

The Court remains mindful of the fact that this disciplinary matter has been pending for approximately 15 years, which passage of time presents concerns. While the matter at issue, the contact with Senator Kansou, is a violation of Rule 4.2, it appears also that the record does not suggest that Senator Kansou suffered any prejudice as a result of the contact. Further, the respondent-attorney has not been found subject to discipline by this Court in any other instance.

Based on all of these considerations, the Court finds that Ms. Marstella Jack, Esq., is in violation of Rule 4.2 of the FSM Model Rules of Professional Conduct; that the appropriate fine therefor should be \$300, payable no later than 90 days from the date of entry of this order. Further, pursuant to Rule 5(h), this Court finds that this decision should be a matter of public record.

III. CONCLUSION

NOW, THEREFORE, IT IS HEREBY ORDERED that respondent-attorney is found to have violated Rule 4.2 of the FSM Model Rules of Professional Conduct and shall pay a fine in the amount of \$300 no later than 90 days after this order is entered. This order shall be a matter of public record.

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FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,)	CRIMINAL CASE NO. 2021-503
)	
Plaintiff,)	
)	
vs.)	
)	
BENETT EDMUND,)	
)	
Defendant.)	
_____)	

ORDER AFTER PRELIMINARY HEARING AND ON MOTION TO DISQUALIFY DEFENSE COUNSEL

Dennis L. Belcourt
Associate Justice

Hearing: October 5, 2021
Decided: November 19, 2021

APPEARANCES:

For the Plaintiff: Jeffrey S. Tilfas, Esq.
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HEADNOTES

Search and Seizure – Probable Cause

The standard for determining probable cause is whether there is evidence and information sufficiently persuasive to warrant a cautious person to believe it is more likely than not that a violation of the law has occurred and that the accused committed that violation. The probable cause determination must be made by a judicial officer's deliberate, impartial judgment. FSM v. Edmund, 23 FSM R. 444, 448 (Pon. 2021).

Criminal Law and Procedure – Motions for Acquittal; Search and Seizure – Probable Cause

Evaluating evidence in a probable cause hearing, similar to the determination of a motion for acquittal under FSM Criminal Rule 29 (although a lower standard of proof applies), entails viewing the evidence and reasonable inferences therefrom in the light most favorable to the prosecution. FSM v. Edmund, 23 FSM R. 444, 448 (Pon. 2021).

Search and Seizure – Probable Cause

When, having been alerted to the threats posted on Facebook directed at the President, the government conducted its investigation of the poster's identity by: 1) the mostly technical approach of reaching out to Facebook, FSM Telecom, and other possible sources to determine the user name's identity, which led to an IP address somewhere on Pohnpei; and 2) an on-the-ground investigation of conducting interviews of persons who could be linked to the user name, beginning with the user name's Facebook "friends" and other investigation of the user name, a profile emerged of salaries and business activities that was similar to the defendant, and coupled with the defendant's admitted Facebook affiliation with the pseudonymous account's user name, provided the minimum basis for probable cause that user name's identity was the defendant's. FSM v. Edmund, 23 FSM R. 444, 448 (Pon. 2021).

Criminal Law and Procedure – Threats and Retaliation; Search and Seizure – Probable Cause

When a threat that forms the basis for the information appears to be directed at the President's official decision that has already been made but which, one could reasonably conclude, also calls for ongoing implementation, probable cause exists as to violating 11 F.S.M.C. 517, which relates to threats to influence future action and as to violating 11 F.S.M.C. 518, which relates to threats in retaliation for past action. FSM v. Edmund, 23 FSM R. 444, 448-49 (Pon. 2021).

Criminal Law and Procedure – Mischief; Search and Seizure – Probable Cause

Criminal mischief occurs when a person intentionally causes another person by deception or threat to suffer any loss, and probable cause exists for criminal mischief when a defendant's threat against the President causes the government a loss because "person" includes the government. FSM v. Edmund, 23 FSM R. 444, 449 (Pon. 2021).

Criminal Law and Procedure – Assault

An assault is committed by a person if he or she unlawfully and intentionally offers or attempts, with force or violence, to strike, beat, wound, or do bodily harm to another. This definition tracks the definition of criminal assault found in the common law. Thus, when there is no FSM precedent stating that an assault may occur by words alone, absent some conduct of the perpetrator, it is appropriate to look to the precedent from elsewhere. FSM v. Edmund, 23 FSM R. 444, 449 (Pon. 2021).

Criminal Law and Procedure – Assault

Words alone are not sufficient to constitute an assault, however insulting, abusive, or violent, the words may be. FSM v. Edmund, 23 FSM R. 444, 449 (Pon. 2021).

Criminal Law and Procedure – Civil Rights Offenses; Search and Seizure – Probable Cause

A Facebook death threat against the President related to his exercise of authority, a privilege, as President, may be probable cause to believe that the Facebook account user committed a civil rights crime. FSM v. Edmund, 23 FSM R. 444, 449-50 (Pon. 2021).

Attorney and Client – Disqualification of Counsel; Criminal Law and Procedure – Motions – Unopposed

When the defendant has not filed an opposition to the government’s motion to disqualify counsel, such omission might be deemed consent to the motion, but the court must have good grounds for granting a motion, even one that is unopposed. FSM v. Edmund, 23 FSM R. 444, 450 (Pon. 2021).

Attorney and Client – Disqualification of Counsel; Criminal Law and Procedure – Right to Counsel

A motion to disqualify the defense counsel because a lawyer cannot act as advocate at a trial in which the lawyer is likely to be a necessary witness, will be denied without prejudice when 1) the motion is premature, as there is no trial date and Rule 3.7 only applies to trial advocacy and testimony, and 2) the motion fails to show that defense counsel is a necessary witness or that she would provide testimony relating to a contested issue. FSM v. Edmund, 23 FSM R. 444, 450 (Pon. 2021).

* * * *

COURT’S OPINION

DENNIS L. BELCOURT, Associate Justice:

On October 5, 2021, a preliminary hearing on probable cause was held in this matter. FSM Assistant Attorney General Jeffrey Tilfas, Esq. appeared on behalf of the Plaintiff, Federated States of Micronesia (“Government”) and Ms. Marstella E. Jack, Esq. appeared on behalf of the Defendant Benett Edmund (“Edmund”). Edmund was also present before the Court.

PROCEEDINGS LEADING UP TO HEARING

On August 22, 2021, Edmund made his initial appearance where he stated that he understood the charges against him and waived his right for those charges to be read to him in open court. On August 23, 2021, Edmund was released on his own recognizance pending trial and subject to pretrial conditions including house arrest. A pretrial conference was scheduled for September 17, 2021 at which time Edmund appeared and requested a preliminary hearing on probable cause. With no opposition from the government, a preliminary hearing on probable cause was set for September 27, 2021 and was later continued to October 5, 2021.

HEARING

Two preliminary matters were raised by the government at the outset of the hearing and were addressed by the Court. On October 5, 2021, the government filed a motion to disqualify Defense Counsel Marstella Jack. This Court declined to rule at the hearing, to give defense counsel the opportunity, in accordance with the court’s rules, to respond to the motion to disqualify defense counsel and the parties were allowed to make their opening statements. In its opening statement, the government touched on issues pertaining to probable cause indicating that this process is duplicative in light of the previous search warrants, and that there are other avenues under our criminal procedure rules available to Edmund. Edmund responded that having found probable cause for a search warrant is different than that for a criminal information and also argued that at this juncture he wants a preliminary hearing to determine whether there is probable cause for the charges brought against him. The Court allowed the preliminary hearing on probable cause to proceed. The government called three witnesses, and Edmund called two witnesses, including himself.

WITNESS TESTIMONY AND WRITTEN SUBMISSIONS

The following facts were presented to the Court through the written filings and witness testimony in this matter.

On August 10, 2021, a press release by the Office of the FSM President regarding mandating the COVID-19 vaccine was posted on Facebook. On August 11, 2021, between 12 p.m. and 1 p.m., Facebook account user Jaylo David posted a comment on the Facebook page of the press release containing a death threat on President Panuelo, specifically using the term “assassinate” and identifying the location of the President’s residence. In receiving a report on this, the FSM national police (“police”) conducted an investigation. Within the two hours that the Facebook comment was viewable online (before it was taken down), the police were able to identify friends of Facebook account user Jaylo David who live on Pohnpei. Among others, these Facebook friends of Jaylo David were interviewed by the police, including Rob Solomon, Johnny Musrasrik, and Benett Edmund (whose identity on Facebook was Benneth Edmund).

In their interviews of friends of Facebook account user Jaylo David, the police discovered that Jaylo David works and earns an annual salary of \$5,928; that his wife also works and earns an annual salary of \$12,000; that he has a small store in Nett for which he recently paid his second quarter gross revenue taxes (“GRT”); and that he has two children living with him. The first witness, Captain Kasner Aldens, who is in charge of the Criminal Investigation Section, testified that two of Jaylo David’s Facebook friends provided the information above based on conversations they had with Jaylo David regarding low-income assistance from the Pandemic Unemployment Assistance program and a small business loan program.

The second witness, Sergeant Darrel Poll, testified that the police also communicated with the Facebook office in Singapore, the U.S. Federal Bureau of Investigation, and the FSM Telecommunication Corporation (“FSMTC”) regarding Facebook account user Jaylo David. The police found that Facebook removed the posted Facebook comment in question because it violated its community guidelines; however, it was the owner Jaylo David that deactivated the Facebook page or profile. Facebook provided an IP address for the source of the comment, which was 119.252.119.91. The police were informed by FSMTC that it is not possible to know the location of the device or identity of its owner, as IP addresses are randomly reassigned and no record is kept that would allow tracing. Even though it is not possible to determine who the IP address belonged to or what electronic device used that IP address when the Facebook comment in question was posted the IP address was in Pohnpei.

Based on their investigation into the matter, the police suspected that the Jaylo David who owned the Facebook account was Edmund. Investigators learned that Edmund works at the Nett District Legislature as an assistant clerk. Edmund makes the annual salary of \$5,928.

The police obtained warrants, and searched and seized devices belonging to or that were available to Edmund at his workplace and at his home. The police were unable to retrieve evidence from these seized devices that connects Edmund with Jaylo David or the posted Facebook comment in question. Some of the devices seized could not be accessed because they were broken. Testimony provided that password-protected devices cannot be accessed without the password even with technical expertise currently available at the FSM Department of Justice. Adam Caldwell, currently the Assistant Secretary for Cyber Security at the Department of Justice, testified that efforts were made to forensically determine whether his work computer or other devices were used to log in as Jaylo David or to access Jaylo David’s gmail, the email account used in setting up the Jaylo David user profile, without success. Efforts are being made to get outside assistance, noting that Facebook and other information may not be saved on the computer used to access it.

Edmund and his supervisor also testified. Both confirmed that he was working on August 11, 2021, the date the threatening comments appeared. He has a computer assigned to him at work, one of the four computers in the clerk’s office, but that computer can also be used by other individuals. Edmund testified that he typically goes online in the morning from 8-9 am. His recollection was not clear as to what he was doing that day between 12 noon and 1 pm.

PROBABLE CAUSE

The standard for determining probable cause is whether there is evidence and information sufficiently persuasive to warrant a cautious person to believe it is more likely than not that a violation of the law has occurred and that the accused committed that violation. The probable cause determination must be made by the deliberate, impartial, judgment of a judicial officer. FSM v. Zhong Yuan Yu No. 621, 6 FSM R. 584, 588-89 (Pon. 1994); FSM v. Wainit, 10 FSM R. 618, 621 (Chk. 2002). Evaluating evidence in a probable cause hearing, similar to the determination of a motion for acquittal pursuant to FSM Criminal Rule 29 (although a lower standard of proof applies), entails “viewing the evidence and reasonable inferences therefrom in the light most favorable to the prosecution”. Andohn v. FSM, 1 FSM Intrm. 433, 438 (App. 1984); People v. Taylor, 655 P.2d 382, 384 (Colo. 1982).

From the parties’ submissions, Edmund was arrested on August 21, 2021, and the government filed a criminal information on August 22, 2021 charging Edmund with violations of the FSM Crimes Act, in particular 11 F.S.M.C. 517, 518, 603, 609 and 701. Count I charges Edmund with violating 11 F.S.M.C. 517 (threat to influence public official, etc.) by threatening President Panuelo. Count II charges Edmund with violating 11 F.S.M.C. 518 (harms another by an unlawful act in retaliation for lawful official action of that person) by threatening President Panuelo in retaliation to the vaccine mandate issued by the FSM national government. Count III charges Edmund with violating 11 F.S.M.C. 603 (criminal mischief—intentionally or recklessly causes another person by threat to suffer any loss) by posting a threatening Facebook comment against President Panuelo. Count IV charges Edmund with violating 11 F.S.M.C. 609 (assault) by posting the Facebook comment. Count V charges Edmund with violating 11 F.S.M.C. 701 (deprivation of rights) by posting a Facebook comment threatening President Panuelo “for his free exercise or enjoyment of rights secured by the FSM Constitution.” On August 22, 2021, Edmund made his initial appearance where he stated that he understood the charges against him and waived the right for those charges to be read to him in open court.

Based upon the witness testimony and the written filings in this matter, the Court finds as follows:

1. *All Counts: Probable Cause of Identity*

All counts of the information have in common the element of identity of who was responsible for posting the threatening comment.

Having been alerted to the threats posted on Facebook directed at President Panuelo, the government conducted its investigation of identity of the poster by: (1) the mostly technical approach of reaching out to Facebook, FSM Telecom and other possible sources to determine identity of the Jaylo David or its alter ego; and (2) the on-the-ground investigation of conducting interviews of persons who could be linked to Jaylo David, beginning with Facebook “friends” of the user name Jaylo David.

While outreach to Facebook and FSM Telecom led to an IP address somewhere on Pohnpei, it has not led to any information that specifically identifies who may have done the posting. On the other hand, from the interviews of friends and other investigation of Jaylo David a profile emerged—salaries and business activities—that is similar to Edmund, and coupled with Edmund’s admitted Facebook affiliation with the pseudonymous account “Jaylo David” provide the minimum basis for probable cause as to Edmund.

2. *Probable Cause as to Specific Counts*

Counts I, II, and III

The threat that forms the basis for the information appears to be directed at an official decision of the President that has been made but which, one could reasonably conclude, calls for ongoing implementation. As such, Count I, which relates to threats to influence future action and Count II, which relates to threats in

retaliation for past action, are both potentially implicated. Therefore, this Court finds that probable cause exists as to the crimes in Counts I and II. As probable cause exists concerning Edmund's identity as the person behind Jaylo David, this Court finds probable cause as to Edmund having committed the crimes in Counts I and II.

Count III alleges criminal mischief. Criminal mischief occurs when a person "intentionally . . . causes another person by deception or threat to suffer any loss." 11 F.S.M.C. 603. This Court finds that probable cause exists to support Edmund's making a threat. A loss may be inferred from the allegations and testimony that the government ("person" includes "government," 11 F.S.M.C. 104(9)) used resources to investigate the threat. Thus, this Court finds probable cause as to Count III.

Count IV

Count IV asserts that by making a threat on Facebook Edmund committed an "assault." An assault is committed by a person "if he or she unlawfully and intentionally offers or attempts, with force or violence, to strike, beat, wound, or do bodily harm to another." 11 F.S.M.C. 609(1). The language of section 609(1) tracks the definition of criminal assault found in the common law. See Carter v. Commonwealth, 585 S.E.2d 848, 850 (Va. 2003); United States v. Bell, 505 F.2d 539, 540 (7th Cir. 1974).

Neither the information, the affidavit accompanying it, nor evidence at the hearing point to any assaultive conduct on the part of Edmund. There is no FSM precedent stating that an assault may occur by words alone, absent some conduct of the perpetrator. It is thus appropriate to look to the precedent from elsewhere. FSM Telecomm. Corp. v. Helgenberger, 17 FSM R. 407, 410 n.2 (Pon. 2011). It has been generally held in other jurisdictions that words alone are not sufficient to constitute an assault, "however insulting, abusive, or violent, the words may be." 6 AM. JUR. 2D *Assault and Battery* § 25, at 29 (1999); Clark v. Commonwealth, 676 S.E.2d 332, 336 (Va. 2009); Kramer v. Ricksmeier, 139 N.W. 1091 (Iowa 1913).

Insofar as the alleged assault consists of threatening words posted on a Facebook page, without more, they do not constitute an assault, and Count IV must be dismissed.

Count V

At the preliminary hearing, Edmund requested that Count V be dismissed in light of this Court's holding in a previous criminal matter, FSM v. Oliver, 23 FSM R. 86 (Pon. 2020). In the Oliver case, the Court dismissed charges against Oliver for violating 11 F.S.M.C. 701 because neither the criminal information nor the accompanying affidavit of probable cause identified the right, privilege, or immunity secured to Edwin by the FSM Constitution or laws that Oliver allegedly deprived Edwin of. Moreover, the Court also noted that even though Oliver's actions seem willful it cannot find probable cause that she deprived Edwin of any right, privilege, or immunity secured to her by the FSM Constitution or laws. *Id.* at 90.

11 F.S.M.C. 701 states that

(1) [a] person commits a crime if he or she willfully, whether or not acting under the 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 laws of the Trust Territory of the Pacific Islands, or the Constitution or laws of the United States of America which are applicable to the Federated States of Micronesia.

In this criminal case, the government argues that Jaylo David made a death threat against the President in the posted Facebook comment in question related to his exercise of authority, a privilege, as President, and based upon probable cause to believe that Edmund is Facebook account user Jaylo David,

the Court finds probable cause for Count V.

MOTION TO DISQUALIFY DEFENSE COUNSEL

Plaintiff filed a motion to disqualify Defense Counsel Marstella Jack, contending that her having Facebook friendship with the username Jaylo David brings her within Rule 3.7 of the Model Rules of Professional Conduct, which states that a “lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness.”

Edmund has not filed an opposition to the government’s motion, which omission might be deemed consent to the motion. However, this Court must have good grounds for granting a motion, even one that is unopposed. Helgenberger, 17 FSM R. at 409.

This Court denies the motion on the following grounds: (1) the motion is premature, as there is no trial date and Rule 3.7 only applies to advocacy and testimony at trial, see Triple J Enterprises v. Kolonia Consumer Coop. Ass’n, 7 FSM Intrm. 385, 386 (Pon. 1996); and (2) the motion fails to show that Ms. Jack is a necessary witness or that Ms. Jack would provide testimony relating to a contested issue, FSM MRPC R. 3.7. Therefore, the government’s motion to disqualify defense counsel is denied without prejudice.

CONCLUSION

Probable cause exists for Counts I-III and V of the Information. Count IV is hereby dismissed. The government’s motion to disqualify defense counsel is denied without prejudice.

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FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,)	CRIMINAL CASE NO. 2021-502
)	
Plaintiff,)	
)	
vs.)	
)	
WU MING KUO (master of the vessel), LAI HSIU)	
SHENG (captain of the vessel), and CITYPRO)	
MANAGEMENT LIMITED (owner of the vessel)	
Queen Isabella 88),)	
)	
Defendants.)	
_____)	

ORDER DEFERRING CONSIDERATION

Larry Wentworth
Associate Justice

Decided: November 22, 2021