

a public policy impetus in favor of remote testimony that is lacking in the United States. For this reason, and because of the compelling reasoning behind the Gigante decision, the standard espoused by the Second Circuit should be adopted in this jurisdiction.

III. CONCLUSION

The Government's motion in limine is consistent with the FSM constitution, and meritorious under either the Craig or Gigante standard. ACCORDINGLY, the Government's motion in limine to introduce the Skype testimony of Mr. Eric Chace is GRANTED.

\* \* \* \*

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MASTER HALBERT, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

CRIMINAL CASE NO. 2014-501

MEMORANDUM AND ORDER

Cyprian J. Manmaw  
Temporary Justice

Hearing: April 14, 2015  
Decided: April 29, 2015

APPEARANCES:

For the Plaintiff: Caroline A. Rugero, Esq.  
Assistant Attorney General  
FSM Department of Justice  
P.O. Box PS-105  
Palikir, Pohnpei FM 96941

For the Defendant: Marstella E. Jack, Esq.  
P.O. Box 2210  
Kolonía, Pohnpei FM 96941

\* \* \* \*

HEADNOTES

Courts - Judges

4 F.S.M.C. 124(2) by its own terms serves to disqualify a temporary justice only when the

Congress taken an affirmative act of adopting a resolution after the justice has served at least three months, but 4 F.S.M.C. 124(2) cannot serve as a basis for disqualification of a temporary justice because the appellate division has ruled it to be in conflict with the FSM Constitution. FSM v. Halbert, 20 FSM R. 49, 51 (Pon. 2015).

Courts – Judges

Because the basis for the Urusemal v. Capelle court decision was its concern for safeguarding the independence of judicial decision making as envisioned in the FSM Constitution, the decision's reasoning is equally valid regardless of whether a temporary justice had previously sat on the FSM Supreme Court or is currently a judge of another court. FSM v. Halbert, 20 FSM R. 49, 51-52 (Pon. 2015).

Courts – Recusal – Bias or Partiality

A determination of a judge's bias should be made on the basis of conduct or information which is extrajudicial in nature. FSM v. Halbert, 20 FSM R. 49, 52 (Pon. 2015).

Courts – Recusal – Bias or Partiality

Since it is in the very nature of our system of justice that judges must rule in favor of one party and against another, a judge does not engage in extrajudicial behavior merely by ruling in favor of one party and against another. FSM v. Halbert, 20 FSM R. 49, 52 (Pon. 2015).

Courts – Recusal – Bias or Partiality

The thesis that an adverse ruling from the bench can constitute extrajudicial behavior that warrants disqualification must be rejected. FSM v. Halbert, 20 FSM R. 49, 52 (Pon. 2015).

Courts – Judges; Evidence – Witnesses

FSM Supreme Court justices, even temporary justices, should be guided by permissible considerations rather than by one party's unsupported supposition that other justices would have ruled differently on a question of first impression. FSM v. Halbert, 20 FSM R. 49, 52 (Pon. 2015).

Evidence – Witnesses

Since for the issue of the admissibility of Skype testimony to be properly before the court, there must be a threshold showing that Skype testimony is feasible and since in the absence of such a showing the government would be asking for a mere advisory opinion, it was proper for the court to require the government to demonstrate Skype testimony's feasibility before ruling on the parties' legal arguments. FSM v. Halbert, 20 FSM R. 49, 52 (Pon. 2015).

Courts – Judges; Criminal Law and Procedure; Evidence

While it is appropriate for a Chief Justice to engage with all the relevant stake-holders in the process of promulgating a general court order, the decision making process is quite different for a justice called upon to render an evidentiary ruling in a criminal case. Even when a party raises a question of first impression, a judge presiding over a criminal case has a responsibility to apply the law to the case's facts, and it would be an abuse of judicial discretion to delay an evidentiary ruling in order to solicit advice from non-parties suggesting what the law should be. This judicial power is curtailed by the process of appellate review. FSM v. Halbert, 20 FSM R. 49, 53 (Pon. 2015).

COURT'S OPINION

CYPRIAN J. MANMAW, Temporary Justice:

This matter came before the Court on the defendant's April 14, 2014, motion to disqualify this justice. Since this motion was filed during the second day of a criminal trial that was in progress,<sup>1</sup> the Court asked both parties to present oral arguments on the question of disqualification before continuing with the trial. After consideration of Defendant's motion and both parties' oral arguments the court denied the motion from the bench. This order reduces the Court's reasoning to writing.

I. DISCUSSION

On October 22, 2014, Acting Chief Justice Ready E. Johnny assigned this matter to me pursuant to his powers under FSM Constitution article XI, § 9(b) and 4 F.S.M.C. 104. Defendant contends that the assignment of this matter to me as a temporary justice expired on January 22, 2015, pursuant to 4 F.S.M.C. 104(2). Defendant further contends that my ruling to admit Skype testimony at trial demonstrates that I am biased in favor of the Government in this matter, and so I should disqualify myself pursuant to 4 F.S.M.C. 124. These contentions will be evaluated in turn.

A. *4 F.S.M.C. 124(2) is Inapplicable on its Face and has been Struck Down as Unconstitutional.*

A discussion of the applicability of 4 F.S.M.C. 124(2) should begin with the language of the statute, which states: "The Congress may by resolution disapprove of the continued service of any temporary Justice whose cumulative service exceeds three months, and the disapproved person shall thereafter be ineligible for further service as a temporary Justice for one year, unless the Congress shall sooner revoke its disapproval."

Defendant contends that this provision operates to designate as a "disapproved person" any temporary justice whose cumulative service exceeds three months, unless that person's status as an ineligible person is revoked by Congress. In effect, the defendant reads the statute to cap a temporary judge's term of service at three months, unless Congress acts by resolution to extend it. Such a reading is in plain conflict with the language of the statute, which states that Congress may by resolution disapprove of the continued service of any temporary justice. The statute by its own terms serves to disqualify a justice only where the Congress taken an affirmative act by adopting a resolution. At the hearing on the motion to disqualify, counsel for defendant stated that she has no knowledge of any Congressional resolution disapproving of this justice's continued service. Therefore, by the plain terms of 4 F.S.M.C. 124(2) it is inapplicable to the circumstances of this case.

Moreover, even if 4 F.S.M.C. 124(2) could be construed in the manner put forward by the defendant, it would not serve as a basis for disqualification because the Appellate Division has ruled this provision to be in conflict with the FSM Constitution. See Urusemal v. Capelle, 12 FSM Intrm. 577 (App. 2004) (holding that 4 F.S.M.C. 124(2) is an unconstitutional intrusion by Congress into the independence of the judiciary). Defendant attempted to distinguish the Urusemal precedent during the hearing on the basis that in Urusemal the justice involved had previously served as a justice of the FSM Supreme Court, whereas this justice sits on the Yap State Court. This argument must fail, however,

---

<sup>1</sup> Counsel for Defendant arrived in court more than one hour after the second day of trial was scheduled to begin. She did not notify opposing counsel or this Court that she would be late. When pressed for an explanation she stated that the reason for her tardiness was that she had been occupied with working on the motion to disqualify this justice. The Court then warned her against engaging in such behavior in the future.

because the basis for the Urusemal court's decision was its concern for safeguarding the independence of judicial decision making as envisioned in the FSM Constitution. This reasoning is equally valid regardless of whether a temporary justice had previously sat on the FSM Supreme Court, or as in this case, is a current judge of another court.

*B. There is no Reasonable Basis for Doubting this Judge's Impartiality*

Defendant contends that my impartiality in this matter can reasonably be doubted, and so it is appropriate for me to disqualify myself. See 4 F.S.M.C. 124(1) ("A Supreme Court Justice shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned"). Recognizing that a determination of a judge's bias should be made on the basis of conduct or information which is extrajudicial in nature, see FSM v. Jonas (III), 1 FSM Intrm. 306, 317-18 (Pon. 1983), Defendant argues that my ruling to allow Skype testimony was so unreasonable so as to constitute conduct that is extrajudicial in nature. However, Defendant does not cite to any authority in support of the proposition that a judge engages in extrajudicial behavior merely by ruling in favor of one party and against another. Indeed, it is in the very nature of our system of justice that judges must rule in favor of one party and against another. Nevertheless, Defendant contends that my ruling from the bench allowing Skype testimony was so unreasonable so as to constitute extrajudicial behavior that would lead a disinterested observer to harbor doubts over my impartiality. See FSM v. Skilling, 1 FSM Intrm. 464, 476 (Kos. 1984).

Although I must reject Defendant's underlying thesis that an adverse ruling can constitute extrajudicial behavior that warrants disqualification, see FSM v. Wainit, 13 FSM Intrm. 293, 295 (Chk. 2005) (judge's adverse rulings in a case do not create grounds for disqualification from that case), it is appropriate to review the arguments propounded by Defendant as evidence of my bias:

Defendant states, without supporting evidence, that in the nearly 40 year history of the FSM Supreme Court no other justice would have allowed Skype testimony at trial, but rather would have proceeded with caution (presumably by denying the Government's motion in limine in favor of Defendant's request to conduct depositions under FSM Criminal Rule 15). He points to my status as a temporary justice as support for his argument that I should rule in accordance with how he imagines the permanent constitutionally seated justices would have ruled. However, this argument does not adequately confront the reality that whether to admit Skype testimony at trial is a question of first impression in this Court. Justices of the FSM Supreme Court, even temporary justices, should be guided by permissible considerations rather than by one party's unsupported supposition that other justices would have ruled differently on a question of first impression.

Defendant also argues that my failure to issue any formal ruling on the record with regard to the Government's motion in limine to introduce Skype testimony is strong evidence of bias. This assertion is incorrect, as a ruling was made orally from the bench. Moreover, this ruling was followed up with a written explanation of the Court's reasoning. [FSM v. Halbert, 20 FSM R. 42 (Pon. 2015).]

Defendant further contends that after a lengthy argument on the novel issue of introducing Skype testimony the only words spoken by the judge were "OK, let's test it." This contention by the defendant reflects a misunderstanding of the events that took place at the hearing on the Government's motion in limine. One of the considerations properly before the Court was whether Skype testimony was logistically feasible in the context of the courtroom in the FSM Supreme Court in Palikir. For the issue of the admissibility of Skype testimony to be properly before the Court, there must be a threshold showing that Skype testimony is feasible. In the absence of such a showing the Government would be asking for a mere advisory opinion. Therefore it was proper for the Court to require the Government to demonstrate the feasibility of Skype testimony before ruling on the parties' legal arguments.

Defendant also takes issue with the Court's oral explanation that it was proper for the Court to consider the admissibility of Skype testimony even in the absence of legislation or court rules specifically addressing the issue. Defendant seems to consider the Court's ruling to represent an impermissible exercise in rule making by a temporary justice. Indeed, the defendant suggests that this judge should have consulted with other justices of the court, Congress, attorneys and the public before rendering a ruling. Defendant goes so far as to argue that it would be acceptable for me to allow Skype testimony in my role as Chief Justice for Yap State Court, but not in my role as an appointed temporary justice.

While it is appropriate for a Chief Justice to engage with all the relevant stake-holders in the process of promulgating a general court order, the decision making process is quite different for a justice called upon to render an evidentiary ruling in a criminal case. A judge presiding over a criminal case has a responsibility to apply the law to the facts of the case, even where a party raises a question of first impression. This judicial power is curtailed by the process of appellate review. It would be an abuse of judicial discretion to delay an evidentiary ruling in order to solicit advice from non-parties suggesting what the law *should be*.

## II. CONCLUSION

For all these reasons the motion to disqualify this justice is DENIED.

\* \* \* \*

### FSM SUPREME COURT TRIAL DIVISION

ISAMU NAKASONE STORE, YUTO NAKASONE, )  
YUMI NAKASONE, YUKO NAKASONE, and )  
TOMOKO AKASONE, )

Plaintiffs, )

vs. )

LUHK EN MEHNLAP DAVID, as Chief Minister )  
of Kitti Municipal Government, and KITTI )  
MUNICIPAL GOVERNMENT, )

Defendants. )

CIVIL ACTION NO. 2011-018

### ORDER GRANTING DISMISSAL

Beauleen Carl-Worswick  
Associate Justice

Decided: May 4, 2015