FSM SUPREME COURT TRIAL DIVISION

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| FEDERATED STATES OF MICRONESIA,<br><br>Plaintiff,<br><br>vs.<br><br>MELVIN SORIM and MARCELLO LUDWIG,<br><br>Defendants. | ) | CRIMINAL CASE NO. 2010-1503 |

MEMORANDUM AND ORDER DENYING MOTIONS

Martin G. Yinug
Chief Justice

Hearing: April 28, 2011
Decided: May 30, 2011

APPEARANCES:

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HEADNOTES

Criminal Law and Procedure – Information

An information is sufficient if: 1) it is a plain, concise and definite written statement of the essential facts constituting the offense charged; 2) it sufficiently apprises the defendant of the charges against which he must be prepared to defend; and 3) it is sufficiently detailed to enable him to plead the case as a bar to future prosecutions for the same offense. An information must also 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. FSM v. Sorim, 17 FSM Intrm. 515, 519 (Chk. 2011).

Criminal Law and Procedure – Information

Since the Criminal Procedure Rules are designed to avoid technicalities and gamesmanship in criminal pleading and are to be construed to secure simplicity in procedure, an information will not be thrown out because of minor, technical objections which do not prejudice the accused. The Rules do

not countenance the practice of fine combing or nit picking a criminal information for verbal and technical omissions; substantial compliance is sufficient. FSM v. Sorim, 17 FSM Intrm. 515, 519-20 (Chk. 2011).

Criminal Law and Procedure – Information

Although the court must first look to FSM sources of law to establish legal requirements in criminal cases rather than start with a review of other courts' cases, when the court has not previously considered certain aspects of a criminal information's sufficiency under Criminal Rule 7, an FSM criminal procedure rule that is identical or similar to a U.S. counterpart, it may look to U.S. sources for guidance. FSM v. Sorim, 17 FSM Intrm. 515, 520 n.1 (Chk. 2011).

Criminal Law and Procedure – Information

Each count in an information should stand on its own although the facts alleged therein may be incorporated by reference, and this is true for each defendant. FSM v. Sorim, 17 FSM Intrm. 515, 520 (Chk. 2011).

Criminal Law and Procedure – Information

To determine a criminal information's sufficiency, the information and its supporting affidavit(s) must be read together. FSM v. Sorim, 17 FSM Intrm. 515, 520 (Chk. 2011).

Criminal Law and Procedure – Information; Criminal Law and Procedure – Theft

When the information and supporting affidavits allege that the accused cashed various national government checks that were made payable to fictitious people and that he and his codefendant shared the money thus obtained, those allegations are sufficient to put the accused on notice that the national government claims a legal, equitable, or possessory interest in the funds that the checks were used to obtain and the allegation that the codefendants made checks out to fictitious persons using legitimate travel authorization numbers for other persons and then cashed those checks, dividing the proceeds among themselves, is sufficient to put the accused on notice that the prosecution alleges that the checks were not authorized. FSM v. Sorim, 17 FSM Intrm. 515, 520 (Chk. 2011).

Criminal Law and Procedure – Information

When the information charges that the accused "invited reliance on these false checks by asking the same be cashed, effectively requesting the financial system and the FSM National Government to accept these false checks as true," and when this charge tracks the statutory language in subdivision 524(1)(c), wherein criminal liability is imposed when a person "invites reliance on any writing which he or she knows to be . . . lacking in authenticity," the accused should not be prejudiced merely because the information cited section 524 instead of subdivision 524(1)(c). FSM v. Sorim, 17 FSM Intrm. 515, 521 (Chk. 2011).

Criminal Law and Procedure – Information

When construing the meaning of an information, the description of the alleged conduct is far more critical than the information's prefatory language or its citation of a particular provision of a statute. It is the statement of facts in the pleading, rather than the statutory citation, that is controlling, and if an information properly charges an offense under the laws it is sufficient even though the government attorney may have supposed that the offenses charged were covered by a different statute. FSM v. Sorim, 17 FSM Intrm. 515, 521 (Chk. 2011).

Criminal Law and Procedure – Information

When the accused is fully informed of the charge against him and the information contains every element of the charge, the accused will have no basis for relief even if the information cites to the wrong subsection, or if it cites to a section and the specific subsection is omitted. FSM v. Sorim, 17

FSM Intrm. 515, 521 (Chk. 2011).

Criminal Law and Procedure – Information

Although 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, an error in the citation or description or its omission will not be ground for the information's dismissal if the error or omission did not mislead the defendant to the defendant's prejudice. FSM v. Sorim, 17 FSM Intrm. 515, 521 (Chk. 2011).

Criminal Law and Procedure – Information

An information should be drawn with greater care. The prosecution should in all cases specify the particular provision or subsection on which the charge is based. By doing so it will ensure that the defendant receives fair warning of the charge against which he or she must defend and will at the same time avoid unnecessary risks to itself on appeal. But when an information falls short of this desired standard, it is still sufficient if it fairly informs the accused of the charge against him. FSM v. Sorim, 17 FSM Intrm. 515, 521 (Chk. 2011).

Criminal Law and Procedure – Falsification

To be criminally liable under 11 F.S.M.C. 524(1)(c) it is enough that the accused invite reliance on any writing which he knows to be lacking in authenticity. The statute does not require that he himself make the writing that is lacking in authenticity. FSM v. Sorim, 17 FSM Intrm. 515, 522 (Chk. 2011).

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

When the information alleges that the accused presented checks to merchants knowing that those checks were false documents, those factual allegations, supported by affidavit, establish probable cause that the accused violated 11 F.S.M.C. 529(1)(b). FSM v. Sorim, 17 FSM Intrm. 515, 522 (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 on two 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. Sorim, 17 FSM Intrm. 515, 523 (Chk. 2011).

Criminal Law and Procedure – Conspiracy; Criminal Law and Procedure – Information

A conspiracy count is sufficient if it alleges an agreement, and identifies the object towards which the agreement is directed and an overt act. But it is not necessary that the information state the object of the agreement with the detail required of an information charging the substantive offense, and it is not necessary in a conspiracy charge to allege with precision all the elements essential to the offense which is the object of a conspiracy; allegations clearly identifying the offense the defendants conspired to commit are sufficient. FSM v. Sorim, 17 FSM Intrm. 515, 523 (Chk. 2011).

Criminal Law and Procedure – Conspiracy; Criminal Law and Procedure – Information

When, although the information could have been drawn with greater care, the accused is not misled to his prejudice because the prosecution failed to cite the statute(s) that the codefendants allegedly conspired to violate, the conspiracy count will not be dismissed. FSM v. Sorim, 17 FSM

Intrm. 515, 523 (Chk. 2011).

Criminal Law and Procedure – Information

An accused is not misled about the underlying crime that he is charged with conspiring to commit when, between the conspiracy count, the facts incorporated therein by reference, and the supporting affidavits, it should be clear that he is charged with conspiring to take, through the use of national government checks with fictitious payees, money from the FSM national government to which neither he nor his codefendant had any rightful claim and when the conspiracy count, the facts incorporated therein by reference, and the supporting affidavits describe the substantive underlying offense with enough specificity to sufficiently apprise the accused of the charges against which he must be prepared to defend and it is sufficiently detailed to enable him to plead the case as a bar to future prosecutions for the same crime. FSM v. Sorim, 17 FSM Intrm. 515, 523 (Chk. 2011).

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

Since the existence of an agreement forming a conspiracy may be proven entirely by circumstantial evidence, circumstantial evidence can be sufficient to establish probable cause that such an agreement existed. FSM v. Sorim, 17 FSM Intrm. 515, 524 (Chk. 2011).

Criminal Law and Procedure – Conspiracy

Customarily, persons charged with conspiracy are tried together. FSM v. Sorim, 17 FSM Intrm. 515, 524 (Chk. 2011).

Criminal Law and Procedure – Right to Confront Witnesses

When codefendants are tried together, one defendant's admissible out-of-court statement ought to be redacted to eliminate references to the codefendant. This is because the use of a defendant's statement as evidence against a codefendant would violate the codefendant's right to be confronted with the witnesses against him if the declarant is not a witness at the trial subject to cross examination. FSM v. Sorim, 17 FSM Intrm. 515, 524 (Chk. 2011).

Criminal Law and Procedure – Right to Confront Witnesses; Search and Seizure – Probable Cause

Redaction is not required for a defendant's statement when it is used to help establish probable cause since hearsay may be used to establish probable cause. FSM v. Sorim, 17 FSM Intrm. 515, 524 n.2 (Chk. 2011).

Criminal Law and Procedure – Right to Confront Witnesses

Although it may not be known whether a codefendant will testify at trial, the prosecution ought to be prepared in advance for the eventuality that she will not and be ready with a redacted version of any statement by her that it intends to introduce as evidence at trial. If she does testify, the prosecution may then introduce the unredacted statement even if it has already introduced a redacted version. FSM v. Sorim, 17 FSM Intrm. 515, 525 (Chk. 2011).

Criminal Law and Procedure – Conspiracy; Criminal Law and Procedure – Right to Confront Witnesses; Evidence – Hearsay

A statement by a party's co-conspirator made during the course and in furtherance of a conspiracy is not hearsay and is admissible. FSM v. Sorim, 17 FSM Intrm. 515, 525 n.3 (Chk. 2011).

Criminal Law and Procedure – Right to Confront Witnesses

As a general principle, an accused in a criminal trial must be able to confront the witnesses against him, but the court will not issue a blanket ruling with unknown effects about statements that the prosecution may or may not seek to introduce at trial. The accused may raise his objections to any statement once it is known that the prosecution intends to introduce it. FSM v. Sorim, 17 FSM Intrm.

515, 525 (Chk. 2011).

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COURT'S OPINION

MARTIN G. YINUG, Chief Justice:

I. INTRODUCTION

On April 28, 2011, this came before the court for hearing defendant Marcello Ludwig's Motion for Dismissal; for Redaction of Defendants' Name on Written Statement by Others, filed January 25, 2011, and the plaintiff's opposition, filed January 31, 2011. Since, during hearing, the movant's counsel cited to and based some of his argument on the February 28, 2011 court decision in FSM v. Esefan, Crim. No. 2010-1501, which had not been in his written motion since his motion (and the FSM's opposition) was filed before Esefan was decided, the FSM was given until May 11, 2011, to file and serve a written response to the oral arguments about the Esefan ruling. When no response was filed, the matter was considered submitted for decision.

Defendant Marcello Ludwig is charged with aggregated theft of over $100,000 of national government funds, 11 F.S.M.C. 602 (Count 1); unsworn falsification, 11 F.S.M.C. 524 (Count 2); records tampering, 11 F.S.M.C. 529 (Count 5); and conspiracy to commit theft, 11 F.S.M.C. 203 (Count 7). He asks the court to dismiss Counts 1, 3, and 7 because the criminal information is defective; to dismiss Counts 3, 5, and 7 for lack of probable cause; and to dismiss Count 5 on double jeopardy grounds. Ludwig also moves to redact mention of his name in any written or recorded statement made by his codefendant and to suppress any statements that implicate him.

The motions to dismiss and to suppress are denied, and the prosecution is advised to prepare a redacted statement. The court's reasons follow.

II. MOTION TO DISMISS

A. *Count 1*

Ludwig contends that Count 1 must be dismissed because the criminal information is defective since it fails to allege that Ludwig knew that the checks were not properly authorized and that the national government had a "legal, equitable, or possessory interest" in the proceeds of the checks.

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 th[e] case as a bar to future prosecutions for the same offense." Laion v. FSM, 1 FSM Intrm. 503, 516-17 (App. 1984). An information must also 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. FSM v. Esefan, 17 FSM Intrm. 389, 394 (Chk. 2011) (omission of an essential element cannot be cured by citing the statute).

Since the Criminal Procedure Rules are designed to avoid technicalities and gamesmanship in criminal pleading and are to be construed to secure simplicity in procedure, an information will not be thrown out because of minor, technical objections which do not prejudice the accused. Laion, 1 FSM Intrm. at 518. The Rules do not countenance the practice of fine combing or nit picking a criminal

information for verbal and technical omissions; substantial compliance is sufficient. *See, e.g.*, United States v. Parisi, 365 F.2d 601, 604 (6th Cir. 1966), *vacated on other grounds sub nom.*, O'Brien v. United States, 386 U.S. 345, 87 S. Ct. 1158, 18 L. Ed. 2d 94 (1967); Finn v. United States, 256 F.2d 304, 307 (4th Cir. 1958); Risken v. United States, 197 F.2d 959, 963 (8th Cir. 1952).[1] Each count in an information should stand on its own although the 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). To determine a criminal information's sufficiency, the information and its supporting affidavit(s) must be read together. FSM v. Sato, 16 FSM Intrm. 26, 29 (Chk. 2008); FSM v. Sam, 15 FSM Intrm. 457, 460-61 (Chk. 2007).

In this case, the information and supporting affidavits allege that Ludwig cashed various FSM national government checks that were made payable to fictitious (non-existent) people and that he and his codefendant Melvin Sorim shared the money thus obtained. Those allegations are sufficient to put Ludwig on notice that the national government claims a legal, equitable, or possessory interest in the funds that the checks were used to obtain. And the allegation that the codefendants made checks out to fictitious persons using legitimate travel authorization numbers for other persons and then cashed those checks, dividing the proceeds among themselves, is sufficient to put Ludwig on notice that the prosecution alleges that the checks were not authorized. Accordingly, the court must deny Ludwig's motion to dismiss Count 1.

B. *Count 3*

1. *Defective Information*

Ludwig moves to dismiss Count 3 because the information is defective since it fails to state which subsection of 11 F.S.M.C. 524 he is alleged to have violated. The subsections of Section 524 that define substantive crimes are as follows:

> (1) A person commits the crime of falsification if, with purpose to mislead a public servant in performing his or her official function, he or she:
>
> (a) makes any written false statement which he does not believe to be true; or
>
> (b) purposely creates a false impression in a written application for any pecuniary or other benefit, by omitting information necessary to prevent statements therein from being misleading; or
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> (c) submits or invites reliance on any writing which he or she knows to be forged, altered, or otherwise lacking in authenticity; or
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> (d) submits or invites reliance on any sample, specimen, map, boundary mark, or other object which he or she knows to be false.

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[1] The court has not previously considered certain aspects of a criminal information's sufficiency under Criminal Procedure Rule 7. Although the court must first look to FSM sources of law to establish legal requirements in criminal cases rather than start with a review of other courts' cases, Alaphonso v. FSM, 1 FSM Intrm. 209, 214 (App. 1982), when the court has not previously construed an FSM criminal procedure rule that is identical or similar to a U.S. counterpart, it may look to U.S. sources for guidance. *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).

> (2) A person commits the crime of falsification if he or she makes a written false statement which he or she does not believe to be true, on or pursuant to a form bearing notice, authorized by statute or regulation of the Federated States of Micronesia, to the effect that false statements made therein are punishable.

11 F.S.M.C. 524. The information does not allege that Ludwig used any forms "bearing notice, authorized by statute or regulation of the Federated States of Micronesia, to the effect that false statements made therein are punishable." Ludwig is thus not accused of committing the crime defined in subsection (2). That leaves the four alternative subdivisions of subsection (1) to consider. Subdivisions (b) and (d) contain elements that are not alleged in the information under any reading of that document and (a) also does not seem applicable.

The information charges that Ludwig "invited reliance on these false checks by asking the same be cashed, effectively requesting the financial system and the FSM National Government to accept these false checks as true." Information ¶ 32. This charge tracks the statutory language in subdivision (c), wherein criminal liability is imposed when a person "invites reliance on any writing which he or she knows to be . . . lacking in authenticity." 11 F.S.M.C. 524(1)(c). Ludwig should not be prejudiced merely because the information cited section 524 instead of subdivision 524(1)(c).

"When construing the meaning of an [information], the description of the alleged conduct is far more critical than the [information's] prefatory language or its citation of a particular provision of a statute." United States v. Bonallo, 858 F.2d 1427, 1430, 99 A.L.R. Fed. 869, 877-78 (9th Cir. 1988). "It is the statement of facts in the pleading, rather than the statutory citation, that is controlling, and if an . . . information properly charges an offense under the laws . . . it is sufficient, even though the [government attorney] may have supposed that the offenses charged were covered by a different statute." 1 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 124, at 544 (3d ed. 1999). When the accused is fully informed of the charge against him and the information contains every element of the charge, the accused will have no basis for relief even if the information cites to the wrong subsection, United States v. Stinson, 594 F.2d 982, 984-85 (4th Cir. 1979), or if it cites to a section and the specific subsection is omitted, Bonallo, 858 F.2d at 1431, 99 A.L.R. Fed. at 879; Colquette v. United States, 216 F.2d 591, 594 (7th Cir. 1954). Thus, although 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 Crim. R. 7(c)(1), an "[e]rror in the citation or description or its omission shall not be ground for dismissal of the information . . . if the error or omission did not mislead the defendant to the defendant's prejudice," FSM Crim. R. 7(c)(3).

> Nevertheless, an information should be drawn with greater care. The prosecution
>
> should in all cases specify the particular provision or subsection on which the charge is based. By doing so it will ensure that the defendant receives fair warning of the charge against which he or she must defend and will at the same time avoid unnecessary risks to itself on appeal.

Bonallo, 858 F.2d at 1431, 99 A.L.R. Fed. at 878. When an information falls short of this desired standard, it is still sufficient if it fairly informs the accused of the charge against him. *Id.*

The court therefore concludes that the information fairly informs Ludwig of the charge against him and that the omission of a citation to a subsection or a subdivision within Section 524 does not mislead Ludwig to his prejudice. This contention is therefore rejected.

2. *Probable Cause*

Ludwig also moves to dismiss Count 3 for lack of probable cause. He asserts that the information and supporting affidavit do not show probable cause that Ludwig intended to mislead a public servant in performing his or her official function because he only cashed the checks and he did not make a false written statement, did not create the supporting false travel authorizations, and did not create the checks. He relies on one of the government's supporting affidavits wherein a store clerk who cashed a check for Ludwig said the check was already signed when Ludwig presented it. Ludwig thus argues that he did not make, nor is he alleged to have made, a false written statement.

This contention must be rejected because Ludwig has misconstrued the crime's elements. To be criminally liable under 11 F.S.M.C. 524(1)(c) it is enough that Ludwig "invite reliance on any writing which he . . . knows to be . . . lacking in authenticity." The statute does not require that he himself make the writing that is lacking in authenticity. Based upon the supporting affidavits, probable cause exists that Ludwig invited reliance on documents he knew to be lacking in authenticity (the false checks) when he presented those checks to be cashed, expecting that the FSM Treasury would be misled into honoring them as legitimate public debts.

C. *Count 5*

1. *Probable Cause*

Ludwig moves to dismiss Count 5 for lack of probable cause because there is insufficient evidence in the information to establish that he "made any false entry in, or false alteration of, any record" and there is no evidence that he physically created false checks.

Under Section 529,

> (1) A person commits a crime if he or she:
>
> (a) knowingly makes a false entry in, or false alteration of, any record, document, or thing received or kept by a public servant, or belonging to the Government of the Federated States of Micronesia for information or record, or required by statute or regulation of the Federated States of Micronesia to be kept by anyone for information of the Government;
>
> (b) makes, presents, or uses any record, document, or thing knowing it to be false, and with purpose that it be taken as a genuine part of information or records referred to in paragraph (a) of this subsection; or
>
> (c) purposely and unlawfully destroys, conceals, removes, or otherwise impairs the verity or availability of any such record, document, or thing.

The information alleges that Ludwig presented checks to merchants knowing that those checks were false documents. Those factual allegations, supported by affidavit, establish probable cause that Ludwig violated 11 F.S.M.C. 529(1)(b). This contention is therefore rejected.

2. *Double Jeopardy*

Ludwig also moves to dismiss Count 5 because the Constitution protects him from multiple punishments for the same offense and because, in his view, he can be found guilty on only Count 3

or Count 5, but not both since they both have the same factual allegations. In the alternative, he argues that if he is found guilty of both counts, then he may only be punished for one of them.

Even assuming that Ludwig's protection against double jeopardy would be violated if he were convicted of both Counts 3 and 5 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). Ludwig thus cannot claim a double jeopardy violation on these grounds at this stage of the proceedings.

D. *Count 7*

1. *Defective Information*

Ludwig moves for the dismissal of Count 7 because it fails to specify which underlying offense the defendants conspired to commit. The prosecution counters that the Count 7 heading clearly states the charge as "CONSPIRACY TO COMMIT THEFT" so it is not possible that Ludwig has been misled. During oral argument, Ludwig added that the conspiracy count should be dismissed because it did not cite the statute that the codefendants allegedly conspired to violate.

A conspiracy count "is sufficient if it alleges an agreement, and identifies the object towards which the agreement is directed and an overt act." United States v. Shaffer, 383 F. Supp. 339, 341-42 (D. Del. 1974). But "it is not necessary that the [information] state the object of the agreement with the detail required of an [information] charging the substantive offense." *Id.* at 342 n.7. "It is not necessary in a conspiracy [charge] to allege with precision all the elements essential to the offense which is the object of a conspiracy; allegations clearly identifying the offense the defendants conspired to commit are sufficient." United States v. Kahn, 381 F.2d 824, 829 (7th Cir. 1967); *see also* United States v. Ramos, 666 F.2d 469, 475 (11th Cir. 1982) (charge of conspiracy "need not be as specific as a substantive count"); United States v. Wander, 601 F.2d 1251, 1259 (3d Cir. 1979) (in a conspiracy count, the conspiracy is the gist of the crime).

Although, once again, the information could have been drawn with greater care, Ludwig is not misled to his prejudice because the prosecution failed to cite the statute(s) that the codefendants allegedly conspired to violate. Count 7 will not be dismissed on this ground. FSM Crim. R. 7(c)(3).

Nor was Ludwig misled about the underlying crime that he is charged with conspiring to commit. Between Count 7, the facts incorporated therein by reference, and the supporting affidavits, it should be clear that Ludwig is charged with conspiring to take, through the use of national government checks with fictitious payees, money from the FSM national government to which neither he nor his codefendant had any rightful claim. Count 7, the facts incorporated therein by reference, and the supporting affidavits describe the substantive underlying offense with enough specificity to sufficiently apprise Ludwig of the charges against which he must be prepared to defend and it is sufficiently detailed to enable Ludwig to plead this case as a bar to future prosecutions for the same crime.

Accordingly, the court must reject this contention.

2. *Probable Cause*

Ludwig also moves to dismiss Count 7 for lack of probable cause because the information and supporting affidavits do not establish that Ludwig intended to commit a crime with Sorim and that there was an agreement to commit the crime. In particular, Ludwig challenges the Information's paragraph 55 as legally insufficient to establish probable cause that there was an agreement. That paragraph states, "Thus the check cashing crime required a plan of action and could not have occurred without an agreement between the defendants that wrote and cashed the checks."

Since the existence of an agreement forming a conspiracy may be proven entirely by circumstantial evidence, *see, e.g.*, Moses v. FSM, 14 FSM Intrm. 341, 346 (App. 2006) (under conspiracy law, an agreement to commit a crime need not be explicit and may be proven by circumstantial evidence); FSM v. Fritz, 14 FSM Intrm. 548, 555 (Chk. 2007) (court may infer an agreement's existence from circumstantial evidence and from the defendants' position and conduct); *see also* Cholymay v. FSM, 17 FSM Intrm. 11, 23-24 (App. 2010); Engichy v. FSM, 15 FSM Intrm. 546, 558 (App. 2008), circumstantial evidence can be sufficient to establish probable cause that such an agreement existed. There is enough evidence in the supporting affidavits and the attendant circumstances for the court to reasonably infer that there was an agreement between the codefendants and thus find probable cause. Likewise, there is enough for the court to conclude that there is probable cause that Ludwig intended to (and did) commit an unlawful act in furtherance of that conspiratorial agreement. Accordingly, Ludwig's motion to dismiss Count 7 for lack of probable cause must be denied.

## III. Motion to Redact and to Suppress

A. *Redaction*

Ludwig also moves that references to his name be redacted from any written or recorded statement made by codefendant Sorim because it would violate his constitutional right to confront a witness against him if those statements are not redacted and are introduced as evidence at trial and Sorim does not testify. The prosecution contends that this motion should not be entertained because it is premature since it is not yet known whether codefendant Sorim will testify at trial.

Customarily, persons charged with conspiracy are tried together, FSM v. Kansou, 15 FSM Intrm. 373, 380 (Chk. 2007); FSM v. Kansou, 15 FSM Intrm. 180, 186-87 (Chk. 2007), as the codefendants in this case will be. When codefendants are tried together, one defendant's admissible out-of-court statement ought to be redacted to eliminate references to the codefendant. Hartman v. FSM, 6 FSM Intrm. 293, 301-02 (App. 1993) (once redacted, no prejudice will occur if the statement then gives no reference to codefendant; failure to redact may result in reversal). This is because the use of a defendant's statement as evidence against a codefendant would violate the codefendant's "right . . . to be confronted with the witnesses against him," FSM Const. art. IV, § 6, if the declarant is not a witness at the trial subject to cross examination. Hartman v. FSM, 5 FSM Intrm. 224, 229 (App. 1991).[2]

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[2] Redaction, of course, is not required for a defendant's statement when it is used to help establish probable cause since hearsay may be used to establish probable cause. *See* FSM v. Wainit, 10 FSM Intrm. 618, 621 (Chk. 2002).

Although it may not be known now whether codefendant Sorim will testify at trial, the prosecution ought to be prepared in advance for the eventuality that she will not. The prosecution should be ready with a redacted version of any statement by her that it intends to introduce as evidence at trial. If Sorim does testify, the prosecution may then introduce the unredacted statement even if it has already introduced a redacted version.[3]

B. *Suppression*

Ludwig also moves, based on his right to confront the witnesses against him, to suppress any statement, made by Sorim or any other person, that implicates him. Ludwig does not identify any particular statement or any declarant other than Sorim.

While, as a general principle, it is true that an accused in a criminal trial must be able to confront the witnesses against him, FSM v. Sam, 14 FSM Intrm. 398, 401 (Chk. 2006) (right to confrontation is a trial right that provides two types of protection: the right to physically face those who testify against the accused, and the accused's right to conduct cross-examination); FSM v. Wainit, 10 FSM Intrm. 618, 621 (Chk. 2002) (same), the court is not inclined to make a blanket ruling with unknown effects[4] about statements that the prosecution may or may not seek to introduce at trial. Ludwig may raise his objections to any statement once it is known that the prosecution intends to introduce it.

## IV. Conclusion

Accordingly, the motions to dismiss are denied. The prosecution is advised to have redacted versions of the codefendant's statements ready in the event that the codefendant does not testify at trial. The motion to suppress unidentified statements is denied without prejudice. The parties shall, within ten days of service of this order, suggest possible trial dates.

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[3] This ruling, of course, would not apply to a statement made by an alleged co-conspirator during the course of and in furtherance of the conspiracy. This is because a statement by a party's co-conspirator made during the course and in furtherance of a conspiracy is not hearsay and is admissible. FSM v. Kansou, 14 FSM Intrm. 139, 141 (Chk. 2006). Ludwig's motion does not appear to be addressed to any such statement and it is not apparent that the prosecution has any such statements that it intends to introduce at trial.

[4] See *supra* note 3 for one type of statement that may be admissible and which Ludwig's requested ruling might unwittingly bar.