FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA, Plaintiff, vs. FRANCIS CHAOY BUCHUN and ANTHONY TUN a/k/a ANTHONY RUTUN TETEETH a/k/a ANTHONY TUN TETEETH, Defendants.	)	CRIMINAL CASE NO. 2020-3503

ORDER DENYING SUPPRESSION OF EVIDENCE

Larry Wentworth
Associate Justice

Hearing: December 17, 2020, January 11, 14, February 1, 2021
Decided: March 24, 2021

APPEARANCES:

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HEADNOTES

Criminal Law and Procedure – Interrogation and Confession; Criminal Law and Procedure – Right to Counsel

When a defendant has expressed a wish to meet with counsel before further questioning, questioning must cease at once. FSM v. Buchun, 23 FSM R. 201, 206 n.2 (Yap 2021).

Criminal Law and Procedure – Interrogation and Confession; Criminal Law and Procedure – Right to Counsel

Defense counsel cannot advise a client to make false statements. Defense counsel can only advise the client to tell the truth or to remain silent and explain the consequences of each course of action. FSM v. Buchun, 23 FSM R. 201, 207 n.4 (Yap 2021).

Criminal Law and Procedure – Interrogation and Confession

For a defendant's statements made during a custodial interrogation to be admissible evidence, the government must first inform the defendant: 1) that the defendant has the right to remain silent; 2) that anything the defendant says may later be used against the defendant; 3) that the defendant has the right to consult an attorney and to have one present during questioning; and 4) that an attorney will be provided for the defendant without charge if one is requested; and also 5) that the defendant may send a message to a family member or employer. These rights to silence and to counsel are sometimes referred to as "Miranda rights" and the process of informing persons of these rights as "Mirandizing" them. FSM v. Buchun, 23 FSM R. 201, 207-08 & n.5 (Yap 2021).

Criminal Law and Procedure – Interrogation and Confession; Criminal Law and Procedure – Right to Counsel; Criminal Law and Procedure – Right to Silence

For defendants to validly waive their rights to silence or to counsel, they must do so knowingly, intelligently, and voluntarily. There is a presumption against such waivers. The government has the burden of proving, by a preponderance of the evidence, that the defendant voluntarily waived the rights to silence and to an attorney. An accused may be shown to have voluntarily waived any of those rights, either expressly by a written waiver or explicitly by speech or implicitly by conduct, and, although the better practice is to complete a written advice of rights and waiver form before starting questioning, it is not a requirement that the accused do so in order for an accused to make a valid waiver of rights. FSM v. Buchun, 23 FSM

R. 201, 208 (Yap 2021).

Criminal Law and Procedure – Interrogation and Confession

The FSM national police should, as a matter of course, have ready for immediate use carefully prepared advice of rights and waiver forms (preferably bilingual) in English and in the various FSM languages in each state. FSM v. Buchun, 23 FSM R. 201, 209 (Yap 2021).

Criminal Law and Procedure – Interrogation and Confession; Criminal Law and Procedure – Right to Counsel

Generally, the presence of counsel would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. An attorney's presence would insure that statements made in the government-established atmosphere are not the product of compulsion because when the defendant and his chosen counsel are given adequate time for consultation before any police interrogation, and counsel is actually present at the police interview, the warnings are rendered superfluous since as a matter of simple logic, if the warnings are meant to protect a defendant until he can consult counsel, they are not necessary when counsel is present. FSM v. Buchun, 23 FSM R. 201, 209 (Yap 2021).

Constitutional Law – Declaration of Rights; Criminal Law and Procedure

U.S. authority may be consulted to understand an FSM Declaration of Rights provision, such as criminal defendants' rights, when it was patterned after one in the U.S. Constitution and because U.S. cases were relied on to guide the constitutional convention. FSM v. Buchun, 23 FSM R. 201, 209 n.7 (Yap 2021).

Criminal Law and Procedure – Interrogation and Confession; Criminal Law and Procedure – Right to Counsel

The prescribed advice or warnings are not mandatory (although they may be advisable) when a suspect has an adequate and meaningful opportunity to confer with an attorney before the custodial interrogation during which the suspect makes the statements in question and the attorney is actually present throughout that interrogation. FSM v. Buchun, 23 FSM R. 201, 210 (Yap 2021).

Criminal Law and Procedure – Venue

The FSM government cannot just move a criminal trial to another state, but either a defendant or the government may petition the court for a change of venue for good cause, and, even if a change-of-venue petition shows good cause, the court must still determine the place of trial with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice. No similar restrictions exist on where a prisoner might be held awaiting trial or where a sentence of imprisonment might be served. FSM v. Buchun, 23 FSM R. 201, 210 n.8 (Yap 2021).

Criminal Law and Procedure – Interrogation and Confession

The totality of the circumstances and not merely the existence or nonexistence of a promise determines whether a confession will be accepted as voluntary or rendered inadmissible as involuntary. To determine whether a defendant's statement to police is voluntary, consistent with the Constitution's due process requirements, courts consider the totality of the surrounding circumstances and review the actual circumstances surrounding the confession and attempt to assess the psychological impact on the accused of those circumstances. FSM v. Buchun, 23 FSM R. 201, 210 (Yap 2021).

Criminal Law and Procedure – Pleas – Plea Agreement

A plea agreement's recommended sentence is not binding on the court, which may impose a different sentence. FSM v. Buchun, 23 FSM R. 201, 210 n.9 (Yap 2021).

Criminal Law and Procedure – Interrogation and Confession; Criminal Law and Procedure – Right to Counsel – Ineffective Assistance

When the suspect, accompanied by his attorney, appears for what will be a custodial interview, the suspect has already exercised his right to have an attorney present to assist him, and he is entitled to receive

effective legal assistance from that attorney. FSM v. Buchun, 23 FSM R. 201, 211 (Yap 2021).

Criminal Law and Procedure – Interrogation and Confession; Criminal Law and Procedure – Right to Counsel – Ineffective Assistance

A defendant is entitled to effective assistance of counsel even during pretrial stages such as a custodial interrogation because the right to counsel is of little value unless there is an expectation that counsel's assistance will be effective. FSM v. Buchun, 23 FSM R. 201, 211 (Yap 2021).

Criminal Law and Procedure – Right to Counsel – Ineffective Assistance

Under FSM law, defense counsel's performance must be both deficient and prejudicial to the defendant to constitute ineffective assistance. To prevail on an ineffective assistance of counsel claim, an appellant must show that 1) counsel's performance was so deficient that it fell below an objective standard of reasonableness, and 2) the deficient performance prejudiced the defense. This showing may be made by a preponderance of the evidence. FSM v. Buchun, 23 FSM R. 201, 211 (Yap 2021).

Criminal Law and Procedure – Right to Counsel – Ineffective Assistance

The proper standard for attorney performance is that of reasonably effective assistance, and, in reviewing the attorney's performance, courts must indulge in a strong presumption of attorney competence. Because the court must presume that counsel's performance was effective, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the counsel's challenged conduct. FSM v. Buchun, 23 FSM R. 201, 211 (Yap 2021).

Criminal Law and Procedure – Right to Counsel – Ineffective Assistance

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the proceedings would have had a different (i.e., better) outcome. Except for those few instances where prejudice is presumed, such as when an attorney represents co-defendants with conflicting interests, prejudice must be shown by the likely impact of counsel's action or inaction on the case's outcome. FSM v. Buchun, 23 FSM R. 201, 211 (Yap 2021).

Criminal Law and Procedure – Right to Counsel – Ineffective Assistance

If the defendant cannot satisfy the ineffective assistance of counsel test's first prong, the court's inquiry should end there, but an analysis might address the second prong first and if the court concludes that there was no prejudice, the court will then further conclude that it does not need to analyze whether counsel's performance was constitutionally deficient. FSM v. Buchun, 23 FSM R. 201, 212 (Yap 2021).

Criminal Law and Procedure – Right to Counsel – Ineffective Assistance

An attorney's strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support limitation on investigation. FSM v. Buchun, 23 FSM R. 201, 212 (Yap 2021).

Criminal Law and Procedure – Interrogation and Confession; Criminal Law and Procedure – Right to Counsel – Ineffective Assistance

The mere fact that counsel advises an accused to make a statement to the police does not constitute inadequate representation as a matter of law, particularly where that advice makes it clear that the decision ultimately lies with the accused. A lawyer has an obligation at the very least to discuss with his client the self-incrimination privilege and the potential consequences of giving a statement to the police, but the decision whether to speak with the police during a custodial interrogation belongs to the suspect. This is true whether the suspect is informed of his right against self-incrimination by police or by prior consultation with an attorney who is present during questioning. FSM v. Buchun, 23 FSM R. 201, 212 (Yap 2021).

Criminal Law and Procedure – Interrogation and Confession; Criminal Law and Procedure – Right to Counsel – Ineffective Assistance

Before affirmatively advising a client to speak about the case to the police, it is necessary for counsel to undertake some investigation of the charge and the government's evidence because without knowing the strength of the evidence the police had at the time, no assessment of the reasonableness of counsel's advice to confess can be made. Circumstances favoring a confession to police are rare, and such advice may constitute ineffective assistance of counsel. Counsel should be properly acquainted with the law governing the proceeding and the facts surrounding the case before advising a client to speak. FSM v. Buchun, 23 FSM R. 201, 212-13 (Yap 2021).

Criminal Law and Procedure – Venue

The government cannot, on its own, move a criminal trial to another state, but must first petition the court for a change of venue, and the court then decides whether venue should be changed based on the defendant's and the witnesses' convenience and the prompt administration of justice. FSM v. Buchun, 23 FSM R. 201, 213 (Yap 2021).

Criminal Law and Procedure – Standard of Proof; Weapons

The government, in order to prove the charge of the use of a firearm to commit the crime of murder has to also prove the murder. FSM v. Buchun, 23 FSM R. 201, 213 (Yap 2021).

Criminal Law and Procedure – Right to Counsel – Ineffective Assistance

In those cases involving claims of inadequate investigation in which the courts have treated the incompetency of counsel issue first, evaluation of that issue necessarily required consideration of the strength of the evidence known to counsel that suggested further inquiry was needed, and whether a counsel's action or inaction was based on a strategic choice, which is a factual question, on which the defendant can offer evidence when the incompetency challenge is presented in a post-conviction proceeding (as often must be the case). FSM v. Buchun, 23 FSM R. 201, 213 (Yap 2021).

Criminal Law and Procedure – Right to Counsel – Ineffective Assistance

A defendant has great difficulty in making an ineffective assistance of counsel claim early in the proceedings instead of post-conviction because the defendant has no final outcome that the defendant can claim is worse than what the defendant would have gotten but for the counsel's alleged ineffective assistance since the defendant has no judgment to overturn. FSM v. Buchun, 23 FSM R. 201, 213 (Yap 2021).

Criminal Law and Procedure – Right to Counsel – Ineffective Assistance

An error by counsel, even if professionally unreasonable, does not warrant setting aside a criminal proceeding's judgment if the error had no effect on the judgment. FSM v. Buchun, 23 FSM R. 201, 213 (Yap 2021).

Criminal Law and Procedure – Interrogation and Confession; Criminal Law and Procedure – Right to Counsel – Ineffective Assistance

Counsel permitting a defendant to make inculpatory statements during an interrogation may be harmless error beyond a reasonable doubt, even though admitted at trial, when the defendant's conviction was based on other evidence. FSM v. Buchun, 23 FSM R. 201, 213 (Yap 2021).

Criminal Law and Procedure – Right to Counsel – Ineffective Assistance

To show that he was prejudiced, a defendant claiming ineffective assistance of counsel, should show that, but for the attorney's ineffective assistance, he could have achieved a better outcome – a dismissal, or an acquittal, or a conviction on a lesser charge, or a lesser sentence. A defendant cannot show ineffective assistance of counsel claim in a pretrial proceeding because the defendant cannot show the prejudice needed when the case has not yet gone to judgment. FSM v. Buchun, 23 FSM R. 201, 214 (Yap 2021).

Criminal Law and Procedure – Interrogation and Confession

Statements made as a result of physical violence or credible threats of physical violence are coerced confessions that must be suppressed. FSM v. Buchun, 23 FSM R. 201, 214 (Yap 2021).

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COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

On December 17, 2020, and on January 11, 14, and February 1, 2021, the court held, via video-conference, an evidentiary hearing on defendant Anthony Tun's Motion to Suppress; Motion for Redaction of Defendant's Name in Co-Defendant's Statements, filed November 17, 2020; Defendant Tun's Supplement to His Motion to Suppress and Motion for Redaction of His Name in Co-Defendant's Statements, filed November 18, 2020; and the prosecution's Response to Defendant's Motion to Suppress and Redaction of Defendant's Name in Co-Defendant's Statements, filed November 26, 2020. As explained below, the motion to suppress[1] is denied.

I. BACKGROUND

A. *October 25, 2019*

Anthony Tun, also known as Anthony Rutun Teteeth and as Anthony Tun Teteeth, was arrested in the evening of October 25, 2019. The arresting officer testified that, when he arrested Tun, he orally advised Tun in English of his right to remain silent, of his rights to talk to an attorney and to have one present during questioning, and his rights to talk to a family member or a co-worker and have them present during questioning and that Tun understood this advice. He also told Tun that there was an arrest warrant for Tun because of a murder allegation against him. Tun was then taken directly to the national police station on Yap.

At the national police station, Tun was not (again) informed of his rights to silence or to an attorney and Tun did not sign (and was not asked to sign) a waiver form to that effect. Tun was questioned from 7:24 p.m. to 7:54 p.m. (mostly by two United States Federal Bureau of Investigation agents who were on Yap to assist the FSM national police). Tun did not make any inculpatory statements during this interrogation. The interrogators then took a break to give Tun time to think things over. They resumed questioning Tun at 8:48 p.m. Tun also was not informed of his rights to silence or to an attorney and did not sign (and was not asked to sign) a waiver before the second interrogation. Questioning continued until 11:51 p.m. It stopped immediately when Tun asked for a lawyer.[2] This was just after the interrogators played for Tun part of a recording of a conversation between Tun and his co-defendant that sounded incriminating.

B. *October 26, 2019*

The next afternoon, October 26, 2019, Tun met with the attorney assigned to him by the FSM Public

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[1] The part of Tun's motion that sought redaction of Tun's name from his co-defendant's statements was granted by an earlier, separate order entered on February 26, 2021.

[2] This was entirely proper because "[w]hen a defendant has expressed a wish to meet with counsel before further questioning, questioning must cease at once." FSM v. Edward, 3 FSM R. 224, 237 (Pon. 1987).

Defenders' Office on Yap.[3] They conferred for about an hour, discussing Tun's various options. Tun's public defender then met with the FSM Attorney General who indicated that the FSM intended to move Tun, and the trial, from Yap to another state, Pohnpei, and that the FSM would also want any sentence imposed on Tun to be served there instead of on Yap, but that, if Tun would "cooperate 100%" with the prosecution, the prosecution would guarantee that Tun would remain on Yap, and that this offer was only available for 24 hours. They also discussed a possible plea agreement and mentioned the possibility of a two-year sentence. The information charging Tun was made available.

After his counsel relayed the government's intentions to Tun and after further consultation, Tun chose to cooperate. During the suppression hearing, Tun testified that his counsel told him to tell the investigators the truth[4] if he wanted to remain on Yap. This interrogation started at 2:10 p.m. Tun was not informed of his rights then. Tun also testified that his former counsel did not inform him that he could remain silent, while his former counsel testified that they had discussed all the various options Tun had, including that he could remain silent. Tun was not asked to sign an advice of rights and waiver form before this interrogation, but his attorney was present with him the whole time. Tun spoke freely and incriminated himself. The interrogation ended at 3:02 p.m., and then the investigators, Tun, and his attorney left together to view sites relevant to the investigation. Tun states that as a result of these site visits, the government acquired further evidence that it now intends to use against him.

C. *Procedural Background*

The FSM charged Tun, in FSM Criminal Case No. 2019-3504, with the illegal possession of a firearm and the use of a firearm to commit the crime of murder of the Yap acting Attorney General. Later, the government filed a superseding information against Tun, Criminal Case No. 2020-3501, and with leave of court, FSM v. Teteeth, 22 FSM R. 438, 446 (Yap 2020), dismissed the original information. On September 3, 2020, Criminal Case No. 2020-3501 was consolidated with the case against Tun's co-defendant. On September 23, 2020, the government filed the current superseding information against both co-defendants, and the previous consolidated case was dismissed.

Tun now moves to suppress his October 26, 2019 statements, and to suppress, as the fruit of the poisonous tree, all evidence recovered as a result of those statements. Tun asserts that this must be done for two reasons: 1) because he was not informed of his rights before he made the October 26, 2019 statements and 2) because those statements were made as a result of the ineffective assistance of his first counsel.

II. WARNINGS AND WAIVERS

A. *Warnings*

Generally, for a defendant's statements made during a custodial interrogation to be admissible evidence, the government must first inform the defendant: 1) that the defendant has the right to remain silent; 2) that anything the defendant says may later be used against the defendant; 3) that the defendant has the right to consult an attorney and to have one present during questioning; and 4) that an attorney will

[3] This particular attorney is now employed (since February 3, 2020) by the FSM Department of Justice as an FSM assistant attorney general and stationed on Pohnpei.

[4] Obviously, defense counsel cannot advise a client to make false statements. Defense counsel can only advise the client to tell the truth or remain silent and explain the consequences of each course of action.

be provided for the defendant without charge if one is requested;[5] and also 5) that the defendant may send a message to a family member or employer. *See* 12 F.S.M.C. 218(7).[6] Thus, the government must show that the defendant was advised of all of these rights; that the defendant understood these rights; and that the defendant knowingly waived these rights before voluntarily making the statements. FSM v. Ezra, 19 FSM R. 497, 509 (Pon. 2014); FSM v. Sangechik, 4 FSM R. 210, 211-12 (Chk. 1990) (defendant must be advised of all the rights in 12 F.S.M.C. 218(1)-(5), not just the rights to remain silent and to counsel).

B. *Waivers*

For defendants to validly waive their rights to silence or to counsel, they must do so knowingly, intelligently, and voluntarily. Ezra, 19 FSM R. at 509; FSM v. Kansou, 14 FSM R. 150, 151 (Chk. 2006). There is a presumption against such waivers. Moses v. FSM, 5 FSM R. 156, 159 (App. 1991); Ezra, 19 FSM R. at 509 (must be a clear and unmistakable warning of the rights being waived); FSM v. Menisio, 14 FSM R. 316, 319 (Chk. 2006); Kansou, 14 FSM R. at 151.

The government thus has the burden of proving, by a preponderance of the evidence, that the defendant voluntarily waived the rights to silence and to an attorney. Ezra, 19 FSM R. at 510; FSM v. Aliven, 16 FSM R. 520, 528 (Chk. 2009); FSM v. Aiken, 16 FSM R. 178, 184 (Chk. 2008); FSM v. Sam, 15 FSM R. 491, 492-93 (Chk. 2008). An accused may be shown to have voluntarily waived any of those rights, either expressly by a written waiver or explicitly by speech or implicitly by conduct, and, although the better practice is to complete a written advice of rights and waiver form before starting questioning, it is not a requirement that the accused do so in order for an accused to make a valid waiver of rights. Ezra, 19 FSM R. at 510.

C. *Application*

Tun asserts that he was never read his rights when he was arrested or at any later time. The government contends that it has shown that Tun was given his rights when he was arrested and that he understood and waived his rights knowingly and intelligently, and that that warning and that waiver remained valid throughout all of Tun's subsequent custodial interrogations.

The government has fallen short of being able to prove that. The court, however, need not make a definitive factual finding now and rule on whether the required warnings were given Tun; or on whether those warnings were adequate; or on whether the government has proven that Tun clearly understood his rights and waived those rights. That is because Tun does not seek to suppress the statements made during the October 25, 2019 interrogations since none of those statements are inculpatory; and, for the reasons explained below in part III, the question of whether the government adequately warned Tun of his rights is not relevant for Tun's October 26, 2019 statements.

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[5] The arresting officer in his testimony, and the attorneys in their written and oral arguments on the current suppression motion, frequently referred to these rights to silence and to counsel as "Miranda rights" and the process of informing persons of these rights as "Mirandizing" them. Undoubtedly, this was because these rights were most famously announced by the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[6] The court has previously noted that 12 F.S.M.C. 218 is "obviously based upon the principles set forth in Miranda, [and] establishes for persons accused of national crimes within the Federated States of Micronesia, statutory rights of the same nature as the constitutional rights announced in Miranda." FSM v. Edward, 3 FSM R. 224, 230 (Pon. 1987).

D. *Judicial Digression*

The court now digresses to express its deep disappointment and grave concern that the FSM law enforcement personnel in this high-profile case were not extra careful to see that Tun's advice of, and any waiver of, his rights were carefully and thoroughly documented before starting to question him. The FSM national police should, as a matter of course, have ready for immediate use carefully prepared advice of rights and waiver forms (preferably bilingual) in English and in the various FSM languages in each state. (If it has not already done so, the Department of Justice should see that such forms are prepared and ready.) The court is deeply troubled that no such English, Yapese, or bilingual English-Yapese forms were used (or seem even to have been available) in this case. The court expected much better.

III. EFFECT OF COUNSEL'S PRESENCE ON WARNINGS

On October 26, 2019, Tun had an adequate opportunity to confer privately with his assigned public defender attorney, and he took advantage of that opportunity for a meaningful consultation with his attorney. Only after that consultation was over did Tun's interrogation resume. Tun's attorney was present throughout that day's interrogation and afterward during the site visits.

Generally, "[t]he presence of counsel . . . would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. [An attorney's] presence would insure that statements made in the government-established atmosphere are not the product of compulsion." Miranda v. Arizona, 384 U.S. 436, 466, 86 S. Ct. 1602, 1623, 16 L. Ed. 2d 694, 719 (1966).[7] "[T]here is no need for Miranda warnings prior to a custodial interrogation when an accused person has had the meaningful opportunity to consult with counsel and counsel is actually present during questioning." State v. Vos, 164 P.3d 1258, 1263 (Utah Ct. App. 2007). "[W]hen the defendant and his chosen defense counsel are given adequate time for consultation prior to any police interrogation, and counsel is actually present at the police interview, the warnings are rendered superfluous." People v. Mounts, 874 P.2d 792, 796 (Colo. 1990). "Miranda warnings are also rendered unnecessary and superfluous where counsel for the defendant is present and defendant has been given an adequate opportunity to consult with counsel prior to the giving of any statement." Collins v. State, 420 A.2d 170, 176 (Del. 1980).

This is because "[a]s a matter of simple logic, if Miranda warnings are meant to protect a defendant until he can consult counsel, Minnick v. Mississippi, 498 U.S. 146, 150, 111 S. Ct. 486, 489, 112 L. Ed. 2d 489, 495-96 (1990), they are not necessary when counsel is present." United States v. Guariglia, 757 F. Supp. 259, 264 (S.D.N.Y. 1991); *see also* Baxter v. State, 331 S.E.2d 561, 568 (Ga. 1975). "[T]he majority of courts that have reached the issue have held that Miranda warnings are not necessary when an attorney is present during questioning and the suspect had an opportunity to consult with the attorney prior thereto." Commonwealth v. Simon, 923 N.E.2d 58, 67 (Mass. 2010). "It is generally accepted that if the attorney was actually present during the interrogation, then this obviates the need for the warnings." 2 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, & ORIN S. KERR, CRIMINAL PROCEDURE § 6.8(a), at 800 (3d ed. 2007); *contra* State v. Joseph, 128 P.3d 795, 809-10 (Haw. 2006) ("defendant must be advised of his or her right to remain silent even if there is an attorney present"); State v. DeWeese, 582 S.E.2d 786, 795-96 (W. Va.

[7] U.S. authority may be consulted to understand an FSM Declaration of Rights provision when it was patterned after one in the U.S. Constitution and because U.S. cases were relied upon to guide the constitutional convention. Afituk v. FSM, 2 FSM R. 260, 263 (Truk 1986); *see also* Primo v. Pohnpei Transp. Auth., 9 FSM R. 407, 412 n.2 (App. 2000). The constitutional convention journal cites Miranda v. Arizona, 384 U.S. 436 (1966) as a guide for the criminal defendants' rights that were adopted in sections 6 and 7 of the Constitution's Declaration of Rights. SCREP No. 23, II J. of Micro. Con. Con. 793, 798. *See supra* notes 5 and 6 for the frequent references to "Miranda" in this case.

2003) (Miranda warning is absolute prerequisite to interrogation regardless of whether counsel is present).

The court hereby adopts the majority view that the prescribed advice or warnings are not mandatory (although they may be advisable) when a suspect has an adequate and meaningful opportunity to confer with an attorney before the custodial interrogation during which the suspect makes the statements in question and the attorney is actually present throughout that interrogation.

The government therefore did not have to advise Tun of his rights or have Tun expressly waive his right against self-incrimination before the October 26, 2019 interrogation. Tun had invoked his right to counsel and, after a lengthy consultation with that counsel, chose to waive his rights to silence and against self-incrimination. And Tun's attorney was present throughout the interrogation.

IV. TRANSFER TO ANOTHER STATE

Tun further contends that any statements he made on October 26, 2019 cannot be considered voluntary because those statements were made as the result of the government's threat to remove him from Yap and hold trial in another state and make him serve any imprisonment in another state.[8]

The totality of the circumstances and not merely the existence or nonexistence of a promise determines whether a confession will be accepted as voluntary or rendered inadmissible as involuntary. FSM v. Jonathan, 2 FSM R. 189, 196 (Kos. 1986). In determining whether a defendant's statement to police is "voluntary," consistent with the Constitution's due process requirements, courts consider the totality of the surrounding circumstances and review the actual circumstances surrounding the confession and attempt to assess the psychological impact on the accused of those circumstances. FSM v. Edward, 3 FSM R. 224, 238 (Pon. 1987).

Looking at the totality of the circumstances, including Tun's hearing the incriminating recording, Tun's consultation with counsel, and counsel's presence throughout the October 26, 2021 interrogation, the court cannot hold that the FSM's promise not to remove Tun from Yap, by itself, made Tun's confession involuntary. That, however, does not end the inquiry.

V. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Tun also contends that his October 26, 2019 statements, and therefore all evidence acquired as a result of those statements and his cooperation should be suppressed because he made those statements due to his then counsel's ineffective assistance. As instances of ineffective assistance, Tun points to his counsel's failure to obtain a written plea agreement with a two-year recommended sentence[9] and the no-removal-from-Yap promise before Tun made his October 26, 2019 admissions; to his counsel's failure to learn exactly what charges the FSM had brought, or intended to bring, against him; to his counsel's alleged advice to "cooperate 100%"; and to his counsel's later perceived inattentiveness to his case such that he felt obligated to retain (his current) private counsel to replace the assigned public defender counsel.

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[8] The FSM government cannot just move a criminal trial to another state. "Either a defendant or the Government may petition the court for a change of venue [for a criminal case] for good cause." 11 F.S.M.C. 106(4). But, even if a change-of-venue petition shows good cause, the court must still "determine the place of trial with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice." *Id.* No similar restrictions exist on where a prisoner might be held awaiting trial or where a sentence of imprisonment might be served.

[9] As Tun acknowledges, a plea agreement's recommended sentence is not binding on the court, which may impose a different sentence. FSM Crim. R. 11(e)(4).

A. *Assistance by Counsel in Custodial Interrogation*

There is no clear authority whether the right to assistance of counsel in connection with a custodial interrogation is a right to the effective assistance of counsel. *See* Commonwealth v. Celester, 45 N.E.3d 539, 552 n.19 (Mass. 2016) (collecting cases both pro and con). But "if counsel fails to provide at least minimally competent advice . . . counsel is not meeting the purpose of ensuring that a defendant have a right to consult counsel in connection with a custodial interrogation." *Id.* at 552-53 (applying the Massachusetts Constitution's right to counsel). But "[a] custodial interrogation of a criminal suspect certainly involves a fundamental liberty interest. It follows that the constitutionally based right to counsel in this setting must be recognized as a right to effective assistance of counsel." *Id.* at 553. "[W]here, as here, the suspect, accompanied by his attorney, appears for what will be a custodial interview, the suspect has already exercised his right to have an attorney present to assist him, and he is entitled to receive effective legal assistance from that attorney." *Id.* at 555.

The court holds that the better view is that a defendant is entitled to effective assistance of counsel even during the pretrial stages such as a custodial interrogation and adopts that view because the "right to counsel is 'of little value unless there is an expectation that counsel's assistance will be effective.'" Commonwealth v. Smiley, 727 N.E.2d 1182, 1186 (Mass. 2000) (attorney advice to defendant before police interrogation should be effective) (quoting Commonwealth v. Griffin, 535 N.E.2d 594, 596 (Mass. 1989)).

B. *Ineffective Assistance Test*

Under FSM law, defense counsel's performance must be both deficient and prejudicial to the defendant to constitute ineffective assistance. Ting Hong Oceanic Enterprises v. FSM, 7 FSM R. 471, 478 (App. 1996). To prevail on an ineffective assistance of counsel claim, an appellant must show that 1) counsel's performance was so deficient that it fell below an objective standard of reasonableness, and 2) the deficient performance prejudiced the defense. Kinere v. Kosrae, 14 FSM R. 375, 382 (App. 2006). This showing may be made by a preponderance of the evidence. State v. Smith, 543 N.W.2d 618, 619 (Iowa 1995). It often requires "a discerning examination and appraisal of the specific circumstances of the given case to see whether there has been serious incompetency, inefficiency, or inattention of counsel–behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer–and, if that is found, then typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defense." Commonwealth v. Saferian, 315 N.E.2d 878, 883 (Mass. 1974).

Under the test's first prong, the proper standard for attorney performance is that of reasonably effective assistance, Ting Hong Oceanic Enterprises, 7 FSM R. at 478, and, in reviewing the attorney's performance, courts must indulge in a strong presumption of attorney competence, Kinere, 14 FSM R. at 382. Because the court must presume that counsel's performance was effective, "the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." State v. McFarland, 899 P.2d 1251, 1257 (Wash. 1995).

Under the second prong, an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Ting Hong Oceanic Enterprises, 7 FSM R. at 478. The second prong requires the defendant to demonstrate a reasonable probability that, but for counsel's deficient performance, the proceedings would have had a different (i.e., better) outcome. Kinere, 14 FSM R. at 382. Except for those few instances where prejudice is presumed, *see, e.g.*, Ting Hong Oceanic Enterprises, 7 FSM R. at 479 (when an attorney represents criminal co-defendants with conflicting interests prejudice is presumed because counsel is burdened by an actual conflict of interest), prejudice must be shown by the likely impact of counsel's action or inaction on the case's outcome. 3 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, & ORIN S. KERR, CRIMINAL PROCEDURE § 11.7(d), at 820, 826 (3d ed. 2007).

C. *Analytical Approaches*

If the movant cannot satisfy the test's first prong, the court's inquiry should end there. Kinere, 14 FSM R. at 382. On the other hand, an analysis might address the second prong first and if the court concludes that there was no prejudice, the court will then further conclude that it does not need to analyze whether counsel's performance was constitutionally deficient. *See* 3 LAFAVE, ISRAEL, KING, & KERR, *supra*, § 11.10(d), at 992 & n.167 (reporting that more cases analyze the second prong – whether there is prejudice – first, rather than undertake the first prong's more subjective analysis of the character of counsel's alleged incompetency); *see also* Celester, 45 N.E.3d at 556 (focusing on second prong first because if the fact-finder was "not likely to have been influenced by the defendant's statement, there would be no need to consider the first point").

D. *Analysis of Claim*

For the reasons stated below, Tun is unable, at this time, to show prejudice, although he might possibly be able to at a later date. The court will, however, analyze both prongs because of the importance of the issues presented.

1. *First Prong*

a. *Choice to Talk*

Tun may have had what either Tun or his counsel considered a legitimate strategic or tactical reason for choosing to "cooperate 100%" – Tun's strong desire to remain on Yap. Tun testified that that was his foremost concern. The FSM agreed to that, and it is an agreement that the government has adhered to – the government has made no attempt to send Tun elsewhere. Tun may now consider that this was insufficient consideration for him to "cooperate 100%" and have second thoughts or regrets. Even so, his counsel's assistance may have fallen below that of an ordinary fallible lawyer. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support limitation on investigation." Strickland v. Washington, 466 U.S. 668, 690-91, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 695 (1984).

"The mere fact that counsel advises an accused to make a statement to the police does not constitute inadequate representation as a matter of law, particularly where that advice makes it clear that the decision ultimately lies with the accused." State v. Black, 815 S.W.2d 166, 184-85 (Tenn. 1991) (citation omitted). A "defendant's lawyer . . . ha[s] an obligation at the very least to discuss with his client the self-incrimination privilege and the potential consequences of giving a statement to the police," Celester, 45 N.E.3d at 554, but "[t]he decision whether to speak with the police during [a] custodial interrogation belongs to the suspect. This is true whether the suspect is informed of his right against self-incrimination by police or by prior consultation with an attorney who is present during questioning." Simon, 923 N.E.2d at 71. Tun's public defender did that.

b. *Duty to Investigate*

But "before affirmatively advising a client to speak about the case to the police, it is necessary for counsel to undertake some investigation of the charge and the government's evidence." Celester, 45 N.E.3d at 555 n.23. That is because "[w]ithout knowing the strength of the evidence the police had at the time, no assessment of the reasonableness of counsel's advice to confess can be made. Circumstances favoring a confession to police are rare, and such advice may constitute ineffective assistance of counsel." Commonwealth v. Moreau, 572 N.E.2d 1382, 1385 (Mass. App. Ct. 1991). In determining whether an

attorney's advice was reasonable, "it is not sufficient to inquire as to what [the attorney] was told by the police. [The attorney] would also have to had to undertake some investigation as to the basis of the information given." *Id.* at 1386 n.4. In Celester, the court agreed that the defendant had been "provided ineffective assistance by instructing or advising him to make a statement to police that had an inculpatory effect . . . and by providing such advice without conducting any investigation of the case and despite the fact that the defendant had been arrested for murder." Celester, 45 N.E.3d at 554.

Counsel should be "properly acquainted" with the law governing the proceeding and the facts surrounding the case before advising a client to speak. United States v. Frappier, 615 F. Supp. 51, 52 (D. Mass. 1985). As stated *supra* note 8, the government cannot, on its own, move a criminal trial to another state, but must first petition the court for a change of venue, and the court then decides whether venue should be changed based on the defendant's and the witnesses' convenience and the prompt administration of justice. 11 F.S.M.C. 106(4). Tun's counsel should have, but appears not to have, been aware of this or taken the time to research this point. Even with the government's arbitrary 24-hour deadline on its offer to guarantee Tun's non-removal from Yap, Tun's counsel had time within which the counsel could become properly acquainted with the law governing the proceeding and the government's evidence against Tun before advising Tun on whether to speak. Tun's counsel did have that limited time to make some investigation into the government's evidence and possible defenses.

There was not much evidence adduced about the extent of the counsel's knowledge of the evidence against Tun. Presumably, Tun informed his counsel about at least some of the evidence against him that he was aware that the government had, and the government may have informed Tun's counsel about some of the evidence it had. During the suppression hearing, Tun's former counsel was questioned about whether counsel knew that the national government had only filed firearms charges against Tun and not murder charges. That particular line of inquiry was not particularly fruitful since the government, in order to prove the charge of the use of a firearm to commit the crime of murder has to also prove the murder.

"[I]n those cases involving claims of inadequate investigation in which the courts have treated the incompetency [of counsel] issue first, evaluation of that issue necessarily required consideration of the strength of the evidence known to counsel that suggested further inquiry was needed." 3 LAFAVE, ISRAEL, KING, & KERR, *supra*, § 11.10(d), at 991. "Whether a counsel's action or inaction was based on a strategic choice is a factual question, on which the defendant can offer evidence when the incompetency challenge is presented in a postconviction proceeding (as often must be the case)." *Id.* § 11.10(c), at 957 (footnote omitted). But as discussed below in the next part, Tun's motion is not part of a post-conviction proceeding, and that may alter the result.

2. *Second Prong*

If Tun were to satisfy the first prong – his counsel's incompetency, the second prong illustrates the great difficulty a defendant has in making an ineffective assistance of counsel claim this early in the proceedings instead of post-conviction. That is because the defendant has no final outcome that the defendant can claim is worse than what the defendant would have obtained but for the counsel's alleged ineffective assistance. Tun has no judgment to overturn.

"'An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.'" Ting Hong Oceanic Enterprises, 7 FSM R. at 478 (quoting Strickland, 466 U.S. at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d at 696). In this case, we do not yet know if the counsel's alleged error has any effect on the judgment because no judgment has yet been rendered. For example, counsel permitting a defendant to make inculpatory statements during an interrogation may be harmless error beyond a reasonable doubt, even though admitted at trial, when the defendant's conviction was based on other evidence, three eyewitnesses, fingerprints, and

recovery of the stolen money. United States v. Sumlin, 567 F.2d 684, 688-89, 49 A.L.R. Fed. 503, 509-10 (6th Cir. 1977).

The interrogators' statements and questions in the second October 25, 2019 interrogation session seem to indicate that the interrogators believed that the government already had enough evidence to convict Tun. At this point, the court cannot determine whether this is true. The interrogators may have been bluffing. But if true, then it would be quite difficult for Tun to show right now that he was prejudiced. That is, that he would have achieved a better outcome – a dismissal, or an acquittal, or a conviction on a lesser charge, or a lesser sentence – than the unknown future outcome that he has yet to obtain. At this point, it is even unknown if the government will use at trial Tun's confession and the evidence acquired as a result of Tun's 100% cooperation. The government might decide to rely solely on other evidence, if it thinks that is convincing. Perhaps, once the case has gone to judgment, Tun will be able to show the prejudice he alleges, but he cannot do so at present. The court therefore must now deny Tun's current ineffective assistance of counsel claim because, Tun cannot, at present, show the prejudice needed.

VI. Alleged Physical Threat

Tun also claims that his October 26, 2019 statements must be suppressed because, as reflected in the transcript of the second interrogation on October 25, 2019, one of the national police officers, who is Pohnpeian, remarked in Pohnpeian to another national police officer, something to the effect of "Why don't we just punch him to get the truth?"

Statements made as a result of physical violence or credible threats of physical violence are coerced confessions that must be suppressed. Arizona v. Fulminante, 499 U.S. 279, 287-88, 111 S. Ct. 1246, 1252-53, 113 L. Ed. 2d 302, 216-17 (1991); *see also* Ezra, 19 FSM R. at 512 ("Of course, the actual use of physical force clearly violates the voluntariness standard.").

There is no evidence that Tun was ever (until his new Pohnpeian-speaking attorney read the interrogation transcript) aware of that possible physical threat. That is because there is no evidence or indication that Tun could understand any Pohnpeian. Tun cannot obtain relief on this ground.

VII. Conclusion

Accordingly, the motion to suppress is denied.

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