IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

ELLENDER NGIRAMEKETII,
Appellant,
v.
REPUBLIC OF PALAU,
Appellee.

Cite as: 2022 Palau 9
Criminal Appeal No. 21-007
Appeal from Criminal Case Nos. 19-097 & 19-118 (Consolidated)

Argued: April 8, 2022
Decided: July 1, 2022

Counsel for Appellant…… Brien Sers Nicholas
Counsel for Appellee……..… April Dawn Cripps, Special Prosecutor

BEFORE: JOHN K. RECHUCHER, Associate Justice
DANIEL R. FOLEY, Associate Justice
KEVIN BENNARDO, Associate Justice

Appeal from the Trial Division, the Honorable Justice Lourdes Materne and Presiding Justice Kathleen Salii, presiding (later consolidated).

OPINION

BENNARDO, Associate Justice:

[¶ 1] Ellender Ngirameketii appeals the outcome of two criminal prosecutions against him that were consolidated for trial. For the reasons set forth below, we AFFIRM the Judgment of the Trial Division on all convictions, VACATE the sentencing order, and REMAND for resentencing.

BACKGROUND

[¶ 2] Ngirameketii held the office of Governor of Ngiwal State during the relevant period, from 2014 to 2019. As a public official within the terms of 33 PNC § 601, Ngirameketii was required to complete Ethics Financial Disclosure forms each year he was in public office.

[¶ 3] In his 2013 disclosure form, Ngirameketii disclosed assets of one 20-foot boat valued at $20,000, a house valued at $30,000, income valued at between $1,000 and $10,000 from his sole proprietorship in Okal Security

Agency, income from a store in Ngiwal valued at $1,700, and his governor's salary of $22,000.

[¶ 4] In subsequent disclosures, from 2014 to 2018, Ngirameketii declared no new interests, changes in financial position, or new duties. He reported a maximum of $14,000 in additional income. He did not disclose any additional income earned from his ownership of Okal Security Agency.

[¶ 5] In 2014, Okal Security Agency was awarded a contract to provide security services for the capitol complex in Ngerulmud in the amount of $99,666.67. Ngirameketii reported that the security agency's gross revenue for the third quarter of 2014 was $24,916.66 and paid $12,229.27 in social security contributions for that quarter. For this same period, the security agency listed nine employees. Thereafter, the security agency was awarded a contract each subsequent year, requested payment, and received the full contract price each year between 2015 and 2019.

[¶ 6] Additionally, between August 1, 2018, and December 31, 2018, Ngirameketii received $644,587.52 for an agreement relating to personal property.

[¶ 7] On July 31, 2019, in what became Criminal Case No. 19-097, the Republic charged Ngirameketii with 20 criminal counts spanning six years including five felony counts of Misconduct in Public Office (17 PNC § 4205 and 17 PNC § 3918), five misdemeanor violations of the Code of Ethics Act (33 PNC § 605(c)(1) and (d)), six misdemeanor violations of the Social Security Act (41 PNC § 744), and four misdemeanor violations of the Unified Tax Act (40 PNC §§ 1204 and 1501). These counts all stemmed from unreported income earned by Ngirameketii.

[¶ 8] On the same day, the Republic filed a Motion for Pre-Arraignment Injunctive Relief to Prevent Diversion of Assets Subject to Criminal Forfeiture pursuant to the Criminal Forfeiture Act [17 PNC §§ 701 *et seq.*]. The Trial Division granted that motion and froze all of the relevant assets until the end of trial. Ngirameketii filed a motion to strike the order, which the court denied.

[¶ 9] Ngirameketii also filed a pre-trial Motion to Suppress Evidence Pursuant to ROP R. Crim. P. 12(b)(3) and a Motion to Dismiss Counts 2, 5, 8,12, & 16. The court denied both motions.

[¶ 10] On September 12, 2019, in what became Criminal Case No. 19-118, the Office of the Special Prosecutor filed a separate Information charging Ngirameketii with Misconduct in Public Office and violating the Code of Ethics. Ngirameketii filed a pre-trial Motion to Dismiss Count 2 [an ethics offense], which the court denied. He also filed a motion in limine to suppress evidence, which the court also denied.

[¶ 11] Although the Trial Division initially refused requests to consolidate the two prosecutions, it granted the Republic's Expedited Motion for Reconsideration of Plaintiff's Motion to Consolidate Criminal Case Nos.

19-118 and 19-097. Over Ngirameketii's objection, the two prosecutions were consolidated in July 2021.

[¶ 12] Upon consolidation, Ngirameketii was ultimately charged with six Misconduct in Public Office charges (Counts 1, 4, 7. 11, and 15 in Case 19-097 and Count 1 in Case 19-118) in violation of 17 PNC § 4204 and 17 PNC § 3918; six violations of the Code of Ethics Act, 33 PNC § 605(c)(1) and (d) (Counts 2, 5, 8, 12, and 16 in Case 19-097 and Count 2 in Case 19-118); six violations of the Social Security Act, 41 PNC § 744 (Counts 3, 6, 9, 13, 17 and 20 in Case 19-097); and five violations of the Unified Tax Act, 40 PNC §§ 1204 and 1501 (Counts 10, 14, 18, and 19 in Case 19-097 and Count 3 in Case 19-118).

[¶ 13] During trial, and over Ngirameketii's objection, the Trial Division admitted exhibits of Ngirameketii's bank records from the Bank of Hawaii. The Republic obtained these records by letters from the Office of the Special Prosecutor to the Bank of Hawaii, represented as being subpoenas *duces tecum.*

[¶ 14] The Trial Division found Ngirameketii guilty of all 23 counts of the Information on July 23, 2021, and entered its written Findings. On August 19, 2021, the court changed its original Findings, and entered Findings of Fact and Conclusions of Law in Support of Guilty Verdict, finding Ngirameketii guilty of 18 counts of the Information and acquitting Ngirameketii of all 5 violations of the Unified Tax Act. In support of the convictions, the Trial Division found that Ngirameketii underreported his income on his financial disclosure forms by $1,337,316 ($692,728.48 from Okal Security Agency and $644,587.52 from the property transaction in 2018), failed to make social security contributions for Okal Security Agency employees from 2015 to 2019, and failed to pay taxes on $644,587.52 in income from the 2018 property transaction.

[¶ 15] Ngirameketii was sentenced on October 15, 2021. He was sentenced to six years of probation and total fines of $674,658.00. For the convictions of 17 PNC § 3918, Ngirameketii was sentenced to five years of probation, as well as eighteen months of imprisonment, which was suspended. For the convictions of 17 PNC § 4204, Ngirameketii was sentenced to one year of imprisonment, concurrent and suspended, and a $1000 fine for each count, totaling $6000. For the Code of Ethics violations, Ngirameketii was sentenced to a fine of $668,658, which is one-half the amount that the court found Ngirameketii failed to report. For violations of 41 PNC § 744, Ngirameketii was sentenced to $1000 for each violation, totaling $6000. These fines were imposed concurrently with the fines relating to 17 PNC § 4204. Ngirameketii timely filed this appeal of both his convictions and sentences.

STANDARD OF REVIEW

[¶ 16] As developed further below, the claims that Ngirameketii brings on appeal are broad ranging. Some challenge conclusions of law, such as matters of constitutional and statutory interpretation. These we review de novo.

Kiuluul v. Elilai Clan, 2017 Palau 14 ¶ 4. Some challenge findings of fact, such as the sufficiency of evidence. These we review for clear error. *Id.* Some challenge discretionary decisions, such as the decision whether to seal a proceeding. These we review for abuse of discretion. *Id.*

DISCUSSION

[¶ 17] Ngirameketii raises ten issues on appeal, set forth below, which the Court considers in turn.

> 1. Whether the Trial Division erred in granting the Republic's motion for pre-arraignment injunctive relief to prevent diversion of assets subject to criminal forfeiture pursuant to the Criminal Forfeiture Act in Case 19-097.
>
> 2. Whether the Trial Division erred in denying Ngirameketii's motion to strike order to prohibit transactions of assets subject to criminal forfeiture in Case 19-097.
>
> 3. Whether the Trial Division erred in denying Ngirameketii's motion to suppress evidence pursuant to Rule of Criminal Procedure 12(b)(3) in Case 19-097.
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> 4. Whether the Trial Division erred in denying Ngirameketii's motion to dismiss Counts 2, 5, 8, 12, and 16 in Case 19-097.
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> 5. Whether the Trial Division erred in denying Ngirameketii's motion to dismiss Count 2 in Case 19-118.
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> 6. Whether the Trial Division erred in denying Ngirameketii's motion in limine to exclude evidence in Case 19-118.
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> 7. Whether the Trial Division erred in granting the Republic's motion for reconsideration of consolidation of Cases 19-087 and 19-118.
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> 8. Whether the Trial Division erred in admitting Ngirameketii's financial records at Bank of Hawaii into evidence.
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> 9. Whether the Trial Division erred in finding that sufficient evidence supported Ngirameketii's convictions of Misconduct in Public Office, violation of the Code of Ethics, and violation of the Social Security Act.
>
> 10. Whether the Trial Division erred in sentencing Ngirameketii in light of the ROP Constitution, Article IV, Section 6's prohibition of double jeopardy and Section 10's prohibition on excessive fines.

1.

[¶ 18] Ngirameketii first argues that the Trial Division erred in granting the Republic's motion for pre-arraignment injunctive relief to prevent diversion of assets subject to criminal forfeiture pursuant to the Criminal Forfeiture Act in Case 19-097. This motion, filed in conjunction with the

Information, on July 31, 2019, aimed to freeze the Defendant's assets for the span of the trial, and no further. The Order expressly stated that the injunction was entered "pending the outcome of this criminal proceeding." Order Prohib. Trans. Of Assets Subject to Cri. Forfeiture (July 31, 2019). In fact, Ngirameketii moved for the release of his assets in October 2021, and the motion was granted. With that, the 2019 order became moot; there is no relief that can be granted on appeal, because the 2021 Order already granted it.

[¶ 19] Also in the scope of this argument, Ngirameketii asserts that Misconduct in Public Office is not a covered offense under the Criminal Forfeiture Act, 17 PNC § 704(b). This assertion lacks merit. The Criminal Forfeiture Act expressly states that any offense "which is chargeable as a felony offense under law of the Republic of Palau" qualifies for criminal forfeiture. 17 PNC § 704(b). Misconduct in Public Office is a class B felony. 17 PNC § 3918. Thus, Misconduct in Public Office is an offense for which property is subject to forfeiture.

2.

[¶ 20] Ngirameketii's second argument is that the Trial Division erred in denying his motion to strike the Trial's Division's order to prohibit transactions of assets that were subject to criminal forfeiture in Case 19-097. This type of order is a common practice in prosecutions involving potential forfeiture. Ngirameketii couches the primary thrust of his argument in jurisdictional terms. He claims that the frozen assets were held by the Bank of Hawaii and the Bank of Hawaii was not a party to the prosecution; thus, the Trial Division lacked jurisdiction to issue an order directed at assets held by the Bank of Hawaii.

[¶ 21] We find no jurisdictional problem with the Trial Division's order. The Trial Division has jurisdiction over assets if it has jurisdiction over the assets' owner or interest-holder. *See* 17 PNC § 703(c). Here, the Trial Division had jurisdiction over Ngirameketii and therefore had jurisdiction to issue orders regarding his assets as well. The fact that the assets were held by a third party changes nothing in that regard. The question of the Trial Division's jurisdiction over the Bank of Hawaii is therefore irrelevant.

[¶ 22] Ngirameketii also argues that the Trial Division's order prohibiting transactions of assets was effectively a temporary restraining order. As such, he argues that it expired fifteen days after it was issued pursuant to 17 PNC § 714(d) and the court erred by failing to recognize its expiration. In its denial Ngirameketii's motion, the Trial Division clarified that its order was not a temporary restraining order, but rather it was an injunction that specified it would expire at the termination of the proceedings. We do not find merit in Ngirameketii's argument that the order was a temporary restraining order limited to fifteen days.

3.

[¶ 23] Third, Ngirameketii argues that the Trial Division erred in denying his motion to suppress evidence pursuant to Rule of Criminal Procedure 12(b)(3) in Case 19-097 because the Republic did not obtain a search warrant for Ngirameketii's bank documents. The Republic does not dispute that a search warrant was not obtained for the documents, stating instead that they were subpoenaed under the authority of 2 PNC § 503(a)(6), which allows the Special Prosecutor "on the basis of probable cause or after a complaint has been filed, to subpoena witnesses, administer oaths, and obtain testimony." Here, the Special Prosecutor's subpoena to the Bank of Hawaii was supported by a finding of probable cause by the Trial Division in Special Proceeding No. 19-008. It was, therefore, procedurally proper under the statutory requirements.

[¶ 24] Nevertheless, Ngirameketii argues that the surrendering of his bank records by the Bank of Hawaii was an unconstitutional seizure of his property. While the bank records were Ngirameketii's property, he had knowingly permitted the Bank of Hawaii to be the custodian of that property. Thus, it was the Bank of Hawaii's decision, not Ngirameketii's decision, whether to share Ngirameketii's bank records with the Republic.

[¶ 25] While not a directly apt analogy, consider a situation in which an individual entrusts his illegal property—let's say narcotics—to his friend for safekeeping. If his friend takes the narcotics to the police or consents to a voluntary search of his property that leads to the discovery of the narcotics, the individual's complaint is with his friend rather than with the police. By entrusting the Bank of Hawaii with evidence of his crimes, Ngirameketii took the risk that the Bank of Hawaii would disclose that information. If Ngirameketii is disappointed with the Bank of Hawaii's handling of his bank records, he should perhaps consider switching to another bank. In short, individuals who violate the law should be careful to whom they entrust evidence of their misdeeds because they have narrow grounds to object if the evidence makes its way from the entrusted party to the authorities. Ngirameketii's situation does not fall within those narrow grounds.

4.

[¶ 26] Ngirameketii's fourth argument is that the Trial Division erred in denying his motion to dismiss the Code of Ethics charges in Case 19-097. He first argues that the unreported money was a "benefit" paid by the government, and therefore need not be reported under 33 PNC § 605(c)(1). The statutory languages does not align with Ngirameketii's reading:

> [Financial disclosure statements shall include] the name and mailing address of *each source and amount of income, including compensation* and gifts from persons other than the public official's or candidate's spouse or children, totalling five hundred dollars ($500) or more, received by or promised to the public official or candidate, *provided that contributions, and salary and benefits from the*

> *national or any state government, need not be reported under this subsection.*

33 PNC § 605(c)(1) (emphasis added). Here, Okal Security Agency was contracted by the government for security services at the capitol complex in Melekeok. This contract, and the payment from it, was not a "benefit" connected to Ngirameketii's position as Governor of Ngiwal State; it was income from his private business. This falls squarely within the compass of "income" that must be disclosed under § 605(c)(1). To read the statute as Ngirameketii suggests would mean that any government payment would be a non-reportable "benefit" regardless of whether the payment was related in any way to the public official's position. This is inconsistent with the structure of the statute, as well as its intention of protecting against bribery and misuse of funds by public officials. The Trial Division correctly denied Ngirameketii's motion on this basis. Order Pretrial Mot. (January 18, 2021).

[¶ 27] Also in advancing this argument, Ngirameketii argues that the Code of Ethics is unconstitutional because it permits disclosure statements to be "amended at any time" and states that such amendments "may be considered as evidence of good faith." 33 PNC § 605(h). According to Ngirameketii, permitting public officials to amend previous financial disclosures nullifies an affirmative defense and calls for individuals to self-incriminate themselves.

[¶ 28] Code of Ethics violations may be civil or criminal. 33 PNC § 611. To be criminal, a violation of the Code of Ethics must be done knowingly or willfully. *Id.* § 611(a). We fail to understand how a statutory provision that provides public officials the ability to correct their own errors—and specifically states that voluntary corrections may be considered as evidence of good faith—endangers their right against self-incrimination. Were such an amendment made, it would remain a credibility determination for the fact finder as to whether the original erroneous disclosure was done knowingly, willfully, in good faith, or otherwise. Here, however, Ngirameketii made no voluntary amendment to his erroneous disclosures, so this line of argument is not relevant in any practical way to the present appeal.

5.

[¶ 29] Fifth, Ngirameketii makes the same constitutionality argument as above, but this time directs it at his conviction for violating the Code of Ethics in Case 19-118. The Trial Division rejected the argument in Case 19-118 on similar reasoning to its rejection of the argument in Case 19-097. Consistent with our holding above, we find no error in the Trial Division's rejection of the argument in Case 19-118.

6.

[¶ 30] Ngirameketii's sixth argument is that the Trial Division erred in denying his motion to exclude evidence in Case 19-118. The disputed evidence was testimonial and documentary evidence from a hearing that was previously held in Case 19-097. In Case 19-097, the Trial Division granted Ngirameketii's

request to exclude the evidence. In Case 19-118, the Trial Division denied Ngirameketii's motion. On appeal, Ngirameketii argues that the Trial Division's decision to exclude the evidence in Case 19-097 conclusively demonstrates that the denial of his motion to exclude the evidence in Case 19-118 was erroneous. Beyond that syllogistic argument, he makes no substantive attempt to explain why the disputed evidence should have been excluded from his prosecution in Case 19-097.

[¶ 31] The evidence that is relevant to one set of charges naturally may be different from the evidence that may be relevant to a different set of charges. Because Ngirameketii's appellate argument is based on a faulty premise, we find it unconvincing.

7.

[¶ 32] Seventh, Ngirameketii argues that the Trial Division erred in consolidating the two prosecutions against him. Here, Ngirameketii was the first party to request consolidation, via an oral motion in October 2019. At that time, the Republic opposed consolidation and the Trial Division denied Ngirameketii's consolidation request. Later, in December 2019, the Republic moved for consolidation, which the Trial Division denied in January 2020. In June 2021, the Republic moved for reconsideration of this denial. Upon reconsideration, the Trial Division consolidated the two prosecutions.

[¶ 33] With regard to consolidation, Ngirameketii first argues that the Republic's June 2021 motion for reconsideration of the Trial Division's January 2020 denial of its motion was untimely because it violated Rule of Civil Procedure 7(b)(5), which provides that "motions for reconsideration . . . shall be filed within ten judicial days following the order to which it relates."

[¶ 34] This argument misses the mark. Ngirameketii's alleges that the Trial Division violated a rule of civil procedure; however, the rules of civil procedure apply only to "suits of a civil nature." ROP R. Civ. P. 1(a). Ngirameketii was embroiled in a criminal prosecution rather than a civil suit. The relevant rules governing procedure in criminal prosecutions are the Rules of Criminal Procedure. *See* ROP R. Crim. P. 1(a). Ngirameketii points us to no similar ten-day limitation period governing motions for reconsideration in criminal prosecutions.

[¶ 35] Ngirameketii also argues that the Trial Division's consolidation of the two prosecutions violated his constitutional right against double jeopardy. This argument likewise fails. By consolidating the two prosecutions, the Trial Division was acting to protect Ngirameketii from double jeopardy. *See* Order Granting Pl. Mot. Recons. Consol. at 6 (July 5, 2021) (finding that "the presence of overlap does raise double jeopardy considerations . . . in favor of consolidation"). We agree with the Trial Division's consolidation. If the court had denied the motion, as Ngirameketii here claims should have happened, then he would have been forced to endure two separate actions on overlapping charges. The danger of double jeopardy in that instance is far greater than in the present consolidated prosecution.

8.

[¶ 36] Though styled somewhat differently, Ngirameketii's eighth appellate argument retreads much of the same ground as his third appellate argument. Both arguments claim error in the admission of the same evidence. While his third argument focused more on the validity of the subpoena used in obtaining the evidence, his eighth argument focuses more on the validity of the special proceeding used to obtain the subpoena. As we stated above, the procedure used to obtain the subpoena complied with the relevant statutory requirements. To the extent that Ngirameketii claims error in the Trial Division's decision to seal the record at the time of the special proceeding, we find no abuse of discretion in that decision given the sensitivity of information relating to ongoing investigations of public officials.[1]

9.

[¶ 37] Ngirameketii's ninth appellate argument claims that his convictions were not supported by sufficient evidence. We review sufficiency of the evidence claims in a "very limited" manner. *Kumangai v. ROP*, 9 ROP 79, 82 (App. Div. 2002). When reviewing for sufficiency of the evidence, we grant deference to the Trial Division's superior vantage point to assess the credibility of witnesses and reverse only for clear error. *Oiterong v. ROP*, 9 ROP 195, 199 (App. Div. 2002).

[¶ 38] As to the Misconduct in Public Office and the Code of Ethics convictions, Ngirameketii argues that the Republic's admissible evidence only showed that payments were made to Ngirameketii, not that he actually *received* the money. App. Opening Br. at 36. According to Ngirameketii, the testimony from Bank of Hawaii employees and his bank records showing that he received the money were improperly admitted and therefore cannot be considered in the sufficiency of the evidence analysis. Because we have already rejected Ngirameketii's arguments regarding the admissibility of that same evidence above, we find no clear error in the Trial Division's finding that sufficient evidence supported his convictions on the Misconduct in Public Office and Code of Ethics charges.

[¶ 39] As to the Social Security Act convictions, Ngirameketii argues that the Republic failed to sufficiently prove the "remuneration" element of the offense under 41 PNC § 744. As charged in the Information, the Republic alleged that Ngirameketii "knowingly failed to make employer contributions to the Palau Social Security System for all Okal Security Agency *employees who received remuneration* from the Okal Security Agency under its contract with the Republic of Palau providing security at the Capitol Complex." Cr. Case No. 19-097, Information, 8 (July 31, 2019) (emphasis added). Essentially, Ngirameketii argues that the Republic failed to sufficiently demonstrate that the employees of his security agency were actually paid.

[1] Counsel for Ngirameketii confirmed during oral argument that he received all documents in connection with the sealed proceeding in advance of trial.

[¶ 40] In response, the Republic argues that Ngirameketii did not raise this argument below. Appellee Opening Br. at 36. This response misperceives who bears the burden of a criminal prosecution. We remind the Republic that it bears the burden of demonstrating every element of an offense beyond a reasonable doubt. A defendant need not argue that an element was unproven to preserve the argument for appeal. Indeed, a defendant who mounts no defense at all may still argue on appeal that his conviction is not supported by sufficient evidence. Those words of caution notwithstanding, we do not find clear error in the Trial Division's conclusion that the employees of Okal Security Agency, a private business, were paid in exchange for their labor. This inference was supported sufficiently by the evidence presented at trial that we will not disturb it on clear error review.

10.

[¶ 41] Ngirameketii's tenth argument challenges his sentences. His first argument with regard to his sentence obliquely references the constitutional prohibition against double jeopardy without an explanation of how his sentences violate it. While the double jeopardy clause protects criminal defendants from multiple punishments for the same offense at a single trial, *see, e.g.*, *Kazuo v. ROP*, 3 ROP Intrm. 343, 346 (App. Div. 1993), we find no double jeopardy violation in the Trial Division's sentencing order. To the extent that Ngirameketii was convicted of overlapping charges stemming from two separate prosecutions, the Trial Division's sentencing order clearly imposes no more than a single sentence for each violation.

[¶ 42] Ngirameketii also challenges the $668,658 fine imposed on him for his six Code of Ethics convictions as violative of the prohibition against "excessive fines" in Article 4, Section 10 of the Constitution.[2] We have previously explained that this excessiveness inquiry "turns on the gravity of the offense," a determination which is "inherently imprecise." *Silmai v. ROP*, 10 ROP 139, 142 (App. Div. 2003). Partially because of that imprecision, we have further stated that the legislature enjoys some deference "in determining the types and limits of punishments for crimes." *Id.*

[¶ 43] Here, the Code of Ethics sets the maximum fine for most misdemeanor convictions at $10,000. 33 PNC § 611(a). For wrongful nondisclosure, however, it permits a fine of up to "three (3) times the amount the person failed to report properly." *Id.* The Trial Division found Ngirameketii guilty of six counts of misdemeanor failure to report based on a cumulative non-disclosure of $1,337,316. Applying 33 PNC § 611(a), the Trial Division calculated the maximum financial penalty for the six misdemeanors at three times that amount, or $4,011,948. At sentencing, the Republic requested a fine of $1,337,316 (the full amount that Ngirameketii failed to report) and Ngirameketii requested a fine of $1,000. The Trial Division imposed a fine of $668,658, one-half of the amount not reported. Thus, the fine that the Trial

[2] The Trial Division additionally fined Ngirameketii $6,000 for his other convictions. He does not appear to challenge that fine on appeal. In any event, it is not unconstitutionally excessive.

Division imposed was one-sixth of the maximum authorized by the OEK in 33 PNC § 611(a).

[¶ 44] Both in its brief and at oral argument, the Republic mustered little more argument than to say that the monetary punishment imposed on Ngirameketii fell comfortably within the statutorily authorized amount. While true, the Republic's argument overstates the amount of deference the OEK enjoys in this area. Ngirameketii did not claim that his monetary punishment exceeded the statutory maximum; rather, he claimed that his monetary punishment was constitutionally excessive. While the legislature's opinion regarding the appropriate range of punishments available for a particular offense is not irrelevant to the constitutional inquiry, it does not follow that every sentence that falls within that range is constitutionally permissible for every conceivable fact pattern.

[¶ 45] Moreover, deference is not the same as acquiescence. Just because the OEK believes that a punishment properly reflects the gravity of an offense does not conclusively make it so. If the OEK prescribed a maximum punishment of having all four limbs amputated and the Trial Division sentenced a defendant to amputation of but one limb, we need not go along with it despite the fact that both the legislature and the lower court apparently found it appropriate punishment. After all, our role as an appellate court is to review the decisions of the lower courts and, when relevant, to review the OEK's statutes for compliance with the Constitution. In order to fulfill our function, we must be careful not to defer too greatly to the very decisions that we are reviewing, including maximum penalties set by the OEK.

[¶ 46] While the monetary punishment for failure to report in 33 PNC § 611(a) is nominally labeled a "fine," it effectively operates as a forfeiture because it is calculated by reference to the amount that the defendant failed to report. Indeed, in Ngirameketii's sentencing, the Republic sought a fine equal to the amount not reported, which would be a classic forfeiture. And the Trial Division securely anchored Ngirameketii's monetary punishment to the amount not reported by imposing a fine that was equal to half of the amount not reported.

[¶ 47] The risk of excessiveness is elevated in forfeiture cases, and the risk is particularly acute in cases in which a conviction for a relatively mild offense involves very valuable assets. This is what we cautioned about when we said that the forfeiture of a $4 million vessel for staying too long in Palauan waters "would raise substantial issues as to possible violation" of the excessive fines clause. *ROP v. M/V Aesarea*, 1 ROP Intrm. 429, 434 (App. Div. 1988). This too is what occurred when the U.S. Supreme Court found that a forfeiture of $357,144 in cash was excessive compared to the gravity of the offense of not declaring the currency on a customs form. *United States v. Bajakajian*, 524 U.S. 321 (1998).

[¶ 48] Like *Bajakajian*, Ngirameketii's offense conduct was a failure to report the money. The distinction, however, is that Ngirameketii was a public official and the defendant in *Bajakajian* was not. Arguably, the gravity of a

public official knowingly not reporting income on a mandatory disclosure form is much greater than an individual who is not a public official failing to report a substantial amount of currency on a customs form. Thus, to determine whether a fine of $668,658 was excessive compared to the gravity of Ngirameketii's six convictions, we shall look to other offenses involving public officials for further guidance regarding the seriousness of offenses by public offenses.

[¶ 49] First, consider the Code of Ethics itself. Any violation of the Code of Ethics other than failure to report carries a maximum fine of $10,000. 33 PNC § 611(a). Failure to report is alone singled out for special treatment and carries a maximum fine amount that, depending on the amount unreported, may total millions and millions of dollars. *Id.* While we do not discount the seriousness of failing to report income by public officials, it is not at all obvious that its seriousness is substantially more magnitudinous than other violations of the Code of Ethics. For example, the Code of Ethics makes it a crime to use or threaten to use government authority in exchange for an individual's vote, but the monetary punishment for that violation is capped at $10,000. 33 PNC §§ 607(g), 611(a). The gravity of threatening governmental action in exchange for an individual's vote is not patently less serious than the gravity of a public official not reporting income, and yet the potential monetary punishment for the former is potentially tens or hundreds of times greater than for the former.

[¶ 50] Moreover, the fact that the OEK lumps all of these offenses together as misdemeanors communicates that it does not consider failure to report to be substantially more serious than other Code of Ethics violations. If Ngirameketii's six Code of Ethics convictions had been for any wrongful behavior other than failure to report, his maximum fine would have been $10,000 per conviction, or $60,000. His actual maximum fine for failure to report was over $4 million, or over 66 times that amount. And the fine actually imposed on him was over $600,000, or over 10 times that amount.

[¶ 51] Next, and perhaps more tellingly, we look at the maximum fine for the offense of Misconduct in Public Office, an offense that only public officials may commit. *See* 17 PNC § 3918(a). This offense is a class B felony, *id.* § 3918(b), punishable by a maximum fine of $25,000, *id.* § 651(a)(2). Six *felony* counts of Misconduct in Public office gives rise to a maximum potential fine of $150,000. Ngirameketii's actual maximum fine for his six *misdemeanor* counts was over 26 times that amount. Indeed, even convictions of the most serious offenses—class A felonies and murder—carry a maximum fine of $50,000 per conviction. *Id.* § 651(a)(1). Ngirameketii's fine for six misdemeanor convictions ($668,658) was more than twice as high as the statutory *maximum* fine ($300,000) for six convictions of the most serious felonies in the Republic.

[¶ 52] Considered in light of the gravity of the offense, we find that the $668,658 fine imposed on Ngirameketii for his six misdemeanor convictions

of Code of Ethics violations was constitutionally excessive.[3] As guidance for future sentencing for failure to report under 33 PNC § 611(a), we advise lower courts to reserve fines of more than $25,000 per count for only the most egregious violations.[4] We do not find that Ngirameketii's offense conduct rises to the level of egregiousness to warrant a total fine of greater than $150,000 for the six Code of Ethics violations. Accordingly, we vacate Ngirameketii's sentences on all counts and remand to the Trial Division for resentencing with the instruction to impose a fine of not greater than $25,000 per count for the Code of Ethics convictions. The Trial Division remains free to adjust other aspects of Ngirameketii's sentences.

CONCLUSION

[¶ 53] For the reasons set forth above, we AFFIRM the Trial Division's Judgment on all counts of conviction, VACATE the Trial Division's sentencing order, and REMAND for resentencing.

[3] We do not find that a fine of three times the amount unreported is inherently excessive in all potential applications of 33 PNC § 611(a). There may be cases in which such a penalty would not be excessive, especially when the unreported amount is a relatively small sum of money.

[4] While $25,000 is significantly greater than the maximum fine of $10,000 for other Code of Ethics violations, the OEK signaled that it considered failure to report to be a potentially more egregious offense by supplying a separate monetary penalty for it. Bearing in mind the inherent imprecision at play in this area of the law, a presumptive maximum fine that is 2.5 times greater for failure to report pays deference to that policy decision while also keeping the maximum fine on the right side of the constitutional limit.