FOR PUBLICATION

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, **Plaintiffs,** **v.** **MELVIN A. SABLAN,** DOB: 09/26/1973 **Defendant.**	**CRIMINAL CASE NO. 13-0157R** **ORDER GRANTING MOTION TO SUPPRESS**

I. INTRODUCTION

THIS MATTER originally came before the Court on October 3, 2013 on the Defendant's motion to suppress statements. The parties argued the motion, and the Court ordered the Defendant to file an additional affidavit and scheduled the continuation of the motion, along with an evidentiary hearing, on October 17, 2013. Plaintiff Commonwealth of the Northern Mariana Islands ("Commonwealth") appeared by and through Assistant Attorney General Chemere K. McField. Defendant Melvin A. Sablan ("Defendant") appeared by and through Assistant Public Defendant Matthew H. Meyer.

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II. FACTUAL BACKGOUND

In his motion, Defendant claimed that he was arrested by the Rota Police on June 7, 2013 and taken to the Rota Department of Public Safety for questioning. At 11:37 a.m., Defendant signed a constitutional rights form indicating that he did not want to speak to the police without the presence of an attorney. Despite his invocation of rights, for approximately the next twenty minutes, the police continued speaking to Defendant, threatening that his failure to talk with them would cause him problems. At 12:18 p.m., Defendant signed a second constitutional rights form indicating his willingness to speak with the police without an attorney present. Thereafter, Defendant made statements that might implicate him in the crime charged. Mot. ¶¶ 1-3.

In support of this motion, Defendant's attorney submitted an affidavit attesting to the truth of the allegations contained within the "Statement of Facts" section of the motion. The affidavit states that the "[u]ndersigned counsel attests, affirms and swears that the facts stated in its' [*sic*] motion to suppress statements made by Mr. Sablan are true and accurate, under penalty of perjury." However, as a caveat, the Statement of Facts contained in the motion has a footnote stating:

> This Statement of Facts is derived from the discovery provided by the Government. Defendant does not concede the truth of the allegations or the statements made, and he reserves the right to challenge the information provided in the documents and in this Statement of Facts at any hearing and at trial.

Mot. fn 1.

The Commonwealth opposed the motion, claiming that (1) the motion was not supported by an affidavit from the defendant or any other witness attesting to the alleged facts and (2) suppression is unnecessary because Defendant received a fresh set of *Miranda* warnings before he provided any allegedly incriminating statements.

The Court held a motion hearing on October 3, 2013. During the discussion of the sufficiency of counsel's affidavit in support of the motion to suppress, the Court ordered the

defense to provide an affidavit that complied with *CNMI v. Petrus* no later than October 10, 2013. *Commonwealth v. Petrus*, Crim. No. 12-0235 (Super. Ct. Aug. 28, 2013) (Order Denying Motion to Suppress Statements without Prejudice). One of the Court's main concerns was whether an affidavit from counsel was appropriate, given the nature of the attorney-client relationship and *Petras*' requirement that the affiant be a person "*competent to testify* as to the matters stated in the declaration." *Id.* at 2 (emphasis added). Counsel stated that attorney affidavits were standard practice and that he regularly submitted them in support of suppression motions before other judges at the Commonwealth Superior Court. As such, he was ordered to attach, as part of the requested affidavit, a similar motion to suppress along with a supporting attorney affidavit.

What the defendant did, instead, was two-fold. First, the defense again submitted an affidavit containing no facts but merely attesting to the facts as set forth in the motion. However, this time, the affidavit was signed by the defendant himself. Defendant's second affidavit in support of his suppression motion states the following: "I, Melvin Sablan, swear that the facts alleged in the Motion to Suppress Statements as presented in the Statement of Facts paragraphs 1-3, in the Motion to Suppress Statements filed on August 8, 2013, are true and accurate to the best of my recollection." Second, the motion attached to the submission did not contain an affidavit filed by the attorney of record but rather a third party.

At the evidentiary hearing, the Commonwealth stated that the facts alleged in the motion were insufficient to warrant an evidentiary hearing. The Commonwealth argued that the facts in this motion comprise only a few sentences of conclusory remarks. In comparison, the motion attached to the defendant's second affidavit contained a page and a half of facts. The Commonwealth contends that allowing such a limited statement to warrant an evidentiary hearing would open the door to other defendants simply making short conclusory remarks outlining rights violations in order to shift the burden to the Government to prove that a criminal defendant's rights

were not violated. The Court took that issue under advisement and proceeded with the evidentiary hearing.

The facts as established at the evidentiary hearing are as follows. Detective Taisacan brought the defendant into the Department of Public Safety ("DPS") in Rota on June 7, 2013. Defendant was read his *Miranda* rights, and signed a constitutional rights form indicating that he did not want to speak with the detective without an attorney being present. Defendant was not restrained in any way. Defendant testified that, in addition to indicating his disinterest in speaking without an attorney on the constitutional rights form, he also verbally informed Detective Taisacan that he did not wish to speak and that he wanted a lawyer. After Defendant invoked his rights, he asked to go outside for a cigarette. Detective Taisacan allowed him to do so and joined the defendant outside. When the defendant had finished his cigarette, Detective Taisacan asked him to come back into the building. They went in together and engaged in a conversation primarily about their families. During this conversation, which lasted approximately twenty minutes, Detective Taisacan told the defendant that "it would be better for him if he just told the truth" at least three times. Defendant testified that, at least in relation to Detective Taisacan's initial suggestion that Defendant tell the truth, he again reiterated that he did not want to speak to the police without a lawyer. Defendant testified that this conversation went back and forth between a discussion related to personal matters to a discussion of the case, with Detective Taisacan repeatedly suggesting that Defendant should "just tell the truth". Defendant further testified that he began to feel intimidated and agitated and that he again stated that he did not want to speak without a lawyer.

At some point during this conversation, the defendant decided he no longer wanted to remain at DPS so he left the building. Detective Taisacan called Sergeant Manglona on the telephone to find out what procedures he should follow because the defendant had left DPS without being released from police custody. He then left the building to retrieve Defendant and eventually

brought him back to DPS. Upon returning to DPS, Sergeant Manglona asked to speak to the defendant. During their telephone conversation, Sergeant Manglona told the defendant to cooperate with the police. Sergeant Manglona testified that his instruction was not meant to elicit a confession; rather he wanted the defendant to remain at DPS until he was officially released. The defendant testified that he told Sergeant Manglona that he wanted a lawyer, but Sergeant Manglona told him that DPS did not have money for a lawyer. Defendant further testified that until that point, he believed that he was not under arrest and was free to leave at any time. However, after this incident and his conversation with Sergeant Manglona, Defendant stated that he felt threatened. This incident occurred at some point between the first and second time that Detective Taisacan told the defendant to "just tell the truth". After getting off the telephone with Sergeant Manglona, Detective Taisacan again told the defendant to "tell the truth".

Approximately forty minutes after he had been given the first constitutional waiver form, and shortly after his conversations with Detective Taisacan and Sergeant Manglona had ended, the defendant began talking about the case. Detective Taisacan then read the defendant his *Miranda* rights again and gave him a second constitutional rights form in which the defendant signed off agreeing to speak with the detective without a lawyer.

III. DISCUSSION

A. SUFFICIENCY OF THE MOTION

A defendant who files a motion to suppress "bears the burden of coming forward with at least an offer of proof or some minimal showing that his suppression motion has some factual basis" before the Court is required to hold an evidentiary hearing. *Commonwealth v. Petrus*, Crim. No. 12-0235 (NMI Super. Ct. Aug. 28, 2013) (Order denying motion to suppress statement without prejudice at 1-2). See also *United States v. Howell*, 231 F.3d 615, 620 (9th Cir. 2000); *United States v. Walczak*, 783 F.2d 852, 857 (9th Cir. 1986); *United States v. Harris*, 914 F.2d 927, 933

(7th Cir. 1990); *United States v. Irwin*, 612 F.2d 1182, 1187 n.14 (9th Cir. 1980). A Court may refuse to conduct an evidentiary hearing where no factual basis has been presented in the motion. *Petrus* at 2.

1. The facts alleged in the motion were sufficient to warrant an evidentiary hearing

The standard as discussed above is not a terribly high threshold to meet in order for a defendant to be granted an evidentiary hearing. He must simply set forth facts that provide a "minimal showing" that there is a basis for suppression. *Id.*

Here, the defendant made specific allegations in his motion that the police acted improperly while he was in their custody. In his "Statement of Facts", Defendant alleges that he was arrested and brought into the Rota DPS on June 7, 2013. At 11:37 a.m. he signed a constitutional rights form indicating that he did not want speak to the police without a lawyer present. Despite this request, the police continued to talk with him and threatened that his failure to speak with them would cause problems for him. Approximately forty minutes later, at 12:18 p.m., Defendant signed a second constitutional rights form indicating that he was willing to speak with the police without the presence of an attorney. Mot. ¶¶ 1-3.

The facts as stated in the motion justify further inquiry. As will be discussed in greater detail below, the defendant's accounting of the facts in his motion indicate a clear breach of his constitutional rights. The Commonwealth's Opposition admits that "whether law enforcement has scrupulously honored *Miranda* warnings requires an inquiry into all of the relevant facts". *Opp'n* at 1. With the defendant stating facts that, on their face, indicate a violation of his rights and the Commonwealth presenting no additional facts in its opposition, the Court sees no way to determine the relevant facts other than to hold an evidentiary hearing.

2. Affidavits containing facts are required to support suppression motions

As stated in previous Superior Court decisions, suppression motions must be supported by affidavits. *Petrus* at 1-2; *Commonwealth v. Arriola*, Crim. No. 09-0225 (Super. Ct. June 28, 2010) (Order granting in part Defendant's motion for reconsideration on motion to suppress statement of co-defendant Joseph Ray Arriola, Jr. at 1). Further, affidavits must contain admissible facts. *Petrus* at 2. The Court is baffled that defense counsel seems so perplexed by this concept. The affidavits submitted by the defense are wholly unacceptable in that they contain no facts. Instead, they merely attest to the facts as set forth in the motion. However, not only is it inappropriate to submit an affidavit in this fashion, but here the motion's statement of facts contains a disclaimer disavowing those statements. Thus, the affidavits are virtually useless. Defense counsel is advised that future affidavits filed in support of motions must actually contain facts and may not simply attest to statements made in other pleadings. The moving papers, including the affidavit, must "allege facts with sufficient definiteness, clarity, and specificity" to justify an evidentiary hearing. *Petrus* at 2, citing *United States v. Howell*, 231 .3d 615 (9th Cir. 2000).

3. Attorney affidavits may be sufficient support for suppression motions

During the original October 3, 2013 motion hearing, the Court questioned the validity of an attorney affidavit in support of a suppression motion. The Court believes this practice to present possible conflicts in that the affiant attorney could be questioned based upon statements made in his affidavit. However, the Court recognizes that some jurisdictions allow third party affidavits from persons competent to testify as to the matters stated in the declaration. *Petrus* at 2, citing *United States v. Wardlow*, 951 F.2d 1115, 1116 n.1 (9th Cir. 1991). In fact, our Superior Court has acquiesced to this practice in the recent *Petrus* decision. *Petrus* at 2, citing *United States v. Batiste*, 868 F.2d 1089, 1092 (9th Cir. 1989).

The Court also recognizes that while a criminal defendant's affidavits and testimony in support of a suppression motion cannot be used as evidence of his guilt, they could conceivably be used for impeachment purposes should a he choose to testify at trial. *Id.*; see also *Simmons v. United States*, 390 U.S. 377, 394 (1968); *United States v. Jaswal*, 47 F.3d 539, 543 (2nd Cir. 1995); *United States v. Beltran-Gutierrez*, 19 F.3d 1287, 1291 (9th Cir. 1994). These two juxtapositions create a legal quandary with no adequate solution. However, this Court will adopt the practice already established by our Superior Court and allow third party affidavits, provided that the declarant is competent to testify, in support of suppression motions. The Court believes that this position poses less risk to a criminal defendant than the latter.

B. THE STATEMENTS ARE SUPPRESSED

1. Legal Standards

Criminal defendants have a privilege against self-incrimination. NMI Const. art. I § 5; U.S. Const. amend. V. In order to protect this privilege, suspects must be informed of their constitutional rights before custodial interrogation may begin. *Commonwealth v. Ramangmau*, 4 NMI 227, 17 (1995); *Commonwealth v. Mettao*, 2008 MP 7 at 17, citing *Miranda v. Arizona*, 384 U.S. 436, 445 (1966). Suspects are deemed to be in "custody" when "they are formally arrested or otherwise deprived of their freedom of action in any significant way." *Mettao*, 2008 MP at 17; *Orozco v. Texas*, 394 U.S. 324, 327 (1969). "Interrogation" is defined not only as express questioning but also includes statements made by police officers intended to elicit incriminating responses from a suspect. *Id*; *Commonwealth v. Yan*, 4 NMI 334, 338 (1996); *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

The privilege against self-incrimination is fulfilled only when a suspect is "guaranteed the right 'to remain silent unless he chooses to speak'". *Miranda v. Arizona*, 384 U.S. 436, 460 (1966). Therefore, if a suspect indicates that he wants to remain silent, he has invoked his Fifth Amendment

privilege, and interrogation must stop. *Michigan v. Mosley*, 423 U.S. 96, 100 (1975). Police must scrupulously honor a suspect's rights once he has invoked them. *Miranda*, 384 US at 479. Where a suspect invokes only his right to remain silent, interrogation must cease. *Miranda* 384 U.S. at 474; *Edwards v. Arizona*, 451 U.S. 477, 481 (1981). However, an officer may reinitiate questioning at a later time under limited circumstances. *See*, for example, *Mosley*, 423 U.S. at 102; *United States v. Hsu*, 852 F.2d 407, 410, 411 n3 (9th Cir. 1988). Conversely, when a suspect invokes his right to counsel, all questioning related to any crime must stop until the suspect is provided with counsel. *Edwards*, 451 U.S. at 481; *Arizona v. Roberson*, 486 U.S. 675, 677 (1988). Questioning may only resume if the *suspect* requests further communication with the police. *Id.* at 484-85.

A suspect must voluntarily, knowingly, and intelligently waive his rights before any statements made in response to police interrogation may be used against him. *Mattao*, 2008 MP at 19; *Commonwealth v. Shoiter*, 2007 MP 20 ¶ 8. The Commonwealth bears the burden of establishing, by a preponderance of the evidence, that a defendant's waiver was voluntary. *Mettao*, 2008 MP 21; *Commonwealth v. Ramangmau*, 4 NMI 227, 235 (1995). A waiver is considered voluntary when it is the "product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421 (1986); *Edwards*, 451 U.S. at 482; *Brewer v. Williams*, 430 U.S. 387, 404 (1977). A waiver has been made knowingly and intelligently when the suspect (1) understood that he had the right to remain silent or to speak only in the presence of counsel and (2) appreciated the consequences associated with waiving these rights when he spoke with the police. *Id.* See also, e.g. *Jaswal*, 47 F.3d at 542. A court will look at the totality of the circumstances, which will include a review of the characteristics of the accused and the details of the interrogation, in order to determine whether *Miranda* rights were validly waived. *Mettao*, 2008 MP at 19, citing *Ramangmau*, 4 NMI at 235; *Shoiter* 2007 MP at ¶ 8. See also, e.g. *Moran*, 475 U.S. at 421; *Fare v. Michael C.*, 422 U.S. 707, 725 (1979); *Miranda*, 384 U.S. 475-77.

2. Analysis

The Commonwealth argues that suppression is unnecessary because Defendant received a fresh set of *Miranda* warnings before he provided his statement to Detective Taisacan. However, the Commonwealth has misapprehended the law. While a fresh set of *Miranda* warnings may allow further police questioning in limited circumstances when a suspect has invoked only his right to remain silent, fresh warnings do not negate the obligation to cease questioning once a suspect has invoked his right to counsel. *Edwards*, 451 U.S. at 484; *Roberson*, 486 U.S. at 683. The United States Supreme Court has created a "bright-line rule" that sets out "'clear and unequivocal' guidelines to the law enforcement profession" in relation to suspects who have invoked their right to counsel. *Roberson*, 486, U.S. at 681-82, citing *Edwards*, 451 U.S. at 484. Once "a person in custody has expressed his desire to deal with the police only though counsel, he 'is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police'" "about the investigation." *Id*. at 681-82; 684, citing *Edwards*, 451 U.S. at 484-85. If interrogation continues after the right to counsel has been invoked, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived" his rights. *Miranda*, 384 U.S. at 475.

In this case, the key facts are: (1) Defendant invoked his right to counsel when he signed the original constitutional rights form by indicating that he did not wish to speak to law enforcement without an attorney present; (2) Defendant verbally invoked his right to counsel to both Detective Taisacan and Sergeant Manglona; (3) despite this invocation discussion about the case did not cease; (4) Defendant did not initiate the continued discussion about the case; and (5) Defendant was not provided with an attorney while in police custody.

There is no indication of who initiated the conversation between Detective Taisacan and Defendant. This fact, though, is unimportant here because the discussion started out as one about family. It was Detective Taisacan who initiated discussion about the case by subtly coercing the defendant to provide statements, in direct contravention of the law. *Roberson*, 486 U.S. at 684.

An individual who invokes his right to counsel indicates that he "does not feel sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney." *Id.* "Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement". *Mosley*, 423 U.S. at 100-01. "[T]o a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without counsel having been provided…surely exacerbate[s] whatever compulsion to speak the suspect may be feeling." *Roberson*, 486 U.S. 686.

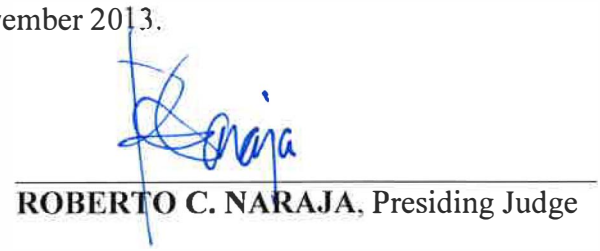
The inherently coercive nature of being detained and interrogated by law enforcement is precisely what took hold in this case. The defendant first invoked his right to counsel when he signed the initial constitutional rights form. He also verbally requested an attorney. Despite the invocation of his right to counsel, no attorney was contacted on his behalf, nor was one provided to him during the time the defendant remained in police custody. Detective Taisacan continually worked on the defendant by stating several times that he should tell the truth. This suggestion was clearly intended to elicit incriminating responses from the defendant. When the defendant attempted to leave DPS, he was escorted back into the building by Detective Taisacan, informed that he was not free to leave, and told to cooperate by Sergeant Manglona. Thereafter, Detective Taisacan again told the defendant that he should tell the truth. It was only after being denied counsel, being detained at DPS, and being pressured by law enforcement that the defendant signed the second constitutional rights waiver and gave his statement. It is clear from the facts of this case that the police did not scrupulously honor the defendant's rights. It is equally clear that the

defendant did not validly waive his rights. Therefore, all statements made to the police on June 7, 2013 must be suppressed.

IV. CONCLUSION

Defendant's motion to suppress is **GRANTED**. The statements made to police on June 7, 2013 are hereby suppressed.

IT IS SO ORDERED this 14th day of November 2013.



ROBERTO C. NARAJA, Presiding Judge