IT IS SO ORDERED.

* * * *

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,	)	CRIMINAL CASE NO. 2010-1501
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
IOPI ESEFAN and FASI ESEFAN,	)	
	)	
Defendants.	)	
	)	

ORDER GRANTING DISMISSAL IN PART

Ready E. Johnny
Associate Justice

Hearing: February 9, 2011
Decided: February 28, 2011

APPEARANCES:

For the Plaintiff: Aaron L. Warren, Esq.
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For the Defendant: Harry A. Seymour, Esq.
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* * * *

HEADNOTES

Criminal Law and Procedure – Filings

A court may, at its discretion, enlarge the time for filing for cause shown if the enlargement request is made before the expiration of the time period in which the papers are to be filed, and if the enlargement request is made after the expiration of the original time period in which the papers were due, then the court may grant an enlargement only upon a showing of excusable neglect. FSM v. Esefan, 17 FSM Intrm. 389, 393 (Chk. 2011).

Criminal Law and Procedure – Filings

A prosecutor cannot show excusable neglect for a motion to enlarge time when he had enough

time to file a request for enlargement before he left on his trip and when, failing that, another admitted attorney in the same office could have filed a request for enlargement before the time to oppose a defendant's motion had expired, but did not. Thus, even though if the prosecution had moved to enlarge time before the time period expired, the assigned prosecutor's previously scheduled trip would have qualified as cause shown, it did not qualify as excusable neglect under the circumstances, and the prosecution's motion to enlarge time will be denied. FSM v. Esefan, 17 FSM Intrm. 389, 393 (Chk. 2011).

Criminal Law and Procedure – Information

An information is sufficient if it is a plain, concise and definite written statement of the essential facts constituting the offense charged and if it sufficiently apprises the defendant of the charges against which he must be prepared to defend and is sufficiently detailed to enable him to plead this case as a bar to future prosecutions for the same offense. Each count in an information should stand on its own although facts alleged therein may be incorporated by reference, and this is true for each defendant. FSM v. Esefan, 17 FSM Intrm. 389, 393 (Chk. 2011).

Criminal Law and Procedure – Information

An information must state for each count the citation of the statute, rule, regulation or other provision of law which the defendant is alleged to have violated. FSM v. Esefan, 17 FSM Intrm. 389, 393 (Chk. 2011).

Criminal Law and Procedure – Information

The mere conclusion that the defendant violated the statute does not supply the necessary factful allegations to charge an offense. The general rule is that an information is insufficient if it states conclusions rather than the facts upon which the conclusions are based. However, such facts need not be stated in detail. FSM v. Esefan, 17 FSM Intrm. 389, 393-94 (Chk. 2011).

Criminal Law and Procedure; Criminal Law and Procedure – Information

Although to establish legal requirements in criminal cases, the court must first consult FSM sources of law rather than begin with a review of other courts' cases, the court may consult U.S. sources for guidance in interpreting an FSM criminal procedure rule when it has not previously construed the rule and the rule is identical or similar to a U.S. counterpart, such as when court has not previously considered some aspects of an information's sufficiency under Criminal Rule 7(c). FSM v. Esefan, 17 FSM Intrm. 389, 394 n.1 (Chk. 2011).

Criminal Law and Procedure – Information

An information must charge all the essential elements of the offense, and, although liberality is the guide in testing an information's sufficiency, this applies to matters of form and not of substance. The omission of an essential element from the pleading cannot be cured by citing the statute. FSM v. Esefan, 17 FSM Intrm. 389, 394 (Chk. 2011).

Criminal Law and Procedure – Information

If a statute makes it an offense to do a certain act "contrary to law," it is not enough simply to cite the statute and to allege that the act was done contrary to law. The pleading must show what other law was violated, either by a citation or by a sufficient statement of facts. FSM v. Esefan, 17 FSM Intrm. 389, 394 (Chk. 2011).

Criminal Law and Procedure – Information

An information that charges that a defendant's shotgun possession is "unlawful" omits the essential element of a factual allegation that makes that possession unlawful when it cites a statute that provides that "[n]o person shall manufacture, purchase, sell, possess or carry any firearm, dangerous

device, or ammunition other than as hereinafter provided" and several different following provisions create different ways a shotgun's possession could be unlawful and carry varying penalties. FSM v. Esefan, 17 FSM Intrm. 389, 394 (Chk. 2011).

Criminal Law and Procedure – Information

In assessing the factual specificity of a charging instrument, courts start from the assumption that the defendant is innocent and consequently has no knowledge of the facts charged against him. FSM v. Esefan, 17 FSM Intrm. 389, 395 (Chk. 2011).

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

When a count, even reading it together with the facts incorporated by reference and the supporting affidavit, does not include all the essential elements constituting the offense that the prosecution has charged, it must be dismissed. FSM v. Esefan, 17 FSM Intrm. 389, 395 (Chk. 2011).

Criminal Law and Procedure – Information; Criminal Law and Procedure – Preliminary Hearing

Usually when a defendant challenges whether the supporting affidavit shows probable cause for a charged offense, the prosecution will call witnesses and possibly introduce exhibits in order to firmly establish probable cause for the offense charged since the prosecution has the burden to establish probable cause. FSM v. Esefan, 17 FSM Intrm. 389, 395 (Chk. 2011).

Search and Seizure – Probable Cause

A probable cause finding may be based upon hearsay evidence in whole or in part. FSM v. Esefan, 17 FSM Intrm. 389, 395 (Chk. 2011).

Criminal Law and Procedure – Information

When there is just barely enough evidence and information in the supporting affidavit sufficiently persuasive to warrant the court to believe it is more likely than not that the violation of the law occurred as charged and that the accused committed that violation, the motion to dismiss the challenged count will be denied. FSM v. Esefan, 17 FSM Intrm. 389, 395-96 (Chk. 2011).

Criminal Law and Procedure – Double Jeopardy

When faced with an accused's claim that it would violate his protection against double jeopardy if he were convicted of both of two charged counts and then sentenced for both, the proper remedy is not to dismiss before trial some counts based on what might happen. When two statutory provisions aimed at similar types of wrongdoing and at upholding public interests of the same nature would apply to a solitary illegal act that caused only one injury, the statutes will be construed as not to authorize cumulative convictions. The government, however, will not be denied the right to charge the separate offenses to guard against the risk that a conviction may not be obtained on one of the offenses. FSM v. Esefan, 17 FSM Intrm. 389, 396 (Chk. 2011).

Criminal Law and Procedure – Aiding and Abetting

As a general rule, a person has no legal duty to protect another from the criminal acts of third parties or to control the conduct of another. For criminal liability to be based upon a failure to act it must first be found that there is a duty to act – a legal duty and not simply a moral duty. Some criminal statutes themselves impose the legal duty to act. With other crimes the duty must be found outside the definition of the crime itself – perhaps in another statute, or in the common law, or in a contract. FSM v. Esefan, 17 FSM Intrm. 389, 396-97 (Chk. 2011).

Criminal Law and Procedure

When establishing legal requirements in criminal cases, the court must look first to FSM sources of law rather than start with a review of other courts' cases, but then the court can and should consider

decisions and reasoning of courts in the United States and other jurisdictions in arriving at [illegible] decisions. FSM v. Esefan, 17 FSM Intrm. 389, 396-97 n.3 (Chk. 2011).

Criminal Law and Procedure – Information

A challenge to a count that is merely a semantical word game must be rejected. FSM v. Esefan, 17 FSM Intrm. 389, 397 (Chk. 2011).

Criminal Law and Procedure – Aiding and Abetting

Under 11 F.S.M.C. 301(d), a person can be held liable as a principal if he "intentionally aids, abets, advises, solicits, counsels, encourages, commands, threatens, menaces or coerces another to commit a crime, or conspires with or otherwise procures another to commit a crime." FSM v. Esefan, 17 FSM Intrm. 389, 397 (Chk. 2011).

Criminal Law and Procedure – Aiding and Abetting

Although the terms are frequently used interchangeably, to "aid" is to assist or help another, and to "abet" means, in its legal sense, to encourage, advise, or instigate the commission of a crime. FSM v. Esefan, 17 FSM Intrm. 389, 397 (Chk. 2011).

Criminal Law and Procedure – Aiding and Abetting

The prosecution may pursue aiding and abetting charges against an accused when he is charged with being present and in the possession of a shotgun while another possessed a handgun and the accused encouraged the other to shoot certain persons. FSM v. Esefan, 17 FSM Intrm. 389, 398 (Chk. 2011).

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

A solicitation charge will merge into a conspiracy charge when the person solicited agrees to the solicitation by acting on the request. FSM v. Esefan, 17 FSM Intrm. 389, 398 n.5 (Chk. 2011).

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

Like aiding and abetting, soliciting and conspiring are all bases for criminal liability for the acts of another found in 11 F.S.M.C. 301(1)(d). FSM v. Esefan, 17 FSM Intrm. 389, 398 n.5 (Chk. 2011).

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

The pretrial dismissal of an information, or of counts in an information, does not, if the facts permit, bar the prosecution from filing a superseding information if the accused has not yet been put in jeopardy. FSM v. Esefan, 17 FSM Intrm. 389, 398 n.6 (Chk. 2011).

* * * *

COURT'S OPINION

READY E. JOHNNY, Associate Justice:

On January 7, 2011, defendant Fasi Esefan filed his Motion for Dismissal. It is granted in part.

I. Enlargement of Time and Excusable Neglect

On February 8, 2011, the prosecution filed an opposition and a motion to enlarge time to file the opposition. The prosecution asked that the time to file its opposition be enlarged because the prosecutor had received the motion on January 10, 2011, and had insufficient opportunity to review

it before he left on a previously scheduled trip January 15-26, 2011. On February 9, 2011, Fasi Esefan's motion to dismiss came before the court for hearing. He opposed any enlargement of time for the prosecution to oppose dismissal. The prosecution's motion to enlarge was denied from the bench because the prosecution had not shown excusable neglect.

A court may, at its discretion, enlarge the time for filing for cause shown if the enlargement request is made before the expiration of the time period in which the papers are to be filed, FSM Crim. R. 45(b)(1), and if the enlargement request is made after the expiration of the original time period in which the papers were due, then the court may grant an enlargement only upon a showing of excusable neglect, FSM Crim. R. 45(b)(2).

The prosecutor did not show excusable neglect because he had enough time to file a request for enlargement before he left on his trip. Failing that, another admitted attorney in the same office could have filed a request for enlargement before the time to oppose Fasi Esefan's motion had expired, but did not. If the prosecution had moved to enlarge time before the time period expired, the assigned prosecutor's previously scheduled trip would have qualified as cause shown. However, under the circumstances, it did not qualify as excusable neglect. Accordingly, the prosecution's motion to enlarge time was denied.

II. The Motion to Dismiss

Fasi Esefan is charged with four violations – Count I, illegal possession of a firearm, 11 F.S.M.C. 1002; Count II, use of a firearm in connection with or in commission of a crime, 11 F.S.M.C. 1023(7); Count VII, aiding and abetting Iopi Esefan's use of a firearm to commit attempted murder or assault with a dangerous weapon, 11 F.S.M.C. 301 and 1023(7); and Count VIII, aiding and abetting Iopi Esefan's possession of a handgun, 11 F.S.M.C. 301 and 1002. Fasi moves to dismiss all four counts. His motion is granted only for Count I and parts of Counts VII and VIII.

A. *Count I*

Count I charges that "defendant Fasi Esefan unlawfully possessed a shotgun two feet in length shotgun [sic] in violation of 11 FSMC section 1002." Information at 2, ¶ 3 (June 28, 2010). Fasi contends that, since merely possessing a shotgun is not unlawful, Count I must be dismissed because it and the supporting affidavit do not give him proper notice of the essential facts constituting the offense charged. Fasi thus asserts that Count I fails to charge an offense.

An information is sufficient if it is a "plain, concise and definite written statement of the essential facts constituting the offense charged," FSM Crim. R. 7(c)(1), and if it "sufficiently apprise[s] the defendant of the charges against which he must be prepared to defend and is sufficiently detailed to enable him to plead this case as a bar to future prosecutions for the same offense." Laion v. FSM, 1 FSM Intrm. 503, 516-17 (App. 1984). Each count in an information should stand on its own although facts alleged therein may be incorporated by reference, and this is true for each defendant. FSM v. Xu Rui Song, 7 FSM Intrm. 187, 189-90 (Chk. 1995). And, the information must "state for each count the citation of the statute, rule, regulation or other provision of law which the defendant is alleged to have violated." FSM Crim. R. 7(c)(1).

Count I charges that Fasi "unlawfully possessed a shotgun two feet in length shotgun [sic] in violation of 11 FSMC section 1002." While the allegation that Fasi possessed a shotgun two feet in length is a factual allegation, the allegation that the possession was unlawful is a legal conclusion, not a factual allegation. "The mere conclusion that the defendant violated the statute does not supply the necessary factful allegations" to charge an offense. United States v. Numrich, 144 F. Supp. 812, 813

(D. Mass. 1956).[1] "[T]he general rule [is] that an [information] is insufficient if it states conclusions rather than the facts upon which the conclusions are based. However, such facts need not be stated in detail." Butzman v. United States, 205 F.2d 343, 348 (6th Cir. 1953) (citations omitted).

The information must charge all the essential elements of the offense, and, although liberality is the guide in testing the sufficiency of an information, "this applies to matters of form and not of substance." United States v. Tornabene, 222 F.2d 875, 878 (3d Cir. 1955). "The omission of an essential element from the pleading cannot be cured by citing the statute." 1 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 124, at 549 (3d ed. 1999). "If a statute makes it an offense to do a certain act 'contrary to law,' it is not enough simply to cite the statute and to allege that the act was done contrary to law. The pleading must show what other law was violated, either by a citation or by a sufficient statement of facts." *Id.* Here, the omitted essential element is the factual allegation that makes Fasi's shotgun possession "unlawful."

Even the statute cited by the prosecution, 11 F.S.M.C. 1002, does not help. Section 1002, in its entirety, provides that "[n]o person shall manufacture, purchase, sell, possess or carry any firearm, dangerous device, or ammunition other than as hereinafter provided." Searching the provisions of the Revised Criminal Code Act's chapter 10 thereinafter reveals: 1) that it is prohibited to "possess or use any . . . shotgun larger than .410 gauge," 11 F.S.M.C. 1023(5); 2) that "[n]o person shall acquire or possess any firearm . . . unless he holds an identification card issued pursuant to" chapter 10, 11 F.S.M.C. 1005(1); and 3) that no one can

> carry a firearm unless he has a valid identification card and is carrying the firearm unloaded in a closed case or other securely wrapped or closed package or container, or locked in the trunk of his vehicle while en route to or from a target range or area where he hunts or takes part in other sports involving firearms, or carries the firearm in plain sight on his person while actively engaged in hunting or sports involving the use of firearms.

11 F.S.M.C. 1007. The information's allegations do not inform the accused of which of these provisions the prosecution intends to prove to show that Fasi "unlawfully" possessed the shotgun. There is no factual allegation in Count I about the shotgun's gauge. An allegation that the shotgun was two feet long says nothing about the shotgun's gauge.[2] Likewise, there is no factual allegation about whether Fasi held a valid identification card.

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[1] Although to establish legal requirements in criminal cases, the court must first consult FSM sources of law rather than begin with a review of other courts' cases, Alaphonso v. FSM, 1 FSM Intrm. 209, 214 (App. 1982), the court may consult U.S. sources for guidance in interpreting an FSM criminal procedure rule when it has not previously construed the rule and the rule is identical or similar to a U.S. counterpart, *see, e.g.*, Zhang Xiaohui v. FSM, 15 FSM Intrm. 162, 167 n.3 (App. 2007); Andohn v. FSM, 1 FSM Intrm. 433, 441 (App. 1984). The court has not previously considered some aspects of an information's sufficiency under Criminal Rule 7(c).

[2] The Code's statutory provisions as they relate to shotguns are rather confused or ambiguous, and Congress may wish to consider clarifying them. Although shotguns (unless the barrels have been sawed off) are generally considered long guns, the statute defines a long gun as "a rifle with one or more barrels eighteen inches in length." 11 F.S.M.C. 104(9). But a shotgun is not a rifle. (It has a smooth-bore, not a rifled, barrel.) A shotgun is undoubtedly a firearm and a "gun." A gun is defined as "a handgun or a long gun." 11 F.S.M.C. 104(6). A handgun is defined as "a pistol or revolver with an overall length of less than twenty-six inches." 11 F.S.M.C. 104(7). Shotguns seem overlooked.

This is not some exercise over form or technicalities. It is a matter of substance. First, "[i]n assessing the factual specificity of a charging instrument, courts start from the assumption that the defendant is innocent and consequently 'has no knowledge of the facts charged against him.'" 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 19.2(d), at 455 (1984). Second, sections 1023(5), 1005(1), and 1007 carry vastly different penalties. The maximum penalty for violating section 1007 is one year's imprisonment, while the maximum penalty for violating section 1023(5) is ten years' imprisonment. 11 F.S.M.C. 1031(1).

Count I, even reading it together with the facts incorporated by reference and the supporting affidavit, does not include all the essential elements constituting the offense that the prosecution has charged. Accordingly Count I must be dismissed.

Also, since section 1002 requires a defendant to comb through the rest of chapter 10 to determine which "hereinafter" provision(s) might apply in his case, charging an accused with only violating 11 F.S.M.C. 1002 may or may not create difficulties with the Rule 7(c)(1) provision that the information "state for each count the citation of the statute . . . which the defendant is alleged to have violated." The court does not now decide whether a charge of violating section 1002 must also cite some other specific provision(s) in chapter 10 as well as making the necessary factual allegations, but notes that it would be the better practice to do so. For example, if the prosecution were to allege in this case that Fasi's possession of a shotgun was unlawful because the shotgun in question was of a gauge greater than .410, it would allege that fact and cite 11 F.S.M.C. 1023(5).

B. *Count II*

Count II charges that "defendant Fasi Esefan unlawfully attempted to use two feet long shotgun in connection with or in aid of the commission of attempted murder or assault with dangerous weapon by CSL 191-26, § 415, 417 and CSL 6-66, § 407 Chuuk State Criminal Code in violation 11 FSMC section 1023(7)." Information at 2, ¶ 6 (June 28, 2010). Fasi contends that this count should be dismissed because, in his view, the supporting affidavit fails to show probable cause for the offense charged. Specifically he contends that the affidavit fails to establish probable cause that he attempted to use the shotgun. He does not contend that Count II fails to definitely state the essential facts constituting the offense charged therein. Nor does he contend that the affidavit fails to establish probable for the other counts.

Usually when a defendant challenges whether the supporting affidavit shows probable cause for a charged offense, the prosecution will call witnesses and possibly introduce exhibits in order to firmly establish probable cause for the offense charged since the prosecution has the burden to establish probable cause. That was not done in this case, which leaves only the supporting affidavit for the court to consider for the probable cause determination.

Fasi's motion turns on whether the court could find probable cause from the affidavit on whether Fasi tried to use or did use the shotgun. Fasi apparently concedes that there is probable cause that any attempted use was in connection with or in aid of the commission of attempted murder or assault with dangerous weapon. The investigating officer's affidavit unequivocally states that Fasi was present at the scene with a shotgun and encouraged or directed Iopi to shoot certain people and was present with the shotgun while Iopi shot at those people and hit some. From this the court may infer that Fasi used the shotgun in some manner, if only by its open possession, in connection with or in aid of the Iopi's commission of attempted murder or assault with dangerous weapon.

Admittedly, the affidavit is hearsay, but a probable cause finding may be based upon hearsay evidence in whole or in part. FSM v. Wainit, 10 FSM Intrm. 618, 621 (Chk. 2002). There is enough,

just barely enough, evidence and information in the affidavit sufficiently persuasive to warrant the court to believe it is more likely than not that the violation of the law occurred as charged and that the accused committed that violation. Accordingly, Fasi's motion to dismiss Count II is denied.

C. *Counts VII and VIII*

1. *Double Jeopardy*

Fasi Esefan contends that Count VII or Count VIII or both should be dismissed because if he is convicted of both Counts VII and VIII it would violate his constitutional protection against double jeopardy since he would be subjected to multiple punishments for the same act.

Even assuming that it would violate Fasi's protection against double jeopardy if he were convicted of both Counts VII and VIII and then sentenced for both, this contention is easily rejected. As the court has previously stated,

> The proper remedy . . . is not to dismiss before trial some counts based on what might happen. When two statutory provisions aimed at similar types of wrongdoing and at upholding public interests of the same nature would apply to a solitary illegal act that caused only one injury, the statutes will be construed as not to authorize cumulative convictions. Laion, 1 FSM Intrm. at 529. The government, however, will not be denied the right to charge the separate offenses to guard against the risk that a conviction may not be obtained on one of the offenses. *Id.*

FSM v. Aliven, 16 FSM Intrm. 520, 531 (Chk. 2009). Fasi cannot claim a double jeopardy violation on these grounds at this stage of the proceedings.

2. *Legal Duty Liability*

Both Counts VII and VIII contain a pleading, made in the alternative, that Fasi Esefan was criminally responsible for Iopi Esefan's unlawful possession of a handgun (Count VIII) and for Iopi's use of that handgun to commit attempted murder, assault with a dangerous weapon, or aggravated assault (Count VII) because Fasi had "a legal duty to prevent the commission of a crime, [and] defendant Fasi Esefan fail[ed] to make proper effort to do so." Information at 6, ¶ 21, at 7, ¶ 25 [misnumbered 18] (June 28, 2010). There are no facts alleged or law cited in the information or its supporting affidavit to support a claim that Fasi Esefan had a legal duty to prevent Iopi's crime.

"As a general rule, a person has no legal duty to protect another from the criminal acts of third parties or to control the conduct of another." Guevara v. State, 191 S.W.3d 203, 206 (Tex. Ct. App. 2006); *see also* Porter v. State, 570 So. 2d 823, 827 ((Ala. Crim. App. 1990) ("legal duty" would "comprehend the situation where a night watchman or policeman, if with an intent to aid the perpetrating party, stands by and neglects his duty to intervene"); Medrano v. State, 612 S.W.2d 576, 578 (Tex. Crim. App. 1981) (same); Raspberry v. State, 757 S.W.2d 885 (Tex. Crim. App. 1988) (off-duty peace officer guilty of assault for failure to halt assault where he had a legal duty to do so).[3]

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[3] These U.S. authorities construe statutes similar to the FSM statute that provides that "[a]ll persons shall be treated as a principal to a crime if that person . . . having a legal duty to prevent the commission of a crime, fails to make proper effort to do so." 11 F.S.M.C. 301(1)(c). Only one prior FSM case has considered this provision but did not address this point. When establishing legal requirements in criminal cases, the court must look first to FSM sources of law rather than start with a review of other courts' cases, but then "the court

> For criminal liability to be based upon a failure to act it must first be found that there is a duty to act–a legal duty and not simply a moral duty. . . . [S]ome criminal statutes themselves impose the legal duty to act . . . . With other crimes the duty must be found outside the definition of the crime itself–perhaps in another statute, or in the common law, or in a contract.

1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 3.3(a), at 283 (1986). *Cf.* FSM v. Cheng Chia-W (II), 7 FSM Intrm. 205, 212-13 (Pon. 1995) (11 F.S.M.C. 301(1)(c) legal duty created through contract), *rev'd sub nom. on other grounds*, Ting Hong Oceanic Enterprises v. FSM, 7 FSM Intrm. 471 (App. 1996).

Accordingly, the portions of Counts VII and VIII that charge that Fasi Esefan had the legal duty to prevent the commission of crimes by Iopi Esefan and failed to make a proper effort to do so are dismissed or disregarded.

3. *Aiding and Abetting Liability*

Fasi also contends that Counts VII and VIII should be dismissed because those counts are not so plain, concise, and definite as to allow Fasi to prepare his defense. He also contends that it is unclear what the phrase "in relation to 11 FSMC 301" means or how it is applicable. He further contends that Count VIII be dismissed because the statute cited to, 11 F.S.M.C. 1002, does not prohibit use of a firearm but prohibits only the possession of one and because in Count VIII Fasi is alleged to have aided and abetted Iopi by encouraging Iopi to use his handgun, not by encouraging Iopi to possess the handgun.

This last contention is merely a semantical word game and must be rejected. If someone is urging another to use a certain instrument, by implication, he must also be urging that person to possess or to continue possessing that instrument since it cannot be used without possessing it.

Both Counts VII and VIII charge Fasi with aiding and abetting Iopi. The phrase "in relation to 11 FSMC 301" in those counts obviously must refer to the legal theory by which the prosecution intends to hold Fasi criminally liable as a principal since 11 F.S.M.C. 301 delineates the various ways a that may be done. Under 11 F.S.M.C. 301(d), a person can be held liable as a principal if he "intentionally aids, abets, advises, solicits, counsels, encourages, commands, threatens, menaces or coerces another to commit a crime, or conspires with or otherwise procures another to commit a crime."

During the motion hearing, Fasi argued that, since the information charged him with aiding and abetting, the prosecution must prove that he both aided and abetted Iopi and he implied that the information may have alleged a basis for one but did not allege a basis for both. Fasi is correct that the terms "aid" and "abet" are not synonymous. Although the terms are frequently used interchangeably, to "aid" is to assist or help another, and to "abet" means, in its legal sense, to encourage, advise, or instigate the commission of a crime. FSM v. Sam, 14 FSM Intrm. 328, 332 (Chk. 2006).

Reading the facts alleged in each count along with the facts incorporated by reference, it is apparent that Fasi is charged with being present and in the possession of a shotgun while Iopi possessed a handgun and that Fasi encouraged Iopi to shoot certain persons. In FSM v. Hadley, 3 FSM Intrm. 281, 283-85 (Pon. 1987), the court found a defendant guilty of robbery under an aiding and

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can and should consider decisions and reasoning of courts in the United States and other jurisdictions . . . in arriving at its own decisions." Alaphonso v. FSM, 1 FSM Intrm. 209, 213-14 (App. 1982).

abetting theory[4] when that defendant "suggested to his companions that they take a bottle" from one of the nearby Korean construction workers and his two juvenile companion chased and caught one Korean and "robbed him of his watch and money" while the defendant unsuccessfully chased another Korean. Accordingly, the prosecution may pursue aiding and abetting[5] charges against Fasi Esefan.

Counts VII and VIII give Fasi Esefan fair and adequate notice of the essential facts constituting the offenses charged against him in those counts. Fasi is informed of which acts of another (Iopi Esefan) the prosecution seeks to hold him liable for – Iopi's possession of a handgun and his use of that handgun to shoot or shoot at certain other people. Fasi is also informed of which of his own acts constitute the aiding and abetting – his possessing a shotgun while at the scene and his telling Iopi to shoot other people.

Since Counts VII and VIII constitute a definite written statement of the essential facts constituting the offenses charged, Fasi's motion to dismiss these counts in their entirety is denied. Only the alternative "legal duty" theory of liability is dismissed. The "aiding and abetting" liability theory remains.

III. Summary and Plea Hearing and Trial Setting

Accordingly, Count I and the legal duty portions of Counts VII and VIII are dismissed.[6]

The court will therefore take the pleas of Iopi Esefan and Fasi Esefan on Monday, March 28, 2011, at 9:30 a.m., and, if a not guilty plea is entered to any count, trial will start shortly thereafter at 10:30 a.m.

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[4] When Hadley was decided the aiding and abetting statutory provision now found at 11 F.S.M.C. 301(1)(d) was codified at 11 F.S.M.C. 301(1)(a).

[5] The alleged facts could also have supported a charge of soliciting a crime when Fasi allegedly asked Iopi to shoot others and the solicitation charge would have merged into a conspiracy charge when Iopi agreed to the solicitation by acting on the request. Like aiding and abetting, soliciting and conspiring are all bases for criminal liability for the acts of another found in 11 F.S.M.C. 301(1)(d).

[6] Of course, the pretrial dismissal of an information, or of counts in an information, does not, if the facts permit, bar the prosecution from filing a superseding information if the accused has not yet been put in jeopardy. *Cf.* Kosrae v. George, 17 FSM Intrm. 5, 7 n.1 (App. 2010) (pretrial dismissal of a criminal prosecution would not raise double jeopardy concerns if the case reinstated because the accused had not once been put in jeopardy since jeopardy does not attach until the first witness is sworn); FSM v. Cheng Chia-W (I), 7 FSM Intrm. 124, 128 (Pon. 1995) (jeopardy does not attach in a criminal case until the first witness is sworn to testify).