FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA, Plaintiff, vs. KAZUHIRO KIMURA (Captain) and OHKURA GYOGYO CO. LTD. (Owner), Defendants.	)	CRIMINAL CASE NO. 2014-503

ORDER DENYING DISMISSAL AND GRANTING DISMISSAL IN PART

Beauleen Carl-Worswick
Associate Justice

Decided: January 29, 2016

APPEARANCES:

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HEADNOTES

Criminal Law and Procedure – Motions

When the government has shown excusable neglect for its tardiness because its Department of Justice needed to assist in emergency relief in Typhoon Maysek's aftermath, the court will excuse the late filing of its response to the defendants' motion. FSM v. Kimura, 20 FSM R. 297, 300 n.1 (Pon. 2016).

Criminal Law and Procedure – Double Jeopardy

The double jeopardy clause provides three basic protections. It protects a person against a second prosecution for the same offense after an acquittal, against a second prosecution for the same offense after a conviction, and against multiple punishments for the same offense. FSM v. Kimura, 20 FSM R. 297, 300 (Pon. 2016).

Criminal Law and Procedure – Double Jeopardy

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, and, if the test is met a dual conviction will not violate the constitutional protection against double jeopardy. FSM v. Kimura, 20 FSM R. 297, 301 (Pon. 2016).

Criminal Law and Procedure – Double Jeopardy

When there are counts that may duplicate another count and when a conviction on both counts would violate the protection against double jeopardy, the proper remedy is not to dismiss before trial some counts based on what might happen because the government will not be denied the right to charge separate offenses to guard against the risk that a conviction may not be obtained on one of the offenses. If the government obtains a guilty finding for the same defendant on two counts that do constitute the same offense, a conviction will be entered only on one of those two counts. FSM v. Kimura, 20 FSM R. 297, 301 (Pon. 2016).

Criminal Law and Procedure – Double Jeopardy

If and when the defendants are found guilty on two or more counts they deem to constitute the same offense, they may then raise their double jeopardy concerns about being subjected to multiple punishments for the same offense and may argue the rule of lenity. FSM v. Kimura, 20 FSM R. 297, 301 (Pon. 2016).

Search and Seizure – Probable Cause

Probable cause exists when there is evidence and information sufficiently persuasive to warrant a cautious person to believe it is more likely than not that a violation of the law has occurred and that the accused committed that violation. FSM v. Kimura, 20 FSM R. 297, 302 (Pon. 2016).

Search and Seizure – Probable Cause

In probable cause determinations, a court must regard the evidence from the vantage point of law enforcement officers acting on the scene but must make its own independent determination as to whether, considering all the facts at hand, a prudent and cautious law enforcement officer, guided by reasonable training and experience, would consider it more likely than not that a violation has occurred. FSM v. Kimura, 20 FSM R. 297, 302 (Pon. 2016).

Criminal Law and Procedure – Standard of Proof; Search and Seizure – Probable Cause

The report of a trained and experienced fisheries observer on the scene and his later deposition testimony is more than sufficient to show probable cause – that it was more likely than not that a violation occurred – when, although the observer never actually saw a crew member throw the trash overboard, the court can infer from the circumstantial evidence that it is more likely than not that that is what occurred. Whether the government will be able to prove that beyond a reasonable doubt, a higher standard, is a matter left for trial. FSM v. Kimura, 20 FSM R. 297, 302 (Pon. 2016).

Federalism; International Law; Marine Resources

The territorial sea is the waters within 12 nautical miles seaward of FSM island baselines, and the exclusive economic zone is the water seaward of the territorial sea outward to 200 nautical miles from the island baselines. FSM v. Kimura, 20 FSM R. 297, 302 (Pon. 2016).

Criminal Law and Procedure – Information; Marine Resources

When an information charges, in different counts, contamination of both the FSM territorial waters and its Exclusive Economic Zone, the FSM must prove not only that the contamination occurred but also where it occurred since it is unlikely that the contamination took place when the vessel was

at a location where trash thrown overboard could contaminate both the territorial sea and the EEZ. FSM v. Kimura, 20 FSM R. 297, 302 (Pon. 2016).

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. This is because an information must be sufficiently certain and unambiguous so as to permit the defendant to prepare its defense, and to inform the court of which of this particular defendant's alleged acts or omissions result in criminal liability. FSM v. Kimura, 20 FSM R. 297, 303 (Pon. 2016).

Criminal Law and Procedure – Information

An information is sufficient if it contains a plain, definite, and concise statement of the essential facts constituting the offense charged so that the defendant can prepare his defense and so that the defendant can avail himself of his conviction or acquittal as a bar to subsequent prosecutions. FSM v. Kimura, 20 FSM R. 297, 303 (Pon. 2016).

Criminal Law and Procedure – Information

A count will not be dismissed if it contains a sufficient statement of the facts that allegedly give rise to criminal liability so as to inform the defendants so that they can prepare their defense and so that they can avail themselves of a conviction or acquittal as a bar to subsequent prosecutions. FSM v. Kimura, 20 FSM R. 297, 303 (Pon. 2016).

Marine Resources; Treaties

Only those fisheries management agreements that require the FSM to enforce, on a reciprocal basis, the fisheries laws of foreign countries against persons who have violated the fisheries law of that foreign country, must, under 24 F.S.M.C. 120(2), implemented by National Oceanic Resource Management Authority regulation. FSM v. Kimura, 20 FSM R. 297, 304 (Pon. 2016).

Marine Resources; Treaties

A fisheries management agreement is any agreement, arrangement, or treaty in force to which the FSM is a party, not including any access agreement, which has as its primary purpose cooperation in or coordination of fisheries management measures in all or part of the region. Such an agreement, by its nature, would not be self-executing. FSM v. Kimura, 20 FSM R. 297, 304 (Pon. 2016).

Marine Resources

FSM citizens and FSM-flagged fishing vessels are required, on the high seas or in an area designated by a fisheries management agreement, to comply with any applicable law or agreement. FSM v. Kimura, 20 FSM R. 297, 304 (Pon. 2016).

Admiralty – Ships; Marine Resources

A person holding a current and valid foreign investment permit is qualified to register a vessel in the FSM, and qualified persons may register in the FSM any vessel they wholly own. An FSM-registered vessel must fly the FSM national flag. FSM v. Kimura, 20 FSM R. 297, 304-05 (Pon. 2016).

Marine Resources

Newly-ratified fisheries management agreement can be made part of FSM domestic law by statute, or by National Oceanic Resource Management Authority regulation under 24 F.S.M.C. 204(1)(d). FSM v. Kimura, 20 FSM R. 297, 305 (Pon. 2016).

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

When the FSM's failure to incorporate the fisheries management agreement provisions by reference in statute, or regulation, or in permits and access agreements leaves the law so vague and ill-defined that what are the acts prohibited cannot be understood by people of ordinary intelligence, and so it cannot serve as a basis for criminal prosecution, the court must grant the defendants' motion to dismiss those counts for the Information's failure to charge an offense. FSM v. Kimura, 20 FSM R. 297, 305 (Pon. 2016).

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COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

This came before the court on March 27, 2015, to hear the defendants' Motion to Dismiss Counts Based on Double Jeopardy, filed March 13, 2015, and the Plaintiff's Response to Defendant's Motion to Dismiss Counts Based on Double Jeopardy, filed March 19, 2015. Also before the court are the following supplementary filings based on arguments made during the March 27, 2015 hearing and submitted in writing at the court's request: 1) the Government's Supplementary Motion in Response to Defendant's Motion to Dismiss Counts Based on Double Jeopardy, filed April 2, 2015; 2) the defendants' Motion to Dismiss Counts Based on No Violation of Laws, No Probable Cause and Errors in Information with supplementary exhibits, filed April 6, 2015; 3) the Government's Response to Defendants' Motion to Dismiss Counts Based on No Violation of Laws, No Probable Cause and Errors in Information, filed April 17, 2015;[1] 4) the defendants' Reply to Government's Response to Defendants' Motion to Dismiss Counts Based on No Violation of Laws, No Probable Cause and Errors in Information, filed April 23, 2015; and 5) the Government's Response to Defendants' Reply to Government's Response to Defendants' Motion to Dismiss Counts Based on No Violation of Laws, No Probable Cause and Errors in Information, filed May 7, 2015. The motions are denied in part for the reasons that follow.

I. Double Jeopardy Motion

The defendants, Kazuhiro Kimura, captain of a purse-seine fishing vessel, the *Tokiwa Maru 28*, and Ohkura Gyogyo Co. Ltd., the vessel's owner, move to dismiss six counts on double jeopardy grounds. The FSM Constitution provides that "[a] person may not . . . be twice put in jeopardy for the same offense." FSM Const. art. IV, § 7. This double jeopardy clause provides three basic protections. It protects a person against a second prosecution for the same offense after an acquittal, against a second prosecution for the same offense after a conviction, and against multiple punishments for the same offense. Laion v. FSM, 1 FSM R. 503, 523 (App. 1984).

The defendants contend that the government, by pleading ten counts in the information, is seeking to subject them to multiple punishments for what should only be four offenses based on four alleged incidents involving the *Tokiwa Maru 28* – 1) fishing on a fish aggregating device on August 14, 2014; 2) fishing on a fish aggregating device on August 24, 2014; 3) the failure to record the species caught or discarded on August 24, 2014; and 4) the contamination of the FSM Exclusive Economic

[1] The defendants contend that this response was untimely because it was more than ten days after service of the motion. The FSM asserts that it has shown excusable neglect for its tardiness because the FSM Department of Justice needed to assist in emergency relief in the aftermath of Typhoon Maysek. The court agrees and excuses the late filing of the FSM's response. FSM Crim. R. 45(b)(2).

Zone ("EEZ") on September 8, 2014. They therefore move, on double jeopardy grounds, that six of the ten counts pled in the information be dismissed before trial, asserting that otherwise they will be subjected to multiple punishments for the same offenses.

The government argues that no count should be dismissed before trial on double jeopardy grounds because it is allowed to plead in the alternative and also because there are two co-defendants in this case, implying that it may not be able to prove both defendants guilty of the same count for the same alleged incident but may be able to prove each defendant guilty of at least one count for each incident.

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, and, if the test is met a dual conviction will not violate the constitutional protection against double jeopardy. Laion, 1 FSM R. at 523-25.

The defendants contend, and the government appears to concede, that there are counts that may duplicate another count and that a conviction on both counts would violate the protection against double jeopardy. "The proper remedy, however, is not to dismiss before trial some counts based on what might happen." FSM v. Aliven, 16 FSM R. 520, 531 (Chk. 2009). The government will not be 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, 1 FSM R. at 529. But if the government obtains a guilty finding for the same defendant on two counts that do constitute the same offense, "a conviction will be entered only on one of those two counts." Aliven, 16 FSM R. at 531. The defendants thus cannot claim a double jeopardy violation and have counts dismissed on these grounds at this stage of the proceedings. FSM v. Esefan, 17 FSM R. 389, 396 (Chk. 2011).

The defendants' motion to dismiss six counts on double jeopardy grounds is thus denied. If and when the defendants are found guilty on two or more counts they deem to constitute the same offense, they may raise their double jeopardy concerns about being subjected to multiple punishments for the same offense and may argue the rule of lenity.

II. Subsequent Motion to Dismiss

Expanding on their double jeopardy motion, the defendants, in their post-hearing motion, contend that various counts must be dismissed because they fail to state a violation of law, or because they lack probable cause, or because of what they term errors in pleading.

A. *Probable Cause for the Contamination Counts*

1. *Probable Cause and Counts 8 and 10*

The defendants contend that Counts 8 and 10 must be dismissed because there is no probable cause on which to base these counts. Counts 8, 9, and 10 are based on the government's allegation that plastics, nylon strings, and aluminum cans were discarded overboard from the *Tokiwa Maru 28* on September 8, 2014, while the vessel was in the FSM EEZ (Counts 8 and 10) or in the FSM's territorial sea (Count 9). This contamination allegation is based on the report by fisheries observer Arthur P. Segal that on September 8, 2014, he saw the crew collecting trash and putting it in a blue basket, of which he took a photograph, but that, after the net hauling set was over, the basket was empty and the vessel's incinerator was also empty, and since he did not see anything over the vessel's side, he "assumed that the trash must have been thrown [overboard] after the set ended, when the vessel began steaming." Purse Seine Trip Rep. at 17.

Probable cause exists when there is evidence and information sufficiently persuasive to warrant a cautious person to believe it is more likely than not that a violation of the law has occurred and that the accused committed that violation. Berman v. Pohnpei, 17 FSM R. 360, 371 (App. 2011). In probable cause determinations, a court must regard the evidence from the vantage point of law enforcement officers acting on the scene but must make its own independent determination as to whether, considering all the facts at hand, a prudent and cautious law enforcement officer, guided by reasonable training and experience, would consider it more likely than not that a violation has occurred. *Id.*; Ishizawa v. Pohnpei, 2 FSM R. 67, 77 (Pon. 1985).

The report of the trained and experienced fisheries observer on the scene, Segal, and his later deposition testimony is more than sufficient to show probable cause – that it was more likely than not that a violation occurred. Even though Segal never actually saw a crew member throw the trash overboard, the court can infer from the circumstantial evidence that it is more likely than not that that is what occurred. Whether the government will be able to prove that beyond a reasonable doubt, a higher standard, is a matter left for trial.

2. *Count 9*

Even if the government can prove beyond a reasonable doubt that the contamination occurred, it is very unlikely that it could obtain a guilty finding on all three counts because while Counts 8 alleges violation of 24 F.S.M.C. 918, which prohibits contamination of the EEZ, and Count 10, which alleges violation of a fishing access agreement that bound the vessel to strictly comply with FSM law, which would include the non-contamination statute, Count 9 alleges the violation of the vessel's fishing permit, Condition 7, which prohibits the discharge of trash within the FSM's territorial sea (and its lagoons). Since the territorial sea is the waters within 12 nautical miles seaward of FSM island baselines, 18 F.S.M.C. 102(1), and the exclusive economic zone is the water seaward of the territorial sea outward to 200 nautical miles from the island baselines, 18 F.S.M.C. 104, it is unlikely that the contamination took place when the vessel was at a location where trash thrown overboard could contaminate both the territorial sea and the exclusive economic zone. The government will have to prove at trial not only that the contamination occurred but where it occurred – the EEZ or the territorial sea. Based on what evidence the government has available to it, it should proceed accordingly.

B. *Errors in Pleading*

The defendants contend that Counts 1, 2, 3, 4, 6, and 10 must be dismissed because, due to what they term errors in pleading, those counts are too broad or too ambiguous for them to know what they are called on to defend.

Counts 1 and 2 charge the defendants with violating 24 F.S.M.C. 906(1)(a) by not strictly complying with the Permit conditions when the *Tokiwa Maru 28* fished on a fish aggregating device. Counts 3 and 4 charge the defendants with violating 24 F.S.M.C. 906(1)(c) by failing to comply with a foreign fishing access agreement when the *Tokiwa Maru 28* fished on a fish aggregating device. Count 6 charges the defendants with violating 24 F.S.M.C. 906(1)(c) by failing to comply with a foreign fishing access agreement when they seriously misreported their catch in one or more ways. And Count 10 charges the defendants with violating 24 F.S.M.C. 906(1)(c) by failing to comply with a foreign fishing access agreement when they contaminated the FSM EEZ. Subsection 906(1)(a) makes it an offense not to comply with Permit conditions, and Subsection 906(1)(c) makes it an offense not to comply with foreign fishing access agreement provisions.

The defendants contend that, for these counts, the information is defective because, under Criminal Procedure Rule 7(c)(1), 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," and because the information, in regard to Counts 3, 4, 6, and 10, does not state which article of the foreign fishing access agreement those counts violated, and, in regard to Counts 1 and 2, does not state which Permit condition was violated.

"'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 R. 389, 394 (Chk. 2011) (quoting 1 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 124, at 549 (3d ed. 1999)). This is because an information must be sufficiently certain and unambiguous so as to permit the defendant to prepare its defense, and to inform the court of which of this particular defendant's alleged acts or omissions result in criminal liability. FSM v. Xu Rui Song, 7 FSM R. 187, 190 (Chk. 1995). An information is sufficient if it contains a plain, definite, and concise statement of the essential facts constituting the offense charged so that the defendant can prepare his defense and so that the defendant can avail himself of his conviction or acquittal as a bar to subsequent prosecutions. FSM v. Sam, 14 FSM R. 328, 333 (Chk. 2006).

Count 6 contains a sufficient statement of the facts that allegedly give rise to criminal liability. A quick glance at the foreign fishing access agreement reveals that those alleged omissions would violate Article VII (Reporting Requirements) of the agreement. Count 10 also contains a sufficient statement of the facts that allegedly give rise to criminal liability, and a quick glance at the foreign fishing access agreement reveals that those alleged acts would violate Article X (Environmental Responsibility) of the agreement. Why the Information does not also cite Article VII for Count 6 and Article X for Count 10 is a mystifying oversight, but the failure to mention those foreign fishing access agreement articles does not leave the defendants unable to prepare their defense for either Count 6 or Count 10.

Counts 1 through 4 also contain a sufficient statement of the facts that allegedly give rise to criminal liability – investigating or fishing on a floating object or a fish aggregating device on August 14 and again on August 24, 2014. The foreign fishing agreement in Article IV, para. 9.d, prohibits fishing within two miles of a fish aggregating device of the FSM government or any other FSM citizen or entity, but the information does not allege that the fish aggregating device(s) that the *Tokiwa Maru No. 28* was fishing on, on either date, was an FSM device. Instead, the government alleges that those acts violate the Third Implementing Agreement to the Nauru Agreement, which prohibits vessels from fishing around any fish aggregating device or floating object from July 1 to September 30, each year, and which has been adopted as law in the FSM by resolution. Information para. 12 (incorporated by reference into Counts 1 through 4).

The Permit, in Condition 8, and the Foreign Fishing Access Agreement in Article V, para. 12, both require strict compliance with all relevant FSM laws, rules, and regulations. The Information thus contains a sufficient statement of the facts that to inform the defendants so that they can prepare their defense and so that they can avail themselves of a conviction or acquittal as a bar to subsequent prosecutions. But whether Counts 1 through 4 state a violation of law is addressed next.

C. *Whether No Violation of Law*

The defendants contend that the Third Implementing Agreement to the Nauru Agreement is not valid law in the FSM, meaning that as a result they cannot be prosecuted for violating its provisions and the Information's counts charging them with fishing on fish aggregating devices do not state offenses. They base this contention on two related reasons. First, they assert that treaties ratified by the FSM cannot be self-executing. And, second, they assert that 24 F.S.M.C. 120(2) requires that in order for

the Third Implementing Agreement to the Nauru Agreement to become FSM law, the National Oceanic Resource Management Authority ("NORMA") had to implement it by promulgating a regulation to that effect, and that NORMA has not done so. The defendants further note, as mentioned above, that no provision of either the Permit or the foreign fishing access agreement specifically prohibit fishing on a fish aggregating device between July 1 and September 30, which prohibition is what they are charged with violating. Thus, Counts 1 through 4 cannot state offenses unless the Third Implementing Agreement to the Nauru Agreement has somehow become FSM domestic law. The government seems to concede the point – that neither it nor NORMA ever promulgated a regulation implementing either the Third Implementing Agreement to the Nauru Agreement or the Nauru Agreement itself.

The defendants' reliance on 24 F.S.M.C. 120(2) can be disposed of first. Subsection 120(2) requires implementation by NORMA regulation only of those "fisheries management agreements described in subsection (1) of this section." 24 F.S.M.C. 120(2). Subsection 120(1) refers to fisheries management agreements that require the FSM to make, on a reciprocal basis, it unlawful to deal in any way with fish that were taken, possessed, transported, or sold in violation of any law or regulation of a foreign country that is a party to a Subsection 120(1) fisheries management agreement.

The defendants misread 24 F.S.M.C. 120(2). Subsection 120(2) only requires NORMA regulations to enforce the fisheries laws of foreign countries against persons who have violated the fisheries law of that foreign country. The government seeks to enforce, not a foreign country's law, but to enforce the Third Implementing Agreement to the Nauru Agreement, which, because Congress ratified it on February 10, 2011, the government considers to be FSM domestic law.

The defendants contend that no treaty the FSM has ratified can be self-executing because the FSM Constitution, unlike the United States Constitution, does not include, in the Constitution's supremacy clause, ratified treaties as part of the supreme law of the land. This is incorrect. It is not just the inclusion of treaties in a constitutional supremacy clause that makes a treaty self-executing, it is the nature of the treaty.

The Third Implementing Agreement to the Nauru Agreement is a fisheries management agreement treaty. A fisheries management agreement is "any agreement, arrangement or treaty in force to which the Federated States of Micronesia is a party, not including any access agreement, which has as its primary purpose cooperation in or coordination of fisheries management measures in all or part of the region . . . ." 24 F.S.M.C. 102(29). Such an agreement, by its nature, would not be self-executing.

However, "[t]here can, of course, be instances in which . . . previously enacted legislation, will be fully adequate to give effect to an apparently non-self-executing international agreement, thus obviating the need of adopting new legislation to implement it." RESTATEMENT OF THE FOREIGN RELATIONS OF THE UNITED STATES (REVISED) § 131 cmt. h (1986). The government contends that the framers of Marine Resources Act of 2002 (Title 24, subtitle 1) had the foresight to include just such a statutory provision. The government points to 24 F.S.M.C. 303. That section, however, is not adequate. It applies to FSM citizens and to FSM-flagged fishing vessels and requires them, "on the high seas or in an area designated by a fisheries management agreement" to comply "with any applicable law or agreement . . . ." 24 F.S.M.C. 303(1)(a). Section 303 applies to "Flag fishing vessels and citizens." 24 F.S.M.C. 303(1). A "'Flag fishing vessel' means any foreign fishing vessel that is registered in the Federated States of Micronesia pursuant to title 18 of this code and any domestic fishing vessel." 24 F.S.M.C. 102(35). There are no vessel registration provisions in Title 18; but there are vessel registration provisions in Title 19. Under 19 F.S.M.C. 302(1)(b), "a person holding a current and valid foreign investment permit" is qualified to register a vessel in the FSM. Qualified persons may register in the FSM any vessel they wholly own. 19 F.S.M.C. 305. An FSM-registered vessel must fly the FSM

national flag. 19 F.S.M.C. 201. Thus, 24 F.S.M.C. 303 does not apply to foreign-flagged vessels, such as the *Tokiwa Maru 28*.

The government does not point to any other provision of Title 24 or to any NORMA regulation that would automatically make every newly-ratified fisheries management agreement part of FSM domestic law. This could have been done by statute, or by NORMA regulation under 24 F.S.M.C. 204(1)(d) (NORMA has the authority to "adopt regulations to implement . . . fisheries management agreements"), or even by including the terms of the fisheries management agreement in each fishing access agreement and fishing permit issued thereafter. NORMA probably could have even included a provision in each fishing access agreement and a condition on each permit that made the permit holder and the parties to the access agreement subject to all duly ratified fisheries management agreements or to the Nauru Agreement and its implementing agreements as part of the laws and regulations in Permit Condition 8, and in the Foreign Fishing Access Agreement Article V, paragraph 12. It did not.

That failure to incorporate the fisheries management agreement provisions by reference in statute, or regulation, or in permits and access agreements leaves the law "so vague and ill-defined that [what are] the acts prohibited cannot be understood by people of ordinary intelligence," and so it "cannot serve as a basis for criminal prosecution." Laion, 1 FSM R. at 506. The court must therefore grant the defendants' motion to dismiss Counts 1 through 4 for the Information's failure to charge an offense.

The court makes this dismissal reluctantly and urges the government to promptly rectify its omission and move quickly to make the fisheries management agreements enforceable civilly and criminally in the FSM EEZ.

III. Conclusion

Accordingly, the defendants' motion to dismiss six counts on double jeopardy grounds and the defendants' motion to dismiss based no probable cause and errors in information are denied, but the defendants' motion to dismiss Counts 1 through 4 (the fishing aggregating device counts), based on no violation of the law alleged, is granted. Counts 1 through 4 are dismissed. Counts 5 through 10 remain for trial.

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