– Novation

The general rule is that parties to a contract may rescind it by making a new contract that is inconsistent with the original contract. Phillip v. Aldis, 3 FSM Intrm. 33, 37 (Pon. S. Ct. Tr. 1987).

Liabilities arising from a contract are not assignable without the consent of the creditor, and the mere assumption of the debt by a third party is not sufficient to establish a novation of the original contract unless there is a clear assent by the creditor to the substitution of a new obligor. Black Micro Corp. v. Santos, 7 FSM Intrm. 311, 314-15 (Pon. 1995).

Liabilities arising from a contract are not assignable without the consent of the creditor, and a third party's mere assumption of the debt is not sufficient to establish a novation of the original contract unless there is a clear assent by the creditor to the substitution of a new obligor. FSM Dev. Bank v. Mudong, 10 FSM Intrm. 67, 74 (Pon. 2001).

The term "novation" is used almost exclusively in contract law and denotes the parties' substitution of a new agreement for an old one that involves either a new obligation between the same parties, or a new debtor, or a new creditor. Walter v. Chuuk, 10 FSM Intrm. 312, 315 (Chk. 2001).

Even assuming that the seller historically did not charge interest on its account with the buyer, nothing precludes the parties to a commercial transaction from coming to a new agreement regarding installment payments on the outstanding indebtedness that also included an interest component calculated over the prior 26 months period, so long as the interest rate charged did not contravene FSM public policy as set out in 34 F.S.M.C. 204. Jayko Int'l, Inc. v. VCS Constr. & Supplies, 10 FSM Intrm. 502, 504 (Pon. 2002).

– Option Contract

An option contract is a unilateral contract where an offer is made and the offeree is invited to accept by rendering a performance instead of promising something in return. Once the offeree either tenders or begins the invited performance, the option contract is created. The offer then becomes irrevocable. Kihara Real Estate, Inc. v. Estate of Nanpei (I), 6 FSM Intrm. 48, 53 (Pon. 1993).

The offeror may vary the common law rule by express provision in the contract; thus, he remains in control of his offer. Absent express provisions to the contrary, an option contract is binding on the offeror who must keep the offer open for a specified time period. The offeree is free to accept or reject within that period. Kihara Real Estate, Inc. v. Estate of Nanpei (I), 6 FSM Intrm. 48, 53 (Pon. 1993).

– Parol Evidence

A party may not seek to introduce evidence that shows that the clear and unambiguous terms of a written agreement are other than as shown on the face of the agreement. Such a prohibition preserves the security and credibility of those who contract with good faith belief that what they sign is what they agree to. Kihara Real Estate, Inc. v. Estate of Nanpei (I), 6 FSM Intrm. 48, 55 (Pon. 1993).

The parol evidence rule bars evidence of a contemporaneous or prior oral agreement that contradicts or alters the terms of the written agreement. FSM Dev. Bank v. Bruton, 7 FSM Intrm. 246, 250 (Chk. 1995).

Parol evidence of a collateral agreement that does not alter or contradict the written agreement is not barred by the parol evidence rule if the collateral agreement is one that in the circumstances might naturally be omitted from the writing. FSM Dev. Bank v. Bruton, 7 FSM Intrm. 246, 250 (Chk. 1995).

The parol evidence rule does not bar evidence of subsequent modification of the contract. FSM Dev. Bank v. Bruton, 7 FSM Intrm. 246, 251 (Chk. 1995).

When there is a single and final memorial of the understanding of the parties embodied in a written

agreement, for evidentiary purposes all prior and contemporaneous negotiations are treated as having been superseded by that written memorial under the parol evidence rule. Fu Zhou Fuyan Pelagic Fishery Co. v. Wang Shun Ren, 7 FSM Intrm. 601, 604-05 (Pon. 1996).

When both plaintiff and defendant were aware of the project's changed specifications; when defendant was present at the project site on the first day of construction and on several days throughout the project term; when defendant had ample notice and knowledge that the project specifications had been changed; and when defendant did not, at any time, notify, stop or interfere with plaintiff's work and completion of the project, it would be unfair to enforce the contract term that required a writing signed by both parties to amend the agreement's terms and conditions. The parol evidence rule does not bar evidence of subsequent modification of a contract. Malem v. Kosrae, 9 FSM Intrm. 233, 236 (Kos. S. Ct. Tr. 1999).

The parol evidence rule generally prohibits the introduction of any extrinsic evidence, whether oral or written, to vary, alter or add to the terms of an integrated written instrument, but parol evidence is generally held admissible to alter the terms of a written contract when it is shown that by reason of mutual mistake the parties' true intention is not expressed. FSM Dev. Bank v. Arthur, 10 FSM Intrm. 479, 480 (Pon. 2001).

A parol agreement inconsistent with a written agreement made contemporaneously therewith is void and unenforceable, unless it was omitted from the written contract by fraud, accident, or mistake. FSM Dev. Bank v. Arthur, 10 FSM Intrm. 479, 480 (Pon. 2001).

– Ratification

If a board of directors, upon learning of an officer's unauthorized transaction, does not promptly attempt to rescind or revoke the action previously taken by the officer, the corporation is bound on the transaction on a theory of ratification. Asher v. Kosrae, 8 FSM Intrm. 443, 452 (Kos. S. Ct. Tr. 1998).

A corporation's directors may ratify any unauthorized act or contract. A corporation's ratification need not be manifested by any vote or formal resolution of the board of directors. An implied ratification can arise if the corporate principal, with full knowledge and recognition of the material facts, exhibits conduct demonstrating an adoption and recognition of the contract as binding, such as acting in the contract's furtherance. It is well established that if a corporation, with knowledge of its officer's unauthorized contract and the material facts concerning it, receives and retains the benefits resulting from the transaction, it thereby ratifies the transaction. A corporation may not accept a transaction's benefit and at the same time attempt to escape its consequences on the ground that the transaction was not authorized. Asher v. Kosrae, 8 FSM Intrm. 443, 452-53 (Kos. S. Ct. Tr. 1998).

When the board of directors did not act promptly to rescind or revoke the agreement made by its general manager; when all its subsequent actions have been consistent with the agreement's terms; when it had knowledge of the unauthorized contract and of the material facts concerning it; when it received, retained, and continues to receive and retain the benefits resulting from the transaction; it is clear that the board of directors has ratified the agreement. The corporation may not accept the agreement's benefits and at the same time escape its liabilities. Asher v. Kosrae, 8 FSM Intrm. 443, 453 (Kos. S. Ct. Tr. 1998).

Even if a corporate official did not have the authority to execute a lease, his execution of the lease was ratified by the corporation's long acceptance of the lease's benefits. Marcus v. Truk Trading Corp., 11 FSM Intrm. 152, 158 (Chk. 2002).

A clan or lineage in some respects functions as a corporation – it is, or can be, composed of many members, but is considered a single legal entity, capable of owning land, suing and being sued, and performing other acts, and which must necessarily act through its representatives. In this respect a corporation and a clan or lineage are analogous. Marcus v. Truk Trading Corp., 11 FSM Intrm. 152, 161 (Chk. 2002).

Generally, any ratification of an unauthorized agreement must be in its entirety because an entity cannot

accept the benefits of an unauthorized act, but reject its burdens. Marcus v. Truk Trading Corp., 11 FSM Intrm. 152, 161 (Chk. 2002).

When a lineage as a whole has accepted all of the benefits of a lease – all of the payments that the lessee was required to make – up to the present and even beyond, it cannot now reject the burden of the lessee exercising its options to renew. Marcus v. Truk Trading Corp., 11 FSM Intrm. 152, 161 (Chk. 2002).

– Reformation

Reformation of an insurance contract may be sought under a theory of mutual mistake or mistake or fraud of the insurance agent. Phillip v. Marianas Ins. Co., 12 FSM Intrm. 464, 470 (Pon. 2004).

Reformation is an equitable doctrine that allows a court to conform a contract (even an insurance contract) to the true agreement between the parties rather than the agreement as written. Phillip v. Marianas Ins. Co., 12 FSM Intrm. 464, 470 (Pon. 2004).

Contracts are not reformed for mistake, writings are. The distinction is crucial. Courts have been tenacious in refusing to remake a bargain entered into because of mistake. They will, however, rewrite a writing which does not express the bargain. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 9 (Pon. 2004).

The classic case for reformation is a scrivener's or typist's error. Reformation is available in the case of the omission of a term agreed on, the inclusion of a term not agreed on, or the incorrect reduction of a term to writing. At the simplest level it is the mechanism for the correction of typographical and other similar inadvertent errors in reducing an agreement to writing. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 9 (Pon. 2004).

The variance between the original agreement and the writing may take any one of an infinity of conceivable forms. Often, the mistake is as to the legal effect of the writing; the parties' agreement called for a particular legal result. The writing, if enforced, produces a different result. Reformation is available. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 9 (Pon. 2004).

Where, because of mistake, a writing fails to accurately state the parties' agreement, reformation is the exclusive remedy. If the writing is inaccurate because of fraud, the alternative remedies of reformation and rescission are available. But when no allegation of fraud has been made, rescission is not an available remedy. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 9 (Pon. 2004).

Reformation will not be granted if its effect would be to curtail the rights of a bona fide purchaser for value or others who have relied upon the writing. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 9 (Pon. 2004).

When a loan agreement and promissory note that were the writings memorialized an agreement are reformed to accurately reflect the parties' agreement, the court is not creating an obligation where none currently exists by reforming the writings. The court is merely reforming the writings to reflect an obligation that already exists. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 10 (Pon. 2004).

– Rescission

The general rule is that parties to a contract may rescind it by making a new contract that is inconsistent with the original contract. Phillip v. Aldis, 3 FSM Intrm. 33, 37 (Pon. S. Ct. Tr. 1987).

Rescission of an insurance contract would, if granted, absolve an insured from liability for the premium and could even entitle him to return of the premium paid. Phillip v. Marianas Ins. Co., 12 FSM Intrm. 464, 470 (Pon. 2004).

Where, because of mistake, a writing fails to accurately state the parties' agreement, reformation is the exclusive remedy. If the writing is inaccurate because of fraud, the alternative remedies of reformation and

rescission are available. But when no allegation of fraud has been made, rescission is not an available remedy. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 9 (Pon. 2004).

– Third Party Beneficiary

A third person may, in his own right and name, enforce a promise made for his benefit even though he is a stranger both to the contract and to the consideration. This concept, originally an exception to the rule that no claim can be sued upon contractually unless it is a contract between the parties to the suit, has become so general and far-reaching in its consequences as to have ceased to be an exception, but is recognized as an affirmative rule, generally known as the third-party beneficiary doctrine. Mailo v. Penta Ocean Inc., 8 FSM Intrm. 139, 141 (Chk. 1997).

The determining factor as to the rights of a third-party beneficiary is the intention of the parties who actually made the contract. The question whether a contract was intended for the benefit of a third person is generally regarded as one of construction of the contract. The parties' intention in this respect is determined by the terms of the contract as a whole, construed in the light of the circumstances under which it was made and with the apparent purpose that the parties are trying to accomplish. Mailo v. Penta Ocean Inc., 8 FSM Intrm. 139, 141 (Chk. 1997).

When the third-party beneficiary is so described as to be ascertainable, it is not necessary that he be named in the contract in order to enforce the contract. Mailo v. Penta Ocean Inc., 8 FSM Intrm. 139, 141-42 (Chk. 1997).

Where a contract is made especially for the benefit of a third person he may enforce it directly against the promisor. Mailo v. Penta Ocean Inc., 8 FSM Intrm. 139, 142 (Chk. 1997).

An intended third party beneficiary may enforce a settlement agreement not to seek further compensation from the third party even though not all the compensation agreed to has been paid when the settlement agreement clearly contemplated that the compensation might be tardy and provided a remedy for such an occurrence. Mailo v. Penta Ocean Inc., 8 FSM Intrm. 139, 142 (Chk. 1997).

A third party beneficiary can only recover if he is an intended beneficiary of the contract; he may not recover if he is only an incidental beneficiary of that contract. FSM Dev. Bank v. Mudong, 10 FSM Intrm. 67, 75 (Pon. 2001).

The determining factor as to a third party beneficiary's rights is the intention of the parties who actually made the contract. The question whether a contract was intended for a third person's benefit is generally regarded as one of construction of the contract. The parties' intention in this respect is determined by the contract's terms as a whole, construed in the light of the circumstances under which it was made and with the apparent purpose that the parties are trying to accomplish. FSM Dev. Bank v. Mudong, 10 FSM Intrm. 67, 75 (Pon. 2001).

When a contract's parties did not enter into that agreement primarily to benefit another, they were seeking to benefit themselves, and when their purpose was not to give the bank the benefit of their bargain, the bank is not the agreement's intended beneficiary and has no right to enforce that agreement. FSM Dev. Bank v. Mudong, 10 FSM Intrm. 67, 75 (Pon. 2001).

A third party beneficiary can only recover if he is an intended beneficiary of a contract. The determining factor as to a third party beneficiary's rights is the intention of the parties who actually made the contract. The question whether a contract was intended for the benefit of a third person is generally regarded as one of construction of the contract. The parties' intention in this respect is determined by the contract's terms as a whole, construed in the light of the circumstances under which it was made and with the apparent purpose that the parties are trying to accomplish. Pohnpei Cmty. Action Agency v. Christian, 10 FSM Intrm. 623, 633 (Pon. 2002).

There must be a valid agreement between two parties to enable a third person, for whose benefit the promise is made, to sue upon it. Pohnpei Cmty. Action Agency v. Christian, 10 FSM Intrm. 623, 633 (Pon. 2002).

A third person can, in his own name and claiming his own right, enforce a promise made to benefit him regardless of the fact that he is a stranger to the contract and the consideration. The determining factor in a third party beneficiary claim is the parties' intent, which is a question of the construction of the contract as determined by the contract's terms as a whole. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 228 (Pon. 2002).

A third person may enforce a contract for his own benefit when he is a stranger to the contract if the contract shows the parties intended to benefit the third person. The question of the parties' intent is generally one of construction of the contract, and this intention is determined by the contract terms as a whole, construed in light of the circumstances of the contract's making and the parties' purpose. Adams v. Island Homes Constr., Inc., 12 FSM Intrm. 234, 239 (Pon. 2003).

When a third-party beneficiary can be ascertained from the contract, he need not be named therein. Adams v. Island Homes Constr., Inc., 12 FSM Intrm. 234, 239 (Pon. 2003).

A claimant may enforce a loan contract and require payment by the lender if he can prove that he was a third-party beneficiary of the loan contract. He must, however, sustain the essential elements of a third party beneficiary claim. There must be a legally enforceable contract, and the parties must have intended that the third party be benefited by the contract's performance. Adams v. Island Homes Constr., Inc., 12 FSM Intrm. 234, 239 (Pon. 2003).

When the lender bank was in charge of the disbursement of the loan proceeds and when the contract language provided that no loan proceeds would be disbursed until the bank had received evidence that all labor and materials have been paid for, the bank assumed the duty under the agreement not to disburse loan proceeds until it had received verification that the suppliers had been paid. When, if the bank had met its commitment in this regard, it would have been impossible for the project to be completed without the suppliers being fully paid, the suppliers were as a matter of law intended third-party beneficiaries of the loan agreement. In such a case, the third-party may enforce the contract against the promisor. The bank's promise not to disburse loan proceeds until it had received confirmation that the suppliers had been paid, is enforceable against the bank. Adams v. Island Homes Constr., Inc., 12 FSM Intrm. 234, 239-40 (Pon. 2003).

When, if the bank had met its obligation under the loan agreement the suppliers would have been fully paid upon completion of the project, the bank is liable to the suppliers. But since the bank, not the borrowers, made the promise not to disburse the loan proceeds until proof of payment to the suppliers, it follows that the suppliers may enforce the promise against the bank but not the borrowers because, at most, the borrowers may have had an unspecified duty to participate in the verification process, which is insufficient to render them liable to the suppliers as intended third-party beneficiaries. Adams v. Island Homes Constr., Inc., 12 FSM Intrm. 234, 240 (Pon. 2003).

The absence of any express duty in a construction contract to insure the payment of the suppliers means that as a matter of law the parties to the construction agreement did not intend the suppliers to be third-party beneficiaries. Adams v. Island Homes Constr., Inc., 12 FSM Intrm. 234, 241 (Pon. 2003).

When a party is precluded from contesting its liability on an oral agreement as a result of its willful, bad faith discovery misconduct and when the plaintiffs' damages are also fully awardable under the plaintiffs' third-party beneficiary claim quite apart from any liability under the agreement, the party's contention that it is not liable under the agreement is wholly lacking in merit. Adams v. Island Homes Constr., Inc., 12 FSM Intrm. 234, 241 (Pon. 2003).

When there was a binding purchase agreement between a land buyer and a clan land seller and the plaintiffs were intended beneficiaries of that contract and when that contract could only be modified by a

consensus decision by the seller's clan members evidenced by the agreement of five or more of the six designated clan members but the purported modification did not contain five genuine signatures of the designated committee representatives, there was a breach of the purchase agreement entitling plaintiffs to damages. Edgar v. Truk Trading Corp., 13 FSM Intrm. 112, 117-18 (Chk. 2005).

COSTS

The determination of costs to be awarded to the prevailing party in litigation is a matter generally within the discretion of the trial court. Ray v. Electrical Contracting Corp., 2 FSM Intrm. 21, 25 (App. 1985).

The FSM Supreme Court's trial division is not precluded from allowing reasonable travel expenses of an attorney for a prevailing party as costs under 6 F.S.M.C. 1018 where there is a showing that no attorney is available on the island where the litigation is taking place. Ray v. Electrical Contracting Corp., 2 FSM Intrm. 21, 26 (App. 1985).

Procedural statute 6 F.S.M.C. 1018, providing that the court may tax any additional costs incurred in litigation against the losing party other than fees of counsel, applies only to Trust Territory courts and not to courts of the Federated States of Micronesia, and therefore does not preclude the FSM Supreme Court from awarding attorney's fees as costs. Semens v. Continental Air Lines, Inc. (II), 2 FSM Intrm. 200, 205 (Pon. 1986).

Where plaintiff's complaint is written in English and the defendant requests a written translation into a local Micronesian language, and where it appears that this is the only language the defendant can speak or read, the trial judge may order that the court provide a written translation and that the expense of providing the translation shall be taxed as a cost to the party not prevailing in the action. Rawepi v. Billimon, 2 FSM Intrm. 240, 241 (Truk 1986).

Where there is dismissal of an action, even though the dismissal is voluntary and without prejudice, the defendant is the prevailing party within the meaning of Rule 54(d) which provides for awards of costs to the prevailing party. Mailo v. Twum-Barimah, 3 FSM Intrm. 411, 413 (Pon. 1988).

FSM Civil Rule 68, allowing for taxation of costs against a plaintiff who declines the defendant's offer of judgment and who then obtains a judgment less favorable than the amount of the offer, does not apply when the litigation is dismissed. Mailo v. Twum-Barimah, 3 FSM Intrm. 411, 413 (Pon. 1988).

Where a plaintiff seeks dismissal of her own complaint without prejudice under Rule 41(a)(2), it is generally thought that the court should at least require the plaintiff to pay the defendant's costs of the litigation as a condition to such dismissal and these costs may include travel expenses of plaintiff's attorney. Mailo v. Twum-Barimah, 3 FSM Intrm. 411, 415 (Pon. 1988).

Where the court set aside a default judgment upon the payment by defendant to plaintiff of air fare to attend the trial, no modification will be granted to require the defendant to pay the costs of the plaintiff's counsel to go to plaintiff's residence to take his deposition which is being noticed by the plaintiff, especially where there is no showing that plaintiff could not attend the trial, nor will the court decide before trial whether such deposition could be used at trial. Morris v. Truk, 3 FSM Intrm. 454, 456-57 (Truk 1988).

Expenses such as faxing and telephoning to and from counsel, and travel, incurred because the defendant selected off-island counsel, fall outside the kind of expenses traditionally payable by the losing party and will be disallowed as costs, except where there is a showing of the unavailability of local counsel. Salik v. U Corp., 4 FSM Intrm. 48, 49 (Pon. 1989).

As a general rule, attorney's fees will be awarded as an element of costs only if it is shown that such fees were traceable to unreasonable or vexatious actions of the opposing party, but where the basic litigation flows from a reasonable difference of interpretation of a lease, the court is disinclined to attempt to sort out or isolate particular aspects of one claim or another of the parties and to earmark attorney's fees awards for those

specific aspects. Salik v. U Corp., 4 FSM Intrm. 48, 49-50 (Pon. 1989).

The court commits no error, when a question of sufficiency of witness fees is not brought promptly to the attention of the court, to consider the matter as an allowance of costs. In re Island Hardware, Inc., 5 FSM Intrm. 170, 175 (App. 1991).

Where there are elements of victory and loss for both parties there is not a prevailing party to which costs could be allowed. In re Island Hardware, Inc., 5 FSM Intrm. 170, 175 (App. 1991).

The government does not pay twice when it violates someone's civil rights and then is forced to pay attorney's fees. It pays only once – as a violator of civil rights. Its role as a provider of public services is distinct from its role as a defendant in a civil case. Thus an award of costs and reasonable attorney's fees should be made to a publicly funded legal services organization whose client prevailed in a civil rights action. Plais v. Panuelo, 5 FSM Intrm. 319, 321 (Pon. 1992).

When a plaintiff's motion is denied on the merits, the defendant may recover costs under FSM Civil Rule 54(d) if properly verified. Berman v. Kolonia Town, 6 FSM Intrm. 242, 244 (Pon. 1993).

When a judgment is affirmed on appeal, costs are usually taxable against the appellant if the appellee timely files its bill of costs with the appellate division. A bill of costs for trial transcripts must be filed in trial court appealed from. Nena v. Kosrae (III), 6 FSM Intrm. 564, 568-69 (App. 1994).

The filing of a petition for rehearing does not automatically extend the time for filing a bill of costs or for opposing a timely filed bill of costs, to a period beyond the ruling on the petition for rehearing. Nena v. Kosrae (III), 6 FSM Intrm. 564, 569 n.5 (App. 1994).

Taxation of costs is not an additional award for the prevailing party. It is a reimbursement to the prevailing party of actual expenses (costs) incurred. A motion for taxation of costs must be denied if it fails to adequately verify appellee's actual costs. Nena v. Kosrae (III), 6 FSM Intrm. 564, 569-70 (App. 1994).

The provision that the cost of printing or otherwise producing necessary copies of briefs, appendices or copies of the record shall be taxable in the Supreme Court appellate division at rates not higher than those generally charged for such work in the area where the clerk's office is located, does not set the amount to be awarded; it sets a cap or upper limit on the actual costs incurred that can be reimbursed. Nena v. Kosrae (III), 6 FSM Intrm. 564, 569-70 (App. 1994).

Costs may be allowed to a party prevailing against an indigent or *in forma pauperis* plaintiff who raised irrelevant matters and engaged in vexatious procedures or whose actions were frivolous or malicious. Damarlane v. United States, 7 FSM Intrm. 468, 469-70 (Pon. 1996).

Although it is especially important to avoid any approach calculated to favor the wealthy and deprive poor persons of access to the courts, that principle should not operate to penalize the indigents' opponent whose costs are increased because of frivolous claims and proceedings which are prolonged by repetition of contentions already ruled upon. Damarlane v. United States, 7 FSM Intrm. 468, 470 (Pon. 1996).

A prevailing party will be allowed costs for depositions and copying costs which represent payments to others for that service, but not the cost of copying within the law office. Long distance telephone and facsimile expenses incurred in communication between the lawyer who appeared and the client and other lawyers, claims for postage and courier expenses, and expenses not adequately explained are disallowed. Damarlane v. United States, 7 FSM Intrm. 468, 470 (Pon. 1996).

A trial court has jurisdiction to issue an order assessing costs, even though it was issued after the notice of appeal was filed. Damarlane v. United States, 8 FSM Intrm. 14, 17 (App. 1997).

Unless the court directs otherwise, costs are allowed as of course to the prevailing party. A prevailing

party is the one in whose favor the decision is ultimately rendered when the matter is finally set at rest, and does not depend upon the degree of success at different stages of the suit. Damarlane v. United States, 8 FSM Intrm. 45, 54 (App. 1997).

When the trial court decides the matter on the merits, based on the evidence, in favor of the defendants and the plaintiffs are not granted a permanent injunction, the defendants are prevailing parties who are appropriately awarded costs. Damarlane v. United States, 8 FSM Intrm. 45, 54 (App. 1997).

Civil rights attorney fee awards and awards of costs may be entered against multiple defendants in the same proportions as those in the original judgment. Davis v. Kutta, 8 FSM Intrm. 218, 224 (Chk. 1997).

Costs that are an avoidable consequence of the prevailing party's actions will be disallowed. Bank of Guam v. O'Sonis, 9 FSM Intrm. 106, 110 & n.1 (Chk. 1999).

Expenditures for photocopying, toll phone calls between lawyers, postage and courier services are disallowed. The extra expense of first class air travel is also disallowed. Bank of Guam v. O'Sonis, 9 FSM Intrm. 106, 111 (Chk. 1999).

In any civil rights action the court may award costs and reasonable attorney's fees to the prevailing party. Bank of Guam v. O'Sonis, 9 FSM Intrm. 106, 113 (Chk. 1999).

A prevailing party in an appeal is routinely entitled to its costs and when an appeal is dismissed, costs are to be taxed against appellant unless the parties otherwise agree or court orders otherwise. Santos v. Bank of Hawaii, 9 FSM Intrm. 306, 307 (App. 2000).

Attorney's fees are not recoverable as costs under Appellate Rule 39. Santos v. Bank of Hawaii, 9 FSM Intrm. 306, 307 (App. 2000).

It is the appellant's duty to prepare and file the appendix. But when the appellant has failed to prepare and file the appendix and the appellee instead does so, and the appellee prevails, the cost of producing copies of the appendix may be taxed in the appellee's favor. Santos v. Bank of Hawaii, 9 FSM Intrm. 306, 308 n.2 (App. 2000).

Appellate Rule 39(c) permits the recovery of costs for producing necessary copies of briefs by word processor or photocopier, but not the costs for producing the original. The maximum amount allowable for word processed copies of briefs is limited to the amount allowed for photocopy services. Santos v. Bank of Hawaii, 9 FSM Intrm. 306, 308 (App. 2000).

On appeals, copying costs are disallowed to the extent that they exceed those generally charged for such work in the area where the clerk's office is located, in this case – Pohnpei, where the FSM appellate clerk's office is located. Santos v. Bank of Hawaii, 9 FSM Intrm. 306, 308 (App. 2000).

Expenses for postage and courier services are disallowed. They are not a part of the usual costs recoverable under Appellate Rule 39. Santos v. Bank of Hawaii, 9 FSM Intrm. 306, 308 (App. 2000).

Costs are customarily awarded the prevailing party. However, costs for service on those defendants who were prevailing parties are not allowed to the plaintiff. Nor are costs for service in and filing fee for the case originally filed in state court allowed as costs are to be awarded only for the costs in this case to the prevailing party in this case. Estate of Mori v. Chuuk, 10 FSM Intrm. 123, 125 (Chk. 2001).

If, on appeal the Chuuk State Supreme Court confirms the election, judgment shall be rendered against the contestants, for costs, in favor of the defendant. Cholymay v. Chuuk State Election Comm'n, 10 FSM Intrm. 220, 222 (Chk. S. Ct. App. 2001).

Attorney's fees awarded as an element of costs are not to be confused with the award of attorney's fees

recoverable as a part of damages pursuant to either statute or contract. Cholymay v. Chuuk State Election Comm'n, 10 FSM Intrm. 220, 223 (Chk. S. Ct. App. 2001).

Attorney's fees are not a part of recoverable costs under the common law. Cholymay v. Chuuk State Election Comm'n, 10 FSM Intrm. 220, 223 (Chk. S. Ct. App. 2001).

When the election law lacks a statutory definition of costs either specifically including or excluding attorney's fees, the court can only conclude that the Legislature did not intend to use the term "costs" in other than its usual and familiar sense, which does not include attorney's fees. Cholymay v. Chuuk State Election Comm'n, 10 FSM Intrm. 220, 223 (Chk. S. Ct. App. 2001).

Costs for an election defendant's airfare will be denied when it is for an uncertain amount and no evidence of this expense been provided to the court and when it is an expense he would have incurred anyway, because he would have had to return shortly from Honolulu to take his seat in the Legislature, and because it is an expense he would not have incurred if he had not voluntarily left Chuuk for Honolulu. Cholymay v. Chuuk State Election Comm'n, 10 FSM Intrm. 220, 223 (Chk. S. Ct. App. 2001).

Costs for printing and copying are expenses that traditionally have been included within costs that are awarded to prevailing parties. Cholymay v. Chuuk State Election Comm'n, 10 FSM Intrm. 220, 224 (Chk. S. Ct. App. 2001).

If an appellee prevails on appeal it will be entitled to recover its trial court and appellate costs, and the court may add the trial court costs to the amount of the appeal bond required for a stay. College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 296, 298 (Pon. 2001).

The trial court may require an appellant to file a bond to cover costs on appeal. College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 296, 298 (Pon. 2001).

Costs are generally allowed as of course to the prevailing party. Udot Municipality v. FSM, 10 FSM Intrm. 354, 362 (Chk. 2001).

Costs are not synonymous with a party's expenses. Only certain types of expenses are cognizable as costs. Amayo v. MJ Co., 10 FSM Intrm. 371, 385 (Pon. 2001).

When, service was done by servers employed at various times by plaintiffs' counsel, but who were duly appointed process servers and charged separate fees for the service, they were acting as private process servers. Fees charged by private process servers may be recoverable as costs. Amayo v. MJ Co., 10 FSM Intrm. 371, 385 (Pon. 2001).

Deposition costs will be allowed when the transcription was done and the deposition was admitted into evidence at trial even though the documentation for the deposition charge was a check made payable to an attorney in the Philippines, and noted as such on the check stub. Amayo v. MJ Co., 10 FSM Intrm. 371, 385-86 (Pon. 2001).

Counsel's travel expenses to and from Pohnpei for litigation on Pohnpei may not be awarded as costs when counsel maintains a Pohnpei office and is thus local counsel. Amayo v. MJ Co., 10 FSM Intrm. 371, 386 (Pon. 2001).

Service costs are always allowable to the prevailing party. Udot Municipality v. FSM, 10 FSM Intrm. 498, 501 (Chk. 2002).

Transcript and copying expenses are allowable costs when they represent payments to others for that service. Udot Municipality v. FSM, 10 FSM Intrm. 498, 501 (Chk. 2002).

An attorney's reasonable travel expenses are allowable as costs when there is a showing that no

attorney is available on the island where the litigation is taking place, especially when the attorneys' travel expenses were reasonable and the actual expenses pro-rated proportionally with other clients on whose behalf they also traveled. Udot Municipality v. FSM, 10 FSM Intrm. 498, 501 (Chk. 2002).

If, for a telephone hearing, a party's counsel initiated the call and bore that expense as a telephone charge then that party, if the prevailing party, would be entitled to tax those telephone charges as a cost, but when it is impossible to tell from the submitted expense billings, which, if any, those telephone charges were, no charges will be allowed. Udot Municipality v. FSM, 10 FSM Intrm. 498, 501 (Chk. 2002).

While costs are allowed as of course to a prevailing party, costs against the FSM, its officers, and agencies are imposed only when authorized by statute. Udot Municipality v. FSM, 10 FSM Intrm. 498, 501, 502 (Chk. 2002).

Appellate Form 2's absence from the FSM Appellate Rules will not be a ground for denying an in forma pauperis motion when the affidavit shows the appellant's inability to pay fees and costs or to give security therefor in the detail required by Rule 24(a) and shows that he is indigent and without any income or property. Lebehn v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 515, 517-18 (Pon. 2002).

If the court appealed from grants the motion to proceed in forma pauperis, the party may proceed without further application to the FSM Supreme Court appellate division and without prepayment of fees and costs in either court or giving security therefor, except when the Public Defender Office or Micronesian Legal Services Corporation represents an indigent party the transcript fee is reduced to $1.25 per page, to be paid by the public agency, and not by the party personally. Lebehn v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 515, 519 (Pon. 2002).

Being allowed to proceed in forma pauperis only relieves an appellant from prepayment of fees and costs, not from ultimate liability for those costs. Lebehn v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 515, 519 (Pon. 2002).

It is a matter to be resolved between the court reporters and the judicial branch whether the judiciary pays the costs for in forma pauperis litigants' transcripts. An in forma pauperis litigant is not required to prepay transcript costs, although if the in forma pauperis litigant is represented by the Public Defender or Micronesian Legal Services Corporation then that agency must prepay $1.25 per page. Lebehn v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 515, 519 (Pon. 2002).

An in forma pauperis appellant is not required to tender payment in order to receive the transcript he has ordered. Lebehn v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 515, 519 (Pon. 2002).

If the appellate court determines that an appeal is frivolous, it may award just damages and single or double costs to the appellee. Phillip v. Moses, 10 FSM Intrm. 540, 546 (Chk. S. Ct. App. 2002).

Appellees intending to ask for Rule 38 costs and damages because the appeal is frivolous must, although the rule does not require a motion filed separately from the brief, give the appellant more notice than first raising the issue at the end of appellees' oral argument. Phillip v. Moses, 10 FSM Intrm. 540, 546-47 (Chk. S. Ct. App. 2002).

Generally, unless the court directs otherwise, prevailing parties are entitled to costs. Lebehn v. Mobil Oil Micronesia, Inc., 11 FSM Intrm. 319, 321 (Pon. 2003).

Determination of costs awarded to prevailing parties is generally a matter within the trial court's discretion, and a trial court has jurisdiction to issue an order assessing costs, even after a notice of appeal has been filed. Lebehn v. Mobil Oil Micronesia, Inc., 11 FSM Intrm. 319, 321 (Pon. 2003).

Rule 54(d) presumes that costs will be allowed to the prevailing party. But this presumption may be overcome. The burden is on the unsuccessful party to show circumstances sufficient to overcome the

presumption in favor of allowing costs to the prevailing party. Lebehn v. Mobil Oil Micronesia, Inc., 11 FSM Intrm. 319, 321 (Pon. 2003).

Although a trial court has discretion when awarding costs, the discretion is narrowly confined because of the strong presumption created by Rule 54(d) that the prevailing party will recover costs. Generally, only the prevailing party's misconduct worthy of a penalty or the losing party's inability to pay will suffice to justify denying costs. Lebehn v. Mobil Oil Micronesia, Inc., 11 FSM Intrm. 319, 321-22 (Pon. 2003).

The presumption that the prevailing party will recover costs has been overcome and costs denied where there is a wide disparity between the parties' economic resources, particularly when the non-prevailing party is indigent. Lebehn v. Mobil Oil Micronesia, Inc., 11 FSM Intrm. 319, 322 (Pon. 2003).

When the economic disparity between the indigent losing plaintiff and the successful defendants could not be more stark and when the plaintiff pursued his case in good faith and it was not frivolous, the defendants' motion to tax costs must be denied and no costs allowed. This result is consistent with the social configuration of Micronesia, as mandated by the Constitution's Judicial Guidance Clause. Lebehn v. Mobil Oil Micronesia, Inc., 11 FSM Intrm. 319, 323 (Pon. 2003).

The principle of not imposing costs on losing indigents may appear to penalize solvency and to encourage other lawsuits against successful businesses because there is no risk of incurring costs if the action fails. However, this principle only applies when the action is pursued in good faith. Costs may be taxed when an indigent plaintiff's case is frivolous or malicious or when he has raised irrelevant matters and engaged in vexatious procedures. Lebehn v. Mobil Oil Micronesia, Inc., 11 FSM Intrm. 319, 323 (Pon. 2003).

The most common basis for denying costs to prevailing defendants is the indigency of the losing plaintiff, coupled with good faith of the indigent and the non-frivolous nature of the case. Lebehn v. Mobil Oil Micronesia, Inc., 11 FSM Intrm. 319, 323 (Pon. 2003).

When the election commission never properly certified anyone as the winning candidate, an appellate trial's result cannot confirm a candidate's election, but rather determines which of two contestants should have been declared elected. Therefore no judgment for costs will be awarded in anyone's favor. In re Mid-Mortlocks Interim Election, 11 FSM Intrm. 470, 477-78 (Chk. S. Ct. App. 2003).

Any post-judgment charges for attorney's fees and costs – any attorney's fees and costs beyond those awarded in the judgments themselves – must first be determined as reasonable and awarded by the court before the judgment-creditors are entitled to these amounts. In re Engichy, 11 FSM Intrm. 520, 534 (Chk. 2003).

While costs cannot be awarded against the FSM, allottees are chargeable with costs of action when the allottees have interests sufficiently distinct from the FSM to confer on them standing in their own right. The rule prohibiting the trial court from charging the FSM with costs of this action does not prohibit the trial court from charging allottees with costs. FSM v. Udot Municipality, 12 FSM Intrm. 29, 57 (App. 2003).

If the Supreme Court appellate division determines that an appeal is frivolous, it may award just damages and single or double costs, including attorney's fees, to the appellee. FSM Dev. Bank v. Adams, 12 FSM Intrm. 456, 462 (App. 2004).

Costs that have been awarded in the FSM include service costs, transcript and copying costs when they represent payment to others for services, and reasonable travel expenses when there is a showing of no attorney available on the island where the litigation is taking place. AHPW, Inc. v. FSM, 13 FSM Intrm. 36, 42 (Pon. 2004).

When insufficient information has been provided concerning the costs set out in an affidavit to enable the court to make an award of costs, none of these costs will be awarded. AHPW, Inc. v. FSM, 13 FSM Intrm. 36, 42 (Pon. 2004).

When an affidavit sets out costs totaling $1,605.15, but no description is provided for the individual amounts beyond the notation "direct expense," the court can make no determination whether these expenses constitute awardable costs and none will be awarded. AHPW, Inc. v. FSM, 13 FSM Intrm. 36, 43 (Pon. 2004).

An award of costs depends upon a finding of reasonableness by the court. FSM Social Sec. Admin. v. Jonas, 13 FSM Intrm. 171, 173 (Kos. 2005).

Fax and long distance telephone charges are not recoverable as costs. Copying costs may be recoverable if the copies are not made in-house, and the costs represent payment to others. FSM Social Sec. Admin. v. Jonas, 13 FSM Intrm. 171, 173 (Kos. 2005).

When an appellant fails to provide a necessary appendix and that appendix is provided by an appellee and the appellee prevails, the cost of producing the appendix may be taxed in the appellee's favor. Chuuk v. Davis, 13 FSM Intrm. 178, 183 (App. 2005).

COURTS

Secretarial Order 3039, section 2 cleared the way for the assumption of jurisdiction by FSM courts by delegating the judicial functions of the government of the Trust Territory Pacific Islands to the Federated States of Micronesia. Thus, the previous exclusive jurisdiction of the High Court under 6 TTC 251 was effectively delegated to the Federated States of Micronesia, insofar as the Constitution of the Federated States of Micronesia authorizes such jurisdiction. Lonno v. Trust Territory (I), 1 FSM Intrm. 53, 57-58 (Kos. 1992).

The language of Secretarial Order 3039, section 5(a) contemplates continued Trust Territory High Court activity pursuant to the "present procedural and jurisdictional provisions of Trust Territory law" only until new functioning courts are established by the constitutional governments, and recognizes that the jurisdictional provisions of Trust Territory law will necessarily be revised when those courts have been established. Lonno v. Trust Territory (I), 1 FSM Intrm. 53, 59 (Kos. 1982).

Interpretation of Secretarial Order 3039 as acquiescing in FSM Supreme Court jurisdiction over suits against the Trust Territory does not conflict with any residual Unites States obligation to oversee activities of the FSM courts pending termination of the Trusteeship Agreement nor does this interpretation imperil any interest the United States government may have in protecting the Trust Territory government against unfair or overreaching actions by courts of the new constitutional governments. Lonno v. Trust Territory (I), 1 FSM Intrm. 53, 64 (Kos. 1982).

Trust Territory Appellate Division jurisdiction by writ of certiorari over appeals from the courts of last resort of the respective jurisdictions of the Federated States of Micronesia, the Marshall Islands, and Palau eliminates any possible risk which might otherwise be posed to the Unites States or its interests or responsibilities here by the full exercise of constitutional jurisdiction by the courts of the constitutional government. Lonno v. Trust Territory (I), 1 FSM Intrm. 53, 64-65 (Kos. 1982).

Until the state courts are established, the Trust Territory High Court retains that portion of its exclusive jurisdiction formerly held under 6 TTC 251 which does not fall within the constitutional jurisdiction of the FSM Supreme Court. Lonno v. Trust Territory (I), 1 FSM Intrm. 53, 68 (Kos. 1982).

State courts, rather than national courts, should normally resolve probate and inheritance issues especially where interests in land are at issue. In re Nahnsen, 1 FSM Intrm. 97, 97 (Pon. 1982).

It would be contrary to the desire of the framers of the Constitution that local officials retain control over local matters if the FSM Supreme Court were to relinquish jurisdiction over issues involving local and state powers to the Trust Territory High Court, which is the least local tribunal now existing in the Trust Territory. In re Nahnsen, 1 FSM Intrm. 97, 110 (Pon. 1982).

The Constitution contemplates that decisions affecting the people of the Federated States of Micronesia will be decided by courts appointed by the constitutional governments of the Federated States of Micronesia. This in turn requires an expansive reading of the FSM Supreme Court's jurisdictional mandate while we await establishment of functioning state courts. In re Nahnsen, 1 FSM Intrm. 97, 111 (Pon. 1982).

The FSM Supreme Court is not bound by decisions of United States courts; however, careful consideration should be given to United States decisions regarding court policies as the FSM national courts are modeled on those of the United States. Nix v. Ehmes, 1 FSM Intrm. 114, 119 (Pon. 1982).

Any power the Trust Territory High Court, the District Courts and the Community Courts may have to exercise judicial powers within the Federated States of Micronesia is to be exercised not as that of autonomous foreign states but as integral parts of the domestic governments. Those courts continue to exercise trial court functions in Ponape only on an interim basis, until the State of Ponape establishes its own courts, either under its present state charter or under any constitution which Ponape may adopt. In re Iriarte (I), 1 FSM Intrm. 239, 244 (Pon. 1983).

The exercise of governmental powers by the Trust Territory High Court, the District Courts and the Community Courts must be carried out in a manner consistent with constitutional self-government and are subject to the safeguards erected by the Constitution for citizens of the Federated States of Micronesia. In re Iriarte (I), 1 FSM Intrm. 239, 245 (Pon.1983).

Preservation of a fair decision-making process, and even the maintenance of a democratic system of government, requires that courts and individual judges be protected against unnecessary external pressures. In re Iriarte (I), 1 FSM Intrm. 239, 246 (Pon. 1983).

The FSM Supreme Court should not intrude unnecessarily in the efforts of the Trust Territory High Court to vindicate itself and other judges through court proceedings within the Trust Territory system. In re Iriarte (I), 1 FSM Intrm. 239, 254 (Pon. 1983).

The Trust Territory High Court is an anomalous entity operating on an interim basis adjacent to a constitutional framework and consisting of judges appointed by officials of the United States Department of Interior. These and other considerations point toward the propriety and necessity of vigilance by the FSM Supreme Court to uphold the constitutional rights of FSM citizens. In re Iriarte (II), 1 FSM Intrm. 255, 267 (Pon. 1983).

The FSM Supreme Court is entitled and required to assure that the Trust Territory High Court, exercising governmental powers within the Federated States of Micronesia, does not violate the constitutional rights of its citizens. In re Iriarte (II), 1 FSM Intrm. 255, 268 (Pon. 1983).

The Trust Territory High Court must promote constitutional self-government to satisfy the provisions of the Trusteeship Agreement to which it is subject. In re Iriarte (II), 1 FSM Intrm. 255, 268 (Pon. 1983).

Transfer of a case not in active trial in the Trust Territory High Court is mandatory unless the legal rights of a party are impaired by the transfer. U.S. Dep't Int. Sec'l Order 3039, § 5(a) (1979). Actouka v. Etpison, 1 FSM Intrm. 275, 277 (Pon. 1983).

The Trust Territory High Court should leave final interpretation of the Constitution and public laws of the Federated States of Micronesia to the Supreme Court. Jonas v. FSM, 1 FSM Intrm. 322, 327 n.1 (App. 1983).

As a general proposition, a court system resolves disputes by considering and deciding between competing claims of two or more opposing parties. In re Sproat, 2 FSM Intrm. 1, 4 (Pon. 1985).

It is thought that the judicial power to declare the law will more likely be exercised in enlightened fashion if it is employed only where the court is exposed to the differing points of view of adversaries. Thus judicial decision-making power is typically exercised by a court which has heard competing contentions of adversaries

having sufficient interests in the outcome to thoroughly consider, research and argue the points at issue. Even then, a court's declarations of law should be limited to rulings necessary to resolve the dispute before it. In re Sproat, 2 FSM Intrm. 1, 4 (Pon. 1985).

By its terms, 1 F.S.M.C. 203 pointing to the *Restatements* as a guide for determining and applying the common law applies only to "courts of the Trust Territory." Since only courts established by the Trust Territory administration existed when the section was issued, it plainly was intended only for those courts at that time. In absence of any persuasive considerations to the contrary, it is logical to conclude that 1 F.S.M.C. 203 applies only to courts of the Trust Territory, not to courts of the Federated States of Micronesia or the various states. Rauzi v. FSM, 2 FSM Intrm. 8, 14 (Pon. 1985).

Since the Trust Territory High Court and District Courts were still active at the time of codification, provisions in the FSM Code referring only to them quite likely were intended only to regulate those courts. Rauzi v. FSM, 2 FSM Intrm. 8, 14 (Pon. 1985).

Statutes governing procedures or decision-making approaches for Trust Territory courts might not apply to constitutional courts. Semens v. Continental Air Lines, Inc. (II), 2 FSM Intrm. 200, 204 (Pon. 1986).

According to Secretarial Order No. 3039, § 5(a), all cases against the Trust Territory of the Pacific Islands and the High Commissioner that were filed in the FSM at the time the Truk State Court was certified will continue to remain within the exclusive jurisdiction of the High Court. Those cases filed after certification are not within the jurisdiction of the High Court. Suda v. Trust Territory, 3 FSM Intrm. 12, 14 (Truk S. Ct. Tr. 1985).

Courts have an affirmative obligation to avoid erroneous rulings and may not be bound by incorrect legal premises upon which even all parties rely. Michelsen v. FSM, 3 FSM Intrm. 416, 419 (Pon. 1988).

The FSM Constitution provides no authority for any court to act within the Federated States of Micronesia, other than the FSM Supreme Court, inferior courts to be established by statute, and state or local courts. United Church of Christ v. Hamo, 4 FSM Intrm. 95, 105 (App. 1989).

The transitional actions of the FSM Congress, intended to adopt as law of the Federated States of Micronesia those portions of Secretarial Order 3039 relating to judicial functions within the FSM and permitting the Trust Territory courts to continue functioning within the FSM pending establishment of constitutional courts, were a necessary and proper exercise of Congress' power under the Constitution to provide for a smooth and orderly transition. United Church of Christ v. Hamo, 4 FSM Intrm. 95, 105 (App. 1989).

The provisions of the FSM Constitution spelling out jurisdiction and vesting the entire judicial power of the national government in the FSM Supreme Court are self-executing, and the judicial power of the FSM Supreme Court is not dependent upon congressional action. United Church of Christ v. Hamo, 4 FSM Intrm. 95, 105-06 (App. 1989).

To the extent that Secretarial Order 3039 can be read as permitting the Trust Territory High Court to continue, after the FSM Supreme Court had begun functioning, to control cases assigned by the FSM Constitution to the FSM Supreme Court, that exercise by Congress of the transitional power under the Constitution could run counter to other specific provisions of the Constitution, especially the judiciary article, and to fundamental principles of the separation of powers; any extension by the Trust Territory High Court of the powers assigned to it under Secretarial Order 3039 would violate those same constitutional provisions and principles. United Church of Christ v. Hamo, 4 FSM Intrm. 95, 106 (App. 1989).

Actions of the Trust Territory High Court taken after the establishment of functioning constitutional courts in the Federated States of Micronesia, and without a good faith determination after a full and fair hearing as to whether the "active trial" exception permitted retention of the cases, were null and void, even though the parties failed to object, because the High Court was without jurisdiction to act and its conduct constituted usurpation of power. United Church of Christ v. Hamo, 4 FSM Intrm. 95, 122 (App. 1989).

Courts have inherent power, and an obligation, to monitor the conduct of counsel and to enforce compliance with procedural rules. Leeruw v. Yap, 4 FSM Intrm. 145, 150 (Yap 1989).

The appellate division of the Supreme Court of the FSM may accept direct filing of a case and an expedited briefing schedule may be established where there is limited time available and prompt resolution of the issues in the case is decidedly in the national interest. Constitutional Convention 1990 v. President, 4 FSM Intrm. 320, 324 (App. 1990).

When the remanding appellate court has not mandated a hearing on remand, it is within the sound discretion of the trial court to decide whether or not to convene a post-remand hearing. FSM v. Hartman (I), 5 FSM Intrm. 350, 351 (Pon. 1992).

Any judicial act, that has been done pursuant to a statute that does not confer the power to do that act, is void on its face. A judgment that is void on its face may be set aside by the court on its own motion. In re Jae Joong Hwang, 6 FSM Intrm. 331, 331-32 (Chk. S. Ct. Tr. 1994).

The Chuuk State Supreme Court is a unified court system with two constitutionally mandated divisions – the trial division and the appellate division. All justices are members of both divisions, but a justice does not serve in the appellate division until he has been designated by the Chief Justice to be the presiding justice on a specific case. The trial division is the state's court of general jurisdiction. Election Commissioner v. Petewon, 6 FSM Intrm. 491, 497 (Chk. S. Ct. App. 1994).

All justices in the trial division have concurrent jurisdiction, but once a case has been assigned to a particular justice, that justice has exclusive jurisdiction over the parties and issues of the case until the case is terminated in the trial division. Election Commissioner v. Petewon, 6 FSM Intrm. 491, 498 (Chk. S. Ct. App. 1994).

Even when a national court places itself in the shoes of the state court and interprets state law, the state court is always the final arbiter of the meaning of a state law. State court interpretations of state law which contradict prior rulings of the national courts are controlling. Pohnpei v. MV Hai Hsiang #36 (I), 6 FSM Intrm. 594, 601 (Pon. 1994).

A court has an interest in insuring that its orders are heeded, and this interest exists apart from any interest the parties may have in the litigation. A court may take whatever reasonable steps are appropriate to insure compliance with its orders. It need not rely on the parties themselves to prescribe the way in which its orders will be carried out, or its judgments executed. Louis v. Kutta, 8 FSM Intrm. 312, 318 (Chk. 1998).

One of our courts' express functions is to apply and interpret the duly enacted and promulgated laws and regulations which lie at the heart of a dispute. Our court system exists to speak to the very issues to which Pohnpeian custom and tradition are silent. In this way, the two systems complement each other. Senda v. Semes, 8 FSM Intrm. 484, 499 (Pon. 1998).

A court has inherent powers to compel submission to its lawful mandates. Pohnpei v. M/V Miyo Maru No. 11, 9 FSM Intrm. 150, 152 & n.1 (Pon. 1999).

Cases pending in a municipal court may be transferred to the Chuuk State Supreme Court trial division upon the request of any party and by order of the Chuuk State Supreme Court trial division. There is no authority for a municipal judge to transfer a case, sua sponte, to the Chuuk State Supreme Court without the request of any party. Phillip v. Phillip, 9 FSM Intrm. 226, 228 (Chk. S. Ct. Tr. 1999).

Rules of court properly promulgated, and not exceeding the limitation of the court's rulemaking power, have the force of law. Kosrae v. M/V Voea Lomipeau, 9 FSM Intrm. 366, 371 (Kos. 2000).

Chuuk state courts have the power to issue all writs for equitable and legal relief, except the power of attachment, execution and garnishment of public property. Kama v. Chuuk, 9 FSM Intrm. 496, 497 (Chk. S.

Ct. Tr. 1999).

Title 6, chapter 10, subchapter 1 of the FSM Code is replete with references to officials who either do not exist now or who no longer carry out the functions with which they are identified in the statute, and when confronted with such language in a section thereof, the FSM Supreme Court has generally ruled that the section applies only to the Trust Territory High Court. FSM v. Kuranaga, 9 FSM Intrm. 584, 586 (Chk. 2000).

The witness fees in 6 F.S.M.C. 1011 apply only to the Trust Territory High Court. FSM v. Kuranaga, 9 FSM Intrm. 584, 586 (Chk. 2000).

Only two courts have jurisdiction over the territory of Chuuk – the Chuuk State Supreme Court and the FSM Supreme Court. A mortgage foreclosure on land in Chuuk therefore could not be in any court other than those two. FSM Dev. Bank v. Ifraim, 10 FSM Intrm. 107, 110 (Chk. 2001).

The Pohnpei Supreme Court is a court of general jurisdiction, not a court whose jurisdiction is limited and confined. Damarlane v. Pohnpei Supreme Court Appellate Division, 10 FSM Intrm. 116, 120 (Pon. 2001).

The FSM Supreme Court trial division has no appellate or supervisory jurisdiction over either division of the Pohnpei Supreme Court, and no appeal lies from the Pohnpei Supreme Court to the FSM Supreme Court trial division. Damarlane v. Pohnpei Supreme Court Appellate Division, 10 FSM Intrm. 116, 120 (Pon. 2001).

In our federal system of government, state courts are not inferior tribunals to the FSM Supreme Court trial division. The national and state court systems are separate systems created by and serving different sovereigns. Neither system is superior to the other. Rather the systems are parallel. Damarlane v. Pohnpei Supreme Court Appellate Division, 10 FSM Intrm. 116, 120 (Pon. 2001).

The FSM Supreme Court trial division is not a superior tribunal to the Pohnpei Supreme Court, although in certain circumstances the FSM Supreme Court appellate division is such a superior tribunal. Damarlane v. Pohnpei Supreme Court Appellate Division, 10 FSM Intrm. 116, 120 (Pon. 2001).

Only one Chuuk State Supreme Court justice may hear or decide an appeal in the appellate division. The other members of the appellate panel must be temporary justices appointed for the limited purpose of hearing the appeal. Cholymay v. Chuuk State Election Comm'n, 10 FSM Intrm. 145, 150 (Chk. S. Ct. App. 2001).

The constitutional language does not require that a Chuuk State Supreme Court justice sit on an appellate panel when none is available, only that no more than one can sit under any circumstance. But if there are Chuuk State Supreme Court justices who are not disqualified, one must preside over the panel in order for it to be properly constituted. If needed, a justice, who is not disqualified, has a professional and constitutional obligation to serve. Cholymay v. Chuuk State Election Comm'n, 10 FSM Intrm. 145, 151 (Chk. S. Ct. App. 2001).

The Pohnpei Supreme Court is a court of general jurisdiction, which has subject matter jurisdiction over a landlord/tenant dispute. Pernet v. Woodruff, 10 FSM Intrm. 239, 242 (App. 2001).

Under the Chuuk Constitution, article VII, § 3(c), the Chuuk State Supreme Court has only appellate or review jurisdiction over the Land Commission, and thus a motion for review de novo of matters not raised before the Land Commission must be denied. Enengeitaw Clan v. Shirai, 10 FSM Intrm. 309, 311 (Chk. S. Ct. Tr. 2001).

Where a remedy exists, the FSM Supreme Court has general power under the Judiciary Act of 1979 to effect that remedy. Amayo v. MJ Co., 10 FSM Intrm. 433, 435 (Pon. 2001).

It is the Chuuk State Supreme Court's duty to enforce the constitution and laws of the state and the

state's 40 municipalities and to see that the constitutions of the several municipalities are protected against unwarranted interference by any state official, regardless of motivation. In re Oneisomw Election, 11 FSM Intrm. 89, 93 (Chk. S. Ct. Tr. 2002).

The Kosrae State Court has jurisdiction to issue writs and other process. Sigrah v. Speaker, 11 FSM Intrm. 258, 260 (Kos. S. Ct. Tr. 2002).

The Kosrae State Court is given rule making authority that operates only in the limited sphere of the court's inherent authority to determine an orderly process for the disposition of cases that come before it for adjudication. Sigrah v. Speaker, 11 FSM Intrm. 258, 262 (Kos. S. Ct. Tr. 2002).

The Chuuk Chief Justice must promulgate rules of evidence and rules governing the administration of all state courts, the regulation of the judicial profession, and practice and procedure in civil and criminal matters. Kupenes v. Ungeni, 12 FSM Intrm. 252, 257 n.3 (Chk. S. Ct. Tr. 2003).

When acting in his rule making capacity, the Chief Justice acts in a legislative capacity. Rules of court, properly promulgated, and not exceeding the limitation of the rule-making authority, have the force of law. Kupenes v. Ungeni, 12 FSM Intrm. 252, 261 (Chk. S. Ct. Tr. 2003).

Acts in excess of a court's jurisdiction are void. Hartman v. Chuuk, 12 FSM Intrm. 388, 399 (Chk. S. Ct. Tr. 2004).

The State of Kosrae's judicial power is vested in the State Court and such inferior courts as may be created by law. The Kosrae Land Court was established as an inferior court within the Kosrae State Court system. The State Court has jurisdiction to review all decisions of inferior courts. The Kosrae Constitution does not specify which division of the State Court is required to review decisions of inferior courts. Heirs of Palik v. Heirs of Henry, 12 FSM Intrm. 415, 420 (Kos. S. Ct. Tr. 2004).

The term "appellate court" is defined as the FSM Supreme Court appellate division. Kosrae State Court decisions may be appealed to the FSM Supreme Court appellate division. Heirs of Palik v. Heirs of Henry, 12 FSM Intrm. 415, 420 (Kos. S. Ct. Tr. 2004).

Since the Kosrae Constitution provides that appeals from the State Court trial division may be made to the State Court appellate division, as shall be prescribed by law, enabling legislation is required to implement appeals from the trial division to the State Court appellate division, and when no such legislation has been passed by the Legislature and signed into law, no constitutional or statutory authority exists to authorize appeals from trial division to the State Court appellate division. Heirs of Palik v. Heirs of Henry, 12 FSM Intrm. 415, 420 (Kos. S. Ct. Tr. 2004).

The Kosrae State Court has jurisdiction to review all decisions of inferior courts. Neither the Kosrae Constitution nor state law requires that Land Court decisions be appealed to the State Court appellate division. Heirs of Palik v. Heirs of Henry, 12 FSM Intrm. 415, 421 (Kos. S. Ct. Tr. 2004).

The State Court has the power to make rules and orders, and do all acts, not inconsistent with law or rule, required for the due administration of justice. It is specifically authorized to govern appeal procedures for appeals from the Land Court and procedures for Land Court appeals to the State Court are established in the Kosrae Rules of Appellate Procedure. Heirs of Palik v. Heirs of Henry, 12 FSM Intrm. 415, 421 (Kos. S. Ct. Tr. 2004).

The Kosrae State Court trial division has jurisdiction to review all decisions of inferior courts, including decisions entered by the Kosrae Land Court. Heirs of Palik v. Heirs of Henry, 12 FSM Intrm. 415, 421 (Kos. S. Ct. Tr. 2004).

A later general court order supersedes an earlier one. Goya v. Ramp, 13 FSM Intrm. 100, 105 n.2 (App. 2005).

Any case over which the trial division has jurisdiction may be heard by any of the justices as assigned by the Chief Justice. Once a case has been assigned to a particular justice, that justice has jurisdictional priority over the parties and issues of the case to the exclusion of all other trial division justices. This exclusive jurisdiction continues until the case is terminated in the trial division. While the case is pending, the priority extends to any other case involving the same parties and issues, even if filed later before a court that could also take jurisdiction. Nikichiw v. O'Sonis, 13 FSM Intrm. 132, 138 (Chk. S. Ct. App. 2005).

When the parties are identical in two civil actions and the plaintiffs sought the same relief in both civil actions – that the contents of certain ballot boxes not be counted and tabulated because of election irregularities and when the only difference in the later civil action was that the plaintiffs were contesting only two of the five boxes they contested in the first civil action and that the irregularities alleged in the later case were discovered during and in the course of the litigation of the first civil action (that is, during the counting and tabulating ordered by the judge in the first civil action), such irregularities would be expected to be brought immediately before the judge on the case in which they were discovered. When they were not, but were instead filed as a separate case, once the trial judge on the first case became available, the case should have been left to him to act upon. Therefore the second trial judge's presiding over the second civil action was in excess of his jurisdiction since the first trial division justice had jurisdictional priority over the parties and the issues in that case to the exclusion of all other trial division justices. Nikichiw v. O'Sonis, 13 FSM Intrm. 132, 138 (Chk. S. Ct. App. 2005).

The appellate court cannot fault a judge for acting on a temporary restraining order application when it was filed since the assigned special trial justice was unavailable in the outer islands and the request for a temporary restraining order needed prompt action, but once the special trial justice again became available, the case should have been left to the special trial justice to act upon. Nikichiw v. O'Sonis, 13 FSM Intrm. 132, 138 (Chk. S. Ct. App. 2005).

Under the doctrine of *stare decisis,* once a point of law has been established by a court, that point of law will be followed by all courts of lower rank in subsequent cases where the same legal issue is raised. Kosrae v. Sikain, 13 FSM Intrm. 174, 177 (Kos. S. Ct. Tr. 2005).

When our nation's highest court, the FSM Supreme Court appellate division, interprets a constitutional provision in a case before it, that interpretation is to be given full effect in all cases still open on direct review, and as to all events, regardless of when they occurred. Once it announces a new rule of law, the integrity of judicial review requires application of the new rule to all similar cases pending on review. Kosrae v. Sikain, 13 FSM Intrm. 174, 177 (Kos. S. Ct. Tr. 2005).

New constitutional rules affecting procedures in criminal cases apply only to those cases which are pending on direct review or which are not yet final when the new rules are announced. Thus a new constitutional rule announced in a January, 2004 decision will apply to a May 2003 case still pending at that time. Kosrae v. Sikain, 13 FSM Intrm. 174, 177 (Kos. S. Ct. Tr. 2005).

– Judges

Preservation of a fair decision-making process, and even the maintenance of a democratic system of government, requires that courts and individual judges be protected against unnecessary external pressures. In re Iriarte (I), 1 FSM Intrm. 239, 247 (Pon. 1983).

In the FSM, criminal cases are tried before the judge as fact finder. Andohn v. FSM, 1 FSM Intrm. 433, 441 (App. 1984).

Judges on the FSM Supreme Court are bound by the American Bar Association Code of Judicial Conduct incorporated into law by 4 F.S.M.C. 122. Andohn v. FSM, 1 FSM Intrm. 433, 444 (App. 1984).

The Judiciary Act of 1979, in Title 4 of the FSM Code, and the Judiciary Article, article XI of the Constitution of the Federated States of Micronesia govern the structure and powers of the FSM Supreme

Court, and make on provision for appointment of special judges to sit with a justice of the FSM Supreme Court Trial Division. 5 F.S.M.C. 514 has no application to proceedings before the FSM Supreme Court. In re Raitoun, 1 FSM Intrm. 561, 564-65 (App. 1984).

Where an appellate court has held that a trial judge is under a clear and non-discretionary duty to step aside from presiding over a case and the petitioner has a constitutional right to obtain compliance with that duty, all documents issued after the date of the appellate decision are null and void and shall be expunged from the record and the judge shall be enjoined from taking any further action as a judge in the case. Etscheit v. Santos, 5 FSM Intrm. 111, 113 (App. 1991).

The Chief Justice has the constitutional authority to make rules for the appointment of special judges, and Congress has the constitutional authority to amend them. Congress has provided the Chief Justice with the statutory authority to appoint temporary justices. Where Congress has acted pursuant to its constitutional authority to provide statutory authority to the court, the court need not have exercised its concurrent rule-making authority. Jano v. King, 5 FSM Intrm. 326, 331 (App. 1992).

The Chief Justice may appoint an acting chief justice if he is unable to perform his duties. "Unable to perform his duties" refers to a physical or mental disability of some duration, not to the legal inability to act on one particular case. Jano v. King, 5 FSM Intrm. 326, 331 (App. 1992).

The FSM Supreme Court is immune from an award of damages, pursuant to 11 F.S.M.C. 701(3), arising from the performance by the Chief Justice of his constitutionally granted rule-making powers. Berman v. FSM Supreme Court (II), 5 FSM Intrm. 371, 374 (Pon. 1992).

The Chief Justice, in making rules, is performing a legislative function and is immune from an action for damages. Berman v. FSM Supreme Court (II), 5 FSM Intrm. 371, 374 (Pon. 1992).

The grant of immunity to the Chief Justice while performing his rule-making authority is to protect the independence of one exercising a constitutionally granted legislative power. Berman v. FSM Supreme Court (II), 5 FSM Intrm. 371, 374 (Pon. 1992).

A judge is generally granted absolute civil immunity from civil liability for acts done in the exercise of a judicial function. Jano v. King, 5 FSM Intrm. 388, 391 (Pon. 1992).

A judge loses the cloak of judicial immunity in only two instances. A judge is not immune for actions not taken in the judge's judicial capacity, and a judge is not immune for actions, though judicial in nature, taken in the absence of all jurisdiction. Jano v. King, 5 FSM Intrm. 388, 391 (Pon. 1992).

An act performed by a judge does not have to be an adjudicatory act in order for it to be a judicial act. Judges and justices of the courts of the Federated States of Micronesia are protected by the cloak of judicial absolute immunity for judicial functions performed unless they are in complete absence of jurisdiction. Jano v. King, 5 FSM Intrm. 388, 392-93 (Pon. 1992).

Judges and justices of the FSM are protected by the cloak of absolute immunity for judicial functions performed, unless the functions were performed in the complete absence of jurisdiction. Issuance of a search warrant is within the jurisdiction of FSM courts. Therefore it is a judicial act to which immunity attaches. Liwi v. Finn, 5 FSM Intrm. 398, 400-01 (Pon. 1992).

In order for a Congressional statute to give the court valid authority in those areas which the Constitution grants the Chief Justice rule-making powers the Chief Justice does not first have to promulgate a rule before Congress may legislate on the same subject. Hartman v. FSM, 6 FSM Intrm. 293, 297 (App. 1993).

If someone constitutionally ineligible for appointment, is appointed a judge then his status is that of a de facto judge. A de facto judge is one who exercises the duties of the judicial office under the color of an appointment thereto. Where there is an office to be filled, and one, acting under color of authority, fills the

office and discharges its duties, his actions are those of an officer de facto, and binding on the public. Hartman v. FSM, 6 FSM Intrm. 293, 298-99 (App. 1993).

Since the acts of a de facto judge are valid against all except the sovereign and generally not subject to collateral attack, the proper method to question a de facto judge's authority is through a quo warranto proceeding brought by the sovereign. Hartman v. FSM, 6 FSM Intrm. 293, 299 (App. 1993).

The view that the de facto doctrine, where applicable, should operate to prevent challenges to the authority of special judges, acting under color of right, by private litigants, in the proceedings before them is better suited for the social and geographical configuration of Micronesia. Hartman v. FSM, 6 FSM Intrm. 293, 299 (App. 1993).

Pursuant to the Chuuk Judiciary Act judges in Chuuk are required to adhere to the standards of the Code of Judicial Conduct of the American Bar Association which require judges to resign from judicial office upon becoming a candidate for a non-judicial office. In re Failure of Justice to Resign, 7 FSM Intrm. 105, 108 (Chk. S. Ct. App. 1995).

Pursuant to the Chuuk Judiciary Act judges in Chuuk have a clear ministerial, non-discretionary duty to resign from judicial office upon becoming a candidate for a non-judicial office. A writ of mandamus is the specific remedy to compel the performance of such a legally required ministerial act. In re Failure of Justice to Resign, 7 FSM Intrm. 105, 110 (Chk. S. Ct. App. 1995).

A chief justice's actions in reviewing an attorney's application for admission is a judicial function that is entitled to absolute immunity from suit for damages. Berman v. Santos, 7 FSM Intrm. 231, 240 (Pon. 1995).

Judges, faithful to their oath of office, should approach every aspect of each case with a neutral and objective disposition and understand their duty to render decisions upon a proper record and to disregard earlier judicial contacts with a case or party. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM Intrm. 1, 9 (App. 1997).

Compensation of Kosrae State Court justices is prescribed by law. Compensation may not be increased or decreased during their terms of office, except by general law applying to all state government employees. Cornelius v. Kosrae, 8 FSM Intrm. 345, 348 (Kos. S. Ct. Tr. 1998).

The phrase "all State Government employees" means employees whose compensation is determined by statute, and does not include those employees who have individual contracts with Kosrae. Therefore a state law reducing state public service system employees' pay can constitutionally be applied to a Kosrae State Court justice's pay. Cornelius v. Kosrae, 8 FSM Intrm. 345, 352 (Kos. S. Ct. Tr. 1998).

A judge is generally granted absolute immunity from civil liability for acts done in the exercise of a judicial function. A judge loses the cloak of judicial immunity in only two events: First, a judge is not immune from non-judicial actions, i.e. actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. Bank of Guam v. O'Sonis, 9 FSM Intrm. 106, 112 (Chk. 1999).

The factors determining whether an act by a judge is a judicial one relate to the nature of act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity. The second question in deciding whether immunity exists is whether the judge acted in complete absence of all jurisdiction. Bank of Guam v. O'Sonis, 9 FSM Intrm. 106, 112 (Chk. 1999).

Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors. Bank of Guam v. O'Sonis, 9 FSM Intrm. 106, 112 (Chk.

1999).

Judicial immunity does not apply against the imposition of prospective injunctive relief. The right to attorney's fees applies when prospective relief is granted against a judge pursuant to the civil rights statute. Bank of Guam v. O'Sonis, 9 FSM Intrm. 106, 113 (Chk. 1999).

Judicial immunity protects from liability for punitive damages. Bank of Guam v. O'Sonis, 9 FSM Intrm. 106, 113 (Chk. 1999).

A judge is generally granted absolute immunity from civil liability for acts done in the exercise of a judicial function. Few doctrines were more solidly established at common law than the immunity of judges for damages for acts committed within their judicial jurisdiction. Damarlane v. Pohnpei Supreme Court Appellate Division, 10 FSM Intrm. 116, 121 (Pon. 2001).

Judges lose their judicial immunity only for non-judicial actions (actions not taken in the judge's judicial capacity), or for actions, though judicial in nature, taken in the complete absence of all jurisdiction. Damarlane v. Pohnpei Supreme Court Appellate Division, 10 FSM Intrm. 116, 121 (Pon. 2001).

Two factors, both relating to the nature of act itself, determine whether an act by a judge is a judicial one: whether it is a function normally performed by a judge, and whether the parties dealt with the judge in his judicial capacity. The second question in deciding whether immunity exists is whether the judge acted in complete absence of all jurisdiction. Damarlane v. Pohnpei Supreme Court Appellate Division, 10 FSM Intrm. 116, 121 (Pon. 2001).

Issuance of appellate opinions is a function normally performed by judges, and the timing of a decision is normally, if not always, a judicial decision. Damarlane v. Pohnpei Supreme Court Appellate Division, 10 FSM Intrm. 116, 121 (Pon. 2001).

The constitutional language does not require that a Chuuk State Supreme Court justice sit on an appellate panel when none is available, only that no more than one can sit under any circumstance. But if there are Chuuk State Supreme Court justices who are not disqualified, one must preside over the panel in order for it to be properly constituted. If needed, a justice, who is not disqualified, has a professional and constitutional obligation to serve. Cholymay v. Chuuk State Election Comm'n, 10 FSM Intrm. 145, 151 (Chk. S. Ct. App. 2001).

Temporary Chuuk State Supreme Court justices, appointed for the limited purpose of hearing the appeal, may be a justice of the FSM Supreme Court, a judge of a court of another FSM state, or a qualified attorney in the State of Chuuk. FSM citizenship is not a constitutional requirement to be a temporary Chuuk State Supreme Court appellate justice and the Legislature cannot add it by statute. Cholymay v. Chuuk State Election Comm'n, 10 FSM Intrm. 145, 152 (Chk. S. Ct. App. 2001).

When a special trial division justice was appointed by the Chief Justice pursuant to the procedure contained in two 1994 general court orders, the special trial division justice appeared to be a properly installed judicial officer, and even if the special trial division justice were not a lawfully appointed judicial officer, that is, a judge de jure, he was a de facto judicial officer. Alafanso v. Suda, 10 FSM Intrm. 553, 556 (Chk. S. Ct. Tr. 2002).

The acts of a judge de facto are generally valid and not subject to collateral attack. Alafanso v. Suda, 10 FSM Intrm. 553, 556 (Chk. S. Ct. Tr. 2002).

Trial judges are expected to suggest the desirability of possible settlement. That is a normal part of their job. Bualuay v. Rano, 11 FSM Intrm. 139, 148 (App. 2002).

The prohibition against compelling a judge's testimony is reflected in a long-standing principle that a court speaks only through its orders. This ban on judges testifying has limits. Those limits are that a judge

must be acting as a judge, and that it is information regarding his or her role as a judge that is sought. FSM v. Wainit, 11 FSM Intrm. 424, 430 (Chk. 2003).

Where the Chuuk Constitution specifically authorizes the appointment of qualified attorneys in Chuuk as temporary appellate justices on a per case basis and the Constitution's framers therefore must have contemplated that counsel in one appeal may well be a temporary justice on a different appeal, the presence of qualified attorneys on an appellate panel is not a ground to grant a rehearing. Rosokow v. Bob, 11 FSM Intrm. 454, 457 (Chk. S. Ct. App. 2003).

An appellate panel's composition of three temporary justices is proper in the sudden absence of the presiding Chuuk State Supreme Court justice when the other Chuuk State Supreme Court justices were disqualified and the matter could not wait for the original presiding justice's recovery from illness because the court was required by statute to decide on the contested election prior to April 15, 2003 and therefore a third temporary justice had to be appointed immediately. In re Mid-Mortlocks Interim Election, 11 FSM Intrm. 470, 473 (Chk. S. Ct. App. 2003).

No one is eligible to serve as the Chuuk Chief Justice or as an associate justice unless at least 35 years of age, was a born Chuukese, has been a resident of the State of Chuuk for at least 25 years, is an FSM citizen, and has never been convicted of a felony. Other qualifications may be prescribed by statute. Kupenes v. Ungeni, 12 FSM Intrm. 252, 256 n.1 (Chk. S. Ct. Tr. 2003).

By general court order, when the other justices are disqualified or have been recused or there is a special need to have a special justice from outside the court to hear a case to avoid the appearance of impropriety, the Chuuk Chief Justice may appoint special justices (who meet the same requirements for the appointment of an appellate division temporary justice) and assign cases to him. Kupenes v. Ungeni, 12 FSM Intrm. 252, 256 n.2 (Chk. S. Ct. Tr. 2003).

The Chuuk State Supreme Court prefers to adopt the majority rule in the United States that a temporary judge cannot be a judge *de facto*, because a temporary judge merely serves for a particular case, whereas a judge *de facto* makes claim to a judicial office under color of authority. This majority rule, in defining a judge *de facto*, requires that a judge *de facto* have all of the qualifications to hold the office which he claims under color of authority, a requirement which cannot, as a matter of definition, apply to temporary judges, who have no claim to the office of judge *de jure*, but rather occupy it on a temporary basis, case by case. Kupenes v. Ungeni, 12 FSM Intrm. 252, 260 (Chk. S. Ct. Tr. 2003).

A judge *de facto* occupies the position under "color of authority," which has been defined in this context as follows: "A de facto officer is one who is in possession of an office, and discharging its duties, under color of authority. By color of authority is meant authority derived from an election or appointment, however irregular or informal, so that the incumbent be not a mere volunteer. Kupenes v. Ungeni, 12 FSM Intrm. 252, 260 (Chk. S. Ct. Tr. 2003).

The Chuuk State Supreme Court adopts the U.S. majority rule that an special trial justice appointed pursuant to Chuuk GCO 2-94 is a temporary judge, a *judge pro hac vice de jure*, and that if the promulgation of GCO 2-94 is unconstitutional, then all acts of the special trial justice in the cases to which he has been assigned, are void and a nullity. Kupenes v. Ungeni, 12 FSM Intrm. 252, 261 (Chk. S. Ct. Tr. 2003).

The Chief Justice of the Chuuk State Supreme Court is the administrative head of the state judicial system, and he may appoint and prescribe duties of other officers and employees of the state judicial system. He is also obligated to promulgate rules governing the administration of all state courts, the regulation of the judicial profession, and practice and procedure in civil matters. Kupenes v. Ungeni, 12 FSM Intrm. 252, 261 (Chk. S. Ct. Tr. 2003).

When acting in his rule making capacity, the Chief Justice acts in a legislative capacity. Rules of court, properly promulgated, and not exceeding the limitation of the rule-making authority, have the force of law. Kupenes v. Ungeni, 12 FSM Intrm. 252, 261 (Chk. S. Ct. Tr. 2003).

Chuuk GCO 2-94 authorizing the appointment of special trial justices is a constitutional exercise of the Chief Justice's rule-making authority since there are no express constitutional limitations on that authority other than that permitting the Legislature to amend rules promulgated by the Chief Justice. Kupenes v. Ungeni, 12 FSM Intrm. 252, 263 & n.10 (Chk. S. Ct. Tr. 2003).

In order to qualify as a temporary justice on a Chuuk State Supreme Court appellate division panel, the temporary justice must be either 1) a justice of the FSM Supreme Court, 2) a judge of a court of another FSM state, or 3) a qualified attorney in the State of Chuuk. Judges of other courts and qualified attorneys, are sufficiently competent in the law to sit as members of a Chuuk State Supreme Court appellate panel, regardless of their nationality or citizenship. Kupenes v. Ungeni, 12 FSM Intrm. 252, 264 (Chk. S. Ct. Tr. 2003).

The Chuuk Constitution provides no guidance, positively or negatively, regarding whether special trial justices are permissible, and if so, what their minimum qualifications must be. Absent any words of limitation in the constitution, the Chief Justice has and should maintain vigorously all the inherent and implied powers necessary to permit the judiciary to function properly and effectively as a separate department in the scheme of government. These inherent and implied powers include the power to adopt general court orders for the appointment of special trial justices and to establish minimum qualifications for those special justices which equal the qualifications for temporary appellate justices under the constitution. Kupenes v. Ungeni, 12 FSM Intrm. 252, 265 (Chk. S. Ct. Tr. 2003).

In appointing a special trial justice, the Chuuk Chief Justice is not appointing a temporary associate justice. A special trial justice, does not make any claim to the office of associate justice. Kupenes v. Ungeni, 12 FSM Intrm. 252, 265 (Chk. S. Ct. Tr. 2003).

The ABA Code of Judicial Conduct (1984 ed.) is the judicial ethics provision in effect in Kosrae today. Anton v. Cornelius, 12 FSM Intrm. 280, 285-86 (App. 2003).

– Records

A court's inherent supervisory power over its own records includes the discretion to seal those records if it determines that the public's right to access is outweighed by legitimate competing needs for privacy and confidentiality. In re Property of Doe, 6 FSM Intrm. 606, 607 (Pon. 1994).

A court will use a three step process designed to protect the public's interest in access to the its files to determine whether the records should be sealed: 1) the court will give the public adequate notice that the judicial records in question may be sealed; 2) the court will give all interested persons an opportunity to object; and 3) if, after considering all objections, the court decides that the records should be sealed, it will seal those records and state on the record the reasons supporting its decision. In re Property of Doe, 6 FSM Intrm. 606, 607 (Pon. 1994).

When the court has posted public notices throughout the state and no member of the public, nor any interested party, objected, and the court has found good cause shown, the records in a case may be sealed. In re Property of Doe, 6 FSM Intrm. 606, 607 (Pon. 1994).

Just as the courts in the judiciary confirm their role in society by adjudicating claims in civil matters, so to must the land commission. When a court fails to provide an adequate record of its proceedings, the role of the judiciary fails. Because claims over land are of no lesser importance than claims in civil matters, the requirement of a full and complete record applies to the land commission. In re Lot No. 014-A-21, 9 FSM Intrm. 484, 493 (Chk. S. Ct. Tr. 1999).

It is the Kosrae State Court's statutory duty to certify Certificates of Live Birth and when the court has information that items on the certificate are incorrect, it will refuse to certify the certificate. In re Phillip, 11 FSM Intrm. 243, 244 (Kos. S. Ct. Tr. 2002).

The subject himself cannot provide the factual basis for the date of his birth, as his knowledge of this information is based upon hearsay only. A person does not have personal knowledge of his date of birth. In re Phillip, 11 FSM Intrm. 243, 245 (Kos. S. Ct. Tr. 2002).

Notarization of a document does not establish truth to the statements made in the document: notarization only verifies the identity and signature of the person who signed the document. Consequently, notarization of a document by a court employee does not represent any court endorsement or certification of the statements made in the document. In re Phillip, 11 FSM Intrm. 243, 245 (Kos. S. Ct. Tr. 2002).

The Certificate of Live Birth is a document with critical legal importance. It forms the foundation upon which other important legal documents are issued. Therefore, the Certificate of Live Birth must be issued in accordance with a procedure, based upon credible factual information supporting the person's date of birth and other information entered on the certificate. In re Phillip, 11 FSM Intrm. 301, 302-03 (Kos. S. Ct. Tr. 2002).

In order to protect the validity and reliability of birth certificates issued by the Kosrae state hospital, the hospital is ordered to issue a Certificate of Live Birth when the necessary information is properly authenticated and verified. The subject person of the certificate may not provide the only information that is relied upon by the hospital. The hospital shall review existing hospital records, other government records and other reliable records to establish the accuracy of information entered into each Certificate of Live Birth. Certificates which do not contain accurate information shall not be certified by the Kosrae State Court. In re Phillip, 11 FSM Intrm. 301, 303 (Kos. S. Ct. Tr. 2002).

– Recusal

No judge should sit in a case in which he is personally involved. In re Iriarte (II), 1 FSM Intrm. 255, 262 (Pon. 1983).

Determination of a judge's bias, prejudice or partiality should be made on the basis of conduct or information which is extrajudicial in nature. FSM v. Jonas (II), 1 FSM Intrm. 306, 317-18 (Pon. 1983).

A judge who, at the beginning of a trial, is so influenced by other information that he knows he will not be capable of basing his decision solely on the properly admitted evidence in the case is under an ethical obligation to disqualify himself or herself from the litigation. FSM v. Jonas (II), 1 FSM Intrm. 306, 320 n.1 (Pon. 1983).

Due process demands impartiality on the part of adjudicators. Suldan v. FSM (II), 1 FSM Intrm. 339, 362 (Pon. 1983).

There is a presumption that a judicial or quasi-judicial official is unbiased. The burden is placed on the party asserting the unconstitutional bias. The presumption of neutrality can be rebutted by a showing of conflict of interest or some other specific reason for disqualification. Where disqualification occurs, it is usually because the adjudicator has a pecuniary interest in the outcome or has been the target of personal abuse or criticism from the party before him. Suldan v. FSM (II), 1 FSM Intrm. 339, 362-63 (Pon. 1983).

A judge has a duty to disqualify himself from presiding in a proceeding in which he entertains a bias or prejudice against a party. Andohn v. FSM, 1 FSM Intrm. 433, 444 (App. 1984).

The fact that answers given by the victim-witness in response to questions posed by the judge happened to strengthen the government's case did not, by itself, indicate that the judge was impermissibly helping the prosecution, or that he was biased against the defendant. Andohn v. FSM, 1 FSM Intrm. 433, 446 (App. 1984).

Practical and policy considerations relating to judicial administration in the FSM could be viewed as justifying invocation of the Rule of Necessity whereby judges are obliged to hear and decide cases from which

they might otherwise recuse themselves if no other judge is available to hear the case. FSM v. Skilling, 1 FSM Intrm. 464, 469-70 (Kos. 1984).

The Rule of Necessity has been held in the United States to prevail over the disqualification provisions of 28 U.S.C. § 455 and Canon 3C of the ABA Code of Judicial Conduct, both of which are nearly identical to the language of 4 F.S.M.C. 124(1) and (2). FSM v. Skilling, 1 FSM Intrm. 464, 470-71 (Kos. 1984).

The power of a justice to recuse himself must be exercised conscientiously and not be used to avoid difficult or controversial cases nor merely to accommodate nervous litigants or counsel. FSM v. Skilling, 1 FSM Intrm. 464, 471 (Kos. 1984).

Canon 3C of the ABA Code of Judicial Conduct applies in the FSM by virtue of 4 F.S.M.C. 122. There is no hint that Canon 3C as incorporated by the Judiciary Act of 1979, and 4 F.S.M.C. 124, were intended by Congress to have different meanings here. FSM v. Skilling, 1 FSM Intrm. 464, 471 n.2 (Kos. 1984).

Questioning a judge's impartiality, under 4 F.S.M.C. 124(1), brings into issue possible favoritism, bias or some other interest of the judge for or against a party. This affords no basis, however, for disqualifying a judge because of his general attitudes, beliefs, or philosophy, even where it is apparent that those do not augur well for a particular litigant. FSM v. Skilling, 1 FSM Intrm. 464, 472-73 (Kos. 1984).

4 F.S.M.C. 124 furnishes no grounds for disqualifying a judge on the basis of statements or rulings made by him in his judicial capacity which reflect reasoned views derived from documents submitted, arguments heard, or testimony received in the course of judicial proceedings in the same case. FSM v. Skilling, 1 FSM Intrm. 464, 473 (Kos. 1984).

In order that the impartiality of a judge might reasonably be questioned there must be facts or reasons which furnish a rational basis for doubting the judge's impartiality. Reasonableness is to be considered from the perspective of a disinterested reasonable person. FSM v. Skilling, 1 FSM Intrm. 464, 475 (Kos. 1984).

The test for determining if the impartiality of a judge in a proceeding might reasonably be questioned is whether a disinterested reasonable person, knowing all the circumstances, would harbor doubts about the judge's impartiality. FSM v. Skilling, 1 FSM Intrm. 464, 475 (Kos. 1984).

One guide to the kinds of facts which could lead a disinterested reasonable observer to harbor doubts about a judge's impartiality is 4 F.S.M.C. 124(2). FSM v. Skilling, 1 FSM Intrm. 464, 475 (Kos. 1984).

4 F.S.M.C. 124(2) prescribes a subjective test under which a judge must disqualify himself if he subjectively concludes that he falls within the statutory provisions. Section 124(1), on the other hand provides an objective standard designed to guard against the appearance of impartiality. FSM v. Skilling, 1 FSM Intrm. 464, 476 (Kos. 1984).

4 F.S.M.C. 124(1) was designed to cover contingencies not foreseen by the draftsmen who set out specific grounds for disqualification in section 124(2). Despite its "catch all" nature, however, it remains necessary to show a factual basis, not just wide-ranging speculation or conclusions, for questioning a judge's impartiality. FSM v. Skilling, 1 FSM Intrm. 464, 476-77 (Kos. 1984).

Courts normally adhere to the rule that any alleged judicial bias and prejudice, to be disqualifying, must stem from an extrajudicial source. FSM v. Skilling, 1 FSM Intrm. 464, 483 (Kos. 1984).

Adverse rulings by a judge in a case do not create grounds for disqualification from that case. FSM v. Skilling, 1 FSM Intrm. 464, 484 (Kos. 1984).

Due process does not require that a second judge decide motions for recusal where the trial judge accepts as true all of the factual allegations in the affidavit of the party seeking recusal, and must rule only on matters of law in making the decision to recuse or not recuse himself. Skilling v. FSM, 2 FSM Intrm. 209,

213 (App. 1986).

The procedure for recusal provided in the FSM Code, whereby a party may file a motion for recusal with an affidavit, and the judge must rule on the motion, stating his reasons for granting or denying the motion, before any further proceeding is taken, allows the moving party due process. Skilling v. FSM, 2 FSM Intrm. 209, 214 (App. 1986).

The bar against "public comment" by a judge regarding a case in trial, contained in 4 F.S.M.C. 122 and Canon 3A(6) of the American Bar Association Code of Judicial Conduct, is not violated by a trial court judge's encouraging a representative of the national official newspaper to publish his opinion on a motion for recusal, and such encouragement does not demonstrate partiality requiring recusal. Skilling v. FSM, 2 FSM Intrm. 209, 215 (App. 1986).

The trial judge is justified in denying a motion for recusal on the basis of failure of the moving party to file an affidavit explaining the factual basis for the motion. Skilling v. FSM, 2 FSM Intrm. 209, 216-17 (App. 1986).

The trial court judge's act of encouraging publication of his opinion on a motion for recusal in a national official newspaper, taken together with 1) the fining of defense counsel for tardiness, 2) the length of the sentence imposed, 3) the judge's comments about community support for defendant, explaining how that factor was taken into account in sentencing, and 4) the accelerated pace of sentencing proceedings, which was not contemporaneously objected to by defense counsel, do not indicate an abuse of discretion by the judge in denying the motion for recusal. Skilling v. FSM, 2 FSM Intrm. 209, 217 (App. 1986).

A party's motion to have a trial justice recuse himself is insufficient if not supported by affidavit as required by 4 F.S.M.C. 124(c). Jonas v. FSM (II), 2 FSM Intrm. 238, 239 (App. 1986).

Where a trial justice is asked to recuse himself rather than continue to sit on remaining counts after receiving testimony concerning stricken counts, the issue presented is whether there exists either actual bias, or prejudice, or appearance of partiality. Jonas v. FSM (II), 2 FSM Intrm. 238, 239 (App. 1986).

The fact that the Pohnpei Judiciary Act, 2L-160-82, §§ 30(1), (2), requires a judge to rule on a motion for recusal reveals that disqualification is not mandated but instead is at the discretion of the judge. Adams v. Etscheit, 4 FSM Intrm. 226, 230-31 (Pon. S. Ct. Tr. 1989).

Disqualification of a judge under the Pohnpei Judiciary Act, 2L-160-82, minimally requires: 1) a written motion for disqualification filed before the trial or hearing unless good cause is shown otherwise; 2) a good faith affidavit showing factual grounds; and 3) grounds which originated after January 20, 1984 when the Act became effective, whereupon impartiality is to be assessed on the basis of whether a disinterested reasonable Pohnpeian who knows all the circumstances would harbor doubt about the judge's impartiality. Adams v. Etscheit, 4 FSM Intrm. 226, 231-32 (Pon. S. Ct. Tr. 1989).

A motion requesting a trial court to reconsider its earlier ruling denying a motion for recusal may be denied where a party making the motion has been aware of the document upon which the motion is based for almost 10 years; where counsel who prepared the motion had done so without previously appearing before the trial judge to "assess the temper of that judge;" where the trial judge had studied the entire case "quite extensively" before the motion had been filed; and where there are "strong indications" that counsel is "judge-shopping," so that counsel's conduct "represents an example of a very serious and contemptuous misconduct" toward the court. Adams v. Etscheit, 4 FSM Intrm. 237, 238-40 (Pon. S. Ct. Tr. 1989).

To apply a standard of judicial ethics established by statute in 1982 to prevent a judge in 1989 from presiding over a case because his conduct prior to 1982 suggests that he now may be biased against the party seeking recusal would be inappropriate, in the nature of an ex post facto violation, and would be contrary to "the policy favoring prospective application of court decisions [which] also applies to statutes." Adams v. Etscheit, 4 FSM Intrm. 237, 240 (Pon. S. Ct. Tr. 1989).

The normal situation in which recusal may be required is when a judge's extrajudicial knowledge, relationship or dealings with a party or the judge's own personal or financial interests, might be such as to cause a reasonable person to question whether the judge could preside over and decide a particular case impartially. In re Main, 4 FSM Intrm. 255, 260 (App. 1990).

Recusal of a trial judge from presiding over a criminal trial, because he has presided over a failed effort to end the case through a guilty plea, is not automatic, since bias, to be disqualifying, generally must stem from an extrajudicial source. In re Main, 4 FSM Intrm. 255, 260 (App. 1990).

If a judge has participated as an advocate in related litigation touching upon the same parties, and in the course of that previous activity has taken a position concerning the issue now before him as a judge, the appearance of justice, as guaranteed by Due Process Clause, requires recusal. Etscheit v. Santos, 5 FSM Intrm. 35, 43 (App. 1991).

There are certain circumstances or relationships which, as a *per se* matter of due process, require almost automatic disqualification, and, if a judge has a direct, personal, substantial, pecuniary interest in the outcome of the case, recusal is constitutionally mandated. Etscheit v. Santos, 5 FSM Intrm. 35, 43 (App. 1991).

To prevent the "probability of unfairness," a former trial counselor or attorney must refrain from presiding as a trial judge over litigation involving his former client, and many of the same issues, and the same interests and the same land, with which the trial judge has been intimately involved as a trial counselor or attorney. Etscheit v. Santos, 5 FSM Intrm. 35, 45 (App. 1991).

Where an appellate court has held that a trial judge is under a clear and non-discretionary duty to step aside from presiding over a case and the petitioner has a constitutional right to obtain compliance with that duty, all documents issued after the date of the appellate decision are null and void and shall be expunged from the record and the judge shall be enjoined from taking any further action as a judge in the case. Etscheit v. Santos, 5 FSM Intrm. 111, 113 (App. 1991).

Mere argument by counsel, be it oral or set forth in a brief, is not the basis on which motions to disqualify are determined. Motions for recusal must be supported by affidavit stating the grounds for recusal. It is the movant's burden to go beyond wide-ranging speculation or conclusions and show a factual basis for recusal. Jano v. King, 5 FSM Intrm. 266, 268 (Pon. 1992).

Even when sufficient allegations have not been made, a judge may disqualify himself if he believes sufficient grounds exist. Jano v. King, 5 FSM Intrm. 266, 271 (Pon. 1992).

In determining whether a judge's impartiality might reasonably be questioned, the test is whether a disinterested reasonable person who knows all the circumstances would harbor doubts about the judge's impartiality. A reasonable disinterested observer would require more evidence than that one of the parties was seen at hotel with where the judge had checked in. Jano v. King, 5 FSM Intrm. 266, 270 (Pon. 1992).

In order to overturn the trial judge's denial of a motion to recuse, the appellant must show an abuse of discretion by the trial judge. The appellate court will not merely substitute its judgment for that of the trial judge. Jano v. King, 5 FSM Intrm. 326, 330 (App. 1992).

Even if neither party alleges or moves for disqualification a judge may disqualify himself if he believes sufficient grounds exist. Youngstrom v. Youngstrom, 5 FSM Intrm. 385, 387 (Pon. 1992).

In order for a judge's personal bias or prejudice to be disqualifying it must stem from an extrajudicial source or conduct, not from information learned or events occurring during the course of a trial. Youngstrom v. Youngstrom, 5 FSM Intrm. 385, 387 (Pon. 1992).

Before a judge disqualifies himself from a case he should also consider whether his disqualification will

cause considerable delay, require substantial expense and effort, and cause undue disruption in the advancement of the matter. Youngstrom v. Youngstrom, 5 FSM Intrm. 385, 387 (Pon. 1992).

Pursuant to Kosrae statute, judges of the Kosrae State Court are subject to the standards of the Code of Judicial Conduct approved by the American Bar Association. A trial judge who owns one or two shares in the plaintiff credit union must follow these standards in deciding whether to recuse himself. Waguk v. Kosrae Island Credit Union, 6 FSM Intrm. 14, 16-17 (App. 1993).

A justice who was a member of a body that negotiated the Compact and related agreements and who was the one member that signed the Compact and Extradition Agreement is not disqualified from presiding over an extradition proceeding by the circumstance of that participation on the ground that his impartiality might reasonably be questioned. In re Extradition of Jano, 6 FSM Intrm. 93, 97-98 (App. 1993).

Even where the circumstance does not give rise to a reasonable person questioning the justice's impartiality, if there is evidence of actual partiality disqualification would follow. In re Extradition of Jano, 6 FSM Intrm. 93, 98 (App. 1993).

The court is required by statute to rule on a motion to disqualify the sitting justice before proceeding further on the matter. Nahnken of Nett v. United States (I), 6 FSM Intrm. 318, 320 n.1 (Pon. 1994).

In order for a justice to be recused for an interest in the subject matter in controversy not only must the justice have an interest, but also it must be such that the interest could be substantially affected by the outcome of the proceeding. Nahnken of Nett v. United States (I), 6 FSM Intrm. 318, 321 (Pon. 1994).

A litigant's unsupported allegations that the trial judge may have subconscious misgivings is speculation and is insufficient to support the judge's disqualification. Nahnken of Nett v. United States (I), 6 FSM Intrm. 318, 322 (Pon. 1994).

Where the trial justice resides in housing provided for him by the national government by statute and is not an intended third-party beneficiary to the government's lease of the land and the action is only for money damages concerning the land the trial justice has no financial or other interest in the matter that may serve to disqualify the justice. Nahnken of Nett v. United States (I), 6 FSM Intrm. 318, 322 (Pon. 1994).

Given the social and geographical configuration of Micronesia the Rule of Necessity may oblige judges to hear and decide cases from which they would otherwise recuse themselves. Factors to be considered include delay, expense, and impact on other cases. Nahnken of Nett v. United States (I), 6 FSM Intrm. 318, 323-24 (Pon. 1994).

In order to overturn the trial judge's denial of a motion to recuse an appellant must show an abuse of the trial judge's discretion. The same standard of review applies to a petition for a writ of prohibition ordering a judge to recuse himself. Nahnken of Nett v. Trial Division, 6 FSM Intrm. 339, 340 (App. 1994).

Where trial justice resides in housing rented by the national government and assigned to the trial justice as a statutory part of his compensation and the party before the court only seeks a monetary award for the alleged loss of the land upon which the trial justice resides the trial justice has no interest which might be substantially affected by any of the relief requested. It is therefore not an abuse of the trial justice's discretion to deny a motion to recuse for interest or bias. Nahnken of Nett v. Trial Division, 6 FSM Intrm. 339, 340 (App. 1994).

A person who is not a party cannot move for the disqualification of the trial judge because persons who are not parties of record to a suit have no standing which will enable them to take part in or control the proceedings. Shiro v. Pios, 6 FSM Intrm. 541, 543 (Chk. S. Ct. App. 1994).

The proper method to obtain a writ of prohibition to disqualify a member of an appellate panel is to move for disqualification before that member, and, if the recusal motion is denied, to file a petition for a writ of

prohibition as a separate matter to be considered by an appellate panel constituted pursuant to Appellate Rule 21(a). Berman v. FSM Supreme Court (I), 7 FSM Intrm. 8, 10 (App. 1995).

In order for a writ of prohibition to issue to require a judge to recuse himself it must be an abuse of discretion for the judge not to recuse himself. Where it is not apparent what interest of the judge could be substantially affected by the outcome of the proceeding or that the judge is biased or prejudiced the writ will not issue. Berman v. FSM Supreme Court (I), 7 FSM Intrm. 8, 10 (App. 1995).

In considering motions for recusal a court must carefully analyze the grounds in terms of the disqualification statute, and it need not lightly grant such motions simply to accommodate or placate litigants or their counsel, lest the judge be violating his judicial oath to administer justice. Damarlane v. United States, 7 FSM Intrm. 52, 54 (Pon. S. Ct. App. 1995).

A motion for disqualification ordinarily may not be predicated on the judge's rulings in the case or in related cases, nor on a demonstrated tendency to rule in a particular way, nor on a particular judicial leaning or attitude derived from his experience on the bench. Damarlane v. United States, 7 FSM Intrm. 52, 54 (Pon. S. Ct. App. 1995).

For the questioning of a judge's impartiality to be reasonable it must be grounded upon facts or reasons which furnish a rational basis for doubting the judge's impartiality, and such reasonableness is not to be considered from the perspective of the litigant or of the judge, but of the disinterested reasonable observer. Damarlane v. United States, 7 FSM Intrm. 52, 54 (Pon. S. Ct. App. 1995).

Under the Pohnpei statute a party moving for disqualification of a judge must do so before the trial or hearings unless good cause is shown for filing it at a later time. Upon receipt of such a motion, the judge shall rule on it before proceeding further in the matter, stating his reasons for granting or denying it on the record. Damarlane v. United States, 7 FSM Intrm. 52, 55 (Pon. S. Ct. App. 1995).

Normally a judge will not be disqualified when after the case has been submitted for decision a party files an unrelated lawsuit against the judge. Damarlane v. United States, 7 FSM Intrm. 52, 55 (Pon. S. Ct. App. 1995).

The Chuuk Judiciary Act requires that a motion for a justice's disqualification be supported by affidavits to establish a factual basis for the motion, and that there be a hearing at which the movant must prove his allegations. In re Disqualification of Justice, 7 FSM Intrm. 278, 279 (Chk. S. Ct. Tr. 1995).

Allegations that are the basis for a motion for a justice's disqualification must be proven by admissible and competent evidence. Inadmissible affidavits are not enough. In re Disqualification of Justice, 7 FSM Intrm. 278, 279 (Chk. S. Ct. Tr. 1995).

A judge shall disqualify himself where he has served in governmental employment and in such capacity participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy. Fu Zhou Fuyan Pelagic Fishery Co. v. Wang Shun Ren, 7 FSM Intrm. 601, 604 (Pon. 1996).

A judge whose governmental employment ended before the facts arose that gave rise to the case in front of him is not disqualified from the case because he did not act as an adviser to or was a material witness to the agreement at issue. Fu Zhou Fuyan Pelagic Fishery Co. v. Wang Shun Ren, 7 FSM Intrm. 601, 604 (Pon. 1996).

The standard to be applied in reviewing a request for disqualification under 4 F.S.M.C. 124(1) is whether a disinterested reasonable observer who knows all the circumstances would harbor doubts about the judge's impartiality. A motion for disqualification must be supported by an affidavit which clearly sets forth the factual basis for the belief that grounds for disqualification exist. Fu Zhou Fuyan Pelagic Fishery Co. v. Wang Shun Ren, 7 FSM Intrm. 601, 605 (Pon. 1996).

A judge's impartiality cannot reasonably be questioned when the judge had been chairman of an agency while it concluded an agreement with a party to a case now before him where only a later agreement is at issue and he had no part in negotiating the first agreement. Fu Zhou Fuyan Pelagic Fishery Co. v. Wang Shun Ren, 7 FSM Intrm. 601, 605 (Pon. 1996).

The power of a justice to recuse himself must be exercised conscientiously, and should not be employed merely to accommodate or placate nervous litigants or counsel. A party's speculation about the justice's unconscious frame of mind is insufficient to create a basis for disqualification. Fu Zhou Fuyan Pelagic Fishery Co. v. Wang Shun Ren, 7 FSM Intrm. 601, 605 (Pon. 1996).

A due process challenge to a criminal contempt charge on the ground of the court's or its personnel's actions may be resolved by the judge's recusal and reassignment of the case to a judge whose impartiality has not been questioned. FSM v. Cheida, 7 FSM Intrm. 633, 638-39 (Chk. 1996).

Because a judge has a ministerial, non-discretionary duty to state on the record his reasons for denying a motion to disqualify himself a writ of prohibition may issue to prevent him from proceeding further on a case until he has done so. Ting Hong Oceanic Enterprises v. Trial Division, 7 FSM Intrm. 642, 643 (App. 1996).

A motion to recuse is untimely when it is brought over five weeks after the deadline for pretrial motions and when the movant had known for months which judge would be presiding over the trial. FSM v. Ting Hong Oceanic Enterprises, 7 FSM Intrm. 644, 647-48, 649 (Pon. 1996).

Because parties have a right to trial before a justice duly appointed by the President under Article XI of the Constitution the Rule of Necessity may be invoked to prevent recusal of a judge when no other judge is qualified to hear the case. FSM v. Ting Hong Oceanic Enterprises, 7 FSM Intrm. 644, 648 (Pon. 1996).

Statements and rulings made by a judge in the course of judicial proceedings do not provide grounds for disqualification under 4 F.S.M.C. 124(1). There is a presumption that judicial officials are unbiased, and the burden of proof is on the party asserting an unconstitutional bias to demonstrate otherwise. A party requesting recusal on retrial must establish that actual bias or prejudice exists that comes from an extrajudicial source. FSM v. Ting Hong Oceanic Enterprises, 7 FSM Intrm. 644, 649 (Pon. 1996).

A judge whose governmental employment ended before the events occurred that gave rise to the criminal case in front of him is not disqualified from the case because he did not act as an adviser to or was a material witness to the agreement at issue. FSM v. Ting Hong Oceanic Enterprises, 7 FSM Intrm. 644, 649-51 (Pon. 1996).

A denial of a motion to recuse may be reviewed by means of a petition for a writ of prohibition or mandamus. The standard of review is whether the trial judge abused his discretion in denying the motion to recuse. The petitioner must show that the trial judge clearly and indisputably abused his discretion when he denied the motion to disqualify. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM Intrm. 1, 4 (App. 1997).

A trial judge's discretion is limited by the disqualification statute, 4 F.S.M.C. 124, which prescribes under what circumstances he "shall disqualify himself." Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM Intrm. 1, 4 (App. 1997).

By statute, a motion to recuse should be brought before the trial or hearing unless good cause is shown for filing it at a later time. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM Intrm. 1, 5 (App. 1997).

A justice's obligation to recuse himself is not dependent on the existence of a party's motion to disqualify him. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM Intrm. 1, 5 (App. 1997).

When the issue of recusal was brought to the trial judge's attention well before the date he set for pretrial motions, a judge's obligation to recuse himself is not dependent on bringing a motion, and the motion was

timely by the terms of the statute because it was brought before trial even though brought after the date set for pretrial motions the motion to recuse cannot be denied as untimely. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM Intrm. 1, 5 (App. 1997).

The only time the Rule of Necessity may apply to allow a judge not to recuse himself is if no other judge is available to hear the case. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM Intrm. 1, 5 (App. 1997).

A judge who sat on an appellate panel that reversed a criminal conviction on the ground of ineffective assistance of counsel is not necessarily disqualified from presiding over the retrial or a later appeal. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM Intrm. 1, 5 (App. 1997).

Because a judicial official is presumed to be unbiased, a judge will not be required to recuse himself where the party seeking his recusal relies on presumptions and has not established a sufficient factual basis. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM Intrm. 1, 6 (App. 1997).

A charge of appearance of partiality must first have a factual basis. Recusal is then appropriate only if a disinterested reasonable person who knows all the circumstances would harbor doubts about the judge's impartiality. The facts must provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality. The trial judge has a range of discretion in making this determination. But a trial judge is not to use the standard of mere suspicion. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM Intrm. 1, 6-7 (App. 1997).

Merely because the trial judge was once the sole official whose responsibility it was to sign a fishing agreement that contained similar and identical terms to a later agreement at issue in a case now before him is insufficient ground to disqualify him from trying this case. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM Intrm. 1, 7 (App. 1997).

The general rule is that the disqualifying factors must be from an extrajudicial source. The normal situation in which recusal may be required is when a judge's extrajudicial knowledge, relationship or dealings with a party, or the judge's own personal or financial interests, might be such as to cause a reasonable person to question whether the judge could preside over and decide a particular case impartially. Even so, the judge may be disqualified from presiding further after a reversal if actual bias or prejudice or an appearance of partiality exists. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM Intrm. 1, 7 (App. 1997).

A judge is not required to recuse himself from a retrial of convictions reversed because of ineffective assistance of counsel where one of his factual findings from the first trial relied upon an independent ground as well as arguably inadmissible evidence when the appellate court never ruled that the finding was clearly erroneous. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM Intrm. 1, 8 (App. 1997).

A trial judge's view which the appellate court cannot be said to have been determined to be erroneous or based on evidence that must be rejected will not require his recusal from the retrial. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM Intrm. 1, 9 (App. 1997).

When disqualification is not required in order to insure retrial before an impartial judge the fact that reassignment would entail minor waste and inconvenience would not change the result. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM Intrm. 1, 9 (App. 1997).

There may be times when each of the grounds raised are insufficient to reasonably question the trial judge's impartiality, but the combination of all would cause a reasonable, disinterested person to harbor doubts about the judge's impartiality. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM Intrm. 1, 10 (App. 1997).

A justice whose extrajudicial statements exhibit a bias towards a party's counsel must disqualify himself under Pohnpei statute, and failure to do so is a denial of due process. Damarlane v. Pohnpei Legislature, 8

FSM Intrm. 23, 27-28 (App. 1997).

A judge who represented a party in an earlier action involving the identical claim is required to recuse himself from the case. Bank of Guam v. O'Sonis, 8 FSM Intrm. 301, 305 (Chk. 1998).

It is a due process violation for a former trial counselor or attorney to preside as a trial judge over litigation involving the same issues and interests he had been intimately involved with as a trial counselor or attorney, particularly where he had represented one of the litigants. Bank of Guam v. O'Sonis, 8 FSM Intrm. 301, 305 (Chk. 1998).

A party has a due process right to a hearing before an unbiased judge and a judge without an interest in the case's outcome. Bank of Guam v. O'Sonis, 8 FSM Intrm. 301, 305 (Chk. 1998).

Canon 3E(1) of the Code of Judicial Conduct, as adopted by Kosrae State Code, section 6.201, requires that a justice be disqualified in certain cases, including those cases where the judge is within the third degree relationship to one of the parties. The term "third degree relationship" is defined in the Code of Judicial Conduct and does not include cousin. Sigrah v. Kosrae State Land Comm'n, 9 FSM Intrm. 89, 92 (Kos. S. Ct. Tr. 1999).

Disqualification under the Code of Judicial Conduct based upon the justice's family relationship to a party is not mandatory when the party is a cousin because the third degree relationship does not include cousin. So when there are no specific allegations of the justice's partiality and the justice has no personal interest in the outcome, a motion to recuse in a matter involving a cousin may be denied. Sigrah v. Kosrae State Land Comm'n, 9 FSM Intrm. 89, 92 (Kos. S. Ct. Tr. 1999).

4 F.S.M.C. 124(6) provides that a party may move to disqualify a Supreme Court justice, and requires that such a motion be accompanied by an affidavit stating the reasons for belief that grounds for disqualification exist. Any disqualification motion must be filed before the trial or hearing, unless good cause is shown. Hartman v. Bank of Guam, 10 FSM Intrm. 89, 95-96 (App. 2001).

The type of partiality at which 4 F.S.M.C. 124(1) is aimed is extrajudicial bias, or bias resulting from information received by the judge outside of the judicial proceeding or proceedings in which the judge has participated. Hartman v. Bank of Guam, 10 FSM Intrm. 89, 96 (App. 2001).

It is not unusual for the same judge to hear interrelated matters involving one or more parties in common, and the fact that the same judge hears different cases involving the same party or parties and related issues does not automatically result in an appearance of partiality under 4 F.S.M.C. 124(1). Hartman v. Bank of Guam, 10 FSM Intrm. 89, 97 & n.5 (App. 2001).

A party in cases involving related issues is not entitled as a matter of right to a different judge for each case. Hartman v. Bank of Guam, 10 FSM Intrm. 89, 97 (App. 2001).

In the absence of a showing of any actual partiality or extrajudicial bias under 4 F.S.M.C. 124(1), a judge properly meets his obligation to hear the case. Hartman v. Bank of Guam, 10 FSM Intrm. 89, 98 (App. 2001).

Recusals are not required to be in writing. While the better practice would be that recusals be in writing, and the Legislature could require that practice if it so chose, there is currently no such statutory or constitutional requirement. Cholymay v. Chuuk State Election Comm'n, 10 FSM Intrm. 145, 151 (Chk. S. Ct. App. 2001).

In the usual case, a Chuuk State Supreme Court justice's temporary unavailability would not be grounds to consider him disqualified and unable to perform his professional and constitutional duty to preside on an appellate panel. But he is disqualified when the court is required by statute to decide the case by a certain date in the near future and the court would be unable to meet its statutory obligation if it had to await the justice's return. Cholymay v. Chuuk State Election Comm'n, 10 FSM Intrm. 145, 151 (Chk. S. Ct. App. 2001).

When all Chuuk State Supreme Court justices have been disqualified from presiding, an appellate panel will have to be constituted without a Chuuk State Supreme Court justice and with a temporarily-appointed justice to preside. Cholymay v. Chuuk State Election Comm'n, 10 FSM Intrm. 145, 151 (Chk. S. Ct. App. 2001).

The "rule of necessity" cannot be applied to force an otherwise disqualified justice to serve because as long as it is possible to appoint a temporary judge who is not disqualified, the rule of necessity has no application and cannot be resorted to. Cholymay v. Chuuk State Election Comm'n, 10 FSM Intrm. 145, 151 (Chk. S. Ct. App. 2001).

If the Chief Justice is a member of a Chuuk State Supreme Court appellate panel, or is so removed or disqualified, then the most senior associate justice who has not been removed or disqualified from the case shall appoint the temporary justices, but if all Chuuk State Supreme Court justices are disqualified and there is no associate justice that could appoint a panel in the Chief Justice's stead and there is no provision for the Chief Justice to appoint a temporary justice to make the appointments, then the rule of necessity, in this limited circumstance, allows the Chief Justice to make the panel appointments. Cholymay v. Chuuk State Election Comm'n, 10 FSM Intrm. 145, 152 (Chk. S. Ct. App. 2001).

A motion to recuse may be considered untimely when it is brought many weeks after the deadline for pretrial motions and where the movant has known for months which justice would be presiding over the trial. Shrew v. Kosrae, 10 FSM Intrm. 533, 535 (Kos. S. Ct. Tr. 2002).

A justice is required to disqualify himself in a proceeding in which a person within the third degree of relationship to the justice is to the justice's knowledge likely to be a material witness in the proceeding. Shrew v. Kosrae, 10 FSM Intrm. 533, 535 (Kos. S. Ct. Tr. 2002).

When the justice's brother has been named as a witness for trial the justice, pursuant to Canon 3.E(I)(d)(iv), is now disqualified from the proceeding. Shrew v. Kosrae, 10 FSM Intrm. 533, 535 (Kos. S. Ct. Tr. 2002).

A Chuuk State Supreme Court trial justice must be disqualified when the justice's impartiality might reasonably be questioned where he or his spouse, or a person within a close relationship to either of them, or the spouse of such person is a party to the proceeding. Kristoph v. Emin, 10 FSM Intrm. 650, 652 (Chk. S. Ct. Tr. 2002).

The ABA Code of Judicial Conduct provides that a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including when the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is a party to the proceeding. Kristoph v. Emin, 10 FSM Intrm. 650, 652-53 (Chk. S. Ct. Tr. 2002).

In order to obtain a justice's disqualification based upon Chk. S.L. No. 190-08, section 22(2)(d)(i), the moving party must establish by admissible evidence that the alleged relationship is within the third degree of relationship. It is not sufficient for disqualification that a party show that a justice is related to a party or a party's spouse solely by virtue of their membership in the same clan. Kristoph v. Emin, 10 FSM Intrm. 650, 653 (Chk. S. Ct. Tr. 2002).

When counsel's affidavit in support of a recusal motion fails to demonstrate in any way how he has personal knowledge of the relationships contained in his affidavit, rather than knowledge based upon statements made to him by others, his affidavit is deficient, and must be disregarded. Kristoph v. Emin, 10 FSM Intrm. 650, 654 (Chk. S. Ct. Tr. 2002).

When it is impossible to determine from an affidavit whether the degree of relationship is within the third degree of consanguinity, a motion to disqualify will be denied because failure to establish the degree of relationship by admissible evidence is fatal to a motion to disqualify. Kristoph v. Emin, 10 FSM Intrm. 650, 654 (Chk. S. Ct. Tr. 2002).

Claims that a trial justice has shown disfavor toward intervenors' counsel, or bias in rulings in the instant case or other cases can be dismissed as failing to provide valid grounds for disqualification. Kristoph v. Emin, 10 FSM Intrm. 650, 654 (Chk. S. Ct. Tr. 2002).

A party is entitled to an unbiased judge, not to a judge of their choosing. A party is not permitted to use a motion to disqualify a judge as a means of forum shopping. Kosrae v. Sigrah, 10 FSM Intrm. 654, 657 (Kos. S. Ct. Tr. 2002).

A justice's power to recuse himself must be exercised concientiously, and should not be used merely to accommodate nervous litigants or counsel. Kosrae State Code, § 6.1202 establishes the standards of conduct for Kosrae state justices, which includes the Code of Judicial Conduct of the American Bar Association. Kosrae v. Sigrah, 10 FSM Intrm. 654, 657 (Kos. S. Ct. Tr. 2002).

The term "disputed evidentiary facts concerning the proceeding" does not apply to disputed legal issues in the case. Even where a judge may have had prior opinions regarding a legal issue, this alone does not disqualify a judge. Kosrae v. Sigrah, 10 FSM Intrm. 654, 657 (Kos. S. Ct. Tr. 2002).

Even if a judge has commented on certain issues of law when he was a government employee, the judge is not disqualified, so long as he has not prejudged the particular case before him. Kosrae v. Sigrah, 10 FSM Intrm. 654, 657 (Kos. S. Ct. Tr. 2002).

The Code of Judicial Conduct requires that a judge disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned. Kosrae v. Sigrah, 10 FSM Intrm. 654, 658 (Kos. S. Ct. Tr. 2002).

In the absence of a showing of any actual partiality or extrajudicial bias, a judge properly meets his obligation to hear the case. Kosrae v. Sigrah, 10 FSM Intrm. 654, 658-59 (Kos. S. Ct. Tr. 2002).

A judge's participation in a constitutional convention does not require his recusal for having personal knowledge of disputed evidentiary facts concerning a provision adopted in that convention because any knowledge gained during the convention is not a disputed evidentiary fact. Kosrae v. Sigrah, 10 FSM Intrm. 654, 659 (Kos. S. Ct. Tr. 2002).

When the justice does not have personal knowledge of disputed evidentiary facts concerning the proceeding; when he has not prejudged any legal issues in this case; and when a disinterested reasonable observer, knowing all the facts and circumstances, would not have doubts regarding his impartiality in this case based upon his participation as a Constitutional Convention delegate nearly twenty years ago, the justice's disqualification is not required under the Code of Judicial Conduct. Kosrae v. Sigrah, 10 FSM Intrm. 654, 659 (Kos. S. Ct. Tr. 2002).

A party is entitled to an unbiased judge, not to a judge of their choosing. A party is not permitted to use a motion to disqualify a judge as a means of judge shopping. Jackson v. Kosrae State Election Comm'n, 11 FSM Intrm. 133, 135-36 (Kos. S. Ct. Tr. 2002).

The power of a justice to recuse himself must be exercised conscientiously, and should not be used merely to accommodate nervous litigants or counsel. Jackson v. Kosrae State Election Comm'n, 11 FSM Intrm. 133, 136 (Kos. S. Ct. Tr. 2002).

The Code of Judicial Conduct requires a justice to disqualify himself in a proceeding where the judge has personal bias or knowledge of disputed evidentiary facts concerning the proceeding. The term "disputed evidentiary facts concerning the proceeding" has been interpreted to mean facts involved in the actions or conduct of persons in a case. The term does not apply to the legal issues presented in the case. Jackson v. Kosrae State Election Comm'n, 11 FSM Intrm. 133, 136 (Kos. S. Ct. Tr. 2002).

The Code of Judicial Conduct requires that a judge disqualify himself in a proceeding in which the

judge's impartiality must reasonably be questioned. Jackson v. Kosrae State Election Comm'n, 11 FSM Intrm. 133, 136 (Kos. S. Ct. Tr. 2002).

Even when a judge has had prior opinions regarding a legal issue, this alone does not disqualify a judge, and even if a judge has commented on certain issues of law when he was a government employee, the judge is not disqualified so long as he has not prejudged the particular case before him. Jackson v. Kosrae State Election Comm'n, 11 FSM Intrm. 133, 137 (Kos. S. Ct. Tr. 2002).

In the absence of a showing of any actual partiality or extrajudicial bias, a judge properly meets his obligation to hear the case. Jackson v. Kosrae State Election Comm'n, 11 FSM Intrm. 133, 137 (Kos. S. Ct. Tr. 2002).

When a justice does not have personal knowledge of disputed evidentiary facts concerning a case involving the interpretation of constitutional provisions because any knowledge gained during a constitutional convention is not personal knowledge of disputed evidentiary facts concerning the case, and when the justice has not prejudged any legal issues in the case, a disinterested reasonable observer, knowing all the facts and circumstances, would not have doubts regarding the justice's impartiality in the case, based upon his participation as a constitutional convention delegate. The justice's disqualification is therefore not required. Jackson v. Kosrae State Election Comm'n, 11 FSM Intrm. 133, 137 (Kos. S. Ct. Tr. 2002).

There is no need to remand a matter for a new trial judge to consider the summary judgment motions when the knowledge that the defendants lived on part of the land was in the record and did not stem from an extrajudicial source; when there was no extrajudicial conduct because the trial judge received information from the former special master when both counsel were present; when trial counsel as well as the judge engaged in appeals to divine aid at the motion hearing; and when the judge encouraged settlement. Bualuay v. Rano, 11 FSM Intrm. 139, 148-49 (App. 2002).

Adverse rulings by a judge in a case do not create grounds for disqualification in that case. To be disqualifying, any alleged judicial bias and prejudice must be based upon an extrajudicial source. Tolenoa v. Kosrae, 11 FSM Intrm. 179, 182 (Kos. S. Ct. Tr. 2002).

It is a judge's duty not to disqualify himself unless he believes that there are proper and reasonable grounds therefor. Tolenoa v. Kosrae, 11 FSM Intrm. 179, 182 (Kos. S. Ct. Tr. 2002).

A motion to recuse should be brought before the trial or hearing unless good cause is shown filing it at a later time. Tolenoa v. Kosrae, 11 FSM Intrm. 179, 182 (Kos. S. Ct. Tr. 2002).

A justice is required to disqualify himself in a proceeding in which a person within the third degree of relationship to the justice is, to the justice's knowledge, likely to be a material witness in the proceeding, but when the justice's brother was never a witness in the case, was not named as a witness by either party, and did not testify at the trial, he was not a person likely to be a material witness in the proceeding and the justice's disqualification was not required on this basis. Tolenoa v. Kosrae, 11 FSM Intrm. 179, 183 (Kos. S. Ct. Tr. 2002).

The Code of Judicial Conduct requires a judge's disqualification when the judge or judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person is a party to the proceeding, or an officer, director or trustee of a party. But the phrase "director of a party" in the Code of Judicial Conduct is limited to corporations and business entities, and does not include directors in state government. Tolenoa v. Kosrae, 11 FSM Intrm. 179, 183-84 (Kos. S. Ct. Tr. 2002).

An application for a trial judge's disqualification must be filed at the earliest opportunity. This rule will be strictly applied against a party who, having knowledge of the facts constituting a disqualification, does not seek to disqualify the judge until an unfavorable ruling has been made. Tolenoa v. Kosrae, 11 FSM Intrm. 179, 184 (Kos. S. Ct. Tr. 2002).

The trial court may deny a motion for new trial when the motion's basis is the judge's failure to recuse himself and the party making the motion was, since the beginning of the case, aware of the information upon which the motion is based. Tolenoa v. Kosrae, 11 FSM Intrm. 179, 184 (Kos. S. Ct. Tr. 2002).

A justice is not required to recuse himself due to his former position as governor at the time that the plaintiff was moved into the teacher position in question. Tolenoa v. Kosrae, 11 FSM Intrm. 179, 184-85 (Kos. S. Ct. Tr. 2002).

When a motion is included with an alternative motion to recuse the judge it is proper to consider the motion to recuse first even though the motion to recuse is termed an "alternative" because, except for purely procedural or housekeeping matters, once a motion to recuse has been filed, it must be ruled on and reasons given before the judge may proceed further. FSM v. Wainit, 11 FSM Intrm. 424, 429 (Chk. 2003).

Generally, neither counsel nor a party may seek recusal of a judge by announcing that they intend to call the judge as a witness. The general rule is that since a court speaks only through its journal, a judge cannot testify about the meaning or intent of his decision in a case or explain aspects of the decision further. Nor can a judge be called to testify as to secret or unexplained reasons which led him to decide a case in a certain manner. FSM v. Wainit, 11 FSM Intrm. 424, 429 (Chk. 2003).

Attempts to disqualify judges by indicating that the judge will be called as a witness are not favored and are rarely granted. Such an easy method of disqualifying a judge should not be encouraged or allowed. FSM v. Wainit, 11 FSM Intrm. 424, 430 (Chk. 2003).

The prohibition against compelling a judge's testimony is reflected in a long-standing principle that a court speaks only through its orders. This ban on judges testifying has limits. Those limits are that a judge must be acting as a judge, and that it is information regarding his or her role as a judge that is sought. FSM v. Wainit, 11 FSM Intrm. 424, 430 (Chk. 2003).

When it is the judge's actions as a judge issuing a search warrant that a party would have the judge testify about, the judge is not a potential witness concerning his issuance of a search warrant, and thus this cannot be a ground to grant the recusal motion. FSM v. Wainit, 11 FSM Intrm. 424, 430 (Chk. 2003).

The applicable recusal statute requires that a Supreme Court justice disqualify himself in any proceeding in which his impartiality might reasonably be questioned. FSM v. Wainit, 11 FSM Intrm. 424, 430 (Chk. 2003).

When the court did not *sua sponte* raise the issue of the search warrant's validity and only proceeded to that question after defense counsel had insisted on entering that area and the government had orally waived its right to oppose the motion in writing and when there was no proper challenge to, and the court has made no ruling on, the arrest warrant's validity, the court will not grant a recusal motion because the court's oral or written rulings on a search warrant's validity or its issuance of an arrest warrant cannot be basis upon which its impartiality may be reasonably questioned and recusal granted. FSM v. Wainit, 11 FSM Intrm. 424, 430-31 (Chk. 2003).

A judge's statements and rulings made in the course of judicial proceedings do not provide grounds for disqualification under 4 F.S.M.C. 124(1) (appearance of partiality) and even a judge's adverse rulings made in the course of judicial proceedings do not provide grounds for disqualification under 4 F.S.M.C. 124(1). FSM v. Wainit, 11 FSM Intrm. 424, 431 (Chk. 2003).

Ex parte applications are allowed (and are usual) for warrant applications or motions to file under seal. No inference of a judge's partiality may be drawn from them. FSM v. Wainit, 11 FSM Intrm. 424, 431 (Chk. 2003).

The type of partiality at which 4 F.S.M.C. 124(1) is aimed is extrajudicial, that is, resulting from information received by the judge outside of the judicial proceeding or proceedings in which the judge has participated. FSM v. Wainit, 11 FSM Intrm. 424, 431 (Chk. 2003).

When the communications in question were not extrajudicial, the court's impartiality cannot be reasonably questioned because the government made *ex parte* applications it is allowed to make under the applicable law. This therefore cannot be a ground for recusal. FSM v. Wainit, 11 FSM Intrm. 424, 431-32 (Chk. 2003).

A charge of appearance of partiality must first have a factual basis and recusal is then appropriate only if a disinterested reasonable person who knows all the circumstances would harbor doubts about the judge's impartiality. The facts must provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality. While the trial judge has a range of discretion in making this determination, he cannot use a standard of mere suspicion. FSM v. Wainit, 11 FSM Intrm. 424, 432 (Chk. 2003).

When a party has not shown a factual basis to reasonably question the judge's impartiality, but only raised a mere suspicion, and when he has not shown a factual basis for a claim of bias or prejudice; and when he cannot call the current judge as a witness to testify about his judicial acts; and when even the combination of these would not cause a reasonable, disinterested person to harbor doubts about the judge's impartiality, the court can find no basis upon which to grant the motion to recuse. FSM v. Wainit, 11 FSM Intrm. 424, 432 (Chk. 2003).

The fact that the same judge hears different cases involving the same party or parties or related issues does not automatically result in an appearance of partiality under 4 F.S.M.C. 124(1). FSM v. Wainit, 11 FSM Intrm. 424, 432 (Chk. 2003).

In the absence of a showing of any actual partiality or extrajudicial bias under 4 F.S.M.C. 124(1), a judge properly meets his obligation to hear the case. FSM v. Wainit, 11 FSM Intrm. 424, 432 (Chk. 2003).

A Supreme Court justice must disqualify himself when a person within a close relationship to him is a director of a party and also in any proceeding in which his impartiality might reasonably be questioned. Adams v. Island Homes Constr., Inc., 12 FSM Intrm. 181, 182-83 (Pon. 2003).

The recusal statute provides that a justice shall disqualify himself if a closely related person is a director of a party, not has been or was at some point in the past. Therefore when the judge's brother's board membership and the judge's assignment to the case was never concurrent, there was not a time when 4 F.S.M.C. 124(2)(e)(i) was applicable, especially when the judge was not aware that his brother had been a member of party's board until so notified by the party's advice to the court. Adams v. Island Homes Constr., Inc., 12 FSM Intrm. 181, 183 (Pon. 2003).

The standard to be applied when a judge's recusal is sought on the ground a judge's impartiality might reasonably be questioned is whether a disinterested reasonable observer who knows all the circumstances would question the judge's impartiality. Adams v. Island Homes Constr., Inc., 12 FSM Intrm. 181, 183 (Pon. 2003).

When it has now been just over three and a half years since the judge's brother was last a party's board member, and more than six and a half years since he first became one, and when the judge was not aware that his brother had been a board member until so advised by the party, the judge's thinking in the course of the case could not have been influenced by a fact of which he was not aware, and the court cannot conclude that a disinterested reasonable observer who knows all of these circumstances would question the judge's impartiality. Adams v. Island Homes Constr., Inc., 12 FSM Intrm. 181, 183 (Pon. 2003).

A motion for disqualification of a Chuuk State Supreme Court justice must be supported by affidavits establishing a factual basis for the motion, and there must be a hearing where the moving party has the burden of proving the basis for the motion. Allegations that provide the basis for a motion to recuse must be proven by admissible and competent evidence. Kupenes v. Ungeni, 12 FSM Intrm. 252, 259 (Chk. S. Ct. Tr. 2003).

A Kosrae State Court judge's failure to disqualify himself, even though he was not asked to, does not constitute plain error requiring the appellate court to vacate and remand the matter to the Kosrae State Court when the case was not the same controversy as the case in which the judge had earlier acted as counsel because that case involved different land and different parties and its only apparent connection with this case was a will, but that will is inapplicable in this case and the prior case was dismissed on res judicata grounds without ever reaching any issues concerning the will. Anton v. Cornelius, 12 FSM Intrm. 280, 286 (App. 2003).

A judge must disqualify himself from a proceeding in which the judge's impartiality might reasonably be questioned, and in specific instances. The disqualifying factors must be from an extrajudicial source. Statements and rulings made by a judge in the course of judicial proceedings do not provide grounds for disqualification. Adverse rulings in a case are not grounds for disqualification of the presiding justice. The slow progress of the case is not based upon an extrajudicial source and therefore is not a basis for disqualification. Allen v. Kosrae, 13 FSM Intrm. 55, 59 (Kos. S. Ct. Tr. 2004).

A charge of appearance of partiality must first have a factual basis. The standard to be applied is whether an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality. The standard of "mere suspicion" is inadequate to support disqualification. Allen v. Kosrae, 13 FSM Intrm. 55, 59 (Kos. S. Ct. Tr. 2004).

Unsolicited letters from the public, expressing their views or requests on matters pending before the court, without anything more, cannot form the basis for disqualification of the justice to whom the letter was addressed. Unsupported allegations that the presiding judge may be influenced by an unsolicited letter is speculation and is insufficient to support the judge's disqualification. Allen v. Kosrae, 13 FSM Intrm. 55, 59 (Kos. S. Ct. Tr. 2004).

A motion to disqualify a judge that is not supported by an affidavit which explains the factual basis for the motion is insufficient and will be denied. Allen v. Kosrae, 13 FSM Intrm. 55, 59 (Kos. S. Ct. Tr. 2004).

CRIMINAL LAW AND PROCEDURE

Since the national government does not have major crimes jurisdiction over Title 11 Trust Territory Code assaults calling for imprisonment of no more than six months, the repealer clause of the National Criminal Code would not appear to repeal those sections. FSM v. Boaz (II), 1 FSM Intrm. 28, 30 (Pon. 1987).

It is doubtful that Congress would have the power to require that all criminal prosecutions be in the name of the Federated States of Micronesia. FSM v. Boaz (II), 1 FSM Intrm. 28, 31 (Pon. 1981).

The language employed by Congress in 11 F.S.M.C. 901 leaves no doubt that Congress was carefully limiting this provision for conduct of cases in the name of the national government to cases involving violation of laws enacted by the Congress and violations of statutes within the jurisdiction of the national government. FSM v. Boaz (II), 1 FSM Intrm. 28, 32 (Pon. 1981).

Familial relationships are an important segment, perhaps the most important component, of the custom and tradition referred to generally in the Constitution FSM Const. art. V, art. XI, § 11, and more specifically in the National Criminal Code. 11 F.S.M.C. 108, 1003. FSM v. Ruben, 1 FSM Intrm. 34, 40 (Truk 1981).

Where the FSM Supreme Court has jurisdiction over a violation of the National Criminal Code, it cannot then take jurisdiction over a non-major crime, which arose out of the same transaction and formed part of the same plan, under a theory of ancillary jurisdiction. FSM v. Hartman, 1 FSM Intrm. 43, 44-46 (Truk 1981).

The repealer clause of the National Criminal Code repealed those provisions of Title 11 of the Trust Territory Code above the monetary minimum of $1,000 set for major crimes. Where the value is below $1,000, section 2 does not apply because it is not within the national court jurisdiction. FSM v. Hartman, 1 FSM Intrm. 43, 46 (Truk 1981).

Title 11 of the Trust Territory Code is not inconsistent with nor violative of the FSM Constitution; therefore 11 Trust Territory Code continued in effect after the effective date of the Constitution and until the effective date of the National Criminal Code. Truk v. Otokichy, 1 FSM Intrm. 127, 130 (Truk 1982).

Title 11 of the Trust Territory Code, prior to the effective date of the National Criminal Code, is not a national law because its criminal jurisdiction was not expressly delegated to the national government, nor is the power it confers of indisputably national character; therefore, it is not within the jurisdiction of the FSM Supreme Court. Truk v. Otokichy, 1 FSM Intrm. 127, 130 (Truk 1982).

The delegation of judicial functions to the Federated States of Micronesia, pursuant to Secretarial Order 3039, section 2 does not by itself give the FSM Supreme Court jurisdiction over Title 11 Trust Territory Code crimes occurring before the effective date of the National Criminal Code. Truk v. Otokichy, 1 FSM Intrm. 127, 131 (Truk 1982).

Offenses prior to the effective date of the National Criminal Code are outside the jurisdiction of the FSM Supreme Court. Truk v. Otokichy, 1 FSM Intrm. 133, 134 (Truk 1982).

The FSM Supreme Court is required by the National Criminal Code to recognize generally accepted customs and to determine the applicability and effect of customary law in a criminal case; it is not authorized to develop new customary law. 11 F.S.M.C. 108. FSM v. Mudong, 1 FSM Intrm. 135, 140, 146-47 (Pon. 1982).

The FSM Supreme Court has jurisdiction to try Title 11 Trust Territory Code cases if they arise under a national law. Title 11 of the Trust Territory Code is not a national law. It was not adopted by Congress as a national law and it did not become a national law by virtue of the transition article. Truk v. Hartman, 1 FSM Intrm. 174, 178 (Truk 1982).

Change of forum for Title 11 Trust Territory Code cases from the Trust Territory High Court to the FSM Supreme Court is a procedural matter with no effect on the substantive rights of criminal defendants. In re Otokichy, 1 FSM Intrm. 183, 183 (App. 1982).

Sections of Title 11 of the Trust Territory Code covering matters within the jurisdiction of Congress owe their continuing vitality to section 102 of the National Criminal Code. Thus, the criminal prosecutions thereunder are a national matter and fall within the FSM Supreme Court's constitutional jurisdiction. 11 F.S.M.C. 102. In re Otokichy, 1 FSM Intrm. 183, 185 (App. 1982).

Upon inception of constitutional self-government by the people of the Federated States of Micronesia, criminal law provisions in Title 11 of the Trust Territory Code became the law of governments within the Federated States of Micronesia by virtue of the Constitution's transition provisions. In re Otokichy, 1 FSM Intrm. 183, 187 (App. 1982).

The savings clause, 11 F.S.M.C. 102(2), unlike the other sections of the National Criminal Code, was intended to apply to offenses committed before the Code's effective date. It specifically authorizes prosecutions of Title 11 Trust Territory Code offenses occurring prior to the enactment of the National Criminal Code. Therefore, these prosecutions fall within the FSM Supreme Court's constitutional jurisdiction. In re Otokichy, 1 FSM Intrm. 183, 189-90 (App. 1982).

Section 102(2) of the National Criminal Code preserved all the substantive rights of defendants applicable in a guilt determination proceeding as of the time of the crime's commission. 11 F.S.M.C. 102(2). In re Otokichy, 1 FSM Intrm. 183, 191-92 (App. 1982).

Change of forum for Title 11 Trust Territory Code cases from the Trust Territory High Court to the FSM Supreme Court is a procedural matter with no effect on the substantive rights of defendants. In re Otokichy, 1 FSM Intrm. 183, 193 (App. 1982).

Presumably, Congress inserted no specific jurisdictional provision in section 102 of the National Criminal Code because Congress recognized that the FSM Supreme Court would have jurisdiction over all cases arising under national law by virtue of article XI, section 6(b) of the Constitution. 11 F.S.M.C. 102. In re Otokichy, 1 FSM Intrm. 183, 193 (App. 1982).

The court must first look to sources of law and circumstances here to establish legal requirements in criminal cases rather than begin with a review of cases decided by other courts. Alaphonso v. FSM, 1 FSM Intrm. 209, 214 (App. 1982).

Although the Model Penal Code was the primary source for the National Criminal Code it was modified to suit the particular needs of the area. Laion v. FSM, 1 FSM Intrm. 503, 511 (App. 1984).

Where more than one offense or wrongful intent is charged in a single count, the trial court may require the government to select among the charges if failure to do so might result in prejudice to the defendant. However, this is a matter within the discretion of the trial court. Laion v. FSM, 1 FSM Intrm. 503, 517 (App. 1984).

A defendant is not unfairly prejudiced or incapable of preparing an intelligent defense, simply because the government insisted on each of 11 F.S.M.C. §§ 918 and 919's three adjectives, "intentionally, knowingly and recklessly," as possibly accurate descriptions of a defendant's frame of mind. Laion v. FSM, 1 FSM Intrm. 503, 518 (App. 1984).

The FSM Supreme Court Rules of Criminal Procedure were designed to avoid technicalities and gamesmanship in criminal pleading. They are to be construed to secure simplicity in procedure. Criminal Rule 2 convictions should not be reversed, nor the information thrown out, because of minor, technical objections which do not prejudice the accused. Laion v. FSM, 1 FSM Intrm. 503, 518 (App. 1984).

A trial court may in its discretion permit a case involving separate charges based upon the same act to proceed to trial. The court, however, should render a decision and enter a conviction only on the more major of the crimes proven beyond a reasonable doubt. After appeal, if any, has been completed, and the greater charge is reversed on appeal, the trial court may then find it necessary to enter a judgment on the lesser charge. Laion v. FSM, 1 FSM Intrm. 503, 529 (App. 1984).

Rule 7 of the FSM Rules of Criminal Procedure is based upon Rule 7 of the Federal Rules of Criminal Procedure employed by the United States federal courts. Engichy v. FSM, 1 FSM Intrm. 532, 541 (App. 1984).

11 F.S.M.C. 301 is one of a set of sections in Chapter 3 of the National Criminal Code specifying general principles of responsibility which apply implicitly to all substantive offenses but do not themselves enunciate substantive offenses. There are not subject to "violations" and are therefore not reached by Rule 7 of the FSM Rules of Criminal Procedure. These general principles are deemed applicable to all crimes, and mere failure to restate them in an Information is not a failure to inform or a violation of due process. Engichy v. FSM, 1 FSM Intrm. 532, 542 (App. 1984).

Article IV, section 6 of the FSM Constitution, as implemented by Rule 7(c) of the Rules of Criminal Procedure, requires that the government's reliance upon aggregation to bring an alleged crime within the jurisdictional boundaries of the court be plainly disclosed to the defendant in the information. Fred v. FSM, 3 FSM Intrm. 141, 144 (App. 1987).

Unchartered and unincorporated municipalities in Truk State have authority to enact curfew ordinances as long as they do not conflict with Truk State laws. David v. Fanapanges, 3 FSM Intrm. 495, 497 (Truk S. Ct. App. 1988).

State courts are not prohibited by article XI, section 6(b) of the FSM Constitution from hearing and determining cases where the defendants are from FSM states other than the prosecuting state. Jurisdiction

over criminal matters between the national and state governments is determined by the severity of the crime; not diversity of citizenship. Pohnpei v. Hawk, 3 FSM Intrm. 543, 554 (Pon. S. Ct. App. 1988).

The general rule of criminal procedure is that jurisdiction over a particular crime places in the trial division the necessary authority to find a defendant guilty of any offense necessarily included in the offense charged. Kosrae v. Tosie, 4 FSM Intrm. 61, 63 (Kos. 1989).

The function of the criminal law is to declare what conduct a society considers to be unacceptable and worthy of sanctions at the instigation of government on the society's behalf; the criminal law is thus the principal vehicle for the expression of the people's standards of right and wrong. Hawk v. Pohnpei, 4 FSM Intrm. 85, 91 (App. 1989).

In the course of the formation of the FSM, the allocation of responsibilities between states and nation was such that the impact of the national courts in criminal matters was to be in the area of major crimes and as the ultimate arbiter of human rights issues. Hawk v. Pohnpei, 4 FSM Intrm. 85, 93 (App. 1989).

Under the equal protection clause of the Declaration of Rights in the FSM Constitution, indigency alone should not disadvantage an accused in our system of criminal justice. Gilmete v. FSM, 4 FSM Intrm. 165, 169 (App. 1989).

In adopting the Declaration of Rights as part of the Constitution of the Federated States of Micronesia and therefore the supreme law of the land, the people of Micronesia subscribed to various principles which place upon the judiciary the obligation, among others, to assure that arrests are based upon probable cause, that determinations of guilt are arrived at fairly, and that punishments for wrongdoing are proportionate to the crime and meet prescribed standards. Tammed v. FSM, 4 FSM Intrm. 266, 281-82 (App. 1990).

The Chapman rule, which holds that a constitutional error can be found harmless only when it is harmless beyond a reasonable doubt, is suitable for the FSM. Jonah v. FSM, 5 FSM Intrm. 308, 314 (App. 1992).

Where the crimes charged are no longer those expressly delegated to Congress to define, or are not indisputedly of a national character the FSM Supreme Court has no subject matter jurisdiction. FSM v. Jano, 6 FSM Intrm. 9, 11 (Pon. 1993).

Criminal statutes in effect on the effective date of the State of Chuuk Constitution (Oct. 1, 1989) that are consistent with the Constitution continue in effect. Chuuk v. Arnish, 6 FSM Intrm. 611, 613 (Chk. S. Ct. Tr. 1994).

The law treats a company, although not an actual, living person, as a person for purposes of liability, and may hold it criminally liable. FSM v. Cheng Chia-W (II), 7 FSM Intrm. 205, 212 (Pon. 1995).

The unambiguous words of a statute which imposes criminal penalties cannot be altered by judicial construction to punish someone not otherwise within its reach, no matter how much he deserves punishment. FSM v. Webster George & Co., 7 FSM Intrm. 437, 440 (Kos. 1996).

A general section in a statute cannot expand the class of principals to whom the more specific sections are directed. FSM v. Webster George & Co., 7 FSM Intrm. 437, 440 (Kos. 1996).

A statute not cited in the information and not mentioned by the prosecution until closing argument cannot be the basis of criminal liability. FSM v. Webster George & Co., 7 FSM Intrm. 437, 440 (Kos. 1996).

A sole proprietorship cannot be charged as a principal if there are no acts or omissions committed by its owner, but it can be found culpable as an accessory if it is specifically charged with vicarious liability for the acts of another. FSM v. Webster George & Co., 7 FSM Intrm. 437, 441 (Kos. 1996).

Proceedings concerning the arrest or release of a vessel should take place in the civil action in which it is a defendant, not in a related criminal case. Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 471, 474 n.4, 475 n.5 (App. 1996).

The criminal conviction of two defendants who never appeared for trial is plain error, and their trial court convictions must be vacated. Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 471, 477 (App. 1996).

A judgment that is reversed and remanded stands as if no trial has yet been held. A party whose convictions have been reversed stands in the position of an accused who has not yet been tried. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM Intrm. 1, 5 (App. 1997).

In an appeal of a criminal conviction, before the appellate court can conclude that a trial court error was harmless, the court must conclude that it was harmless beyond a reasonable doubt. Yinmed v. Yap, 8 FSM Intrm. 95, 99 (Yap S. Ct. App. 1997).

When the Yap Legislature has not demonstrated a positive intent to authorize conviction for two crimes, one of which requires proof of an additional fact, on the same facts, the trial court should render a decision and enter a conviction only on the more major of the crimes proven beyond a reasonable doubt. Therefore a conviction for aggravated assault should be vacated when for the same act there is a conviction for assault with a dangerous weapon, which requires proof of an additional fact. Yinmed v. Yap, 8 FSM Intrm. 95, 101 (Yap S. Ct. App. 1997).

Congress has the express power to define national crimes, and until the Constitution was amended in 1991, Congress also had the express power to define major crimes. FSM v. Fal, 8 FSM Intrm. 151, 153 (Yap 1997).

A national crime is one that is committed in some place where the national government has jurisdiction, or that involves an instrumentality of the national government, or involves an activity that the national government has the power to regulate. This power to define national crimes was inherent in the national government and existed before the 1991 constitutional amendment made the power express. FSM v. Fal, 8 FSM Intrm. 151, 154 (Yap 1997).

Because a corporate principal may be held criminally liable for its agent's conduct when the agent acts within the scope of its authority for the principal's benefit, a foreign fishing agreement party may be held criminally liable for the conduct of its authorized vessel. FSM v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 166, 176 (Pon. 1997).

An authorized vessel's master's knowledge is attributable to its foreign fishing agreement party because knowledge held by an agent or employee of a corporation may be attributed to its principal. FSM v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 166, 180 (Pon. 1997).

In reviewing a criminal conviction against an insufficiency of the evidence challenge, the appellate court must ask whether the trier of fact could reasonably have been convinced beyond a reasonable doubt by the evidence it had a right to believe and accept as true. Nelson v. Kosrae, 8 FSM Intrm. 397, 401 (App. 1998).

A first and fundamental principle of criminal jurisprudence is that in order for a state to impose criminal penalties on an individual, it must be shown that he or she committed some unlawful act or engaged in some prohibited course of conduct, together with a wrongful intent or mens rea. Nelson v. Kosrae, 8 FSM Intrm. 397, 405 (App. 1998).

The criminal law is not to be used to settle conflicting claims to property. Property disputes in Micronesia strain the social fabric of the communities in which they occur. The filing of a criminal action injects an element of criminality into a matter which is, at its core, civil, and increases that strain. Nelson v. Kosrae, 8 FSM Intrm. 397, 406 (App. 1998).

The legislative history of Title 54 indicates that it was created as a system primarily aimed at recovering revenue rather than punishing wrongdoers with lengthy prison sentences and that the fines and criminal penalties adopted in it were thought to be commensurate with the specified wrongdoing. FSM v. Edwin, 8 FSM Intrm. 543, 547 (Pon. 1998).

The National Criminal Code was primarily drawn from the Model Penal Code modified to suit the particular needs of the area. FSM v. Edwin, 8 FSM Intrm. 543, 548 (Pon. 1998).

There is no clearly expressed Congressional intent for the criminal code to be used to prosecute tax crimes. Since the FSM had existing laws with comprehensive civil and criminal penalties applicable to tax crimes at the time the criminal code was adopted, the implication is that the criminal code was not intended for the purpose of prosecuting such crimes. FSM v. Edwin, 8 FSM Intrm. 543, 549 (Pon. 1998).

A court's finding of guilt and sentencing would not render illegal, or prevent, customary forgiveness of the defendant by the victim's family or clan. Whatever the court does, customary settlement may remain desirable to resolve lingering hostility and disputes between the families. Chuuk v. Sound, 8 FSM Intrm. 577, 579 (Chk. S. Ct. Tr. 1998).

A customary forgiveness ceremony resolving disputes among families or clans may not prevent the court system from determining the individual guilt of the defendant and considering whether societal notions of justice and the need to uphold law and order require fining, imprisonment or other restriction of the defendant's freedom. Chuuk v. Sound, 8 FSM Intrm. 577, 579 (Chk. S. Ct. Tr. 1998).

When, in a three-year old criminal appeal, notice was served requiring appellant's opening brief to be filed and served by a certain date and the notice further stated that failure to do so would be grounds for dismissal of the appeal, no brief was ever filed and a motion bordering on frivolous was filed for more time, the motion may be denied and the case is remanded to the trial division for additional proceedings, including sentencing, as is provided for by law. Reselap v. Chuuk, 8 FSM Intrm. 584, 586-87 (Chk. S. Ct. App. 1998).

The purpose of an information, summons or warrant is to inform the defendant of what he is called upon to defend. Chuuk v. Defang, 9 FSM Intrm. 43, 45 (Chk. S. Ct. Tr. 1999).

The Chuuk State Supreme Court is authorized by law to do all acts as may be necessary for due administration of justice, including the issuance of a bench warrant. Chuuk v. Defang, 9 FSM Intrm. 43, 45 (Chk. S. Ct. Tr. 1999).

The purpose of a preliminary examination is two-fold. The court must determine whether there is probable cause to believe that a criminal offense has been committed and that the arrested person committed it. FSM v. Moses, 9 FSM Intrm. 139, 145 (Pon. 1999).

No probable cause to believe that a criminal offense has been committed exists when the defendants' alleged conduct as set out in the information has not been made criminal under any statute, rule, or regulation to which the court's attention has been directed. FSM v. Moses, 9 FSM Intrm. 139, 145 (Pon. 1999).

When the FSM moves for a stay of a civil case to preserve the defendants' rights in a related criminal case and the defendants oppose the motion and claim that they would suffer substantial prejudice from a delayed prosecution of the civil action and when the FSM had the prosecutorial discretion to file both the civil and criminal cases simultaneously, although there is nothing in the statute requiring that, the motion to stay will be denied and, in the absence of good cause, the civil case will go forward. FSM v. Zhong Yuan Fishery Co., 9 FSM Intrm. 351, 353 (Kos. 2000).

The statute that provides for joint law enforcement agreements between the national government and the states reflects a public policy in favor of cooperative law enforcement undertakings. FSM v. Zhong Yuan Fishery Co., 9 FSM Intrm. 421, 423 (Kos. 2000).

The standard to be applied in reviewing a criminal conviction against an insufficiency of the evidence challenge is whether the appellate court can conclude that the trier of fact could reasonably have been convinced beyond a reasonable doubt by the evidence which it had a right to believe and accept as true. The appellate court must review the evidence in the light most favorable to the trial court's factual determination. A trial court's factual findings challenged for insufficiency are reviewed on a clearly erroneous standard, while the appellate court may disagree with and overrule the trial court's conclusions of law. Sander v. FSM, 9 FSM Intrm. 442, 449 (App. 2000).

FSM Appellate Procedure Rule 9(c) sets forth the criteria for release pending an appeal from a criminal conviction. The burden of establishing the requisite criteria rests with the defendant. FSM v. Akapito, 10 FSM Intrm. 255, 256 (Chk. 2001).

The legislative privilege doctrine has both substantive and evidentiary aspects. In substance, the doctrine renders legislators immune from civil and criminal liability based on either speech or debate in the course of proceedings in the legislature. From an evidentiary standpoint, a legislator may claim the privilege in declining to answer any questions outside the legislature itself where those questions concern how a legislator voted, acted, or decided on matters within the sphere of legitimate legislative activity. AHPW, Inc. v. FSM, 10 FSM Intrm. 420, 425 (Pon. 2001).

Although the court must first look to sources of law and circumstances in the FSM to establish legal requirements in criminal cases rather than begin with a review of cases decided by other courts, when an FSM court has not previously construed an FSM criminal procedure rule which is identical or similar to a U.S. counterpart, the court may look to U.S. sources for guidance in interpreting the rule. FSM v. Wainit, 11 FSM Intrm. 1, 11 n.2 (Chk. 2002).

The Pohnpei state criminal statutes were intended to provide for criminal penalties for those who commit certain acts which are prohibited by the Act. The Pohnpei Crimes Act is not intended to create a basis for private parties to sue other parties, but to enable the Pohnpei state government to be able to punish those persons who violate provisions of the Act. Statutes which do not by their terms provide citizens with a cause of action for money damages cannot be the basis for private damages claims. Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 17, 25 (Pon. 2002).

In a criminal appeal, the appropriate standard of review for sufficiency of the evidence questions is whether, reviewing the evidence in the light most favorable to the trial court's determinations of fact, there is sufficient evidence to convince a reasonable trier of fact of the defendant's guilt beyond a reasonable doubt. Yow v. Yap, 11 FSM Intrm. 63, 65 (Yap S. Ct. App. 2002).

The word "demand" means "ask as by right." When a police officer did request and ask as by right for the defendant's driver's license, even though the officer did not use the word "demand," the officer's request to the defendant for his driver's license satisfies the statute's "demand" requirement. Kosrae v. Sigrah, 11 FSM Intrm. 263, 264 (Kos. S. Ct. Tr. 2002).

It is fundamental that no person may be deprived of liberty without due process of law. Due process of law, in the case of citizens accused of a crime, includes the right to be promptly brought before a Chuuk State Supreme Court justice, or other judicial officer, and to be informed of the charges being brought against him. In re Paul, 11 FSM Intrm. 273, 278 (Chk. S. Ct. Tr. 2002).

The right of a person arrested for the commission of a crime to due process of law, including the right to be promptly brought before a Chuuk State Supreme Court justice or other judicial officer for initial appearance within 24 hours of his arrest, is a fundamental right afforded to all Chuuk citizens. Only under the most extraordinary circumstances, and then only with a specific, clear, and unambiguous statement, may a Governor's declaration of emergency suspend this due process right or other civil rights of Chuuk citizens. In re Paul, 11 FSM Intrm. 273, 280 (Chk. S. Ct. Tr. 2002).

When there are no reported decisions in the FSM interpreting a Chuuk Criminal Rule, the Chuuk State

Supreme Court may look for guidance to cases addressing the issue from the U.S. Federal Circuits. Trust Territory v. Edgar, 11 FSM Intrm. 303, 306 n.2 (Chk. S. Ct. Tr. 2002).

Logic dictates that certain events in the course of a criminal investigation and prosecution will involve ex parte communications with a judge. For example, giving advance notice of an impending search could defeat the purposes of the search where property permitted to be seized was located on the about-to-be searched premises. Similarly, giving a defendant notice of the filing of a criminal complaint or information prior to arrest could facilitate a defendant's avoidance of arrest were a defendant disinclined to cooperate with law enforcement. FSM v. Wainit, 11 FSM Intrm. 411, 413 (Pon. 2003).

One subparagraph of a criminal rule should not be read so as to render another subparagraph unsusceptible to a meaning readily derived from the words employed at best, and indecipherable at worst. FSM v. Wainit, 11 FSM Intrm. 511, 513 (Pon. 2003).

Prosecutions for offenses committed before the effective date of the new national criminal code are governed by the prior law, which is continued as if the new code were not in force. FSM v. Wainit, 12 FSM Intrm. 105, 108 (Chk. 2003).

Although the court must first look to FSM sources of law and circumstances to establish legal requirements in criminal cases rather than begin with a review of cases decided by other courts, when an FSM court has not previously construed an FSM procedural rule which is identical or similar to a U.S. counterpart, the court may look to U.S. sources for guidance in interpreting the rule. FSM v. Wainit, 12 FSM Intrm. 105, 109 n.1 (Chk. 2003).

A felony is an offense punishable by more than one year in prison and a misdemeanor is an offense punishable by more than 30 days imprisonment and up to one year. FSM v. Wainit, 12 FSM Intrm. 105, 109 n.2 (Chk. 2003).

By deliberately using a different term in 11 F.S.M.C. 105(3)(b) from the one defined in 11 F.S.M.C. 104(11), the drafters can only have intended that the meaning be different, and, by not defining it, that the term's meaning should be the common, ordinary English language meaning of the term because words and phrases as used in the code must be read with their context and be construed according to the common and approved usage of the English language. FSM v. Wainit, 12 FSM Intrm. 105, 110 (Chk. 2003).

When the statute's drafters deliberately chose the term "public officer" in an exception to the criminal statute of limitations instead of using the term "public servant," as they did in so many other criminal code sections, the statute's object and the drafters' intent was to apply this exception to all public officers, not just to those the criminal code defined as "public servants." This is the statute's plain and unambiguous meaning. If the drafters had intended to restrict the exception to just those persons that had been defined as "public servants," they could easily have inserted that term instead. FSM v. Wainit, 12 FSM Intrm. 105, 111 (Chk. 2003).

As jeopardy does not attach in a criminal case until the first witness is sworn in to testify at trial, the trial court will therefore not stay pretrial proceedings while the defendant seeks appellate review because rulings on pretrial motions not yet filed may dispose of the case entirely in the defendant's favor. FSM v. Wainit, 12 FSM Intrm. 201, 204 (Chk. 2003).

The only stay of a pending criminal case while appellate review is sought that the trial court could consider granting would be a stay of trial. For a stay to be granted, the appeal must be meritorious – a substantial likelihood that the applicant will prevail. A stay is normally granted only where the court is persuaded as to the probability of the movant's ultimate success. FSM v. Wainit, 12 FSM Intrm. 201, 204 (Chk. 2003).

In order for a defendant to be granted a stay of a criminal proceeding while he seeks interlocutory appellate review, he must show that his appeal or his petition is meritorious and has a substantial likelihood

of success on the merits. FSM v. Wainit, 12 FSM Intrm. 201, 205 (Chk. 2003).

A person commits an offense if he 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 having so exercised any right, privilege, or immunity secured to him by the FSM Constitution or laws. Section 701(3) provides for civil liability, including attorney's fees, against any person engaging in the proscribed conduct. "Person" includes state governments. Wortel v. Bickett, 12 FSM Intrm. 223, 225 (Kos. 2003).

A court cannot infer criminal conduct when the FSM statute at issue is not tailored to prohibit general threats, but only those that expressly are for the purpose of influencing a decision of a public officer. When there are no applicable criminal prohibitions in the Code of the Federated States of Micronesia, it is Congress, not the court, that must act to more specifically prohibit such threatening statements or conduct. In re FSM Nat'l Police Case No. NP 10-04-03, 12 FSM Intrm. 248, 251 (Pon. 2003).

Although the court must first look to FSM sources of law to establish legal principles in criminal cases rather than begin with a review of cases decided by other courts, the court may also look to U.S. sources for guidance in interpreting a rule when the FSM rule is identical or similar to a U.S. counterpart. FSM v. Wainit, 12 FSM Intrm. 376, 381 n.3 (Chk. 2004).

The Constitution permits the Chief Justice to promulgate rules, including criminal procedure rules, which Congress may amend by statute. Congress has the authority to amend or create procedural rules by statute, and when Congress has enacted a procedural rule, it is valid. The Chief Justice does not have the authority to amend Congressionally-enacted statutes. Therefore, if the statute applies and the statute and the rule conflict, the statute must prevail. FSM v. Wainit, 12 FSM Intrm. 376, 383 (Chk. 2004).

The statute, 12 F.S.M.C. 204, and the rule, FSM Crim. R. 4(a), applying to criminal complaints cannot be followed when no complaint was ever filed and when the government earlier filed a criminal information. FSM v. Wainit, 12 FSM Intrm. 376, 383-84 (Chk. 2004).

A complaint is made upon oath before a judicial officer or a clerk of the court. FSM v. Wainit, 12 FSM Intrm. 376, 384 (Chk. 2004).

Unlike the appellate rules, neither the civil nor criminal procedure rules provide for an amicus curiae's appearance, although the court has in the past invited amicus curiae briefs in civil cases. FSM v. Sipos, 12 FSM Intrm. 385, 387 (Chk. 2004).

Although the court must first look to FSM sources of law and circumstances to establish legal requirements in criminal cases rather than begin with a review of cases decided by other courts, when the court has not previously construed an FSM criminal procedure rule which is identical or similar to a U.S. rule, it may look to U.S. sources for guidance. FSM v. Wainit, 12 FSM Intrm. 405, 409 n.3 (Chk. 2004).

The national criminal code signed into law on January 25, 2001, does not apply to acts committed before its effective date, and prosecutions for offenses committed before the effective date are governed by the prior law, which is continued in effect for that purpose. FSM v. Ching Feng 767, 12 FSM Intrm. 498, 501 (Pon. 2004).

Under previous law, A felony is an offense which may be punished by imprisonment for more than one year; a petty misdemeanor is an offense which may be punished by imprisonment for not more than 30 days; and every other offense is a misdemeanor. FSM v. Ching Feng 767, 12 FSM Intrm. 498, 501 (Pon. 2004).

When, for the offenses charged, a defendant convicted of the crime cannot be subjected to any imprisonment, the offenses are classified as petty misdemeanors. FSM v. Ching Feng 767, 12 FSM Intrm. 498, 501 (Pon. 2004).

As a general principle, a court must impose the least severe sanction that will accomplish the desired result of prompt and full compliance with applicable criminal procedure. FSM v. Kansou, 13 FSM Intrm. 48, 50 (Chk. 2004).

Although the court must first look to FSM sources of law and circumstances to establish legal requirements in criminal cases rather than begin with a review of other courts' decisions, when an FSM court has not previously construed an FSM criminal procedure rule which is identical or similar to a U.S. rule, the court may look to U.S. sources for guidance in interpreting the rule. FSM v. Fritz, 13 FSM Intrm. 85, 87 n.1 (Chk. 2004).

Although the court must first look to FSM sources of law and circumstances to establish legal requirements in criminal cases rather than begin with a review of other courts' decisions, when an FSM court has not previously construed an FSM criminal procedure rule which is identical or similar to a U.S. counterpart, the court may look to U.S. sources for guidance in interpreting the rule. FSM v. Fritz, 13 FSM Intrm. 88, 90 (Chk. 2004).

When our nation's highest court, the FSM Supreme Court appellate division, interprets a constitutional provision in a case before it, that interpretation is to be given full effect in all cases still open on direct review, and as to all events, regardless of when they occurred. Once it announces a new rule of law, the integrity of judicial review requires application of the new rule to all similar cases pending on review. Kosrae v. Sikain, 13 FSM Intrm. 174, 177 (Kos. S. Ct. Tr. 2005).

New constitutional rules affecting procedures in criminal cases apply only to those cases which are pending on direct review or which are not yet final when the new rules are announced. Thus a new constitutional rule announced in a January, 2004 decision will apply to a May 2003 case still pending at that time. Kosrae v. Sikain, 13 FSM Intrm. 174, 177 (Kos. S. Ct. Tr. 2005).

– Accessory

The offense of accessory requires proof beyond a reasonable doubt of a person who, knowing that an offense has been committed, receives, relieves, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment. Kosrae v. Nena, 12 FSM Intrm. 525, 528 (Kos. S. Ct. Tr. 2004).

When the defendants, through their actions, did comfort and assist a relative in order to prevent his apprehension or arrest by a police lieutenant and they knew that that their relative had committed a criminal offense and that the police lieutenant was attempting to arrest him for that offense and the defendants admitted that they were trying to get him away so that he could be delivered to other relatives, the state has proved beyond a reasonable doubt all elements of the criminal offense of accessory. Kosrae v. Nena, 12 FSM Intrm. 525, 528 (Kos. S. Ct. Tr. 2004).

– Aggravated Assault

The requisite intent for aggravated assault cannot be found simply by determining that the defendant purposely engaged in conduct which caused serious bodily injury. The crime of aggravated assault assumes at the very least disregard by the defendant for the well-being of the victim, and more typically, requires desire on the part of the defendant to injure the victim seriously. Laion v. FSM, 1 FSM Intrm. 503, 519-20 (App. 1984).

Causal connection between an act done purposely and serious bodily injury to another is not sufficient to establish the crime of aggravated assault, even when the act is coupled with an intention to cause bodily injury. Serious bodily injury, not just an injury, must have been intended in order to commit aggravated assault. Laion v. FSM, 1 FSM Intrm. 503, 520 (App. 1984).

In context of a claim of aggravated assault which calls for "causing serious bodily injury intentionally," the words, "engaged in the conduct," in 11 F.S.M.C. 104(4) mean engaging in the conduct of causing serious bodily injury. Section 104(4) mean engaging in the conduct of causing serious bodily injury or to cause a result, which is itself serious bodily injury. Laion v. FSM, 1 FSM Intrm. 503, 520 (App. 1984).

A person is guilty of acting recklessly with extreme indifference to the value of human life under the aggravated assault statute, 11 F.S.M.C. 916, if he voluntarily creates conditions or acts in such manner that a reasonable person would deem likely to result in serious injury to another. Machuo v. FSM, 6 FSM Intrm. 40, 43 (App. 1993).

A defendant who holds a knife in his hands, engages in a fight while extremely drunk and knowing that at least one other person is in the immediate vicinity, and who strikes another with the knife causing serious physical harm is guilty of aggravated assault. Machuo v. FSM, 6 FSM Intrm. 40, 44 (App. 1993).

When the Yap Legislature has not demonstrated a positive intent to authorize conviction for two crimes, one of which requires proof of an additional fact, on the same facts, the trial court should render a decision and enter a conviction only on the more major of the crimes proven beyond a reasonable doubt. Therefore a conviction for aggravated assault should be vacated when for the same act there is a conviction for assault with a dangerous weapon, which requires proof of an additional fact. Yinmed v. Yap, 8 FSM Intrm. 95, 101 (Yap S. Ct. App. 1997).

Kosrae statute provides that aggravated assault is assaulting, striking, beating, or wounding another with a dangerous weapon, with an intent to kill, rape, rob, inflict grievous bodily harm or to commit any other felony. Palik v. Kosrae, 8 FSM Intrm. 509, 513 (App. 1998).

A dangerous weapon is any object that, as used or attempted to be used, can endanger life or inflict great bodily harm. Shoes worn on the feet are dangerous weapons when used to kick a victim. Stationary objects can also be dangerous or deadly weapons. Palik v. Kosrae, 8 FSM Intrm. 509, 513 (App. 1998).

The offense of aggravated assault is included in the resulting homicide. Accordingly, an aggravated assault conviction cannot be used to support a felony-murder conviction. Palik v. Kosrae, 8 FSM Intrm. 509, 515 (App. 1998).

Aggravated assault in Yap is when a person attempts to cause serious bodily injury to another or causes serious bodily injury intentionally, knowingly, or recklessly under circumstances showing extreme indifference to the value of human life. Yow v. Yap, 11 FSM Intrm. 63, 65 (Yap S. Ct. App. 2002).

Yap's aggravated assault statute requires a showing of serious bodily injury, and serious bodily injury, not just any injury, must have been intended. Serious bodily injury is bodily injury which creates a substantial risk of death or which causes serious, or permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. The injury must be coupled with the specific intent to inflict that injury. Yow v. Yap, 11 FSM Intrm. 63, 66 (Yap S. Ct. App. 2002).

Anyone who knowingly causes serious bodily injury has committed aggravated assault, but when a person has acted intentionally to beat someone any difference between these two mental states does not add materially to the discussion. Yow v. Yap, 11 FSM Intrm. 63, 66 (Yap S. Ct. App. 2002).

A person commits aggravated assault under the extreme indifference recklessness state of mind when he voluntarily creates conditions or engages in behavior that a reasonable person would consider likely to result in serious injury to another. "Likely" means of such nature or so circumstanced as to render something probable. Yow v. Yap, 11 FSM Intrm. 63, 68 (Yap S. Ct. App. 2002).

The offense of aggravated assault requires proof beyond a reasonable doubt of assaulting, striking, beating, or wounding another with a dangerous weapon, with an intent to kill, rape, rob, inflict grievous bodily harm, or to commit any other felony. Kosrae v. Sigrah, 12 FSM Intrm. 562, 566 (Kos. S. Ct. Tr. 2004).

When the defendant pushed the victim's face into the pillow but there was no evidence presented that the pillow was used to assault, strike, beat or wound the victim, the pillow was not used as a dangerous weapon within the elements of the offense of aggravated assault and the state thus has not proven beyond a reasonable doubt the criminal offense of aggravated assault. Kosrae v. Sigrah, 12 FSM Intrm. 562, 566 (Kos. S. Ct. Tr. 2004).

– Aiding and Abetting

11 F.S.M.C. 301 is one of a set of sections in Chapter 3 of the National Criminal Code specifying general principles of responsibility which apply implicitly to all substantive offenses but do not themselves enunciate substantive offenses. These are not subject to "violation" and are therefore not reached by Rule 7 of the FSM Rules of Criminal Procedure. These general principles are deemed applicable to all crimes, and mere failure to restate them in an Information is not a failure to inform or a violation of due process. Engichy v. FSM, 1 FSM Intrm. 532, 542 (App. 1984).

In criminal proceedings where several persons are charged with the murder of the same victim, the plain implication is that while one person's act may have been the direct cause of the death of the victim, the government surely will be contending that all others have participated or aided or assisted the killing in some way. It is inherent in a prosecution against multiple defendants for a single murder that defendants will be confronted with charges that they either actually killed the victim or assisted one or more persons who did so. Engichy v. FSM, 1 FSM Intrm. 532, 544 (App. 1984).

Under 11 F.S.M.C. 301(2) defendants are held responsible for the natural consequences of joining and encouraging others in unlawful use of dangerous weapons and brutal beatings of others. Engichy v. FSM, 1 FSM Intrm. 532, 548 (App. 1984).

One who suggests to his drinking companions that they obtain additional liquor by taking a bottle from construction laborers in the area, and who then leads his companions in an effort to attack one of the workers,

solicits more possibilities than just the taking of a bottle, and is guilty of aiding and abetting the robbery of a watch and money from another construction worker carried out by his companions while the original instigator is still pursuing the first laborer. FSM v. Hadley, 3 FSM Intrm. 281, 284 (Pon. 1987).

It is reasonably foreseeable that a robbery of watch and money from a Korean construction worker may be a probable consequence of a common plan to take a bottle from "some Koreans," and the person who suggests the plan and initiates efforts to attack one of the construction workers may be held guilty of aiding and abetting the robbery of watch and money carried out by his companions against another Korean worker, immediately after the defendant initiated the first attack. FSM v. Hadley, 3 FSM Intrm. 281, 284 (Pon. 1987).

Under 11 F.S.M.C. 301, defendants who are charged with being aided and abetted by others are not entitled to an allegation specifying the acts constituting the aiding and abetting. Hartman v. FSM, 5 FSM Intrm. 224, 232 (App. 1991).

When there are verdicts that are inconsistent to such an extent that an essential element cannot be proven beyond a reasonable doubt a resulting conviction is reversible error. Thus when someone is convicted of a charge for which an essential element is being aided and abetted by another and that other is acquitted of being an aider and abettor the conviction is reversible error for failure of proof beyond a reasonable doubt of the essential element of being aided and abetted. Hartman v. FSM, 6 FSM Intrm. 293, 300-01 (App. 1993).

A person can be criminally liable for the conduct of another if having a legal duty to prevent the commission of an offense, he fails to make proper effort to do so. FSM v. Cheng Chia-W (II), 7 FSM Intrm. 205, 212 (Pon. 1995).

The acts of agents, illegal or otherwise, are the acts of the principal itself provided that those acts are in the ordinary course of the agent's business relationship with its principal because under accepted principles of agency law a principal is responsible for the criminal acts of its agents provided that those acts where committed in furtherance of the agents' business relationship with the principal. FSM v. Cheng Chia-W (II), 7 FSM Intrm. 205, 212-13 (Pon. 1995).

When a law punishes criminal conduct only by a consignee and the government prosecutes agents of the consignee, it must proceed under the principles of vicarious criminal liability governed by 11 F.S.M.C. 301. FSM v. Webster George & Co., 7 FSM Intrm. 437, 440 (Kos. 1996).

A person who allegedly aided and abetted another to commit an offense must be specifically charged with aiding and abetting in the information. FSM v. Webster George & Co., 7 FSM Intrm. 437, 440 (Kos. 1996).

A sole proprietorship cannot be charged as a principal if there are no acts or omissions committed by its owner, but it can be found culpable as an accessory if it is specifically charged with vicarious liability for the acts of another. FSM v. Webster George & Co., 7 FSM Intrm. 437, 441 (Kos. 1996).

– Arrest and Custody

No right is held more sacred, or is more carefully guarded by the common law than the right of every individual to the possession and control of his own person, free from all restraints or interference of others, unless by clear and unquestionable authority of law. FSM v. Tipen, 1 FSM Intrm. 79, 86 (Pon. 1983).

The purpose of FSM Appellate Rule 9 is to permit a defendant held in custody, or subjected to conditions of release, to receive expedited review of that restriction of his freedom. There is no suggestion in the rule nor in any other authority indicating that the government is entitled to appeal from the pretrial release of a defendant. FSM v. Yal'Mad, 1 FSM Intrm. 196, 198 (App. 1982).

The law generally requires that a prisoner test the legality of his detention in a court of law rather than attempt to enforce his own claim to freedom. FSM v. Doone, 1 FSM Intrm. 365, 368 (Pon. 1983).

Where a municipal police officer intending to make an arrest for unlawful drinking, informs the accused that he is going to "take him to a place" because he was drinking and where there are indications that the accused understands that the officer is seeking to effect an arrest, there is sufficient compliance with the requirement of 12 F.S.M.C. 214 that arresting officers "make every reasonable effort to advise the person arrested as to the cause and authority of the arrest." Loch v. FSM, 1 FSM Intrm. 566, 569 (App. 1984).

A police officer is entitled under 12 F.S.M.C. 215 to respond to physical resistance or attacks against him as he attempts to make an arrest and he may use whatever force is reasonably necessary to defend himself or others from harm. However, the police officer may not employ more force than he reasonably believes to be necessary, either to effect arrest or to defend himself. Loch v. FSM, 1 FSM Intrm. 566, 570 (App. 1984).

Where no Micronesian legislative body has addressed the rules concerning arrests and where no party suggests that the matter is influenced by customary law, the principles stated in the *Restatements of Torts* concerning use of deadly force may be considered in determining, for purposes of a criminal case, the scope of police officer's right to use force while making an arrest. Loch v. FSM, 1 FSM Intrm. 566, 570 (App. 1984).

The interest of society in the life of its members, even though they be felons or reasonably suspected of felony, is so great that the use of force involving serious danger to them is privileged only as a last resort when it reasonably appears that there is no other alternative except abandoning his attempts to make the arrest. In determining whether the use of such force is privileged, the actor has not the same latitude of discretion which is permitted to him in determining whether it is necessary to use force which is intended or likely to cause less serious consequences. Loch v. FSM, 1 FSM Intrm. 566, 570 (App. 1984).

Deadly force by a police officer attempting to effect an arrest, may be justified by evidence indicating the defendant reasonably believes that there is no alternative method of effecting the arrest and that deadly force is necessary as a last resort. Loch v. FSM, 1 FSM Intrm. 566, 571-72 (App. 1984).

Reasonableness of a police officer's conduct in using deadly force while making an arrest must be assessed on the basis of the information the police officer had when he acted. Loch v. FSM, 1 FSM Intrm. 566, 571-72 (App. 1984).

It is quite reasonable for a police officer, who uses a deadly weapon in deadly fashion against a person armed with a knife, to obtain a weapon that will afford him a means of protecting himself against the knife and intimidating the person to be arrested. Loch v. FSM, 1 FSM Intrm. 566, 573 (App. 1984).

Where a police officer arms himself with a weapon to arrest a man armed with a knife, and then uses the weapon in a deadly fashion without first giving the person an opportunity to submit and without determining whether the person intends to use the knife to prevent arrest, this use of force cannot be viewed as a last resort necessary to the arrest not as reasonably necessary to protect the police officer from serious bodily injury. Loch v. FSM, 1 FSM Intrm. 566, 573 (App. 1984).

While a police officer may use force to effect an arrest and to protect himself and other citizens, he may not use force simply to punish people he dislikes or those he decides have done wrong. The principal functions of the police officer are to preserve peace and order and to apprehend lawbreakers so that they may be tried by the courts and handled justly. Loch v. FSM, 1 FSM Intrm. 566, 574-75 (App. 1984).

Punishment is no part of the police officer's assignment. A policeman who chooses to mete out punishment violates his office and does so at his own peril. Loch v. FSM, 1 FSM Intrm. 566, 575 (App. 1984).

It is not unreasonable for a trial court to conclude that a police officer, claiming to effect an arrest, who hits a person four times with a mangrove coconut husker and kills him was trying to kill him. Loch v. FSM, 1 FSM Intrm. 566, 576 (App. 1984).

A constitutional search may be conducted without a warrant if the search is incidental to a lawful arrest.

Ludwig v. FSM, 2 FSM Intrm. 27, 32 (App. 1985).

Suspicion of guilt can justify the extreme action of an arrest only when based upon reasonable grounds known to the arresting officer at the time of arrest so strong that a cautious man would "believe," that is, consider it more likely than not that the accused is guilty of the offense. Ludwig v. FSM, 2 FSM Intrm. 27, 33 (App. 1985).

A police officer making an arrest has a limited right to conduct a search incident to that arrest. This right to search is for the limited purposes of preventing the arrested person from reaching concealed weapons to injure the officer or others, and from destroying evidence. Although the right to search is of limited scope, it plainly authorizes a reasonable search of the person being arrested. Ludwig v. FSM, 2 FSM Intrm. 27, 34 (App. 1985).

Police may question persons who, while they are in police custody, fall under suspicion for another crime, without regard to the fact that other persons in a similar category would be released without questioning. FSM v. Jonathan, 2 FSM Intrm. 189, 199 (Kos. 1986).

A police vehicle being used to transport an arrested person from the police station to the jail is a custodial facility within the meaning of 11 F.S.M.C. 505(3), and a person who, having been informed that he is under arrest, flees from such a vehicle and the custody of a police officer authorized to detain or arrest persons on behalf of the Federated States of Micronesia, is guilty of an escape under 11 F.S.M.C. 501(1). Doone v. FSM, 2 FSM Intrm. 103, 106 (App. 1985).

A municipality which employs untrained persons as police officers, then fails to train them and authorizes their use of excessive force and summary punishment, will be held responsible for their unlawful acts, including abuse of a prisoner arrested without being advised of the charges or given an opportunity for bail, whose handcuffs were repeatedly tightened during his 14 hour detention in such a way that he was injured and unable to work for one month. Moses v. Municipality of Polle, 2 FSM Intrm. 270, 271 (Truk 1986).

A municipality which employs untrained persons as police officers, fails to train them and authorizes their use of excessive force and summary punishment, will be held responsible for their actions in stripping a prisoner, handcuffing his leg to a table and his arms behind his back, then kicking and abusing him. Alaphen v. Municipality of Moen, 2 FSM Intrm. 279, 280 (Truk 1986).

Under FSM law, courts will rarely be required to look to the Constitution to determine the scope of any right a person in custody may have to be advised of rights before questioning because national statute establishes the rights of persons accused of national crimes. 12 F.S.M.C. §§ 218, 220. FSM v. Edward, 3 FSM Intrm. 224, 230 (Pon. 1987).

One should be considered "arrested," for the purposes of the right to be advised of his rights to remain silent when one's freedom of movement is substantially restricted or controlled by a police officer exercising official authority based upon the officer's suspicion that the detained persons may be, or may have been, involved in commission of a crime. FSM v. Edward, 3 FSM Intrm. 224, 232 (Pon. 1987).

In making an otherwise lawful arrest, a police officer may use whatever force is reasonably necessary to effect the arrest, and no more; he must avoid using unnecessary violence. Meitou v. Uwera, 5 FSM Intrm. 139, 143 (Chk. S. Ct. Tr. 1991).

A person's constitutional right to due process of law, and his right to be free from cruel and unusual punishment is violated when an officer instead of protecting the person from attack, threw him to the ground, and beat the person in the jail. Meitou v. Uwera, 5 FSM Intrm. 139, 144 (Chk. S. Ct. Tr. 1991).

The use of force by police officers is not privileged or justified when the arrestee was so drunk and unstable to resist or defend himself and when the police officer used force because he was enraged at being insulted by the arrestee. Meitou v. Uwera, 5 FSM Intrm. 139, 144 (Chk. S. Ct. Tr. 1991).

Constitutional provisions applicable to a prisoner may vary depending on his status. A pre-trial detainee has a stronger right to liberty, which right is protected by the Due Process Clause, FSM Const. art. IV, § 3. A convicted prisoner's claims upon liberty have been diminished through due process so that person must rely primarily on article IV, section 8 which protects him from cruel and unusual punishment. Plais v. Panuelo, 5 FSM Intrm. 179, 190 (Pon. 1991).

In a case where a convicted prisoner, who is also a pre-trial detainee, asserts civil rights claims arising out of ill-treatment after arrest, denial of access to family is a due process claim, and physical abuse involves due process as well as cruel and unusual punishment claims. Plais v. Panuelo, 5 FSM Intrm. 179, 190 (Pon. 1991).

A person arrested by the police must be brought before a justice of the state court without unnecessary delay, not to exceed twenty-four hours. Chuuk v. Arnish, 6 FSM Intrm. 611, 613 (Chk. S. Ct. Tr. 1994).

An arrest is illegal if, at or before the time of arrest, the police make no reasonable effort to advise the person arrested as to the cause and authority of the arrest. FSM v. George, 6 FSM Intrm. 626, 628 (Kos. 1994).

Police officers' authority to issue citations in lieu of complaints or information is provided by law. In any case in which a policeman may lawfully arrest a person without a warrant, he may instead, subject to such limitations as his superiors may impose, issue and serve a citation upon the person, if he deems that the public interest does not require an arrest. Chuuk v. Dereas, 8 FSM Intrm. 599, 602 (Chk. S. Ct. Tr. 1998).

A bench warrant is a process issued by the court itself, or from the bench, for the attachment or arrest of a person. One accused of crime, not in custody or under bail, may be brought before the court, after information filed, by means of a bench warrant or a capias, for his arrest; and the state has the right to have as many capias issued as are necessary to accomplish its duty to try one accused. Chuuk v. Defang, 9 FSM Intrm. 43, 44 (Chk. S. Ct. Tr. 1999).

If a defendant fails to appear in response to a summons, a warrant shall issue. Chuuk v. Defang, 9 FSM Intrm. 43, 45 (Chk. S. Ct. Tr. 1999).

A warrant must be signed by a judicial officer, contain the defendant's name, describe the offense, and command that the defendant be arrested and brought before a judicial officer. Chuuk v. Defang, 9 FSM Intrm. 43, 45 (Chk. S. Ct. Tr. 1999).

Police must bring an arrested person before a state court justice without unnecessary delay, not to exceed 24 hours. Estate of Mori v. Chuuk, 10 FSM Intrm. 6, 10 n.1 (Chk. 2001).

A person is considered arrested for the purpose of the right to be advised of his constitutional rights, when his freedom is substantially restricted or controlled by a police officer who is exercising official authority based upon the officer's suspicion that the person may have been involved in the commission of a crime. Kosrae v. Erwin, 11 FSM Intrm. 192, 193 (Kos. S. Ct. Tr. 2002).

Where a person's freedom was substantially restricted by a police officer when he was placed into a police car and where that person was under the police officer's suspicion that he was involved in the crimes committed earlier that evening, he was considered arrested for the purpose of the right to be advised of his constitutional rights to remain silent and to have legal counsel. And when the police officers failed to advise him of his constitutional rights at the time he was placed in the police car and considered arrested, all his statements made to the police after his arrest and placement into the police car and before he was advised of his constitutional rights, are inadmissible against him. Kosrae v. Erwin, 11 FSM Intrm. 192, 193-94 (Kos. S. Ct. Tr. 2002).

Kosrae state legislators are, in all cases except felony or breach of peace, privileged from arrest during their attendance at sessions or committee meetings of the Legislature, and in going to and returning from the

same. Kosrae v. Sigrah, 11 FSM Intrm. 249, 253 (Kos. S. Ct. Tr. 2002).

When an arrest occurs will depend on the facts of each case. A person should be considered "arrested" when one's freedom of movement is substantially restricted or controlled by a police officer exercising official authority, based upon the officer's suspicion that the detained persons may be or may have been involved in commission of a crime. Kosrae v. Sigrah, 11 FSM Intrm. 249, 253 (Kos. S. Ct. Tr. 2002).

The validity of an arrest is judged by an objective standard, instead of accepting the police officer's personal motives. Factors which may be considered include a police officer's display of a weapon, threatening presence of several officers, or a police officer's use of language indicating compliance is required. Kosrae v. Sigrah, 11 FSM Intrm. 249, 253 (Kos. S. Ct. Tr. 2002).

Arrest means placing any person under any form of detention by legal authority. Kosrae v. Sigrah, 11 FSM Intrm. 249, 253 (Kos. S. Ct. Tr. 2002).

Where a person's freedom of movement was not substantially restricted or controlled when he was stopped at a roadblock and was issued a citation and where there was no display of weapon by the police officer and there was no threatening presence or language by the police officers who conducted the roadblock, based upon an objective standard, the person was not arrested when he was stopped at a roadblock and issued a citation. Evidence obtained under these circumstances at a roadblock was not obtained in violation of a Senator's immunity from arrest. Kosrae v. Sigrah, 11 FSM Intrm. 249, 253 (Kos. S. Ct. Tr. 2002).

A person who is stopped for a routine traffic offense is not in custody for purposes of Miranda warnings. Kosrae v. Sigrah, 11 FSM Intrm. 249, 255 (Kos. S. Ct. Tr. 2002).

The Kosrae Constitution, Article II, Section 1(e) provides that the defendant in a criminal case has a right to be informed of the nature of the accusation against him, and Kosrae State Code, Section 17.1102 further requires that at or before making an arrest, a person makes a reasonable attempt to inform the arrested person of the cause and authority of the arrest. Kosrae v. Anton, 12 FSM Intrm. 217, 219 (Kos. S. Ct. Tr. 2003).

An arrest is illegal if, at or before the time of arrest, the police make no reasonable effort to advise the person arrested as to the cause and authority of the arrest. Kosrae v. Anton, 12 FSM Intrm. 217, 219 (Kos. S. Ct. Tr. 2003).

When an arrest was executed in violation of law, the remedy is to suppress the defendant's statement to the police. Kosrae v. Anton, 12 FSM Intrm. 217, 219 (Kos. S. Ct. Tr. 2003).

When a defendant understood through the statements made by the officer that he was being arrested for the incident which took place on the previous day, the defendant was given adequate information regarding the cause and authority for his arrest, and therefore there was no statutory or constitutional violation of the defendant's right to be informed of the reason for his arrest. Kosrae v. Anton, 12 FSM Intrm. 217, 219 (Kos. S. Ct. Tr. 2003).

Even assuming that there was an illegal arrest, a defendant is still not entitled to dismissal of the information. The remedy for an illegal arrest, for failure to provide cause and authority of the arrest, is suppression of any statements made by the defendant. When he did not make any statements to the police, there are no statements to suppress. Kosrae v. Anton, 12 FSM Intrm. 217, 219-20 (Kos. S. Ct. Tr. 2003).

Under Kosrae statute, following commission of an offense a police officer who has reasonable grounds to believe that a particular person has committed the offense may arrest the person. This establishes the standard for the arrest of a person, but it does not establish the standard for the police to conduct an investigatory stop of a vehicle. Kosrae v. Tosie, 12 FSM Intrm. 296, 299 (Kos. S. Ct. Tr. 2004).

When there are no decisions by FSM courts which discuss which standard applies to conducting an

investigatory stop of a vehicle, the court may look to the law of the United States for guidance. Kosrae v. Tosie, 12 FSM Intrm. 296, 299 (Kos. S. Ct. Tr. 2004).

Reasonable suspicion is required for police officers to make an investigatory stop of a vehicle. "Reasonable suspicion" is a particularized and objective basis for suspecting that a person is engaged in a criminal activity. Kosrae v. Tosie, 12 FSM Intrm. 296, 299 (Kos. S. Ct. Tr. 2004).

Generally, an anonymous tip is not sufficient justification for a stop by the police. Police need sufficient reasonable articulated suspicion. Kosrae v. Tosie, 12 FSM Intrm. 296, 299 (Kos. S. Ct. Tr. 2004).

A police officer may, as a general rule, consider any evidence in determining whether reasonable suspicion or probable cause exists. The information may be provided by an informer. Police should consider the underlying circumstances from which the informer drew his conclusion. Some of the underlying circumstances must show that the informant was reliable. However, evidence to establish reasonable suspicion or probable cause may be entirely based upon hearsay. The general rule is that virtually any evidence may be considered. Kosrae v. Tosie, 12 FSM Intrm. 296, 299 (Kos. S. Ct. Tr. 2004).

When an officer has made a warrantless arrest by relying upon a tip from an informant, the reviewing court will evaluate the tip based upon the totality of the circumstances, including the informant's truthfulness and reliability, and the basis of his or her knowledge. Deficiency in one prong may be compensated for by a strong showing of the other. Kosrae v. Tosie, 12 FSM Intrm. 296, 299 (Kos. S. Ct. Tr. 2004).

Once the police have reasonable suspicion that the Defendant has committed a criminal offense, they may conduct an investigatory stop, which is a temporary stop to confirm or dispel the suspicion which initially induced the investigatory stop. Investigatory stops are based upon less than probable cause and are temporary in nature. The information gained at the investigatory stop is then used to confirm or dispel the initial suspicion, and then either arrest or release the defendant. Kosrae v. Tosie, 12 FSM Intrm. 296, 300 (Kos. S. Ct. Tr. 2004).

A criminal prosecution for driving under the influence will not be dismissed when the police officers had sufficient reasonable suspicion to conduct an investigatory stop of the defendant because the reasonable suspicion was supplied by an informant, whose identity, credibility, reputation and reliability were known. When at the investigatory stop, the police observed signs of the defendant's alcohol impairment, these signs provided grounds for the police to administer the field sobriety tests to the defendant, and when the defendant failed two field sobriety tests, it gave the police reasonable grounds and probable cause for defendant's commission of driving under the influence and probable cause to arrest the defendant. Kosrae v. Tosie, 12 FSM Intrm. 296, 300 (Kos. S. Ct. Tr. 2004).

A roadblock stop where all oncoming traffic was stopped is not an arrest. Just as indubitably, such a stop is a "seizure" within the meaning of the proscription against unreasonable search and seizures. Sigrah v. Kosrae, 12 FSM Intrm. 320, 328 (App. 2004).

– Assault and Battery

Where one person, encouraged by the defendant to commit an assault, carries out the assault and then proceeds to commit robbery by the taking of turtle meat from the possession of the assaulted person, the defendant is not guilty of robbery where: 1) he did not suggest taking of the turtle meat or anything of value; 2) there is no showing that he could have foreseen the assault would be followed by the taking of something of value; and 3) the defendant left the premises before the turtle meat was taken. FSM v. Carl, 1 FSM Intrm. 1, 2 (Pon. 1981).

A simple assault, one without a weapon or the intent to inflict serious bodily injury, is punishable only by six months' imprisonment. Therefore, it is neither a major crime under the National Criminal Code, because it does not call for three years' imprisonment, nor a felony. FSM v. Boaz (I), 1 FSM Intrm. 22, 24 n.* (Pon. 1981).

Under section 951 of the National Criminal Code the issue is not whether the defendant actually committed an assault or a battery, but whether he entered the house with the purpose of committing an assault. 11 F.S.M.C. 951(1). FSM v. Boaz (I), 1 FSM Intrm. 22, 25-26 (Pon. 1981).

Because Congress defined a major crime under the National Criminal Code as one calling for imprisonment of three years or more and because assaults under Title 11 of the Trust Territory Code are punishable by only six months' imprisonment, it is clear that the assault provisions of the Trust Territory Code are left intact. FSM v. Boaz (II), 1 FSM Intrm. 28, 30 (Pon. 1981).

The crimes of assault, and assault and battery, undoubtedly are necessarily included within the charges of assault with a dangerous weapon and aggravated assault, because they all relate to the protection of the same interests and are so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense. Kosrae v. Tosie, 4 FSM Intrm. 61, 63 (Kos. 1989).

When the Yap Legislature has not demonstrated a positive intent to authorize conviction for two crimes, one of which requires proof of an additional fact, on the same facts, the trial court should render a decision and enter a conviction only on the more major of the crimes proven beyond a reasonable doubt. Therefore a conviction for aggravated assault should be vacated when for the same act there is a conviction for assault with a dangerous weapon, which requires proof of an additional fact. Yinmed v. Yap, 8 FSM Intrm. 95, 101 (Yap S. Ct. App. 1997).

When the defendant did not strike, beat, wound or otherwise cause bodily harm to the complainant, the state has failed to prove beyond a reasonable doubt that the defendant committed an assault and battery upon the complainant, and that charge must be dismissed. Kosrae v. Jonah, 10 FSM Intrm. 270, 272 (Kos. S. Ct. Tr. 2001).

An assault and battery in Yap is when a person unlawfully strikes, beats, wounds or otherwise does bodily harm to another. Simple assault does not require proof of specific intent. Yow v. Yap, 11 FSM Intrm. 63, 66 (Yap S. Ct. App. 2002).

An assault against a national public servant at the national government capitol complex in Palikir, in the middle of a workday, in the National Public Auditor's Office demonstrates precisely the national government's interests that Congress sought to protect by defining a crime against a national public servant in the course of the public servant's employment as a national crime. FSM v. Anson, 11 FSM Intrm. 69, 74 (Pon. 2002).

Assault is defined as offering or attempting, with force or violence, to strike, beat, wound, or to do bodily harm to another. Kosrae v. Jackson, 12 FSM Intrm. 93, 100 (Kos. S. Ct. Tr. 2003).

When the state has proven that the defendant also threatened the victim with a knife after the sexual assault, and told her not to tell anyone what had happened, the state has proven all the elements of the offense of assault beyond a reasonable doubt. Kosrae v. Jackson, 12 FSM Intrm. 93, 100 (Kos. S. Ct. Tr. 2003).

The offense of assault and battery requires proof beyond a reasonable doubt of striking, beating, wounding, or otherwise doing bodily harm to another. Kosrae v. Sigrah, 12 FSM Intrm. 562, 567 (Kos. S. Ct. Tr. 2004).

When the evidence is undisputed that the defendant held the victim down, placed his hand over her mouth, and prevented her escape from his attack upon her, and these actions resulted in bodily harm to the victim, the state has proved beyond a reasonable doubt all of the elements of the criminal offense of assault and battery. Kosrae v. Sigrah, 12 FSM Intrm. 562, 567 (Kos. S. Ct. Tr. 2004).

– Burglary

Where there is no question that the defendant entered a building, the relevant question under the FSM burglary statute is whether the defendant's entry was accompanied by the purpose to commit any felony, assault, or larceny therein. 11 F.S.M.C. 951(1). FSM v. Boaz (I), 1 FSM Intrm. 22, 23-24 (Pon. 1981).

Under section 951 of the National Criminal Code the issue is not whether the defendant actually committed an assault or a battery, but whether he entered the house with the purpose of committing an assault. 11 F.S.M.C. 951(1). FSM v. Boaz (I), 1 FSM Intrm. 22, 25-26 (Pon. 1981).

A privilege to enter one's cousin's house cannot be exercised by pounding on the walls of house at two a.m. until a hole for entry is created and shouting threats at the occupants. FSM v. Boaz (I), 1 FSM Intrm. 22, 26 (Pon. 1981).

The fact that one may have a general privilege to enter property does not necessarily mean that the privilege may be exercised at all times and in every conceivable manner. FSM v. Ruben, 1 FSM Intrm. 34, 39 (Truk 1981).

The court is willing to assume that the homeowner whose wife's brother is seeking to enter the house by force late at night in a threatening manner should as a matter of customary law go lightly and use less force than he might to expel some other intruder. FSM v. Ruben, 1 FSM Intrm. 34, 41 (Truk 1981).

Since under Yap statutory law trespass is a lesser included offense of burglary, a trespass conviction will be vacated when there is a burglary conviction for the same act. Yinmed v. Yap, 8 FSM Intrm. 95, 101-02 (Yap S. Ct. App. 1997).

The criminal offense of burglary is defined as entering by force, stealth or trickery, the dwelling place or building of another with the intent to commit a felony, larceny, assault, or assault and battery therein. Kosrae v. Jackson, 12 FSM Intrm. 93, 98 (Kos. S. Ct. Tr. 2003).

When the state has not proven the element of entering by force, stealth or trickery, the state has not proven all elements of the offense of burglary beyond a reasonable double. The burglary charge will accordingly be dismissed. Kosrae v. Jackson, 12 FSM Intrm. 93, 98 (Kos. S. Ct. Tr. 2003).

– Conspiracy

Where the prosecution of an underlying offense is not time-barred, prosecution of conspiracy to commit that offense is not time-barred even if part of the conspiracy extends back in time to a point that would be time-barred. In re Extradition of Jano, 6 FSM Intrm. 93, 107 (App. 1993).

A person commits the offense of conspiracy, if, with intent to promote or facilitate the commission of a national offense if he agrees with one or more persons that they, or one or more of them, will engage in or solicit the conduct or will cause or solicit the result specified by the definition of the offense; and he or another person with whom he conspired commits an overt act in pursuance of the conspiracy. FSM v. Este, 12 FSM Intrm. 476, 483 (Chk. 2004).

The agreement in a conspiracy does not have to be explicit. A mere tacit understanding will suffice, and there need not be any written statement or even a speaking of words which expressly communicates the agreement. FSM v. Este, 12 FSM Intrm. 476, 483 (Chk. 2004).

A conspiracy exists when either the agreement or the means contemplated for its achievement are unlawful. FSM v. Este, 12 FSM Intrm. 476, 483 (Chk. 2004).

When it was unlawful and a national offense for any of the Uman Social Project funds to be spent on anything other than the construction of six new community halls on Uman, an agreement to do so would thus constitute the national offense of conspiracy. A single overt act committed by one of the co-conspirators before the end of the conspiracy is sufficient for there to be criminal liability for conspiracy. FSM v. Este, 12

FSM Intrm. 476, 483 (Chk. 2004).

Conspiracy to commit a crime is an offense separate and distinct from the crime that is the object of the conspiracy. FSM v. Este, 12 FSM Intrm. 476, 483 (Chk. 2004).

It is not necessary to prove the specific terms or the specific scope of the conspiratorial agreement or to prove that the conspiracy's substantive object was accomplished. FSM v. Este, 12 FSM Intrm. 476, 483 (Chk. 2004).

The existence of, and participation in, a criminal conspiracy may be proved by circumstantial as well as by direct evidence, if it affords a reasonable inference as to the ultimate facts sought to be proved. There must be evidence of some participation or interest in the commission of the offense. FSM v. Este, 12 FSM Intrm. 476, 483 (Chk. 2004).

The trial court is allowed great discretion in the reception of circumstantial evidence, for a conspiracy must be proved by a number of indefinite acts, conditions, and circumstances varying with the purpose to be accomplished. When it is shown that the defendants by their acts pursued the same object, one performing one part and the other performing another part so as to complete it or with a view to its attainment, the trier of fact will be justified in concluding that they were engaged in a conspiracy to effect that object. Most conspiracy convictions are based on circumstantial evidence. FSM v. Este, 12 FSM Intrm. 476, 483 (Chk. 2004).

A finding by the court that there is insufficient evidence to convict all but one of the parties alleged to have participated in a conspiracy ordinarily requires the discharge of the one remaining defendant. FSM v. Este, 12 FSM Intrm. 476, 484 (Chk. 2004).

– Controlled Substances

The Trust Territory Controlled Substance Act is based on the United States Uniform Controlled Substance Act, therefore United States Cases construing the law are examined because it is presumed that the law adopted from the U.S. will be given the same construction in the FSM. Kallop v. FSM, 4 FSM Intrm. 170, 174 (App. 1989).

Because the legislative intent in defining cannabis sativa L. in 11 F.S.M.C. 1112(14) was to embrace all species of marijuana, the government need not prove a defendant guilty of dealing in cannabis sativa L., but only in marijuana. Kallop v. FSM, 4 FSM Intrm. 170, 174 (App. 1989).

A trial court may properly infer from the quantity of marijuana possessed that the requisite intent existed to support a conviction of trafficking. Kallop v. FSM, 4 FSM Intrm. 170, 177 (App. 1989).

– Cruel and Unusual Punishment

Actions of a police officer in stripping a prisoner to punish and humiliate him, then beating him and damaging his pickup truck, constituted violation of the prisoner's constitutional rights to be free from cruel and unusual punishment and his due process rights. Tolenoa v. Alokoa, 2 FSM Intrm. 247, 250 (Kos. 1986).

Where a person has not been tried, convicted and sentenced, no question of cruel and unusual punishment arises. Paul v. Celestine, 4 FSM Intrm. 205, 208 (App. 1990).

A person's constitutional right to due process of law, and his right to be free from cruel and unusual punishment is violated when an officer instead of protecting the person from attack, threw him to the ground, and beat the person in the jail. Meitou v. Uwera, 5 FSM Intrm. 139, 144 (Chk. S. Ct. Tr. 1991).

Constitutional provisions applicable to a prisoner may vary depending on his status. A pre-trial detainee has a stronger right to liberty, which right is protected by the Due Process Clause, FSM Const. art. IV, § 3.

A convicted prisoner's claims upon liberty have been diminished through due process so that person must rely primarily on article IV, section 8 which protects him from cruel and unusual punishment. Plais v. Panuelo, 5 FSM Intrm. 179, 190 (Pon. 1991).

In a case where a convicted prisoner, who is also a pre-trial detainee, asserts civil rights claims arising out of ill-treatment after arrest, denial of access to family is a due process claim, and physical abuse involves due process as well as cruel and unusual punishment claims. Plais v. Panuelo, 5 FSM Intrm. 179, 190 (Pon. 1991).

In interpreting the provision against cruel and unusual punishment in the FSM Constitution, the court should consider the values and realities of Micronesia, but against a background of the law concerning cruel and unusual punishment and international standards concerning human rights. Plais v. Panuelo, 5 FSM Intrm. 179, 196-97 (Pon. 1991).

Deliberate indifference to an inmate's medical needs can amount to cruel and unusual punishment. Plais v. Panuelo, 5 FSM Intrm. 179, 199-200 (Pon. 1991).

Confining a prisoner in dangerously unsanitary conditions, which represent a broader government-wide policy of deliberate indifference to the dignity and well-being of prisoners, is a failure to provide civilized treatment or punishment, in violation of prisoners' protection against cruel and unusual punishment, and renders the state liable under 11 F.S.M.C. 701(3). Plais v. Panuelo, 5 FSM Intrm. 179, 208 (Pon. 1991).

Revocation of probation of an alcohol dependent person because he consumed alcohol or because of alcohol related offenses for which he was convicted does not constitute cruel and unusual punishment in violation of the constitution. FSM v. Phillip, 5 FSM Intrm. 298, 300 (Kos. 1992).

The FSM Constitution prohibits cruel and unusual punishment, but when a person has not been tried, convicted and sentenced, no question of cruel and unusual punishment arises. Youp v. Pingelap, 9 FSM Intrm. 215, 217 (Pon. 1999).

FSM cases addressing cruel and unusual punishment have consistently focused on claims made by prisoners. Youp v. Pingelap, 9 FSM Intrm. 215, 217 (Pon. 1999).

When the plaintiff's alleged injuries occurred in connection with his arrest, and not as a result of any subsequent sentence he may have received, the plaintiff, as a matter of law, could not have been subjected to cruel and unusual punishment. His cruel and unusual punishment claim will therefore be dismissed. Youp v. Pingelap, 9 FSM Intrm. 215, 217-18 (Pon. 1999).

When there is no constitutional provision which specifies the type of food to be provided to inmates and no statutory or regulatory provisions which specify the type of food to be provided to inmates, there is no clear ministerial duty of the Chief of Police which states the type of food to be provided to inmates. Talley v. Timothy, 10 FSM Intrm. 528, 530 (Kos. S. Ct. Tr. 2002).

In interpreting the provision against cruel and unusual punishment, a court considers the value and realities of Micronesia, against a background of the law concerning cruel and unusual punishment and international standards concerning human rights. Talley v. Timothy, 10 FSM Intrm. 528, 530 (Kos. S. Ct. Tr. 2002).

Deliberate indifference to an inmate's medical needs can amount to cruel and unusual punishment. Talley v. Timothy, 10 FSM Intrm. 528, 530 (Kos. S. Ct. Tr. 2002).

When it appears that the Chief of Police has attended to a prisoner's medical needs with respect to food preparation and the medical recommendation for low salt and low fat foods, there has been no refusal by the state to provide to the prisoner's medical needs. Talley v. Timothy, 10 FSM Intrm. 528, 530 (Kos. S. Ct. Tr. 2002).

When a prisoner has not shown deliberate indifference to his medical needs by the state, there was no cruel and unusual punishment. Talley v. Timothy, 10 FSM Intrm. 528, 531 (Kos. S. Ct. Tr. 2002).

– Defamation

The criminal offense of "defamation" is an offense against the person and not an offense against tradition. Kosrae v. Waguk, 11 FSM Intrm. 388, 391 (Kos. S. Ct. Tr. 2003).

The definition of the offense of "defamation" does not provide detailed warning of what type of speech is regulated whereas in other criminal offenses where speech is regulated, the specified words constituting the offense are listed. Kosrae v. Waguk, 11 FSM Intrm. 388, 391 (Kos. S. Ct. Tr. 2003).

The offense of defamation does not provide adequate notice of what speech is regulated. A statute, properly interpreted, must give sufficient notice so that conscientious citizens may avoid inadvertent violations. The statute must also provide sufficiently definite standards to prevent arbitrary law enforcement. Kosrae v. Waguk, 11 FSM Intrm. 388, 391 (Kos. S. Ct. Tr. 2003).

The Kosrae criminal offense of "defamation" does not contain specific language defining the conduct or speech which forms the offense. There are no specific words or conduct listed in the offense which forms the basis for the defamatory conduct. Kosrae v. Waguk, 11 FSM Intrm. 388, 392 (Kos. S. Ct. Tr. 2003).

The offense of defamation was not enacted to protect tradition, and if the offense of defamation does not protect tradition, then the fundamental right of freedom of expression as guaranteed by the Kosrae Constitution may not be impaired or denied. Kosrae v. Waguk, 11 FSM Intrm. 388, 392 (Kos. S. Ct. Tr. 2003).

Since the Kosrae criminal defamation statute does not protect tradition, it may not impair a defendant's fundamental right of freedom of expression. The defamation statute impairs the fundamental right of freedom of expression because it fails to provide a specific standard of criminal conduct, thereby persons would not have adequate notice of what type of speech was regulated under it. Kosrae v. Waguk, 11 FSM Intrm. 388, 392 (Kos. S. Ct. Tr. 2003).

The complainant's right to bring a civil suit against the defendant for the tort of defamation is not impaired by the court's dismissal of the criminal defamation charges against her. Kosrae v. Waguk, 11 FSM Intrm. 388, 392 (Kos. S. Ct. Tr. 2003).

– Defenses

As a matter of constitutional due process, a trial court presented with an alibi defense should consider evidence concerning the alibi along with all other evidence and shall not find the defendant guilty if after considering all of that evidence, the judge feels there is a reasonable doubt as to the defendant's guilt. Alaphonso v. FSM, 1 FSM Intrm. 209, 223-25 (App. 1982).

Statutes which provided a defense in the form of exceptions to a general proscription do not reduce or remove the government's traditional burden of proving beyond a reasonable doubt every fact necessary to constitute the offense. Ludwig v. FSM, 2 FSM Intrm. 27, 35 (App. 1985).

The government ultimately bears the burden of disproving the applicability of a statutory exception when it is properly presented as a defense. Ludwig v. FSM, 2 FSM 27, 35 (App. 1985).

Some exceptions under 11 F.S.M.C. 1203 whereunder possession of a firearm is permissible relate to considerations separate from the essential elements of the crime and require the defendant to place them in issue. A defendant claiming exemption as a law enforcement officer or United States military person engaged in official duty, §§ 1203(1), (4), or as a designated crocodile hunter, § 1203(5), is not disputing any element of the government's basic case. Instead, these exemption claims bring into play new facts, uniquely within the knowledge of the defendant, which the government could overlook by focusing on whether the conduct prohibited by the Weapons Control Act has occurred. The defendant is in a far better position to place these exemptions in issue and it is fair to require that he do so. Ludwig v. FSM, 2 FSM Intrm. 27, 36 (App. 1985).

The 11 F.S.M.C. 1203(1), (4) and (5) exemptions whereunder possession of a firearm is permissible are defenses within the meaning of 11 F.S.M.C. 107, although they are not affirmative defenses for they are not so designated. The ultimate burden of persuasion remains with the government, but the defendant has the burden of going forward with sufficient evidence to raise these exemptions as issues. Ludwig v. FSM, 2 FSM Intrm. 27, 36 (App. 1985).

The 11 F.S.M.C. 1203(2) exemption for curios, ornaments and historical pieces whereunder possession of a firearm is permissible requires findings that the firearm be in "unserviceable condition" and "incapable of being fired or discharged." Ludwig v. FSM, 2 FSM Intrm. 27, 37 (App. 1985).

If there are defenses, proof of which would not negate any essential element of the crime itself, it is constitutionally permissible to place same burden of proof for those defenses upon defendant. Runmar v. FSM, 3 FSM Intrm. 308, 311 (App. 1988).

11 F.S.M.C. 107 does not create any presumption as to mental health or lack thereof but merely establishes the standard of proof for a defense based upon mental disease, disorder, or defect, and places the burden of persuasion for that defense upon the defendant. Runmar v. FSM, 3 FSM Intrm. 308, 314 (App. 1988).

Defendant who fails to request consideration of a lesser offense normally may not successfully appeal from a conviction arrived at without such consideration, but where all elements for murder exist but homicide was caused under extreme mental or emotional disturbance for which there is reasonable explanation or excuse, defendant is entitled to be convicted of manslaughter rather than murder, without regard to whether request for consideration of manslaughter was made by either counsel. Runmar v. FSM, 3 FSM Intrm. 308, 319 (App. 1988).

Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded. FSM Crim. R. 52(a). Otto v. Kosrae, 5 FSM Intrm. 218, 222 (App. 1991).

Because Congress has neither adopted the de minimis defense found in the Model Penal Code nor any provision comparable to it that defense is not available in the FSM Supreme Court. FSM v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 166, 179 (Pon. 1997).

The elements of an equal protection claim of discriminatory or selective enforcement are: other similarly situated persons who generally have not been prosecuted; the defendant was intentionally or purposefully singled out for prosecution; and the prosecution was based on an arbitrary or invidious classification. FSM v. Wainit, 11 FSM Intrm. 1, 7 (Chk. 2002).

If a criminal defendant is to make out a selective prosecution equal protection claim, he must identify any persons similarly situated to him that the government could have prosecuted, but has failed to, and he must show that his prosecution is based on an invidious classification such as sex, race, ancestry, national origin, language, or social status. FSM v. Wainit, 11 FSM Intrm. 1, 8 (Chk. 2002).

A motion for judgment of acquittal on the ground the state had not sustained its burden of proof by proving all of the elements of the offense beyond a reasonable doubt because the state had not proven that police officer had "demanded" a driver's license from the defendant as required by statute, will be denied when the state proves that the officer did ask as by right for the defendant's driver's license. Kosrae v. Sigrah, 11 FSM Intrm. 263, 264 (Kos. S. Ct. Tr. 2002).

The reasoning behind the principle barring physical resistance to an invalid search warrant is that while society has an interest in securing for its members the right to be free from unreasonable searches and seizures, society also has an interest in the orderly settlement of disputes between citizens and their government and it has an especially strong interest in minimizing the use of violent self-help in the resolution of those disputes particularly when a proper accommodation of those interests requires that a person claiming to be aggrieved by a search conducted pursuant to an allegedly invalid warrant test that claim in a court of law

and not forcibly resist the warrant's execution at the place of search. This reasoning resonates even more strongly in Micronesia, where society has customarily prized peaceful and orderly resolution of disputes much higher than in the United States. FSM v. Wainit, 11 FSM Intrm. 424, 436 (Chk. 2003).

At the time the FSM Constitution was framed and adopted, the prevailing U.S. constitutional analysis of its constitutional search and seizure provision, which the FSM constitutional provision was modeled after, was that persons had no right to resist a search warrant even if that warrant was invalid. FSM v. Wainit, 11 FSM Intrm. 424, 436 (Chk. 2003).

A defective search warrant is not a defense to a prosecution for resisting the defective warrant. FSM v. Wainit, 11 FSM Intrm. 424, 436 (Chk. 2003).

Under FSM constitutional jurisprudence, a person has no right, with some possible narrow exception, to resist a court-issued search warrant even if that search warrant turns out to be invalid. A person's remedies for being subjected to a search with an invalid search warrant are the suppression of any evidence seized, and, in the proper case, a civil suit for damages. The self-help of resistance is not a remedy and because of the Micronesian customary preference for the peaceful resolution of disputes, this conclusion is consistent not only with the FSM Constitution, but also with the social configuration of Micronesia as is required by the Constitution's Judicial Guidance Clause. FSM v. Wainit, 11 FSM Intrm. 424, 436-37 (Chk. 2003).

The issue of a search warrant's validity is not a central, or even major issue in a case of resisting a search. It is not an available defense. FSM v. Wainit, 11 FSM Intrm. 424, 437 (Chk. 2003).

Under common law, a person may resist a lawful arrest if the arresting officer uses unreasonable force. After careful consideration of public policy and the constitutional protection of individual rights, including protection against arrests involving excessive force, the Kosrae State Court recognizes and accepts the application of the defense. A police officer has a right to use force reasonably necessary to effectuate an arrest. The reasonableness of a police officer's conduct while making an arrest must be assessed on the basis of information that the police officer had when he acted. Kosrae v. Nena, 12 FSM Intrm. 525, 530 (Kos. S. Ct. Tr. 2004).

– Discovery

It is normally for the trial court to fashion remedies and sanctions for failure of a party to comply with discovery requirements. The exercise of the trial court's discretion should not be disturbed by an appellate court absent a showing that the trial court's action has unfairly resulted in substantial hardship and prejudice to a party. Engichy v. FSM, 1 FSM Intrm. 532, 558 (App. 1984).

The burden of showing whether exceptional circumstances exist within the meaning of FSM Criminal Rule 15 is upon the defendant. To obtain a court order for taking of a deposition, the defendant must show that the witness is unavailable to attend the trial, that the testimony of the witness would be material and that such testimony would be in the interest of justice. Wolfe v. FSM, 2 FSM Intrm. 115, 122 (App. 1985).

It is normally for the trial court to fashion remedies and sanctions for failure of a party to comply with discovery requirements and the exercise of the trial court's discretion should not be disturbed by an appellate court absent a showing that the trial court's action has unfairly resulted in substantial hardship and prejudice to a party. Bernardo v. FSM, 4 FSM Intrm. 310, 313 (App. 1990).

Where defendants have no constitutional right to the discovery sought, an untimely motion to compel discovery will be denied. FSM v. Cheng Chia-W (I), 7 FSM Intrm. 124, 128 (Pon. 1995).

The prosecution has an ongoing obligation to supply to defendants any and all unprivileged evidence of an exculpatory nature. FSM v. Cheng Chia-W (I), 7 FSM Intrm. 124, 128 n.4 (Pon. 1995).

The government has no affirmative obligation to provide the defendant with information concerning

misdemeanor offenses committed by its potential witnesses. FSM v. Cheida, 7 FSM Intrm. 633, 641 (Chk. 1996).

A subpoena duces tecum is not unreasonable and oppressive when it requires documents that were earlier produced in response to discovery and materials and documents not discoverable under Criminal Rule 16 because it is not a valid objection that documents required by the subpoenas are not discoverable under Rule 16, but any materials already furnished in discovery need not be produced pursuant to the subpoenas. FSM v. Kuranaga, 9 FSM Intrm. 584, 585 (Chk. 2000).

A preliminary hearing is not a defendant's discovery tool. The preliminary hearing's purpose is to establish probable cause for detaining or requiring bail for an accused, not to create a discovery opportunity for the defendant (although some discovery may usually be a by-product of the hearing). The Criminal Procedure Rules provide other discovery methods for a defendant's use. FSM v. Wainit, 10 FSM Intrm. 618, 623 (Chk. 2002).

The government can request discovery of a defendant in a criminal case in only three limited instances. FSM v. Wainit, 11 FSM Intrm. 1, 9 (Chk. 2002).

The government can ask the nature of any defense which a criminal defendant intends to use at trial and the name and address of any person whom the defendant intends to call in support thereof. FSM v. Wainit, 11 FSM Intrm. 1, 9 (Chk. 2002).

If, and only if, the defendant has already requested discovery under Rule 16(a)(1)(C) or (D), then the government can ask to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the defendant's possession, custody or control and which the defendant intends to introduce as evidence in chief at the trial, and it can also ask discovery of reports of scientific tests or experiments done which the defendant intends to introduce as evidence in chief at trial or which a witness the defendant intends to call will testify about. FSM v. Wainit, 11 FSM Intrm. 1, 9 (Chk. 2002).

All the evidence that the government is entitled to request discovery of, is evidence that the defendant intends to introduce at trial. FSM v. Wainit, 11 FSM Intrm. 1, 9 (Chk. 2002).

The government's right to discovery is, in part, limited due to constitutional concerns about an accused's right to protection against self-incrimination. FSM v. Wainit, 11 FSM Intrm. 1, 10 (Chk. 2002).

One reason for limiting the government's right to discovery is the many other means the government has for obtaining needed information, such as the search warrant. FSM v. Wainit, 11 FSM Intrm. 1, 10 (Chk. 2002).

Rule 16(b) only concerns the limited amount of information that the government may, in very limited circumstances, seek by discovery. It is not concerned with what the government may seek to obtain through the use of a search warrant – search warrants are not "discovery." FSM v. Wainit, 11 FSM Intrm. 1, 10 (Chk. 2002).

If, before or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection, or discovers additional witnesses or defenses, that party must promptly notify the other party or that other party's attorney or the court of its existence. FSM v. Wainit, 11 FSM Intrm. 186, 189 (Chk. 2002).

The rules contemplate that additional evidence and material might be discovered after the initial disclosure and prior to or even during trial that will need to be disclosed before being used at trial. The rules do not prohibit either side from finding more evidence for use at trial. Such late disclosure may be necessary for the just determination of a criminal proceeding. FSM v. Wainit, 11 FSM Intrm. 186, 189-90 (Chk. 2002).

While it is understandable that the government may not want to include someone as a witness until it has had the chance to interview that person to see what their testimony might be, this does not override Rule 16(c)'s prompt notification requirement. FSM v. Wainit, 11 FSM Intrm. 186, 190 (Chk. 2002).

If the government feels that disclosing material to a defendant would jeopardize other pending investigations before they were completed, it can comply with Rule 16(c)'s prompt disclosure requirement and address its legitimate concerns over a pending investigation's confidentiality by notifying the court. Such a notification would be by a written ex parte motion for a protective order to be viewed by the judge alone in camera. The movant's burden would be to make a sufficient showing that a protective order is needed. FSM v. Wainit, 11 FSM Intrm. 186, 190 & n.1 (Chk. 2002).

When rather than seek a protective order, the government has deliberately chosen not to disclose the material to the defendant (and to the court) until it felt that its other investigation would not be jeopardized, some sanction must be imposed in such circumstances. FSM v. Wainit, 11 FSM Intrm. 186, 190 (Chk. 2002).

When it has been brought to the court's attention that a party has failed to comply with Rule 16, the court may order that party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. FSM v. Wainit, 11 FSM Intrm. 186, 190 (Chk. 2002).

The preferred remedy when the government makes a late disclosure of evidence is to offer the defendant a continuance to prepare to meet the additional evidence. FSM v. Wainit, 11 FSM Intrm. 186, 190 (Chk. 2002).

A court should impose the least severe sanction that will accomplish the desired result of prompt and full compliance with the court's discovery orders and Rule 16(c). In exercising its discretion to fashion the appropriate remedy, the court should take into account the reasons why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances. These factors must be weighed even where there is a clear discovery order. FSM v. Wainit, 11 FSM Intrm. 186, 190-91 (Chk. 2002).

It can be an abuse of discretion to exclude evidence, instead of granting continuance, when the late disclosure of evidence was inadvertent. FSM v. Wainit, 11 FSM Intrm. 186, 191 (Chk. 2002).

Less drastic remedies, such as a continuance are proper instead of suppression when the government's discovery violations are not in bad faith. FSM v. Wainit, 11 FSM Intrm. 186, 191 (Chk. 2002).

Even when the government has not acted in bad faith, and although a continuance may normally be the most desirable remedy, a court may still properly suppress late-disclosed evidence for prophylactic purposes. FSM v. Wainit, 11 FSM Intrm. 186, 191 (Chk. 2002).

Late-disclosed evidence may be suppressed for use in the government's case-in-chief, but allowed for use in rebuttal. FSM v. Wainit, 11 FSM Intrm. 186, 191 (Chk. 2002).

There is no good reason to stay the completion of discovery in a criminal case while appellate review is sought when the defendant has already made his discovery request and because the amount of discovery that can be requested in a criminal case is so limited and the government cannot even request discovery unless the defendant has already done so, it is difficult to conceive of any circumstances under which staying discovery in a criminal case would be proper. FSM v. Wainit, 12 FSM Intrm. 201, 204 (Chk. 2003).

The government may file under seal an ex parte document, for the court to view in camera, explaining which discovery entries should be redacted and for what reasons. FSM v. Kansou, 13 FSM Intrm. 167, 169 (Chk. 2005).

If the government feels that disclosing certain material to the defendants would jeopardize other pending

investigations before they were completed it can comply with Rule 16(c)'s prompt disclosure requirement and address its legitimate concerns over the confidentiality of pending investigation(s) by notifying the court. Such a notification can be by a written ex parte motion for a protective order to be viewed by the judge alone in camera. FSM v. Kansou, 13 FSM Intrm. 167, 169 (Chk. 2005).

Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. FSM v. Kansou, 13 FSM Intrm. 167, 169 (Chk. 2005).

– Dismissal

Customary settlements do not require court dismissal of criminal proceedings if no exceptional circumstances are shown. FSM v. Mudong, 1 FSM Intrm. 135, 140 (Pon. 1982).

After prosecution has been initiated, the court may dismiss litigation if there is no probable cause to believe that a crime has been committed. FSM v. Mudong, 1 FSM Intrm. 135, 140 (Pon. 1982).

The prosecutor does not have authority to dismiss an existing prosecution on the basis of customary law but the court does have power to respond to a prosecutorial suggestion for dismissal because of customary considerations. FSM v. Mudong, 1 FSM Intrm. 135, 141 (Pon. 1982).

At common law, repeal of a criminal statute abated all criminal prosecutions which had not reached final disposition in the highest court authorized to review them. In re Otokichy, 1 FSM Intrm. 183, 189-90 n.4 (App. 1982).

Although the prosecution has broad discretion in determining whether to initiate litigation, once that litigation is initiated in the FSM Supreme Court, the court also has responsibility for assuring that actions thereafter taken are in the public interest. Thus, criminal litigation can be dismissed only by obtaining leave of court. FSM v. Ocean Pearl, 3 FSM Intrm. 87, 91 (Pon. 1987).

Although it is reasonable to analyze settlement agreements in civil actions on the basis of contract principles alone, important public policy considerations attach to the settlement of criminal cases. FSM v. Ocean Pearl, 3 FSM Intrm. 87, 91 (Pon. 1987).

Where a court has dismissed a criminal case for lack of jurisdiction over the crimes for which the defendant was charged, the dismissal does not act as a discharge so as to preclude extradition on the charge. "Discharge" requires both personal and subject matter jurisdiction. In re Extradition of Jano, 6 FSM Intrm. 93, 107-08 (App. 1993).

Under the common law the death of a criminal appellant pending appeal abates the proceedings ab initio – not only the appeal but all proceedings from the inception of the prosecution, thus requiring the appellate court to dismiss the appeal, and remand the case to the trial court to vacate the judgment and dismiss the information. Palik v. Kosrae, 6 FSM Intrm. 362, 364 (App. 1994).

When a criminal defendant dies while his conviction is on appeal and where there was no discrete victim and where there are no collateral matters impinging upon the case requiring further court proceedings it is appropriate under the facts of the case to abate the proceedings ab initio and vacate the conviction. Palik v. Kosrae, 6 FSM Intrm. 362, 364 (App. 1994).

Where counts in an information other than the one count dismissed also charge illegal fishing violations the dismissal of two other counts for which illegal fishing is an element will be denied. FSM v. Cheng Chia-W (I), 7 FSM Intrm. 124, 126 (Pon. 1995).

A dismissal pursuant to FSM Crim. R. 48(a) is granted without prejudice and by leave of court. In considering whether to granted leave, a court must find that the dismissal is in the public interest. Factors

among those customarily considered are whether the dismissal involved any harassment of the defendants and whether a bona fide reason, such as insufficient evidence to obtain a conviction, existed for the dismissal. FSM v. Yue Yuan Yu No. 346, 7 FSM Intrm. 162, 163 (Chk. 1995).

An information that, as a practical matter, is not sufficiently certain and unambiguous so as to permit the defendant to prepare its defense, or to inform the court of what alleged acts or omissions of this particular defendant result in criminal liability is defective, and may be dismissed without prejudice. FSM v. Xu Rui Song, 7 FSM Intrm. 187, 190 (Chk. 1995).

After prosecution has been initiated, it may be dismissed by a court if there is no probable cause – evidence giving a reasonable ground for suspicion sufficiently strong to warrant a cautious person to believe that the accused is guilty of the offense – to believe that a crime has been committed, or that the defendant has committed it. FSM v. Cheida, 7 FSM Intrm. 633, 638 (Chk. 1996).

Because the trend of the application of customary settlements in the criminal justice system, is its use as excuse, justification or mitigation during the imposition of sentence after conviction for a crime and not as an element of guilt or the dismissal of an information and complaint charging a criminal offense, a motion for dismissal of a major criminal charge on the grounds that a customary settlement has been reached will be denied. Chuuk v. Sound, 8 FSM Intrm. 577, 579-80 (Chk. S. Ct. Tr. 1998).

A motion to dismiss an information because the named defendant is not a formally constituted entity is moot when the government's motion to amend the information to change the defendant's name to its proper name is granted. FSM v. Moses, 9 FSM Intrm. 139, 142 (Pon. 1999).

When there is no statutory requirement that a candidate submit his taped speech before it is aired and when there is no mention of criminal liability on the of the government broadcast facility should it do so, there is no probable cause to believe a crime has been committed, and the information and criminal summons should be dismissed without prejudice. FSM v. Moses, 9 FSM Intrm. 139, 145 (Pon. 1999).

A criminal prosecution for fishing in state waters will not be dismissed when even if the Foreign Fishing Agreement were to be construed as regulating commercial fishing in Kosrae's waters, the cooperative law enforcement public policy weighs in favor of Kosrae's ability to expressly ratify any such regulation by a specific request to institute a prosecution where the ratification facilitated the enforcement of a national law criminalizing conduct proscribed in the Foreign Fishing Agreement. FSM v. Zhong Yuan Fishery Co., 9 FSM Intrm. 421, 423 (Kos. 2000).

A criminal defendant who presents clear evidence that shows that his prosecution violates his right to equal protection (is impermissible discrimination) would be entitled to a dismissal. FSM v. Wainit, 11 FSM Intrm. 1, 8-9 (Chk. 2002).

The government may by leave of court file a dismissal of an information and thereupon terminate the prosecution. The purpose for requiring court approval of dismissal of a criminal case is to invest the court with sufficient discretion so that the court may determine that dismissal serves the public interest. FSM v. Tomiya Suisan Co., 11 FSM Intrm. 15, 16 (Yap 2002).

Dismissal under Rule 48(a) is appropriate when the government represents that there is insufficient evidence to obtain a conviction. FSM v. Tomiya Suisan Co., 11 FSM Intrm. 15, 16-17 (Yap 2002).

Reasons for which a court may exercise its discretion to dismiss a criminal case are: a plea agreement, the defendant's death, defendant's incompetency to stand trial, government security interests that might be placed at risk by disclosures at trial, when a defendant has cooperated with a prosecutorial investigation, and when the indictment has been superseded. FSM v. Tomiya Suisan Co., 11 FSM Intrm. 15, 17 (Yap 2002).

The relationship between the defendant and victim is never a basis for dismissal of a criminal information. Kosrae v. Nena, 12 FSM Intrm. 20, 22 (Kos. S. Ct. Tr. 2003).

A case will not be dismissed when the state's penal code does not excuse the criminal conduct alleged in the case based upon a father-daughter relationship. Many criminal cases with a variety of charges involving members of the same family as defendant-victim are prosecuted to final disposition. Kosrae v. Nena, 12 FSM Intrm. 20, 22 (Kos. S. Ct. Tr. 2003).

Reconciliation is not a basis for dismissal of a criminal information. The law of our nation in this regard is clear. Custom, including customary apology and reconciliation, is to be considered during the sentencing of a criminal prosecution. Kosrae v. Nena, 12 FSM Intrm. 20, 22 (Kos. S. Ct. Tr. 2003).

A prosecutor's request to dismiss a criminal information without any legal basis for such action and contrary to public policy will be denied. Kosrae v. Nena, 12 FSM Intrm. 20, 23 (Kos. S. Ct. Tr. 2003).

A criminal case will not be dismissed if the whole FSM Department of Justice must be disqualified from prosecuting since a special prosecutor can be appointed. FSM v. Wainit, 12 FSM Intrm. 172, 176 (Chk. 2003).

Even assuming that there was an illegal arrest, a defendant is still not entitled to dismissal of the information. The remedy for an illegal arrest, for failure to provide cause and authority of the arrest, is suppression of any statements made by the defendant. When he did not make any statements to the police, there are no statements to suppress. Kosrae v. Anton, 12 FSM Intrm. 217, 219-20 (Kos. S. Ct. Tr. 2003).

It is the prosecutor's discretion to initiate, continue, or terminate a particular criminal prosecution. However, once prosecution has been initiated, the court also has responsibility to assure that all actions taken thereafter are in the public interest. Public interest requires the court to examine the grounds for a dismissal request. Kosrae v. Tosie, 12 FSM Intrm. 296, 298 (Kos. S. Ct. Tr. 2004).

Public interest requires the court to examine the grounds for dismissal request. The court may dismiss a criminal case on grounds that the court lacks jurisdiction over the crimes charged. The court may also dismiss a criminal case if there is insufficient evidence to obtain a conviction or if there is a lack of probable cause to believe that a crime has been committed by the defendant. Kosrae v. Tosie, 12 FSM Intrm. 296, 298 (Kos. S. Ct. Tr. 2004).

A criminal prosecution for driving under the influence will not be dismissed when the police officers had sufficient reasonable suspicion to conduct an investigatory stop of the defendant because the reasonable suspicion was supplied by an informant, whose identity, credibility, reputation and reliability were known. When at the investigatory stop, the police observed signs of the defendant's alcohol impairment, these signs provided grounds for the police to administer the field sobriety tests to the defendant, and when the defendant failed two field sobriety tests, it gave the police reasonable grounds and probable cause for defendant's commission of driving under the influence and probable cause to arrest the defendant. Kosrae v. Tosie, 12 FSM Intrm. 296, 300 (Kos. S. Ct. Tr. 2004).

When there is no way to determine if prosecutors who were not disqualified would have exercised their discretion to file these charges, the information must be dismissed to allow that to happen. This is because no matter how firmly and conscientiously a prosecutor may steel himself against the intrusion of a competing and disqualifying interest, he never can be certain that he has succeeded in isolating himself from the inroads on his subconscious. The defendant does not have to show actual prejudice, because on the basis of public policy, it will be presumed to exist as a matter of law. The purpose of this is to avoid the appearance of impropriety. This is designed not only to prevent the dishonest practitioner from improper conduct but also to preclude the honest practitioner from being put in a position where he will be forced to choose between conflicting duties. FSM v. Wainit, 12 FSM Intrm. 360, 364 (Chk. 2004).

When a dismissal is not on the merits and the defendant has not been put in jeopardy, the dismissal is without prejudice. FSM v. Wainit, 12 FSM Intrm. 360, 365 (Chk. 2004).

Since the statute and possibly the rules require sworn written statements to be filed with the information,

when no such statements were attached, motions to dismiss on this ground will be granted. These dismissals are not on the merits. Neither defendant has been put in jeopardy. FSM v. Wainit, 12 FSM Intrm. 376, 384 (Chk. 2004).

The dismissal of a criminal case because of a statutorily defective information is without prejudice. FSM v. Wainit, 12 FSM Intrm. 376, 384 (Chk. 2004).

Rule 48(b) is the mechanism by which a defendant may assert his constitutional right to a speedy trial, although it also embraces the court's inherent power to dismiss for want of prosecution. The court's power to dismiss under Rule 48(b) is not limited to those situations in which the defendant's constitutional speedy trial right has been violated. The Rule is a restatement of the court's inherent power to dismiss a case for want of prosecution. It imposes a stricter standard of tolerable delay than does the Constitution. FSM v. Wainit, 12 FSM Intrm. 405, 409 (Chk. 2004).

A four-factor balancing test for determining speedy trial violations: – length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant – is an appropriate tool to analyze the meaning of the FSM Constitution's speedy trial right. It is also an appropriate tool to use in analyzing a Rule 48(b) dismissal. FSM v. Wainit, 12 FSM Intrm. 405, 410 (Chk. 2004).

In determining whether to exercise its discretionary power to dismiss under Rule 48(b), the court may consider the same factors relevant to a constitutional decision regarding denial of a speedy trial. FSM v. Wainit, 12 FSM Intrm. 405, 410 (Chk. 2004).

The attorney for the government may by leave of court file a dismissal of an information or complaint. FSM v. Fu Yuan Yu 398, 12 FSM Intrm. 487, 491 (Pon. 2004).

While the prosecution has broad discretion in determining whether to initiate litigation, once that litigation is instituted in court, the court also has responsibility for assuring that actions thereafter taken are in the public interest; therefore criminal litigation can be dismissed only by obtaining leave of the court. In a fishing case where criminal and civil cases are filed together, and the dismissal of the criminal proceeding(s) is obviously "integral" to the settlement agreement for which court approval is sought, the same policy considerations apply to the settlement of the civil proceeding(s) as apply to the criminal dismissal. FSM v. Fu Yuan Yu 398, 12 FSM Intrm. 487, 491 (Pon. 2004).

Factors to examine when determining whether a dismissal is in the public interest include whether the dismissal involved any harassment of the defendants and whether a bona fide reason exists for the dismissal. FSM v. Fu Yuan Yu 398, 12 FSM Intrm. 487, 491 (Pon. 2004).

The court is required to exercise sound judicial discretion in considering a request for dismissal. This requires that the court have factual information supporting the request. FSM v. Fu Yuan Yu 398, 12 FSM Intrm. 487, 491 (Pon. 2004).

Rule 48 contemplates public exposure of the reasons for a prosecution's abandonment in order to prevent abuse of the power of dismissal. The court must be satisfied that the reasons advanced for dismissal are substantial and in the public interest and are the real grounds upon which the application is based, and it should not be content with mere conclusory statements that the dismissal is in the public interest, but will require a statement of the underlying reasons and underlying factual basis. FSM v. Fu Yuan Yu 398, 12 FSM Intrm. 487, 491 (Pon. 2004).

Title 24 establishes agencies to conclude fishing agreements and establish regulations for the exploitation of FSM marine resources. In fishing cases, when the prosecution seeks a dismissal, the court should be presented with evidence that appropriate agencies have been involved in the resolution of the case(s). FSM v. Fu Yuan Yu 398, 12 FSM Intrm. 487, 492 (Pon. 2004).

When, although the settlement contains fines which seem quite small in comparison to the potential fines

the defendants face if found guilty, the particular violations are minor and somewhat technical violations of the law, rather than a blatant disregard of the law regulating foreign fishing vessels operating in FSM waters, and when the settlement amount includes an understanding by the FSM that its case is not a very strong one and it is very possible that it might not be able to prove its case against the defendants if it took the case to trial, the court finds sufficient reasons stated to justify dismissal of the action. FSM v. Fu Yuan Yu 398, 12 FSM Intrm. 487, 492 (Pon. 2004).

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While the prosecution has broad discretion in determining whether to initiate litigation, once that litigation is instituted in court, the court also has responsibility for assuring that actions thereafter taken are in the public interest; therefore criminal litigation can be dismissed only by obtaining leave of the court. In a fishing case where criminal and civil cases are filed together, and the dismissal of the criminal proceeding(s) is obviously "integral" to the settlement agreement for which court approval is sought, the same policy considerations apply to the settlement of the civil proceeding(s) as apply to the criminal dismissal. FSM v. Ching Feng 767, 12 FSM Intrm. 498, 502, 504 (Pon. 2004).

Factors to examine when determining whether a dismissal is in the public interest include whether the dismissal involved any harassment of the defendants and whether a bona fide reason exists for the dismissal. FSM v. Ching Feng 767, 12 FSM Intrm. 498, 502, 504 (Pon. 2004).

The court is required to exercise sound judicial discretion in considering a request for dismissal. This requires that the court have factual information supporting the request. FSM v. Ching Feng 767, 12 FSM Intrm. 498, 504 (Pon. 2004).

Rule 48 contemplates public exposure of the reasons for a prosecution's abandonment in order to prevent abuse of the power of dismissal. The court must be satisfied that the reasons advanced for dismissal are substantial and are the real grounds upon which dismissal is required. FSM v. Ching Feng 767, 12 FSM Intrm. 498, 504 (Pon. 2004).

Title 24 establishes agencies to conclude fishing agreements and establish regulations for the exploitation of FSM marine resources. In fishing cases where the prosecution seeks a dismissal, the court should be presented with evidence that appropriate agencies have been involved in the resolution of the case(s). FSM v. Ching Feng 767, 12 FSM Intrm. 498, 504 (Pon. 2004).

Dismissal of a case is warranted when the statute of limitation applicable to both of the counts in the criminal information had elapsed before the case was filed. FSM v. Ching Feng 767, 12 FSM Intrm. 498, 504-05 (Pon. 2004).

When a criminal information is not supported by written statement(s) under oath showing probable cause to the court's satisfaction before a penal summons (or an arrest warrant) is issued, there is no ground stated that would warrant dismissal of the information if there is nothing before the court that indicates that the information is not a "plain, concise and definite statement of the essential facts constituting the offense." But the summonses issued pursuant to such an information are improperly issued and the resulting initial appearances are as a consequence defective. FSM v. Kansou, 13 FSM Intrm. 48, 50 (Chk. 2004).

The Governor's issuance of Declaration of Temporary State of Emergency and the Executive Decree, which prohibited the issuance of drinking permits, possession and consumption of alcoholic drinks by persons under the age of 35 and revoked drinking permits which had been issued to persons under the age of 35, exceeded the authority granted to him by the Kosrae Constitution, Article V, Section 13 because there was no civil disturbance, riot, typhoon, natural disaster or immediate threat of war or insurrection which constituted an "extreme emergency" and the Decree was therefore unconstitutional and void. Any criminal charges which have been based upon violation of the Executive Decree must be dismissed. Kosrae v. Nena, 13 FSM Intrm. 63, 67 (Kos. S. Ct. Tr. 2004).

The offense of negligent driving requires proof of driving a vehicle in such a manner as to constitute a substantial deviation from the standard of care a reasonable person would exercise in the situation and when the state did not present any witnesses who saw the defendant driving his vehicle and there was no evidence presented to show the manner in which defendant was driving his vehicle and whether it was a substantial deviation from the appropriate standard of care and an officer testified that the defendant reported that he had a problem with his vehicle, it is reasonable to infer that this problem may caused the vehicle to leave the road and come to rest in the culvert. The state thus failed to present a prima facie case and the defendant's motion for acquittal on that count was granted and that count dismissed. Kosrae v. Alokoa, 13 FSM Intrm. 82, 83 (Kos. S. Ct. Tr. 2004).

The offense of unauthorized operation of a motor vehicle requires proof of operating a motor vehicle on a road without possessing a valid license or learner's permit and when the state did not present any witnesses who saw the defendant operating his vehicle and did not present any evidence that the defendant did not possess a driver's license or learner's permit, there was no evidence presented to prove that the defendant operated his vehicle without a valid license or permit in his possession. The state thus failed to present a prima facie case and the defendant's motion for acquittal on that count was granted and that count dismissed. Kosrae v. Alokoa, 13 FSM Intrm. 82, 83 (Kos. S. Ct. Tr. 2004).

– Disturbing the Peace

The offense of disturbing the peace requires proof beyond a reasonable doubt of wilfully committing any act which unreasonably annoys or disturbs another so that she is deprived of peace and quiet. Kosrae v. Sigrah, 12 FSM Intrm. 562, 567 (Kos. S. Ct. Tr. 2004).

When the evidence is undisputed that the defendant intruded upon the victim while she was sleeping, committed acts to wake the victim from her sleep, restrained her and attacked her, and that she was deprived of her peace, quiet and sleep that night by the defendant's actions, the state has proven beyond a reasonable doubt all the elements of the criminal offense of disturbing the peace. Kosrae v. Sigrah, 12 FSM Intrm. 562, 567 (Kos. S. Ct. Tr. 2004).

– Double Jeopardy

The principal purpose of the protection against double jeopardy established by FSM Constitution, article IV, section 7 is to prevent the government from making repeated attempts to convict an individual for the same alleged act. Laion v. FSM, 1 FSM Intrm. 503, 521 (App. 1984).

The double jeopardy clause, FSM Const. art. IV, § 7, of the Declaration of Rights of the FSM Constitution was drawn from the Bill of Rights of the United States Constitution. Laion v. FSM, 503, 522 (App. 1984).

The double jeopardy clause of the FSM Constitution protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction and against multiple punishments for the same offense. Laion v. FSM, 1 FSM Intrm. 503, 523 (App. 1984).

United States constitutional law at the time of the Micronesian Constitutional convention furnishes guidance as to the intended scope of the FSM Constitution's double jeopardy clause. Laion v. FSM, 1 FSM Intrm. 503, 523 (App. 1984).

Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. If the test is met a dual conviction will not violate the constitutional protection against double jeopardy. Laion v. FSM, 1 FSM Intrm. 503, 523-25 (App. 1984).

When assault with a dangerous weapon requires use or attempted use of a dangerous weapon, a fact not required for aggravated assault, and aggravated assault requires an intent to cause serious bodily injury, which need not be proved for conviction of assault with a dangerous weapon, conviction on both charges for

the same wrongful act will not violate the double jeopardy clause of the Constitution. Laion v. FSM, 1 FSM Intrm. 503, 524 (App. 1984).

Where a trial court orders concurrent sentences of two convictions of different offenses flowing from a single wrongful act, there is not cumulative or multiple punishments that might violate the double jeopardy clause. Laion v. FSM, 1 FSM Intrm. 503, 524 (App. 1984).

While Congress is not prevented by the double jeopardy clause from providing that two convictions of the same import may flow from a single wrongful act, a court will not merely assume such a congressional intention. Laion v. FSM, 1 FSM Intrm. 503, 525 (App. 1984).

Where two statutory provisions aimed at similar types of wrongdoing and upholding citizen and public interests of the same nature would apply to a solitary illegal act, which caused only one injury, the statutes will be construed not to authorize cumulative convictions in absence of a clear indication of legislative intent. However, the government is not denied the right to charge separate offenses to guard against the risk that a conviction may not be obtained on one of the offenses. Laion v. FSM, 1 FSM Intrm. 503, 529 (App. 1984).

The protection against double jeopardy in a second trial is not available until the person has first been tried in one trial. Jeopardy does not attach in a criminal trial until the first witness is sworn in to testify. FSM v. Cheng Chia-W (I), 7 FSM Intrm. 124, 128 (Pon. 1995).

Where the defendant has not yet been convicted of any crime, the protection against double jeopardy does not attach. FSM v. Cheida, 7 FSM Intrm. 633, 637 (Chk. 1996).

A prosecution for criminal contempt does not pose a double jeopardy problem when previous contempt proceedings were in the nature of civil contempt, nor does it violate the statutory prohibition against successive prosecutions for contempt. FSM v. Cheida, 7 FSM Intrm. 633, 637 (Chk. 1996).

There is no violation of the double jeopardy clause of the FSM Constitution if each offense charged requires proof of a fact which the other does not. FSM v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 166, 179 (Pon. 1997).

When the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. If the test is met, a dual conviction will not violate the constitutional protection against double jeopardy. Palik v. Kosrae, 8 FSM Intrm. 509, 514 (App. 1998).

If, for the same act, both a lesser included and a greater offense are proven, the court should then enter a conviction on only the greater offense. A defendant cannot be sentenced on both the higher and the lesser included offense arising out of the same criminal transaction. Palik v. Kosrae, 8 FSM Intrm. 509, 516 (App. 1998).

– Escape

The national escape statute's requirements are met where an escaped defendant was being held for law enforcement purposes by state police officers authorized to detain on behalf of the Federated States of Micronesia. 11 F.S.M.C. 505. FSM v. Doone, 1 FSM Intrm. 365, 367 (Pon. 1983).

The law generally requires that a prisoner test the legality of his detention in a court of law rather than attempt to enforce his own claim to freedom. FSM v. Doone, 1 FSM Intrm. 365, 368 (Pon. 1983).

A prisoner held illegally in a custodial facility is never permitted to escape. 11 F.S.M.C. 505(3). FSM v. Doone, 1 FSM Intrm. 365, 368 (Pon. 1983).

Outside of a custodial facility, one illegally detained by a law officer acting in good faith is entitled to

escape only if he can do so with "no substantial risk of harm to the person or property of anyone other than the defendant." FSM v. Doone, 1 FSM Intrm. 365, 368 (Pon. 1983).

To minimize disruption and challenges to official police authority, the statutory exceptions to prohibitions against escape should be read restrictively. 11 F.S.M.C. 505. FSM v. Doone, 1 FSM Intrm. 365, 368-69 (Pon. 1983).

A police car being used to maintain custody as well as transport a detainee from one custodial facility to another is a custodial facility within the meaning of 11 F.S.M.C. 505(3). FSM v. Doone, 1 FSM Intrm. 365, 369 (Pon. 1983).

A police vehicle being used to transport an arrest person from the police station to the jail is a custodial facility within the meaning of 11 F.S.M.C. 505(3), and a person who, having been informed that he is under arrest, flees from such a vehicle and the custody of a police officer authorized to detain or arrest persons on behalf of the Federated States of Micronesia, is guilty of an escape under 11 F.S.M.C. 505(1). Doone v. FSM, 2 FSM Intrm. 103, 106 (App. 1985).

Illegality of arrest or detention is no defense to a charge that one has unlawfully escaped from a custodial facility. Doone v. FSM, 2 FSM Intrm. 103, 106 (App. 1985).

Escape from state police officers, authorized by a Joint Law Enforcement Agreement Between the National Government and the State to detain and arrest persons on behalf of the Federated States of Micronesia can be the foundation for an escape conviction under 11 F.S.M.C. 505(1), without regard to whether the detention was for a major crime. Doone v. FSM, 2 FSM Intrm. 103, 106 (App. 1985).

In the absence of any explanation in the legislative history or from the government to justify a different interpretation, the only apparent reason for the deletion of the words "alleged to be found delinquent" from the Model Penal Code definition of official detention is that Congress wished to exclude detained juveniles from the national prohibitions against escape. 11 F.S.M.C. 505(1). In re Cantero, 3 FSM Intrm. 481, 484 (Pon. 1988).

Juveniles alleged or found to be delinquent children are not under "official detention" within the meaning of 11 F.S.M.C. 505(1). In re Cantero, 3 FSM Intrm. 481, 484 (Pon. 1988).

– Expungement of Records

Without more, expungement is not appropriate when the court's order entered pursuant to a plea agreement specifically found sufficient factual basis to render a judgment of guilt against the defendant, and, although imposition of sentence was suspended pursuant to 11 F.S.M.C. 1002(4), the defendant served jail time, was under house arrest, and paid a total of $14,374.00 to the national treasury. FSM v. Kihleng, 8 FSM Intrm. 323, 324-25 (Pon. 1998).

Expungement of criminal records falls generally within three categories: expungement pursuant to statute, expungement where it is necessary to preserve basic legal rights, and expungement based on acquittal. FSM v. Kihleng, 8 FSM Intrm. 323, 325 (Pon. 1998).

Where the arrest itself was an unlawful one, or where the arrest represented harassing action by the police, or where the statute under which the arrestee was prosecuted was itself unconstitutional, courts have ordered expunction. FSM v. Kihleng, 8 FSM Intrm. 323, 325 (Pon. 1998).

Although expungement calls for a balancing of the equities between the government's need to maintain extensive records in order to aid in general law enforcement and the individual's right to privacy, an acquittal, standing alone, is not in itself sufficient to warrant an expunction of an arrest record. FSM v. Kihleng, 8 FSM Intrm. 323, 325 (Pon. 1998).

As the grant or denial of a motion to expunge the record of a Trust Territory convicytion lies solely within the court's discretion, as limited by law, no appearance is deemed necessary by Chuuk as the successor to the Trust Territory of the Pacific Islands government. The court can decide the motion without oral argument because no evidentiary proceeding is necessary, absent credible assertions of grounds, such as lack of competent counsel, innocence of the charges brought, or that the plea was not voluntarily made. Trust Territory v. Edgar, 11 FSM Intrm. 303, 305 & n.1 (Chk. S. Ct. Tr. 2002).

The Chuuk State Supreme Court cannot vacate a criminal conviction, based upon a voluntary guilty plea, in order to circumvent the constitutional and statutory proscriptions against felons being candidates for the FSM Congress when the defendant does not now complain that he was not guilty of the crimes, or that he was not afforded due process of law when he was accused of, and then pleaded guilty to, two separate felonies. Trust Territory v. Edgar, 11 FSM Intrm. 303, 308 (Chk. S. Ct. Tr. 2002).

The Chuuk State Supreme Court has no power to strike from the public records all evidence of the charges against a defendant, and his convictions, who seeks a way around the constitutional and statutory proscriptions which is unavailable even to one who has been pardoned for his crimes. It will therefore deny his motion to expunge. Trust Territory v. Edgar, 11 FSM Intrm. 303, 308 (Chk. S. Ct. Tr. 2002).

– Filings

The general court order concerning facsimile transmission rejected indiscriminate filing by fax because it concluded that an effort to accommodate counsel by accepting filing through the use of fax would impose an undue burden upon the clerks and could also result in additional paperwork, expense, duplication efforts, and confusion. Therefore, filing by fax is permitted only by order of a justice given for special cause. FSM v. Wainit, 12 FSM Intrm. 405, 408 (Chk. 2004).

The general court order authorizing fax filing for special cause is not an excuse to wait for the filing deadline and then fax the papers to the court because waiting to the last minute so that it can then be faxed does not constitute "special cause." FSM v. Wainit, 12 FSM Intrm. 405, 408 (Chk. 2004).

General Court Order 1990-1 does not apply to filing by facsimile transmission in civil cases because the (later promulgated) applicable portion of Civil Procedure Rule 5(e) has superseded it. It may retain some vitality in criminal cases since the criminal rules do not contain a provision concerning fax filing. However, Civil Rule 5(e)'s pertinent part is identical to section 2 of General Court Order 1990-1. Goya v. Ramp, 13 FSM Intrm. 100, 105 & n.3 (App. 2005).

– Homicide

In a criminal prosecution under 11 F.S.M.C. 301, where defendant's overt actions indicated their intention to aid those involved in attacks, and where it was reasonably foreseeable by them that somebody might be fatally injured as a probable consequences of the beatings that they aided and abetted, they may be held legally responsible for the death resulting from the assaults even if the defendants did not actually intend that the victims be killed or seriously injured. Engichy v. FSM, 1 FSM Intrm. 532, 548 (App. 1984).

It is not unreasonable for a trial court to conclude that a police officer, claiming to effect an arrest, who hits a person four times with a mangrove coconut husker and kills him was trying to kill him. Loch v. FSM, 1 FSM Intrm. 566, 576 (App. 1984).

Where the defendant is fighting another person and uses a wrestling hold which causes the death of the other person, but where the court is unable to find that reasonable person would be aware that such a hold, as applied, would create a substantial risk of death, the defendant is not guilty of the crimes of manslaughter or negligent homicide. FSM v. Raitoun, 1 FSM Intrm. 589, 590-92 (Truk 1984).

Under the law of the Federated States of Micronesia, manslaughter is a lesser degree of homicide included within the charge of murder. Runmar v. FSM, 3 FSM Intrm. 308, 318 (App. 1988).

In order for trier of fact to be free to choose between the lesser offense, manslaughter, or a greater degree of homicide, there must be a factual element, the resolution of which will determine whether the greater or lesser offense is applicable. Runmar v. FSM, 3 FSM Intrm. 308, 318 (App. 1988).

Defendant who fails to request consideration of a lesser offense normally may not successfully appeal from a conviction arrived at without such consideration, but where all elements for murder exist but homicide was caused under extreme mental or emotional disturbance for which there is reasonable explanation or excuse, defendant is entitled to be convicted of manslaughter rather than murder, without regard to whether request for consideration of manslaughter was made by either counsel. Runmar v. FSM, 3 FSM Intrm. 308, 319 (App. 1988).

That a victim/aggressor scuffled with the defendant and chased the defendant with a rock in his hand before the defendant fatally stabbed the victim/aggressor is not such a mitigating factor as automatically to compel the reduction of a charge from murder to manslaughter. Bernardo v. FSM, 4 FSM Intrm. 310, 315 (App. 1990).

A trial court must give specific consideration to the possibility of manslaughter where there is evidence suggesting that the person who caused a death was under the influence of mental or emotional disturbance and if the trial court then finds guilt for murder rather than manslaughter, it must make a specific finding, either orally or in writing, explaining why 11 F.S.M.C. 912 is not applicable. Bernardo v. FSM, 4 FSM Intrm. 310, 315 (App. 1990).

Manslaughter is committed if death is caused by one acting recklessly. Robert v. FSM, 4 FSM Intrm. 316, 318 (App. 1990).

If the acts which caused the death were in willful disregard of the attendant circumstances and unjustifiably created excessive risks, the acts need not have been done with the purpose of causing death or with substantial certainty that death would result. Robert v. FSM, 4 FSM Intrm. 316, 319 (App. 1990).

A necessary element of proof in a prosecution for the homicide of an infant is that the infant was born alive. Welson v. FSM, 5 FSM Intrm. 281, 285 (App. 1992).

In the absence of evidence as to how much alcohol the defendant drank and how it affected his conduct, the court need not determine whether the defendant's intoxication negated his ability to form the intent to kill. Jonah v. FSM, 5 FSM Intrm. 308, 312 (App. 1992).

To act while disregarding something willfully or intentionally requires that the actor be aware of the information disregarded. Thus a conviction for reckless manslaughter may be upheld only if the circumstances known by the defendant at the time of acting created a substantial and unjustified risk of death and he nonetheless willfully and irresponsibly accepted this risk by acting in a manner considerably different from the conduct that might be expected of a well-meaning, law-abiding citizen. Alouis v. FSM, 6 FSM Intrm. 83, 86 (App. 1993).

In assessing whether conduct which has caused death was reckless, courts must also determine whether the conduct was unjustifiable. Alouis v. FSM, 6 FSM Intrm. 83, 88 (App. 1993).

Reckless manslaughter as defined in the FSM Code is intended to apply to willfully irresponsible, life-threatening behavior, actions which grossly deviate from the standards of conduct that a law-abiding person in the actor's situation would observe. Alouis v. FSM, 6 FSM Intrm. 83, 88 (App. 1993).

In the Kosrae Code there are two alternative mens rea elements under which the killing of another can be second-degree murder – the killing is either done with malice aforethought, or it is done while perpetrating or attempting to perpetrate a felony other than one which would statutorily incur liability for first-degree murder. Proof of either one of the two alternative mens rea elements is sufficient for a second-degree murder conviction. Palik v. Kosrae, 8 FSM Intrm. 509, 514 (App. 1998).

The primary function of the felony-murder doctrine is to relieve the prosecution of the necessity of proving, and the trier of fact of the necessity of finding, actual malice on the part of the defendant in the commission of the homicide. The malice involved in the perpetration or attempted perpetration of the felony is transferred or imputed to the commission of the homicide so that the accused can be found guilty of murder even though the killing is accidental. Palik v. Kosrae, 8 FSM Intrm. 509, 514 (App. 1998).

The offense of aggravated assault is included in the resulting homicide. Accordingly, an aggravated assault conviction cannot be used to support a felony-murder conviction. Palik v. Kosrae, 8 FSM Intrm. 509, 515 (App. 1998).

Malice is always presumed when a person deliberately injures another, and if a person uses a deadly weapon on another maliciousness must be inferred. Thus the malice aforethought required for a second-degree murder conviction may correctly be inferred from the deliberate use of three dangerous or deadly weapons. Palik v. Kosrae, 8 FSM Intrm. 509, 515-16 (App. 1998).

– Immunity

The granting of immunity is traditionally a matter within the powers of the prosecution. This is so because grants of immunity call for the balancing of numerous factors and weighing of important prosecutorial policies. Engichy v. FSM, 1 FSM Intrm. 532, 551 (App. 1984).

The FSM Supreme Court may have the power to grant immunity, but the granting of immunity is traditionally a matter of executive or prosecutorial discretion. In the Federated States of Micronesia, where there is no right to trial by jury and the trial judge is the trier of both fact and law, it seems especially unwise for the court to play an aggressive or active role concerning grants of immunity. Engichy v. FSM, 1 FSM Intrm. 532, 552 (App. 1984).

Courts generally have recognized that they should grant immunity only under extraordinary circumstances. Engichy v. FSM, 1 FSM Intrm. 532, 552 (App. 1984).

– Information

Where the language of an information is more specific than the language of the statute under which the offense is charged, the prosecution is required to establish those specific facts in addition to a violation of the statute. FSM v. Boaz (I), 1 FSM Intrm. 22, 24 (Pon. 1981).

An information which claims that the defendant entered a building for the purpose of "fighting" rather than "assaulting" a person within the building does not render the information inadequate for a conviction. A desire to fight carries with it a desire to commit an assault. FSM v. Boaz (I), 1 FSM Intrm. 22, 26 (Pon. 1981).

The government's failure to prove the assertion in its information that a dangerous weapon was used to cause the victim to submit to the sexual assault need not result in dismissal of the case. It merely prevents an application of the greater punishment available under 11 F.S.M.C. 914(3)(b). Buekea v. FSM, 1 FSM Intrm. 487, 493-94 (App. 1984).

Allegations in the information alleging a criminal violation must be proven in order to obtain a conviction. It is not sufficient that the evidence show a violation of the statute specified in the Information if the actual violation is different from the one alleged. Buekea v. FSM, 1 FSM Intrm. 487, 493-94 (App. 1984).

At the discretion of the trial judge, the information may be amended to conform to the evidence if it appears fair to do so. Buekea v. FSM, 1 FSM Intrm. 487, 494 (App. 1984).

When an information sufficiently apprises the defendant of the charges against which he must be prepared to defend and is sufficiently detailed to enable him to plead his case as a bar to future prosecutions for the same offense, it is generally sufficient that an information set forth the offense in words of the statute

itself. Laion v. FSM, 1 FSM Intrm. 503, 516-17 (App. 1984).

The language of Rule 7(c) of the FSM Supreme Court Rules of Criminal Procedure has been interpreted by other courts as permitting the prosecution to charge commission of a single offense by different means, or by charging in the conjunctive actions prohibited disjunctively in a statute. Laion v. FSM, 1 FSM Intrm. 503, 517 (App. 1984).

The FSM Supreme Court Rules of Criminal Procedure were designed to avoid technicalities and gamesmanship in criminal pleading. They are to be construed to secure simplicity in procedure. Criminal Rule 2 convictions should not be reversed, nor the information thrown out, because of minor, technical objections which do not prejudice the accused. Laion v. FSM, 1 FSM Intrm. 503, 518 (App. 1984).

11 F.S.M.C. 301 is one of a set of sections in Chapter 3 of the National Criminal Code specifying general principles of responsibility which apply implicitly to all substantive offenses but do not themselves enunciate substantive offenses. These are not subject to "violation" and are therefore not reached by Rule 7 of the FSM Rules of Criminal Procedure. These general principles are deemed applicable to all crimes, and mere failure to restate them in an Information is not a failure to inform or a violation of due process. Engichy v. FSM, 1 FSM Intrm. 532, 542 (App. 1984).

Dropping one count from a criminal information does not prevent the prosecution from proving that count as an element of other pending charges. FSM v. Cheng Chia-W (I), 7 FSM Intrm. 124, 126 (Pon. 1995).

Criminal defendants have the constitutional right to be informed of the nature of the accusation against them. This protection is implemented through Criminal Rule 7(c)(1), which requires that an information must "be a plain, concise and definite written statement of the essential facts constituting the offense charged." An information should not be thrown out because of minor, technical objections which do not prejudice the accused. FSM v. Xu Rui Song, 7 FSM Intrm. 187, 189 (Chk. 1995).

The fundamental purpose of the information is to inform the defendant of the charge so that he may prepare his defense, and the test for sufficiency is whether it is fair to the defendant to require him to defend on the basis of the charge as stated in the particular information. Another purpose is to inform the court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction, if one should be had. FSM v. Xu Rui Song, 7 FSM Intrm. 187, 189 (Chk. 1995).

The information should be sufficiently definite, certain, and unambiguous as to permit the accused to prepare his defense. Common sense will be a better guide than arbitrary and artificial rules, and the sufficiency of the information will be determined on the basis of practical rather than technical considerations. In an information each count should stand on its own although facts alleged therein may be incorporated by reference. This is true as to each defendant. FSM v. Xu Rui Song, 7 FSM Intrm. 187, 189-90 (Chk. 1995).

An information that is sufficient for one co-defendant may be insufficient and defective as to another. FSM v. Xu Rui Song, 7 FSM Intrm. 187, 190 (Chk. 1995).

An information that, as a practical matter, is not sufficiently certain and unambiguous so as to permit the defendant to prepare its defense, or to inform the court of what alleged acts or omissions of this particular defendant result in criminal liability is defective, and may be dismissed without prejudice. FSM v. Xu Rui Song, 7 FSM Intrm. 187, 190 (Chk. 1995).

A person who allegedly aided and abetted another to commit an offense must be specifically charged with aiding and abetting in the information. FSM v. Webster George & Co., 7 FSM Intrm. 437, 440 (Kos. 1996).

A statute not cited in the information and not mentioned by the prosecution until closing argument cannot be the basis of criminal liability. FSM v. Webster George & Co., 7 FSM Intrm. 437, 440 (Kos. 1996).

The government will be permitted to file an amended information to dismiss those counts for which the statute of limitations has expired. FSM v. Edwin, 8 FSM Intrm. 543, 545 (Pon. 1998).

Although the government is not precluded from charging and trying, in one information, violations of two or more separate provisions of the FSM codes which arise from the same course of conduct, but when the case involves conduct specifically addressed by the tax code (which has comprehensive civil and criminal penalties established for a clearly stated purpose) the government cannot also seek to charge the defendant with alternative violations of criminal code sections providing for criminal penalties up to ten times greater than those allowed under the tax code and which were not clearly intended to apply to tax crimes. FSM v. Edwin, 8 FSM Intrm. 543, 546 (Pon. 1998).

Relevant provisions of Title 12 of the Trust Territory Code regarding traffic citations' definition and procedure continue in effect as Chuuk state law on criminal procedure, as long as these provisions have not been amended or repealed and are consistent with the Chuuk Constitution. Chuuk v. Dereas, 8 FSM Intrm. 599, 601 (Chk. S. Ct. Tr. 1998).

A "citation" is a written order to appear before a court at a time and place named therein to answer a criminal charge briefly described in the citation. It contains a warning that failure to obey it will render the accused liable to have a complaint filed against him upon which an arrest warrant may be issued. Chuuk v. Dereas, 8 FSM Intrm. 599, 601 (Chk. S. Ct. Tr. 1998).

The court may accept the statement of the charge or charges in a citation or a copy thereof in place of an information in any misdemeanor tried. Chuuk v. Dereas, 8 FSM Intrm. 599, 601 (Chk. S. Ct. Tr. 1998).

In accepting the use of a citation in place of a complaint or information in an action, a court must review the statement of charge or charges that appear on the citations in conformity with the nature and contents of an information or complaint. The citation must be a plain, concise and definite written statement of the essential facts constituting the offense charged, and must state for each count of the citation, the statute, rule, regulation or other provision of law which the defendant is alleged to have violated. Chuuk v. Dereas, 8 FSM Intrm. 599, 601 (Chk. S. Ct. Tr. 1998).

Police officers' authority to issue citations in lieu of complaints or information is provided by law. In any case in which a policeman may lawfully arrest a person without a warrant, he may instead, subject to such limitations as his superiors may impose, issue and serve a citation upon the person, if he deems that the public interest does not require an arrest. Chuuk v. Dereas, 8 FSM Intrm. 599, 602 (Chk. S. Ct. Tr. 1998).

When defendants have been charged in a citation with misdemeanor offenses, it is lawfully appropriate for the court to pursue the charges in litigation in place of complaints or information because police officers' issuance of citations to defendants in lieu of complaints or information for violation of Chuuk State Motor Vehicle Code provisions is authorized. Chuuk v. Dereas, 8 FSM Intrm. 599, 602 (Chk. S. Ct. Tr. 1998).

The statements that appear on citations fulfill the essential requirement of that of a complaint or information in a criminal case as provided in Chuuk Criminal Procedure Rule 7(c)(1). Chuuk v. Dereas, 8 FSM Intrm. 599, 602 (Chk. S. Ct. Tr. 1998).

The purpose of an information, summons or warrant is to inform the defendant of what he is called upon to defend. Chuuk v. Defang, 9 FSM Intrm. 43, 45 (Chk. S. Ct. Tr. 1999).

A motion to dismiss an information because the named defendant is not a formally constituted entity is moot when the government's motion to amend the information to change the defendant's name to its proper name is granted. FSM v. Moses, 9 FSM Intrm. 139, 142 (Pon. 1999).

An information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. FSM v. Moses, 9 FSM Intrm. 139, 145 (Pon. 1999).

The purpose of a criminal information is to inform the defendant of the charges against him so that he may prepare his defense, and to advise the court of the facts alleged so that the court may determine whether those facts, if proven, may support a conviction. An information that is deficient in these respects may be dismissed without prejudice. FSM v. Moses, 9 FSM Intrm. 139, 145 (Pon. 1999).

When an information alleges violation of a statute, that statute must be drawn so as to give a person of ordinary intelligence fair notice that the contemplated conduct was forbidden. Laws must provide explicit standards for those who apply them. FSM v. Moses, 9 FSM Intrm. 139, 145 (Pon. 1999).

No probable cause to believe that a criminal offense has been committed exists when the defendants' alleged conduct as set out in the information has not been made criminal under any statute, rule, or regulation to which the court's attention has been directed. FSM v. Moses, 9 FSM Intrm. 139, 145 (Pon. 1999).

The use of affidavits to support the filing of a criminal information does not violate a criminal defendant's right to confrontation. The defendant will have the opportunity to confront the affiants if they are called as witnesses at trial by either the government or the defendant. FSM v. Wainit, 10 FSM Intrm. 618, 621 (Chk. 2002).

The court is authorized to issue an arrest warrant or penal summons if the information is supported by one or more written statements under oath showing probable cause. FSM v. Wainit, 12 FSM Intrm. 376, 383 (Chk. 2004).

The statute, 12 F.S.M.C. 204, and the rule, FSM Crim. R. 4(a), applying to criminal complaints cannot be followed when no complaint was ever filed and when the government earlier filed a criminal information. FSM v. Wainit, 12 FSM Intrm. 376, 383-84 (Chk. 2004).

When applying for an arrest warrant, the person giving evidence under oath by telephone must physically appear before someone who can identify the witness and administer the oath. FSM v. Wainit, 12 FSM Intrm. 376, 384 (Chk. 2004).

Since an information is not made under oath, that would leave only affidavits as the means to show the required "probable cause under oath" for informations. FSM v. Wainit, 12 FSM Intrm. 376, 384 (Chk. 2004).

Since the statute and possibly the rules require sworn written statements to be filed with the information, when no such statements were attached, motions to dismiss on this ground will be granted. These dismissals are not on the merits. Neither defendant has been put in jeopardy. FSM v. Wainit, 12 FSM Intrm. 376, 384 (Chk. 2004).

The dismissal of a criminal case because of a statutorily defective information is without prejudice. FSM v. Wainit, 12 FSM Intrm. 376, 384 (Chk. 2004).

When a criminal information is not supported by written statement(s) under oath showing probable cause to the court's satisfaction before a penal summons (or an arrest warrant) is issued, there is no ground stated that would warrant dismissal of the information if there is nothing before the court that indicates that the information is not a "plain, concise and definite statement of the essential facts constituting the offense." But the summonses issued pursuant to such an information are improperly issued and the resulting initial appearances are as a consequence defective. FSM v. Kansou, 13 FSM Intrm. 48, 50 (Chk. 2004).

Under 12 F.S.M.C. 210, the lack of sworn, written statements showing probable cause makes the issuance of the summonses defective. It does not make the information defective. FSM v. Kansou, 13 FSM Intrm. 48, 50 (Chk. 2004).

– Insanity

Mental condition defense established by 11 F.S.M.C. 302(1) is an affirmative defense and therefore

places squarely upon the defendant the burden to establish "the facts which negative liability" by a "preponderance of the evidence." 11 F.S.M.C. 107(1)(b). Runmar v. FSM, 3 FSM Intrm. 308, 312 (App. 1988).

Mental condition defense established by 11 F.S.M.C. 302(1), and other affirmative defenses, do not lift from government the burden of establishing all essential elements of the crime beyond a reasonable doubt. Runmar v. FSM, 3 FSM Intrm. 308, 312 (App. 1988).

– Interrogation and Confession

Courts may look to the Journals of the Micronesian Constitutional Convention for assistance in determining the meaning of constitutional language that does not provide an unmistakable answer. The Journals provide no conclusion as to whether promises of leniency by the police should be regarded as having compelled a defendant to give statements and other evidence but shows that the article IV, section 7 protection against self-incrimination was based upon the fifth amendment to the United States Constitution. Therefore courts within the Federated States of Micronesia may look to United States decisions to assist in determining the meaning of article IV, section 7. FSM v. Jonathan, 2 FSM Intrm. 189, 193-94 (Kos. 1986).

A confession which is the product of an essentially free and unconstrained choice by its maker may be used as evidence to establish the guilt of the defendant in court. FSM v. Jonathan, 2 FSM Intrm. 189, 194 (Kos. 1986).

Although questioning of witnesses and suspects is a necessary tool for the effective enforcement of criminal law, courts have recognized that there is an unbroken line from physical brutality to more subtle police use of deception, intimidation and manipulation, and that vigilance is required. FSM v. Jonathan, 2 FSM Intrm. 189, 195 (Kos. 1986).

In the area of police questioning and confessions, the protection against self-incrimination is the principal protection, designed to restrict or prevent use of devices to subvert the will of an accused. FSM v. Jonathan, 2 FSM Intrm. 189, 195 (Kos. 1986).

Overall circumstances and not merely the existence or nonexistence of a promise determines whether a confession will be accepted as voluntary or rendered inadmissible as involuntary. FSM v. Jonathan, 2 FSM Intrm. 189, 196 (Kos. 1986).

Voluntariness of a confession may not be resolved by reference to any single infallible touchstone, such as whether a promise was made, but instead must be determined by reference to the totality of surrounding circumstances. FSM v. Jonathan, 2 FSM Intrm. 189, 197 (Kos. 1986).

Where a police officer promised to reduce charges if the defendant cooperated but there was no other showing of police intimidation or manipulation and the defendant had recognized that his guilt was apparent, the confession was not induced by the promises but instead was a voluntary response to the futility of carrying the deceit further. FSM v. Jonathan, 2 FSM Intrm. 189, 198 (Kos. 1986).

Police may question persons who, while they are in police custody, fall under suspicion for another crime, without regard to the fact that other persons in a similar category would be released without questioning. FSM v. Jonathan, 2 FSM Intrm. 189, 199 (Kos. 1986).

Protection offered by the Constitution of the Federated States of Micronesia against compulsory self-incrimination is traceable to the fifth amendment of the United States Constitution. FSM v. Edward, 3 FSM Intrm. 224, 230 (Pon. 1987).

Voluntary admissions prompted by the accumulation of evidence against the defendant are a legitimate goal of police investigation. FSM v. Edward, 3 FSM Intrm. 224, 232 (Pon. 1987).

Where admissions have been obtained in the course of questioning conducted in violation of 12 F.S.M.C. 218, statutory policy calls for a presumption that subsequent admissions were obtained as a result of the violation. FSM v. Edward, 3 FSM Intrm. 224, 233 (Pon. 1987).

When a defendant has expressed a wish to meet with counsel before further questioning, questioning must cease at once. Any attempt by police officers to ignore or override the defendant's wish, or to dissuade him from exercising his right, violates 12 F.S.M.C. 218. FSM v. Edward, 3 FSM Intrm. 224, 235 (Pon. 1987).

A statement of a defendant may be used as evidence against him only if the statement was made voluntarily. FSM v. Edward, 3 FSM Intrm. 224, 236 (Pon. 1987).

In determining whether a defendant's statement to police is "voluntary," consistent with the due process requirements of the Constitution, courts should consider the totality of the surrounding circumstances. Courts review the actual circumstances surrounding confession and attempt to assess the psychological impact on the accused of those circumstances. FSM v. Edward, 3 FSM Intrm. 224, 238 (Pon. 1987).

The court will not issue a writ of certiorari to review the trial court's suppression of defendant's confession in a case in which no assignments of error are furnished to the court, although such decision effectively terminates the case because the government cannot continue its prosecution without the confession, and although no appeal is available to the government. In re Edward, 3 FSM Intrm. 285, 286-87 (App. 1987).

Where no motion to suppress a confession has been made before trial and no cause has been offered as to the failure to raise the objection, the trial court was justified in finding that the defendant had waived any objection to the admission of the confession. In re Juvenile, 4 FSM Intrm. 161, 163 (App. 1989).

Where the trial record shows no waiver of a minor's rights against self-incrimination, where a remarkable discrepancy exists between police procedure for taking a statement and the written evidence offered at trial, where the only evidence supporting the conviction other than the confession is an accomplice's testimony, where the minor is 16 years of age and had been on detention some 2 weeks prior to his confession, and where the parents of the minor were absent at the time the confession was made, the trial court erred in admitting the defendant's confession. In re Juvenile, 4 FSM Intrm. 161, 164 (App. 1989).

A defendant's statement will be suppressed when the defendant has not been advised of all the rights set forth in 12 F.S.M.C. 218 (1)-(5), even though he was advised of the right to remain silent and the right to counsel and he waived those rights. FSM v. Sangechik, 4 FSM Intrm. 210, 211-12 (Chk. 1990).

For a defendant to waive his right to silence or to counsel he must do so knowingly and intelligently. There exists a presumption against such waivers. Moses v. FSM, 5 FSM Intrm. 156, 159 (App. 1991).

Although implied waivers of a defendant's rights might be valid there is a presumption against a finding of a waiver of rights. Moses v. FSM, 5 FSM Intrm. 156, 159-60 (App. 1991).

A form which advises a suspect of his right to lawyer, and of his right to remain silent but only asks if the suspect wants a lawyer now, is confusing and lacks a specific waiver as to the right to remain silent. Moses v. FSM, 5 FSM Intrm. 156, 161 (App. 1991).

Although there is a danger of prejudice in cases where a co-defendant's inculpatory statement is admitted into evidence, because the court is hesitant to limit the broad discretion afforded the trial judge by Criminal Rule 14, and because many problems can be eliminated by redaction of the statement, the court will not adopt a *per se* rule of severance at this time. Hartman v. FSM, 5 FSM Intrm. 224, 230 (App. 1991).

For a confession of a defendant to be admissible as evidence the defendant must not merely waive his right to counsel but must also specifically waive the independent right to remain silent. Hartman v. FSM, 5 FSM Intrm. 224, 234-35 (App. 1991).

By responding voluntarily to questions asked without coercion, after he has been advised of his rights, a defendant waives his right to remain silent. FSM v. Hartman (I), 5 FSM Intrm. 350, 352 (Pon. 1992).

If severance is denied, the defendants' out of court statements ought to be redacted to eliminate in each references to other codefendants. Failure to do so may result in reversal of convictions in the interests of justice. After redaction, no prejudice will occur if the statements then give no reference to any codefendant. Redaction can normally be accomplished by the parties. Thus the court will not view the statement until after redaction. Hartman v. FSM, 6 FSM Intrm. 293, 301-02 & n.12 (App. 1993).

By statute, statements taken as a result of a violation of the defendant's statutory right to be brought before a judicial officer without unnecessary delay are inadmissible, even if voluntary. Chuuk v. Arnish, 6 FSM Intrm. 611, 613 (Chk. S. Ct. Tr. 1994).

Even if the police advise a person of all his rights in strict compliance with the statute, the issue remains whether the incriminating statement was voluntarily made. Voluntariness of a statement made while in custody is determined not by consideration of a single fact alone but instead by reference to the totality of surrounding circumstances. One of the standards to be applied in assessing a claim of involuntariness is the length of detention of the arrested person. FSM v. George, 6 FSM Intrm. 626, 629 (Kos. 1994).

Statements made by a person being questioned by police without being advised of all his rights violates 12 F.S.M.C. 218. A statement so obtained is rendered inadmissible by 12 F.S.M.C. 220. FSM v. George, 6 FSM Intrm. 626, 629 (Kos. 1994).

When a person's ability to think or reason has been diminished due to lack of rest by being held in custody for over 12 hours, his submission to questioning is not an act of voluntariness or consent even though he was advised of some of his rights just before questioning. Any statements made then were the products of physical exhaustion and a sense of oppression, and as a result of violation of the accused's rights under 12 F.S.M.C. 218. Under 12 F.S.M.C. 220, the statement, or evidence derived therefrom, is thus inadmissible against the accused. FSM v. George, 6 FSM Intrm. 626, 629 (Kos. 1994).

When a defendant who testified in a civil contempt proceeding was not in custody, the civil contempt proceedings were not conducted to gather evidence for use in a subsequent criminal action and because a court is not required to warn a defendant of his right to counsel before giving testimony in a civil contempt proceeding, the defendant's testimony and voluntarily submitted pleadings in a civil contempt proceeding are admissible in a later criminal contempt proceeding. FSM v. Cheida, 7 FSM Intrm. 633, 640 & n.2 (Chk. 1996).

A defendant's constitutional right against self-incrimination is an important right, and, although an implied waiver of the right might be valid, there is a presumption against such waivers. FSM v. Fal, 8 FSM Intrm. 151, 154 (Yap 1997).

No FSM case determines that a corporation is a person for purposes of the privilege against self-incrimination found in article IV, section 7 of the FSM Constitution. FSM v. Zhong Yuan Fishery Co., 9 FSM Intrm. 351, 352 (Kos. 2000).

Should the privilege against compulsory self-incrimination attach, it would be for the defendants to assert, not the FSM. FSM v. Zhong Yuan Fishery Co., 9 FSM Intrm. 351, 353 (Kos. 2000).

Where a person's freedom was substantially restricted by a police officer when he was placed into a police car and where that person was under the police officer's suspicion that he was involved in the crimes committed earlier that evening, he was considered arrested for the purpose of the right to be advised of his constitutional rights to remain silent and to have legal counsel. And when the police officers failed to advise him of his constitutional rights at the time he was placed in the police car and considered arrested, all his statements made to the police after his arrest and placement into the police car and before he was advised of his constitutional rights, are inadmissible against him. Kosrae v. Erwin, 11 FSM Intrm. 192, 193-94 (Kos. S. Ct. Tr. 2002).

Statements made by an arrested person being questioned by police without having been advised of his constitutional rights violates the law and the Kosrae Constitution, and any such statement made by that person is inadmissible against him. Kosrae v. Erwin, 11 FSM Intrm. 192, 194 (Kos. S. Ct. Tr. 2002).

A defendant's statement may be used as evidence against him only if the statement was made voluntarily. In deciding whether a statement was made voluntarily, the court will consider the totality of the circumstances. Kosrae v. Sigrah, 11 FSM Intrm. 249, 255 (Kos. S. Ct. Tr. 2002).

The protection against self-incrimination requires the giving of the so-called "Miranda" warnings to the accused, prior to questioning of the accused. The "Miranda" warnings include statements made by the police officers to an accused regarding the accused's right to remain silent and right to legal counsel, free of charge. Kosrae v. Sigrah, 11 FSM Intrm. 249, 255 (Kos. S. Ct. Tr. 2002).

Routine questioning by government agents as part of procedure does not require Miranda warnings. The purpose of this type of procedural questioning is not to compel the person being questioned to incriminate himself. The government agents cannot be held to foresee that criminal liability of the subject might be exposed during the questioning. Kosrae v. Sigrah, 11 FSM Intrm. 249, 255 (Kos. S. Ct. Tr. 2002).

Routine traffic stops which occur on the open road in view of passersby, and which do not result in custodial interrogation, do not require Miranda warnings. Kosrae v. Sigrah, 11 FSM Intrm. 249, 255 (Kos. S. Ct. Tr. 2002).

The requirements that a person's driver's license be in the immediate possession of the operator, and that the operator display his license to a police officer upon demand do not violate the Kosrae Constitution. Kosrae v. Sigrah, 11 FSM Intrm. 249, 257 (Kos. S. Ct. Tr. 2002).

– Intoxication

A contention that defendant's voluntary intoxication absolves him of the legal consequences of his conduct by preventing him from forming the requisite intent to commit a crime is not a defense. The defendant, rather than the rest of the community should bear the risk of his own intoxication. FSM v. Boaz (I), 1 FSM Intrm. 22, 27 (Pon. 1981).

Mere observation by a police officer of a person conducting himself in a manner generally associated with intoxication could be "reasonable grounds" for a cautious person to consider it more likely than not that the person has been consuming alcohol. This of course would depend upon the opportunity to observe actions and mannerisms usually associated with intoxication. Ludwig v. FSM, 2 FSM Intrm. 27, 33 n.3 (App. 1985).

In the absence of evidence as to how much alcohol the defendant drank and how it affected his conduct, the court need not determine whether the defendant's intoxication negated his ability to form the intent to kill. Jonah v. FSM, 5 FSM Intrm. 308, 312 (App. 1992).

Voluntary intoxication does not excuse a defendant from awareness of the risk of causing serious bodily injury to another through recklessly dangerous behavior. Machuo v. FSM, 6 FSM Intrm. 40, 44 (App. 1993).

– Joinder and Severance

It is appropriate to proceed separately in cases involving multiple juvenile defendants. FSM v. Albert, 1 FSM Intrm. 14, 17 (Pon. 1981).

Although there is a danger of prejudice in cases where a co-defendant's inculpatory statement is admitted into evidence, because the court is hesitant to limit the broad discretion afforded the trial judge by Criminal Rule 14, and because many problems can be eliminated by redaction of the statement, the court will not adopt a *per se* rule of severance at this time. Hartman v. FSM, 5 FSM Intrm. 224, 230 (App. 1991).

If severance is denied, the defendants' out of court statements ought to be redacted to eliminate in each references to other codefendants. Failure to do so may result in reversal of convictions in the interests of justice. After redaction, no prejudice will occur if the statements then give no reference to any codefendant. Redaction can normally be accomplished by the parties. Thus the court will not view the statement until after redaction. Hartman v. FSM, 6 FSM Intrm. 293, 301-02 & n.12 (App. 1993).

– Juvenile

The National Criminal Code places in the FSM Supreme Court exclusive jurisdiction over allegations of violations of the Code. No exception to that jurisdiction is provided for juveniles, so charges of crimes leveled against juveniles are governed by the National Criminal Code. FSM v. Albert, 1 FSM Intrm. 14, 15 (Pon. 1981).

To dismiss litigation against juvenile defendants for lack of jurisdiction would be contrary to the National Criminal Code despite the fact that Code makes no reference to charges against juveniles or to the Juvenile Code. FSM v. Albert, 1 FSM Intrm. 14, 15 (Pon. 1981).

The section of the Juvenile Code mandating that courts adopt flexible procedures in juvenile cases remains in effect; neither the National Criminal Code nor any other provision of law enacted by the Congress is at odds with it. 12 F.S.M.C. 1101. FSM v. Albert, 1 FSM Intrm. 14, 17 (Pon. 1981).

It is appropriate to proceed separately in cases involving multiple juvenile defendants. FSM v. Albert, 1 FSM Intrm. 14, 17 (Pon. 1981).

In the absence of any explanation in the legislative history or from the government to justify a different interpretation, the only apparent reason for the deletion of the words "alleged to be found delinquent" from the Model Penal Code definition of official detention is that Congress wished to exclude detained juveniles from the national prohibitions against escape. 11 F.S.M.C. 505(1). In re Cantero, 3 FSM Intrm. 481, 484 (Pon. 1988).

Juveniles alleged or found to be delinquent children are not under "official detention" within the meaning of 11 F.S.M.C. 505(1). In re Cantero, 3 FSM Intrm. 481, 484 (Pon. 1988).

– Kidnapping

The victims were confined in a "place of isolation" within the meaning of 11 F.S.M.C. 921(1), defining the offense of kidnapping, where they were moved from place to place but all locations were in the same vicinity, their captors were in complete control, and they could expect no assistance from anybody. Teruo v. FSM, 2 FSM Intrm. 167, 170-71 (App. 1986).

Confinement for four to six hours is a "substantial period" of confinement within the meaning of 11 F.S.M.C. 921(1), defining the offense of kidnapping, particularly where the victims were subjected to indignities and brutalities amounting to torture during that time. Teruo v. FSM, 2 FSM Intrm. 167, 171 (App. 1986).

The criminal charge of kidnapping is defined as forcibly or fraudulently and deceitfully, and without authority, imprisoning, seizing, detaining, or inveigling away any person (other than his minor child), with intent to cause the person to be secreted against his will, or sent out of the State against his will, or sold or held as a slave or for ransom. Kosrae v. Jackson, 12 FSM Intrm. 93, 98 (Kos. S. Ct. Tr. 2003).

– Major Crimes

A simple assault, one without a weapon or the intent to inflict serious bodily injury, is punishable only by six months' imprisonment. Therefore, it is neither a major crime under the National Criminal Code, because it does not call for three years' imprisonment, nor a felony. FSM v. Boaz (I), 1 FSM Intrm. 22, 24 n.* (Pon. 1981).

Because Congress defined a major crime under the National Criminal Code as one calling for imprisonment of three years or more and because assaults under Title 11 of the Trust Territory Code are punishable by only six months' imprisonment, it is clear that the assault provisions of the Trust Territory Code are left intact. FSM v. Boaz (II), 1 FSM Intrm. 28, 30 (Pon. 1981).

Exclusive national government jurisdiction over major crimes is not mandated by the Constitution; such jurisdiction would be exclusive in any event only if criminal jurisdiction was a power of indisputably national character. Truk v. Hartman, 1 FSM Intrm. 174, 181 (Truk 1982).

The National Criminal Code is an exercise of Congress' power to define and provide penalties for major crimes. In re Otokichy, 1 FSM Intrm. 183, 187 (App. 1982).

The Weapons Control Act violations punishable by imprisonment of three or more years are national crimes. Joker v. FSM, 2 FSM Intrm. 38, 41 (App. 1985).

In light of the Constitution's Transition Clause, action by the FSM Congress is not necessary in order to establish that violations of the Weapons Control Act are prohibited within the Federated States of Micronesia. The only question is whether those are state or national law prohibitions or both. If the definition of major crimes in the National Criminal Code bears upon the Weapons Control Act at all, it is only for that purpose of allocating between state and national law. Joker v. FSM, 2 FSM Intrm. 38, 43 (App. 1985).

The Weapons Control Act seems well attuned to the recognition of shared national-state interest in maintaining an orderly society and the goal of cooperation in law enforcement as reflected in the Major Crimes Clause, article IX, section 2(p) of the Constitution as well as the Joint Law Enforcement Act, 12 F.S.M.C. 1201. Joker v. FSM, 2 FSM Intrm. 38, 44 (App. 1985).

The Major Crimes Clause, with its admonition to Congress to have due regard for local custom and tradition, unmistakably reflects awareness of the framers that Congress would be empowered under this clause to regulate crimes that would require consideration of local custom and tradition. Tammow v. FSM, 2 FSM Intrm. 53, 57 (App. 1985).

Departure from the form of the United States Constitution reveals an intention by the framers of the FSM Constitution to depart from the substance as well, so far as major crimes are concerned. Tammow v. FSM, 2 FSM Intrm. 53, 58 (App. 1985).

Major crimes obviously were not viewed by the framers as simply a local or state problem. The Major Crimes Clause undoubtedly reflects their judgment that the very integrity of this new nation could be threatened if major crimes could be committed with impunity in any part of the nation, with the national government forced helplessly to stand aside. Tammow v. FSM, 2 FSM Intrm. 53, 58 (App. 1985).

The framers of the Constitution stipulated that the line for determining whether a crime is major be drawn on the basis of severity or gravity of the crime rather than by reference to principles of federalism developed under the Constitution of the United States. Tammow v. FSM, 2 FSM Intrm. 53, 58 (App. 1985).

The scope of state police powers under the FSM Constitution must be determined by reference to the powers of the national government under the Major Crimes Clause. It follows that legitimate exercise of the national government power to define major crimes cannot be viewed as an unconstitutional encroachment upon the states' police powers. Tammow v. FSM, 2 FSM Intrm. 53, 59 (App. 1985).

The members of the Micronesian Constitutional Convention obviously did not believe the Major Crimes Clause was improperly at odds with their general view that governmental power should be less centralized under the FSM Constitution than it had been in Trust Territory days. Tammow v. FSM, 2 FSM Intrm. 53, 59 (App. 1985).

The precise line to be drawn in defining major crimes is to be determined by Congress. The policy

determined in the Constitutional Convention was that the major-minor crimes distinction be based on the severity of the crime; and that local custom be taken into account. Tammow v. FSM, 2 FSM Intrm. 53, 60 (App. 1985).

The general rule of criminal procedure is that jurisdiction over a particular crime places in the trial division the necessary authority to find a defendant guilty of any offense necessarily included in the offense charged. Kosrae v. Tosie, 4 FSM Intrm. 61, 63 (Kos. 1989).

Under the constitutional and statutory framework of the Federated States of Micronesia, the FSM Supreme Court trial division, when exercising jurisdiction over cases reasonably initiated as major crimes charges, may also exercise jurisdiction over lesser included offenses prohibited by state law. Kosrae v. Tosie, 4 FSM Intrm. 61, 65 (Kos. 1989).

Rather than rely heavily on United States precedent for guidance in establishing principles of federalism in matters of criminal regulation, the FSM Supreme Court is under an affirmative obligation to develop approaches suited to permit implementation of the national major crime responsibilities identified by Congress. Kosrae v. Tosie, 4 FSM Intrm. 61, 65 (Kos. 1989).

In the course of the formation of the FSM, the allocation of responsibilities between states and nation was such that the impact of the national courts in criminal matters was to be in the area of major crimes and as the ultimate arbiter of human rights issues. Hawk v. Pohnpei, 4 FSM Intrm. 85, 93 (App. 1989).

The intent of the Constitutional Convention is that major crimes, as defined by Congress and committed prior to voter ratification, fall within the jurisdiction of the national government and may be prosecuted pursuant to the national law after the effective date of the amendment. In re Ress, 5 FSM Intrm. 273, 276 (Chk. 1992).

The national court should not abstain from deciding a criminal case where the crime took place before the effective date of the 1991 amendment removing federal jurisdiction over major crimes because of the firmly expressed intention by the Constitutional Convention delegates as to the manner of transition from national jurisdiction to state jurisdiction. In re Ress, 5 FSM Intrm. 273, 276 (Chk. 1992).

Where the crimes charged are no longer those expressly delegated to Congress to define, or are not indisputedly of a national character the FSM Supreme Court has no subject matter jurisdiction. FSM v. Jano, 6 FSM Intrm. 9, 11 (Pon. 1993).

Ever since the ratification of the constitutional amendment removed from Congress the power to define "major crimes" and substituted for it the power to define "national crimes" the national government has had no general criminal jurisdiction. That jurisdiction now lies with the states. In re Extradition of Jano, 6 FSM Intrm. 93, 102 (App. 1993).

Congress has the express power to define national crimes, and until the Constitution was amended in 1991, Congress also had the express power to define major crimes. FSM v. Fal, 8 FSM Intrm. 151, 153 (Yap 1997).

Since the FSM Constitution was amended in 1991, the national courts no longer have jurisdiction over major crimes. FSM v. Anson, 11 FSM Intrm. 69, 73 (Pon. 2002).

When the constitutional amendment to article IX, § 2(p) was ratified, it eliminated Congress's power to define major crimes and repealed by implication Title 11's major crimes provisions. FSM v. Anson, 11 FSM Intrm. 69, 74 (Pon. 2002).

– Malicious Mischief

An essential element of the crime of malicious mischief is that the property injured or destroyed be the property of another. A good faith belief that one owns the property injured or destroyed typically constitutes

a defense to the crime. Nelson v. Kosrae, 8 FSM Intrm. 397, 402, 407 (App. 1998).

As a matter of law, then, if one has a good faith belief that he or she owns the property subject to the crime, he or she cannot be guilty of trespass, malicious mischief or petty larceny. Whether a defendant has a good faith belief in ownership is ordinarily a determination for the trier of fact. Nelson v. Kosrae, 8 FSM Intrm. 397, 402-03 (App. 1998).

The burden was on the government to establish beyond a reasonable doubt that defendants' interference with the crops at issue was unlawful; if there was any doubt about defendants' claim of right, defendants should have been acquitted on the malicious mischief charge. Nelson v. Kosrae, 8 FSM Intrm. 397, 406-07 (App. 1998).

If defendants, in good faith, believe they can assert ownership rights over plantings made on their own land, they cannot be guilty of malicious mischief with respect to those plantings. Nelson v. Kosrae, 8 FSM Intrm. 397, 407 (App. 1998).

The penalties applicable to criminal mischief pertain to deterring the commission of the crime not for the primary purpose of raising revenue as with the tax code which has comprehensive civil and criminal penalties designed specifically for that purpose. FSM v. Edwin, 8 FSM Intrm. 543, 549 (Pon. 1998).

– Motions

A motion to reopen a hearing will be denied where the movant does not demonstrate that the has learned of or located any new information after the hearing was closed. FSM v. Tipen, 1 FSM Intrm. 79, 94 (Pon. 1982).

A written motion and notice of the hearing thereof shall be served, with a memorandum of points and authorities, not later than 14 days before the time specified for the hearing unless a different period is fixed by order of the court, and the moving party's failure to file a memorandum of points and authorities shall be deemed a waiver by the moving party of the motion. FSM v. Moses, 9 FSM Intrm. 139, 143 (Pon. 1999).

Any defense, objection, or request which is capable of determination without the trial of the general issue may be made before trial by motion. Motions may be written or oral at the judge's discretion. FSM v. Moses, 9 FSM Intrm. 139, 143 (Pon. 1999).

Failure by the non-moving party to respond to the motion constitutes a consent to the granting of the motion, but even if a motion is unopposed, a court still needs good grounds before the motion may be granted. FSM v. Wainit, 12 FSM Intrm. 201, 203 (Chk. 2003).

Failure to oppose a motion is generally deemed a consent to the motion and a party who has failed to oppose will not be permitted to orally argue the motion. But even when there is no opposition, a court still needs good grounds before it can grant the motion. FSM v. Wainit, 12 FSM Intrm. 360, 362 (Chk. 2004).

Generally, a motion to disqualify a prosecutor must be made at the earliest possible time, and failure to do so may constitute a waiver of the objection. FSM v. Wainit, 12 FSM Intrm. 360, 363 (Chk. 2004).

Motions raising defenses and objections based on defects in the information (other than it fails to state an offense or the court lacks jurisdiction) must be raised prior to trial. FSM v. Wainit, 12 FSM Intrm. 360, 363 (Chk. 2004).

Failure to oppose a motion is generally deemed a consent to the motion, but even when there is no opposition, a court still needs good grounds before it can grant the motion. But when the motion seeks the same relief, makes much the same arguments, and rests on much the same grounds as a motion that has been opposed, the court will consider the two motions together and the responsive filings as being applicable to both. FSM v. Wainit, 12 FSM Intrm. 376, 379 (Chk. 2004).

Failure to oppose a motion is generally deemed a consent to the motion, but even if there is no opposition, the court still needs good grounds before it can grant the motion. FSM v. Sipos, 12 FSM Intrm. 385, 386 (Chk. 2004).

By rule, timely receipt by the court would be ten days from date of service of the papers being responded to, if served personally, and sixteen days if served by mail. FSM v. Wainit, 12 FSM Intrm. 405, 408 (Chk. 2004).

When no opposition has been filed, it is generally deemed a consent to the motion, but even without an opposition, a court still needs good grounds before it can grant the motion. FSM v. Wainit, 12 FSM Intrm. 405, 408 (Chk. 2004).

Although failure to oppose a motion is generally deemed a consent to a motion, even if there is no opposition, the court still needs good grounds before it can grant the motion. FSM v. Moses, 12 FSM Intrm. 509, 511 (Chk. 2004).

A moving party's failure to file a memorandum of points and authorities in support of a motion is deemed the moving party's waiver of the motion. FSM v. Moses, 12 FSM Intrm. 509, 511 n.1 (Chk. 2004).

A written motion must be served with a memorandum of points and authorities. The moving party's failure to file the memorandum of points and authorities is deemed the moving party's waiver of the motion. When a party has waived his motion, there was no motion pending before the court. FSM v. Fritz, 13 FSM Intrm. 88, 90 (Chk. 2004).

Service is incomplete when a defendant's response to a government motion is served only on the government and not on the other defendants because all filings are to be served on all other parties, including other co-defendants. FSM v. Kansou, 13 FSM Intrm. 167, 168 n.1 (Chk. 2005).

Failure to respond in writing to a written motion is deemed a consent to the granting of the motion, and oral argument will not be heard from that party. FSM v. Kansou, 13 FSM Intrm. 167, 169 n.2 (Chk. 2005).

– National Crimes

Congress did not exceed its constitutional authority when it defined a national crime as one committed "against a national public servant in the course of, in connection with, or as a result of that person's employment or service;" nor was this definition so vague that it does not give reasonable notice of what conduct is prohibited, or encourages arbitrary and discriminatory enforcement. FSM v. Anson, 11 FSM Intrm. 69, 73 (Pon. 2002).

The Constitution, as amended, expressly delegates to Congress the power to define national crimes and prescribe penalties. Congress enacted the Revised Criminal Code Act, as amended, pursuant to this constitutional power. FSM v. Anson, 11 FSM Intrm. 69, 74 (Pon. 2002).

Congress defined crimes against persons as inherently national when they are committed against national public servants, if the crime is sufficiently connected with national public servants' performance of their duties. FSM v. Anson, 11 FSM Intrm. 69, 74 (Pon. 2002).

An assault against a national public servant at the national government capitol complex in Palikir, in the middle of a workday, in the National Public Auditor's Office demonstrates precisely the national government's interests that Congress sought to protect by defining a crime against a national public servant in the course of the public servant's employment as a national crime. FSM v. Anson, 11 FSM Intrm. 69, 74 (Pon. 2002).

Congress acted constitutionally and within its power to define national crimes when it defined a crime against a national public servant in the course of employment as a national crime. FSM v. Anson, 11 FSM Intrm. 69, 74 (Pon. 2002).

When a very strong nexus exists in this case between the defendant's alleged criminal conduct and the victim's employment as a national public servant because it was a crime of violence perpetrated on government property, against a government employee who was conducting official government business, it should be the national government that determines the penalty for that conduct and punishes that conduct. FSM v. Anson, 11 FSM Intrm. 69, 76 (Pon. 2002).

– New Trial

On a defendant's motion, the court may grant a new trial to that defendant if required in the interests of justice. When the motion is not brought on the ground of newly-discovered evidence, the other grounds on which a motion for a new trial may be granted are if the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, or for any error of sufficient magnitude to require reversal on appeal. FSM v. Fritz, 13 FSM Intrm. 85, 87 (Chk. 2004).

If a timely motion for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. FSM v. Fritz, 13 FSM Intrm. 85, 87-88 (Chk. 2004).

– Obstructing Justice

The offense of obstructing justice requires proof beyond a reasonable doubt of resisting or interfering with a police officer in the lawful pursuit of his duties. The intent of the statute is that the police should be able to perform their official duties, including the arrest of an accused, without any obstacles, obstructions or hindrances placed in their way. Arresting a person is within scope of employment and within the lawful pursuit of a police officer's duties. Kosrae v. Nena, 12 FSM Intrm. 525, 528 (Kos. S. Ct. Tr. 2004).

The term "interfere" means to check or hamper the action of the officer, or to do something which hinders or prevents or tends to prevent the performance of his legal duty. Defendants' actions in contacting, holding and pulling up a person while an officer was attempting to arrest him, did hamper or hinder the officer in the performance of his legal duty. Kosrae v. Nena, 12 FSM Intrm. 525, 529 (Kos. S. Ct. Tr. 2004).

The offense of obstructing justice does not require force. However, the use of force, as distinguished from the use of words, is obviously sufficient. Kosrae v. Nena, 12 FSM Intrm. 525, 529 (Kos. S. Ct. Tr. 2004).

Mere threats are not sufficient to constitute obstruction of justice. However, threats, accompanied by a show of force, are sufficient to constitute the offense. Kosrae v. Nena, 12 FSM Intrm. 525, 529 (Kos. S. Ct. Tr. 2004).

Arguments with or criticism of a police officer, without any other action, is generally not sufficient to constitute the offense. For example, demanding that the officers properly identify themselves and show an arrest warrant, is not adequate for the offense of obstructing justice. Kosrae v. Nena, 12 FSM Intrm. 525, 529 (Kos. S. Ct. Tr. 2004).

Under common law, a person may resist a lawful arrest if the arresting officer uses unreasonable force. After careful consideration of public policy and the constitutional protection of individual rights, including protection against arrests involving excessive force, the Kosrae State Court recognizes and accepts the application of the defense. A police officer has a right to use force reasonably necessary to effectuate an arrest. The reasonableness of a police officer's conduct while making an arrest must be assessed on the basis of information that the police officer had when he acted. Kosrae v. Nena, 12 FSM Intrm. 525, 530 (Kos. S. Ct. Tr. 2004).

When an arrestee was intoxicated and the arresting officer restrained and held the arrestee with a technique that he had been trained in to subdue intoxicated persons; when he did not use any weapons to subdue the arrestee; when the arrestee was not injured and did not receive any medical treatment for any injuries received; when the arrestee was not in danger of death or great bodily harm from the action in

restraining him, the officer's conduct in making the arrest was reasonable based upon the information available to him when he acted and therefore he used the reasonable force necessary in trying to subdue, hold, and arrest the arrestee. Therefore the defendants' defense of resisting the arrest of another where the arresting officer uses unreasonable force, must fail. Kosrae v. Nena, 12 FSM Intrm. 525, 530 (Kos. S. Ct. Tr. 2004).

– Pardon

The English version of the Pohnpei Constitution gives the Governor the power to commute a sentence and to grant a pardon (though the Pohnpeian version restricts that power to felony cases); and both versions are silent on the power to grant parole. Pohnpei v. Hawk, 3 FSM Intrm. 17, 23 (Pon. S. Ct. Tr. 1986).

In one line of cases, the United States Supreme Court held that the presidential power to pardon includes the power to commute a sentence even if not specifically provided for by statute, as long as the conditions do not offend the Constitution; in another line of case, however, the court holds that Congress may vest the power to commute by statute. This latter line, requiring legislative enactment, should be adopted by the Pohnpei state court system. Pohnpei v. Hawk, 3 FSM Intrm. 17, 24 (Pon. S. Ct. Tr. 1986).

The only power given to the executive to modify a sentence is the power to grant pardons and reprieves. FSM v. Finey, 3 FSM Intrm. 82, 84 (Truk 1986).

While a person's assertion that, given his rehabilitation over time, and his good work in the community and on behalf of his municipality in the years since his conviction, it is a "manifest injustice" that his felony conviction prohibits him from serving in Congress, may be grounds for a pardon, it is not a valid ground for setting aside a conviction and permitting withdrawal of a guilty plea under Rule 32(d). Trust Territory v. Edgar, 11 FSM Intrm. 303, 306 (Chk. S. Ct. Tr. 2002).

– Parole

The National Criminal Code preserves the President's parole powers for offenses committed before the Code's effective date; the repeal of parole powers applies only to offenses committed thereafter. Tosie v. Tosie, 1 FSM Intrm. 149, 151, 158 (Kos. 1982).

The English version of the Pohnpei Constitution gives the Governor the power to commute a sentence and to grant a pardon (though the Pohnpeian version restricts that power to felony cases); and both versions are silent on the power to grant parole. Pohnpei v. Hawk, 3 FSM Intrm. 17, 23 (Pon. S. Ct. Tr. 1986).

The parole statute, 11 F.S.M.C. 1401, does not mandate, but merely authorizes, review of sentences for the purpose of determining parole eligibility. Yalmad v. FSM, 5 FSM Intrm. 32, 33 (App. 1991).

When considering parole a justice shall request and consider the views of the prosecution, the prisoner and his counsel, the victim or head of the victim's family, and, when requested by the prosecution of the prisoner, such community leaders as clergy and municipal and village leaders when determining a prisoner's eligibility for parole. The justice shall also base his determination upon the prisoner's behavior in prison and any factors indicative of the prisoner's chance for successful adaptation to community life after release. Yalmad v. FSM, 5 FSM Intrm. 32, 33-34 (App. 1991).

An appeal from the decision of the trial judge may be only on the grounds of abuse of discretion resulting from the justice exceeding constraints imposed by the parole statute, 11 F.S.M.C. 1401. Yalmad v. FSM, 5 FSM Intrm. 32, 34 (App. 1991).

Sentencing is to be individualized, and the overall objective must be to make the sentence fit the offender as well as the offense. The sentencing court's focus must be the defendant, the defendant's background and potential, and the nature of the offense. The term of imprisonment fixed in the sentence must be the time which the sentencing judge believes the convicted person justly should be required to serve.

There is no justification for the sentence to include an additional factor in recognition of the possibility of parole. Kimoul v. FSM, 5 FSM Intrm. 53, 60-61 (App. 1991).

If a motion were considered to be a parole application based on the defendant having served ⅓ of his sentence then it would have to be denied, with leave to renew within 30 days, for failure to follow the proper procedures and supply the proper information. FSM v. Akapito, 11 FSM Intrm. 194, 196 (Chk. 2002).

The Kosrae Parole Board must consider any written statements and recommendations of the presiding justice. If one is not in the file, the Board, upon receipt of a parole petition, will serve a written notice on the presiding justice, who may, in his sole discretion, submit or decline to submit a written statement or recommendation. If no written statement and/or recommendation is received by the Parole Board from the presiding justice within the specified 10 day period, the Parole Board shall so state in its submission to the Governor. Phillip v. Kosrae State Parole Bd., 11 FSM Intrm. 331, 332-33 (Kos. S. Ct. Tr. 2003).

The Kosrae Parole Board will not consider any verbal statements made by the presiding justice. Phillip v. Kosrae State Parole Bd., 11 FSM Intrm. 331, 333 (Kos. S. Ct. Tr. 2003).

– Pleas

The trial judge did not actively participate in plea negotiations where he did nothing other than judicially review and comment upon a proposed plea agreement prepared solely by counsel an parties and then voluntarily submitted by counsel to the court. FSM v. Skilling, 1 FSM Intrm. 464, 478-79 (Kos. 1984).

A trial judge cannot be said to have negotiated with the parties concerning a proposed plea where he did not in any way suggest that the defendant plead guilty, made no efforts to encourage either party to enter into a plea agreement or to pursue further negotiations, offered no promise to accept any agreement ultimately arrived at, nor was present at any plea agreement negotiations. FSM v. Skilling, 1 FSM Intrm. 464, 479 (Kos. 1984).

The plea bargaining process contemplates that plea agreements will be submitted to the trial judge for acceptance or rejection. When counsel place documents before a court either voluntarily or as part of standard court procedures under circumstances where the court is normally expected to comment judicially on the documents, the court's response may not customarily be used as a basis for judicial disqualification. FSM v. Skilling, 1 FSM Intrm. 464, 480-81 (Kos. 1984).

Submission of a proposed plea agreement to the court is intended to elicit from the court some indication of an acceptable sanction, assuming that the defendant will admit guilt. The court's statement as to an acceptable penalty does not denote its belief of defendant's guilt. FSM v. Skilling, 1 FSM Intrm. 464, 482 (Kos. 1984).

The existence of plea negotiations says little to the court about defendant's actual guilt. FSM v. Skilling, 1 FSM Intrm. 464, 483 (Kos. 1984).

A defendant's violation of his plea agreement after the agreement was filed with, and accepted by, the court, but before sentencing by the court, may serve as the basis for court punishment of the defendant. Based upon that violation, the court may accept the defendant's plea of guilty to the crime, although the plea agreement provides for the court to defer acceptance of the plea. FSM v. Dores, 1 FSM Intrm. 580, 584 (Pon. 1984).

FSM Criminal Rule 11(e)(1)(C) calls for implementation of the terms of a plea agreement by the court if the court accepts the agreement. When the court accepts, the defendant, the prosecution and the court are all bound to carry out the terms of the plea agreement. The defendant is entitled to the benefit of the bargain reflected in the plea agreement and the government is likewise entitled to enforce the defendant's promises. FSM v. Dores, 1 FSM Intrm. 582, 587 (Pon. 1984).

Considerations of fairness and mutuality, as well as sound policy, require that a defendant who enters into a plea agreement be subject to punishment when he violates the terms of his agreement. FSM v. Dores, 1 FSM Intrm. 582, 588 (Pon. 1984).

There are sound reasons why prosecutors should retain discretion over whether to submit a plea agreement to a court based upon information obtained by the prosecution subsequent to execution of a written plea agreement but before presentation of that agreement to the court. FSM v. Ocean Pearl, 3 FSM Intrm. 87, 91 (Pon. 1987).

A plea agreement calling for dismissal or reduction of charges pending in criminal litigation is contingent upon court approval. Until such approval, neither party is bound by the agreement and neither party can enforce it against the other. FSM v. Ocean Pearl, 3 FSM Intrm. 87, 92 (Pon. 1987).

A plea agreement is not fixed until the court has acted upon it in all particulars and has fixed all conditions and explained them to the defendant. Dores v. FSM, 3 FSM Intrm. 155, 158 (App. 1987).

The defendant may withdraw from a plea agreement at any time prior to the court's action on every element on the agreement. Dores v. FSM, 3 FSM Intrm. 155, 158 (App. 1987).

A duty imposed on the trial court by Rule 11(e)(5) of the FSM Rules of Criminal Procedure to protect the defendant by assuring that there is a factual basis for the plea, may be breached only if the trial court should "enter a judgment" without finding a factual basis. In re Main, 4 FSM Intrm. 255, 259 (App. 1990).

Default judgments are unknown in criminal law. Guilty pleas by a defendant require compliance with formalities designed to insure that the accused receives due process. Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 471, 474 n.3 (App. 1996).

A criminal defendant, having pled not guilty at arraignment, is not required to abandon that plea upon conviction. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM Intrm. 1, 9 (App. 1997).

Ordinarily Rule 32(d) only permits a motion to withdraw a guilty plea prior to imposition of sentence. When the defendant has been sentenced and served his sentence fully, a motion under this rule should under most circumstances be denied. Trust Territory v. Edgar, 11 FSM Intrm. 303, 306 (Chk. S. Ct. Tr. 2002).

After sentencing, the court, in its discretion, may set aside a judgment of conviction and thereafter permit a defendant to withdraw his guilty plea only upon a showing manifest injustice. The burden of proof of establishing "manifest injustice" sufficient to warrant setting aside a conviction lies with the defendant. In order to sustain his burden, the defendant must show that the conviction was obtained through fraud, imposition upon him, or misapprehension of his legal rights, and/or that he is not guilty of the crimes as charged. Trust Territory v. Edgar, 11 FSM Intrm. 303, 306 (Chk. S. Ct. Tr. 2002).

While a person's assertion that, given his rehabilitation over time, and his good work in the community and on behalf of his municipality in the years since his conviction, it is a "manifest injustice" that his felony conviction prohibits him from serving in Congress, may be grounds for a pardon, it is not a valid ground for setting aside a conviction and permitting withdrawal of a guilty plea under Rule 32(d). Trust Territory v. Edgar, 11 FSM Intrm. 303, 306 (Chk. S. Ct. Tr. 2002).

Grounds for setting aside a conviction and permitting withdrawal of a guilty plea under Rule 32(d) include, *inter alia,* the trial court's failure to comply with Rule 11; the trial court's failure to adduce a factual basis for the plea; and lack of assistance of counsel coupled with a failure to understand the direct consequences of a guilty plea as regards the sentence to be imposed. Trust Territory v. Edgar, 11 FSM Intrm. 303, 306-07 (Chk. S. Ct. Tr. 2002).

A Rule 32(d) motion can be granted if the defendant failed to understand the direct consequences of his plea with regard to sentencing, but failure to comprehend the collateral consequences of a plea is not

grounds for the granting of a Rule 32(d) motion. The fact that the defendant, upon pleading guilty to a felony, would be precluded from becoming a candidate for public office is a collateral consequence of the plea. Felons lose privileges available to those who do not commit crimes. Loss of these privileges of good citizenship is simply not grounds for vacating a conviction. Trust Territory v. Edgar, 11 FSM Intrm. 303, 307 (Chk. S. Ct. Tr. 2002).

– Preliminary Hearing

The statute providing for preliminary hearings for criminal defendants, by its terms, does not apply to a defendant who was never arrested and who appeared before the court competent to try him. FSM v. Wainit, 10 FSM Intrm. 618, 622 (Chk. 2002).

Because a prosecutor's assessment of probable cause is not sufficient alone to justify restraint of liberty pending trial, a preliminary hearing would be required if the defendant were to be detained pending trial or if significant restraints were to be placed on his liberty. FSM v. Wainit, 10 FSM Intrm. 618, 622 (Chk. 2002).

The government is required to make a probable cause showing at a hearing before pretrial restraints on the defendant's liberty can be granted. This is because a fair and reliable determination of probable cause is a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest. Affidavits can be used, if properly introduced, as evidence at that hearing to make the probable cause showing. FSM v. Wainit, 10 FSM Intrm. 618, 622 (Chk. 2002).

Because a probable cause determination is not a constitutional prerequisite to the charging decision, it is constitutionally required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. FSM v. Wainit, 10 FSM Intrm. 618, 622 (Chk. 2002).

A preliminary hearing for the government to make a probable cause showing or for the defendant to challenge probable cause is not required either by the statute or by the Constitution when the defendant has not been arrested and has had no restraints placed on his liberty other than the condition that he appear for trial. FSM v. Wainit, 10 FSM Intrm. 618, 622-23 (Chk. 2002).

A preliminary hearing is not a defendant's discovery tool. The preliminary hearing's purpose is to establish probable cause for detaining or requiring bail for an accused, not to create a discovery opportunity for the defendant (although some discovery may usually be a by-product of the hearing). The Criminal Procedure Rules provide other discovery methods for a defendant's use. FSM v. Wainit, 10 FSM Intrm. 618, 623 (Chk. 2002).

A preliminary hearing is not a mini-trial. FSM v. Wainit, 10 FSM Intrm. 618, 623 (Chk. 2002).

– Prisons and Prisoners

Actions of a police officer in stripping a prisoner to punish and humiliate him, then beating him and damaging his pickup truck, constituted violation of the prisoner's constitutional rights to be free from cruel and unusual punishment and his due process rights. Tolenoa v. Alokoa, 2 FSM Intrm. 247, 250 (Kos. 1986).

Except in grave emergencies, the Director of Public Safety or any other executive branch official responsible for the administration of the jail has no inherent or implied power to exercise his own discretion, or to carry out instructions from other nonjudicial officials, in determining whether to release from jail persons ordered to be confined there. Soares v. FSM, 4 FSM Intrm. 78, 79-80 (App. 1989).

There is necessarily some limited power for a jailer to release prisoners in the case of a grave emergency to protect lives or property, but the emergency power is narrow, to be exercised only when there is no opportunity to contact the proper authorities. Soares v. FSM, 4 FSM Intrm. 78, 81 (App. 1989).

Although the internal management of a jail or prison is, subject to compliance with constitutional

requirements, a function of the executive branch, the legislature controls the overall sentencing scheme through statute. Soares v. FSM, 4 FSM Intrm. 78, 82 (App. 1989).

In the absence of legislative action saying otherwise, it is the sentencing order, not the jailer or any member of the executive branch, which determines whether the prisoner is to be confined, and for how long. Soares v. FSM, 4 FSM Intrm. 78, 82 (App. 1989).

A national senator has no power to release national prisoners confined for violation of laws enacted by the national Congress. Soares v. FSM, 4 FSM Intrm. 78, 83 (App. 1989).

The Joint Law Enforcement Agreement between the State of Truk and the national government in no way affects the ability of a national court to require a jailer who has accepted custody of a prisoner to act in conformity with the sentencing order governing the confinement of the prisoner. Soares v. FSM, 4 FSM Intrm. 78, 84 (App. 1989).

The serious illness of a prisoner's child does not constitute an emergency necessitating the defendant's release from prison, where the child will receive the treatment she requires whether the prisoner is released or not. FSM v. Engichy, 4 FSM Intrm. 177, 180 (Truk 1989).

Constitutional provisions applicable to a prisoner may vary depending on his status. A pre-trial detainee has a stronger right to liberty, which right is protected by the Due Process Clause, FSM Const. art. IV, § 3. A convicted prisoner's claims upon liberty have been diminished through due process so that person must rely primarily on article IV, section 8 which protects him from cruel and unusual punishment. Plais v. Panuelo, 5 FSM Intrm. 179, 190 (Pon. 1991).

In a case where a convicted prisoner, who is also a pre-trial detainee, asserts civil rights claims arising out of ill-treatment after arrest, denial of access to family is a due process claim, and physical abuse involves due process as well as cruel and unusual punishment claims. Plais v. Panuelo, 5 FSM Intrm. 179, 190 (Pon. 1991).

Deliberate indifference to an inmate's medical needs can amount to cruel and unusual punishment. Plais v. Panuelo, 5 FSM Intrm. 179, 199-200 (Pon. 1991).

Where a prisoner is physically abused by an official with final policy-making authority, these acts are governmental and a statement of state policy concerning the prisoner. Plais v. Panuelo, 5 FSM Intrm. 179, 207 (Pon. 1991).

Refusing to permit the public defender or the prisoner's mother to see him are violations of civil rights guaranteed under 12 F.S.M.C. 218(1) and (2) and constitute official actions for which a state must be held responsible under 11 F.S.M.C. 701(3). Plais v. Panuelo, 5 FSM Intrm. 179, 207 (Pon. 1991).

Confining a prisoner in dangerously unsanitary conditions, which represent a broader government-wide policy of deliberate indifference to the dignity and well-being of prisoners, is a failure to provide civilized treatment or punishment, in violation of prisoners' protection against cruel and unusual punishment, and renders the state liable under 11 F.S.M.C. 701(3). Plais v. Panuelo, 5 FSM Intrm. 179, 208 (Pon. 1991).

The national government is liable for violations of 6 F.S.M.C. 702(2) when it has abdicated its responsibility toward national prisoners. Plais v. Panuelo, 5 FSM Intrm. 179, 210-11 (Pon. 1991).

A prisoner's rights to procedural due process have been violated when he received neither notice of the charges against him nor an opportunity to respond to those charges before or during confinement. Plais v. Panuelo, 5 FSM Intrm. 179, 212 (Pon. 1991).

A prisoner, incarcerated as the result of his conviction for a national crime, is in the national government's custody although incarcerated in a state jail. The state is merely acting as the national

government's agent in keeping the prisoner in custody. Primo v. Pohnpei Transp. Auth., 9 FSM Intrm. 407, 412 (App. 2000).

When it appears that the Chief of Police has attended to a prisoner's medical needs with respect to food preparation and the medical recommendation for low salt and low fat foods, there has been no refusal by the state to provide to the prisoner's medical needs. Talley v. Timothy, 10 FSM Intrm. 528, 530 (Kos. S. Ct. Tr. 2002).

The Chuuk Attorney General must make a bi-weekly report to the Chuuk State Supreme Court listing each defendant and witness who has been held in custody pending information, arraignment or trial for a period in excess of ten days. In re Paul, 11 FSM Intrm. 273, 279 (Chk. S. Ct. Tr. 2002).

– Prosecutors

A prosecuting attorney's decision whether to prosecute must be overruled only in the most extraordinary circumstances, e.g., vindictiveness, impermissible discrimination, or an attempt to prevent the exercise of constitutional rights. Nix v. Ehmes, 1 FSM Intrm. 114, 125-26 (Pon. 1982).

A prosecuting attorney has wide discretion in determining whether to prosecute. Nix v. Ehmes, 1 FSM Intrm. 114, 126 (Pon. 1982).

The decision to initiate, continue, or terminate a particular criminal prosecution is, with limited exceptions, within the discretion of the prosecutor. FSM v. Mudong, 1 FSM Intrm. 135, 140 (Pon. 1982).

The prosecutor does not have authority to dismiss an existing prosecution on the basis of customary law, but the court does have power to respond to a prosecutorial suggestion for dismissal because of customary considerations. FSM v. Mudong, 1 FSM Intrm. 135, 141 (Pon. 1982).

The prosecution of criminals is not a power having an indisputably national character. Truk v. Hartman, 1 FSM Intrm. 174, 178 (Truk 1982).

The high public office of state prosecutor may be the most powerful office in our system of justice. The prosecutor invokes and implements the sovereign powers of the state in the justice system and is given a wide degree of discretion in so doing. Rauzi v. FSM, 2 FSM Intrm. 8, 13 (Pon. 1985).

Some government workers have been held partially or completely immune from tort liability on grounds that they are public officers. This immunity, intended to serve the purpose of encouraging fearless and independent public service, has been bestowed upon prosecutors as well as other public officials. Rauzi v. FSM, 2 FSM Intrm. 8, 16 (Pon. 1985).

There are sound reasons why prosecutors should retain discretion over whether to submit a plea agreement to a court based upon information obtained by the prosecution subsequent to execution of a written plea agreement but before presentation of that agreement to the court. FSM v. Ocean Pearl, 3 FSM Intrm. 87, 91 (Pon. 1987).

Although the prosecution has broad discretion in determining whether to initiate litigation, once that litigation is initiated in the FSM Supreme Court, the court also has responsibility for assuring that actions thereafter taken are in the public interest. Thus, criminal litigation can be dismissed only by obtaining leave of court. FSM v. Ocean Pearl, 3 FSM Intrm. 87, 91 (Pon. 1987).

Prosecuting attorneys have wide discretion in determining whether to prosecute, and a prosecutor's decision whether to prosecute must be overruled only in the most extraordinary circumstances, such as vindictiveness, impermissible discrimination, or an attempt to prevent the exercise of constitutional rights. FSM v. Wainit, 11 FSM Intrm. 1, 8 (Chk. 2002).

Absent evidence to the contrary, a decision to prosecute a particular person is presumed to be motivated solely by proper considerations. In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present clear evidence to the contrary. FSM v. Wainit, 11 FSM Intrm. 1, 8 (Chk. 2002).

To overcome the presumption that a decision to prosecute a particular person is motivated solely by proper considerations, a criminal defendant has a heavy burden to establish *prima facie* the elements of an impermissible selective prosecution so as to shift the burden to the government to demonstrate that the prosecution was not premised on an invidious objective. FSM v. Wainit, 11 FSM Intrm. 1, 8 (Chk. 2002).

Under the Model Rules of Professional Conduct, which regulates conduct of legal counsel admitted to practice law in the State of Kosrae, Rule 1.7 prohibits a counsel from representing a client if representation

of that client may be materially limited by the counsel's responsibilities to a third person or the counsel's own interests. A counsel may not represent the state in prosecuting a criminal action, if the counsel's prosecution will be materially limited by his personal relationship to the defendant. Kosrae v. Nena, 12 FSM Intrm. 20, 23 (Kos. S. Ct. Tr. 2003).

A prosecutor's duty is to zealously and diligently prosecute criminal charges which are supported by probable cause, in the public interest, and, in his position as a public servant, to serve the public interest, consistent with the Model Rules of Professional Conduct. If the prosecutor cannot fulfill his prosecutorial duties in a particular case due to a conflict, including a personal relationship to the defendant, then the prosecutor is obligated to withdraw from the case. Kosrae v. Nena, 12 FSM Intrm. 20, 23 (Kos. S. Ct. Tr. 2003).

The Office of the Attorney General should complete appropriate assignment of criminal matters to avoid conflicts of interest. Kosrae v. Nena, 12 FSM Intrm. 20, 23 (Kos. S. Ct. Tr. 2003).

A criminal case will not be dismissed if the whole FSM Department of Justice must be disqualified from prosecuting since a special prosecutor can be appointed. FSM v. Wainit, 12 FSM Intrm. 172, 176 (Chk. 2003).

The question of disqualification of counsel, including prosecutors, is largely within the trial court's discretion. FSM v. Wainit, 12 FSM Intrm. 172, 177 (Chk. 2003).

A prosecutor must communicate to his witnesses so that they appear at hearings when they are needed even if they are attorneys in the same office. FSM v. Wainit, 12 FSM Intrm. 172, 177 (Chk. 2003).

Statements to the press generally will not disqualify a prosecutor, especially since there is no jury pool to taint through pretrial publicity as there are no jury trials in the FSM. FSM v. Wainit, 12 FSM Intrm. 172, 177 (Chk. 2003).

Failure to return a .22 rifle to a criminal defendant does not show bias when the defendant's release conditions do not allow him to possess firearms, since if the government had returned the rifle to him, he would have been put in the position of violating his own bail bond release. That is not a position the government should be permitted to put any defendant into. FSM v. Wainit, 12 FSM Intrm. 172, 177 (Chk. 2003).

Prosecutors' seeking a change of venue do not necessarily indicate bias so that they could continue to prosecute when the case is ready for immediate trial and, under the then alleged prevailing conditions, any FSM prosecutor might have felt unsafe unless venue were changed. FSM v. Wainit, 12 FSM Intrm. 172, 177 (Chk. 2003).

Having sought the same release conditions for a defendant in two separate prosecutions does not constitute a hopeless intertwining of the two cases. Release conditions in two otherwise unrelated cases are easily separable. FSM v. Wainit, 12 FSM Intrm. 172, 178 & n.3 (Chk. 2003).

A government lawyer, like any lawyer, cannot represent a client if the representation of that client may be materially limited by the lawyer's own interests. The lawyer's own interests may include emotional interests. An emotional interest, in order to be disqualifying, must create a bias or hostility in the government lawyer sufficiently strong to interfere seriously with the lawyer's exercise of public responsibility. FSM v. Wainit, 12 FSM Intrm. 172, 178 (Chk. 2003).

A government lawyer's public responsibility involves the exercise of discretion. A prosecutor may be disqualified when the prosecutor suffers from a conflict of interest which might prejudice him against the accused and thereby affect, or appear to affect, his ability to impartially perform the discretionary function of his office. FSM v. Wainit, 12 FSM Intrm. 172, 178 (Chk. 2003).

Prosecutors' discretion is limited. They can neither withdraw from representing the plaintiff government, nor dismiss the case, without first seeking and obtaining leave of court. They can, of course, seek such leave. Their other remaining discretion lies in a possible plea bargain should the defendant seek one and in their sentencing recommendation should he be convicted. They also retain discretion in choice of trial tactics to employ. FSM v. Wainit, 12 FSM Intrm. 172, 178 (Chk. 2003).

The court declines to establish a bright line rule that any prosecutor who has some involvement with another case involving the defendant must always be disqualified. To conclude that prosecutors who are allegedly later victims of offenses committed by someone they are prosecuting must always be disqualified from continuing to prosecute would set an unhealthy precedent. It would provide an unwanted incentive for a criminal defendant who sought to disqualify a certain prosecutor to obtain his disqualification through extralegal means. FSM v. Wainit, 12 FSM Intrm. 172, 178-79 (Chk. 2003).

When prosecutors have a special emotional stake or interest in a case, their disqualification from any future involvement with the prosecution is warranted. The current prosecutor will therefore make certain that there is no contact with the former prosecutors about the case and that they have no access to the case file. The current prosecutor may be ordered to file and serve a notice detailing all steps taken to implement this precaution. FSM v. Wainit, 12 FSM Intrm. 172, 179 (Chk. 2003).

A prosecutor that has no interest in the case's outcome other than that justice be done has the exact interest that an impartial prosecutor must have because government's interest in a criminal case is not that it should win the case, but that justice be done. FSM v. Wainit, 12 FSM Intrm. 172, 180 (Chk. 2003).

Because the court is required to make decisions consistent with the FSM's social and geographical configuration and because the FSM is a large country in terms of geographical distances, but has a small land base, a small population, and limited resources with a small government legal office and few other lawyers available, the court thus should not order the government to go outside its Department of Justice for a prosecutor unless it is absolutely necessary. FSM v. Wainit, 12 FSM Intrm. 172, 180 (Chk. 2003).

There is no basis to disqualify the current prosecutor and the entire FSM Department of Justice when no member of the department is either an alleged victim or a witness in the case; when the current prosecutor was not a member of the department when the events occurred that ultimately lead to the disqualification of the other assistant attorneys general; when neither of the disqualified attorneys have any supervisory power over the current prosecutor and he is not subordinate to them; and when, if he has not already done so, he can and will be ordered to have no contact with them concerning the case and to keep all case files segregated from all other department files so that no other department employee can obtain access to them. FSM v. Wainit, 12 FSM Intrm. 172, 180 (Chk. 2003).

It is the prosecutor's discretion to initiate, continue, or terminate a particular criminal prosecution. However, once prosecution has been initiated, the court also has responsibility to assure that all actions taken thereafter are in the public interest. Public interest requires the court to examine the grounds for a dismissal request. Kosrae v. Tosie, 12 FSM Intrm. 296, 298 (Kos. S. Ct. Tr. 2004).

Generally, a motion to disqualify a prosecutor must be made at the earliest possible time, and failure to do so may constitute a waiver of the objection. FSM v. Wainit, 12 FSM Intrm. 360, 363 (Chk. 2004).

A government lawyer, like any other lawyer, cannot represent the government if the representation of that client may be materially limited by the lawyer's own interests. A lawyer's own interests may include emotional interests. An emotional interest, in order to be disqualifying, must create a bias or hostility in the government lawyer sufficiently strong to interfere seriously with the lawyer's exercise of public responsibility. FSM v. Wainit, 12 FSM Intrm. 360, 363 (Chk. 2004).

Since a government lawyer's public responsibility involves the exercise of discretion, a prosecutor may be disqualified when the prosecutor suffers from a conflict of interest which might prejudice him against the accused and thereby affect, or appear to affect, his ability to impartially perform the discretionary function of

his office. FSM v. Wainit, 12 FSM Intrm. 360, 363 (Chk. 2004).

Since a prosecutor has wide discretion in deciding whether to initiate a particular criminal prosecution, a prosecutor's emotional interest sufficiently strong to impair the impartial exercise of this discretion will disqualify the prosecutor from any participation in the matter, including filing the information. FSM v. Wainit, 12 FSM Intrm. 360, 364 (Chk. 2004).

When prosecutors filed a case just two months after the frightening events allegedly caused by the defendant, and when it seems reasonable for them to have had emotional interests that would disqualify them from impartially exercising their discretion whether to prosecute the same defendant in any new cases, their failure to disqualify themselves raises an appearance of impropriety. Accordingly, a motion to disqualify those prosecutors will be granted. FSM v. Wainit, 12 FSM Intrm. 360, 364 (Chk. 2004).

When there is no way to determine if prosecutors who were not disqualified would have exercised their discretion to file these charges, the information must be dismissed to allow that to happen. This is because no matter how firmly and conscientiously a prosecutor may steel himself against the intrusion of a competing and disqualifying interest, he never can be certain that he has succeeded in isolating himself from the inroads on his subconscious. The defendant does not have to show actual prejudice, because on the basis of public policy, it will be presumed to exist as a matter of law. The purpose of this is to avoid the appearance of impropriety. This is designed not only to prevent the dishonest practitioner from improper conduct but also to preclude the honest practitioner from being put in a position where he will be forced to choose between conflicting duties. FSM v. Wainit, 12 FSM Intrm. 360, 364 (Chk. 2004).

Since a lawyer's conflicts are usually imputed to all in the lawyer's office or firm, one member's disqualification generally requires the entire firm's disqualification, but unlike private law firms, the disqualification of all government attorneys in an office is not required when one is disqualified. This different treatment for private and government law offices is considered to stem, in part, from government agency attorneys not being bound by a common profit motive as are lawyers in private practice, and in part because a prosecutor's duty is to seek justice, not merely to convict. FSM v. Wainit, 12 FSM Intrm. 376, 380 & n.2 (Chk. 2004).

The general rule is that the recusal or disqualification of an assistant attorney general does not require the recusal of the attorney general or his other assistants. Individual rather than vicarious disqualification is the general rule but individual disqualification must be complete and any participation or anything less than complete abstention by a disqualified member of a prosecutor's office in a supervisory capacity would warrant disqualification of the entire office. FSM v. Wainit, 12 FSM Intrm. 376, 381 (Chk. 2004).

As a general rule, an entire office of prosecutors will not be disqualified when one member is disqualified unless that one member has supervisory or administrative control over all the others. This general principle has been followed even when the entire prosecutor's office might be said to be a victim of the defendants' crimes. FSM v. Wainit, 12 FSM Intrm. 376, 382 (Chk. 2004).

In light of the social and geographical configuration of Micronesia, FSM Const. art. XI, § 11, and the principle that a prosecutor's disqualification is largely within the court's discretion, the better course is to follow the general principle and disqualify only those in the office over whom the disqualified attorneys had, or have, supervisory authority, not the entire office. FSM v. Wainit, 12 FSM Intrm. 376, 383 (Chk. 2004).

– Public Trial

The FSM constitutional right that the defendant in a criminal case has a right to a speedy public trial is traceable to the U.S. Bill of Rights. FSM v. Wainit, 12 FSM Intrm. 405, 410 (Chk. 2004).

A sentence is imposed when it is pronounced in open court. This is a constitutional as well as procedural requirement. The rules require the defendant's presence at sentencing. This is also required by the FSM constitutional provision, requiring a public trial and giving a defendant the right to confront witness

against him. FSM v. Fritz, 13 FSM Intrm. 88, 91 n.1 (Chk. 2004).

– Right to Compel Witnesses

Upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the witness's presence is necessary to an adequate defense, the government will bear the costs of insuring that the witness is present at trial. Specifically, this includes travel costs. FSM v. Wainit, 11 FSM Intrm. 511, 512 (Pon. 2003).

In a criminal case, a witness's fees and costs need not be tendered at the time of service of the subpoena, a useful precautionary measure. FSM v. Wainit, 11 FSM Intrm. 511, 513 (Pon. 2003).

If a criminal defendant elects to proceed under FSM Criminal Rule 17(b), he should then ascertain from the FSM what that manner of payment is, and how that procedure will work in the event that he is found unable to pay the costs attendant upon securing the presence of his witnesses at trial. FSM v. Wainit, 11 FSM Intrm. 511, 513 (Pon. 2003).

– Right to Confront Witnesses

A codefendant's inculpatory statement which has been admitted into evidence may not be used against any defendant other than the declarant without violating the right of confrontation guarantee of the FSM Constitution. Hartman v. FSM, 5 FSM Intrm. 224, 229 (App. 1991).

Use of a defendant's out of court statement as evidence against a codefendant would violate the codefendant's "right of confrontation" since the declarant is not a witness at the trial subject to cross examination. Hartman v. FSM, 6 FSM Intrm. 293, 301 (App. 1993).

Criminal conviction of a defendant who has failed to appear for trial violates the accused's constitutional right to confront witnesses against him, and other rights, such as due process and effective assistance of counsel, may also be implicated. But a defendant who appears at the beginning of trial and voluntarily absents himself before the trial's end waives any further right to be present. Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 471, 477 & n.7 (App. 1996).

An accused's right to confront the witnesses against him provides him with two types of protection: the right physically to face those who testify against him, and the right to conduct cross-examination. FSM v. Wainit, 10 FSM Intrm. 618, 621 (Chk. 2002).

Because the FSM Declaration of Rights was modeled after the U.S. Bill of Rights, the court may look to U.S. sources for guidance in interpreting similar Declaration of Rights provisions, such as the right to confrontation. FSM v. Wainit, 10 FSM Intrm. 618, 621 n.1 (Chk. 2002).

The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the factfinder to weigh the demeanor of the witness, and it applies when the ability to confront witnesses is most important–when the trier-of-fact determines the ultimate issue of fact. FSM v. Wainit, 10 FSM Intrm. 618, 621 (Chk. 2002).

The right to confrontation does not apply before a criminal defendant is accused, and it is doubtful that the right applies even at a pretrial hearing. FSM v. Wainit, 10 FSM Intrm. 618, 621 (Chk. 2002).

The use of affidavits to support the filing of a criminal information does not violate a criminal defendant's right to confrontation. The defendant will have the opportunity to confront the affiants if they are called as witnesses at trial by either the government or the defendant. FSM v. Wainit, 10 FSM Intrm. 618, 621 (Chk. 2002).

– Right to Counsel

The Constitution secures to the criminal defendant, as a minimum, the right to receive reasonable notice of the charges against the defendant, the right to examine any witnesses against the defendant, and the right to offer testimony and be represented by counsel. In re Iriarte (II), 1 FSM Intrm. 225, 260 (Pon. 1983).

Where the defendants had been advised of their right to counsel but there was no indication that they desired or requested counsel, there is no basis for finding that their right to counsel had been violated. FSM v. Jonathan, 2 FSM Intrm. 189, 199 (Kos. 1986).

When a defendant has expressed a wish to meet with counsel before further questioning, questioning must cease at once. Any attempt by police officers to ignore or override the defendant's wish, or to dissuade him from exercising his right, violates 12 F.S.M.C. 218. FSM v. Edward, 3 FSM Intrm. 224, 235 (Pon. 1987).

For a defendant to waive his right to silence or to counsel he must do so knowingly and intelligently. There exists a presumption against such waivers. Moses v. FSM, 5 FSM Intrm. 156, 159 (App. 1991).

Although implied waivers of a defendant's rights might be valid there is a presumption against a finding of a waiver of rights. Moses v. FSM, 5 FSM Intrm. 156, 159-60 (App. 1991).

Where defendant's counsel had five days to prepare for the defense of the accused, and was granted a two day continuance, in the absence of any showing in the record or representation by counsel of resulting prejudice or ineffectiveness of counsel, the trial court's refusal to grant a longer continuance was not an abuse of discretion and did not violate article IV, section 6 of the FSM Constitution. Hartman v. FSM, 5 FSM Intrm. 224, 233-34 (App. 1991).

The right of effective assistance of counsel applies equally to retained as well as appointed counsel. Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 471, 478 (App. 1996).

Criminal defendants charged with a serious crime have a constitutional right to effective assistance of counsel even if the defendant is a corporation with retained counsel. Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 471, 478 (App. 1996).

Defense counsel's performance must be both deficient and prejudicial to the defendant to be ineffective assistance. Under the first prong of the test, the proper standard for attorney performance is that of reasonably effective assistance, and under the second prong, an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment, but in certain contexts prejudice is presumed. Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 471, 478 (App. 1996).

Because prejudice is presumed when counsel is burdened by an actual conflict of interest an attorney representing criminal codefendants with conflicting interests denies a defendant his constitutional right to effective assistance of counsel. Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 471, 479 (App. 1996).

In order to prevail on an ineffective assistance of counsel claim in cases of joint representation, a criminal defendant who raised no objection at trial to the joint representation must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 471, 479 (App. 1996).

A criminal defendant who cannot show joint representation of conflicting interests can still prevail on an ineffective assistance claim if he can show deficient attorney performance resulting in actual prejudice. Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 471, 479 (App. 1996).

To resolve an ineffective assistance of counsel claim a court must consider the entire record. Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 471, 479 (App. 1996).

It is an uncommon case where joint representation of criminal defendants is proper because the potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to represent more than one codefendant. Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 471, 479-80 (App. 1996).

Conflicting interests in the joint representation of criminal defendants might be discovered and avoided if an early hearing is conducted pursuant to FSM Criminal Rule 44(c). Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 471, 480 n.9 (App. 1996).

In a case of actual conflict between jointly represented criminal codefendants a presumption of prejudice exists so that actual prejudice does not have to be shown and so that a harmless error inquiry is inappropriate. Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 471, 480 (App. 1996).

There must first be a finding of a valid waiver to any conflict of interest from the jointly represented codefendants before the question of whether counsel's trial tactics were reasoned becomes proper. Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 481, 483 (App. 1996).

A court must indulge in every reasonable presumption against the waiver of the conflict of an attorney jointly representing codefendants. Such a waiver is not to be lightly inferred–it must be shown to have been knowingly, voluntarily and intelligently made. Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 481, 483 (App. 1996).

Reversal of a conviction is warranted where there has been no inquiry into waiver of any conflict of counsel jointly representing codefendants, no hint of a waiver appears on the record, and an actual conflict existed. A new trial is then proper. Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 481, 483 (App. 1996).

The right to waive an attorney's conflict of interest is not absolute. There are times when a court should not allow an otherwise valid waiver by a jointly represented codefendant. Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 481, 484 (App. 1996).

While an evidentiary hearing on remand may be necessary in many, or even most, ineffective assistance of counsel cases, it may not be needed when counsel's performance was deficient, and an actual conflict of interest existed which adversely affected that performance. In some such cases the conviction may be reversed, and the government may proceed with a new trial. Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 481, 484 (App. 1996).

The right to counsel means competent counsel, but a trial counselor is not, merely because he is a trial counselor and not a lawyer, incompetent counsel. Representation by a trial counselor is not per se ineffective assistance of counsel failing to meet the constitutional requirement. Nelson v. Kosrae, 8 FSM Intrm. 397, 400 (App. 1998).

A court cannot allow defense counsel to withdraw so that the defendant can seek new counsel to resume trial when the trial is well into the defendant's case-in-chief and when that new counsel was not present during trial and has not heard either the prosecution's witnesses' testimony or that of the defense witnesses who have already testified. FSM v. Jano, 9 FSM Intrm. 470a, 470b (Pon. 2000).

Defense counsel cannot, in the middle of a criminal trial, precipitously accept other employment, without making the acceptance of employment conditional, commit himself to begin work "immediately," and then move for withdrawal because defense counsel is under an ethical obligation to continue as counsel until the criminal trial ends, even if that means postponement of his departure for new employment. FSM v. Jano, 9 FSM Intrm. 470a, 470b (Pon. 2000).

When ordered to by a tribunal, defense counsel is ethically obligated to continue the representation even if good cause to withdraw is present. Should the criminal trial end in a conviction, new counsel may be

obtained for sentencing. FSM v. Jano, 9 FSM Intrm. 470a, 470b (Pon. 2000).

Denying withdrawal of counsel in the middle of a criminal trial is within the court's discretion, and as long as counsel is providing effective assistance, a criminal defendant has the choice of either continuing with that counsel or representing himself pro se. FSM v. Jano, 9 FSM Intrm. 470a, 470b (Pon. 2000).

A defendant in a criminal case has a right to have counsel for his defense. This constitutional right to counsel affords a criminal defendant the right to choose his own counsel, provided that the choice of counsel does not interfere with just resolution of the case. Kosrae v. Sigrah, 11 FSM Intrm. 26, 29 (Kos. S. Ct. Tr. 2002).

– Right to Silence

The issue of the court's jurisdiction to try a case is a preliminary matter that the accused, by testifying upon, does not subject himself to cross-examination as to other issues in the case. FSM v. Fal, 8 FSM Intrm. 151, 154 (Yap 1997).

When a motorist, detained at routine traffic stop for a temporary and brief period, was not arrested and was not in custody at the time he was questioned regarding his driver's license, the police questioning at the roadblock was routine questioning, conducted by government agents as part of their roadblock procedure and did not require Miranda warnings. Therefore, based upon the totality of the circumstances, that motorist was not compelled into giving incriminating evidence against himself, his right against self-incrimination was not violated by the roadblock, and the evidence thus obtained will not be suppressed. Kosrae v. Sigrah, 11 FSM Intrm. 249, 255 (Kos. S. Ct. Tr. 2002).

The privilege against self-incrimination is designed to prevent the use of devices to subvert the will of an accused. This protection has its roots in the United States Constitution's fifth amendment. Historically, the linchpin of this principle has been to prohibit the compelling of evidence of a testimonial or communicative nature. The protection does not extend to non-testimonial evidence such as fingerprints, handwriting exemplars, voice exemplars, or blood samples for purposes of determining a person's blood alcohol level, or the admission into evidence of a person's refusal to take a blood alcohol test. Sigrah v. Kosrae, 12 FSM Intrm. 320, 331 (App. 2004).

The larger question is not whether a statute technically requires an act versus a statement, but whether the driver's failure to produce his license was compelled by the state in violation of the right against self-incrimination. Sigrah v. Kosrae, 12 FSM Intrm. 320, 332 (App. 2004).

While a statute may be said to "compel" compliance with its requirement that a driver display his driver's license upon request by a police officer, it is manifestly the case that in such a sense every law specifying a positive duty and a penalty for failure to comply with that duty may be said to "compel" the required conduct. But this generalized characteristic of all effectively enforceable laws is a different question from whether the state coerced the driver's failure to display his license when the police officer requested him to do so. Sigrah v. Kosrae, 12 FSM Intrm. 320, 332 (App. 2004).

A driver may not lay his own conduct in failing to have his license in his possession and failing to produce it upon an officer's request, at the statute's feet by claiming that it requires him to incriminate himself. The police officer who requested the driver to produce his license cannot be said to have prevented him from displaying his license, or to have engaged in any other type of coercive conduct. The short of it is that the state did not compel the driver's failure to produce his driver's license. Sigrah v. Kosrae, 12 FSM Intrm. 320, 332 (App. 2004).

The constitutional privilege against self-incrimination is not meant to be a refuge for those who, by their own conduct and without any coercive action on the part of the state, fail to comply with the reasonable requirements of a valid statute. Sigrah v. Kosrae, 12 FSM Intrm. 320, 332-33 (App. 2004).

Failure to produce a driver's license upon a police officer's request in contravention of a statute does not constitute compelled evidence within the meaning of either Article II, § 1(f) of the Kosrae Constitution, or Article IV, § 7 of the FSM Constitution, so as to render the statute unconstitutional under either of those constitutional provisions. Sigrah v. Kosrae, 12 FSM Intrm. 320, 333 (App. 2004).

– Robbery

Where one person, encouraged by the defendant to commit an assault, carries out the assault and then proceeds to commit robbery by the taking of turtle meat from the possession of the assaulted person, the defendant is not guilt of robbery where: 1) he did not suggest taking of the turtle meat or anything of value; 2) there is no showing that the could have foreseen the assault would be followed by the taking of something of value; and 3) the defendant left the premises before the turtle meat was taken. FSM v. Carl, 1 FSM Intrm. 1, 2 (Pon. 1981).

Robbery requires a linkage between the threat or use of violence and the taking of something of value. FSM v. Carl, 1 FSM Intrm. 1, 2 (Pon. 1981).

In robbery, as defined in 11 F.S.M.C. 920, the element of use or threatened use of immediate force or violence must be shown to have preceded or been noncombatant or contemporaneous with the taking. Andohn v. FSM, 1 FSM Intrm. 433, 446-47 (App. 1984).

A conviction for robbery is a finding which can only be reversed if the court's finding is clearly erroneous. Loney v. FSM, 3 FSM Intrm. 151, 155 (App. 1987).

One who suggests to his drinking companions that they obtain additional liquor by taking a bottle from construction laborers in the area, and who then leads his companions in an effort to attack one of the workers, solicits more possibilities than just the taking of a bottle, and is guilty of aiding and abetting the robbery of a watch and money from another construction worker carried out by his companions while the original instigator is still pursuing the first laborer. FSM v. Hadley, 3 FSM Intrm. 281, 284 (Pon. 1987).

It is reasonably foreseeable that a robbery of watch and money from a Korean construction worker may be a probable consequence of a common plan to take a bottle from "some Koreans," and the person who suggests the plan and initiates efforts to attack one of the construction workers may be held guilty of aiding and abetting the robbery of watch and money carried out by his companions against another Korean worker, immediately after the defendant initiated the first attack. FSM v. Hadley, 3 FSM Intrm. 281, 284 (Pon. 1987).

– Self-Defense

The general rule is that a person can use no more force than is necessary to protect himself, his family, and his home and property from an intruder and to expel the intruder. FSM v. Ruben, 1 FSM Instr. 34, 37 (Truk 1981).

There is no automatic prohibition against use of a dangerous weapon to protect oneself and family against an intruder, even against an intruder without a weapon, so long as the weapon is not used in deadly fashion and the actual force employed is not more than would be reasonably necessary for purposes of protection. FSM v. Ruben, 1 FSM Intrm. 34, 38 (Truk 1981).

The court is willing to assume that the homeowner whose wife's brother is seeking to enter the house by force late at night in a threatening manner should as a matter of customary law go lightly and use less force than he might to expel some other intruder. FSM v. Ruben, 1 FSM Intrm. 34, 41 (Truk 1981).

Self-defense is not an affirmative defense. A defense is an affirmative defense only if it is so designated by the National Criminal Code or another statute. Engichy v. FSM, 1 FSM Intrm. 532, 554 (App. 1984).

A police officer is entitled under 12 F.S.M.C. 215 to respond to physical resistance or attacks against

him as he attempts to make an arrest and he may use whatever force is reasonably necessary to defend himself or others from harm. However, the police officer may not employ more force than he reasonably believes to be necessary, either to effect arrest or to defend himself. Loch v. FSM, 1 FSM Intrm. 566, 570 (App. 1984).

A person can use no more force than is reasonably necessary to protect himself, his family, home and property from an intruder, and to expel the intruder. Tosie v. FSM, 5 FSM Intrm. 175, 177-78 (App. 1991).

Privilege to use reasonable force in defense of family, home and property may under the circumstances extend onto the road adjacent to the home. Tosie v. FSM, 5 FSM Intrm. 175, 177 (App. 1991).

A claim of self-defense is meritless when the only provocation is an insulting gesture and there is no imminent threat of bodily harm. Alik v. Kosrae, 6 FSM Intrm. 469, 472 (App. 1994).

There are two different standards used when reviewing a claim of self-defense. When one is threatened with imminent serious bodily harm or death by another he may justifiably use deadly force if necessary to protect himself from great bodily harm or death. When one is threatened with imminent unlawful bodily harm (but not serious bodily harm or death) he may justifiably use nondeadly force if force is necessary to prevent the unlawful bodily harm. Where there is no threat of deadly force the correct standard is that the unlawful force must at least constitute imminent threat of an assault before one may defend oneself by force. The force employed must be reasonable in the light of the amount, degree and kind of force being used by the aggressor. Alik v. Kosrae, 6 FSM Intrm. 469, 473 (App. 1994).

– Sentencing

Custom is more properly considered during sentencing than at other stages of a criminal prosecution. FSM v. Mudong, 1 FSM Intrm. 135, 147-48 (Pon. 1982).

A criminal sentence may be affirmed on appeal when a review of the record reveals that the sentence is appropriate. Malakai v. FSM, 1 FSM Intrm. 338, 338 (App. 1983).

The government's failure to prove the assertion in its information that a dangerous weapon was used to cause the victim to submit to the sexual assault need not result in dismissal of the case. It merely prevents an application of greater punishment available under 11 F.S.M.C. 914(3)(b). Buekea v. FSM, 1 FSM Intrm. 487, 493-94 (App. 1984).

The statutory construction rule of lenity reflects the reluctance of courts to increase or multiply punishments absent a clear and definite legislative direction. Laion v. FSM, 1 FSM Intrm. 503, 528 (App. 1984).

Where two statutory provisions aimed at similar types of wrongdoing and upholding citizen and public interests of the same nature would apply to a solitary illegal act, which caused only one injury, the statutes will be construed not to authorize cumulative convictions in absence of a clear indication of legislative intent. However, the government is not denied the right to charge separate offenses to guard against the risk that a conviction may not be obtained on one of the offenses. Laion v. FSM, 1 FSM Intrm. 503, 529 (App. 1984).

The only power given to the executive to modify a sentence is the power to grant pardons and reprieves. FSM v. Finey, 3 FSM Intrm. 82, 84 (Truk 1986).

No authority exists for the court to grant home visits. FSM v. Finey, 3 FSM Intrm. 82, 84 (Truk 1986).

The doctrine of separation of powers does not prevent courts from modifying sentences even though the effect of modification may be the same as commuting the sentence. Kosrae v. Mongkeya, 3 FSM Intrm. 262, 263-64 (Kos. S. Ct. Tr. 1987).

Commutation powers affect the enforcement of the judgment whereas the modification powers affect the judgment itself. Kosrae v. Mongkeya, 3 FSM Intrm. 262, 265 (Kos. S. Ct. Tr. 1987).

The Kosrae Constitution did not intend for the executive's power to commute a sentence to prevent the Kosrae State Court from modifying its own sentencing orders or to prevent the appellate division of the Federated States of Micronesia from reviewing a sentencing order of the state court. Kosrae v. Mongkeya, 3 FSM Intrm. 262, 266 (Kos. S. Ct. Tr. 1987).

Although the internal management of a jail or prison is, subject to compliance with constitutional requirements, a function of the executive branch, the legislature controls the overall sentencing scheme through statute. Soares v. FSM, 4 FSM Intrm. 78, 82 (App. 1989).

In the absence of legislative action saying otherwise, it is the sentencing order, not the jailer or any member of the executive branch, which determines whether the prisoner is to be confined, and for how long. Soares v. FSM, 4 FSM Intrm. 78, 82 (App. 1989).

A national senator has no power to release national prisoners confined for violation of laws enacted by the national Congress. Soares v. FSM, 4 FSM Intrm. 78, 83 (App. 1989).

The Joint Law Enforcement Agreement between the State of Truk and the national government in no way affects the ability of a national court to require a jailer who has accepted custody of a prisoner to act in conformity with the sentencing order governing the confinement of the prisoner. Soares v. FSM, 4 FSM Intrm. 78, 84 (App. 1989).

Both cumulative and concurrent sentencing are logically not mentioned in 11 F.S.M.C. 1002, because they are not alternatives to the punishments specified by the separate criminal statutes, but rather the standards from which the "authorized sentences" of 11 F.S.M.C. 1002 deviate. Plais v. FSM, 4 FSM Intrm. 153, 155 (App. 1989).

The authority to impose consecutive punishments for different crimes can be understood to be within the powers which the legislature has implicitly granted to the court in its overall scheme of criminal law; since each crime in the criminal code carries with it a separate and distinct punishment, it is logical to infer that when a person commits multiple crimes arising from more than one act, Congress intended that person to be punished separately for each offense. Plais v. FSM, 4 FSM Intrm. 153, 155 (App. 1989).

If a defendant himself is incapable of paying restitution and he has made a request for assistance to his family, the family's bad faith in not paying cannot be imputed to the defendant and result in increased imprisonment. Gilmete v. FSM, 4 FSM Intrm. 165, 166 (App. 1989).

The sentencing judge has authority to make a broad inquiry into the background of a defendant; specifically, the court may consider even cases in which the defendant was accused but not convicted. Kallop v. FSM, 4 FSM Intrm. 170, 178 (App. 1989).

A sentencing judge may properly consider factors which would show trafficking of a controlled substance in a previous case, even though in the earlier case the defendant had pled guilty to possession and the trafficking charge had been dismissed. Kallop v. FSM, 4 FSM Intrm. 170, 178 (App. 1989).

In the absence of authority derived from the Constitution, statutes or court rules, judges of the FSM Supreme Court are bound by their own sentencing orders arrived at through the normal exercise of criminal jurisdiction. FSM v. Likitimus, 4 FSM Intrm. 180, 181 (Pon. 1990).

The trial division of the FSM Supreme Court has no power to amend its sentences at will. FSM v. Likitimus, 4 FSM Intrm. 180, 181 (Pon. 1990).

The National Criminal Code does not contemplate routine application of the maximum or any other

specific punishment but instead requires individualized sentencing, that is, court consideration of a broad range of alternatives, with the court's focus at all times on the defendant, the defendant's background and potential, and the nature of the offense, with the "overall objective" of the exercise of discretion being to "make the punishment fit the offender as well as the offense." Tammed v. FSM, 4 FSM Intrm. 266, 272-73 (App. 1990).

In reviewing a sentencing decision of a trial court, an appellate court should follow the standards generally applied in criminal appeals, upholding findings of fact supported by credible evidence but overruling those legal rulings with which the appellate court disagrees. Tammed v. FSM, 4 FSM Intrm. 266, 274 (App. 1990).

When, before sentencing, a beating has been administered to a defendant by family and friends of the victim to punish the defendant for the crime for which he is to be sentenced, the sentencing court's refusal to consider the beatings is an inappropriate attempt to achieve a larger social purpose and an unacceptable diversion of the sentencing process when the refusal is not motivated by defendant's guilt or status but instead is an attempt to influence the future conduct of people who were not before the court and who had not committed crimes similar to those committed by defendants. Tammed v. FSM, 4 FSM Intrm. 266, 276-77 (App. 1990).

Sentencing courts are not free to bar from consideration beatings that were grounded upon, or were products of custom and tradition when considering sentencing, and failure to consider the customary implications of those beatings violates not only the implicit statutory requirement of individualized sentencing, but also mandate of 11 F.S.M.C. 1003, enacted pursuant to article V, section 2 of the Constitution, as well as the judicial guidance clause. Tammed v. FSM, 4 FSM Intrm. 266, 278 (App. 1990).

When a trial court is asked to give special mitigative effect to customary punishment during its sentencing proceedings, the court must first consider whether these customary activities have become so imbued with official state action so that the actions of the assailants are seen as actions of the state itself; if so the punishments must be tested by the same standards that would be applied if state officials carried out these punishments directly. Tammed v. FSM, 4 FSM Intrm. 266, 283 (App. 1990).

The judicial guidance clause prohibits a sentencing court from giving special effect to customary beatings administered to the defendant, unless the court finds that such recognition would be consistent with the protections guaranteed to individuals by the Declaration of Rights. Tammed v. FSM, 4 FSM Intrm. 266, 284 (App. 1990).

Sentencing is to be individualized, and the overall objective must be to make the sentence fit the offender as well as the offense. The sentencing court's focus must be the defendant, the defendant's background and potential, and the nature of the offense. The term of imprisonment fixed in the sentence must be the time which the sentencing judge believes the convicted person justly should be required to serve. There is no justification for the sentence to include an additional factor in recognition of the possibility of parole. Kimoul v. FSM, 5 FSM Intrm. 53, 60-61 (App. 1991).

Because the defendants were convicted of the crime of aggravated sexual assault, which by nature is a violent crime, especially in this case where it was random, if released there is a likelihood they would pose a danger to others in the community. But because the defendants have committed one wrongdoing in the three years since their conviction other factors are needed to require denial of stay of sentence. FSM v. Hartman (II), 5 FSM Intrm. 368, 369-70 (Pon. 1992).

Where defendants have willfully violated the court's previous order to remain confined to the Municipality of U, thus indicating a risk of flight, and where there is no substantial question of law or fact, defendants' motion for a stay of sentence pending appeal will not be granted. FSM v. Hartman (II), 5 FSM Intrm. 368, 370-71 (Pon. 1992).

In considering the mitigation in sentencing to be given without regard to custom because of the beatings

received by the defendants, the severity of the beating is the primary consideration. FSM v. Tammed, 5 FSM Intrm. 426, 428 (Yap 1990).

The court cannot give further mitigative effect in sentencing to reflect the customary nature of the beatings if the court cannot find from the evidence presented that the beatings were customary. FSM v. Tammed, 5 FSM Intrm. 426, 429 (Yap 1990).

The purpose of a sentencing hearing is to determine an appropriate sentence for criminal violations of which a defendant has already been convicted, not to reopen already decided issues of liability. FSM v. Cheng Chia-W (II), 7 FSM Intrm. 205, 219 (Pon. 1995).

Congress, by prescribing a mandatory minimum penalty, has determined that the penalty is proportionate to the nature of the crimes involved. FSM v. Cheng Chia-W (II), 7 FSM Intrm. 205, 219 (Pon. 1995).

Where a statute imposes a mandatory minimum fine and does not permit probation, a court cannot impose probation without violating the statute. FSM v. Cheng Chia-W (II), 7 FSM Intrm. 205, 219-20 (Pon. 1995).

Mitigating evidence cannot be used to depart below the mandatory minimum penalty required by the statute. A court may only consider that evidence in deciding whether the minimum sentence should be enhanced. FSM v. Cheng Chia-W (II), 7 FSM Intrm. 205, 220 (Pon. 1995).

A single, consolidated sentence for multiple offenses is proper, and when some convictions are vacated on appeal the consolidated sentence will be affirmed if it neither exceeds the maximum sentence of all the remaining convictions combined nor exceeds the maximum possible sentence for the most serious conviction remaining. Yinmed v. Yap, 8 FSM Intrm. 95, 103 (Yap S. Ct. App. 1997).

Although a single, consolidated sentence for multiple offenses is proper, the better practice is for the trial court to impose sentence on each count individually, and to indicate on the record whether the sentences are to run concurrently or consecutively. A sentence which tracks the individual counts in this manner facilitates appellate review, and obviates the need for the appellate court to review the propriety of the entire sentence in the event any count underlying a general sentence is vacated. Yinmed v. Yap, 8 FSM Intrm. 95, 103 (Yap S. Ct. App. 1997).

Where there is a plain legislative intent to impose separate punishments a court may reject a proposal that the sentences for those counts run concurrently. FSM v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 166, 181 (Pon. 1997).

In fashioning an appropriate sentence for fishing violations, a court considers the nature, circumstances, extent, and gravity of the prohibited acts committed, the defendant's degree of culpability and history of prior offenses, whether other civil penalties or criminal fines have already been imposed for the specific conduct before the court, and such other matters as justice might require, keeping in mind the statutory purpose behind the provisions violated. FSM v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 166, 181-82 (Pon. 1997).

When a person convicted of a crime appeals only his jail sentence and seeks a stay of that sentence pending appeal, the trial court will grant a stay only if it is reasonably assured that the appellant will not flee or pose a danger to any other person or to the community, and that the appeal is not for purpose of delay, and raises a substantial question of law or fact likely to result in a sentence that does not include a term of imprisonment. The burden of establishing these criteria rests with the defendant. FSM v. Nimwes, 8 FSM Intrm. 299, 300 (Chk. 1998).

The request of a defendant, who is appealing only his jail sentence, for a stay pending appeal will be denied because his allegation that his four-month jail sentence for misappropriating to his own use $17,125

of government money is cruel and unusual punishment and an abuse of the judge's discretion when he has diabetes does not raise a substantial question likely to result in a sentence without a jail term and raises the inference that the appeal was brought for the purpose of delay. FSM v. Nimwes, 8 FSM Intrm. 299, 300 (Chk. 1998).

If, for the same act, both a lesser included and a greater offense are proven, the court should then enter a conviction on only the greater offense. A defendant cannot be sentenced on both the higher and the lesser included offense arising out of the same criminal transaction. Palik v. Kosrae, 8 FSM Intrm. 509, 516 (App. 1998).

A sentence of imprisonment will be stayed if an appeal is taken to the Chuuk State Supreme Court appellate division and the defendant is released pending disposition of appeal if application for release is made in the first instance in the court appealed from. Iwenong v. Chuuk, 8 FSM Intrm. 550, 551-52 (Chk. S. Ct. App. 1998).

Sentencing is to be individualized, and the overall objective is to make the punishment fit the offender as well as the offense. Cheida v. FSM, 9 FSM Intrm. 183, 187 (App. 1999).

The sentencing court's focus at all times must be on the defendant, the defendant's background and potential, and the nature of the offense. Cheida v. FSM, 9 FSM Intrm. 183, 187 (App. 1999).

If the trial court based the sentence upon the defendant's background and potential, and the nature of the offense, such individualized sentencing decision would be entitled to the deference accorded to findings of fact. Cheida v. FSM, 9 FSM Intrm. 183, 187 (App. 1999).

The original sentence is to be one which the sentencing court has considered carefully and has concluded fits the offender as well as the offense. Any change in that sentence will not be lightly won. Cheida v. FSM, 9 FSM Intrm. 183, 187 (App. 1999).

As a criminal contempt remedy is designed for individual deterrence, to punish for intentional disobedience of the court's orders, a defendant's status as a first time offender is not a mitigating factor in his sentencing. Cheida v. FSM, 9 FSM Intrm. 183, 188 (App. 1999).

When an appellant has failed to provide a transcript of the relevant evidence and failed to identify the portions of the record that support his argument, he has failed to demonstrate that the trial court has erred as a matter of law in imposing sentence, and the presumption is that the evidence was sufficient to sustain the trial court's judgment. Cheida v. FSM, 9 FSM Intrm. 183, 189 (App. 1999).

A trial judge may impose a sentence less than the maximum permitted by law. Cheida v. FSM, 9 FSM Intrm. 183, 189-90 (App. 1999).

A sentence is individualized when the maximum is not imposed, the defendant's work schedule is taken into account, and an incentive is provided for compliance with other court orders. Cheida v. FSM, 9 FSM Intrm. 183, 190 (App. 1999).

Imposing a fine is inadequate when the money diverted to the court would otherwise be used to repay the victim. Cheida v. FSM, 9 FSM Intrm. 183, 190 (App. 1999).

A jail sentence with work release enables a defendant to continue his employment, meet his financial obligations to his family and fulfill a trial court judgment to repay the victims. Cheida v. FSM, 9 FSM Intrm. 183, 190 (App. 1999).

Among the criteria the defendant must show to be released pending appeal when the appeal is only of his sentence of imprisonment is that the appeal is not for the purpose of delay and that it raises a substantial question of law or fact likely to result in a sentence that does not include a term of imprisonment. FSM v.

Akapito, 10 FSM Intrm. 255, 256 (Chk. 2001).

A defendant appealing his sentence has utterly failed to meet the criteria for release pending appeal when neither his moving papers nor argument raised a substantial question of law or fact likely to result in a sentence not including a term of imprisonment. FSM v. Akapito, 10 FSM Intrm. 255, 256 (Chk. 2001).

That the defendant would then be free, in mind and body, to assist his counsel in the preparation of his appeal is not a substantial question of law or fact justifying release pending an appeal. FSM v. Akapito, 10 FSM Intrm. 255, 257 (Chk. 2001).

When an appeal of a criminal sentence does not raise any substantial question likely to obtain the result the appellant seeks, the court may draw the inference that it was brought for the purpose of delay. FSM v. Akapito, 10 FSM Intrm. 255, 257 (Chk. 2001).

By statute, the Chuuk State Supreme Court, at any time before imposition of sentence, may suspend imposition of sentence on conditions, and if the conditions are fully satisfied, it must vacate the conviction, but this statute is only applicable before the imposition of sentence and not in a case where the sentence was not only imposed, but was fully served. Trust Territory v. Edgar, 11 FSM Intrm. 303, 307 (Chk. S. Ct. Tr. 2002).

Reconciliation is not a basis for dismissal of a criminal information. The law of our nation in this regard is clear. Custom, including customary apology and reconciliation, is to be considered during the sentencing of a criminal prosecution. Kosrae v. Nena, 12 FSM Intrm. 20, 22 (Kos. S. Ct. Tr. 2003).

Appellate Rule 9(c) sets the criteria for release pending appeal in a criminal case, and the burden of establishing the requisite criteria rests with the defendant. FSM v. Moses, 12 FSM Intrm. 509, 511 (Chk. 2004).

To grant a release pending appeal, the court first must conclude that one or more release conditions will reasonably assure that the appellant will not flee or pose a danger to another person or the community, and then the movant must establish that the appeal is not for purpose of delay and that it raises a substantial question of law or fact likely to result in either 1) a reversal; 2) an order for a new trial; 3) a sentence that does not include a term of imprisonment; or 4) a reduced sentence to a term of imprisonment less than the total of the time already served. FSM v. Moses, 12 FSM Intrm. 509, 511 (Chk. 2004).

The release of a prisoner is not automatic once a notice of appeal and a motion for release have been filed. The prisoner must establish the requisite criteria exist under Appellate Rule 9(c). FSM v. Moses, 12 FSM Intrm. 509, 511 (Chk. 2004).

When a criminal defendant wants to be released pending appeal but his appeal does not raise any substantial question likely to obtain the result sought by the appeal, the court may draw the inference that the appeal was brought for the purpose of delay. FSM v. Moses, 12 FSM Intrm. 509, 511 (Chk. 2004).

A stay of sentence pending appeal is not automatic upon the filing of a notice of appeal and a motion to stay, but rests on the court's discretion. FSM v. Moses, 12 FSM Intrm. 509, 511 (Chk. 2004).

The court may, in its discretion, stay pending appeal upon such terms as the court deems proper, an order for restitution, but the court may require the defendant pending appeal to deposit the whole or any part of the fine, restitution or costs in the registry of the trial court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets. The court may invite the movant and the government to submit their views on the advisability, if restitution is stayed, of an order that while the appeal is pending the restitution be paid into the court's registry to remain there in an interest-bearing account until the appeal is decided. FSM v. Moses, 12 FSM Intrm. 509, 512 (Chk. 2004).

Generally, a criminal sentence starts when it is pronounced from the bench unless the sentence contains

a provision that the sentence starts at some later time. A jail sentence starts to run the date the defendant is received at the jail or other place of detention. FSM v. Fritz, 13 FSM Intrm. 88, 90-91 (Chk. 2004).

A sentence is imposed when it is pronounced in open court. This is a constitutional as well as procedural requirement. The rules require the defendant's presence at sentencing. This is also required by the FSM constitutional provision, requiring a public trial and giving a defendant the right to confront witness against him. FSM v. Fritz, 13 FSM Intrm. 88, 91 n.1 (Chk. 2004).

A written sentence must conform to the one delivered orally. If it does not, the oral sentence controls. FSM v. Fritz, 13 FSM Intrm. 88, 91 n.1 (Chk. 2004).

– Sentencing – Probation

Courts have uniformly held that sound policy requires that they be able to revoke probation for a defendant's offense committed before the sentence commences. FSM v. Dores, 1 FSM Intrm. 582, 586 (Pon. 1984).

Revocation of probation of an alcohol dependent person because he consumed alcohol or because of alcohol related offenses for which he was convicted does not constitute cruel and unusual punishment in violation of the Constitution. FSM v. Phillip, 5 FSM Intrm. 298, 300 (Kos. 1992).

Even if the defendant had been arrested merely for drinking alcohol the court would be compelled to return him to prison because the no-drinking condition had been imposed before the court became aware of the defendant's alcohol dependent condition and because compliance with that condition is fundamental to a proper probation. FSM v. Phillip, 5 FSM Intrm. 298, 300-01 (Kos. 1992).

While the court is interested in the rehabilitation of a defendant, its greater interest is in protecting society at large from illegal conduct. When a court releases a convicted person on probation, it does so at its own discretion. Probation is a leniency granted by the court. It is not a right and revocation of probation should not be thought of as additional punishment. FSM v. Phillip, 5 FSM Intrm. 298, 301-02 (Kos. 1992).

The issue of whether a defendant actually broke the law or that his arrest was unconstitutional is beyond the scope of a probation revocation hearing. The issues of whether a conviction is valid and constitutional should be taken to the appropriate court of appeals. FSM v. Phillip, 5 FSM Intrm. 298, 302 (Kos. 1992).

A parole revocation hearing is significantly different than a trial. Although a court may not act capriciously in revoking probation, there is no need to establish beyond a reasonable doubt that the terms of the probation have been violated. A court may revoke probation if it is reasonably satisfied that the terms of the probation were violated. FSM v. Phillip, 5 FSM Intrm. 298, 302-03 (Kos. 1992).

Probation is inappropriate sentence when the defendant has departed from the FSM, not permitting the FSM to monitor or control its future behavior, and where the seriousness of its violations warranted a more serious sanction. FSM v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 166, 181 (Pon. 1997).

The Kosrae State Court may modify an order of probation during the term of probation when the court finds a termination of probation serves the ends of justice and the best interests of the public and the defendant. Kosrae v. Nena, 12 FSM Intrm. 20, 23 (Kos. S. Ct. Tr. 2003).

An order placing a defendant on probation may be stayed if an appeal is taken. If not stayed, the court shall specify when the term of probation will commence. If the order is stayed, the court must fix the terms of the stay. FSM v. Moses, 12 FSM Intrm. 509, 512 (Chk. 2004).

In most instances in which a court orders probation, a defendant is placed on probation without any intervening imprisonment or delay. A court often orders "delayed probation," but this is when the probationary period is to start after the defendant has completed a sentence of imprisonment for some other crime.

However, these statements in regard to Criminal Rule 32 do not apply when the sentence is probation and an appeal is sought. FSM v. Fritz, 13 FSM Intrm. 88, 91 (Chk. 2004).

Under Rule 38(a)(4), when a sentence is probation and an appeal is taken, an automatic stay pending appeal remains in effect until a starting date is set for probation to begin. If a motion to stay is filed, the court would not set a starting date until the defendant's motion for a stay was either granted (in which case the terms of that stay order would take effect) or denied (in which case a starting date would be set for probation to begin). Conceivably, the court could set a starting date that came before the court was able to rule on the motion to stay. In such a circumstance, the probation would start and then a stay would be either granted or denied. FSM v. Fritz, 13 FSM Intrm. 88, 91-92 (Chk. 2004).

A sentence of probation is automatically stayed upon appeal until a starting date for probation is explicitly set by the court. As a general rule, the court must explicitly state when the probation period starts and, until it does, a sentence of probation will not start. FSM v. Fritz, 13 FSM Intrm. 88, 92 (Chk. 2004).

The court cannot revoke a sentence of probation for acts that took place before the sentence started. Probation cannot be revoked upon the basis of a probation violation occurring before defendant was placed on probation. FSM v. Fritz, 13 FSM Intrm. 88, 92 (Chk. 2004).

– Sentencing – Reduction of Sentence

Rule 35 of the Pohnpei Supreme Court Rules of Criminal Procedure is void because the statutes and Constitution of Pohnpei do not give the power to reduce sentences to the courts. Rather, the statutes and Constitution of Pohnpei explicitly reserve that power for the executive branch, in the person of the Governor. Pohnpei v. Hawk, 3 FSM Intrm. 17, 24 (Pon. S. Ct. Tr. 1986).

There is no provision in the National Criminal Code of the Federated States of Micronesia permitting the court to modify a sentence after judgment. The rules only permit the court to reduce a sentence within 120 days after the sentence has been imposed. FSM v. Finey, 3 FSM Intrm. 82, 84 (Truk 1986).

Even when mitigative effect cannot be given due to the beatings suffered by the defendants the court may consider a reduction of sentence pursuant to FSM Crim. R. 35. FSM v. Tammed, 5 FSM Intrm. 426, 430 (Yap 1990).

In a criminal case, the appellate court may commute, reduce, or suspend the execution of sentence, but when the appellate court has held that the trial court did not abuse its discretion in considering and imposing its sentence on the defendant for the offense committed, it will find no way to commute, reduce, or suspend the sentence. Cheida v. FSM, 9 FSM Intrm. 183, 190 (App. 1999).

FSM Criminal Rule 35 permits the sentencing judge to reduce a sentence within 120 days after sentence is imposed. FSM v. Faen, 9 FSM Intrm. 416, 417 (Yap 2000).

Although the court may reduce a sentence simply because it has changed its mind, it usually will not do so where nothing is shown to justify a reduced sentence that was not already considered by the court when the initial sentence was fixed. FSM v. Faen, 9 FSM Intrm. 416, 417 (Yap 2000).

Occasions will arise when a conscientious judge, after reflection or upon receipt of new probation reports or other information, will feel that he has been too harsh or has failed to give weight to mitigating factors which properly should have been taken into account. FSM v. Faen, 9 FSM Intrm. 416, 417 (Yap 2000).

While it is a sobering fact that any incarceration will interrupt family life, that fact alone, however, does not constitute a basis upon which to reduce defendant's sentence when the court was aware of the defendant's family situation at the time of sentencing, and the motion for reconsideration presents nothing that could not have been presented then. FSM v. Faen, 9 FSM Intrm. 416, 417 (Yap 2000).

The court may reduce a sentence from one of incarceration to one of probation within 120 days after the sentence is imposed, or within 120 days after the court's receipt of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or after entry of any order or judgment denying review of, or having the effect of upholding, a judgment of conviction. FSM v. Akapito, 11 FSM Intrm. 194, 195 (Chk. 2002).

The FSM Supreme Court has jurisdiction to hear a Rule 35 motion for reduction of sentence after a convicted criminal defendant has dismissed his own appeal. FSM v. Akapito, 11 FSM Intrm. 194, 196 (Chk. 2002).

When the relevant portion of FSM Criminal Procedure Rule 35(b) is identical to the United States Federal Rule of Criminal Procedure 35(b) that was in effect until November 1, 1987, and is derived from that source, the standard applied by U.S. federal courts exercising their discretion in Rule 35(b) requests is thus persuasive. FSM v. Akapito, 11 FSM Intrm. 298, 300 (Chk. 2002).

A reduction of sentence may be granted if the court decides that the sentence unduly severe. The court may reduce the sentence simply because it has changed its mind, but usually will not do so where nothing is shown to justify a reduced sentence that was not already considered by the court when the original sentence was fixed. FSM v. Akapito, 11 FSM Intrm. 298, 300 (Chk. 2002).

A court may reconsider a sentence in light of further information presented to it in the interim between the imposition of sentence and the motion to reduce the sentence. FSM v. Akapito, 11 FSM Intrm. 298, 300 (Chk. 2002).

On an application for reduction of sentence, the applicant's commendable prison deportment is only some evidence on the issue to be resolved, neither to be disregarded nor overestimated. Also, hardship on the applicant's family may justify a sentence reduction. FSM v. Akapito, 11 FSM Intrm. 298, 300 (Chk. 2002).

A motion for reduction of sentence will be denied when the original sentence was not unduly severe, when no reason appeared for the court to change its mind, and when nothing is presented now that was not already considered at the time the sentence was imposed. FSM v. Akapito, 11 FSM Intrm. 298, 300 (Chk. 2002).

– Service

It is not unreasonable and oppressive to serve witness subpoenas one week before trial. FSM v. Kuranaga, 9 FSM Intrm. 584, 585 (Chk. 2000).

A subpoena duces tecum is not unreasonable and oppressive when it requires documents that were earlier produced in response to discovery and materials and documents not discoverable under Criminal Rule 16 because it is not a valid objection that documents required by the subpoenas are not discoverable under Rule 16, but any materials already furnished in discovery need not be produced pursuant to the subpoenas. FSM v. Kuranaga, 9 FSM Intrm. 584, 585 (Chk. 2000).

A subpoena will not be quashed for failure to tender a witness's travel costs "allowed by law" when the subpoena was served because, in the absence of a statute or rule setting a figure for the "fee for one day's attendance and the mileage allowed by law," the law does not allow an amount. FSM v. Kuranaga, 9 FSM Intrm. 584, 586 (Chk. 2000).

– Sexual Offenses

The constitutional requirement that proof of guilt be established beyond a reasonable doubt provides protection to persons accused of sexual offenses as well as those accused of other crimes. Complaints by women of sexual assault in Micronesia require no more corroboration than those of other witnesses in other serious cases. Buekea v. FSM, 1 FSM Intrm. 487, 492 (App. 1984).

Where there is sufficient evidence of other force in the record to support a conviction for forced sexual penetration, there is no inconsistency in finding the use of force even without ruling that a knife compelled the victim to submit. Buekea v. FSM, 1 FSM Intr. 487, 494 (App. 1984).

Forcing the victim into the nahs, holding and disrobing her, and subjecting her to sexual penetration against her will in the presence of others constituted a single contemporaneous series of events, all of which were intended to be, and were, mutually supporting the general plan to subject the victim to group rape. FSM v. Hartman (I), 5 FSM Intrm. 350, 352 (Pon. 1992).

When the state has failed to prove beyond a reasonable doubt that the sexual penetration was made against the complainant's will, the state has not carried its burden of proof and the sexual assault charge must be dismissed. Kosrae v. Jonah, 10 FSM Intrm. 270, 272 (Kos. S. Ct. Tr. 2001).

Sexual assault is intentionally subjecting another person to sexual penetration, or forcing another person to make a sexual penetration on himself or another or on an animal, against the other person's will, or under conditions in which the offender knows or should know that the other person is mentally or physically incapable of resisting or understanding the nature of his conduct. Sexual penetration is sexual intercourse, cunnilingus, fellatio, anal or oral intercourse, or the causing of penetration of the genital, anal, or oral opening of another to any extent and with any object whether or not there is an emission. Kosrae v. Jackson, 12 FSM Intrm. 93, 99 (Kos. S. Ct. Tr. 2003).

When the state did prove beyond a reasonable doubt that the defendant did commit a sexual assault by intentionally subjecting the victim to sexual penetration, by oral intercourse, under conditions in which the defendant knew or should have known that she was mentally or physically incapable of resisting or understanding the nature of his conduct, the defendant is guilty of the offense of sexual assault. Kosrae v. Jackson, 12 FSM Intrm. 93, 100 (Kos. S. Ct. Tr. 2003).

The offense of sexual assault requires proof beyond a reasonable doubt of intentionally subjecting another person to sexual penetration, against the other person's will. Sexual penetration includes the causing of penetration of the genital, anal, or oral opening of another to any extent and with any object whether or not there is an emission. Kosrae v. Sigrah, 12 FSM Intrm. 562, 566 (Kos. S. Ct. Tr. 2004).

When the evidence is undisputed that the defendant used his fingers to penetrate the victim's vagina, he did cause the penetration of the victim's genital opening with an object: his fingers, and the state has proven beyond a reasonable doubt all of the elements of the criminal offense of sexual assault. Kosrae v. Sigrah, 12 FSM Intrm. 562, 566 (Kos. S. Ct. Tr. 2004).

– Speedy Trial

The Pohnpeian customary practice of quickly resolving conflict resulting from the commission of an act is closely related to, if not the counterpart of the Western concept of a speedy trial. Pohnpei v. Weilbacher, 5 FSM Intrm. 431, 450 (Pon. S. Ct. Tr. 1992).

Under the Pohnpei Constitution an accused's right to a speedy trial is not violated if the delay was necessary to afford the accused the opportunity (if he chooses to exercise the customary practice) of pacifying hostilities arising from the criminal conduct between the defendant and his victims; or if the delay was necessary for the prosecutor to prepare for trial, given the complexity and other circumstances of the case; or if the delay was the result of certain excusable neglect by any agency involved in the criminal process. It is a violation of an accused's right to a speedy trial if the delay was employed by the prosecution to subject the accused to undue oppression. Pohnpei v. Weilbacher, 5 FSM Intrm. 431, 450-51 (Pon. S. Ct. Tr. 1992).

The right to a speedy public and impartial trial attaches either when an information or complaint has been filed with the court and service of that information or complaint has been effected upon the one named as the accused; or when an accused has been arrested by means of an arrest warrant or other process issued by a judicial officer. "Other process" includes summons, writ, warrant, mandate or other process issuing from

or by the authority of the court to have the defendant named therein appear before it at the appointed time. It does not refer to a warrantless arrest. Pohnpei v. Weilbacher, 5 FSM Intrm. 431, 451-53 (Pon. S. Ct. Tr. 1992).

The statute of limitations begins to run from the commission of an offense, or when the crime is complete. Once prosecution has been commenced the statute of limitations period is no longer available to the prosecution who must then face the task of bringing the defendants to a prompt trial. Pohnpei v. Weilbacher, 5 FSM Intrm. 431, 454-55 (Pon. S. Ct. Tr. 1992).

A delay in bringing to trial caused by a "subsisting agreement" between the government and the Public Defender's Office that was not clear as to how service of the criminal process was to be effected on defendants was excusable neglect and thus not a violation of the right to a speedy trial. Pohnpei v. Weilbacher, 5 FSM Intrm. 431, 455 (Pon. S. Ct. Tr. 1992).

The Pohnpeian concept of justice and Pohnpei Criminal Rule 48 both allow the court to dismiss a criminal case for delay even when the defendant's constitutional right to a speedy trial has not been violated. Pohnpei v. Weilbacher, 5 FSM Intrm. 431, 456 (Pon. S. Ct. Tr. 1992).

When a defendant has already agreed to a trial date that meets the constitutional requirement for a speedy trial, and no reason is offered why that date is no longer constitutionally sound, a later motion for a speedy trial may be denied. FSM v. Wu Ya Si, 6 FSM Intrm. 573, 574 (Pon. 1994).

When only ten months have passed since the defendant was charged with twelve counts and about 8½ months since his initial appearance – not enough time has elapsed for speedy trial concerns to be implicated in a complex case, especially when trial seems imminent. FSM v. Wainit, 11 FSM Intrm. 186, 191 (Chk. 2002).

The time that elapses between the alleged offenses and the filing of charges is not to be considered when determining whether a defendant has been denied a speedy trial. FSM v. Wainit, 11 FSM Intrm. 186, 191 (Chk. 2002).

Rule 48(b) is the mechanism by which a defendant may assert his constitutional right to a speedy trial, although it also embraces the court's inherent power to dismiss for want of prosecution. The court's power to dismiss under Rule 48(b) is not limited to those situations in which the defendant's constitutional speedy trial right has been violated. The Rule is a restatement of the court's inherent power to dismiss a case for want of prosecution. It imposes a stricter standard of tolerable delay than does the Constitution. FSM v. Wainit, 12 FSM Intrm. 405, 409 (Chk. 2004).

It is appropriate to look to U.S. constitutional law and its courts' interpretations, especially those interpretations existing at the time of the Micronesian Constitutional Convention, as a guide to the intended meaning and scope of the FSM Constitution's words (such as the speedy trial right) since the provisions in the FSM Constitution's Declaration of Rights are traceable to the U.S. Constitution's Bill of Rights. FSM v. Wainit, 12 FSM Intrm. 405, 409 (Chk. 2004).

The FSM constitutional right that the defendant in a criminal case has a right to a speedy public trial is traceable to the U.S. Bill of Rights. FSM v. Wainit, 12 FSM Intrm. 405, 410 (Chk. 2004).

A four-factor balancing test for determining speedy trial violations: – length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant – is an appropriate tool to analyze the meaning of the FSM Constitution's speedy trial right. It is also an appropriate tool to use in analyzing a Rule 48(b) dismissal. FSM v. Wainit, 12 FSM Intrm. 405, 410 (Chk. 2004).

In determining whether to exercise its discretionary power to dismiss under Rule 48(b), the court may consider the same factors relevant to a constitutional decision regarding denial of a speedy trial. FSM v. Wainit, 12 FSM Intrm. 405, 410 (Chk. 2004).

A lengthy delay is a triggering mechanism to determine if further analysis is required to determine if a defendant's right to a speedy trial has been violated. FSM v. Wainit, 12 FSM Intrm. 405, 410 (Chk. 2004).

No trial can be held while an appellate division-ordered stay is in effect, nor until after a defendant's motions to disqualify the prosecutors and to dismiss the case are decided. FSM v. Wainit, 12 FSM Intrm. 405, 411 (Chk. 2004).

Delay caused or requested by a defendant suspends his speedy trial right, or is considered his waiver of that right, until that delay is over, even when that delay is justified. FSM v. Wainit, 12 FSM Intrm. 405, 411 (Chk. 2004).

An accused is not denied a speedy trial when the delay is clearly attributable to the accused himself or to his counsel. Such delay includes the defendant's excused absences and the time to rule on his pretrial motions. FSM v. Wainit, 12 FSM Intrm. 405, 411-12 (Chk. 2004).

For speedy trial or unnecessary delay purposes, a defendant cannot take advantage of delays caused by his own conduct whether or not those delays were justified. FSM v. Wainit, 12 FSM Intrm. 405, 412 (Chk. 2004).

– Standard of Proof

All elements of a crime need not themselves be criminal in order for the combination of those elements to be criminal. FSM v. Boaz (II), 1 FSM Intrm. 28, 33 (Pon. 1981).

The Due Process Clause of the Constitution requires proof beyond a reasonable doubt as a condition for criminal conviction in the Federated States of Micronesia. Alaphonso v. FSM, 1 FSM Intrm. 209, 217-23 (App. 1982).

As a matter of constitutional due process, a trial court presented with an alibi defense should consider evidence concerning the alibi along with all other evidence and shall not find the defendant guilty if after considering all of that evidence, the judge feels there is a reasonable doubt as to the defendant's guilt. Alaphonso v. FSM, 1 FSM Intrm. 209, 223-25 (App. 1982).

Unsubstantiated speculations raised subsequent to trial are not sufficient to raise reasonable doubt as to a person's guilt in the light of eyewitness testimony. Alaphonso v. FSM, 1 FSM Intrm. 209, 225-27 (App. 1982).

In stating that the prosecution's burden was to present a "prima facie" case, the trial court did not apply an incorrect standard in deciding an FSM Criminal Rule 29 motion for judgment of acquittal. Andohn v. FSM, 1 FSM Intrm. 433, 437-38 (App. 1984).

The government's burden in criminal prosecutions is to show guilt beyond a reasonable doubt. Andohn v. FSM, 1 FSM Intrm. 433, 441 (App. 1984).

An ordinary reading of FSM Criminal Rule 29 would require that the prosecution's case warrant a finding of guilt beyond a reasonable doubt, or else a motion for judgment of acquittal should be granted. Andohn v. FSM, 1 FSM Intrm. 433, 441 (App. 1984).

In deciding a motion for a judgment of acquittal, the question is not whether the government has proved its case beyond a reasonable doubt. The proper question is whether from the evidence presented, a reasonable fact finder *could* find guilt beyond a reasonable doubt. Andohn v. FSM, 1 FSM Intrm. 433, 441-42 (App. 1984).

In deciding a FSM Criminal Rule 29 motion for judgment of acquittal, it is not required that the evidence presented *compel*, but only that it be *capable of* persuading the trial fact finder to reach a verdict of guilt by

the requisite standard. Andohn v. FSM, 1 FSM Intrm. 433, 442 (App. 1984).

The constitutional requirement that proof of guilt be established beyond a reasonable doubt provides protection to persons accused of sexual offenses as well as those accused of other crimes. Complaints by women of sexual assault in Micronesia require no more corroboration than those of other witnesses in other serious cases. Buekea v. FSM, 1 FSM Intrm. 487, 492 (App. 1984).

A gun with a defective trigger is a firearm under 11 F.S.M.C. 1204(4). The statute's purpose may not be evaded by such simple expedients as dismantling the weapon, maintaining weapons and ammunition in separate places, removing one easily replaceable part, or other similar ploys. Under the statute, current operability is not an essential element of the crime of possession of a firearm. Ludwig v. FSM, 2 FSM Intrm. 27, 34 (App. 1985).

The government in any criminal case is required, as a matter of due process, to prove all elements of the offense beyond a reasonable doubt. Ludwig v. FSM, 2 FSM Intrm. 27, 35 (App. 1985).

Statutes which provide a defense in the form of exceptions to a general proscription do not reduce or remove the government's traditional burden of proving beyond a reasonable doubt every fact necessary to constitute the offense. Ludwig v. FSM, 2 FSM Intrm. 27, 35 (App. 1985).

The government ultimately bears the burden of disproving the applicability of a statutory exception when it is properly presented as a defense. Ludwig v. FSM, 2 FSM Intrm. 27, 35 (App. 1985).

Each item of evidence is merely a building block. The standard of proof beyond a reasonable doubt is not applied to any specific item of evidence to determine admissibility but to all of the evidence collectively to determine whether all elements of the crime have been established beyond a reasonable doubt. Joker v. FSM, 2 FSM Intrm. 38, 47 (App. 1985).

Mental condition defense established by 11 F.S.M.C. 302(1), and other affirmative defenses, do not lift from government the burden of establishing all essential elements of the crime beyond a reasonable doubt. Runmar v. FSM, 3 FSM Intrm. 308, 312 (App. 1988).

In order for trier of fact to be free to choose between the lesser offense, manslaughter, or a greater degree of homicide, there must be a factual element, the resolution of which will determine whether the greater or lesser offense is applicable. Runmar v. FSM, 3 FSM Intrm. 308, 318 (App. 1988).

The burden of proof beyond a reasonable doubt is on the government as to all essential elements of a crime charged. FSM v. Oliver, 3 FSM Intrm. 469, 479 (Pon. 1988).

Where two government witnesses testified that they knew the defendant and the witnesses were policemen who participated in the search of the defendant's property in the defendant's presence, the trial court was justified in reaching the finding, beyond a reasonable doubt, that the defendant was the one who committed the crime even though there was no in-court identification or description of the defendant. Kallop v. FSM, 4 FSM Intrm. 170, 177 (App. 1989).

In a murder case, the defendant's voluntary admissions, including an express statement to his mother that he had committed the crime and asking others if the victim had been killed at a time before the body had been found, corroborated by finding the body slain in a manner consistent with the defendant's statement, constitute evidence sufficient to permit a reasonable trier of fact to find beyond a reasonable doubt that the defendant in fact killed the victim. Kimoul v. FSM, 5 FSM Intrm. 53, 58 (App. 1991).

Failure to raise objections which must be made prior to trial constitutes a waiver of objections, FSM Crim. R. 12(f). Moses v. FSM, 5 FSM Intrm. 156, 159 (App. 1991).

A variance – a discrepancy or disagreement between allegations of the charging instrument and the

proof adduced at trial – will be tolerated as long as it is not material to the basic elements of the crime charged. Otto v. Kosrae, 5 FSM Intrm. 218, 221-22 (App. 1991).

Variance between charge of striking police car windshield with fists and evidence adduced at trial of damaging headlights with a beer can is not so misleading and prejudicial that defendant was denied a fair trial or suffered from a lack of notice as to the evidence to be offered at trial on a charge of damaging the property of another. Otto v. Kosrae, 5 FSM Intrm. 218, 222 (App. 1991).

Where evidence offered at trial showed the defendant was hitting vehicle and that there was damage to vehicle and that defendant was at and participated in illegal roadblock the trial court, acting reasonably, could be convinced beyond a reasonable doubt of the defendant's guilt. Otto v. Kosrae, 5 FSM Intrm. 218, 223 (App. 1991).

Proof beyond a reasonable doubt is not established in a case in which only one witness testifies as to the presence of an element of the crime (live birth) and he expresses assumptions and has difficulty in being exact or sure, and states that the infant was either born alive or its heart was beating. Welson v. FSM, 5 FSM Intrm. 281, 285-87 (App. 1992).

In a case in which the existence of an element of the crime (live birth) was not established because of the uncertainty of the evidence on this point, and in which a review of all the evidence yields the possibility that the infant was dead at the time the defendant disposed of the body, a reasonable doubt would exist in the mind of the trier of fact as to the element of live birth. Welson v. FSM, 5 FSM Intrm. 281, 287 (App. 1992).

The Chapman rule, which holds that a constitutional error can be found harmless only when it is harmless beyond a reasonable doubt, is suitable for the FSM. Jonah v. FSM, 5 FSM Intrm. 308, 314 (App. 1992).

When there are verdicts that are inconsistent to such an extent that an essential element cannot be proven beyond a reasonable doubt a resulting conviction is reversible error. Thus when someone is convicted of a charge for which an essential element is being aided and abetted by another and that other is acquitted of being an aider and abettor the conviction is reversible error for failure of proof beyond a reasonable doubt of the essential element of being aided and abetted. Hartman v. FSM, 6 FSM Intrm. 293, 300-01 (App. 1993).

The government has the burden of proof in criminal cases, and must prove each element of the crimes charged beyond a reasonable doubt. FSM v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 166, 171 (Pon. 1997).

Proof of guilt may be by either direct evidence, circumstantial evidence or both. Direct evidence is evidence, which if believed, proves the existence of facts in issue without inference or presumption. Circumstantial evidence is evidence of facts and circumstances from which the existence or nonexistence of facts in issue may be inferred. FSM v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 166, 171 (Pon. 1997).

The burden was on the government to establish beyond a reasonable doubt that defendants' interference with the crops at issue was unlawful; if there was any doubt about defendants' claim of right, defendants should have been acquitted on the malicious mischief charge. Nelson v. Kosrae, 8 FSM Intrm. 397, 406-07 (App. 1998).

Where a person claims to have acted in the lawful exercise of his rights, the burden is on the government to show that his interference with the property was unlawful; if the evidence leaves any room for reasonable doubt as to the accused's claim of right, the accused should be acquitted. Nelson v. Kosrae, 8 FSM Intrm. 397, 407 (App. 1998).

Proof beyond a reasonable doubt is the constitutionally-mandated standard to sustain a criminal defendant's conviction. FSM v. Wainit, 10 FSM Intrm. 618, 621 (Chk. 2002).

In order for a warrant or a criminal summons to issue, the affidavits, or affidavits and exhibits, attached to a criminal information should make a prima facie showing of probable cause, not proof beyond a reasonable doubt. FSM v. Wainit, 10 FSM Intrm. 618, 621 (Chk. 2002).

The standard of review that a court uses in considering a renewed motion for acquittal under Criminal Rule 29(c) is whether the evidence could "sustain" a conviction, i.e., such evidence that reasonable persons could find guilt beyond reasonable doubt. It is not a requirement that the evidence compel, but only that it is capable of or sufficient to persuade the factfinder to reach a verdict of guilt by the requisite standard. FSM v. Fritz, 13 FSM Intrm. 85, 86 (Chk. 2004).

When considering whether an allegation of variance warrants relief, the court must examine whether the variance was material or prejudicial, that is, whether it affected the substantial rights of the accused. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded. The issue is whether the accused is given sufficient notice of the charges against him so as to be able to present his defense and not be taken by surprise by the evidence offered at the trial and also to be protected against another prosecution for the same offense. FSM v. Fritz, 13 FSM Intrm. 85, 87 (Chk. 2004).

– Strict Liability Crime

The absence of an intent element in 11 F.S.M.C. 1223(6) (which prohibits any person from boarding or attempting to board a commercial airliner while carrying a firearm either on his person or in his luggage) evinces a legislative intent to dispense with the mens rea element and make the proscribed conduct a strict liability crime. The court can properly infer from Congress's silence in subsection (6) and lack of silence in subsections (1) and (2) that Congress intended that subsection (6) constitute a strict liability offense, whereas subsections (1) and (2) do not. Sander v. FSM, 9 FSM Intrm. 442, 447 (App. 2000).

Although 11 F.S.M.C. 1223(6) does not dispense with the mental element that the defendant must know or be aware that he had the shotgun in his possession, the statute does dispense with the specific intent to board the aircraft knowing that it was illegal to do so with a shotgun. Sander v. FSM, 9 FSM Intrm. 442, 447 (App. 2000).

A heavy maximum penalty of a $2000 fine and five years imprisonment is not dispositive in determining whether a crime is a strict liability offense. Sander v. FSM, 9 FSM Intrm. 442, 448 (App. 2000).

Because violation of 11 F.S.M.C. 1223(6) is not a case of an attempt to commit a crime but a case where "attempt to board" is an element of the offense, 11 F.S.M.C. 201 (the attempt statute) does not apply to the crime of attempting to board a commercial aircraft with a firearm. Sander v. FSM, 9 FSM Intrm. 442, 448 (App. 2000).

Because conduct alone without regard to the doer's intent is often sufficient to convict someone of a crime, because there is wide latitude to declare an offense and to exclude elements of knowledge and diligence from its definition, and because the defendant knew, by his own admission, that he was not permitted to take a weapon on board the plane, the strict criminal liability imposed by 11 F.S.M.C. 1223(6) for boarding or attempting to board a commercial aircraft while carrying a firearm or dangerous device does not violate due process. Sander v. FSM, 9 FSM Intrm. 442, 449-50 (App. 2000).

– Theft

When existing facts having a material bearing upon the desirability of a proposed investment are intentionally misrepresented, the investor has been defrauded, even if the person who has induced the investors by false statements fervently hopes that related promises of future actions, developments or profitability will be fulfilled. Wolfe v. FSM, 2 FSM Intrm. 115, 120 (App. 1985).

Where an obvious and unreasonable risk of loss was forced on investors, without their knowledge or consent, by defendant's intentional misstatement of facts, and the defendant thereby obtained money of the

investors knowing that he was exposing the investors to risk beyond their knowledge, this is theft in violation of 11 F.S.M.C. 934. Wolfe v. FSM, 2 FSM Intrm. 115, 120 (App. 1985).

When a person makes statements calculated to create a false impression as to value in order to induce those who heard him to give him their money, and the statements did have that result, the person has purposely obtained property through deception within the meaning of 11 F.S.M.C. 932(6). Wolfe v. FSM, 2 FSM Intrm. 115, 121 (App. 1985).

When the government fails to notify defendant of its intention to rely upon 11 F.S.M.C. 931(3), allowing aggregation of amounts involved in the thefts, as its source of jurisdiction, such aggregation will not be allowed. Fred v. FSM, 3 FSM Intrm. 141, 144 (App. 1987).

The crime of grand larceny requires proof beyond a reasonable doubt of the stealing, taking or carrying away of the personal property of another, in the value of $50 or more, without the owner's knowledge or consent, and with the intent to convert it to one's own use. Kosrae v. Tolenoa, 4 FSM Intrm. 201, 202 (Kos. S. Ct. Tr. 1990).

To prove larceny, the prosecution generally need not prove that the victim had an unassailable right to possession in the items stolen, only that the defendant had no greater right to possession of the stolen items. Kosrae v. Tolenoa, 4 FSM Intrm. 201, 203 (Kos. S. Ct. Tr. 1990).

As with trespass and malicious mischief, a necessary element of the offense of petty larceny is that the subject personalty be "property of another." Thus a good faith belief in a right to the property negates an element of the offense of petty larceny as well. Nelson v. Kosrae, 8 FSM Intrm. 397, 402 (App. 1998).

Where one, in good faith, takes the property of another and converts it to his own use, believing it to be legally his own, or that he has a legal right to its possession, he is not guilty of larceny, although his claim is based on a misconception of the law or of his right under it, for although ignorance of law and honest intentions cannot shield a man from civil liability for a trespass committed by him, they do protect him from criminal liability by divesting the act of the felonious intent without which it cannot be a crime. Nelson v. Kosrae, 8 FSM Intrm. 397, 402 (App. 1998).

As a matter of law, then, if one has a good faith belief that he or she owns the property subject to the crime, he or she cannot be guilty of trespass, malicious mischief or petty larceny. Whether a defendant has a good faith belief in ownership is ordinarily a determination for the trier of fact. Nelson v. Kosrae, 8 FSM Intrm. 397, 402-03 (App. 1998).

The doctrine of separation of powers is not violated every time a person, who happens to be a senator, allegedly misuses property that is traceable to an appropriation made under national law. If a senator takes a car, boat, desk, computer, or pen that rightfully is in the possession of another person or entity, he should bear the same responsibility and consequences as any other person: he could be charged criminally, or sued in a civil action by the rightful owner for conversion of that property. Pohnpei Cmty. Action Agency v. Christian, 10 FSM Intrm. 623, 632 (Pon. 2002).

– Traffic Offenses

When neither the Legislature nor the court has provided any rules of procedure for traffic cases, the proper rules to follow are the court's rules of criminal procedure. Chuuk v. Dereas, 8 FSM Intrm. 599, 601 (Chk. S. Ct. Tr. 1998).

Relevant provisions of Title 12 of the Trust Territory Code regarding traffic citations' definition and procedure continue in effect as Chuuk state law on criminal procedure, as long as these provisions have not been amended or repealed and are consistent with the Chuuk Constitution. Chuuk v. Dereas, 8 FSM Intrm. 599, 601 (Chk. S. Ct. Tr. 1998).

A person who is stopped for a routine traffic offense is not in custody for purposes of Miranda warnings. Kosrae v. Sigrah, 11 FSM Intrm. 249, 255 (Kos. S. Ct. Tr. 2002).

The offense of negligent driving requires proof of driving a vehicle in such a manner as to constitute a substantial deviation from the standard of care a reasonable person would exercise in the situation and when the state did not present any witnesses who saw the defendant driving his vehicle and there was no evidence presented to show the manner in which defendant was driving his vehicle and whether it was a substantial deviation from the appropriate standard of care and an officer testified that the defendant reported that he had a problem with his vehicle, it is reasonable to infer that this problem may caused the vehicle to leave the road and come to rest in the culvert. The state thus failed to present a prima facie case and the defendant's motion for acquittal on that count was granted and that count dismissed. Kosrae v. Alokoa, 13 FSM Intrm. 82, 83 (Kos. S. Ct. Tr. 2004).

The offense of unauthorized operation of a motor vehicle requires proof of operating a motor vehicle on a road without possessing a valid license or learner's permit and when the state did not present any witnesses who saw the defendant operating his vehicle and did not present any evidence that the defendant did not possess a driver's license or learner's permit, there was no evidence presented to prove that the defendant operated his vehicle without a valid license or permit in his possession. The state thus failed to present a prima facie case and the defendant's motion for acquittal on that count was granted and that count dismissed. Kosrae v. Alokoa, 13 FSM Intrm. 82, 83 (Kos. S. Ct. Tr. 2004).

– Trespass

Where there is consent to enter another's property for certain purposes, but a person enters the property with the intent to commit an assault therein a conviction for trespass can be maintained because no consent can be implied to enter for an unlawful purpose. Lawful entry followed by a later unlawful act, however, is not trespass. Alik v. Kosrae, 6 FSM Intrm. 469, 472 (App. 1994).

Since under Yap statutory law trespass is a lesser included offense of burglary, a trespass conviction will be vacated when there is a burglary conviction for the same act. Yinmed v. Yap, 8 FSM Intrm. 95, 101-02 (Yap S. Ct. App. 1997).

A necessary element of the crime of trespass is that the property trespassed upon be property of another. Nelson v. Kosrae, 8 FSM Intrm. 397, 401-02 (App. 1998).

The real property on which a defendant is alleged to have trespassed must be the property of another. A good faith claim of right to the property provides a complete defense to the crime of trespass because it negates the criminal intent necessary for conviction. Nelson v. Kosrae, 8 FSM Intrm. 397, 402 (App. 1998).

As a matter of law, then, if one has a good faith belief that he or she owns the property subject to the crime, he or she cannot be guilty of trespass, malicious mischief or petty larceny. Whether a defendant has a good faith belief in ownership is ordinarily a determination for the trier of fact. Nelson v. Kosrae, 8 FSM Intrm. 397, 402-03 (App. 1998).

The court's role in a civil trespass case is to determine which party has the greater possessory right to disputed property. In a criminal trespass case, in contrast, the court must determine whether the prosecution has established each element of the crime of trespass beyond a reasonable doubt. Nelson v. Kosrae, 8 FSM Intrm. 397, 403 (App. 1998).

Criminal trespass is defined as entering, or causing an object to enter, the dwelling place, premises, or property of another without his express or implied consent, or entering with his consent and, following withdrawal of the consent, refusing to leave the dwelling place, premises, or property. Kosrae v. Jackson, 12 FSM Intrm. 93, 98-99 (Kos. S. Ct. Tr. 2003).

When the householders did not give the defendant permission to enter their home, and when, even

assuming that the defendant did have some implied consent to enter the home due to being a family friend, that implied consent did not extend to the time and purpose under consideration – to enter the home between the hours of midnight and 4 am, for the purpose of waking up, and assaulting the handicapped daughter. Kosrae v. Jackson, 12 FSM Intrm. 93, 99 (Kos. S. Ct. Tr. 2003).

The offense of trespass requires proof beyond a reasonable doubt of entering the dwelling place, premises, or property of another without her express or implied consent. Kosrae v. Sigrah, 12 FSM Intrm. 562, 567 (Kos. S. Ct. Tr. 2004).

When the evidence is undisputed that the defendant did not have consent to enter the victim's cookhouse at 2 a.m., (although there appeared to be implied consent for neighbors to cross the victim's property around her house and cookhouse, this consent does not extend to the cookhouse's interior), and that the defendant entered the victim's dwelling place and property without her express or implied consent, the state proved beyond a reasonable doubt all the elements of the criminal offense of trespass. Kosrae v. Sigrah, 12 FSM Intrm. 562, 567 (Kos. S. Ct. Tr. 2004).

– Venue

All trials of criminal offenses should be held in the state in which the offense was committed. Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 471, 474 n.2 (App. 1996).

The venue provision in a criminal case in the FSM is not a constitutional right but rather is provided for under statute and under court rule, which provide for the trial of offenses in the state where committed. The provisions thus do not apply to occurrences not within any state in the FSM, such as in the EEZ. FSM v. Ting Hong Oceanic Enterprises, 7 FSM Intrm. 578, 580 (Pon. 1996).

The primary purpose of the criminal venue requirement is to prevent government oppression of a defendant by requiring him to defend against a criminal prosecution in a place far from his home, counsel and any witnesses or evidence which may be of help to him in his defense. FSM v. Ting Hong Oceanic Enterprises, 7 FSM Intrm. 578, 580 (Pon. 1996).

Trial of a corporation for a crime committed in the FSM EEZ is appropriate on Pohnpei when the corporation's FSM offices are on Pohnpei and most of its witnesses and its counsel are available on Pohnpei. FSM v. Ting Hong Oceanic Enterprises, 7 FSM Intrm. 578, 580-81 (Pon. 1996).

An order granting or refusing a transfer of venue is not a final judgment and is not appealable. FSM v. Wainit, 11 FSM Intrm. 411, 412 (Pon. 2003).

Since an order granting a change of venue is not appealable, no stay is warranted while the defendant seeks its review in the appellate division. FSM v. Wainit, 11 FSM Intrm. 411, 412 (Pon. 2003).

By statute, either a defendant or the government may petition the court for a change of venue for good cause. FSM v. Wainit, 11 FSM Intrm. 411, 413 (Pon. 2003).

Apart from the rights conferred by 11 F.S.M.C. 106, there is no constitutional or statutory right to trial in the same state as the offense. FSM v. Wainit, 11 FSM Intrm. 411, 413 (Pon. 2003).

A criminal defendant may raise the issue of venue on any appeal from a final judgment should he be convicted. If he is acquitted, then he has suffered no prejudice. FSM v. Wainit, 11 FSM Intrm. 411, 413 (Pon. 2003).

A defendant's contention that he will suffer irreparable injury if he is forced to defend his case in a different venue is not persuasive. Any individual who employs private counsel to defend himself in a criminal case will incur the costs of defense, even if he is ultimately acquitted. FSM v. Wainit, 11 FSM Intrm. 411, 413 (Pon. 2003).

Prosecutors' seeking a change of venue do not necessarily indicate bias so that they could continue to prosecute when the case is ready for immediate trial and, under the then alleged prevailing conditions, any FSM prosecutor might have felt unsafe unless venue were changed. FSM v. Wainit, 12 FSM Intrm. 172, 177 (Chk. 2003).

CUSTOM AND TRADITION

A customary privilege to enter one's cousin's house cannot be exercised by pounding on the walls of the house at two a.m. until a hole for entry is created and shouting threats at the occupants. FSM v. Boaz (I), 1 FSM Intrm. 22, 26 (Pon. 1981).

The fact that one may have a general customary privilege to enter property does not necessarily mean that the privilege may be exercised at all times and in every conceivable manner. FSM v. Ruben, 1 FSM Intrm. 34, 39 (Truk 1981).

Familial relationships are at the core of Micronesian society and are the source of numerous rights and obligations which influence practically every aspect of the lives of individual Micronesians. FSM v. Ruben, 1 FSM Intrm. 34, 40 (Truk 1981).

Familial relationships are an important segment, perhaps the most important component, of the custom and tradition referred to generally in the Constitution, FSM Const. art. V, art. XI, § 11, and more specifically in the National Criminal Code, 11 F.S.M.C. 108, 1003. FSM v. Ruben, 1 FSM Intrm. 34, 40 (Truk 1981).

While the court may find that a criminal defendant's conduct did not violate the criminal law and the defendant owes no debt to society in general, this does not suggest that the defendant has necessarily fulfilled all customary obligations he may owe to a relative who was the victim of his actions. FSM v. Ruben, 1 FSM Intrm. 34, 41 (Truk 1981).

The court is willing to assume that the homeowner whose wife's brother is seeking to enter the house by force late at night in a threatening manner should as a matter of customary law go lightly and use less force than he might to expel some other intruder. FSM v. Ruben, 1 FSM Intrm. 34, 41 (Truk 1981).

State officials generally should have greater knowledge of use, local custom and expectations concerning land and personal property. They should be better equipped than the national government to control and regulate these matter. The framers of the Constitution specifically considered this issue an felt that powers of this sort should be state powers. In re Nahnsen, 1 FSM Intrm. 97, 107, 109 (Pon. 1982).

Under appropriate circumstances customary law may assume importance equal to or greater than particular written provisions in the National Criminal Code. 11 F.S.M.C. 108. FSM v. Mudong, 1 FSM Intrm. 135, 139-40 (Pon. 1982).

Customary law is placed in neither an overriding nor inferior position by the FSM Constitution and statutes. FSM v. Mudong, 1 FSM Intrm. 135, 139 (Pon. 1982).

Customary settlements do not require court dismissal of court proceedings if no exceptional circumstances are shown. FSM v. Mudong, 1 FSM Intrm. 135, 140 (Pon. 1982).

The FSM Supreme Court is required by the National Criminal Code to recognize generally accepted customs and to determine the applicability and effect of customary law in a criminal case; it is not authorized to develop new customary law. 11 F.S.M.C. 108. FSM v. Mudong, 1 FSM Intrm. 135, 140, 146-47 (Pon. 1982).

The prosecutor does not have authority to dismiss an existing prosecution on the basis of customary law, but the court does have power to respond to a prosecutorial suggestion for dismissal because of customary considerations. FSM v. Mudong, 1 FSM Intrm. 135, 141 (Pon. 1982).

The burden of proof is on a defendant to establish effect of customary law; the effect of customary apology ceremony on court proceedings is not self-evident. 11 F.S.M.C. 108(3). FSM v. Mudong, 1 FSM Intrm. 135, 141-43.

Customary law and the constitutional legal system perform different roles; they may mutually support each other. Neither system controls the other. FSM v. Mudong, 1 FSM Intrm. 135, 145 (Kos. 1982).

Custom is more properly considered during sentencing than at other stages of a criminal prosecution. FSM v. Mudong, 1 FSM Intrm. 135, 147-48 (Pon. 1982).

The constitutional government seeks not to override custom but to work in cooperation with the traditional system in an atmosphere of mutual respect. In re Iriarte (II), 1 FSM Intrm. 255, 271 (Pon. 1982).

Where no custom is established by a preponderance of the evidence that the vile phrases used are

sufficient provocation for a serious attack on the speaker, that alleged custom will not be considered in determining the criminal culpability of the person who attacks the one who has used vile phrases. FSM v. Raitoun, 1 FSM Intrm. 589, 591-92 (Truk 1984).

The Major Crimes Clause, with its admonition to Congress to have due regard for local custom and tradition, unmistakably reflects awareness of the framers that Congress would be empowered under this clause to regulate crimes that would require consideration of local custom and tradition. Tammow v. FSM, 2 FSM Intrm. 53, 57 (App. 1985).

Even where the parties have not asserted that any principle of custom or tradition applies, the court has an obligation of its own to consider custom and tradition. Semens v. Continental Air Lines, Inc. (I), 2 FSM Intrm. 131, 140 (Pon. 1985).

Where the business activities which gave rise to the lawsuit are not of a local or traditional nature, and the work setting and the work itself are of a markedly non-local, international character, the court need not conduct an intense search for applicable customary laws and traditional rules when none have been brought to its attention by the parties. Semens v. Continental Air Lines, Inc. (I), 2 FSM Intrm. 131, 140 (Pon. 1985).

Customary and traditional practices within a state should be considered in determining whether the people of that state would expect their state government to be immune from court action. Panuelo v. Pohnpei (I), 2 FSM Intrm. 150, 159 (Pon. 1986).

Defendants are not within the coverage of FSM Constitution article V, section 1, preserving "the role or function of a traditional leader as recognized by custom and tradition," simply by virtue of their status as municipal police officers. Teruo v. FSM, 2 FSM Intrm. 167, 172 (App. 1986).

Whether interference with the efforts of a non-FSM citizen engaged in business within the Federated States of Micronesia is an abuse of process is not an issue which may be resolved by reference to traditional or customary principles. Mailo v. Twum-Barimah, 2 FSM Intrm. 265, 268 (Pon. 1986).

An agreement between the FSM National Government and operators of a United States fishing vessel in an attempt to terminate court proceedings, is not the kind of matter that historically came within principles of custom and tradition. FSM v. Ocean Pearl, 3 FSM Intrm. 87, 91 (Pon. 1987).

In a case of first impression concerning national employment contracts, when no party points to applicable customary principles of law or traditional values, the FSM Supreme Court looks to the common law in other jurisdictions to assist in developing legal principles suitable for Micronesia. Falcam v. FSM Postal Serv., 3 FSM Intrm. 112, 120 (Pon. 1987).

In a case in which the defendant proposes a standard of requiring clear and convincing evidence in civil conspiracy cases rather than a preponderance based upon conditions, customs and traditions in Micronesia, it is incumbent upon him to establish such conditions by evidence, because the court will not take judicial notice of such conditions, customs or traditions. Opet v. Mobil Oil Micronesia, Inc., 3 FSM Intrm. 159, 164 (App. 1987).

Sentencing courts are not free to bar from consideration beatings that were grounded upon, or were products of custom and tradition when considering sentencing, and failure to consider the customary implications of those beatings violates not only the implicit statutory requirement of individualized sentencing, but also mandate of 11 F.S.M.C. 1003, enacted pursuant to article V, section 2 of the Constitution, as well as the judicial guidance clause. Tammed v. FSM, 4 FSM Intrm. 266, 278 (App. 1990).

The duty of a national court justice to give full and careful consideration to a request to consider a particular customary practice or value in arriving at a decision requires careful investigation of the nature and customary effect of the specific practice at issue, a serious effort to reconcile the custom and tradition with other constitutional requirements, and an individualized decision as to whether the specific custom or tradition

should be given effect in the particular contexts of the case before the court. Tammed v. FSM, 4 FSM Intrm. 266, 279 (App. 1990).

When a trial court is asked to give special mitigative effect to customary punishment during its sentencing proceedings, the court must first consider whether these customary activities have become so imbued with official state action so that the actions of the assailants are seen as actions of the state itself; if so the punishments must be tested by the same standards that would be applied if state officials carried out these punishments directly. Tammed v. FSM, 4 FSM Intrm. 266, 283 (App. 1990).

The judicial guidance clause prohibits a sentencing court from giving special effect to customary beatings administered to the defendant, unless the court finds that such recognition would be consistent with the protections guaranteed to individuals by the Declaration of Rights. Tammed v. FSM, 4 FSM Intrm. 266, 284 (App. 1990).

Congress has no power to specify voting requirements for the Constitutional Convention and therefore any attempt to exercise this power so as to uphold tradition is also outside the powers of Congress under article V, section 2 of the Constitution, which is not an independent source of congressional power but which merely confirms the power of Congress, in exercising national legislative powers, to make special provisions for Micronesian tradition. Constitutional Convention 1990 v. President, 4 FSM Intrm. 320, 328 (App. 1990).

6 F.S.M.C. 1614 exempts adoptions effected in accordance with local custom from the domestic relations law of the Federated States of Micronesia. Customary adoptions are an alternative to court-ordered adoptions which are established by the Code. In re Marquez, 5 FSM Intrm. 381, 383 (Pon. 1992).

Parties who wish to adopt a child have a choice of method of adoption. They may adopt according to local custom, or they may adopt according to the laws of the Federated States of Micronesia. What a petitioner may not do is seek the court's involvement in a customary adoption. In re Marquez, 5 FSM Intrm. 381, 383 (Pon. 1992).

Determining the relevancy of custom in carrying out the mandate of article XI, section 11 of the FSM Constitution must proceed on a case-by-case basis. Wito Clan v. United Church of Christ, 6 FSM Intrm. 129, 132 (App. 1993).

Where entitlement to customary relief has been proven and the means to execute such a remedy are within the trial court's authority and discretion, the trial court should as a matter of equity and constitutional duty grant the relief. Wito Clan v. United Church of Christ, 6 FSM Intrm. 129, 133 (App. 1993).

FSM courts must consider customary law where relevant to a decision, but it is not error for a court to consider custom and find that it is not relevant to its decision because a Certificate of Title had been issued for the land. Luzama v. Ponape Enterprises Co., 7 FSM Intrm. 40, 50 (App. 1995).

Issues related to the EEZ cannot be determined by relying on custom and tradition, as the commercial value of the EEZ to the Federated States of Micronesia was first realized when the nation acceded to the Law of the Sea Convention. While the rights of individual Micronesians, families and clans to living marine resources under particular circumstances might be amenable to determination by custom and tradition, the states' legal entitlement to share in fishing fees derived from commercial fishing ventures, extending to 200 miles from island baselines, is not. Chuuk v. Secretary of Finance, 8 FSM Intrm. 353, 378 (Pon. 1998).

Any claim to resources in the EEZ based upon custom and tradition must rest with clans, families and individuals rather than with the states. Chuuk v. Secretary of Finance, 8 FSM Intrm. 353, 379 (Pon. 1998).

The constitutional government works not to override custom, but works in cooperation with the traditional system in an atmosphere of mutual respect. Senda v. Semes, 8 FSM Intrm. 484, 497 (Pon. 1998).

In a civil case where defendants seeks to advance Pohnpeian customary practice as a defense to a

claim of equitable contribution, the burden is on the defendants to establish by a preponderance of the evidence the relevant custom and tradition. Senda v. Semes, 8 FSM Intrm. 484, 497 (Pon. 1998).

Micronesian custom, and the constitutional legal system established by the people of the FSM, flow from differing (not necessarily inconsistent) premises and purposes. These two systems, then, can be seen as supplementary and complementary, not contradictory. Each has a valuable role to perform, independent of the other. Senda v. Semes, 8 FSM Intrm. 484, 499 (Pon. 1998).

One of our courts' express functions is to apply and interpret the duly enacted and promulgated laws and regulations which lie at the heart of a dispute. Our court system exists to speak to the very issues to which Pohnpeian custom and tradition are silent. In this way, the two systems complement each other. Senda v. Semes, 8 FSM Intrm. 484, 499 (Pon. 1998).

Allowing a contribution claim between parties who are relatives, and who are equally liable under a duly promulgated regulation for a corporation's debts, is consistent with the customary principle that relatives should assist one another. Senda v. Semes, 8 FSM Intrm. 484, 499 (Pon. 1998).

A contention that custom and tradition as a procedural device may prevent an equitable claim for contribution based on violation of a regulation governing the formation of corporations is an insufficient defense as a matter of law. Senda v. Semes, 8 FSM Intrm. 484, 499 (Pon. 1998).

In a civil case when a defendant seeks to advance Pohnpeian customary practice as a defense, the burden is on the defendant to establish by a preponderance of the evidence the relevant custom and tradition. Phoenix of Micronesia, Inc. v. Mauricio, 9 FSM Intrm. 155, 158-59 (App. 1999).

The FSM Constitution requires court decisions be consistent with Micronesian customs and traditions, and provides that the FSM Congress may enact statutes to protect the traditions of the people of the FSM. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 66 (Pon. 2001).

The filing of the appeal over land was not a breach of the defendant's condition and was not a breach of a customary settlement when the appeal was filed before the customary settlement and condition were made; and when the appeal was not decided in the defendant's favor, the defendant's condition regarding his promised grant of a portion of land was satisfied and the customary settlement and the defendant's promise were therefore enforceable. Robert v. Semuda, 11 FSM Intrm. 165, 168 (Kos. S. Ct. Tr. 2002).

Customary and traditional use rights to an island are a form of property right. Rosokow v. Bob, 11 FSM Intrm. 210, 217 (Chk. S. Ct. App. 2002).

Since the FSM people's traditions may be protected by statute and if challenged as violative of the fundamental rights in Article IV, protection of Micronesian tradition shall be considered a compelling social purpose warranting such governmental action, Kosrae may pass a law which protects the Kosraean people's traditions. Kosrae v. Waguk, 11 FSM Intrm. 388, 390 (Kos. S. Ct. Tr. 2003).

Reconciliation is not a basis for dismissal of a criminal information. The law of our nation in this regard is clear. Custom, including customary apology and reconciliation, is to be considered during the sentencing of a criminal prosecution. Kosrae v. Nena, 12 FSM Intrm. 20, 22 (Kos. S. Ct. Tr. 2003).

While the doctrine of unjust enrichment has not been explicitly discussed or adopted, Pohnpei state law and Micronesian custom and tradition dictate that a party who has benefitted unjustly from another should, under certain circumstances, be made to repay that benefit. Fonoton Municipality v. Ponape Island Transp. Co., 12 FSM Intrm. 337, 346 (Pon. 2004).

– Chuuk

In Trukese society, the husband, as the head of the household, is responsible for taking care of the

family legal matters such as signing of documents, and overseeing all family financial matters. O'Sonis v. Truk, 3 FSM Intrm. 516, 518 (Truk S. Ct. Tr. 1988).

Either the husband or the wife may prosecute or defend a civil action in which one or both are parties, provided that he or she has informed his or her spouse of the representation. O'Sonis v. Truk, 3 FSM Intrm. 516, 518 (Truk S. Ct. Tr. 1988).

Even when the parties have not raised an issue of custom or tradition, the court has an obligation of its own to consider custom and tradition. O'Sonis v. Truk, 3 FSM Intrm. 516, 518 (Truk S. Ct. Tr. 1988).

Since the judicial system and customary settlement in Truk are fundamentally different and serve different goals, the primary concern of customary settlement being community harmony rather than compensation for loss, the use of one should not prevent the use of the other. Suka v. Truk, 4 FSM Intrm. 123, 128 (Truk S. Ct. Tr. 1989).

Offers or acceptances of customary settlement should neither be used in court to prove liability on the part of the wrongdoer, nor be deemed the same as a legal release on the part of the plaintiff. Suka v. Truk, 4 FSM Intrm. 123, 129 (Truk S. Ct. Tr. 1989).

To the extent that customary settlements are given any binding effect at all, they should be only binding as to those persons that are part of custom; state agencies and non-Trukese persons are not part of that system. Suka v. Truk, 4 FSM Intrm. 123, 129 (Truk S. Ct. Tr. 1989).

The absolute defenses of Assumption of the Risk and Contributory Negligence are contrary to the traditional Chuukese concepts of responsibility and shall not be available in Chuuk State. Epiti v. Chuuk, 5 FSM Intrm. 162, 167 (Chk. S. Ct. Tr. 1991).

The traditional remedy for the original landowners in an "ammot" transaction when the grantee no longer used the land for the purpose for which it was given was repossession of the land and nothing more. Wito Clan v. United Church of Christ, 6 FSM Intrm. 129, 134 (App. 1993).

Patrilineal descendants – or *afokur* – have no rights to lineage land in Chuuk. They only enjoy permissive rights of usage from the members of the lineage. Mere usage of lineage land by *afokur* does not constitute title of any sort even if the usage lasts a lifetime. Transfer of lineage land to any descendants of male members requires the clear agreement of the Clan. Chipuelong v. Chuuk, 6 FSM Intrm. 188, 196 (Chk. S. Ct. Tr. 1993).

It is an established principle of Chuukese land tenure, that lineage land is owned by the matrilineal descendants and not by the patrilineal descendants or "afokur." Chipuelong v. Chuuk, 6 FSM Intrm. 188, 197 (Chk. S. Ct. Tr. 1993).

The people of Chuuk have always considered themselves to have rights and ownership of the tidelands, and thereby hold the property rights in them, throughout all of the several foreign administrations. These traditional and customary claims came down from time immemorial. Nimeisa v. Department of Public Works, 6 FSM Intrm. 205, 208 (Chk. S. Ct. Tr. 1993).

The sanction imposed on one who controls and manages the land of a group who does not fairly and according to custom concern himself with the rights of the other members or another member of the group is the censure of the community. In re Estate of Hartman, 6 FSM Intrm. 326, 328 (Chk. 1994).

When the children of a landowner with full title to land inherit the land they form a land-owning group ("corporation"). The senior male, the *mwääniichi*, is required to manage the property in the interest of the "corporation." The corporation owns the land even if one part or another is allotted to a member for his use. In re Estate of Hartman, 6 FSM Intrm. 326, 329 (Chk. 1994).

Individuals have full title to the improvements (as distinguished from the soil) made upon land owned by a land-owning group or "corporation." In re Estate of Hartman, 6 FSM Intrm. 326, 330 (Chk. 1994).

The property owned in full title by one who dies is inherited by the children of the deceased. Personal property suited for use by women is inherited by daughters and sisters. In re Estate of Hartman, 6 FSM Intrm. 326, 330 (Chk. 1994).

A court should not order a traditional apology, compensation, and settlement when none has been offered voluntarily because traditional settlements are customarily non-adversarial and arrived at without outside coercion and court decisions must be consistent with custom. Alafonso v. Sarep, 7 FSM Intrm. 288, 290-91 (Chk. S. Ct. Tr. 1995).

The Chuuk Constitution provides that existing Chuukese custom and tradition shall be respected. Chuuk v. Sound, 8 FSM Intrm. 577, 578 (Chk. S. Ct. Tr. 1998).

A court's finding of guilt and sentencing would not render illegal, or prevent, customary forgiveness of the defendant by the victim's family or clan. Whatever the court does, customary settlement may remain desirable to resolve lingering hostility and disputes between the families. Chuuk v. Sound, 8 FSM Intrm. 577, 579 (Chk. S. Ct. Tr. 1998).

A customary forgiveness ceremony resolving disputes among families or clans may not prevent the court system from determining the individual guilt of the defendant and considering whether societal notions of justice and the need to uphold law and order require fining, imprisonment or other restriction of the defendant's freedom. Chuuk v. Sound, 8 FSM Intrm. 577, 579 (Chk. S. Ct. Tr. 1998).

Because the trend of the application of customary settlements in the criminal justice system, is its use as excuse, justification or mitigation during the imposition of sentence after conviction for a crime and not as an element of guilt or the dismissal of an information and complaint charging a criminal offense, a motion for dismissal of a major criminal charge on the grounds that a customary settlement has been reached will be denied. Chuuk v. Sound, 8 FSM Intrm. 577, 579-80 (Chk. S. Ct. Tr. 1998).

Because the Chuuk Constitution requires the courts to make decisions consistent with Chuukese customs and traditions, Chuukese custom and tradition may prevail over the provisions of a holographic will in deciding who may enter upon land for the purpose of making reasonable use thereof. In re Ori, 8 FSM Intrm. 593, 595 (Chk. S. Ct. App. 1998).

When tidelands were never properly divided during the father's lifetime, the logical conclusion is that those tidelands remain lineage or family property according to Chuukese tradition and custom and cannot be transferred without the consent of all male adults of the lineage, subject only to the traditional rights of afokur as consented to. Lukas v. Stanley, 10 FSM Intrm. 365, 366 (Chk. S. Ct. Tr. 2001).

Under Chuukese custom and tradition the oldest sister may have the authority in family and lineage matters to sign for younger family members, but the youngest sister does not have the authority, under custom and tradition, to sign for the older ones. Stephen v. Chuuk, 11 FSM Intrm. 36, 44 (Chk. S. Ct. Tr. 2002).

An *afokur*'s rights to lineage land are permissive use rights only. Marcus v. Truk Trading Corp., 11 FSM Intrm. 152, 159 (Chk. 2002).

The consent of all adult members of the lineage is needed to sell lineage land. Marcus v. Truk Trading Corp., 11 FSM Intrm. 152, 159 (Chk. 2002).

It would seem that for a long-term land lease (especially one that could last two or three or more generations) the level of lineage members' consent needed should be equivalent to that needed for a sale. Marcus v. Truk Trading Corp., 11 FSM Intrm. 152, 160 (Chk. 2002).

An entity, such as a corporation, which must act through agents or representatives, can, by its conduct, ratify an unauthorized agreement. A lineage or a clan is a similar entity in that it is recognized by courts in Chuuk as a personable entity – a entity capable of suing and being sued and of entering into contracts. This parallels and recognizes the clan's or lineage's position under custom and tradition in which the clan or lineage is an entity capable of owning, acquiring, and alienating land. Marcus v. Truk Trading Corp., 11 FSM Intrm. 152, 160 (Chk. 2002).

A clan or lineage in some respects functions as a corporation – it is, or can be, composed of many members, but is considered a single legal entity, capable of owning land, suing and being sued, and performing other acts, and which must necessarily act through its representatives. In this respect a corporation and a clan or lineage are analogous. Marcus v. Truk Trading Corp., 11 FSM Intrm. 152, 161 (Chk. 2002).

Generally, any ratification of an unauthorized agreement must be in its entirety because an entity cannot accept the benefits of an unauthorized act, but reject its burdens. Marcus v. Truk Trading Corp., 11 FSM Intrm. 152, 161 (Chk. 2002).

When a lineage as a whole has accepted all of the benefits of a lease – all of the payments that the lessee was required to make – up to the present and even beyond, it cannot now reject the burden of the lessee exercising its options to renew. Marcus v. Truk Trading Corp., 11 FSM Intrm. 152, 161 (Chk. 2002).

Distribution of benefits within a lineage is an internal lineage matter. Courts generally will not involve themselves in a lineage's internal affairs. Marcus v. Truk Trading Corp., 11 FSM Intrm. 152, 161 (Chk. 2002).

Community censure is the sanction imposed on one who controls and manages the land of a group who does not fairly and according to custom concern himself with the rights of other members or another member of the group. That is not a sanction that a court can order or relief that a court could grant. Marcus v. Truk Trading Corp., 11 FSM Intrm. 152, 161 (Chk. 2002).

The court is unaware of any tradition or custom within Chuukese society for a child, or even an adult, to carry the last name of his or her step-father or step-mother, and finds and concludes that no such tradition or custom exists. In re Suda, 11 FSM Intrm. 564, 566 (Chk. S. Ct. Tr. 2003).

Acheche is traditionally a gift of land at the time of the birth of the first son so there could not have been any acheche of the land later because the transfer would have had to have taken place when the son was born. In re Lot No. 014-A-21, 11 FSM Intrm. 582, 593 (Chk. S. Ct. Tr. 2003).

When the project control document did not say otherwise, the community halls contemplated by the Uman Social Project project control document are the customary and traditional community hall (an *wuut* or *uut*) found in Uman (and throughout the Southern Namoneas and Chuuk Lagoon) because this is the meaning of the term community hall (*wuut* or *uut*) as understood by the defendants, who are all from the Southern Namoneas and because is this is not only the only logical conclusion to draw under the circumstances, this result is mandated by the Judicial Guidance Clause, which requires all judicial decisions to be consistent with custom and tradition. FSM v. Este, 12 FSM Intrm. 476, 481 (Chk. 2004).

– Kosrae

When the land commission concludes that a traditional gift of land, a "kewosr," has been made, but is unable to determine who made the gift, and when, and does not explain any details about the customary gift sufficient to explain how it has determined that a kewosr was made, the opinion does not reflect proper resolution of the legal issues or reasonable assessment of the evidence and therefore must be set aside. Heirs of Mongkeya v. Heirs of Mackwelung, 3 FSM Intrm. 395, 402 (Kos. S. Ct. Tr. 1988).

Pursuant to the Kosrae State Code, the court cannot consider tradition unless satisfactory evidence of it is introduced. Kosrae Code 6.303. Seymour v. Kosrae, 3 FSM Intrm. 537, 540 (Kos. S. Ct. Tr. 1988).

Because farming of short term crops, such as sugar cane, on someone else's land is not uncommon in Kosrae, the fruits of such farming are considered the personal property of the person planting them. Kosrae v. Tolenoa, 4 FSM Intrm. 201, 204 (Kos. S. Ct. Tr. 1990).

A statutory cap on the amount and scope of recovery in a wrongful death action, lawfully enacted by the Kosrae legislature, does not interfere with traditional Kosraean or Micronesian compensation of a victim's family by the tortfeasor. Tosie v. Healy-Tibbets Builders, Inc., 5 FSM Intrm. 358, 361 (Kos. 1992).

Until proven contrary to Kosraean custom the Kosrae State Court will entertain actions for negligence as tort liability for negligence is consistent with Micronesian culture. Nena v. Kosrae, 5 FSM Intrm. 417, 420 (Kos. S. Ct. Tr. 1990).

On Kosrae, *usru* is a gift of land by a parent to one's children, and *kewosr* is an outright gift of land from a man to a favored lover. Heirs of Mongkeya v. Heirs of Mackwelung, 8 FSM Intrm. 31, 36 (Kos. S. Ct. Tr. 1997).

Under Kosraen custom one does not openly declare that a *kewosr* has taken place, but simply acts, with a witness present, in a certain fashion. A *kewosr* is a secret way of giving land that only the man and woman involved know about. Heirs of Mongkeya v. Heirs of Mackwelung, 8 FSM Intrm. 31, 36 (Kos. S. Ct. Tr. 1997).

Although transfer of land by *kewosr* fell out of favor after the arrival of Christianity on Kosrae, *kewosr* did continue afterward. Heirs of Mongkeya v. Heirs of Mackwelung, 8 FSM Intrm. 31, 37 (Kos. S. Ct. Tr. 1997).

Under the Kosrae Code, a court cannot consider tradition unless satisfactory evidence of tradition is introduced. Nelson v. Kosrae, 8 FSM Intrm. 397, 406 (App. 1998).

The Kosrae Constitution provides that the state government protect the state's traditions as the public interest may require. Anton v. Heirs of Shrew, 10 FSM Intrm. 162, 165 (Kos. S. Ct. Tr. 2001).

The court is required to receive satisfactory evidence that custom or tradition applies to a case, before utilizing it. Kosrae v. Sigrah, 11 FSM Intrm. 26, 30 (Kos. S. Ct. Tr. 2002).

– Pohnpei

The court must try to apply the Court Rules of Civil Procedure in a way that is consistent with local customary practice. Hadley v. Board of Trustees, 3 FSM Intrm. 14, 16 (Pon. S. Ct. Tr. 1985).

Judicial decisions, including interpretations of rules of civil procedure, should be consistent with the Constitution and with the Pohnpeian concept of justice. Hadley v. Board of Trustees, 3 FSM Intrm. 14, 16 (Pon. S. Ct. Tr. 1985).

The Pohnpeian custom of "Ke pwurohng omw mwur," according to which one reaps the fruit of one's misdeed, requires the lessor to bear the consequences of his failure to repossess the rented vehicle from the lessee. Phillip v. Aldis, 3 FSM Intrm. 33, 38 (Pon. S. Ct. Tr. 1987).

Customary law takes precedence over the common law, according to Pon. Const. art. 5, § 1; 1 TTC 103; 1 F.S.M.C. 203. Phillip v. Aldis, 3 FSM Intrm. 33, 38 (Pon. S. Ct. Tr. 1987).

The Pohnpei Supreme Court may look to Pohnpeian customs and concepts of justice when there are no statutes governing the subject matter, but it may also draw from common law concepts when they are appropriate. Koike v. Ponape Rock Products, Inc., 3 FSM Intrm. 57, 64 (Pon. S. Ct. Tr. 1986).

The common Pohnpeian custom of assisting a person in need should not be dispensed with in order to allow the defense of contributory negligence or assumption of risk to be raised. Koike v. Ponape Rock

Products, Inc., 3 FSM Intrm. 57, 67 (Pon. S. Ct. Tr. 1986).

According to the Pohnpeian view of civil wrongs, if one damages another's property, he must repair or replace it; if one injures another person, he must apologize and provide assistance to the injured person and his family; if one kills another person, he must provide the assistance that the victim would have provided and may have to offer another person to take the place of victim in his family. Koike v. Ponape Rock Products, Inc., 3 FSM Intrm. 57, 70-71 (Pon. S. Ct. Tr. 1986).

The Pohnpei Supreme Court declines to adopt the "collateral source" rule, according to which alternative sources of income available to a victim are not allowed to be deducted from the amount the negligent party owes, because it does not want to discourage customary forms of family restitution. Koike v. Ponape Rock Products, Inc., 3 FSM Intrm. 57, 74 (Pon. S. Ct. Tr. 1986).

Under Pohnpeian state law after confirmation of a customary separation or divorce under 39 TTC 5, the court may order custody and child support under 39 TTC 103. Pernet v. Aflague, 4 FSM Intrm. 222, 225 (Pon. 1990).

Although under historical Pohnpeian customary law only the husband had rights over the children of the marriage, now both parents have rights and responsibilities in connection with a marriage and the court should take this into consideration in determining child custody rights and support payment obligations in cases of customary divorce. Pernet v. Aflague, 4 FSM Intrm. 222, 225 (Pon. 1990).

The doctrine of comparative negligence is more consistent with life in Pohnpei in that the doctrine recognizes that injuries and damages are often caused through a combination of errors and misjudgments by more than one person. Nothing in Pohnpei custom absolves a party who caused injury to another from the customary obligations of apology and reconciliation because the injured party's negligence contributed to the injury. Alfons v. Edwin, 5 FSM Intrm. 238, 242 (Pon. 1991).

The Pohnpei court system has to be extra cautious applying the foreignly developed concepts of criminal justice into its own, so that in adopting or applying such concepts it does so without doing injustice to Pohnpeian culture and traditional values. Pohnpei v. Weilbacher, 5 FSM Intrm. 431, 449 (Pon. S. Ct. Tr. 1992).

The Pohnpeian customary practice of quickly resolving conflict resulting from the commission of an act is closely related to, if not the counterpart of the Western concept of a speedy trial. Pohnpei v. Weilbacher, 5 FSM Intrm. 431, 450 (Pon. S. Ct. Tr. 1992).

Should Pohnpeian custom and tradition not be determinative, the FSM Supreme Court will look to its earlier holding and decisions of United States courts for guidance as to relevant common law tort principles, and will evaluate the persuasiveness of the reasoning in these decisions against the background of pertinent aspects of Micronesian society and culture in Pohnpei. Mauricio v. Phoenix of Micronesia, Inc., 8 FSM Intrm. 248, 253 (Pon. 1998).

Although under Pohnpeian custom it is inappropriate for a parent, or an individual who stands in the place of a parent, to see his daughter come home late at night with a boyfriend, it is not a corollary that that person is justified under custom in inflicting a battery on the boyfriend, or damaging car he is driving. Elymore v. Walter, 9 FSM Intrm. 450, 456 (Pon. 2000).

When there was no evidence to suggest that a parent's customary privilege to discipline ran beyond the daughter to encompass her boyfriend as well, when there was no evidence to suggest that when the boyfriend dropped the daughter off he was threatening or in any other way posing a danger of physical harm to her such that the parent was entitled to inflict a battery upon the boyfriend in order to defend the daughter as he may have been obligated to do under custom, and when there was no evidence that under custom a parent could attack the car driven by the daughter's boyfriend with the baseball bat as a way of demonstrating his displeasure with the boyfriend for his role in keeping her out late, and in dropping her off under circumstances

where he would see them together, Pohnpeian custom does not constitute a defense to either the battery or property damage claims. Elymore v. Walter, 9 FSM Intrm. 450, 456 (Pon. 2000).

The people of Pohnpei's traditional and customary rights to freely navigate the reef, engage in subsistence fishing in that area, and control the use of and materials in that marine environment is recognized in 67 TTC 2(e), in the FSM Constitution, and the Pohnpei Constitution. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 66 (Pon. 2001).

The construction of a multistory building using imported technology is not imbued with Pohnpeian custom and tradition so as to lend itself to an analysis in those terms. Amayo v. MJ Co., 10 FSM Intrm. 371, 384 (Pon. 2001).

– Yap

Since under Yapese custom a daughter in her adult years may be expected to provide certain services for her mother, the loss of such customary services should be considered in calculating the mother's pecuniary injury resulting from her daughter's death. Leeruw v. FSM, 4 FSM Intrm. 350, 365 (Yap 1990).

Given that a 19-year old daughter is considered a child under Yapese custom, that the decedent was a 19-year old daughter who up to the time of her death continued to live with her parents in Yap and to perform those household chores expected under custom of young female persons within families in Yap, and that the parents were accompanying their daughter en route to obtain medical services when she died, the daughter was a child within the meaning of 6 F.S.M.C. 503. Leeruw v. FSM, 4 FSM Intrm. 350, 366 (Yap 1990).

CUSTOMS

All aircraft entering FSM ports of entry are subject to immigration inspection, customs inspections, agricultural inspections and quarantines, and other administrative inspections authorized by law. In Chuuk, the Chuuk International Airport is the only port of entry for aircraft. FSM v. Joseph, 9 FSM Intrm. 66, 70 (Chk. 1999).

Customs officers have the right to examine all goods subject to customs control, and it is unlawful to import into the FSM any goods whose use, possession or import is prohibited or contrary to restrictions imposed by the FSM or the state into which the goods are imported. FSM v. Joseph, 9 FSM Intrm. 66, 70 (Chk. 1999).

DEBTORS' AND CREDITORS' RIGHTS

With respect to liens, first in time is not always first in right. Bank of Guam v. Island Hardware, Inc. (II), 3 FSM Intrm. 105, 108 (Pon. 1987).

A prior statutory lien will not necessarily be given priority over all liens which arise subsequently. Rather, the effect to be given to a statutory lien must be determined through interpretation of the statute which provides for the lien. Bank of Guam v. Island Hardware, Inc. (II), 3 FSM Intrm. 105, 108 (Pon. 1987).

In an insolvency proceeding, a broad range of issues must be decided for which there is little or no guidance by way of statute or precedent, and the court is acting as an equitable court and must apply equitable principles to the circumstances of each case to reach a fair result. In re Mid-Pacific Constr. Co., 3 FSM Intrm. 292, 296 (Pon. 1988).

In absence of statute pertaining to rights of employees of insolvent companies to receive preference against other creditors of employer, an appropriate source of guidance is the common law as it existed in absence of statute. In re Mid-Pacific Constr. Co., 3 FSM Intrm. 292, 300 (Pon. 1988).

Claims for wages asserted by low level employees and laborers are entitled to preference over all other

claims, except wage and salary tax lien rights of the national government, which are given priority over all other claims and liens by 54 F.S.M.C. 135(2). In re Mid-Pacific Constr. Co., 3 FSM Intrm. 292, 301 (Pon. 1988).

Attachment and seizure create statutory and possessory lien rights which will be unaffected by subsequent writs of execution, but will be subject to national government's wage and salary tax lien claims under 54 F.S.M.C. 135(2), to wage claims of low level employees and laborers, and to pre-existing national government lien rights under 54 F.S.M.C. 153. In re Mid-Pacific Constr. Co., 3 FSM Intrm. 292, 303 (Pon. 1988).

Without more, continuing guaranties given to a creditor do not establish any lien rights for the creditor against property of the debtor whose obligations are covered by the guaranty. In re Mid-Pacific Constr. Co., 3 FSM Intrm. 292, 304 (Pon. 1988).

An execution creditor holds a more powerful position than a mere judgment creditor. In re Mid-Pacific Constr. Co., 3 FSM Intrm. 292, 306 (Pon. 1988).

Where it becomes apparent that claims of creditors will outstrip the value of debtor's assets, the approach is to give all creditors an opportunity to submit claims, and distribute any available proceeds on an equitable basis. In re Mid-Pacific Constr. Co., 3 FSM Intrm. 292, 306 (Pon. 1988).

An employee's preference for wage claims is determined by reference to the equities among the parties rather than exclusively by specific dates upon which particular liens were established. In re Island Hardware, 3 FSM Intrm. 332, 341 (Pon. 1988).

Unless a statute or common law principle expressly says otherwise, disclosure is a prerequisite for making a lien effective against other creditors. In re Island Hardware, 3 FSM Intrm. 332, 342 (Pon. 1988).

Where purchasers at a judicial sale are not served by summons and complaint pursuant to FSM Civil Rule 3 but receive notice of a motion seeking confirmation of the sale and made by a creditor of the party whose property was sold, and where the purchasers do not object to the motion, confirmation of the sale is effective and binding on the purchasers and is not violative of their rights of due process. Sets v. Island Hardware, 3 FSM Intrm. 365, 368 (Pon. 1988).

The fact that stock issued by a corporation and formerly owned by a judgment debtor has been sold to a third party at a judicial sale of the debtor's assets does not make the corporation a party to the litigation concerning distribution of the assets of the insolvent debtor for purposes of determining whether the shares were validly issued and outstanding shares of the corporation. Sets v. Island Hardware, 3 FSM Intrm. 365, 368 (Pon. 1988).

A lawsuit to enforce a mortgage is an attempt to enforce a type of lien against a delinquent debtor. Such a case bears a relationship to the power to regulate "bankruptcy and insolvency," which the Constitution, in article IX, section 2(g), places in the national Congress. Bank of Guam v. Semes, 3 FSM Intrm. 370, 381 (Pon. 1988).

Under circumstances where there is no bankruptcy legislation or comprehensive system for establishing and recognizing liens in the FSM, the court acts essentially as a court of equity when deciding insolvency cases. In re Pacific Islands Distrib. Co., 3 FSM Intrm. 575, 581 (Pon. 1988).

In an insolvency proceeding, holders of writs of execution should be paid on the basis of a first-in-time, first-in-right rule according to the dates of the individual parties' writs, subject to the rights of the creditors entitled to superior treatment by virtue of statutory lien priority or extraordinary equitable relief. In re Pacific Islands Distrib. Co., 3 FSM Intrm. 575, 582 (Pon. 1988).

Creditors with judgments more than 10 days old are entitled to writs of execution upon request. In re

Pacific Islands Distrib. Co., 3 FSM Intrm. 575, 582 (Pon. 1988).

In an insolvency proceeding, claimants without liens and not entitled to special equitable treatment, who comply with a court order or with the instructions of a court appointed receiver, trustee or other custodian to substantiate their claims against the debtor's estate after the proceedings have been consolidated, shall receive payment on a pro rata basis with other creditors in the same class. In re Pacific Islands Distrib. Co., 3 FSM Intrm. 575, 583 (Pon. 1988).

In an insolvency proceeding, judgment creditors with judgments issued on or before the consolidation of the case but without writs of execution as of that time are prioritized on a pro rata basis, after satisfaction of claims of lienholders, those with special equitable claims and holders of writs of execution. In re Pacific Distrib. Co., 3 FSM Intrm. 575, 583 (Pon. 1988).

The final class of creditors entitled to distribution in an insolvency proceeding shall consist of all the debtor's remaining creditors who either reduced their claims to judgment after the consolidation date or who substantiate their claims according to the receiver's instructions. In re Pacific Islands Distrib. Co., 3 FSM Intrm. 575, 585 (Pon. 1988).

Where the rights of a corporation have been assigned to its creditors in previous litigation, the creditors' rights as against the shareholders or subscribers of stock in the corporation are derived from the rights of the corporation itself, and the creditors will be able to enforce the shareholders' liability only to the extent that the corporation could have enforced it before the assignment. Creditors of Mid-Pac Constr. Co. v. Senda, 4 FSM Intrm. 157, 159 (Pon. 1989).

In an action to enforce an unpaid stock subscription, the statute of limitations begins to run against the creditors when it runs against the corporation. Creditors of Mid-Pac Constr. Co. v. Senda, 4 FSM Intrm. 157, 159 (Pon. 1989).

Stock subscriptions which are silent as to the date and terms of payment do not become due until a call has been issued by the corporation or, if the corporation becomes insolvent without ever issuing such a call, then the cause of action to collect unpaid subscriptions accrues when the creditors, by authority of the court, first demand payment. Creditors of Mid-Pac Constr. Co. v. Senda, 4 FSM Intrm. 157, 161 (Pon. 1989).

It is necessary for each creditor to establish that attorney's fees to be charged to a debtor pursuant to an agreement in a promissory note are reasonable in relation to the amount of the debt as well as to the services rendered. Bank of Hawaii v. Jack, 4 FSM Intrm. 216, 220 (Pon. 1990).

The statutory right of a judgment creditor to obtain immediate issuance of a writ of execution implies as well a legislative intent that holders of writs be paid on the basis of a first-in-right rule according to the dates of the individual parties' writs. In re Island Hardware, Inc., 5 FSM Intrm. 170, 173 (App. 1991).

The trial court did not abuse its discretion when it ruled that judgment creditor who had accepted assignment of debtor's accounts receivable should not otherwise participate in distribution of assets of insolvent debtor. In re Island Hardware, Inc., 5 FSM Intrm. 170, 174 (App. 1991).

Where a debtor/account receivable to an insolvent corporation is liable to the corporation's creditors the debtor has no standing to vindicate the rights of any of the creditors against other creditors. Creditors of Mid-Pac Constr. Co. v. Senda, 6 FSM Intrm. 140, 142 (Pon. 1993).

Where a debtor/account receivable to an insolvent corporation is liable to the corporation's creditors the debtor cannot challenge the arrangement for attorney's fees made between the creditors, counsel, and the court for collection of the insolvent corporation's accounts receivable. Creditors of Mid-Pac Constr. Co. v. Senda, 6 FSM Intrm. 140, 142 (Pon. 1993).

In collection cases creditors must establish that the attorney's fees to be charged are reasonable in

relation to the amount of the debt as well as to the services rendered. Generally, plaintiff's attorney's fees in a debt collection case, barring bad faith on the defendant's part, will be limited to a reasonable amount not to exceed fifteen percent of the outstanding principal and interest. J.C. Tenorio Enterprises, Inc. v. Sado, 6 FSM Intrm. 430, 432 (Pon. 1994).

Among execution creditors the claims of those whose writs are dated earliest have priority to an insolvent's assets over those whose writs are dated later. Individual writ-holders are to be paid on the basis of first-in-time, first-in-right rule according to the dates of their writs. Western Sales Trading Co. v. Ponape Federation of Coop. Ass'ns, 6 FSM Intrm. 592, 593 (Pon. 1994).

An intervenor must make a three part showing to qualify for intervention as a matter of right: an interest, impairment of that interest, and inadequacy of representation by existing parties. A tax lien holder and a judgment creditor with an unsatisfied writ of execution may intervene as a matter of right where an assignee is compromising a debtor's accounts receivable. California Pac. Assocs. v. Alexander, 7 FSM Intrm. 198, 200 (Pon. 1995).

Where a creditor accepts a premium payment for insurance that he has agreed to procure, where he makes a diligent effort to fulfill his agreement to do so, promptly notifies the debtor of his inability to procure insurance, he would not be held liable to the debtor, as he would have fulfilled his contract to attempt to procure insurance which is not a contract of insurance. FSM Dev. Bank v. Bruton, 7 FSM Intrm. 246, 250 (Chk. 1995).

Both contract and tort theories can be pursued by a debtor who alleges that a creditor has failed to procure credit insurance. FSM Dev. Bank v. Bruton, 7 FSM Intrm. 246, 251 (Chk. 1995).

A creditor who undertakes to secure credit insurance for a debtor is liable to the debtor for negligent performance of that duty or of duty to notify debtor if insurance not obtained. FSM Dev. Bank v. Bruton, 7 FSM Intrm. 246, 251 (Chk. 1995).

Failure of a creditor to notify the debtor of its failure to obtain insurance is negligence. As a consequence the creditor is liable to the debtor for the entire amount of the debtors' loss, otherwise the debtor is only entitled to return of full amount of insurance premiums paid. FSM Dev. Bank v. Bruton, 7 FSM Intrm. 246, 251 (Chk. 1995).

Judgment creditors will be paid in their priority order except for those who release their claims in writing. Payment of a released judgment may be returned to the judgment debtor. Mid-Pacific Constr. Co. v. Senda, 7 FSM Intrm. 371, 373-75 (Pon. 1996).

Appointment of a receiver is not appropriate when what little evidence that has been presented on the financial strength of the defendant company is long out of date, there is no reliable measure of the value of defendant's current assets and liabilities, no finding of insolvency, and plaintiffs have not demonstrated that the available legal remedy – the reduction of their claims to judgment, followed by a demand for payment, will be insufficient to provide the relief to which they may later prove themselves entitled. Lavides v. Weilbacher, 7 FSM Intrm. 400, 402-03 (Pon. 1996).

Generally, a person who seeks to satisfy the court that his failure to obey an order or decree was due entirely to his inability to render obedience, without fault on his part, must prove such inability. The FSM Supreme Court places the burden on the movant to show that the debtor has the ability to comply. Once this burden has been met and the debtor has been held in contempt, it is then the debtor's burden to show that he no longer has the ability to comply through no fault of his own despite his exercise of due diligence. Hadley v. Bank of Hawaii, 7 FSM Intrm. 449, 452-53 (App. 1996).

A cooperative may be dissolved administratively by the FSM Registrar of Corporations and trustees appointed to wind up the cooperative's affairs. In re Kolonia Consumers Coop. Ass'n, 9 FSM Intrm. 297, 300 (Pon. 2000).

All violations of the FSM Regulations under which the FSM Registrar of Corporations may appoint trustees in dissolution for winding up an association's affairs are enjoinable. In re Kolonia Consumers Coop. Ass'n, 9 FSM Intrm. 297, 300 (Pon. 2000).

When a judgment-debtor has unilaterally increased his indebtedness to non-judgment creditors while not increasing his payments to his judgment-creditor, it is the judgment-debtor who should bear the burden of this improvidence, and not the judgment-creditor. The court will therefore order the allotment amounts for the new voluntary debts to be allotted to the judgment-creditor's debt instead. Bank of Guam v. Tuuth, 9 FSM Intrm. 467, 469-70 (Yap 2000).

As between a judgment creditor and a creditor who has not instituted legal action, the judgment creditor should enjoy a priority. Bank of Guam v. Tuuth, 9 FSM Intrm. 467, 470 (Yap 2000).

The national government is not subject to writ of garnishment or other judicial process to apply funds or other assets it owes to a state to satisfy the state's obligation to a third person. FSM v. Louis, 9 FSM Intrm. 474, 479 (App. 2000).

The only purpose of statutes authorizing orders in aid of judgment is to force the payment of a judgment and to provide means to collect a money judgment, which is the same as proceedings for attachment, garnishment or execution. Kama v. Chuuk, 9 FSM Intrm. 496, 498 (Chk. S. Ct. Tr. 1999).

Historically, orders in aid of judgment and orders in aid of execution serve the same purpose and the terms are used interchangeably. Their purpose is to provide a means of discovery to inquire into the assets and ability of a judgment debtor to pay a judgment. Kama v. Chuuk, 9 FSM Intrm. 496, 498 (Chk. S. Ct. Tr. 1999).

When Chuuk has ultimate access to money on a monthly basis that greatly exceeds the amount of the civil rights judgment, Chuuk must pay the judgment. Davis v. Kutta, 9 FSM Intrm. 565, 568 (Chk. 2000).

A court shall determine the fastest manner in which the debtor can reasonably pay a judgment. Davis v. Kutta, 9 FSM Intrm. 565, 568 (Chk. 2000).

When a judgment was entered over four years ago, and the bulk of it remains outstanding and the debtor has the means to pay, the judgment should be paid forthwith. Davis v. Kutta, 9 FSM Intrm. 565, 568 (Chk. 2000).

When loan collateral is in the lender's possession and the borrower has made a reasonable request that the lender liquidate the collateral to preserve its value, the lender should do so; but there is no duty in law requiring the lender to take possession of the collateral and foreclose on property at the borrowers' request when that property is not in the lender's possession, unless there is a provision in the mortgage requiring it. FSM Dev. Bank v. Gouland, 9 FSM Intrm. 605, 607 (Chk. 2000).

A debtor who knew of an order, since he stipulated to it, and who had some ability to pay, as evidenced by the payments that he did make, cannot be found in contempt for failing to meet the payments under the stipulated order when there was insufficient evidence presented to establish any income sufficient to confer on the debtor the ability to pay under the order because having some ability to pay is different from having the ability to make the payments specified in the order. Mobil Oil Micronesia, Inc. v. Benjamin, 10 FSM Intrm. 100, 102 (Kos. 2001).

An attorney's fee must be reasonable, and the court must make such a finding. Except in unusual circumstances, an attorney's fee in debt collection cases will be limited to a reasonable amount not to exceed 15% of the amount due on the loan at the time of default. Mobil Oil Micronesia, Inc. v. Benjamin, 10 FSM Intrm. 100, 103 (Kos. 2001).

The rationale for limiting attorney's fees in collection cases, whether the attorney's fees result from a loan

agreement or a stipulated judgment, to a reasonable percentage of the amount collected is so that a debtor is not ultimately faced with an obligation far in excess of that originally anticipated, and to provide certainty to debtors and creditors alike. Mobil Oil Micronesia, Inc. v. Benjamin, 10 FSM Intrm. 100, 103 (Kos. 2001).

Payments totaling the principal amount of a judgment have been paid do not fully satisfy the judgment when the judgment expressly provides for 9% interest and for attorney's fees incurred in enforcing the judgment. Even if it did not so state, the judgment creditor would be entitled to statutory interest of 9% under 6 F.S.M.C. 1401. Until such time as all interest and a reasonable attorney's fee is paid, the judgment remains unsatisfied. Mobil Oil Micronesia, Inc. v. Benjamin, 10 FSM Intrm. 100, 103 (Kos. 2001).

While the fact that as part of an assignment another agreed to assume all of a debtor's liabilities under a stipulated judgment may provide the debtor with recourse against the other, it does not affect the debtor's obligation to the creditor under the judgment and payment order. Mobil Oil Micronesia, Inc. v. Benjamin, 10 FSM Intrm. 100, 103 (Kos. 2001).

When a debtor has engaged in the unreasonable conduct that he has no further liability on the judgment, it is equitable to award an attorney's fee of 30% of the remaining amount due on the loan for work done to collect on the judgment, rather than the 15% allowed in Bank of Hawaii v. Jack. Mobil Oil Micronesia, Inc. v. Benjamin, 10 FSM Intrm. 100, 103 (Kos. 2001).

When a debtor's unreasonable conduct occurred in opposing the collection of the remainder of a judgment after the bulk of it had been paid and the creditor is entitled to reasonable attorney's fees, it is equitable to award the creditor reasonable attorney's fees not to exceed 15% for work done in collecting the bulk of the judgment, and reasonable attorney's fees not to exceed 30% of the judgment's remainder, rather than attorney's fees not exceeding 15% of the total judgment. Mobil Oil Micronesia, Inc. v. Benjamin, 10 FSM Intrm. 100, 103-04 (Kos. 2001).

Criminal contempt is not a specified remedy in 6 F.S.M.C. 1412, but is an available remedy under the general FSM contempt statute, 4 F.S.M.C. 119, under which the court may punish any intentional disobedience to a lawful court order. Davis v. Kutta, 10 FSM Intrm. 125, 127 (Chk. 2001).

Generally, pre-judgment interest is only included as an element of damages as a matter of right when a debtor knows precisely what he is to pay and when he is to pay it. This occurs when a party has been deprived of funds to which he was entitled by virtue of the contract, and the defaulting party knew the exact amount and terms of the debt. In those types of cases, the goal of compensation requires that the complaining party be compensated for the loss of use of those funds. This compensation is made in the form of interest. Kilafwakun v. Kilafwakun, 10 FSM Intrm. 189, 196 (Kos. S. Ct. Tr. 2001).

Payments should be applied first to interest, then principal. Davis v. Kutta, 10 FSM Intrm. 224, 226 (Chk. 2001).

An agreement between two defendants who are jointly liable on the note, whereby one of them would assume full responsibility on the note (and thereby "releasing" the other from responsibility on the note), is not binding on the plaintiff, especially when the note's language clearly states that in the case of joint obligors, one of the obligors can only be released from liability via a signed writing, signed by an official of the plaintiff bank. Bank of the FSM v. Hebel, 10 FSM Intrm. 279, 285 (Pon. 2001).

An agreement between two defendants, jointly responsible on a loan, as to who will be responsible to pay back the loan is not binding on the creditor unless the creditor clearly assents to the agreement. Bank of the FSM v. Hebel, 10 FSM Intrm. 279, 285 (Pon. 2001).

When the parties' written agreement requires that a writing signed by a bank officer would be necessary to release one of the obligors from responsibility on the note, the presence of a bank employee at the defendants' divorce proceeding (regardless of whether that employee were an officer or agent), and his failure to object to the defendants' settlement agreement, without more, would not release one of the defendants

from liability to the bank on the note. Bank of the FSM v. Hebel, 10 FSM Intrm. 279, 285 (Pon. 2001).

When a divorced couple is jointly responsible on a promissory note, no agreement they could make between them could possibly prevent the creditor from pursuing its claims against either or both of them, and since the issue of whether one of the defendants could have relieved himself or herself from responsibility to the creditor could not have been litigated in the divorce proceeding, the creditor cannot be precluded from litigating that issue. Bank of the FSM v. Hebel, 10 FSM Intrm. 279, 286 (Pon. 2001).

A divorcing couple is free to enter into whatever agreement they choose as to who between the two of them will be responsible to repay a bank loan. However, such an agreement can have no effect on bank's right to seek repayment of the loan from either or both of them. Bank of the FSM v. Hebel, 10 FSM Intrm. 279, 286 (Pon. 2001).

A promissory note is a term of art. There is a division of authority as to whether a document containing no express promise to pay constitutes a promissory note, but a writing that does not include such promise-to-pay language, but which is signed by the party to be charged is enforceable on its face as an acknowledgment of a debt. Jayko Int'l, Inc. v. VCS Constr. & Supplies, 10 FSM Intrm. 475, 477 (Pon. 2001).

The general rule is that payments are applied to interest first, and then to principal. Jayko Int'l, Inc. v. VCS Constr. & Supplies, 10 FSM Intrm. 475, 477 (Pon. 2001).

Unpaid interest and principal, consolidated into a new principal sum for purposes of a new loan is not a violation of a statute that prohibits interest compounding, since interest compounding results where interest is automatically compounded, and not where interest has become due, has not been paid, and becomes the subject of a new loan agreement. Jayko Int'l, Inc. v. VCS Constr. & Supplies, 10 FSM Intrm. 475, 478 (Pon. 2001).

Even assuming that the seller historically did not charge interest on its account with the buyer, nothing precludes the parties to a commercial transaction from coming to a new agreement regarding installment payments on the outstanding indebtedness that also included an interest component calculated over the prior 26 months period, so long as the interest rate charged did not contravene FSM public policy as set out in 34 F.S.M.C. 204. Jayko Int'l, Inc. v. VCS Constr. & Supplies, 10 FSM Intrm. 502, 504 (Pon. 2002).

When an agreement provides for 18% interest per annum on the principal remaining after the debtor's last payment, no usury issue arises, and when the interest charged cannot be said to be arbitrary and capricious on any other basis, the interest portion of the agreement is binding. Jayko Int'l, Inc. v. VCS Constr. & Supplies, 10 FSM Intrm. 502, 504 (Pon. 2002).

Previous insolvency cases involved juridical persons, either corporations or cooperatives, which after they were declared insolvent and the creditors paid to the extent they could be, were dissolved. Once a corporation's or a cooperative's assets are all paid out and the corporation or cooperative is dissolved, unpaid creditors are generally without further recourse to collect any unpaid sums. In re Engichy, 11 FSM Intrm. 520, 525 (Chk. 2003).

While the court may determine (and has in the absence of statute) the priority of its judgments as to a debtor, the court is reluctant to assume that it may order the discharge of a judgment against a debtor when, by statute, the judgment is to remain valid and enforceable for twenty years. In re Engichy, 11 FSM Intrm. 520, 525 (Chk. 2003).

The Constitution assigns Congress the authority to enact bankruptcy laws and thus to determine when a judgment against an insolvent person should be discharged without either full payment or the parties' agreement. In re Engichy, 11 FSM Intrm. 520, 525-26 (Chk. 2003).

Even if the court can declare natural persons insolvent in the manner it can and has declared corporations and cooperatives insolvent, the court does not have the authority to "discharge" a natural person

judgment-debtor's debts short of full satisfaction of the judgment. In re Engichy, 11 FSM Intrm. 520, 526 (Chk. 2003).

There is no impediment to appointing a receiver in the absence of an insolvency declaration, especially when it is the judgment-debtors who ask that one be appointed. In re Engichy, 11 FSM Intrm. 520, 526 (Chk. 2003).

In order to purge any possible contempt buy the judgment-debtors, the court may order the receiver to pay out of funds on deposit with the court the arrearages accrued on orders in aid of judgment before the judgments were consolidated. In re Engichy, 11 FSM Intrm. 520, 526 (Chk. 2003).

Among judgment creditors, those with a writ of execution have priority over those who do not. In re Engichy, 11 FSM Intrm. 520, 527 (Chk. 2003).

One reason writ-holders are granted a higher priority is that the judgment creditor who has taken the effort and exhibited the diligence to move to the status of execution creditor deserves to be treated differently on that basis. In re Engichy, 11 FSM Intrm. 520, 527 (Chk. 2003).

A judgment-creditor who has obtained an order in aid of judgment should be accorded the same status as a judgment creditor who has obtained a writ of execution because both methods of enforcing a money judgment are provided for by statute and both methods show that the judgment creditor has taken the effort and exhibited diligence greater than that of a mere judgment-creditor. In re Engichy, 11 FSM Intrm. 520, 528 (Chk. 2003).

A judgment-creditor's statutory right to obtain immediate issuance of a writ of execution implies as well a legislative intent that holders of writs be paid on the basis of a first-in-time, first-in-right rule according to the dates of each party's writ. In re Engichy, 11 FSM Intrm. 520, 528 (Chk. 2003).

Judgment-creditors with execution creditor status are to be paid on the basis of a first-in-time, first-in-right rule according to the dates of the individual parties' writs. The pro rata payment basis is the rule for unsecured judgment-creditors who do not hold execution creditor status or a statutory lien priority. Because holders of orders in aid of judgment are accorded the status of execution creditors, those judgment-creditors will be paid in order according to the date of either their first writ of execution or their first order in aid of judgment. In re Engichy, 11 FSM Intrm. 520, 528-29 (Chk. 2003).

If a creditor's judgment is secured by a mortgage, it would have priority over the other unsecured judgment-creditors for the proceeds from the sale of the mortgaged property. In re Engichy, 11 FSM Intrm. 520, 530 (Chk. 2003).

Assuming that the transfer of title to property by the judgment-debtors to a judgment-creditor was not a sham transaction with the judgment-debtors retaining ownership of it and the judgment-creditor merely selling it for them, but was a bona fide transfer of title, it was within the judgment-creditor's rights to take property instead of cash as payment on its judgment. In re Engichy, 11 FSM Intrm. 520, 533 (Chk. 2003).

When a judgment-creditor decides to take title to property as full payment for the outstanding judgment in lieu of a cash payment for the remainder of the judgment, the judgment is satisfied at that point, not at some later time when the judgment-creditor has managed to sell the property for cash. A judgment-creditor accepting title to property in lieu of cash as full satisfaction of its judgment takes the risk that its later sale of the property could amount to less (or the chance it could be more) than amount due on the judgment or that the sale might fall through. In re Engichy, 11 FSM Intrm. 520, 533 (Chk. 2003).

In the usual case, the payment of a money judgment against the state must abide a legislative appropriation. "The usual case" means the ordinary civil case for money damages. Estate of Mori v. Chuuk, 12 FSM Intrm. 3, 9 (Chk. 2003).

The court will not determine the state to be insolvent and appoint a receiver to manage its debts to insure the payment of its judgments because it is a much more drastic approach than garnishment and it is also a course upon which the court will not embark without the benefit of a substantially fuller record than that now before it. Estate of Mori v. Chuuk, 12 FSM Intrm. 3, 11 (Chk. 2003).

That a promissory note's co-signer did not receive the loan proceeds, but the other signers did and they spent it, is not a defense to an action on the note or a ground for dismissal of the case against the co-signer. LPP Mortgage Ltd. v. Maras, 12 FSM Intrm. 27, 28 (Chk. 2003).

Except for unusual circumstances, 15% is the upward limit for an attorney's fee to be deemed reasonable when it is awarded pursuant to a stipulation for the payment of attorney's fees in a debt collection case. LPP Mortgage Ltd. v. Maras, 12 FSM Intrm. 112, 113 (Chk. 2003).

That a corporation is insolvent does not mean that it lacks the capacity to sue or be sued. Goyo Corp. v. Christian, 12 FSM Intrm. 140, 147 (Pon. 2003).

Even though the FSM does not have a bankruptcy code, the FSM Supreme Court has previously recognized the appointment of receivers or special masters to engage in collection efforts on behalf of insolvent corporate entities. A trustee's purpose in a bankruptcy proceeding is similar to the appointment of a receiver or collection agent to act on behalf of an insolvent corporation, and the fact of a corporation's insolvency does not affect the ability of a trustee, receiver, or collection agent to proceed on a corporation's behalf to recover assets in the corporation's name, and for the benefit of the corporation's creditors or shareholders. Goyo Corp. v. Christian, 12 FSM Intrm. 140, 147 (Pon. 2003).

When the plaintiff had a legal right to initiate a lawsuit against a corporate defendant for its unpaid debts at the time that the promissory note was executed in 1994, but instead of initiating a lawsuit, it agreed to certain terms of payment, and required individuals to personally guarantee that payment would be made, each of the parties gained something in the execution of the promissory note and security agreement. There was thus consideration exchanged by the parties when they entered into these agreements. Goyo Corp. v. Christian, 12 FSM Intrm. 140, 149 (Pon. 2003).

In a broad sense a guarantor or surety is one who promises to answer for the debt or default of another. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 10 (Pon. 2004).

When the defendants contend that they cannot be liable on the guaranty because the guaranty secures the promissory note on which they are named as the promisors, but can only prevail on this argument if they are the primary obligors on the loan, but they are not, and never were even though certain writings failed to properly reflect that, and when those writings have been reformed, this contention is without merit. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 10 (Pon. 2004).

Like other contracts, contracts of guaranty must be supported by consideration, and a guaranty will not be enforced unless the promise is supported by consideration. However, if the promise of the guarantor is shown to have been given as part of a transaction or arrangement which created the guaranteed debt or obligation, the promise is supported by the same consideration which supports the principal transaction. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 11 (Pon. 2004).

When a guaranty was given as a part of the same transaction by which the debt to the bank was created, no independent consideration was necessary. The guaranty was supported by the same consideration that supported the transaction between the debtor and the bank. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 11 (Pon. 2004).

A debtor is not an indispensable party under Rule 19 in an action to enforce a guaranty of payment. A lender holding a guaranty of payment can sue a guarantor directly, without naming the borrower. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 11 (Pon. 2004).

When, under the terms of a guaranty, the guarantors waived any right to require the bank to proceed against the borrower, to proceed against or exhaust any security held from the borrower, or to pursue any other remedy in its power whatsoever, the guarantors' contention that the bank could not proceed against them without also proceeding against the borrower is without merit. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 11 (Pon. 2004).

Guaranties and suretyships bear many similarities. A guaranty creates a secondary obligation under which the guarantor promises to be responsible for the debt of another. The guarantor is only secondarily liable, and then only on proof of the default by the principal debtor. A suretyship differs from a guarantee in that a surety's obligation to the creditor is primary and unconditional whereas a guarantor's obligation is secondary and conditioned on the principal's default. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 11 (Pon. 2004).

The main distinction between a contract of surety and one of guaranty has been expressed by stating that a surety is primarily and jointly liable with the principal debtor, while a guarantor's liability is collateral and secondary and is fixed only by the inability of the principal debtor to discharge the primary obligation. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 11 (Pon. 2004).

A court does not need to determine whether an instrument is a guaranty or a surety when the result would be the same. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 12 (Pon. 2004).

– Orders in Aid of Judgment

FSM law allows imprisonment of a debtor for "not more than six months" if he is "adjudged in contempt as a civil matter" for failure "without good cause to comply with any order in aid of judgment." 6 F.S.M.C. 1412. The inability of a judgment debtor to comply with an order in aid of judgment without fault on his part after his exercise of due diligence constitutes "good cause" within the meaning of the statute. Hadley v. Bank of Hawaii, 7 FSM Intrm. 449, 452 (App. 1996).

In order to hold a debtor in contempt for failure to comply with an order in aid of judgment it is not enough that the debtor's noncompliance was found to be willful. There must also be a recital, or a finding somewhere in the record, that the debtor was able to comply. Hadley v. Bank of Hawaii, 7 FSM Intrm. 449, 453 (App. 1996).

A non-party is deprived of due process of law when a case is started against it without notice or it having been made a party, when an order in aid of judgment has been issued against the non-party without a judgment and a hearing held following notice, and when a writ of execution has been issued against a non-party and without notice or hearing to determine the amount to be executed upon. Bank of Guam v. O'Sonis, 8 FSM Intrm. 301, 304 (Chk. 1998).

The statute authorizing issuance of an order in aid of judgment, 6 F.S.M.C. 1409, presents two issues: the debtor's ability to pay, and the most expeditious way that payment can be accomplished. Louis v. Kutta, 8 FSM Intrm. 312, 316 (Chk. 1998).

A court has an interest in insuring that its orders are heeded, and this interest exists apart from any interest the parties may have in the litigation. A court may take whatever reasonable steps are appropriate to insure compliance with its orders. It need not rely on the parties themselves to prescribe the way in which its orders will be carried out, or its judgments executed. Louis v. Kutta, 8 FSM Intrm. 312, 318 (Chk. 1998).

By statute, a court has wide latitude in crafting an order in aid of judgment and may even modify the order on its own motion. Louis v. Kutta, 8 FSM Intrm. 312, 319 (Chk. 1998).

Under 11 F.S.M.C. 701 *et seq.* a private cause of action is provided to any person whose constitutional rights are violated. In order for the remedy provided by 11 F.S.M.C. 703 to be effective, it must be enforceable. Where the defendant in a civil rights action is a state, this means that the remedy should not be

dependent upon subsequent state legislative action, such as appropriation of funds, which would thwart the Congressional mandate that 11 F.S.M.C. 701 is meant to implement. Accordingly, the FSM Supreme Court is not precluded from issuing an order in aid of judgment against a state in the absence of a state legislative appropriation. Davis v. Kutta, 8 FSM Intrm. 338, 341 (Chk. 1998).

Under 6 F.S.M.C. 1409, an individual judgment debtor is allowed to "retain such property and such portion of his income as may be necessary to provide the reasonable living requirements of the debtor and his dependents," but if the debtor has some limited ability to pay, the court can order some payment. Davis v. Kutta, 8 FSM Intrm. 338, 342 (Chk. 1998).

Under 6 F.S.M.C. 1410(2), an order in aid of judgment may provide for the sale of particular assets, such as unencumbered property that is not necessary for the debtor to meet his family and customary obligations, and payment of the net proceeds to the creditor. Davis v. Kutta, 8 FSM Intrm. 338, 343 (Chk. 1998).

Under 6 F.S.M.C. 1409, the court makes two inquiries: the judgment debtor's ability to pay, and the fastest manner to accomplish payment. Davis v. Kutta, 8 FSM Intrm. 338, 343 (Chk. 1998).

Because the court must consider the debtor's ability to pay, an order which takes this factor properly into consideration will not result, in and of itself, in the financial undoing of a debtor. Davis v. Kutta, 8 FSM Intrm. 338, 344 (Chk. 1998).

A motion for an order in aid of judgment against the State of Chuuk to assign sufficient assets to pay a money judgment will be denied because the state may make payments subject only to legislative appropriation. Judah v. Chuuk, 9 FSM Intrm. 41, 42 (Chk. S. Ct. Tr. 1999).

The only purpose of statutes authorizing orders in aid of judgment is to force the payment of a judgment and to provide means to collect a money judgment, which is the same as proceedings for attachment, garnishment or execution. Kama v. Chuuk, 9 FSM Intrm. 496, 498 (Chk. S. Ct. Tr. 1999).

The Trust Territory Code provisions for orders in aid of judgment are not available as against Chuuk because, when it barred the courts' power of attachment, execution and garnishment of public property, the clear legislative intent was to supersede or repeal all provisions of the Trust Territory Code, Title 8 insofar as they allowed seizure of Chuuk state property. Kama v. Chuuk, 9 FSM Intrm. 496, 498 (Chk. S. Ct. Tr. 1999).

Historically, orders in aid of judgment and orders in aid of execution serve the same purpose and the terms are used interchangeably. Their purpose is to provide a means of discovery to inquire into the assets and ability of a judgment debtor to pay a judgment. Kama v. Chuuk, 9 FSM Intrm. 496, 498 (Chk. S. Ct. Tr. 1999).

Proceedings in aid of a judgment are supplementary proceedings to enforce a judgment, the same as attachment, execution and garnishment, and as against Chuuk State public property, are prohibited by § 4 of the Chuuk Judiciary Act. Kama v. Chuuk, 9 FSM Intrm. 496, 498 (Chk. S. Ct. Tr. 1999).

The court may modify any order in aid of judgment as justice may require, at any time, upon the application of either party and notice to the other, or on the court's own motion. Davis v. Kutta, 10 FSM Intrm. 224, 225 (Chk. 2001).

A court may grant a debtor's motion to modify an order in aid of judgment when the debtor's proposed commitment to pay is reasonable. Davis v. Kutta, 10 FSM Intrm. 224, 225 (Chk. 2001).

A judgment debtor's request to the court for a hearing, pursuant to 6 F.S.M.C. 1409 to determine its ability to pay the debt and the fastest means to pay and satisfy the judgment constitutes a motion for an order in aid of judgment. Walter v. Chuuk, 10 FSM Intrm. 312, 316 (Chk. 2001).

Either party may apply for an order in aid of judgment. Once it has, the court must, after notice to the

opposite party, hold a hearing on the question of the debtor's ability to pay and determine the fastest manner in which the debtor can reasonably pay a judgment based on the finding. Walter v. Chuuk, 10 FSM Intrm. 312, 316-17 (Chk. 2001).

Although under FSM law once an application for an order in aid of judgment has been filed no writ of execution may issue except under an order in aid of judgment or by special order of the court, it is uncertain what effect, if any, this (or the Chuuk state law prohibiting attachment, execution, or garnishment of Chuuk public property) would have on courts in jurisdictions outside the Federated States of Micronesia. Walter v. Chuuk, 10 FSM Intrm. 312, 317 (Chk. 2001).

The procedure for a judgment creditor to obtain an order in aid of judgment and the authority for a court to issue one is contained in section 55 of Title 8 of the Trust Territory Code, which, under the Chuuk Constitution's Transition Clause, is still applicable law in Chuuk. Section 55, by its terms, does not bar its application to a government judgment debtor. Kama v. Chuuk, 10 FSM Intrm. 593, 600 (Chk. S. Ct. App. 2002).

Section 4 of the Chuuk Judiciary Act of 1990 denies courts the power of attachment, execution and garnishment of public property. Thus, a court may issue an order in aid of judgment addressed to the state, but is barred from issuing any order in aid of judgment that acts as an attachment, execution and garnishment of public property. Kama v. Chuuk, 10 FSM Intrm. 593, 600 (Chk. S. Ct. App. 2002).

Any order in aid of judgment may, be modified by the trial court at any time upon application of either party and notice to the other, or on the court's own motion. Kama v. Chuuk, 10 FSM Intrm. 593, 600 (Chk. S. Ct. App. 2002).

It is generally within the Chuuk State Supreme Court's power to issue an order in aid of judgment. This power derives from the court's power to issue all writs for equitable and legal relief. Narruhn v. Chuuk, 11 FSM Intrm. 48, 53 (Chk. S. Ct. Tr. 2002).

In deciding whether to issue an order in aid of judgment, the court is presented with two issues: 1) the debtor's ability to pay, and 2) the fastest manner in which the debtor can reasonably pay the judgment based upon the finding of ability to pay. Narruhn v. Chuuk, 11 FSM Intrm. 48, 53 (Chk. S. Ct. Tr. 2002).

As a matter of law, the court cannot issue an order directing the state to pay money absent an appropriation therefor. The inquiry, then, is how, when funds are available to pay judgments, the court can assist a judgment creditor in getting his judgment paid in the fastest manner. Narruhn v. Chuuk, 11 FSM Intrm. 48, 53 (Chk. S. Ct. Tr. 2002).

In addressing the question of how best to assure payment of a judgment in "the fastest manner," the court is mindful of the fact that it has wide latitude in crafting an order in aid of judgment. While the court cannot direct the Legislature to appropriate money to pay a judgment, it does have the authority to compel the Director of Treasury, and the Governor, through mandamus, to meet their non-discretionary duty to pay judgments in a fair and non-discriminatory manner. Narruhn v. Chuuk, 11 FSM Intrm. 48, 54 (Chk. S. Ct. Tr. 2002).

A judgment creditor needing continuing medical care resulting from a state employee's negligent or wilful conduct, may apply to the court for specific relief, and assuming funds have been appropriated for payment of the state's judgment debts which remain undisbursed and available, any such judgment creditor shall receive payment on his or her judgment regardless of the judgment's date of entry. Narruhn v. Chuuk, 11 FSM Intrm. 48, 54 (Chk. S. Ct. Tr. 2002).

The statutory remedy for violations of an order in aid of judgment is that if any debtor fails without good cause to comply with any order in aid of judgment, he may be adjudged in contempt as a civil matter. The inability of a judgment debtor to comply with an order in aid of judgment without fault on his part after his exercise of due diligence constitutes "good cause." Rodriguez v. Bank of the FSM, 11 FSM Intrm. 367, 374

(App. 2003).

When the judgment-debtor's Social Security retirement benefits are received by him and have not been subjected to any sort of direct levy, allotment or garnishment or any execution, attachment, or assignment of these benefits and when these benefits may be commingled with any other income the debtor may have available to him, and from these funds he meets his living expenses and his other obligations, the trial court's order in aid of judgment does not require that the payment come from any particular source of income. Rodriguez v. Bank of the FSM, 11 FSM Intrm. 367, 379 (App. 2003).

There is no violation of the 53 F.S.M.C. 604 susceptibility of benefits rule, when there has been no execution, attachment, garnishment, or assignment of the judgment-debtor's Social Security retirement benefits and when the trial court's order in aid of judgment specifically found that the judgment-debtor would have sufficient funds for his and his dependents' basic support. Rodriguez v. Bank of the FSM, 11 FSM Intrm. 367, 380 (App. 2003).

While the trial court does not violate the Constitution's involuntary servitude provision when it orders a judgment-debtor to seek immediate employment, when the judgment-debtor has presented evidence that he is unable to work, the trial court must make specific findings with regard to his fitness for work before it orders him to seek immediate employment. Rodriguez v. Bank of the FSM, 11 FSM Intrm. 367, 386 (App. 2003).

A major purpose for granting consolidation of judgments is to establish the payment priority for the consolidated judgments and to implement an orderly payment plan involving one, instead of multiple, orders in aid of judgments. In re Engichy, 11 FSM Intrm. 520, 527 (Chk. 2003).

A judgment-creditor's right to the issuance of a writ of execution is provided for by statute, as is the right to obtain an order in aid of judgment. In re Engichy, 11 FSM Intrm. 520, 527 (Chk. 2003).

An FSM judgment-debtor can, if he so chooses, prevent the issuance of a writ of execution because any party, either the judgment-creditor or the judgment-debtor may apply for an order in aid of judgment and once a party has applied for an order in aid of judgment, the judgment-creditor is statutorily barred from obtaining a writ of execution except as part of an order in aid of judgment or by special order of the court for cause shown. In re Engichy, 11 FSM Intrm. 520, 528 (Chk. 2003).

A judgment-creditor who has obtained an order in aid of judgment should be accorded the same status as a judgment creditor who has obtained a writ of execution because both methods of enforcing a money judgment are provided for by statute and both methods show that the judgment creditor has taken the effort and exhibited diligence greater than that of a mere judgment-creditor. In re Engichy, 11 FSM Intrm. 520, 528 (Chk. 2003).

Judgment-creditors with execution creditor status are to be paid on the basis of a first-in-time, first-in-right rule according to the dates of the individual parties' writs. The pro rata payment basis is the rule for unsecured judgment-creditors who do not hold execution creditor status or a statutory lien priority. Because holders of orders in aid of judgment are accorded the status of execution creditors, those judgment-creditors will be paid in order according to the date of either their first writ of execution or their first order in aid of judgment. In re Engichy, 11 FSM Intrm. 520, 528-29 (Chk. 2003).

On motion for an order in aid of judgment, the court must determine both the question of the judgment debtor's ability to pay and the fastest manner in which payment can reasonably be made. Estate of Mori v. Chuuk, 11 FSM Intrm. 535, 542 (Chk. 2003).

Courts have the power to issue all writs for equitable and legal relief, except the power of attachment, execution and garnishment of public property. This statutory prohibition has been held to prohibit the issuance of an order in aid of judgment against Chuuk. Ben v. Chuuk, 11 FSM Intrm. 649, 651 (Chk. S. Ct. Tr. 2003).

A stipulated judgment, even after court approval, cannot confer jurisdiction on a court to issue an order

in aid of judgment against Chuuk in direct contravention of a statute. Regardless of the stipulated judgment's language, the court simply cannot violate the statute and issue an order in aid of judgment against Chuuk. Ben v. Chuuk, 11 FSM Intrm. 649, 651 (Chk. S. Ct. Tr. 2003).

When no appropriation has been made, general or otherwise, for the payment of judgments, even if the court were to issue an order in aid of judgment, and even if the state government were to identify funds from some other source for payment of the judgment, the Chuuk Financial Control Commission would be precluded from approving the payment pursuant to the order in aid of judgment since it is precluded from paying any court ordered judgements unless specifically appropriated by law. Ben v. Chuuk, 11 FSM Intrm. 649, 652 (Chk. S. Ct. Tr. 2003).

Under a Chuuk State Supreme Court decision, if money was appropriated to pay court judgments, the oldest judgment must be paid in full before any payment could be made on the next oldest judgment. Ben v. Chuuk, 11 FSM Intrm. 649, 652 (Chk. S. Ct. Tr. 2003).

An order in aid of judgment only requires future payment according to its terms, which invariably will not be immediate payment in full, and which may later be modified. In re Engichy, 12 FSM Intrm. 58, 66 (Chk. 2003).

An order in aid of judgment, unlike a writ of execution, may only be obtained after application and notice to the other party and a hearing instead of the prompt issuance possible for a writ of execution. In re Engichy, 12 FSM Intrm. 58, 66 (Chk. 2003).

A judgment-creditor (or its attorney) must evaluate which method (writ of execution or order in aid of judgment) is most likely to best satisfy its judgment unless the judgment-debtor has already foreclosed that choice by applying for an order in aid of judgment. In re Engichy, 12 FSM Intrm. 58, 66-67 (Chk. 2003).

An order in aid of judgment generally deals not only with funds and assets currently in a judgment-debtor's possession but also with funds that are expected to come into the judgment-debtor's possession in the future. In re Engichy, 12 FSM Intrm. 58, 72 (Chk. 2003).

When the court has found the defendants in civil contempt, it may order them imprisoned until such time as they comply with the orders issued to date and/or pay an amount necessary to compensate the court and plaintiff for the wasted time and expense involved in having held and set over pretrial conferences that the defendants never timely rescheduled nor attended; but if, in the court's opinion, imprisonment is a less suitable punishment than a ruling that by its nature will move this litigation to its conclusion, and when the defendant's only asserted defense to having defaulted on the underlying promissory note was his unemployment and inability to pay and he is now employed, the court may order the defendants to settle the case and file a stipulated judgment or the court will strike defendants' answer and enter a default judgment against the defendants, grant a motion for order in aid of judgment, the plaintiff files one, hold a hearing thereon, make findings as to the defendants' ability to pay, and if warranted, order the defendants' wages garnished for such amount as the court deems appropriate in light of those findings. FSM Dev. Bank v. Ladore, 12 FSM Intrm. 169, 171-72 (Pon. 2003).

When a person has entered the plaintiff's parcel on at least two occasions and harvested crops in violation of the court's decision that the plaintiff is the fee simple owner of the parcel, an injunction will issue against that person and the defendants which prohibits further trespass and taking of crops from the parcel, and the defendants will be given a reasonable time to remove a local hut that they have constructed on parcel. Edwin v. Heirs of Mongkeya, 12 FSM Intrm. 220, 222 (Kos. S. Ct. Tr. 2003).

Failure to comply with an order in aid of judgment and an injunction can be grounds for a contempt proceeding. Edwin v. Heirs of Mongkeya, 12 FSM Intrm. 220, 222 (Kos. S. Ct. Tr. 2003).

– Secured Transactions

Because courts generally were concerned that third parties, especially other potential creditors, might rely to their detriment on assets which are in the possession of the borrower but, unknown to the other parties, are subject to a secret lien, there exists in the law a strong general policy against non-possessory and secret liens. Bank of Guam v. Island Hardware, Inc., 2 FSM Intrm. 281, 279 (Pon. 1986).

The common law of the United States today concerning secured transactions is the Uniform Commercial Code (UCC), a comprehensive statute covering commercial transactions. Absence in the Federated States of Micronesia of any filing requirement to notify others of a security interest, and of a designated place for filing, which provisions are at the heart of the UCC statutory scheme, virtually precludes any judicial attempt to draw heavily on UCC principles in fashioning an approach to secured transactions. Bank of Guam v. Island Hardware, Inc., 2 FSM Intrm. 281, 287 (Pon. 1986).

In considering the law concerning secured transactions, the FSM Supreme Court must look for guidance of the pre-UCC common law and may only declare the existence of such security interests as have been found by other courts to exist in the absence of statutes. Bank of Guam v. Island Hardware, Inc., 2 FSM Intrm. 281, 288 (Pon. 1986).

When a party agrees to create a security interest to secure his debt but then refuses to do what is necessary to vest the other party with statutory or common law lien rights in the property, courts can find that the other party has an equitable lien in property even if statutory or common law lien requirements have not been made. Bank of Guam v. Island Hardware, Inc., 2 FSM Intrm. 281, 290 (Pon. 1986).

Non-possessory equitable liens will not be found to exist against another who had neither actual notice nor reason to know of the existence of the security claim. Bank of Guam v. Island Hardware, Inc., 2 FSM Intrm. 281, 290 (Pon. 1986).

In absence of an authorized statute, a claim of a chattel mortgage will not be upheld as an equitable lien against third parties who had neither actual notice nor reason to know of the existence of the security claim unless there has been some method of notice so that other interested persons could have a reasonable opportunity to become aware of the security interest. In re Island Hardware, 3 FSM Intrm. 332, 340 (Pon. 1988).

A "general security agreement," without more does not establish a lien under common law or pursuant to any statute in the Federated States of Micronesia. In re Island Hardware, 3 FSM Intrm. 332, 342 (Pon. 1988).

Unless a statute or common law principle expressly says otherwise, disclosure is a prerequisite for making a lien effective against other creditors. In re Island Hardware, 3 FSM Intrm. 332, 342 (Pon. 1988).

Secured transactions within the Federated States of Micronesia remain subject to the policies applied elsewhere prior to the adoption of the Uniform Commercial Code. In re Island Hardware, 3 FSM Intrm. 332, 342 (Pon. 1988).

In the absence of a statute authorizing the recording of security interests, security agreements should be authenticated by a controller, accountant, bookkeeper, or other employee with firsthand, personal knowledge of the secured party's books and records. Bank of Hawaii v. Kolonia Consumer Coop. Ass'n, 7 FSM Intrm. 659, 663 (Pon. 1996).

A secured interest will not be given priority status when there is no recording statute, thus making it a secret lien, and where there is no transfer of dominion to the lender, and the lender appears to claim a floating interest. Bank of Hawaii v. Kolonia Consumer Coop. Ass'n, 7 FSM Intrm. 659, 664 (Pon. 1996).

It has long been recognized in the FSM, that secret liens are not enforceable against third parties. Banks in the past have attempted to assert a priority right for unpaid loan balances where the loan was used to purchase chattel property. The court has denied them and refused to uphold the asserted liens against

third parties. This is controlling law in the FSM. UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 361, 365 (Chk. 2003).

If a judgment-creditor were to attempt to execute against a piece of land for which there was a certificate of title and that certificate showed an outstanding mortgage on the land, or if there was no certificate of title for the land but a mortgage had been duly and properly recorded at the Land Commission so that anyone searching the records there should necessarily find it, then that would be a security interest that was not a secret lien and therefore valid against third parties. UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 361, 365 (Chk. 2003).

Because there are no statutory schemes in the FSM to record liens and mortgages on chattel property and provide notice thereof because no Micronesian legislature has established any, except that for vessels, chattel mortgages are therefore secret liens which cannot be enforced against third parties who had neither notice nor reason to know of the security interest claim. UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 361, 365 (Chk. 2003).

When the FSM Supreme Court's concern in inquiring into a Guam bankruptcy case was not to determine whether the principles of comity should be applied, but rather whether any order the court might issue would subject a party to liability for contempt in the other court because the party was required by two courts to obey contradictory orders and when that concern has been assuaged, the court will take no position on whether, and under what circumstances, it might recognize U.S. bankruptcy law or proceedings and whether or when comity would apply in such a case. UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 361, 366 (Chk. 2003).

Generally, a secured interest will not be given priority status when there is no recording statute, thus making it a secret lien. In re Engichy, 11 FSM Intrm. 520, 530 (Chk. 2003).

A promissory note and a security agreement are enforceable contractual agreements between the parties. Goyo Corp. v. Christian, 12 FSM Intrm. 140, 146 (Pon. 2003).

– Setoff

The general rule is that where a creditor has failed to both procure credit insurance paid for by the debtor and to notify the debtor of his failure to procure the insurance requested, prior to loss, the debtor may plead such failure as a defense or setoff. FSM Dev. Bank v. Bruton, 7 FSM Intrm. 246, 250 (Chk. 1995).

Equity does not dictate that a setoff for the amount of a defendant's stock subscription be allowed against a contribution claim when the person claiming the setoff received by far the greatest benefit from the failed corporation while it was operating. Senda v. Semes, 8 FSM Intrm. 484, 507 (Pon. 1998).

A statute that requires the creditor to give written notice to the debtor of the creditor's intention to foreclose prior to foreclosing on the property, is inapplicable to setoffs because foreclosures and setoffs are very different things. Bank of the FSM v. Asugar, 10 FSM Intrm. 340, 342 (Chk. 2001).

A setoff is a debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor, or the counterbalancing sum owed by the creditor. Bank of the FSM v. Asugar, 10 FSM Intrm. 340, 342 (Chk. 2001).

Banks generally have a common law right to a setoff against depositors. Bank of the FSM v. Asugar, 10 FSM Intrm. 340, 342 (Chk. 2001).

When a bank has a contractual right to setoff because the promissory note contains a provision granting the bank a right to setoff and in that provision, the borrowers authorize the bank's use of setoff, and the borrowers are on notice that if payments are not made that the bank may exercise a setoff against the borrower's bank deposits. And when the note provides that the bank may forgo or delay enforcing any of its rights or remedies without losing them, the bank was within its rights to setoff sums in the borrowers' bank

accounts against the monthly payments as each became due and remained unpaid instead of declaring the loan in default and accelerating payment of the entire amount. Bank of the FSM v. Asugar, 10 FSM Intrm. 340, 342 (Chk. 2001).

A setoff is a debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor, or the counterbalancing sum owed by the creditor. Phillip v. Marianas Ins. Co., 12 FSM Intrm. 464, 469 (Pon. 2004).

A promissory note will not bear any interest past the date it is setoff against an opposing claim. Phillip v. Marianas Ins. Co., 12 FSM Intrm. 464, 470 (Pon. 2004).

– Tax Liens

Liens under 54 F.S.M.C. 135 have priority even over liens which arose earlier in time. Bank of Guam v. Island Hardware, Inc. (II), 3 FSM Intrm. 105, 108 (Pon. 1987).

The statute 54 F.S.M.C. 153 does not require the government to give notice of its lien claims to any other creditors or even to the taxpayer. This statute, then, authorizes a lien which may be kept secret from interested parties. The effect of such a lien would be determined against the background of the strong general policy against secret liens. Bank of Guam v. Island Hardware, Inc. (II), 3 FSM Intrm. 105, 108 (Pon. 1987).

A section 153 lien should be treated as an equitable lien, its effect to be determined on a case-by-case basis with a view toward equitable considerations, especially when the government has taken reasonable and timely action to notify such other parties to the government's claims based upon tax delinquency. Bank of Guam v. Island Hardware, Inc. (II), 3 FSM Intrm. 105, 108 (Pon. 1987).

Any lien rights of the government under section 135(2) supersede even preexisting lien rights of any other party. Bank of Guam v. Island Hardware, Inc. (II), 3 FSM Intrm. 105, 110 (Pon. 1987).

The priority lien rights provided for the government in section 135(2) relate only to wage and salary tax claims and not to gross revenue taxes or other taxes. Bank of Guam v. Island Hardware, Inc. (II), 3 FSM Intrm. 105, 111 (Pon. 1987).

Under 54 F.S.M.C. 135(2), no other payment to creditors may be made from execution sale proceeds until all amounts owing for wage and salary taxes are paid in full to the government. In re Mid-Pacific Constr. Co., 3 FSM Intrm. 292, 297 (Pon. 1988).

Priority of national government's lien for unpaid business gross revenue taxes under 54 F.S.M.C. 153 is subject to requirement that government take reasonable and timely action to notify other parties of the government's claim, but filing of litigation is sufficient notification to all parties under 54 F.S.M.C. 153. In re Mid-Pacific Constr. Co., 3 FSM Intrm. 292, 297 (Pon. 1988).

53 F.S.M.C. 104 does not establish lien rights in the Trust Territory Social Security Board, and gives the board no lien or priority claim of any kind. In re Mid-Pacific Constr. Co., 3 FSM Intrm. 292, 299 (Pon. 1988).

Claims for wages asserted by low level employees and laborers are entitled to preference over all other claims, except wage and salary tax lien rights of the national government, which are given priority over all other claims and liens by 54 F.S.M.C. 135(2). In re Mid-Pacific Constr. Co., 3 FSM Intrm. 292, 301 (Pon. 1988).

Attachment and seizure create statutory and possessory lien rights which will be unaffected by subsequent writs of execution, but will be subject to national government's wage and salary tax lien claims under 54 F.S.M.C. 135(2), to wage claims of low level employees and laborers, and to pre-existing national government lien rights under 54 F.S.M.C. 153. In re Mid-Pacific Constr. Co., 3 FSM Intrm. 292, 303 (Pon. 1988).

Under 54 F.S.M.C. 135(2), the government's judgment for wages and salary taxes constitutes a lien that is entitled to highest priority. In re Island Hardware, 3 FSM Intrm. 332, 337 (Pon. 1988).

In order for the government's judgment for gross revenue taxes to have a highest priority lien, notice that the tax payments are overdue, not just that tax liability has accrued must be given. In re Island Hardware, 3 FSM Intrm. 332, 338 (Pon. 1988).

Amounts owing for penalties and interest under the tax law, 54 F.S.M.C. 155 and 902, do not qualify for lien treatment under 54 F.S.M.C. 135 or 153. In re Island Hardware, Inc., 3 FSM Intrm. 428, 433 (Pon. 1988).

Where the government is entitled to a lien on the debtor's assets as of the date it gave notice of its claim for those taxes the lien also becomes effective as of that date. In re Pacific Islands Distrib. Co., 3 FSM Intrm. 575, 585 (Pon. 1988).

Language in 54 F.S.M.C. 135(2) that the amount of wage and salary taxes formed "a lien on the employer's entire assets, having priority over all other claims and liens" meant that this statutory lien superseded the general rule of first in time, first in right. In re Engichy, 12 FSM Intrm. 58, 64 (Chk. 2003).

All Social Security taxes, including penalties and interest, constitute a lien upon any property of the employer, having priority over all other claims and liens including liens for other taxes. This creates a lien for social security taxes that has priority over even other tax liens, such as the wage and salary tax liens given first priority in Island Hardware and Pacific Islands Distributing. In re Engichy, 12 FSM Intrm. 58, 64 (Chk. 2003).

The social security tax lien arises by operation of law whenever social security taxes become due and are not paid. In re Engichy, 12 FSM Intrm. 58, 64 (Chk. 2003).

Under 53 F.S.M.C. 607, Social Security taxes specifically take priority over other tax liens. In re Engichy, 12 FSM Intrm. 58, 65 (Chk. 2003).

A social security tax lien has priority over a mortgage because section 607 grants social security tax liens priority over all other liens regardless of whether the other liens arose earlier. In re Engichy, 12 FSM Intrm. 58, 65 (Chk. 2003).

Under the general rule a mortgage first in time has superior right in the absence of the applicability of a statutory provision to the contrary. Section 607 is a statutory provision to the contrary because it grants social security tax liens priority over all other liens regardless of whether the other liens arose earlier. In re Engichy, 12 FSM Intrm. 58, 65 (Chk. 2003).

Social Security's statutory priority tax lien is consistent with the general rule that acknowledges that the first-in-time priorities are also subject to legislative action that restructures the normal priorities. In re Engichy, 12 FSM Intrm. 58, 65 (Chk. 2003).

Social Security's tax lien priority is statutory, not equitable. Statutory law, as enacted by Congress, not equitable principles fashioned by the court, applies. The statute, 53 F.S.M.C. 607, expressly gives Social Security a tax lien superior to all other liens. In re Engichy, 12 FSM Intrm. 58, 65 (Chk. 2003).

As Congress clearly intended, social security tax liens must be given priority over all other claims and liens and paid first. In re Engichy, 12 FSM Intrm. 58, 66 (Chk. 2003).

DOMESTIC RELATIONS

Where there is diversity of citizenship between the parties, litigation involving domestic relations issues, including custody and child support, falls within the jurisdiction of the FSM Supreme Court. Mongkeya v. Brackett, 2 FSM Intrm. 291, 292 (Kos. 1986).

A marriage procured and induced by fraud is void ab initio and the party whose consent was so procured is entitled to a judgment annulling the marriage. Burrow v. Burrow, 6 FSM Intrm. 203, 204-05 (Pon. 1993).

– Adoption

6 F.S.M.C. 1614 exempts adoptions effected in accordance with local custom from the domestic relations law of the FSM. Customary adoptions are an alternative to court-ordered adoptions which are established by the Code. In re Marquez, 5 FSM Intrm. 381, 383 (Pon. 1992).

Parties who wish to adopt a child have a choice of method of adoption. They may adopt according to local custom, or they may adopt according to the laws of the Federated States of Micronesia. What a petitioner may not do is seek the court's involvement in a customary adoption. In re Marquez, 5 FSM Intrm. 381, 383 (Pon. 1992).

6 F.S.M.C. 1615 grants the court jurisdiction to confirm customary adoptions. For the court to hear a petition to confirm a customary adoption there must first be a challenge to the validity of that adoption. Furthermore, the challenge must either cause "serious embarrassment" to one of the parties, or affect their property rights. Mere speculation or gossip will not suffice. In re Marquez, 5 FSM Intrm. 381, 383-84 (Pon. 1992).

Before the court may confirm a customary adoption, there must first have occurred a customary adoption. Thus, a threshold question is whether a customary adoption has taken place. In re Marquez, 5 FSM Intrm. 381, 384 (Pon. 1992).

Evidence that a customary adoption has taken place may be offered via affidavits from the natural parents of the child, consenting and attesting to the customary adoption. In re Marquez, 5 FSM Intrm. 381, 384 (Pon. 1992).

A petition to confirm a customary adoption which fails to indicate that the customary adoption has occurred is premature and unreviewable. In re Marquez, 5 FSM Intrm. 381, 385 (Pon. 1992).

The court has no statutory authority to enter a decree of adoption, pursuant to statute, for an adult. In re Jae Joong Hwang, 6 FSM Intrm. 331, 331 (Chk. S. Ct. Tr. 1994).

An adoption of an adult may qualify for recognition by the court if done under Chuukese custom. In re Jae Joong Hwang, 6 FSM Intrm. 331, 332 (Chk. S. Ct. Tr. 1994).

– Child Support and Custody

Where there is diversity of citizenship between the parties, litigation involving domestic relations issues, including custody and child support, falls within the jurisdiction of the FSM Supreme Court. Mongkeya v. Brackett, 2 FSM Intrm. 291, 292 (Kos. 1986).

In litigation brought by a mother seeking child support payments from the father, the court will not grant the defendant-father's motion to change the venue to the FSM state in which he now resides from the FSM state in which: 1) the mother initiated the litigation; 2) the couple was married and resided together; 3) their children were born and have always lived; and 4) the mother still resides. Pernet v. Aflague, 4 FSM Intrm. 222, 224 (Pon. 1990).

Statutory provisions in the Trust Territory Code concerning domestic relations are part of state law because domestic relations fall within the powers of the states and not the national government. Pernet v. Aflague, 4 FSM Intrm. 222, 224 (Pon. 1990).

Since the determination of support payments payable by a divorced husband is a matter governed by state law, the FSM Supreme Court in addressing such an issue is obligated to attempt to apply the pertinent

state statutes in the same fashion as would the highest state court in the pertinent jurisdiction. Pernet v. Aflague, 4 FSM Intrm. 222, 224 (Pon. 1990).

Under Pohnpeian state law after confirmation of a customary separation or divorce under 39 TTC 5, the court may order custody and child support under 39 TTC 103. Pernet v. Aflague, 4 FSM Intrm. 222, 225 (Pon. 1990).

Although under historical Pohnpeian customary law only the husband had rights over the children of the marriage, now both parents have rights and responsibilities in connection with a marriage and the court should take this into consideration in determining child custody rights and support payment obligations in cases of customary divorce. Pernet v. Aflague, 4 FSM Intrm. 222, 225 (Pon. 1990).

Under the law of Pohnpei a court may award child custody, and, if necessary order child support. The standard to be applied is the "best interests of the child." Youngstrom v. Youngstrom, 5 FSM Intrm. 335, 337 (Pon. 1992).

Under the law of Pohnpei support of the children is the responsibility of both parents. A court may order the parent without custody to make support payments. In granting or denying a divorce, the court may make such orders for custody of minor children, for their support as it deems justice and the best interests of all concerned may require. Youngstrom v. Youngstrom, 6 FSM Intrm. 304, 306 (Pon. 1993).

If a court deems justice and the best interest of all concerned so require, it may award past child support. When considering child support, it is the best interests of the children with which a court is most concerned. Youngstrom v. Youngstrom, 6 FSM Intrm. 304, 306 (Pon. 1993).

Factual determinations of a trial court, such as the appropriate size and period for an award of child support, will be overturned on appeal only if the findings of the trial court are clearly erroneous. Youngstrom v. Youngstrom, 7 FSM Intrm. 34, 36 (App. 1995).

Citation to other cases is of limited assistance in framing an award for child support because a child support award is an inherently fact specific determination that must be made on a case by case basis. Youngstrom v. Youngstrom, 7 FSM Intrm. 34, 37 (App. 1995).

The reciprocal child support enforcement provisions of chapter 17 of Title 6 of the FSM Code remain in effect as part of state law. Burke v. Torwal, 7 FSM Intrm. 531, 534 (Pon. 1996).

A proceeding for enforcement in the FSM of a CNMI child support order is properly filed in state court by the state attorney general, not in national court by the FSM Attorney General. Burke v. Torwal, 7 FSM Intrm. 531, 535-36 (Pon. 1996).

Although national law provides for the reciprocal enforcement of child support orders, case law supports the conclusion that FSM Supreme Court should abstain from exercising its jurisdiction at least until the state court has had the opportunity to rule on the issues. Villazon v. Mafnas, 11 FSM Intrm. 309, 310 (Pon. 2003).

Based on the traditional state jurisdiction over matters of domestic relations and on the applicable statutory provisions' language and history, a proceeding for enforcement of a foreign support order is properly commenced in the state court in which the defendant resides, rather than in the FSM Supreme Court and for the same reasons, these cases are properly prosecuted by the Pohnpei Attorney General's office, rather than by the FSM Attorney General's office. Villazon v. Mafnas, 11 FSM Intrm. 309, 310-11 (Pon. 2003).

Pohnpei state law anticipates the prosecution of child support enforcement actions in foreign jurisdictions, and provides plaintiffs with a procedure and remedy that is identical to that which they would enjoy under the national code. Villazon v. Mafnas, 11 FSM Intrm. 309, 311 (Pon. 2003).

A biological father whose paternity has been established owes his natural child a duty of support.

Tolenoa v. Timothy, 11 FSM Intrm. 485, 487 (Kos. S. Ct. Tr. 2003).

The interests of justice require an award of child support based upon the custom, tradition, prevailing economic status of Kosrae, the child's needs, the plaintiff's household status, and the defendant's earning capacity in Guam. Tolenoa v. Timothy, 11 FSM Intrm. 485, 487 (Kos. S. Ct. Tr. 2003).

In domestic relations matters, the national court should abstain from exercising jurisdiction until the state court has had the opportunity to rule on the issues presented when it is a proceeding for enforcement of a foreign support order. These cases are properly commenced in the state court in which the defendant resides, rather than in the FSM Supreme Court and are properly prosecuted by a state attorney general, rather than by the FSM Attorney General. Anson v. Rutmag, 11 FSM Intrm. 570, 571-72 (Pon. 2003).

Plaintiffs seeking to prosecute a foreign child support enforcement action must file their action in state court, where they will be provided with a procedure and remedy that is identical to that which they would enjoy under the national code. When such a case has been filed in the FSM Supreme Court, it will be ordered transferred to a state court with the proviso that if that court has not ruled on the issues presented within 45 days, the FSM Supreme Court may reinstitute active proceedings. The national court's role is to docket and transfer the case to a state court for determination of the paternity and child support issues. Anson v. Rutmag, 11 FSM Intrm. 570, 572 (Pon. 2003).

When a state has not enacted laws in an area within its jurisdiction such as child support, national law is applicable to the state court proceeding, because the Trust Territory Code reciprocal support enforcement provisions, now codified at 6 F.S.M.C. 1711, are imputed to be state law under the FSM Constitution's Transition Clause. Under that clause, Trust Territory statutes that were applicable to the states became part of the states' laws regardless of whether they were published thereby. They stand as the laws of the states until amended, superseded or repealed. Anson v. Rutmag, 11 FSM Intrm. 570, 572 (Pon. 2003).

Reciprocal support enforcement procedure requires that a state attorney general's office be diligent in its prosecution of it, and that, after a hearing, the state court will issue an order that decides the paternity question and determines the amount of child support and medical insurance coverage, if any, to which the petitioner is entitled. Anson v. Rutmag, 11 FSM Intrm. 570, 572-73 (Pon. 2003).

Since any decree as to custody or support of the parties' minor children is subject to revision by the court at any time upon motion of either party, the court has on-going jurisdiction to reconsider the question of child support previously decided. Ramp v. Ramp, 11 FSM Intrm. 630, 639 (Pon. 2003).

In the context of a confirmation of a customary divorce, the court has awarded reimbursement for child support expenses where the father made no support payments, even when part of the reimbursement is sought for a period when no pendente lite order requiring support payments was in effect. Ramp v. Ramp, 11 FSM Intrm. 630, 641 (Pon. 2003).

When it is a court-ordered divorce decree's child support provisions, not a confirmation of a customary divorce, that a party seeks to modify, the court, bearing in mind the suitability to the FSM of any specific common law principle, may, in determining Pohnpei law, look to the Restatements (compilations of U.S. common law according to subject matter) and decisions from jurisdictions outside the FSM that also follow the common law tradition. Ramp v. Ramp, 11 FSM Intrm. 630, 641 (Pon. 2003).

Court-ordered child support payments may be modified at any time circumstances render such a change appropriate, but the modification operates prospectively only. Child support cannot be modified retroactively. This is consistent with the equitable principle, suitable for Micronesia or elsewhere, that one having a claim should pursue it when he or she first has notice of it. Ramp v. Ramp, 11 FSM Intrm. 630, 641 (Pon. 2003).

While a child support decree may be subject to revision by the court at any time, a party seeking modification of child support must show a substantial change in circumstances not anticipated by the original decree in order to justify the modification. For determination is the question of the children's needs, and not

the standard of living desired by the custodial parent. Ramp v. Ramp, 11 FSM Intrm. 630, 641 (Pon. 2003).

While a divorced party's ability to help defray the alleged increased child support costs is certainly a valid consideration generally, it does not go to the question of the children's alleged changed circumstances (i.e., increased needs), which is the primary issue for determination in a support modification proceeding. When the custodial parent was aware in 1993 of these needs, her remedy was to move for modification under 6 F.S.M.C. 1622 at the time when she first had notice. It was not to wait nearly ten years until she had learned that his income had increased and her child support was about to terminate when during this period, he was making all of the court-ordered payments, a factor which the court may legitimately give some attention to in judging the equities as between the parties and their children's welfare. Ramp v. Ramp, 11 FSM Intrm. 630, 642 (Pon. 2003).

Under Pohnpei law, both the mother and the father are responsible for their children's support. The parties' obligation to support their children is in accordance with their respective abilities. It is sound public policy to require both parents to make some contribution toward the support of their children regardless of income disparity. Ramp v. Ramp, 11 FSM Intrm. 630, 642 (Pon. 2003).

Even if one divorced party's income is greater than the other's, that fact alone does not support a proposed modification to shift all of the pre-motion child-rearing costs retroactively to the higher-income party. Ramp v. Ramp, 11 FSM Intrm. 630, 642 (Pon. 2003).