

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,)	CRIMINAL CASE NO. 2003-1500
)	
Plaintiff,)	
)	
vs.)	
)	
JACK FRITZ,)	
)	
Defendant.)	
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ORDER DENYING EXPUNGEMENT

Dennis K. Yamase
Chief Justice

Hearing: July 4, 2016
Decided: September 2, 2016

APPEARANCES:

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

For the Defendant: Jack Fritz, Esq. (pro se)
P.O. Box 788
Weno, Chuuk FM 96942

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HEADNOTES

Criminal Law and Procedure – Motions – Unopposed

While failure to oppose a motion is generally deemed a consent to the motion, even then the court still needs good grounds before it can grant an unopposed motion. FSM v. Fritz, 20 FSM R. 596, 598 (Chk. 2016).

Criminal Law and Procedure – Motions – Unopposed

When a party has failed to respond in writing to a written motion, oral argument will generally not be heard from that party, but the court may decide to permit a limited oral response on the assurance that the party's arguments would not stray outside the scope of the movant's arguments. FSM v. Fritz, 20 FSM R. 596, 598 (Chk. 2016).

Criminal Law and Procedure – Expungement of Records

A court's power to expunge criminal records falls into three general categories: 1) expungement pursuant to a statute, 2) expungement when it is necessary to preserve basic legal rights, or 3)

expungement based on an acquittal, although, in the case of an acquittal, the court doubts that expungement can be ordered based solely on the acquittal. FSM v. Fritz, 20 FSM R. 596, 599 & n.1 (Chk. 2016).

Criminal Law and Procedure – Expungement of Records

No FSM statute authorizes the expungement of records. FSM v. Fritz, 20 FSM R. 596, 600 (Chk. 2016).

Criminal Law and Procedure – Pardon

A Presidential pardon restores a convicted felon's basic civil rights. FSM v. Fritz, 20 FSM R. 596, 600 (Chk. 2016).

Criminal Law and Procedure – Expungement of Records

Courts can exercise the power to expunge records to preserve basic legal rights only when the defendant's conviction stems from the unlawful conduct of law enforcement agents. In the absence of a statute, a court's inherent power is limited to expunging the record of an unlawful arrest or conviction, or to correcting a clerical error. FSM v. Fritz, 20 FSM R. 596, 600 (Chk. 2016).

Constitution Law – Judicial Guidance Clause

The Judicial Guidance Clause's first command is that the court's decisions be consistent with the Constitution itself. FSM v. Fritz, 20 FSM R. 596, 600 (Chk. 2016).

Criminal Law and Procedure – Pardon; Separation of Powers – Legislative Powers

The court does not have the constitutional power to make persons granted a pardon of a felony conviction eligible for election to Congress because the Constitution reserves that power to Congress, and the court cannot exercise a power that only Congress has. FSM v. Fritz, 20 FSM R. 596, 600 (Chk. 2016).

Criminal Law and Procedure – Pardon; Separation of Powers – Legislative Powers

The Constitution permits Congress, and only Congress, to change, by statute, the constitutional provision disqualifying a person convicted of a felony from membership in Congress, and Congress so far has not seen fit to alter this qualification. FSM v. Fritz, 20 FSM R. 596, 600 (Chk. 2016).

Separation of Powers – Judicial Powers; Separation of Powers – Legislative Powers

The court should not and cannot make choices that the Constitution assigns to Congress. FSM v. Fritz, 20 FSM R. 596, 600 (Chk. 2016).

Criminal Law and Procedure – Pardon; Separation of Powers – Legislative Powers

Congress itself always has the final say over the election and qualification of its members, and, unless Congress acts to change the qualifications, a person convicted of a felony and later pardoned is still ineligible for Congress membership. FSM v. Fritz, 20 FSM R. 596, 600-01 (Chk. 2016).

Criminal Law and Procedure – Expungement of Records; Criminal Law and Procedure – Pardon

If a Presidential pardon automatically entitled the pardoned person to an expungement of his criminal record, then the executive branch would have the power to interfere with the record-keeping of another co-equal branch of government (the judicial branch) while also preventing still another co-equal branch of government (Congress) from access to the judicial branch's records that would assist it in its constitutional duty to be the sole judge of the qualification of its members. FSM v. Fritz, 20 FSM R. 596, 601 (Chk. 2016).

Criminal Law and Procedure – Expungement of Records

Whether a pardoned felon's records are expunged cannot turn on the fact that he pled not guilty and later appealed while another pardoned felon who pled guilty is denied expungement. FSM v. Fritz, 20 FSM R. 596, 601 (Chk. 2016).

Criminal Law and Procedure – Expungement of Records

The court, following the Judicial Guidance Clause's mandate that its decisions be consistent with the Constitution, can order an expungement of criminal records of a pardoned felon, only if Congress grants it the authority to do so. FSM v. Fritz, 20 FSM R. 596, 601 (Chk. 2016).

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COURT'S OPINION

DENNIS K. YAMASE, Chief Justice:

On July 4, 2016, the court heard defendant Jack Fritz's Motion for Expungement, filed June 11, 2015; his Supplemental Points of Authorities, filed January 12, 2016; and his Additional and Final Supplemental Points of Authorities to Movant's Original Memorandum of Points and Authorities with supporting affidavit, filed January 27, 2016. The government did not file a written opposition.

While failure to oppose a motion is generally deemed a consent to the motion, FSM Crim. R. 45(d), even then the court still needs good grounds before it can grant an unopposed motion. FSM v. Semwen, 18 FSM R. 222, 224 (Chk. 2012); FSM v. Phillip, 17 FSM R. 595, 597 (Pon. 2011); FSM v. Suzuki, 17 FSM R. 114, 115 (Chk. 2010); FSM v. Marehalau, 16 FSM R. 505, 507 (Pon. 2009); FSM v. Zhang Xiaohui, 14 FSM R. 602, 609, 613 (Pon. 2007). And, when a party has failed to respond in writing to a written motion, oral argument will generally not be heard from that party. FSM v. Kansou, 13 FSM R. 167, 169 n.2 (Chk. 2005); FSM v. Wainit, 12 FSM R. 360, 362 (Chk. 2004). The court, however, decided to permit the government to respond orally, but limited the government's presentation to only five minutes on its assurance that its arguments would not stray outside the scope of Fritz's arguments.

Since good grounds to grant the motion do not exist, the motion is denied for the reasons that follow.

I.

In 2004, Jack Fritz was convicted, after trial, of three counts of Obliging Funds for Purposes Other than Permitted, 55 F.S.M.C. 221(3); 55 F.S.M.C. 223, and one count of Obliging Funds in Advance of Availability, 55 F.S.M.C. 221(2); 55 F.S.M.C. 223. Fritz was sentenced to one-year's probation and fined \$4,000.

Fritz successfully completed his sentence. On May 5, 2015, he received a full pardon from the President.

II.

Fritz now moves to have the record of his conviction expunged. He notes that his pardon was full and unconditional, that this case was his only criminal conviction, that there are no criminal charges pending against him, and that he continues to be a respected law-abiding citizen. These points were not disputed.

Fritz contends that the court has the inherent power to expunge criminal records, including his conviction. Fritz argues that the recipient of a full pardon should not be left with any legal liabilities still resting upon him. He asserts that the pardon means he should be treated as if he had never been convicted of a crime. He states that "an FSM citizen who has not been convicted of a felony enjoys the right to run for national public office including Congress and to enter the United States without restriction in accordance with the terms of the amended Compact." Mot. to Expunge at 5 (June 11, 2015). He adds that since his 2004 conviction he has been "unable to participate in election to the FSM Congress and was unable to enter the United States without restriction." *Id.* He believes that the expungement of his criminal records and conviction "will complete the restoration of [his] civil rights and privileges, which are basic rights provided to FSM citizens under the Constitution and the amended Compact." Mot. to Expunge at 5-6.

Fritz further argues that the expungement of his record is compelled by the Constitution's Judicial Guidance Clause, FSM Const. art. XI, § 11, which requires that court decisions "be consistent with the Constitution, Micronesian custom and tradition, and the social and geographic configuration of Micronesia." Fritz contends that expungement is in keeping with the Chuukese custom of apology and forgiveness exemplified by the terms *Omusalu* and *Chafonu*, which although used to resolve discord and preserve peace, harmony, and love between private parties, should also be applicable between the FSM government and its people. Fritz also notes that this type of forgiveness or pardoning each other are similar to the Church practice of confession, the absolving of sins of the persons confessing, and that absolution permitting them to receive communion.

Fritz, aware of the court's January 19, 2016 decision denying expungement in FSM v. Innocenti, 20 FSM R. 293 (Chk. 2016), filed on January 27, 2016, Additional and Final Supplemental Points of Authorities in order to distinguish his case from Innocenti's. Fritz notes that he not only pleaded not guilty to all eleven counts he was charged with and that he was convicted of violating only four counts, but he also appealed (unsuccessfully) his conviction, while Simeon Innocenti was convicted on his guilty plea. Fritz further emphasizes that the trial judge, when delivering the court's finding, specifically stated that Fritz did not take any government funds for his own benefit.

Fritz, although providing information in his supporting affidavit in which he appears to argue that he should have been acquitted or would have won a reversal on appeal if it were not for some occurrence or other, states that he is not proposing to retry the case. He adds that he is also not asking the court to rule that he may run for Congress or that the United States should allow him to enter its territory. He recognizes that that would be beyond the court's power. Fritz does, however, suggest that an expungement should help him if he should decide to participate in an election for Congress since election staff routinely ask the courts if a candidate has a criminal record before deciding if a candidate is eligible to be on the ballot. Additional & Final Suppl. P. & A. to Memo. of P. & A. at 6 (Jan. 27, 2016). And he further suggests that an expungement could assist him in getting his name removed from the U.S. restricted entry list so that he can come and go in U.S. territory in the same manner as most FSM citizens. *Id.* at 7.

III.

As Fritz acknowledges, the court has previously ruled that a court's power to expunge criminal records falls into three general categories: 1) expungement pursuant to a statute, 2) expungement when it is necessary to preserve basic legal rights, and 3) expungement based on an acquittal.¹ FSM v.

¹ Although, in the case of an acquittal, the court doubts that expungement can be ordered based solely on the acquittal. See FSM v. Innocenti, 20 FSM R. 293, 295 (Chk. 2016).

Erwin, 16 FSM R. 42, 43 (Chk. 2008); FSM v. Kihleng, 8 FSM R. 323, 325 (Pon. 1998). Fritz acknowledges that no FSM statute authorizes the expungement of records and that he was not acquitted.

Fritz claims that his case falls within the remaining category of an expungement necessary to preserve basic legal rights, but urges the court not to follow the various U.S. cases cited in previous court orders denying expungement. He does urge the court to follow those Nineteenth Century U.S. cases that state a pardoned person is the same as a person who has not committed a crime. Although Fritz argues that expungement is needed to preserve his basic rights, the Presidential pardon has, as Fritz acknowledges and as the court has previously stated, already restored Fritz's basic civil rights. See Innocenti, 20 FSM R. at 295. In his motion, Fritz mentioned the two "rights" that he cannot exercise now even though he has been pardoned, but which he now concedes the court does not have the power to restore – the right to be eligible to be a member of Congress and the right to travel to and from United States territory without restriction. As noted above, Fritz does believe that expungement will help him regain those rights.

The court has already held that courts can exercise the power to expunge records to preserve basic legal rights only when the defendant's conviction stems from the unlawful conduct of law enforcement agents, Erwin, 16 FSM R. at 44; Kihleng, 8 FSM R. at 325, and that in the absence of a statute, a court's inherent power is limited to expunging the record of an unlawful arrest or conviction, or to correcting a clerical error. Innocenti, 20 FSM R. at 295-96. Although Fritz maintains his innocence, he does not claim that his conviction was unlawful or that the record of his conviction was a clerical error. Fritz's conviction remains valid, having withstood the challenge of an appeal. Nevertheless, Fritz contends that, under the Judicial Guidance Clause, an exception should be made in his case.

The court takes due cognizance of the Constitution's Judicial Guidance Clause. The court notes that that clause's first command is that its decisions be consistent with the Constitution itself. The court does not have the constitutional power to make persons granted a pardon of a felony conviction eligible for election to Congress because the Constitution reserves that power to Congress, FSM Const. art. IX, § 9, and the court cannot exercise a power that only Congress has. Robert v. Mori, 6 FSM R. 394, 401 (App. 1994) (pardoned felons not eligible to run for Congress unless Congress alters that).

The Constitution permits Congress, and only Congress, to change, by statute, the constitutional provision disqualifying a person convicted of a felony from membership in Congress. FSM Const. art. IX, § 9. Congress so far has not seen fit to alter this qualification. If Congress were to act, it could decide to make all convicted felons eligible for Congress membership. Or Congress could make them eligible for election only after they had completed their sentence or after a certain amount of time had passed after their sentence ended. Or Congress could choose not to make eligible persons convicted of certain felonies while making eligible those convicted of other felonies. Congress could also choose to make only those convicted felons who have been pardoned eligible for election to Congress. Or Congress could choose to make eligible those persons pardoned of certain offenses while keeping ineligible persons who committed other offenses, even if pardoned. These are all choices and decisions that only Congress can make.

The court should not and cannot make them. But, by expunging his record, the court would be informing election officials that inquire, that Fritz has no criminal record, and thus implicitly telling them that he is eligible to run for Congress (although Congress itself always has the final say over the election and qualification of its members, FSM Const. art. IX, § 17(a), and, unless Congress acts to change the qualifications, a person convicted of a felony and later pardoned is still ineligible for

Congress membership).

Other separation of powers concerns are also apparent. If a Presidential pardon automatically entitled the person pardoned to an expungement of his criminal record, then the executive branch would have the power to interfere with the record-keeping of another co-equal branch of government (the judicial branch) while also preventing still another co-equal branch of government (Congress) from access to the judicial branch's records that would assist it in its constitutional duty to be the sole judge of the qualification of its members.

Lastly, whether Fritz's records are expunged cannot turn on the fact that he pled not guilty and later appealed while Innocenti pled guilty. Fritz, like Innocenti, has had his civil rights restored. And like Innocenti, he seeks expungement of his criminal record as an aid to regaining the ability to travel freely in United States territory and to be able to, if the electorate is agreeable, seek a Congress seat.

IV.

The court, following the Judicial Guidance Clause's mandate that its decisions be consistent with the Constitution, therefore concludes that it can order an expungement of criminal records in a case such as this one, only if Congress grants it the authority to do so. If Congress should ever enact such legislation, Fritz is free to renew his motion for expungement. Since no FSM statute currently authorizes the court to expunge the criminal records of a person pardoned by the President, Fritz's motion must be denied.

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FSM SUPREME COURT TRIAL DIVISION

ANGELINE NETH and FRANCINE POLL,)
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 Plaintiffs,)
)
 vs.)
)
 MARCELO PETERSON, in his official capacity as)
 Governor, Pohnpei Government, CHRISTINA)
 ELNEI, in her official capacity as the Acting)
 Director of the Department of Treasury, Pohnpei)
 Government, MALPIHNA NELPER, in her official)
 capacity as the Chief of Personnel, Labor and)
 Manpower Development, and POHNPEI)
 GOVERNMENT,)
)
 Defendants.)
)

CIVIL ACTION NO. 2015-007

ORDER SETTING ASIDE ENTRY OF DEFAULT

Ready E. Johnny
Associate Justice

Decided: September 7, 2016