IV. Conclusion

Under FSM Constitution article XI, § 6(b), original jurisdiction is proper for alleged violations to any treaty, or international agreement. Furthermore, enforcement of international law requires the national government to exercise its criminal code which creates exclusive jurisdiction under 11 F.S.M.C. 104(7)(a)(ii). A treaty signed by the president, and ratified by congress, is our law.[16] Thus, although an ordinary misdemeanor trespass and theft have no place in the national courts, this misdemeanor trespass and theft was a violation of an international treaty.

* * * *

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA, Plaintiff, vs. MAVERICK EZRA, MAXON JOHNNY, MYRON JOHNNY, JOHNNY JOHNNY a/k/a SONY JOHNNY, Defendants.	)	CRIMINAL CASE NO. 2013-500

ORDER

Beauleen Carl-Worswick
Associate Justice

Hearing: February 6, 2014
Decided: August 22, 2014

APPEARANCES:

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[16] "International law is a part of our law." The Paquete Habana, 175 US 677, 700, 20 S. Ct. 290, 299, 44 L. Ed. 320, 328 (1900).

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* * * *

HEADNOTES

Criminal Law and Procedure – Speedy Trial

The FSM Constitution guarantees a criminal defendant the right to a speedy public trial. FSM v. Ezra, 19 FSM R. 497, 505 (Pon. 2014).

Criminal Law and Procedure – Speedy Trial

An appropriate tool to analyze the meaning of the FSM Constitution's speedy trial right is a four-factor balancing test for determining speedy trial violations: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. FSM v. Ezra, 19 FSM R. 497, 505-06 (Pon. 2014).

Criminal Law and Procedure – Speedy Trial

Rule 48(b) is the mechanism by which a defendant may assert his constitutional right to a speedy trial, although it also embraces the court's inherent power to dismiss for want of prosecution. The court's power to dismiss under Rule 48(b) is not limited to those situations in which the defendant's constitutional speedy trial right has been violated since the Rule is a restatement of the court's inherent power to dismiss a case for want of prosecution and it imposes a stricter standard of tolerable delay than does the Constitution. FSM v. Ezra, 19 FSM R. 497, 506 (Pon. 2014).

Criminal Law and Procedure – Speedy Trial

The court will use the same four-factor balancing test to determine whether dismissal is appropriate under 12 F.S.M.C. 802 since that statutory right is embodied in Rule 48(b). Accordingly, a case may be dismissed by the court if there is unnecessary delay in bringing the accused to trial. FSM v. Ezra, 19 FSM R. 497, 506 (Pon. 2014).

Criminal Law and Procedure – Speedy Trial – Length of Delay

The time that elapses between the alleged offenses and the filing of charges is not to be considered when determining whether a defendant has been denied a speedy trial. FSM v. Ezra, 19 FSM R. 497, 506 (Pon. 2014).

Criminal Law and Procedure – Statutes of Limitation

A prosecution for a misdemeanor must be commenced within two years after it is committed. A prosecution is commenced either when an information or complaint is filed or when an arrest warrant, summons or other process is issued, provided that reasonable attempts are made at service. FSM v. Ezra, 19 FSM R. 497, 506 (Pon. 2014).

Criminal Law and Procedure – Speedy Trial

The right to a speedy trial does not attach until the information, or other process is issued. FSM v. Ezra, 19 FSM R. 497, 506 (Pon. 2014).

Criminal Law and Procedure – Speedy Trial – Length of Delay; Criminal Law and Procedure – Statutes of Limitation

The statute of limitations is not the same as the right to a speedy trial, but it is a referent as to whether the case should be dismissed under the more exacting standard of unnecessary delay found in 12 F.S.M.C. 802. FSM v. Ezra, 19 FSM R. 497, 506 (Pon. 2014).

Criminal Law and Procedure – Dismissal; Criminal Law and Procedure – Statutes of Limitation

Generally, the filing of an information within the statute of limitations time frame weighs in favor of non-dismissal, unless evidence of bad faith reasons for the delay are shown. FSM v. Ezra, 19 FSM R. 497, 506 (Pon. 2014).

Criminal Law and Procedure – Speedy Trial – Reason for Delay

An accused is not denied a speedy trial when the delay is clearly attributable to the accused himself or to his counsel. Such delay includes the defendant's excused absences and the time to rule on his pretrial motions. FSM v. Ezra, 19 FSM R. 497, 506 (Pon. 2014).

Criminal Law and Procedure – Speedy Trial – Reason for Delay

Delay caused or requested by the defendant suspends his right to a speedy trial, or is considered his waiver of that right, until after that delay is over, even if the delay is justified. Such delay includes the time to rule on a defendant's pretrial motions. FSM v. Ezra, 19 FSM R. 497, 507 (Pon. 2014).

Criminal Law and Procedure – Speedy Trial – Length of Delay

A single speedy trial "clock" governs in cases with multiple defendants. The "clock" starts to run with the most recently added defendant and any delay attributable to any one defendant is charged against the single clock, thus making the delay applicable to all defendants. FSM v. Ezra, 19 FSM R. 497, 507 (Pon. 2014).

Criminal Law and Procedure – Speedy Trial – Reason for Delay

When delay is justified by a legitimate reason, such as complexity, a speedy trial claim will fail absent a demonstration of actual prejudice. FSM v. Ezra, 19 FSM R. 497, 507 (Pon. 2014).

Criminal Law and Procedure – Speedy Trial – Reason for Delay

When a defendant's attorney had to file multiple enlargements due to the fact that he could not contact his client, this delay is attributable to the defendant's own actions and is applicable to all co-defendants in a joint trial. FSM v. Ezra, 19 FSM R. 497, 507 (Pon. 2014).

Criminal Law and Procedure – Speedy Trial – Reason for Delay

When the delay is reasonably attributed to the complexity and unusual character of a case of first impression, to the appointment of counsel, to the defendants' own actions, and to a non-intentional change in the lead investigator, no unnecessary delay has shown on the prosecution's part, nor any intent to prejudice the defendants thereby. FSM v. Ezra, 19 FSM R. 497, 507 (Pon. 2014).

Criminal Law and Procedure – Speedy Trial – Assertion of Right

A defendant may waive his right to a speedy trial. He effects a waiver when he requests it, consents to it, enters a plea of guilty or when the delay is otherwise attributable to the defendant. FSM v. Ezra, 19 FSM R. 497, 507 (Pon. 2014).

Criminal Law and Procedure – Speedy Trial – Assertion of Right

Although non-assertion of the right does not constitute waiver of the speedy trial right, a court can consider whether the right was asserted, and how vigorously, in determining the reasonableness of any delay. When the defendants have raised the right and cannot be considered to be sleeping on the right, but some delay is being caused collectively by the defendants' pretrial actions, and motions, this delay is an implicit acquiescence and necessary part of any criminal action. FSM v. Ezra, 19 FSM R. 497, 507 (Pon. 2014).

Criminal Law and Procedure – Speedy Trial – Prejudice to Accused

Prejudice to an accused may consist of: 1) oppressive pretrial incarceration; 2) the accused's pretrial anxiety; and 3) impairment of the defense. Of these, the most serious is the last because the possibility an accused's inability to adequately prepare his defense skews the fairness of the entire system. Pretrial anxiety is the least significant factor and because a certain amount of pretrial anxiety naturally exists, the accused must demonstrate that he suffered extraordinary or unusual pretrial anxiety as a result of the delay. FSM v. Ezra, 19 FSM R. 497, 507 (Pon. 2014).

Criminal Law and Procedure – Speedy Trial – Prejudice to Accused

When the pretrial release restrictions placed on the defendants are not onerous and do not rise to the level of oppressive and when the anxiety caused by delay in confronting trespass charges is not extraordinary, the prejudice as a result of the delay is minimal and will not impact the fairness of the trial procedure, the quality of the evidence, or jeopardize any other due processes right of the defendants. FSM v. Ezra, 19 FSM R. 497, 508 (Pon. 2014).

Criminal Law and Procedure – Speedy Trial – Reason for Delay

When, due to the complexity of jurisdictional questions of first impression, combined with coordinating the activity of all four defendants, and to the lead investigator's death, no intentional delay can be attributed to the prosecution, the defendants' right to a speedy trial has not been violated under the Constitution, nor has it been violated under the more exacting standard of "unnecessary delay" under 12 F.S.M.C. 802. FSM v. Ezra, 19 FSM R. 497, 508 (Pon. 2014).

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

The FSM Constitution protects the due process rights of all people accused of a crime. These rights include the right to be informed, the right against self-incrimination, and the right to have an attorney present at the time of questioning. These rights, along with others, were codified under 12 F.S.M.C. 214 and 218. The remedy for unlawful violations of these due process rights shall not 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. FSM v. Ezra, 19 FSM R. 497, 508 (Pon. 2014).

Criminal Law and Procedure – Arrest and Custody; Criminal Law and Procedure – Interrogation and Confession

A defendant must be advised of a full "panoply" of due process rights in addition to the right to remain silent and the right to counsel. These may be summarized as the right not to be denied access to counsel, family members, or other interested persons; the right to send a message, or other communications; the right to stop all questioning until such persons are present; the right to remain silent; and the right to be brought before a judge or released within a reasonable time. FSM v. Ezra, 19 FSM R. 497, 509 & n.4 (Pon. 2014).

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

The statutory protections are reviewed under a two-part analysis: first, under a statutory review of whether the defendant knowingly and intelligently waived his rights before giving a statement to the

police. Second, they are reviewed under a constitutional backdrop of whether the defendant voluntarily waived those rights. This second look is often cursory, or entirely unnecessary, in the ordinary case where no investigatory irregularities are implicated. This two-part analysis is ultimately the inquiry into whether a defendant, knowingly, intelligently, and voluntarily waived his or her rights. FSM v. Ezra, 19 FSM R. 497, 509 (Pon. 2014).

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

For a defendant to waive his right to silence or to counsel he must do so knowingly and intelligently. FSM v. Ezra, 19 FSM R. 497, 509 (Pon. 2014).

Criminal Law and Procedure – Right to Silence

A defendant's constitutional right against self-incrimination is an important right and, although an implied waiver of the right might be valid, there is a presumption against such waivers. For waiver to be effective, there must be a clear and unmistakable warning of the rights being waived. FSM v. Ezra, 19 FSM R. 497, 509 (Pon. 2014).

Criminal Law and Procedure – Interrogation and Confession

A motion to suppress an accused's statement will be granted when the government has failed to meet its burden to show that the accused was advised of his rights, that he understood those rights, and that he waived them before he voluntarily made his statement. FSM v. Ezra, 19 FSM R. 497, 509 (Pon. 2014).

Criminal Law and Procedure – Right to Counsel

When the defendants have been advised of their right to counsel but there was no indication that they desired or requested counsel, there is no basis for finding that their right to counsel has been violated. FSM v. Ezra, 19 FSM R. 497, 509 (Pon. 2014).

Criminal Law and Procedure – Interrogation and Confession; Criminal Law and Procedure – Standard of Proof

The government has the burden of proving that an accused's statement is voluntary and thus admissible and must show this by a preponderance of the evidence. FSM v. Ezra, 19 FSM R. 497, 510 (Pon. 2014).

Criminal Law and Procedure – Interrogation and Confession

Waiver of a fundamental right may not be presumed in ambiguous circumstances. Thus, a signed advice of rights form without any other evidence cannot meet the prosecution's burden to show the advice of rights was given and a waiver received. FSM v. Ezra, 19 FSM R. 497, 510 (Pon. 2014).

Criminal Law and Procedure – Interrogation and Confession

While the better practice is to finish all the paperwork concerning the advice of rights and waiver before beginning questioning, it is not a requirement in order for an accused to have made a valid waiver of his rights. FSM v. Ezra, 19 FSM R. 497, 510 (Pon. 2014).

Criminal Law and Procedure – Interrogation and Confession

An accused's waiver may be inferred by his responding voluntarily to questions asked of him without coercion after he has been advised of his rights. FSM v. Ezra, 19 FSM R. 497, 510 (Pon. 2014).

Criminal Law and Procedure – Interrogation and Confession

Voluntariness of a confession may not be resolved by reference to any single infallible touchstone, but instead must be determined by reference to the totality of the surrounding

circumstances. FSM v. Ezra, 19 FSM R. 497, 511 (Pon. 2014).

Criminal Law and Procedure – Interrogation and Confession

There are two sets of factors to consider in determining whether a suspect's will was overborne. The first set of factors are the particular vulnerabilities and characteristics of the defendant himself, such as the accused's age, education, intelligence and general sophistication. The second set of factors focuses on the coercive conduct and the manner of the interrogation such as the length, detention facility, presence of weapons, number of interrogators, access to food and water, threats, deception, promises, and the denial of access to family friends or attorneys as well failure to inform suspect of rights. Of course, the actual use of physical force clearly violates the voluntariness standard. Ultimately, this is an ad hoc test and no one aspect is determinative. FSM v. Ezra, 19 FSM R. 497, 511-12 (Pon. 2014).

Criminal Law and Procedure – Interrogation and Confession

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 accused's background, experience, and conduct. FSM v. Ezra, 19 FSM R. 497, 511 n.7 (Pon. 2014).

Criminal Law and Procedure – Interrogation and Confession

When the entire interview was conducted in Pohnpeian; when the enumerated form shows that the defendant and his guardian were advised of his rights and that at the end of each statement he was asked whether he understood the right, and that after each statement he indicated, in writing, "yes" in each blank provided; when at the conclusion of the reading of the advice of rights the officer asked the defendant if he understood his rights and he responded that he did; when the officer asked the guardian if she understood, and she nodded her head; when the defendant answered "no" to "Do you want to meet your attorney now?"; when the defendant and the guardian both then signed the form; and when the officer subsequently took the defendant's statement as recorded in the record of interview which both the defendant and his guardian also signed, it was sufficiently reliable evidence to indicate that the defendant knowingly and intelligently waived his rights. FSM v. Ezra, 19 FSM R. 497, 512-13 (Pon. 2014).

Criminal Law and Procedure – Arrest and Custody

Title 12 protects the right of a defendant to be informed, requiring that an arresting officer shall, at or before the time of the arrest, make every reasonable effort to advise the person arrested as to the cause and authority of the arrest. FSM v. Ezra, 19 FSM R. 497, 513 (Pon. 2014).

Criminal Law and Procedure – Arrest and Custody

A person should be considered arrested when one's freedom of movement is substantially restricted or controlled by a police officer, or when the suspect is otherwise deprived of his freedom of action in any significant way. Thus an arrest can occur during a "custodial interrogation," even if the suspect never formally arrested. A custodial interrogation is one that is held in a police dominated atmosphere. The custody test is an objective test, determined in the totality of the circumstances and not based on the police officer's intention nor the subjective views harbored by the person being questioned. FSM v. Ezra, 19 FSM R. 497, 514 (Pon. 2014).

Criminal Law and Procedure – Arrest and Custody; Search and Seizure – Probable Cause

In adopting the Declaration of Rights as part of the FSM Constitution and therefore the supreme law of the land, the people of Micronesia subscribed to various principles which place upon the judiciary the obligation, among others, to assure that arrests are based upon probable cause. Probable cause has been defined as a reasonable ground for suspicion, sufficiently strong to warrant a cautious person to believe that a crime has been committed. FSM v. Ezra, 19 FSM R. 497, 514 (Pon. 2014).

Search and Seizure – Probable Cause

In probable cause determinations, the court must regard evidence from vantage point of law enforcement officers acting on scene but must make its own independent determination as to whether, considering all facts at hand, a prudent and cautious law enforcement officer, guided by reasonable training and experience, would consider it more likely than not that a violation has occurred. Thus, an officer's prior training and experience is a valid source of consideration when making a probable cause determination. FSM v. Ezra, 19 FSM R. 497, 515 n.13 (Pon. 2014).

Search and Seizure – Probable Cause

The finding of probable cause may be based upon hearsay evidence in whole or in part. As a general rule, a police officer may consider virtually any evidence in determining whether reasonable suspicion or probable cause exists. FSM v. Ezra, 19 FSM R. 497, 515 (Pon. 2014).

Criminal Law and Procedure – Arrest and Custody

Police questioning alone does not trigger the right to be informed. The police have the right make brief detentions, and ask questions without making an arrest. This determination is based on the totality of the circumstances, guided by common sense. Thus, when a defendant was definitively informed as to the nature of the questions at the police station, even if an arrest subsequently occurred in a custodial environment, the explanation given at that time was sufficient to meet the due process requirement under 12 F.S.M.C. 214. FSM v. Ezra, 19 FSM R. 497, 516 (Pon. 2014).

Search and Seizure – Probable Cause

Probable cause existed when the police knew a crime had occurred because they received a call reporting a break-in at the Chinese Embassy; when there was reason to believe that a crime had occurred inside the Chinese Embassy compound; when based partly on the victim's statement and the Chinese Embassy's video surveillance, the police brought in two suspects whose statements implicated another; and when even though some of the evidence used by the police in determining that the other was a suspect to that crime was hearsay, a cautious person, based on the evidence the police already had in their possession, would have had reason to bring him in for questioning or to make an arrest without further questioning. The police have the discretion to formally arrest someone or to gather more information as they deem necessary. FSM v. Ezra, 19 FSM R. 497, 516 (Pon. 2014).

Criminal Law and Procedure – Interrogation and Confession

When the defendant voluntarily went to the police station for questioning and when the officer's explanation adequately informed the defendant as to the reason for the questioning, and the requirement under 12 F.S.M.C. 214 was met, at that time, regardless of whether or not an arrest was subsequently effected in a custodial environment. FSM v. Ezra, 19 FSM R. 497, 517 (Pon. 2014).

Criminal Law and Procedure – Interrogation and Confession; Search and Seizure – Probable Cause

Even though there was no probable cause to charge a defendant with theft prior to his own incriminating statements, when the police had probable cause to suspect him of trespass based on the video surveillance and interviews of the other co-defendants, that alone was sufficient to ask him to come in for questioning or to arrest him without further questioning since it is not uncommon for an ongoing investigation to result in the emergence of additional crimes, or the reduction of crimes, as new facts and evidence come into light, including statements taken from the defendants themselves. FSM v. Ezra, 19 FSM R. 497, 517 (Pon. 2014).

Criminal Law and Procedure – Joinder and Severance

The court has the authority to order two or more informations to be tried together. However, if it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an information or by such joinder for trial together, the court may order an election or separate trials

of counts, grant a severance of the defendants or provide whatever other relief justice requires. FSM v. Ezra, 19 FSM R. 497, 518 (Pon. 2014).

Criminal Law and Procedure – Interrogation and Confession; Criminal Law and Procedure – Joinder and Severance

Although there is a potential danger of prejudice in cases where a co-defendant's inculpatory statement is admitted into evidence, many problems can be eliminated by a redaction. Thus, the court has not adopted a per se rule of severance. FSM v. Ezra, 19 FSM R. 497, 518 (Pon. 2014).

Criminal Law and Procedure – Interrogation and Confession; Criminal Law and Procedure – Right to Confront Witnesses

The use of a defendant's inculpatory statements in evidence against a co-defendant, would violate the right of confrontation since the declarant is not a witness at the trial subject to cross examination. FSM v. Ezra, 19 FSM R. 497, 518 (Pon. 2014).

Criminal Law and Procedure – Right to Confront Witnesses

An accused's right to confront the witnesses against him provides him with two types of protection: the right physically to face those who testify against him, and the right to conduct cross-examination. FSM v. Ezra, 19 FSM R. 497, 518 (Pon. 2014).

* * * *

COURT'S OPINION

BEAULEEN CARL-WORSWICK, Associate Justice:

On February 6, 2014, the court heard pretrial motions in this criminal matter.[1] All parties were present. For the prosecution, Assistant Attorney General Pole Atanraoi-Reim represented the Federated States of Micronesia ("Government"). For the defense, attorney Timoci Romanu represented Maverick Ezra (Ezra), attorney Harry Seymour represented Maxon Johnny (Maxon), Salomon Saimon represented Johnny Johnny (Sony), and Joseph Phillip represented Myron Johnny (Myron). As a preliminary matter the court announced it had made a ruling accepting jurisdiction based on the written briefs of the parties, and granted two motions by the defense: first, a motion to sequester the police officers; and second, a motion for translation. The court then proceeded to hear arguments and oppositions to three motions filed by three defendants, Ezra, Maxon, and Sony. Defendant Myron did not join the motions. On January 6, 2014, Ezra filed a Motion to Suppress and Redact. On January 10, 2014, Sony joined the motions, filing a Notice to Join Motions to Dismiss and Suppress. On January 6, 2014, Maxon filed a Motion for Dismissal; for Suppression of Incriminating Statements; and Redaction of Name from any Co-defendants written or Recorded Statements. On January 24, 2014, the prosecution filed Plaintiff's Opposition to Defendant Maverick Ezra's Motion to Suppress. On January 27, 2014, the prosecution filed Plaintiff's Opposition to: Defendant Maxon Johnny's Motion for Dismissal; For Suppression of Incriminating Statements; and Redaction of Name from any Co-defendant's Written or Recorded Statement.

The court understands these motions, and oppositions, to have been made collectively on behalf of all of the defendants who expressed an intent to join in them, but when necessary distinguishes the particular and unique facts for each individual: first, in the motion to dismiss; second, in the motion to

[1] The information charges all four defendants with two separate counts: Trespassing contrary to 11 F.S.M.C. 605(1), and Theft contrary to 11 F.S.M.C. 602(1).

suppress; and third, in the motion to redact.

Upon CONSIDERATION of the testimony and representations of the parties made at the hearing, and of the file and record contained herein, the court DENIES the motion to dismiss; DENIES the motion to suppress; and GRANTS the motion to redact; based on the following conclusions of fact and law:

I. FACTS

The court finds the following facts undisputed, based on the submissions, and as put forward by the testimony that day:

1. On October 13, 2011, Mr. Wen Zhencai (Zhencai) from the Embassy of the People's Republic of China (Chinese Embassy), located in Palikir, reported to the National Police Central Office that a break in had occurred sometime in the night, or early morning, before.

2. Zhencai reported that the padlock to the rear entrance gate to the Chinese Embassy had been broken and that their surveillance camera showed several individuals entering the premises.

3. Zhencai reported that several items were missing including, among other things, shovels and some tools.

4. Based on this report, an investigation was begun by Sergeant Sirak Sos (Sos),who after suffering from health complications was removed from the case, and ultimately died on July, 23, 2012. Sos was replaced by Officer Wensper Raymond (Raymond).

5. On January 25, 2012, defendants Maxon and Myron were brought in for questioning regarding their participation in the alleged break in. Both made statements to the police at that time.

6. On January 26, 2012, the next day, defendant Ezra was brought in for questioning regarding his participation in the alleged break in, partly based on the statements given by the other two other codefendants.

7. On June 5, 2012, defendant Sony was brought in for questioning regarding his participation in the alleged break in, partly based on statements made by the three other co-defendants.

8. On February 27, 2013, the Penal Summons and Information was filed with this court.

9. On October 15, 2013, all four defendants had been appointed legal counsel and agreed to the representation.

II. MOTION TO DISMISS

"The FSM Constitution guarantees a criminal defendant the right to a 'speedy public trial.' FSM Const. art. IV, § 6." FSM v. Wu Ya Si, 6 FSM Intrm. 573, 574 (Pon. 1994). In FSM v. Wainit, this court adopted the so called Barker test as "an appropriate tool to analyze the meaning of the FSM Constitution's . . . speedy trial right." 12 FSM Intrm. 405, 410 (Chk. 2004) (citing Barker v. Wingo, 407 U.S. 512, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117 (1972)). The Barker test is "a four-

factor balancing test for determining speedy trial violations:" Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.*

"It is also an appropriate tool to use in analyzing a Rule 48(b) dismissal." Wainit, 12 FSM Intrm. at 410.

> Rule 48(b) is the mechanism by which a defendant may assert his constitutional right to a speedy trial, although it also embraces the court's inherent power to dismiss for want of prosecution. The court's power to dismiss under Rule 48(b) is not limited to those situations in which the defendant's [constitutional] speedy trial right has been violated. The Rule is a restatement of the inherent power of the court to dismiss a case for want of prosecution. "The Rule imposes a stricter standard of tolerable delay than does the [Constitution]."

Wainit, 12 FSM Intrm. at 409 (footnote and citations omitted). Thus "[t]he court will also use the same four-factor balancing test to determine whether dismissal is appropriate under 12 F.S.M.C. 802 since that statutory right is embodied in Rule 48(b)." FSM v. Kansou, 15 FSM Intrm. 180, 183 (Chk. 2007). Accordingly, a case may be dismissed by the court "[i]f there is unnecessary delay in bringing the accused to trial." 12 F.S.M.C. 802.

A. *Length of Delay*

"The time that elapses between the alleged offenses and the filing of charges is not to be considered when determining whether a defendant has been denied a speedy trial." FSM v. Wainit, 11 FSM Intrm. 186, 191 (Chk. 2002). "When only ten months have passed since the defendant was charged with twelve counts and about 8½ months since his initial appearance not enough time has elapsed for speedy trial concerns to be implicated in a complex case, especially when trial seems imminent." *Id.*

In this case, the defendants argue that the criminal information was filed on January 27, 2013, approximately 14 months after the defendants had given their statements and this is too long for a simple trespass. The prosecution responds that right to a speedy trial does not attach until the charges are filed, "a prosecution for a misdemeanor must be commenced within two years after it is committed." 11 F.S.M.C. 105(4). Furthermore, "a prosecution is commenced either when an information or complaint is filed or when an arrest warrant, summons or other process is issued, provided that reasonable attempts are made at service." 11 F.S.M.C. 105(6). Thus the filing of the information was within that time period and is statutorily permissible. This court agrees that the right to a speedy trial does not attach until the information, or other process is issued, and that 14 month length of time is not included in the calculus. The court furthermore notes that the statute of limitations is not the same as the right to a speedy trial, but it is a referent as to whether the case should be dismissed under the more exacting standard of unnecessary delay found in 12 F.S.M.C. 802. After legislative review, the F.S.M. Congress passed the Revised Criminal Code Act Pub. L. No. 11-72[, § 7(4) (codified at 11 F.S.M.C. 105(4))], setting a two-year statute of limitations on all misdemeanors. Generally, filing the information within that time frame weighs in favor of non-dismissal, unless evidence of bad faith reasons for the delay are shown.

B. *Reason for Delay*

"An accused is not denied a speedy trial when the delay is clearly attributable to the accused himself or to his counsel. Such delay includes the defendant's excused absences and the time to rule on his pretrial motions." Wainit, 12 FSM Intrm. at 411-12 (citations omitted). "Delay caused or

requested by the defendant suspends his right to a speedy trial, or is considered his waiver of that right, until after that delay is over, even if the delay is justified." *Id.* at 411. "Such delay includes the time to rule on a defendant's pretrial motions." FSM v. Kansou, 14 FSM Intrm. 497, 500 (Chk. 2006). Furthermore, "[a] single speedy trial 'clock' governs in cases with multiple defendants. The 'clock' starts to run with the most recently added defendant and any 'delay attributable to any one defendant is charged against the single clock, thus making the delay applicable to all defendants.'" Kansou, 15 FSM Intrm. at 187-88. Finally, "[w]hen delay is justified by a legitimate reason, such as complexity, a speedy trial claim will fail absent a demonstration of actual prejudice." *Id.* at 188.

In this case, the defendants argue that this is a simple misdemeanor trespass and suggest by implication that the delay was unnecessary and intentional. There are four defendants, however, all accused of violating the inviolability of the Chinese embassy, and implicating complex international questions of a jurisdiction. Thus, this is not a typical trespass action. Additionally, the court needed to assign qualified defense attorneys to each defendant, secure the permission from each defendant for that attorney to represent them, and file the notice of appearances. Delay was also caused by the withdrawal of attorney Bethwell O'Sonis, and replacement with attorney Joseph Phillip. Additionally, further delay was caused by the defendant Sony whose attorney Salomon Saimon had to file multiple enlargements due to the fact that he could not contact his client. Regardless of the reason, this delay is attributable to the Sony's own actions and is applicable to all defendants in a joint trial. Pretrial motions have additionally delayed trial. Finally, although the right to speedy trial does not attach until the information is filed, the criminal investigation was begun by Sergeant Sos, days after the incident, but who died as a result of personal health issues not long after the assignment. As a result, the investigation had to be reassigned to another detective, Officer Raymond. Thus, the evidence presented suggests that the delay in the case is reasonably attributed to the complexity and unusual character of a case of first impression, appointment of counsel, the defendants' own actions, and a non-intentional change in the lead investigator. No unnecessary delay was shown on the part of the prosecution, nor intent to prejudice the defendants thereby.

C. *Assertion of Right*

"A defendant may waive his right to a speedy trial. He effects a waiver . . . when he requests it, consents to it, enters a plea of guilty . . . or when the delay is otherwise attributable to the defendant." Kansou, 15 FSM Intrm. at 185. "[A]lthough non-assertion of the right does not constitute waiver of the speedy trial right" a court can consider whether the right was asserted, and how vigorously, in determining the reasonableness of any delay. *Id.*

In this case, the defendants have raised the right and cannot be considered to be sleeping on the right. Some delay however, is being caused collectively by the defendants' pretrial actions, and motions, and this delay is an implicit acquiescence and necessary part of any criminal action.

D. *Prejudice*

> Prejudice to an accused may consist of: 1) oppressive pretrial incarceration; 2) the accused's pretrial anxiety; and 3) impairment of the defense. Of these, the most serious is the last because the possibility an accused's inability to adequately prepare his defense skews the fairness of the entire system. Pretrial anxiety is the least significant factor and because a certain amount of pretrial anxiety naturally exists, the accused must demonstrate that he suffered extraordinary or unusual pretrial anxiety

as a result of the delay. Kansou, 15 FSM Intrm. at 188 (citations and quotations omitted).

The defendants raise the fact that although they are not incarcerated, they are subject to pretrial release conditions that have bound them since the court Order on March 13, 2013. Furthermore, the defendants have a right to be cleared of the offense, or to put the offense behind them. The defense did not raise any issues regarding the inability or prejudice or the inaccuracy of the evidence in prosecution. The court finds that restrictions placed on the defendants are not onerous, and the requirements of checking in with the court every other week, and notifying the court of any change of address, do not rise to the level of oppressive. Neither, is the anxiety caused by delay in confronting trespass charges extraordinary. Finally, the court finds that the prejudice as a result of the delay is minimal, will not impact the fairness of the trial procedure, the quality of the evidence, or jeopardize any other due processes right of the defendants.

In conclusion, the defendants' right to a speedv trial has not been violated under the constitution, nor has it been violated under the more exacting standard of "unnecessary delay" under 12 F.S.M.C. 802. Due to the complexity of jurisdictional questions of first impression, combined with coordinating the activity of all four defendants, and the death of the lead investigator, the court finds that no intentional delay can be attributed to the prosecution and the due process rights of the defendants have not been violated.

III. Motion to Suppress

The FSM Constitution protects the due process rights of all people accused of a crime under article IV, §§3, 6, & 7.[2] These rights include the right to be informed, the right against self-incrimination, and the right to have an attorney present at the time of questioning. These rights, along with others, were codified under 12 F.S.M.C. §§ 214, 218. Accordingly, the courts have held:

> 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.

FSM v. Edward, 3 FSM Intrm. 225, 230 (Pon. 1987). The remedy for unlawful violations of these due process rights shall not "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." 12 F.S.M.C. 220. Pursuant to FSM Criminal Rule 12, the court may "suppress evidence" that was acquired in violation of due process. FSM Crim. R. 12(b)(3). Title 12 statutorily establishes the criminal procedures protecting the right of a defendant to be informed, requiring that an arresting officer "shall, at or before the time of the arrest, make every reasonable effort to advise the person arrested as to the cause and authority of the arrest." 12 F.S.M.C. 214. Additionally, this court has held that, "Subsections (1) through (5) of 12 F.S.M.C. 218 list the rights which may not be denied in case of an arrest. Subsections (6) and (7) of Section 218, Title 12, are designed to assure that an arrested person will be advised of his rights." FSM v.

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[2] "A person may not be deprived of life, liberty, or property without due process of law, or be denied the equal protection of the laws." FSM Const. art. IV, § 3. "The defendant in a criminal case has a right to a speedy public trial, to be informed of the nature of the accusation, to have counsel for his defense, to be confronted with the witnesses against him, and to compel attendance of witnesses in his behalf." FSM Const. art. IV, §6. "A person may not be compelled to give evidence that may be used against him in a criminal case, or be twice put in jeopardy for the same offense." FSM Const. art. IV, § 7.

George, 6 FSM Intrm. 626, 629 (Kos. 1994). "[I]t 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." 12 F.S.M.C. 218(6). A defendant's statement will be suppressed when the defendant has not been advised "of all his rights" set forth in 12 F.S.M.C. 218 (1)-(5), even though he was advised of the right to remain silent and the right to counsel, and he waived those rights. FSM v. Sangechik, 4 FSM Intrm. 210, 211 (Chk. 1990).[3] Thus, the FSM court has held that a defendant must be advised of a full "panoply" of due process rights[4] in addition to the right to remain silent and the right to counsel. *Id.*; *see* 12 F.S.M.C. 218(7).

In the motion to suppress, each of the defendants raise slightly different issues regarding the particular circumstances of their arrest and therefore, to some extent, must be analyzed individually. Although all of these statutory rights are inseparably linked, the right to be informed of the nature of the proceedings will be analyzed separately from, and following the right to remain silent, the right to have counsel present, and other due process protections. These later statutory protections are reviewed under a two part analysis: first, under a statutory review of whether the defendant knowingly and intelligently waived his rights before giving a statement to the police. Second, they are reviewed under a constitutional backdrop of whether the defendant voluntarily waived those rights. This second look is often cursory, or entirely unnecessary, in the ordinary case where no investigatory irregularities are implicated. This two part analysis is ultimately the inquiry into whether a defendant, knowingly, intelligently, and voluntarily waived his or her rights.

A. *Knowingly and Intelligently*

"For a defendant to waive his right to silence or to counsel he must do so knowingly and intelligently." Moses v. FSM, 5 FSM Intrm. 156, 159 (App. 1991). "A defendant's constitutional right against self-incrimination is an important right and, although an implied waiver of the right might be valid, there is a presumption against such waivers." FSM v. Fal, 8 FSM Intrm. 151, 154 (Yap 1997). For waiver to be effective, there must be "a clear and unmistakable warning" of the rights being waived. In re Iriarte (II), 1 FSM Intrm. 255, 264 (Pon. 1983)." A motion to suppress an accused's statement will be granted when the government failed to meet its burden to show that the accused was advised of his rights, that he understood those rights, and that he waived them before he voluntarily made his statement." FSM v. Aliven, 16 FSM Intrm. 520, 529 (Chk. 2009). Finally, "[w]here the defendants had been advised of their right to counsel but there was no indication that they desired or requested counsel, there is no basis for finding that their right to counsel had been violated." FSM v. Jonathan, 2 FSM Intrm. 189, 199 (Kos. 1986).

1. *Advice of Rights*

In FSM v. Aliven, the court was confronted with three defendants and three separate advice of rights forms that were incompletely filled out and had indications of unreliability. In one instance the date and time was not entered at all, in another instance the date and time was the same for both the advice of rights and the statement, and in a third instance the time was too sloppy to read fully. 16

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[3] In Sangechik, the court held that the defendant should have been informed of all of the rights as required by § 218(6), which specifically includes subsections (1)-(5). 4 FSM Intrm. at 211.

[4] Those rights can be summarized as: the right not to be denied access to counsel, family members, or other interested persons; the right to send a message, or other communications; the right to stop all questioning until such persons are present; the right to remain silent; and the right to be brought before a judge or released within a reasonable time. *See* Edward, 3 FSM Intrm. at 230; *see* 12 F.S.M.C. 218(1)-(5).

FSM Intrm. at 528-29. The court held that "[w]ithout any other evidence, [a] signed advice of rights and waiver" with no date and time, or the exact same date and time, as the suspect's statement"cannot meet the prosecution's burden to show the advice of rights was given, and a waiver received, *before* [the suspect] began to answer questions or make a statement." *Id.* at 529 (emphasis added). In the third instance, however, the partly illegible date and time on the advice of rights form, when supplemented by an officer's testimony, was held sufficient. *See id.* In In re Juvenile, the court similarly held that the record did not reflect a waiver of rights because"there were no initials of the minor, nor any blank space to signify by initials an understanding of each right" on the advice of rights form. 4 FSM Intrm. 161, 164 (App. 1989). In the absence of evidence of an express waiver, and when combined with other due process concerns, the court remanded the case for further fact finding on determination of knowing and intelligent waiver. The court expressed concern that: there was deviation from normal police protocol when taking the statement; the minor was in a prison environment for two weeks prior to giving the statement; there was a lack of physical and testimonial evidence; and that the youthfulness of the 16 year old minor might have been *exploited. See id.* But perhaps most concerning was the fact that neither his parents nor an attorney were present at the time of the confession. *See id.* Finally, in FSM v. Louis, the advice of rights has been challenged when it is not read in the native language of the defendant. 15 FSM Intrm. 206 (Pon. 2007). The court held that the defendant's contention that the state and national police failed to properly inform him of his rights is without merit where he was properly informed in Pohnpeian of his rights, including the right to remain silent and the right to counsel and when those rights were later reread to him in English with each one explained in Pohnpeian. *Id.* at 210.

2. *Express and Implied Waiver*

"The government has the burden of proving that an accused's statement is voluntary and thus admissible." Aliven, 16 FSM Intrm. at 528. "The prosecution has the burden to show this by a "preponderance of the evidence." *Id.* at 529. "Waiver of a fundamental right may not be presumed in ambiguous circumstances." Edward, 3 FSM Intrm. at 234. Thus a signed advice of rights form "without any other evidence . . . cannot meet the prosecution's burden to show advice of rights was given, and waiver received." Aliven, 16 FSM Intrm. at 529. "While the better practice is to finish all the paperwork concerning the advice of rights and waiver before beginning questioning, it is not a requirement in order for [an accused] to have made a valid waiver of his rights." *Id.* Waiver may be inferred "by responding voluntarily to questions asked of him without coercion after he has been advised of his rights." FSM v. Hartman, 5 FSM Intrm. 350, 353 (Pon. 1992); *see* Moses v. FSM, 5 FSM Intrm. 156, 159 (App. 1991).[5] In Moses, the court expressed concern that the advice of rights

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[5] In Moses, the court recited the U.S. case history of implied waiver:

> The reports of the lower courts of the United States are filled with cases of implied waiver. Ahmad v. Redman, 782 F.2d 409, 413 (3d Cir. 1986) ("Hooks voluntarily responded to questioning. Because the state courts found that Hooks was informed of and understood his Miranda rights and that he was subjected to no pressure to respond to questioning, it follows that Hooks knowingly and intelligently waived his rights."). United States v. Valesquez, 626 F.2d 314, 320 (3d Cir. 1980) ("Pauline's subsequent willingness to answer questions after acknowledging that she understood her Miranda rights is sufficient to constitute an implied waiver under Butler.").
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> In United States v. Daniel, 441 F.2d 374 (5th Cir. 1971) the sole issue on appeal was whether a reading of the rights, a statement by the defendant that he understood, followed by a statement met the requirement of waiver. The court held the statement was admissible, citing particularly United States v. Montos, 421 F.2d 215, 224 (5th Cir. 1970), cert. denied,

form is not to be confused with an express written waiver, and the advice of rights form must be supplemented by additional evidence of waiver in the record, either written, or supplied by police testimony. *See* 5 FSM Intrm. at 156. This is especially so when the advice of rights or waiver form are ambiguous as to the right or rights being waived.[6] In Moses, the advice of rights form was followed by the single question, "Do you want us to send for a lawyer now?" *Id.* at 158. The defendant expressly waived that right, in writing, answering, "No." *Id.* Upon review, the trial court was remanded on the issue of whether the right to remain silent was also waived, there being no evidence in the record. See *Id.* Similarly, in In re Juvenile, a partial express waiver of one right was remanded to the trial court for additional fact finding on the other. *See* 4 FSM Intrm. at 165. In In re Juvenile, following the Advice of Rights, was a single question, "Do you want us to contact your attorney now to come meet with you?" *Id.* at 163. The minor wrote "no" in Pohnpeian ("soh"). *Id.* This court notes the similarity in these last two cases with the present issue before us.

B. *Voluntarily*

Ultimately, voluntariness of a confession "may not be resolved by reference to any single infallible touchstone but instead must be determined by reference to the totality of the surrounding circumstances." Jonathan, 2 FSM Intrm. at 197. In Jonathan, the court set out two sets of factors to consider in determining whether a suspect's will was overborne. 2 FSM Intrm. at 195 ("subvert the will"). First set of factors are the particular vulnerabilities and characteristics of the defendant himself, such as "the age, education, intelligence and general sophistication of the accused." *Id.* at 197.[7] The second set of factors focuses on the coercive conduct and the manner of the interrogation such as the

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397 U.S. 1022. Other courts have agreed. People v. Johnson, 70 Cal. 2d 541, 450 P.2d 865, 876 (1969) ("Once the defendant has been informed of his rights and indicates that he understands those rights it would seem that his choosing to speak and not requesting a lawyer is sufficient evidence that he knows his rights and chooses not to exercise them."). This case reviews many cases, and quotes at length United States v. Hayes, 385 F.2d 375, 377_78 (4th Cir. 1967).

5 FSM Intrm. at 160.

[6] On appeal, the court stated in dicta:

> We are concerned that the form, after advising of both the rights to remain silent (and its consequences if a statement is made) and to have counsel (including appointed counsel), only inquires as to whether the defendant wishes to assert his right to counsel. This limited inquiry on the form is misleading since it fails to inquire as to whether the defendant wishes to remain silent. It would be acceptable if the form inquired as to both rights, or if it inquired as to neither. If neither question were asked the form would be strictly an advice of rights form. In its present state, by providing for a written waiver of counsel by the defendant and in lacking a specific waiver as to the right to remain silent a defendant is presented with a narrow and confusing option as to what right is being waived.

Moses, 5 FSM Intrm. at 156. The court did not, however, overturn the form.

[7] This list is not exclusive and is variously stated, "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." Edward, 3 FSM Intrm. at 235 n.7 (quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 1466 (1938)).

length, detention facility, presence of weapons, number of interrogators, access to food and water, threats, deception, promises, and the denial of access to family friends or attorneys as well failure to inform suspect of rights.[8] Of course, the actual use of physical force clearly violates the voluntariness standard. *See* Edward, 3 FSM Intrm. at 240. Ultimately, this is an ad hoc test and "no one aspect would have been determinative." In re Juvenile, 4 FSM Intrm. at 164.[9] Finally, this court notes the need to exercise "special caution" when assessing the voluntariness of a juvenile, particularly in the absence of a parent or lawyer. In re Gault, 387 U.S. 1, 45, 87 S. Ct. 1428, 1453, 18 L. Ed. 2d 527, 556 (1967).

Maxon

On January 25, 2012, Maxon made an inculpatory statement to investigative officer Raymond and in front of investigative officer Lorenzo Robert (Robert). The defense moves to suppress this statement. Maxon argues that at the time he gave the statement he was a minor and only 17 years old. Maxon argues that he was not informed of the nature of why he was being taken in for questioning, and although he was accompanied by his grandmother Selihter (Selihter). Maxon argues that Selihter was not informed of the nature of the interrogation or his rights therein. Nor was Selihter asked if she agreed to the proceedings. Under those circumstances, Maxon argues, that he could not have made the statement to the police knowingly and intelligently cognizant of the legal implications. The prosecution responds, first, that Maxon is a mature and reasonably intelligent 17 year old, months away from the age of majority, with no mental defects, and fully capable of understanding the legal implications of making a confession without having a parent or guardian present. Second, the prosecution responds that Selihter is a legal guardian of the minor, and who was present the entire time. Third, Officer Raymond testified that on the day of the interview he did inform Maxon as to the nature of why he was being questioned and that he directly spoke to Selihter as well. He conducted this explanation, and the entire interview, in Pohnpeian. He then proceeded to read out a document entitled "Your Rights in the Constitution" (Advice of Rights). The enumerated form shows that the defendant and guardian were advised of the following: 1) of his right to remain silent; 2) that any statement he made may be used against him in court; 3) that he had the right to meet with a member of his family or an employment supervisor; 4) that he had the right to talk to a lawyer at any time and be advised by counsel during questioning by the police; 5) that if he could not afford a lawyer, a Public Defender may be appointed to represent him with no charge; 6) that if he decided to answer questions from the police without counsel, he has the right to stop answering any further questions at any time

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[8] In Jonathan, the court cited the U.S. case history on police coercion factors:

> United States v. Powe, 591 F.2d 833, 836 (D.C. Cir. 1978) ("it is firmly established that self-incriminating statements induced by promises or offers of leniency shall be regarded as involuntary and shall not be admitted into evidence for any purpose."); Bram v. United States, 168 U.S. 532, 542-43, 18 S. Ct. 183, 187, 42 L. Ed. 568, 573 (1897) ("[A] confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."); McLallen v. Wyrick, 498 F. Supp. 137, 139 (W.D. Mo. 1980) ("A confession can never be received in evidence where the prisoner has been influenced by any threat or promise.").

2 FSM Intrm. at 196.

[9] Receiving a waiver from a suspect who was hospitalized and barely conscious was held involuntary even though the police did not engage in any "gross abuses." Mincey v. Arizona, 437 U.S. 385, 401, 98 S. Ct. 2408, 2418, 57 L. Ed. 2d 290, 305-06 (1978).

if he felt he needed to talk to a lawyer. At the end of each statement Maxon was asked whether he understood the right, or not. After each statement he indicated, in writing, "yes" in each blank provided. At the conclusion of the reading of the Advice of Rights Officer Raymond asked Maxon if he understood his rights and he responded that he did. He then turned to Selihter and asked if she understood, and she nodded her head, which he took to mean that she did. Maxon then answered the following question, "Do you want to meet your attorney now?" indicating "no."[10] Both Maxon and Selihter then signed this form, dated it, and noted the time at 3:15 PM. Officer Raymond subsequently took Maxon's statement as recorded in the Record of Interview which both Maxon and his guardian also signed. The Record of Interview form set the date and time of the questioning at approximately 3:15 PM on January 25, 2012. According to Officer Raymond's testimony, Officer Robert was present the entire time.

In conclusion, the court finds that the prosecution has met its burden demonstrating that the evidence submitted was legally sufficient to indicate that Maxon was informed of the nature of the proceedings, in Pohnpeian, and that his grandmother Selihter was also informed. Furthermore, this court finds, to a preponderance of the evidence, that both Maxon and Selihter were read the Advice of Rights, and when combined with Officer Raymond's testimony, as well as the Record of Interview, this is sufficiently reliable evidence.to indicate that Maxon knowingly and intelligently waived his rights. Notably, the court finds that Maxon expressly waived his right to an attorney, and through voluntary participation, after having been informed of his right to silence, implicitly waived his right to silence. The court finds the testimony of Officer Raymond sufficiently eliminated any ambiguity in the circumstances. Finally, no promises or threats were made to Maxon during the questioning. Thus, under the totality of the circumstances, the court finds that Maxon voluntarily made the statement. Therefore, based on the testimony of Officer Raymond, and on the file and record contained herein, Maxon's Motion to Suppress is denied.

C. *Right to be Informed*

As stated above, Title 12 protects the right of a defendant to be informed, requiring that an arresting officer "shall, at or before the time of the arrest, make every reasonable effort to advise the person arrested as to the cause and authority of the arrest." 12 F.S.M.C. 214. This court has previously explored the contours of the right to be informed in at least three other cases. In Loch v. FSM, a police officer told the defendant that he was going to take him "to a place." 1 FSM Intrm. 566, 567 (App. 1984). This was held sufficient when combined with implied knowledge regarding the circumstances of the arrest. The court explained, "While the phrasing lacked precision, two other witnesses testified that . . . [the defendant] apparently understood that [Officer] Loch was seeking to effect an arrest. We consider this . . . sufficient compliance with 12 F.S.M.C. 214." Loch, 1 FSM Intrm. at 569. Complete silence, on the other hand, is not sufficient to meet the standard. In FSM v. George, the arresting officer "failed to offer any reason or explanation of the arrest" when asked by the defendant why he was being arrested. 6 FSM Intrm. 626, 628 (Kos. 1994). In fact, "George was never told why he was under arrest even after he was taken to the police station" *Id.* Similarly, in Warren v. Pohnpei State Dep't of Public Safety, it was not adequate when the arresting officer told the suspect that they would find out later. 13 FSM Intrm. 483, 494 (Pon. 2005). In Warren, the defendant was being handcuffed and put into the back of a police car when he asked,"What he had done wrong?" *Id.* The police officer responded, "[You will] find out at the station." *Id.* Thus, the right to be informed attaches at the moment of arrest, but often the exact moment that an arrest is technically made is unclear. The courts have held a person should be considered arrested for the

[10] The exact words in Pohnpeian are, "Ke anahne tuhong ahmw sounsawas ansou wet?" Maxon replied in writing,"soh."

purposes of 12 F.S.M.C. 218, "when one's freedom of movement is substantially restricted or controlled by a police officer." Edward, 3 FSM Intrm. at 232.[11] Alternatively, when the suspect is "otherwise deprived of his freedom of action 'in any significant way.'" Edward, 3 FSM Intrm. at 229 (citing Miranda v. Arizona, 384 U.S. 436, 467, 86 S. Ct. 1602, 1624, 16 L. Ed. 2d 694, 719 (1966)).[12] Thus an arrest can occur during a "custodial interrogation," even if the suspect never formally arrested. Miranda, 384 U.S. at 467, 86 S. Ct. at 1624, 16 L. Ed. 2d at 719. A custodial interrogation is one that is held in a "police dominated atmosphere." Miranda, 384 U.S. at 445, 86 S. Ct. at 1612, 16 L. Ed. 2d at 707. It does not require that the defendant be in a police station, nor is the fact that the defendant was in a police station definitive. *See* Oregon v. Mathiason, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977). The touchstone in U.S. courts is whether a "reasonable person" would have felt at liberty to leave. Thompson v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 465, 133 L. Ed. 2d 383, 394 (1995); Yarborough v. Alvarado, 541 U.S. 652, 673, 124 S. Ct. 2140, 2154, 158 L. Ed. 2d 938, 957 (2004) (Breyer, J., dissenting). The "custody test is an objective test." Yarborough, 541 U.S. at 653, 124 S. Ct. at 2142, 158 L. Ed. 2d at 945. It is determined in the "totality of the circumstances." *Id.* at 662, 124 S. Ct. at 2148, 158 L. Ed. 2d at 950. It is not based on the intention of the police officer. Stansbury v. California, 511 U.S. 318, 319, 114 S. Ct. 1526, 1527, 128 L. Ed. 2d 293, 296 (1983) ("irrelevant to the assessment"). Nor is it based on the "subjective views harbored . . . by the person being questioned." *Id.* at 323, 114 S. Ct. at 1529, 128 L. Ed. 2d at 298. The factors the courts often look to include are the location, presence or absence of weapons, the duration of the interrogation, and the number of the officers present, but ultimately there is "no bright line rule . . . common sense and ordinary human experience must govern over rigid criteria." United States v. Sharpe, 470 U.S. 675, 685, 105 S. Ct. 1568, 1575, 84 L. Ed. 2d 605, 615 (1985).

D. *Probable Cause*

"In adopting the Declaration of Rights as part of the Constitution of the Federated States of Micronesia and therefore the supreme law of the land, the people of Micronesia subscribed to various principles which place upon the judiciary the obligation, among others, to assure that arrests are based upon probable cause." Tammed v. FSM, 4 FSM Intrm. 266, 281-82 (App. 1990); *see* FSM Const. art. IV, § 5. Probable cause has been defined by this court as "a reasonable ground for suspicion, sufficiently strong to warrant a cautious person to believe that a crime has been committed." Ishizawa v. Pohnpei, 2 FSM Intrm. 67, 76 (Pon. 1985); FSM v. Zhong Yuan Yu No. 621, 6 FSM Intrm. 584, 588-89 (Pon. 1994) ("evidence and information"); Ludwig v. FSM, 2 FSM Intrm. 27, 33 (App. 1985) ("more likely than not that the accused is guilty of the offense").[13] "The finding of probable cause may

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[11] In Warren, the court found that there was "no question" that defendant was arrested when he was handcuffed with his arms behind his back and put in a police car. 13 FSM Intrm. at 494. Meeting the first definition his freedom of movement was physically restricted.

[12] The courts have previously found that the national statute drafted in title 12 is "obviously based upon the principles set forth in Miranda." Edward, 3 FSM Intrm. at 229-30. That court also stated that the Miranda analysis "is the primary analytical tool in considering claims that protections against self-incrimination have been violated." Thus we look to guidance from the U.S. Miranda case history to supplement our own case law, when necessary.

[13] In probable cause determinations the court "must regard evidence from vantage point of law enforcement officers acting on scene" but "must make its own independent determination as to whether, considering all facts at hand, a prudent and cautious law enforcement officer, *guided by reasonable training and experience*, would consider it more likely than not that a violation has occurred." Ishizawa v. Pohnpei, 2 FSM Intrm. 67, 77 (Pon. 1985) (emphasis added). Thus, an officer's prior training and experience is a valid source

be based upon hearsay evidence in whole or in part." FSM v. Wainit, 10 FSM Intrm. 618, 621 (Chk. 2002). It has been persuasively stated by other courts that as a general rule virtually any evidence may be considered by a police officer "in determining whether reasonable suspicion or probable cause exists." Kosrae v. Tosie, 12 FSM Intrm. 296, 299 (Kos. S. Ct. Tr. 2004);[14] Chuuk v. Chosa, 16 FSM Intrm. 95, 98 (Chk. S. Ct. Tr. 2008).[15]

Ezra

On January 26, 2012, Ezra made an inculpatory statement to investigative Officer Raymond and in front of investigative Officer Soichey Diopulos (Diopulos). The defense moves to suppress this statement. First, Ezra argues that before he made this statement, he had effectively been arrested, but not informed of his cause and authority for his arrest as required under 12 F.S.M.C. 214. Second, Ezra challenges the legality of the arrest and subsequent questioning based on a lack of probable cause. The prosecution responds that Ezra was a suspect who was cognizant of why he was being brought in for questioning, and voluntarily went to the police station with the police. Further the prosecution responds that the police had probable cause to both question him and/or arrest him at that time, but did not do so. The police contend that he was never formally arrested and did not intend to arrest him. Notably, Ezra does not contest the validity of the Advice of Rights which he signed on January 26, 2012, at 1:48 PM. Nor does he contest that he was read those rights, in Pohnpeian, as enumerated, and that he put his initial after each one indicating that he understood. Nor does he contest that Officer Raymond explained to Ezra why he was brought in and the purpose of the questions he was about to ask. Nor does he contest that Raymond then read the Advice of Rights which concluded with the express waiver of a right to an attorney and that he voluntarily gave his statement which Ezra signed and dated in the Record of Interview at 1:56 PM. At no time was he promised anything for his statement, nor was he threatened. Notably, Officer Raymond testified that he did not expressly tell Ezra he was free to leave at any time during the questioning. Furthermore, Officer Raymond was not aware of what Officer Diopulos had told Ezra prior to bringing him in, but testified that Ezra was without handcuffs, which indicated that he was not under arrest at that time. Officer Raymond further explained that it is routine police practice to place handcuffs on all suspects who have been arrested, but not otherwise.

The court is satisfied that the defendant was not arrested when he came to the police station.

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of consideration when making a probable cause determination.

[14] In Tosie, the Kosrae State court found that the police must use some discretion in considering the evidence,"[t]he information may be provided by an informer. Police should consider the underlying circumstances from which the informer drew his conclusion. Some of the underlying circumstances must show that the informant was reliable. However, evidence to establish reasonable suspicion or probable cause may be entirely based upon hearsay." 12 FSM Intrm. at 299 (citation omitted).

[15] In Chosa, the Chuuk State court succinctly articulated the rule,

> The standard for determining probable cause is whether there is evidence and information sufficiently persuasive to warrant a cautious person to believe it is more likely than not that a violation of the law has occurred and that the accused committed that violation. As a general rule, any evidence may be considered in determining whether reasonable suspicion or probable cause exists. The finding of probable cause may be based upon hearsay evidence in whole or in part.

16 FSM Intrm. at 97-98 (citations omitted).

He was not in handcuffs, and his voluntary cooperation was testified to by Officer Raymond. Significantly, no restraints, force, or any other restriction was placed on the defendant's movement, nor complained of in court. The mere fact that the defendant got into a police car is not sufficient to establish an arrest and the court notes that only one officer went to ask him to come in for questioning. The testimony of his voluntary cooperation combined with the fact that he was not formally arrested supports this conclusion. Finally, the right to be informed is not triggered by police questioning alone, the police have the right make brief detentions, and ask questions without making an arrest. This determination is based on the totality of the circumstances, guided by common sense. The court finds that the defendant was definitively informed as to the nature of the questions at the police station by Officer Raymond, and even if an arrest subsequently occurred in a custodial environment, the explanation given at that time was sufficient to meet the due process requirement under 12 F.S.M.C. 214. Finally, the court is cognizant that an arrest can and does sometimes occur in a custodial environment but the court makes no finding as to whether a reasonable person would have felt free to leave in this case. Such an analysis is not necessary, because the prosecution demonstrated, to a preponderance, that the defendant was informed when he got to the police station.

Second, Ezra challenges whether the police had probable cause to arrest him. The police knew a crime had occurred when Zhencai called on October 13, 2011, to report a break in at the Chinese Embassy. Based partly on the victim's statement and the Chinese Embassy's video surveillance, the police brought in two suspects, Myron and Maxon, on January 25, 2012. Maxon's statement was that he "met with Maverick" and that he, "Myron Johnny, Maverick Ezra, [and] Sony Johnny" entered the compound. Similar statements of Ezra's participation that night were independently collaborated by Myron. Partly based on the statements taken from those two suspects, and partly based on other evidence, Ezra was taken in for questioning the following day, January 26, 2013. The court finds that from Officer Raymond's testimony, and the all of the evidence referred to in the file record, including video surveillance, there was reason to believe that a crime had occurred inside the Chinese Embassy compound. Physical evidence shows that a lock was broken and several items were missing. Although some of the evidence used by the police in determining that Ezra was a suspect to that crime was hearsay, taken from the other co-defendants, those statements are permissible when determining whether reasonable suspicion or probable cause had been met. Thus the court finds that a cautious person would have had reason to bring in Ezra for questions, or to make an arrest without further questioning, based on the evidence the police had in their possession at that time. The police have the discretion to formally arrest someone, or gather more information as they deem necessary, and ultimately, in this case, the police chose further investigation.

As an auxiliary matter, the court finds that the prosecution has met its burden demonstrating that the evidence submitted through Officer Raymond's testimony, combined with the signed Advice of Rights, and Record of the Interview, was legally sufficient to show that Ezra was adequately informed of his rights. Further, the court finds to a preponderance of the evidence that Ezra expressly waived his right to an attorney, and through voluntary participation, implicitly waived his right to silence after having been informed of the right.

In conclusion, the court finds that Ezra voluntarily participated in the investigation, and was adequately informed as to the reason for the questioning. The court further finds that the police had probable cause to bring him for questioning, at that time. Further the court finds that the police adequately informed him of his rights, before any questions were asked, and that Ezra expressly waived his right to an attorney, and implicitly waived his right to silence by voluntarily giving his statement. Therefore, based on the testimony of Officer Raymond, and on the file and record contained herein, Ezra's Motion to Suppress is denied.

Sony

On June 5, 2012, Sony made an inculpatory statement to Officer Raymond and in front of Officer Robert. The defense moves to suppress this statement. Like Ezra, Sony raises two arguments: first, that he was not adequately informed as to the cause and authority of his arrest and, second, that prosecution did not have probable cause to arrest him for theft. Officer Raymond testified that on the day that Sony was brought in for questioning he was not wearing handcuffs. Officer Raymond explained the purpose of the questions and why he was being brought in. Raymond then read the Advice of Rights and explained each of the six rights in Pohnpeian. Sony initialed each right and signed the document dated June 5, 2012, at 11:30AM. Raymond then took his statement and the Record of Interview was signed and dated June 5, 2012, at 11:47AM. According to testimony Officer Robert was present the entire time and neither threat nor promise was made to Sony during the interview.

With regard to the first challenge, the court finds that Sony voluntarily went to the station for questioning as evidenced by the fact that was not wearing handcuffs and by the description of his cooperative behavior given in the testimony of Officer Raymond. The court further finds that Officer Raymond's explanation adequately informed Sony as to the reason for the questioning, and the requirement under 12 F.S.M.C. 214 was met, at that time, regardless of whether or not an arrest was subsequently effected in a custodial environment.

Second, Sony contends that the police had no record of brown shoes missing in the initial complaint submitted by Zhencai, nor was there any record of brown shoes indicated in the Record of Interviews by any of taken from the other co-defendants. Therefore, there was no probable cause to charge Sony with theft prior to his own incriminating statements. While that is true, the police had probable cause to suspect him of trespass based on the video surveillance and interviews of the other co-defendants. That alone is sufficient to ask him to come in for questioning, or to arrest him without further questioning. It is not uncommon for an ongoing investigation to result in the emergence of additional crimes, or the reduction of crimes, as new facts and evidence come into light, including statements taken from the defendants themselves. Thus the court finds that a cautious person would have had reason to bring in Sony for questions, notwithstanding the fact that theft may not have been one of the charges against Sony but-for his own inculpatory statement.

As an auxiliary matter, the court finds that the prosecution has met its burden demonstrating to a preponderance of the evidence, through Officer Raymond's testimony, the signed Advice of Rights, and Record of the interview, that Sony was adequately informed as to his rights, expressly waived his right to an attorney, and implicitly waived his right to silence through voluntary participation when giving his statement.

In conclusion, the court finds that Sony voluntarily participated in the investigation, that Officer Raymond informed him of his rights at the station, and the police had probable cause to bring him for questioning as a suspect. Further the court finds that he explicitly waived his right to an attorney and implicitly waived his right to silence after having been read his rights. Neither was he exposed to any form of coercion. Therefore, based on the testimony of Officer Raymond, the file and record contained herein, Sony's Motion to Suppress is denied.

E. *Conclusion*

In CONCLUSION, the Motion to Suppress is denied for all three defendants who are parties to the motion, namely, Maxon, Ezra, and Sony. Myron did not join the motion, therefore, his statement will be admitted without objection.

IV. MOTION TO REDACT

FSM Constitution article IV, § 6 states: "The defendant in a criminal case has a right to a speedy public trial, to be informed of the nature of the accusation, to have counsel for his defense, to be confronted with the witnesses against him, and to compel attendance of witnesses in his behalf."

Pursuant to FSM Criminal Rule 13, the court has the authority to "order two or more informations to be tried together." FSM Crim. R. 13. However, "[i]f it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of the defendants or provide whatever other relief justice requires." FSM Crim. R. 14. Although there is a potential danger of prejudice in cases where a co-defendant's inculpatory statement is admitted into evidence, "many problems can be eliminated by a redaction." Hartman v. FSM, 5 FSM Intrm. 224, 230 (App. 1991). Thus, this Court has not adopted "a per se rule of severance." *Id.* On appeal, the use of redaction was affirmed, however, the court reversed the conviction against the defendants, stating that if severance is denied, defendants' out of court statements must be "redacted to eliminate" all references to the other codefendants. Hartman v. FSM, 6 FSM Intrm. 293, 301 (App. 1993). That court held that the use of those statements, in evidence against a co-defendant, would violate the "right of confrontation" since declarant is not a witness at the trial subject to cross examination. *Id.* at 301. The appellate court also held after redaction, "no prejudice would occur because the statements would then give no reference to any codefendant." *Id.* at 303. The court further noted, "Redaction can normally be accomplished by the parties." *Id.* at 303 n.12. Separately, this court has found that "[a]n accused's right to confront the witnesses against him provides him with two types of protection: the right physically to face those who testify against him, and the right to conduct cross-examination." Wainit, 10 FSM Intrm. at 621.

The defendants have submitted that all four have made statements to the police. In those statements, the names of the other defendants are used at various times and that the admission of this information will prejudice each individual's case, if admitted without allowing the cross examination of that defendant who has the right not to take the stand under the confrontation clause. The Prosecution did not object to the redaction motion and in fact agreed that this is preferred to severance.

ACCORDINGLY, based on the arguments of the parties, and on the file and record contained herein, the court finds that any statements implicating the parties of criminal wrongdoing must be REDACTED from the record. Sua sponte, the court applies this constitutional protection to all of the defendants regardless of whether they joined the motion or not.

V. CONCLUSION

THEREFORE, the court hereby DENIES the Motion to Dismiss for all defendants who made the request; DENIES the Motion to Suppress for all defendants who made the request; and GRANTS the Motion to Redact for all defendants, regardless of whether they made the request. Accordingly, this matter is set for a Pre-trial conference to be held on Wednesday, September 10, 2014, at 9:30 AM, Palikir, FSM Supreme Court. All parties are required to be present and be prepared to discuss scheduling of the matter for trial. Parties may obviate the need for a pre-trial conference provided the parties confer and agree upon three proposed trial dates which shall be submitted for this court's consideration no later than Tuesday, September 9, 2014.

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