FSM SUPREME COURT
TRIAL DIVISION (Pon.)
Cite as *FSM v. Edward*,
3 FSM Intrm. 225 (Pon.1987)

[3 FSM Intrm. 224]

FEDERATED STATES OF MICRONESIA,
Plaintiff,

v.

STEWARD EDWARD,
Defendant.

CRIMINAL CASE NO. 1987-515

OPINION

Before Edward C. King
Chief Justice
October 26, 1987

APPEARANCES:

For the Plaintiff: Randy M. Boyer
Pohnpei State Attorney
Pohnpei, FSM 96941

For the Defendant: Fred Atcheson
Public Defender's Office
Truk, FSM 96942

* * * *

HEADNOTES

Constitutional Law - self incrimination

Protection offered by the Constitution of the Federated States of Micronesia against compulsory self-incrimination is traceable to the fifth amendment of the United States Constitution. FSM v. Edward, 3 FSM Intrm. 224, 230 (Pon. 1987).

Constitutional law - general;
Criminal law and Procedure - custody

Under FSM law, courts will rarely be required to look to the Constitution to determine the scope of any right a person in custody may have to be advised of rights before questioning because national statute establishes the rights of persons accused of national crimes. 12 F.S.M.C. §§ 218, 220. FSM v. Edward, 3 FSM Intrm. 224, 230 (Pon. 1987).

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Constitutional Law - general

If a dispute properly may be resolved on statutory grounds without reaching potential constitutional issues and without disserving constitutional principles, the Court should do so. FSM v. Edward, 3 FSM Intrm. 224, 230 (Pon. 1987).

Criminal Law and Procedure - arrest

One should be considered "arrested" for purposes of the right to be advised of his rights to remain silent when one's freedom of movement is substantially restricted or controlled by a police officer exercising official authority based upon the officer's suspicion that the detained person may be, or may have been, involved in commission of a crime. FSM v. Edward, 3 FSM Intrm. 224, 232 (Pon. 1987).

Criminal Law and Procedure - interrogation

Voluntary admissions prompted by the accumulation of evidence against the defendant are a legitimate goal of police investigation. Edward v. FSM, 3 FSM Intrm. 224, 232 (Pon. 1987).

Evidence - presentation

Where admissions have been obtained in the course of questioning concluded in violation of 12 F.S.M.C. 218, statutory policy calls for a presumption that subsequent admissions were obtained as a result of the violation. FSM v. Edward, 3 FSM Intrm. 224, 231 (Pon. 1987).

Constitutional Law - waiver

Waiver of a fundamental right may, not be presumed in ambiguous circumstances. FSM V. Edward, 3 FSM Intrm. 224, 235 (Pon. 1987).

Criminal Law and Procedure - interrogation

When a defendant has expressed a wish to meet with counsel before further questioning, questioning must cease at once. Any attempt by police officers to ignore or override the defendant's wish, or to dissuade him from exercising his right, violates 12 F.S.M.C. 218. FSM v. Edward, 3 FSM Intrm. 224, 235 (Pon. 1987).

Criminal Law and Procedure - self-incrimination

A statement of a defendant may be used as evidence against him only if the statement was made voluntarily. FSM v. Edward, 3 FSM Intrm. 224, 236 (Pon. 1987).

Criminal Law and Procedure - Self incrimination;
Evidence - admissions

In determining whether a defendant's statement to police is "voluntary," consistent with the due process requirements of the Constitution, courts

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should consider the totality of the surrounding circumstances. Courts review the factual circumstances surrounding confession and attempt to assess the psychological impact on the accused of those circumstances. FSM v. Edward, 3 FSM Intrm. 224, 238 (Pon. 1987).

* * * *

COURT'S OPINION

EDWARD C. KING, Chief Justice:

Defendant Steward Edward is charged with the murder of Tony Dosolwa on or about June 19, 1987, in violation of 11 F.S.M.C. 911. Mr. Edward moves to suppress, that is, to

bar from evidence a statement he made to police officers during questioning the day after the victim died.

Mr. Edward contends that this written statement was taken in violation of his rights under 12 F.S.M.C. 218 and article IV, sections 3, 6 and 7 of the Constitution of the Federated States of Micronesia.

Mr. Edward was picked up by police officers sometime shortly after 11:00 a.m. on June 19. Some eleven hours later, just after 10:00 p.m., he signed the statement, which both parties apparently agree tends to incriminate him.

Mr. Edward contends that his signing of the statement was not a voluntary act, but instead was caused by his weakened condition, which in part resulted from the actions of the police in confining and questioning him for an extended period of time on June 20 without advising him of his rights to remain silent or honoring his right to have counsel present at questioning. He insists that he does not now, and did not at the time he signed the statement, remember having harmed Tony Dosolwa.

For the reasons stated in this opinion, the Court concludes that significant violations of 12 F.S.M.C. 218 occurred during the June 19 questioning, that the statement resulted in substantial part from denial of his right to consult with counsel, and that the statement was not voluntarily made. Therefore the motion to suppress is granted.

I. Factual Background

A great deal of conflicting testimony has been presented. Most of it centers around the methods of interrogation employed by the police. Mr. Edward insists that he was stripped naked and questioned extensively by police officers. He also has testified that two police officers were in the room with him throughout much of the questioning and that during at least some part of the questioning one officer was in front of him while another stood behind him holding a piece of metal, or pipe. He says also that his hair was pulled

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by police officers. Finally, he contends that officers subverted his will by misinforming him. For example, Mr. Edward had scratches on the back of his neck and his side during the questioning. According to Mr. Edward, police, officers told him, inaccurately, that samples of his skin had been obtained from Tony Dosolwa's fingernails and that his keys and trousers had been found immediately next to Tony Dosolwa's body. The police officers who testified all deny these charges.

Having observed the demeanor of the witnesses and reflected upon the testimony offered during the hearing on the motion to suppress, I make the following findings of fact.

Steward Edward, 18 years old, was a senior at PICS High School and participated in graduation ceremonies on June 18. He was awake almost the entire night of June 17 preparing food for celebration of the graduation. He did not sleep at any time on June 18 and did not eat anything after the sun rose that day. On the night of June 18, at approximately 6:00 p.m., he began drinking-alcoholic beverages. Throughout the rest of the evening he consumed some twelve cans of beer and approximately 12 ounces of 151

proof rum. He did not eat anything.

At some point during the predawn hours of June 19, while he was at or in the vicinity of the Blue Magic bar in U Municipality, Steward Edward either went to sleep or passed out. He awakened the next morning, June 19, at the Blue Magic bar. He was wearing only underpants and shoes, sitting on a chair with his head on a table. He was hung over and ill.

He left the Blue Magic with a young man from Awak. As they were passing the Pohnpei hospital, Steward Edward saw his father with their car which Steward had abandoned there the night before it broke down.

Steward spent most of the remainder of the morning visiting friends in an effort to track down the keys to the car. In the course of these activities one person told him of the death of Tony Dosolwa. Steward Edward then went to see his mother, who was working in the Porakiet area.

Meanwhile, police officers were conducting an investigation of Tony Dosolwa's death. Detective Elson Mudong had been told by several people that trousers and keys found near the crime scene belonged to Steward Edward. He dispatched officer Costan Yoma to bring Steward Edward to police headquarters.

At approximately 11 a.m., just about the time Steward Edward was leaving from his visit with his mother, Officer Yoma spotted him driving a gray sedan alone in Porakiet. Officer Yoma stopped Steward Edward, had him get out of the gray sedan and into the police car, and drove him to the police station.

At the station, Detective Mudong showed Mr. Edward the trousers and keys and asked if they belonged to him. Mr. Edward acknowledged that they did, whereupon Detective Mudong told him to wait in a room just next to the booking or reception desk in the police station.

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This was a small room with one desk and a chair. The room has louvered windows and an unlocked door so was not entirely secure. At the same time, no officer ever advised Mr. Edward that he was free to leave, and he did not believe he would be permitted to leave.

Steward Edward sat at the chair and desk. Throughout the afternoon a series of officers camp into the room, usually one at a time, and asked various questions of him. During intervals between questioning sessions, Mr. Edward dozed off from time to time. This continued until approximately 4 p.m., when Detectives Joe Roby and Lucas Carlos took him to the detectives' office for further questioning.

At no time throughout these sessions, from approximately 11:30 a.m. until about 7 p.m., did any officer advise Mr. Edward that he had a right to remain silent and could decline to answer questions. Nor was he told during this time that he was entitled to have legal counsel and that counsel could be present during any further questioning.

At about 7 p.m., Detective Roby decided to have Mr. Edward confined in jail. This was done on the grounds that the police by then had enough information to justify charges against him. Detective Roby testified that Mr. Edward was also subject to confinement on grounds that he was still intoxicated. Although there is no corroborating written evidence or supporting testimony from other police officers, and despite Mr. Edward's denial, the Court accepts as true Detective Roby's testimony that he advised Mr. Edward of his rights for the first time while booking him into jail.

Mr. Edward did not remain at the jail for long. Shortly after being placed there, he was taken to the hospital for examination. This was Mt at his request or for his own health care, but instead was intended primarily to provide a record for the police of Mr. Edward's scars and scratches.

Throughout the entire time Mr. Edward was given nothing to cat. By the time he signed the statement at issue here, Mr. Edward had not eaten for more than 40 hours and had slept only fitfully, for a few hours, during the preceding 60 hours.

At approximately 9 p.m., very shortly after Mr. Edward was returned to the jail from the hospital, Detective Roby had him brought back to the detectives' office. The questioning continued. At about 10 p.m., Mr. Edward said he would be willing to make a statement. Detective Roby then called in another officer, Josaiah Santos, to advise the defendant of his rights.

This time, when Mr. Edward was advised of his right to have counsel

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present, he said that he did wish to have counsel. Officer Santos began to leave the room, whereupon Mr. Edward said he did not need an attorney immediately.

Officer Santos promptly renewed his reading of the rights. Mr. Edward then signed two Pohnpeian language forms, one indicating that he had been advised of his rights, the other stating that he did not desire to have an attorney brought to him immediately.

Detective Roby then resumed questioning. The result is the statement which is the subject of the motion to suppress now under consideration.

II. Legal Analysis

A. Advice Prior to Questioning

Until about 20 years ago, the admissibility of statements made by an accused in custody was determined solely by whether the statements were voluntary." See FSM v. Jonathan, 2 FSM Intrm. 189, 195 (Kos. 1986).*1*

In 1968 however, the United States Supreme Court determined that certain "procedural safeguards" are constitutionally necessary "to secure the privilege against self-incrimination" of any person "taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706 (1966) (footnote omitted).

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney there can be no questioning.

384 U.S. at 444-45, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706-07.

In the United States, these "Miranda rights" have now become the primary analytical tool in considering claims that protections against self-incrimination have been violated.

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Protection afforded by the Constitution of the Federated States of Micronesia against compulsory self-incrimination is traceable to the fifth amendment of the United States Constitution. FSM v. Jonathan, 2 FSM Intrm. at 194. Thus, to determine the scope of that constitutional protection, and the necessity for attendant procedural safeguards, we would look for guidance to Miranda and its United States progeny.2 Primary emphasis would be placed upon decisions made before the Micronesian Constitutional Convention adopted the proposed Constitution on November 8, 1975. of secondary, but significant, import would be United States decisions made before ratification of the Constitution in the plebiscite held on July 12, 1978. See Alaphonso v. FSM, 1 FSM Intrm. 209, 216 (App. 1982).

Under the present state of the law in the Federated States of Micronesia however, courts will rarely, if ever, be required to look to the Constitution to determine the scope of any right a person in custody may have to be advised of rights before questioning. This is because a national statute, obviously based upon the principles set forth in Miranda, 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. 12 F.S.M.C. §§ 218, 220.

Unnecessary constitutional adjudication is to be avoided. In re Otokichy, 1 FSM Intrm. 183, 190 (App. 1982). If a dispute properly may be resolved on statutory grounds without reaching potential constitutional issues and without disserving constitutional principles, the court should do so. Ponape Chamber of Commerce v. Nett Municipal Gov't, 1 FSM Intrm. 389, 402 (Pon. 1984). Accordingly, analysis begins with the statute.

1. The statutory rights - Subsections (1) through (5) of 12 F.S.M.C. 218 enumerate a panoply of rights which may not be denied in case of an arrest. These include, among others, the right of counsel "to see the arrested person once, at any time,' the rights of the arrested person to see counsel, family members and others, the right to send a message, and the righteither to be released within a reasonable time or to be brought before a judge.

However, the statute in its original form, as promulgated by a Trust Territory High

Commissioner, imposed "no express obligation on anyone to inform the arrested person of these rights." Trust Territory v. Poll, 3 TTR

[3 FSM Intrm. 231]

387, 393 (Pon. 1968).3

In 1968 the Congress of Micronesia enacted provisions, now codified as 12 F.S.M.C. §§ 218(6) and (7), designed to assure that an arrested person will be advised of his rights. Pub. L. No. 4-5 (1st. Cong., 4th Reg. Sess. 1968).

> § 218(6). [F]urther, it shall be unlawful for those having custody of one arrested, before questioning him about his participation in any crime, to fail to inform him of his rights and their obligations under subsections (1) through (5) of this section.
>
> § 218(7). In addition, any person arrested shall be advised as follows:
>
> (a) that the individual has a right to remain silent;
>
> (b) that the police will, if the individual so requests, endeavor to call counsel to the place of detention and allow the individual to confer with counsel there before he is questioned further, and allow him to have counsel present while he is questioned by the police if he so desires; and
>
> (c) that the services of the Public Defender, when in the vicinity, or of his local representative, are available for these purposes without charge.

12 F.S.M.C. §§ 218 (6) and (7).

2. Persons entitled to advice - The rights to be advised are owing to "one arrested," § 218(6), and to "any person arrested." 12 F.S.M.C. 218(7).

"Arrest" is defined as "placing any person under any form of detention by legal authority." 12 F.S.M.C. 101(1). The report of the Congress of

[3 FSM Intrm. 232]

Micronesia House of Representatives Committee on Judiciary and Governmental Operations states that the purpose of Public Law No. 4-5 is to assure that any person "interrogated by the police as a criminal suspect" is to be warned of these rights. SCREP No. 21. House J. of Cong., 4th Reg. Sess. (July 8, 1968 to Aug. 6, 1968).

These references coincide with the mainstream of legal thought about the term "arrest." Most who have considered the question agree that, although brief detention for questioning about suspicious circumstances is not an arrest,4 neither is a formal charge essential. Henry v. United States, 361 U.S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959).

The Court concludes that the legislation was intended to invoke general principles

concerning the meaning of the term "arrested." Thus, one should be considered "arrested" within the meaning of 12 F.S.M.C. 218 when one's freedom of movement is substantially restricted or controlled by a police officer exercising official authority based upon the officer's suspicion that the detained person may be, or may have been, involved in commission of a crime. See generally J. Cook, Rights of the Accused: Constitutional Pretrial Rights § 6 (1972).

It need not be determined here precisely when the arrest of Mr. Edward took place. He does not contend that Officer Yoma's actions in taking him to the police station constituted an arrest. Nor does he object to the brief questioning by Detective Mudong immediately upon Mr. Edward's arrival at the police station.

Instead, he simply insists, and I agree, that by the time these events had transpired and he was sent into a room to await further instructions, he was an arrested person entitled to be advised of his rights "before questioning ... about his participation in any crime." 12 F.S.M.C. 218(6).

3. Violation and sanctions - Plainly, the defendant's rights under 12 F.S.M.C. 218(6) and (7) were violated when he was detained and questioned for some six or seven hours without being advised of his rights.

While 12 F.S.M.C. 218 establishes various rights the denial of which is "unlawful," the section imposes no specific penalty for violations. Instead, the primary sanction is supplied by 12 F.S.M.C. 220: "No violation of the provisions of this chapter shall in and of itself entitle an accused to an acquittal, but no evidence obtained as a result of such violation shall be admissible against the accused...."

The issue, then, is whether the statement made by Mr. Edward after he was advised of his rights was "obtained as a result of" the earlier questioning conducted without such advice.

[3 FSM Intrm. 233]

Of course, voluntary admissions prompted by the accumulation of evidence against the defendant are a legitimate goal of police investigation. This Court has previously recognized that when a defendant is faced with persuasive evidence, including an admission, he may be overwhelmed" concluding that further resistance would be futile. FSM v. Jonathan, 2 FSM Intrm. at 198.***5***

On the other hand, 12 F.S.M.C. 220 prohibits the use of evidence or admissions, gained through violation of the defendant's rights under 12 F.S.M.C. 218, to elicit other admissions from the defendant. Where admissions have been obtained in the course of questioning conducted in violation of 12 F.S.M.C. 218, statutory policy calls for a presumption that subsequent admissions were obtained as a result of the violation. Unless the government rebuts the presumption by showing a break in the chain of events or through some other satisfactory showing, the subsequent admissions will be rendered inadmissible by 12 F.S.M.C. 220.***6***

[3 FSM Intrm. 234]

Here, however, there has been no showing either that Mr. Edward made any admissions during the initial unlawful questioning or that the earlier questioning in any direct way led to the admissions contained in the subsequent statement. This record furnishes no basis for either a presumption or an ultimate conclusion that the statement made by Mr. Edward at 10:15 p.m. on June 19, 1987 was obtained as a result of the unwarned questioning.

The actions of the police officers in holding Mr. Edward for several hours and questioning him without advising him of his rights were significant. Those actions contributed to a general atmosphere in which it appeared that the police bad all the power, and that Mr. Edward was completely at their mercy. Thus, the violation of 12 F.S.M.C. 218 was an important part of the totality of circumstances supporting this Court's conclusion that Mr. Edward's submission to questioning later that night without consulting with counsel, and his statement to the police, were not voluntary acts.

However, based on the preceding analysis in this portion of the opinion, the Court concludes that the unlawful questioning of Mr. Edward during the afternoon of June 19, without prior advice of his rights, although in violation of 12 F.S.M.C. 218, does not require suppression pursuant to 12 F.S.M.C. 220 of Mr. Edward's later statement made after he had been advised of his rights.

B. Right to Counsel Before Questioning

At about 10:15 p.m., shortly before he signed the statement, Mr. Edward was advised of various rights, including his right under 12 F.S.M.C. 218(7)(b) to confer with counsel before being questioned further.

In response, he indicated that he desired to have counsel present. However, when the officer advising him of his rights began to leave the room, Mr. Edward said that he did not need a lawyer immediately. The officer, apparently interpreting Mr. Edward's remark as waiver of his right to consult with counsel before being questioned further, returned to the room and resumed reading Mr. Edward's rights to him. The officers then presented Mr. Edward with written forms, which he signed. The forms contain statements that he understood his rights, including his right to counsel, and that he did not desire to have counsel brought to him immediately. Questioning was then resumed and the statement at issue in this motion was obtained.

The issue here is whether, after Mr. Edward invoked his right to meet with counsel before further questioning, he then voluntarily waived that right either by saying that it would not be necessary for him to meet with counsel immediately, or by acquiescing in signing the forms and then making the statement which he now seeks to suppress.

1. Waiver - Waiver of a fundamental right may not be presumed in ambiguous circumstances. In re Iriarte (II), 1 FSM Intrm. 255, 264-65 (Pon. 1983). For waiver to be effective, there must be clear and unmistakable

[3 FSM Intrm. 235]

reference to the rights waived. Id.7

These principles should be applied with an awareness that many arrested persons in the Federated States of Micronesia, even when fully apprised of their right to counsel, may fail to perceive the significance of the right.

> Another important difference [from conditions in the United States] is the much lower degree of general understanding as to the functions of counsel, the responsibilities of the police and limitations on their powers, and the much greater apprehension of danger of [sic] police requests are not complied with or unnecessary requests are made of them. [The predecessors of 12 F.S.M.C. §§ 218 and 220] have proved largely ineffective because apparently most Micronesians under arrest for examination either never think of asking to see anyone or do not dare to ask.... In the present case, the accused's principal complaint voiced against the constabulary is not that they failed to notify him of his right to counsel, but that they failed to explain to him why he needed counsel, and in a surprising number of cases, we have found instances of an accused stating that he desired counsel, but apparently quite freely going on to talk about the merits of the case without any effort to obtain counsel or have counsel obtained for him on the theory that counsel would only be important at the time of trial, even though the "notice to accused" used has expressly advised him that he has the right to advice of counsel before making any statement which may involve him as an accused in any criminal action.

Trust Territory v. Poll, 3 TTR 387, 399-400 (Pon. 1968) (Furber, C. J.).

It would be unrealistic, and probably impossible, for police officers and courts to take unto themselves the responsibility of assuring that all parties who waive rights are fully aware of all uses to which that discarded right could have been put. Yet, the point made by former Trust Territory High

[3 FSM Intrm. 236]

Court Chief Justice Furber in Poll serves as a healthy reminder that within the social context of the Federated States of Micronesia, courts should indeed"indulge every reasonable presumption" against waiver of the right to counsel.*8*

With these principles in mind, we move to analysis of the claimed waiver.

Mr. Edward said only that he did not need to see a lawyer immediately. He said nothing about being questioned further at that time. He also did not say that he would be willing to be questioned without first having consulted with counsel.

The officers apparently assumed that these latter ideas were necessarily implied by his statement that he did not need to see an attorney immediately. Their assumption is understandable since his comment was made in a context where Mr. Edward had said he would make a statement, the officers were poised and eager to obtain a statement, and only the mention of a lawyer had halted progress.

However, government officers may not so readily assume that a waiver of fundamental right was intended but instead must indulge every reasonable presumption against such a waiver. Mr. Edward's words could be treated as a waiver only if his expressed willingness to defer meeting with an attorney clearly and unmistakably conveyed willingness to be questioned further without first consulting with counsel.

The requisite clarity did not exist here. The words Mr. Edward used are consistent with the possibility of waiver, but they are equally consistent with alternative interpretations reflecting no intention to waive the right to consult with counsel before being questioned further. For example, the words are consistent with both of the following possible meanings:

1. Mr. Edward still wanted to see counsel before being questioned further but was willing to defer both events until some later time.

2. Without giving any thought to the logical or temporal relationship between presence of counsel and continued questioning, Mr. Edward was trying to be polite and accommodating, wishing not to be seen as imposing on Detective Santos and other officers the burden of searching for an attorney at 10:30 p.m. on Friday night.

The Court considers both of those alternative interpretations more likely than the officers' assumption. Both interpretations are fully consistent with the circumstances in which Mr. Edward spoke.

[3 FSM Intrm. 237]

The first, calculated to defer further questioning until the next day, could be anticipated of a person who, without food or sleep for a considerable period of time, had been held for some 12 hours and questioned during much of that time. The second alternative interpretation would be consistent with the temperament of one who, under the control of others, wished more than anything to avoid offending them.

In considering these various possible interpretations, it is noteworthy also that the interpretation of the police officers does not align well with common sense or normal human experience. It is difficult to understand why a person who had just asserted a right would then almost immediately waive that right. In absence of some explanation, which has not been proffered here, such odd behavior is not to be assumed.

In any event, whatever may be the correct interpretation of Mr. Edward's words as Detective Santos was leaving the room, the crucial point is that the words were ambiguous. Mr. Edward's statement was not sufficiently clear or unmistakable to constitute a waiver, or revocation, of his right to consult with counsel before being questioned.

2. Waiver by subsequent conduct - Mr. Edward's subsequent conduct in signing the forms, engaging in continuing colloquy with the officers, and providing a statement, also may not be regarded as a waiver of the right to consult with counsel.

When a defendant has expressed a wish to meet with counsel before further

questioning, questioning must cease at once. Any attempt by police officers to ignore or override the defendant's wish, or to dissuade him from exercising his right, constitutes a violation of a defendant's rights under 12 F.S.M.C. §§ 218(1),(2),(6) and (7).

While the Court does not question the good faith of the police officers here in believing that Mr. Edward had revoked his earlier request and waived his right to have counsel present, no waiver had in fact occurred. It follows that their actions in then presenting the waiver form to Mr. Edward and resuming questioning were in violation of his right to have his earlier request respected.

I summarize. Mr. Edward properly invoked his right to counsel under 12 F.S.M.C. 218. He did not waive that right or revoke his earlier request. It was therefore violative of section 218 for the officers to present the waiver form to him for his signature and to resume questioning. The statement obtained as a result of these actions is inadmissible under 12 F.S.M.C. 220.

C. Voluntariness

An additional claim of Mr. Edward is that his statement was not voluntarily made. He asserts that his will was overborne by improper actions of police officers and by the totality of the circumstances, and that the statement was not his own voluntary act as a free agent but, in essence, was

[3 FSM Intrm. 238]

suggested to him by the officers, then extracted from him through compulsion.

Article IV, section 7 of the Constitution of the Federated States of Micronesia protects an accused person from being "compelled to give evidence that may be used against him in a criminal case." The due process clause, article IV, section 3, also protects accused persons against improper and coercive methods. Under these provisions, a statement of a defendant maybe used as evidence against him only if the statement was made voluntarily.***9***

Although 12 F.S.M.C. §§ 218 and 220 are designed to implement and support these constitutional protections, it remains possible that a statement obtained in compliance with the requirements of 12 F.S.M.C. 218 may nevertheless be involuntary. Although 12 F.S.M.C. 218 establishes several important rights of the defendant, the statute is silent about numerous forms of coercion historically employed to extract statements from criminal defendants.

Thus, while we are spared by 12 F.S.M.C. 218 from engaging in constitutional analysis concerning advice to a defendant of his rights prior to questioning, it remains necessary to measure claims that a statement was involuntary against the standards supplied by the Constitution itself. See FSM v. Jonathan.

In Jonathan, the Court set out standards to be applied in assessing such a claim:

> What is `voluntary,'... may not be resolved by reference to any single infallible touchstone but instead must be determined by reference to the totality of

> surrounding circumstances. In determining whether a confession was voluntarily made, the courts have considered numerous factors about the accused and the interrogation. These include the age, education, intelligence and general sophistication of the accused, whether he had been advised of his constitutional rights, the length of detention, whether the questioning was repeated or prolonged, whether the accused person had been deprived of food or sleep and other facts indicating the atmosphere of the interrogation. Courts review the factual circumstances surrounding a confession and attempt to assess the psychological impact on the accused of those circumstances.

[3 FSM Intrm. 239]

2 FSM Intrm. at 197 (citations omitted).

On June 19, Steward Edward was just 18 years old and freshly graduated from high school. He had never before been accused of a crime nor exposed to police interrogation. He was not well equipped by age or background to withstand police pressures.

When he was picked up by officer Yoma, Mr. Edward's youthful vulnerability was magnified by weakened physical condition. Hung over from a night of excessive drinking, he had not eaten for more than 24 hours and had almost no sleep during the two preceding nights. These conditions were by no means alleviated during the eleven hours he was in police custody before the statement was made.*10*

The treatment he received at the hands of the police surely weakened him still further and increased his sense of helplessness. Foremost in importance is the fact that he was illegally subjected to police control and questioning for some seven or eight hours without a hint from anybody that he might have any rights in those circumstances.

Throughout the day he was required to remain in a room in the police station, his isolation punctuated from time to time by unannounced visits from various police officers, each of whom questioned him. At various times he was asked to remove items of clothing. one officer testified that the requests to remove his trousers were made so that his method of doing so might be observed. The requests to remove his shirt were to permit officers to inspect scratches on his body. Whatever the purpose may have been, such forced disrobing surely lent to the general atmosphere of police domination.

Throughout the entire eleven hour period until he made his statement, no concern about the sensibilities of Mr. Edward was exhibited. Nobody asked if he would like to convey a message to his parents.*11* Although he had been without food for more than 24 hours when he was arrested, no food was provided to him.

Throughout the entire time, Mr. Edward had little opportunity to sleep. His efforts to doze off were interrupted by officers entering the room to ask questions. Even when he was booked into jail, he was not allowed to rest, but instead was taken to the hospital for examination. As already indicated, this examination was not requested by Mr. Edward, nor for purposes

of treatment, but instead was an attempt to obtain and preserve evidence.

He was finally advised of his rights for the first time at 7 p.m., but in connection with booking into jail, a step calculated to impress upon him a heightened degree of police control.

At 10 p m., when yet another questioning session had been initiated, he ventured a first request, that he be allowed to confer with counsel. As described in the preceding section of this opinion, this request was quickly overridden, and the questioning continued.

I conclude that the statement was not a voluntary act, but a product of Mr. Edward's lack of sophistication and experience, his weakened physical and mental condition, a sense of oppression induced by violation of his rights under 12 F.S.M.C. 218, and other factors.

Accordingly, the Court finds that the statement was made involuntarily, a product of compulsion in violation of article IV, sections 3 and 7 of the Constitution, and must be suppressed on that ground.

Conclusion

Although Steward Edward was questioned extensively without being advised of his rights as required by 12 F.S.M.C. 218, he had been made. aware of those rights by the time he made his statement to the officers. There is no showing that Mr. Edward's subsequent statement was obtained as a result of the prior unlawful questioning. Thus suppression on that ground is not required by 12 F.S.M.C. 220.

However, after he had been advised of his rights, Mr. Edward requested an opportunity to meet with counsel. His subsequent equivocation was not sufficiently clear to constitute a revocation of the request or a waiver of the right to meet with counsel before further questioning. Therefore presentation of the waiver forms to Mr. Edward and resumption of the questioning were violative of his rights under 12 F.S.M.C. 218. The statement was obtained as a direct result of this violation and therefore is rendered inadmissible by 12 F.S.M.C. 220.

Finally, based upon review of the totality of the circumstances, the Court concludes that by the time Mr. Edward was being advised of his rights by Detective Santos after 10 p.m. on June 19, his will was overborne. Any waivers by him of his rights, or statements made thereafter, were not voluntary but were products of physical exhaustion and a sense of oppression borne of violation of his rights under 12 F.S.M.C. 218.

Accordingly, the motion to suppress is granted.

* * * *

Footnotes:

1. This is the more modern American approach. English courts, and American decisions before about 1940, focus on the trustworthiness of confessions, placing less emphasis on tactics of the

police. Ogletree, Are Confessions Really Good for the Soul? A Proposal to Mirandize Miranda, 100 Harv. L. Rev. 1826, 1830 (1987). Also see E. Cleary, McCormick on Evidence §§ 146, 147 (3d ed. 1984).

2. Protections against self-incrimination provided by the two Constitutions are not necessarily coterminous. The fifth amendment to the United States Constitution provides that "No person shall be ... compelled in any criminal case to be a witness against himself." Article IV, section 7 of the Federated States of Micronesian Constitution says that a person may not be compelled to "give evidence" that may be used against him in a criminal case. It has been suggested that the "give evidence" phrasing may provide "broader protection than is available under other formulations." E. Cleary, McCormick on Evidence §§ 115, 124 (3d ed. 1984).

3. In contrast with much of the legislation initiated by Trust Territory High Commissioners before establishment of Micronesian national legislative bodies, this legislation has been actively reviewed, affirmed and strengthened by representatives of the people of Micronesia. In addition to the insertion of 12 F.S.M.C. 218(6) and (7) by the Congress of Micronesia as discussed in the text of this opinion, the Congress of the Federated States of Micronesia also added what is now 12 F.S.M.C. 218(1) to assure immediate access for an arrested person to an attorney." Pub. L. No. 1-170, SCREP No. 1-136, 2nd Reg. Sess. (1979).

Thus, elected representatives of Micronesian self-government have twice made clear their desire that the rights specified in 12 F.S.M.C. 218 be upheld and enforced in the Federated States of Micronesia.

4. See Castellano v. State, 585 P.2d 361, 365 (Okla. 1978).

5. See also United State v. Bayer, 331 U.S. 532, 540-41, 67 S. Ct. 1394, 1398, 91 L. Ed. 1654, 1660 (1947): "[A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession may always be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed."

6. In Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985), the United States Supreme Court concluded that constitutional principles do not require such a presumption. "[T]he mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of Miranda warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." Id. at 314, 105 S. Ct. at 1296, 84 L. Ed. 2d at 235.

The Elstad analysis, however, was limited to constitutional principles. The court emphasized that failure to advise an accused person of his rights under Miranda is not a direct violation of constitutional rights, but merely a violation of procedures established by the United States Supreme Court to protect a defendant from being compelled to give evidence against himself. Id. at 306-08, 105 S. Ct. at 1291-92, 84 L. Ed. 2d at 230-31.

Within the Federated States of Micronesia, 12 F.S.M.C. 218 establishes a statutory right in the nature of a civil right, which is directly violated by questioning without prior advice of rights.

Of course, Elstad is also of diminished import even for purposes of constitutional interpretation within the Federated States of Micronesia since the case was decided long after the Micronesian Constitutional Convention in 1975 and after ratification of the Constitution on July 12, 1978. Alaphanso v. FSM, 1 FSM Intrm. 209, 216 (App. 1982).

7. In a landmark case concerning waiver of right to counsel, the United States Supreme Court noted that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and ... do not presume acquiescence in the loss of fundamental rights." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 1466 (1938). The Johnson court went on to say: "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

8. "Court decisions shall be consistent with...the social...configuration of Micronesia." FSM Const. art. XI, § 11.

9. "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." Spano v. New York, 360 U.S. 315, 320-21, 79 S. Ct. 1202, 1205, 3 L. Ed. 2d 1265, 1270 (1959).

10. Presumably the effects of overdrinking diminished somewhat during the day. Yet, Officer Roby testified that he still perceived Mr. Edward to be "under intoxication" when he booked him into jail at 7 p.m.

11. Mr. Edward testified that in the morning, when he was first taken into custody, he asked to have his father and mother notified. Police officers deny any knowledge or record that such a request was made.