. 2012) (most defenses require factual determinations that make pretrial disposition inappropriate). Thus, DeOrio's professed belief that the letter was his wife's property is not a ground to dismiss the theft charge before trial.

3. *Document's Value*

DeOrio also contends that he cannot be charged with theft because the letter he took has no intrinsic or monetary value and, in his view, is worth zero dollars. He notes that the government did not plead or assert that the letter had any specific value but instead recited all the various statutory penalties for theft depending on what monetary value the stolen property might have.

This cannot be a ground for a pretrial dismissal. The letter has some monetary value, even if only measured by the cost of the paper and ink to create it or by the cost to the government to recreate it or replace it in the government's records once it became a missing government document. The court notes that, because Congress has neither adopted the de minimis defense found in the Model Penal Code nor any provision comparable to it, a de minimis defense is not available in the FSM Supreme Court. FSM v. Ting Hong Oceanic Enterprises, 8 FSM R. 166, 179 (Pon. 1997) ("Court will not expand the law of the FSM to include a de minimis defense"). The government may present evidence of the letter's value at trial.

4. *Document's "Privilege" Status*

DeOrio further contends that he cannot be charged with the theft of "a privilege government document" because "privilege government document" is nowhere defined in the Criminal Code.⁵ But "privilege" is not a statutory element of the crime charged – theft. "Privilege" may, however, have a bearing on the document's value. Thus, depending on the evidence, it may affect the sentence imposed if there is a guilty finding. The motion to dismiss the theft charge on this ground is therefore denied.

D. *Unauthorized Possession or Removal of Property*

The Information charges that DeOrio, knowing that he did not have proper authority, violated 11

⁵ What the government apparently meant by "a privilege government document" is set out in the Information in the unauthorized removal or possession of property charge (11 F.S.M.C. 604) as a "document which is intended only for the President's Cabinet and their designee to see." Information para. 8 (Oct. 13, 2020).

F.S.M.C. 604 "by taking or removing a privilege government document which is intended only for the President's Cabinet and their designee to see." Information para. 8 (Oct. 13, 2020). Under this statute, "[a] person commits a crime if, knowing he or she does not have proper authority, he or she has in his or her possession, or has removed from its location any property, wherever situated, in which another person has any legal, equitable, or possessory interest." 11 F.S.M.C. 604(1).

DeOrio contends, similar to his theft charge contentions, that his taking of the letter cannot be considered the unauthorized possession or removal of property because the letter that he took was his wife's property, not the government's. DeOrio therefore reasons that he did not need any authorization to remove the letter from government (TC&I) offices.

This unauthorized-possession-or-removal-of-property charge appears to be a lesser included offense to the theft charge because, unlike theft, which presumes (and implicitly charges) that the accused intended to permanently withhold – deprive another of the another's property – permanent withholding is not necessary for this charge. It is only necessary that the prosecution prove that the accused knew he or she lacked the authority to remove another's property, or the proper authority to have it in his or her possession.

Just as the court has rejected DeOrio's theft charge contentions, it must also reject those same arguments for this charge. Since the court has just denied the dismissal of the greater offense, theft, the court must, for the same reasons, also deny the dismissal of the lesser included offense of unauthorized removal or possession of property.

E. *Deprivation of Rights*

The last charge against DeOrio alleges that his removal of the "privilege government document which is intended only for the President's Cabinet and their designee to see" was a deprivation of rights, Information para. 9 (Oct. 13, 2020), although the Information does not state whose civil rights were violated or what those violated rights were. DeOrio moves to dismiss the civil rights violation charge because the Information's factual allegations fail to state a crime under 11 F.S.M.C. 701(1). That statute states:

A person commits a crime if he or she willfully, whether or not acting under color of law, deprives another of, or injures, oppresses, threatens, or intimidates another in the free exercise or enjoyment of, or because of his or her having so exercised any right, privilege, or immunity secured to him by the Constitution or laws of the Federated States of Micronesia
.....

The government, during the motion hearing, acknowledged that dismissal of this charge was appropriate.

When neither the information nor the accompanying affidavit of probable cause identify the right, privilege, or immunity secured by the FSM Constitution or laws that the defendant allegedly deprived someone of, or who was actually deprived of those rights, and when none of the rights in the FSM Declaration of Rights, nor any statutory right, are implicated, the court must dismiss the civil rights charge. FSM v. Oliver, 23 FSM R. 86, 90 (Pon. 2020).

Furthermore, if the Information had instead meant to charge DeOrio with violating the government's civil rights, that would also fail to allege a crime. That is because governments do not have civil rights that can be violated. See In re Constitutionality of Chuuk State Law No. 14-18-23, 22 FSM R. 258, 263 (Chk. 2019); Kitti Mun. Gov't v. Pohnpei Utilities Corp., 21 FSM R. 408, 409 (Pon. 2017); Onanu Municipality v. Elimo, 20 FSM R. 535, 542-43 (Chk. 2016); Eot Municipality v. Elimo, 20 FSM R. 482, 491 (Chk. 2016). The civil rights statute's purpose is to protect private parties and create remedies for them, not to protect government bodies. See Onanu Municipality, 20 FSM R. at 543; Eot Municipality, 20 FSM R. at 491.

Therefore, the deprivation of rights charge is hereby dismissed.

III. CONCLUSION

Accordingly, the court grants DeOrio's motion to dismiss for the obstructing the administration of law, conflict of interest, and deprivation of rights charges, and denies it for the theft and unauthorized possession or removal of property charges.

The court will take defendant Mark DeOrio's plea at 10:00 a.m., Wednesday, March 3, 2021, and if a not guilty plea is entered, trial will start immediately thereafter.

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