REPUBLIC OF PALAU,
Plaintiff,

v.

ANDY MESUBED aka YEN-AN LAI aka ANDY LAI,
Defendant.

CRIMINAL CASE NO. 13-002

Supreme Court, Trial Division
Republic of Palau

Decided: July 19, 2013

[1] **Criminal Law:** Rights of Defendant

Civil rights of a criminal defendant in Palau come from three sources: statute, the Constitution and the *Miranda* prophylactic rule.

[2] **Criminal Law:** Suppression of Evidence

Where the government violates one of the statutorily enumerated rights, no evidence obtained as a result of such violation shall be admissible against the accused.

[3] **Criminal Law:** Advice of Rights

Pursuant to 18 PNC § 218, a person under arrest must be advised of his right to an attorney and his right to remain silent. Additionally, it is 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 (a)(1) - (3) of 18 PNC § 218.

[4] **Criminal Law:** Arrest

"Arrest," is defined under the statute as any form of legal detention by legal authority. 18 PNC § 101(a). Within the context of advice of rights, "arrest" includes detentions "for examination" based on probable cause that a crime has been committed.

[5] **Criminal Law:** Arrest

When considering the existence of arrest or custody several factors guide the inquiry: the location of the interview; the length and manner of questioning; whether the individual possessed unrestrained freedom of movement during the interview; and whether the individual was told she need not answer the questions.

[6] **Criminal Law:** Suppression of Evidence

In order to suppress evidence obtained in violation of 18 PNC § 218, defendant must at the very least assert a causal link between the failure of investigators [and the discovery of the evidence]. Consequence will not be presumed where it is not alleged.

[7] **Criminal Law:** Right to Counsel

Pursuant to section 218, the Government may not deny an arrestee the right to see at reasonable intervals, and for a reasonable time at the place of his detention, counsel, or members of his family, or his employer, or a representative of his employer.

[8] **Constitutional Law:** Suppression of Evidence

There are three types of constitutional bars to admission of evidence in a criminal proceeding. First, the Constitution may speak directly to admissibility. Second, under the prudential exclusionary rule, evidence obtained in violation of a constitutional right will be deemed inadmissible in court. Relatedly, where a constitutional right has been violated, evidence must be suppressed when recovery of the evidence has come by exploitation of that illegality.

[9] **Criminal Law:** Supression of Evidence

There are three types of constitutional bars to admission of evidence in a criminal proceeding. First, the Constitution may speak directly to admissibility. Second, under the prudential exclusionary rule, evidence obtained in violation of a constitutional right will be deemed inadmissible in court. Relatedly, where a constitutional right has been violated, evidence must be suppressed when recovery of the evidence has come by exploitation of that illegality.

[10] **Constitutional Law:** Right Against Self-Incrimination

The right against self-incrimination protects against two separate acts. First, the core protection afforded by the Self–Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial. Second, the right privileges a person not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.

[11] **Criminal Law:** Right Against Self-Incrimination

The right against self-incrimination protects against two separate acts. First, the core protection afforded by the Self–Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial. Second, the right privileges a person not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.

[12] **Criminal Law:** Voluntary Statements

To determine whether a statement was voluntary rather than compelled a court must consider the totality of the circumstances to determine whether the will of the suspect was overborne by government coercion. The test for the voluntariness of a confession is whether the confession was extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence.

[13] **Criminal Law:** Right to Counsel

Like the right against self-incrimination, the right to counsel attaches at the time a defendant has been implicated in a crime.

[14] **Criminal Law:** Right to Counsel

The right to counsel renders inadmissible in the prosecution's case in chief statements deliberately elicited from a defendant without an express waiver of the right to counsel.

The Honorable ARTHUR NGIRAKLSONG, Chief Justice:

This matter is before the Court on Defendant Andy Mesubed's motion to suppress statements and evidence collected on January 25, 2012. An evidentiary hearing on Defendant's Motion was held on July 10-11, 2013. For the reasons set forth below, the motion is **GRANTED**.

BACKGROUND

On May 1, 2013, Defendant filed a motion to suppress statements and evidence based on violations of his constitutional and statutory rights. In support of his motion, Defendant submitted an affidavit which made the following allegations:

> That the police came to his house in Ngerchemai on January 24, 2012 around lunch time and ordered that he go with them to the police station;
>
> That after arriving at the police station the police interrogated him without first advising him of his rights. Only after he gave a statement was he read his rights;
>
> That he asked the police if needed a lawyer since they were going to ask him questions and the police told him he did not need one because was not arrested;
>
> That the police told him he was not free to leave and that if he did not talk to them he would be put in the dark room;
>
> That he was deprived of sleep and food and when he did not wish to talk to the police he was given some type of drug which he took;

> That the drug had an effect on him, it made him feel happy, at ease but slightly dizzy, and comfortable to talk to the police;
>
> That after the police obtained his statement and recovered [evidence] he was released.

[Affidaivt, ¶¶ 3-9].

Based on these allegations, an evidentiary hearing was convened. Testimony from the hearing showed the following:

At approximately noon on January 24, 2012, approximately three police officers, including Officer Harline Stark, traveled to Defendant's home in Koror. Upon arriving at the residence, the officers asked Defendant to accompany them to the police station to discuss a robbery of the Long Rainbow Tour Office. Defendant requested time to get ready to leave and was given approximately twenty minutes to shower and change. Defendant was driven to the police station in a BPS vehicle.

Defendant was taken to the offices of the BPS Narcotics Division. From approximately 12:30 until 6:00 p.m., Defendant sat with Officer Felix Francisco and Officer Stark answering questions about the robbery. At the commencement of questioning, Defendant asked whether he needed an attorney. Francisco responded that Defendant did not need an attorney because he was not under arrest. However, at Defendant's request, Francisco contacted Defendant's family members and requested that they come to the police station. Emory Mesubed appeared first, and spoke with Defendant for approximately fifteen minutes. Shortly after, Elmis Mesubed came to the station and spoke with Defendant for approximately twenty minutes.

Defendant claims that at some point during his conversation with Stark and Francisco, Officer Francisco waved a knife in his face and threatened to put Defendant in a "dark room" with an unknown person who would hurt him. At some point during the conversation, Francisco offered Defendant a piece of an apple which fell on the floor; Defendant declined the offer. Defendant testified that he asked to end the interview but that Francisco told him he could not leave.

At approximately 4:00 p.m. on January 24, 2012, Defendant informed the officers he needed to use the restroom. Defendant was escorted to a restroom outdoors and locked in the facility. When he was ready to get out, he was forced to knock on the door and inform the officers he wanted to leave.

At approximately 6:00 p.m. Defendant stated that he had a headache. In response to Defendant's complaint, the officers gave him two white pills which they claimed to be Tylenol. Defendant testified that, after taking the pills, he felt light-headed and "easier to talk."

Defendant was not advised of his rights during the initial five-and-a-half hours of questioning.

A second round of questioning began at 7:00 p.m. Defendant claims that at an unspecified time, Francisco promised Defendant that there would be no gun related charges if he cooperated and led the

police to the gun used in the robbery. Following this promise, Defendant agreed to take police officers to a location in Malakal where the gun allegedly used in the robbery was hidden. Defendant testified that, following his agreement he was taken three times to Malakal on searches for the gun. The first two searches, which began at 12:00 and 3:00 a.m., and lasted approximately an hour each, were unsuccessful. A third search, which began at approximately 6:30 a.m. on January 25, 2012, uncovered the handgun. Between the searches, Defendant was allowed to sleep in an unlocked office with a small couch.

When Defendant returned after the third search, he was taken to the BPS CID building where, at approximately 9:00 a.m., he was questioned by Officer Sherry Sisior and CID Chief Aloysius Alonz. Officer Sisior testified that she was directed to take a statement regarding the discovered gun. The questioning was conducted in Chief Alonz's office, an approximately 6-foot-by-8-foot room with four windows and good lighting.

At the outset of the questioning, Defendant was presented a "Bureau of Public Safety Advice of Rights" form, which provided:

> 1) You have the right to remain silent. You do not have to talk to me un less you want to do so.
>
> 2) If you do talk to me, anytihing [sic] you say may be used against you as evidence in a court of law.
>
> 3) You have the right to consult with a lawyer and to have a lawyer present while you are being questioned. You may stop talking to me at any time and demand a lawyer.
>
> 4) If you want a lawyer but are unable to pay for one, a lawyer will be appointed to represent you free of any cost to you. If you want a lawyer to consult with [sic] before or during questioning, we will try to get a lawyer here to talk to you.
>
> 5) The service of the Public Defender or his representative are [sic] available to you without charge.
>
> 6) You may ask to see your lawyer, members of your family, or your employer or a representative of your employer, and will be permitted to see them at reasonable intervals and for reasonable amounts of time if you so request.
>
> 7) You may ask that a message be sent to your lawyer, or to members of your family, or to your employer or to a representative of your employer, provided that the message can be sent without expense to the Government or you repay such expense.

8) Public Safety will release you or charge you with a criminal offense within a reasonable amount of time; you will not be held more than 24 hours without being charged.

[ROP Exhibit B].

Chief Alonz testified that he went over the Advice of Rights form with Defendant and that Defendant initialed and signed the form. Defendant testified that he only signed the form and that he only did so after Alonz told him that he could leave once he signed.

On the form, which was admitted into evidence, the initials "Y-L" are handwritten next to each of the numbered rights. Below the rights, the words "yes Y-L" are written next to the phrase "Do you understand these rights I have read and explained to you?" Below the acknowledgement of rights, the words "yes Y-L" are written next to the phrase "Knowing these rights, do you want to talk to me without having lawyer [sic] present?" The form is signed by Defendant and dated January 25, 2012, "0919 hrs."

Chief Alonz testified that he believed Defendant was under arrest but that Defendant was very cooperative. Alonz denied making threats or promises to Defendant.

Officer Sisior confirmed that Defendant was advised of his rights and that he signed the waiver form. Sisior testified that although Defendant spoke and understood English, he appeared very "sleepy," and was slow to comprehend questions. However, Defendant never asked to stop the interview. Three or four times during the interview, Defendant was allowed to leave the room to make tea.

Defendant spoke with Sisior and Alonz for approximately two hours. At the conclusion of the interview, he signed and initialed a written statement. Notably, the statement is initialed "Y-A." [ROP Exhibit C].

Defendant was released from custody sometime in the afternoon of January 25, 2012.

On January 15, 2013, Defendant was charged in a multi-count information with: (1) two counts of robbery; (2) two counts of grand larceny; (3) conspiracy to commit robbery; (4) conspiracy to commit grand larceny; (5) conspiracy to commit aggravated assault; (6) two counts of unlawful possession of a firearm; and (7) two counts of unlawful possession of ammunition.

DISCUSSION

In his motion, Defendant seeks to suppress all evidence obtained as a result of his detention (including the gun) and also the statements made to Sisior and Alonz.[1]

[1] Civil rights of a criminal defendant in Palau come from three sources: statute, the Constitution and the *Miranda* prophylactic rule. *See* 18 PNC §§ 218, 210; ROP Const. Art. IV, § 7; *Wong v. ROP*, 11 ROP 178, 182 (2004) (setting forth *Miranda*

[1] The Government does not intend to introduce Defendant's statements made prior to the Sisior interview.

rule). This decision will address suppression under each of the relevant rules.

I. Section 220

18 PNC § 218 provides:

> (a) In any case of arrest, or arrest for examination, as provided in subsection (d), section 211 of this chapter, it shall be unlawful:
>
> (1) to deny to the person so arrested the right to see at reasonable intervals, and for a reasonable time at the place of his detention, counsel, or members of his family, or his employer, or a representative of his employer; or
>
> (2) to refuse or fail to make a reasonable effort to send a message by telephone, cable, wireless, messenger or other expeditious means, to any person mentioned in subsection (a)(1) of this section, provided the arrested person so requests and such message can be sent without expense to the government or the arrested person prepays any expense there may be to the government; or
>
> (3) to fail either to release or charge such arrested person with a criminal offense within a reasonable time, which under no circumstances shall exceed 24 hours;
>
> (4) 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 (a)(1) - (3) of this section.
>
> (b) In addition, any person arrested shall be advised as follows:
>
> (1) that the individual has a right to remain silent;
>
> (2) 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
>
> (3) that the services of the public defender, when in the vicinity of his local representative, are available for these purposes without charge.
>
> 18 PNC § 218.

[2] Where the government violates one of the statutorily enumerated rights, "no evidence obtained as a result of such violation shall be admissible against the accused." 18 PNC § 220. Insofar as section 220 bars the admission of evidence "obtained as a result" of a violation of Title 18, a challenge to admissibility brought under the statute requires two inquiries: (1) whether there was a violation of Title 18; and (2) whether the evidence sought to be suppressed was "obtained as a result" of the

relevant violation. At the hearing, Defendant identified two potential violations—a failure to advise him of his rights and a denial of his right to counsel.

A. Advice of Rights

[3] Pursuant to 18 PNC § 218, a person under arrest must be advised of his right to an attorney and his right to remain silent. 18 PNC § 218(b). Additionally, "it is 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 (a)(1) - (3) of [18 PNC § 218]." 18 PNC § 218(a)(4). There is no question that Defendant was not advised of his rights until approximately 9:00 a.m. on January 25, well after he led the police to the gun used in the robbery. Accordingly, the Government violated section 218(b) if Defendant was "under arrest," at any time prior the January 25 advice of rights. Likewise, the Government violated section 218(a)(4) if Defendant was under arrest and those in custody of him questioned him about his participation in any crime without advising him of his rights set forth in 18 PNC § 218 (a)(1) - (3).

[4] "Arrest," is defined under the statute as "any form of legal detention by legal authority." 18 PNC § 101(a). Within the context of advice of rights, "arrest" includes detentions "for examination" based on probable cause that a crime has been committed. *See* 18 PNC §§ 211(d), 218(a). The statutory touchstone of legal detention tracks the *Miranda* requirement that warnings be issued to a person when he has been formally arrested or when he is in custody and subject to "restraint on freedom of movement of the degree associated with a formal arrest." *Stansbury v. California*, 511 U.S. 318, 322 (1994). Such similarity comports with the Appellate Division's direction that, insofar as section 218 codifies the *Miranda* warning, relevant United States case law may be used to interpret the statute's provision. *See Wong v. ROP,* 11 ROP 178, 182 n.2 (2004).

[5] When considering the existence of arrest (or custody) "[s]everal factors guide the inquiry: the location of the interview; the length and manner of questioning; whether the individual possessed unrestrained freedom of movement during the interview; and whether the individual was told she need not answer the questions." *U.S. v. Panak*, 552 F.3d 462, 465 (6th Cir. 2009).

Here all three of the relevant factors suggest a finding of "arrest" while Defendant was at the police station. The interview was conducted at the police station. Defendant was escorted by police when he left the station and was locked inside a bathroom. There is no indication (until the January 25 interview) that Defendant was told he did not need to answer questions. Finally, Defendant was kept at the police station for more than twenty-four hours. Accordingly, the Court concludes that Defendant was arrested, within the meaning of section 218, during his time at the police station. *See Panak*, 552 F.3d at 465.

Having found that Defendant was under arrest within the meaning of the statute, it is clear that the Government's failure to inform him of his rights under section 218 was a violation of the statute

requiring suppression of all evidence obtained "as a result" of such violation.

[6] "The phrase 'as a result of' necessarily means that the violation must be the proximate cause of the improperly obtained evidence. Thus, in order to suppress evidence obtained in violation of 18 PNC § 218, defendant must at the very least assert a causal link between the failure of investigators [and the discovery of the evidence]. Consequence will not be presumed where it is not alleged." *In re Temol*, 6 ROP Intrm. 326, 329 (Tr. Div. 1996). Defendant has not asserted a causal link between the violation and either the recovery of the gun or his statements. In the absence of such link, suppression pursuant to section 218 must be denied.

B. Statutory Right to Counsel

[7] Pursuant to section 218, the Government may not "deny" an arrestee "the right to see at reasonable intervals, and for a reasonable time at the place of his detention, counsel, or members of his family, or his employer, or a representative of his employer." 18 PNC § 218(a)(1). This provision mirrors a similar statute in Hawaii. *See* Haw. Rev. State § 803-9 ("It shall be unlawful in any case of arrest for examination [to] deny to the person so arrested the right of seeing, at reasonable intervals and for a reasonable time at the place of the person's detention, counsel or a member of the arrested person's family.").

In evaluating the scope of a defendant's right pursuant to this provision, the Court once again turns to *Miranda* case law. *Wong,* 11 ROP at 182 n.2. In this regard, the *Miranda* right to counsel must be invoked unambigously to be effective. *See Davis v. U.S.*, 512 U.S. 452, 458 (1984) (*Miranda* right to counsel must be invoked to be effective). Accordingly, the Court concludes that the right to counsel arising from section 218 also must be invoked unambiguously in order to be violated.

There is no dispute that Defendant's right to see family members was not violated. As to the right to see counsel, the evidence supports a conclusion that Defendant asked if he "needed" a lawyer and was told that he "did not need one because he was not arrested." Inquiries regarding the necessity of a lawyer are not unambiguous invocations of the right to counsel arising from *Miranda*. *See Diaz v. Senkowski*, 76 F.3d 61, 63 (2d Cir. 1996) ("Do you think I need a lawyer?" was not a clear statement invoking *Miranda* rights). Accordingly, the Court concludes that Defendant did not invoke his right to counsel under 18 PNC, and that, therefore, such right could not have been denied.

II. Constitution

[8, 9] There are three types of constitutional bars to admission of evidence in a criminal proceeding. First, the Constitution may speak directly to admissibility. *See e.g.*, ROP Const. art. IV, § 7 ("Coerced or forced confessions shall not be admitted into evidence."). Second, under the prudential "exclusionary rule," evidence obtained in violation of a constitutional right will be deemed inadmissible in court. *See Herring v. United States*, 555 U.S. 135, 139 (2009) (The exclusionary rule, "when applicable, forbids the use of improperly obtained evidence at trial."). Relatedly, where a constitutional

right has been violated, evidence must be suppressed when recovery of the evidence has "come . . . by exploitation of that illegality." *United States v. Delancy*, 502 F.3d 1297, 1309 (11th Cir. 2007) (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)).

Here, Defendant contends that the events of January 24 and January 25 violated his constitutional right to counsel and his constitutional right against self-incrimination.

A. Self-Incrimination

Like the United States Constitution, our Constitution protects an individual against compelled self-incrimination. ROP Const. art. IV, § 7. However, while the U.S. Constitution extends this protection to all "persons," the ROP right applies only to persons "accused of a criminal offense." *Compare* U.S. Const. amend. V, *with* ROP Const. art. IV, § 7. Accordingly, as an initial matter, the Court must first address when a person is "accused" within the meaning of Article IV, section 7.

In ascertaining the meaning of the constitutional provision, the Court begins with the general rule that "the courts are required to give effect to the intent of the framers as expressed in the plain meaning of the language used in the constitution." *Ngeremlengui Chiefs v. Ngeremlengui Gov't, 8 ROP Intrm.*, 178, 181 (2000). In this regard, a person is considered "accused" of a crime when he is "implicated" in the crime. Black's Law Dictionary (9th ed. 2009), accused. A person is "implicated" when it is "show[n he is] involved in . . . a crime." Black's Law Dictionary (9th ed. 2009), implicate (internal punctuation omitted).

[10, 11]The right against self-incrimination protects against two separate acts. First, "the core protection afforded by the Self–Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial." *United States v. Patane*, 542 U.S. 630, 637 (2004) (plurality op.) Second, the right "privileges [a person] not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). The latter of these rights prohibits the compelling from the accused of self-incriminating statements. *See ROP v. Recheluul*, 10 ROP 205 (Tr. Div. 2002).

[12] To determine whether a statement was voluntary (rather than compelled) a court must consider "the totality of the circumstances to determine whether the will of the suspect was overborne by government coercion." *Wong*, 11 ROP at 183. "The test for the voluntariness of a confession is whether the confession was extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence." *Id*. at 183–84 (quoting *Hutto v. Ross*, 429 U.S. 28, 30 (1976) (internal quotation marks omitted)). Additionally, a statement may be involuntary if the accused is incapable of voluntarily waiving their right to silence. *Recheluul*, 10 ROP at 207. In evaluating a capacity to waive, a court should consider the accused's age, intelligence, health, and impairment due to drugs or alcohol. *Id*.

Of relevance here, "the Self–Incrimination Clause contains its own exclusionary rule . . . . [Specifically,] those subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (or evidence derived from their statements) in any subsequent criminal trial." *Patane*, 542 U.S. at 640.

1. The Relevant Facts

Here, there are two relevant incriminating statements: (1) the signed confession made during the January 25 interview; and (2) the statements made the evening of January 24, leading the police to the gun. Defendant contends that these statements were involuntary because: (1) Francisco waved a knife in Defendant's direction while yelling; (2) Francisco threatened to put Defendant in a "dark room" with someone who would hurt him; (3) Defendant was deprived of food and sleep; (4) Francisco promised Defendant that if he led him to the gun he would not be charged for the gun; (5) Defendant was on some type of drug (which had been given to him by the police); and (6) Alonz told him that if he signed the waiver form, he would be able to go home. Defendant alleges that that he was deprived of food (with the exception of an apple slice) and sleep during the more than twenty-four hours of detention.

Officer Stark, who was with Francisco and Defendant for much of the afternoon and evening, denied witnessing any of the threats or promises described by Defendant. Chief Alonz testified that he did not threaten or make any promises to Defendant. Testimony established that Defendant was allowed to sleep on a small couch in an unlocked room.

As to the drug allegation, Defendant alleged in his affidavit that, following his consumption of two pills he was told were Tylenol, he felt "happy, at ease but slightly dizzy, and comfortable to talk to the police." [Affidavit, at ¶ 8]. Defendant did not testify how long this feeling lasted, or what role, if any, it had in his making the statements leading police to the gun or the statements on January 25.

In evaluating these allegations, the Court notes that "the trial court is not required to accept uncontradicted testimony as true . . . . Although a finder of fact may not arbitrarily disregard testimony, [he] is not bound to accept even uncontradicted testimony." *Ngetelkou Lineage v. Orakiblai Clan*, 17 ROP 88, 92 (2010).

Having considered the credibility of the witnesses, the Court concludes that Defendant was provided an opportunity to sleep on a small couch and that he was offered at least some food. Likewise, Chief Alonz did not make any promises or threats to secure Defendant's statement during the January 25 interrogation.

The allegations regarding Officer Francisco's actions, however, are more concerning. The uncontradicted testimony was that Officer Francisco made a series of threats to Defendant and then promised that there would be no gun charges if Defendant led the police to the gun used in the robbery. Following the alleged promise, Defendant made statements leading the police to the gun. Although these allegations were not included in Defendant's initial affidavit,

they stand un-rebutted by Francisco himself (who for reasons unknown was not called to testify)[2] or any of the officers who appeared at the hearing. Notably, there is no testimony explaining *why* Defendant (a criminal suspect) made statements directly leading police to evidence of his crime. In the absence of such testimony, the Court credits Defendant's allegations that Francisco promised that Defendant would not be charged for the gun if led police to the weapon. However, the Court finds the allegations regarding the threats to be exaggerated and uncredible.

2. The Law Applied

The affidavit of probable cause filed in this matter shows that on January 23, 2013, Defendant was identified as one of the perpetrators of the robbery. Thus, there can be no doubt that Defendant was implicated in a crime at the time he was brought to the police station. Accordingly, at all relevant times, Defendant was an "accused" entitled to a protection against self-incrimination under the Constitution. *See* Article IV, section 7.

Having found that Francisco promised Defendant that he would not be charged for the gun if he led the police to the gun, the question becomes whether such conduct (in conjunction with the other circumstances of the detention, such as sleep deprivation) resulted in an overbearing of Defendant's will. *Wong*, 11 ROP at 183.

A promise of non-prosecution is sufficient to overbear the will of a suspect. *See Wong*, 11 ROP at 184 ("The test for the voluntariness of a confession is whether the confession was extracted by any sort of threats or violence, *or obtained by any direct or implied promises, however slight*, or by the exertion of any improper influence." (emphasis added)); *see also U.S. v. Menesses*, 962 F.2d 420, 428 (5th Cir. 1992) ("[A] confession made induced by an assurance that there will be no prosecution is not voluntary."). Here, the totality of the circumstances—the promise made to Defendant regarding the retrieval of the gun, the sleep deprivation and the overall tenor of the detention—operated to overbear Defendant's will. Accordingly, Defendant's statements regarding the gun were involuntary and subject to suppression. *Id*. Likewise, all evidence derived from such statements must be suppressed. *Patane*, 542 U.S. at 640.

It is clear that the discovery of the gun (and all evidence discovered with the gun) was derived from Defendant's statements leading the police to the gun. Likewise, insofar as Officer Stark testified that she was directed to take Defendant's statement regarding the gun, it is equally clear that Defendant's statements to Officer Stark were derived from the previous unlawful coercion. Accordingly, the gun and Defendant's January 25 statements must be suppressed. *Patane*, 542 U.S. at 640.

B. Right to Counsel

[13] Like the right against self-incrimination, the right to counsel attaches at the time a defendant has been implicated in a crime. Article IV, section 7. In this

[2] Although the Government could not have known the allegations that would be levied against Francisco, it is clear that he was the officer in charge of Defendant's interrogation. Accordingly, it is inconceivable that he would not have been called to testify.

regard, the right differs from the express constitutional right to counsel derived from the United States Constitution, which attaches at the time formal charges are filed. *Texas v. Cobb*, 532 U.S. 162, 167–68 (2001) (Sixth Amendment right to counsel attaches when "a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."). Such difference is seen in the prefatory clauses of the two sections. *Compare* Article IV, section 7 ("At all times the accused shall have the right to counsel.") with U.S. Const. amendment 6. ("In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."). Despite the difference in texts, the Appellate Division has looked to the United States in interpreting the scope of Palau's right to counsel. *See Sanders v. ROP*, 8 ROP Intrm. 90, 91 n.1 (1999).

[14] Once attached, the right to counsel secures for the accused "the right to rely on counsel as a 'medium' between him and the State." *Michigan v. Jackson*, 475 U.S. 625, 632 (1986) (internal quotation marks omitted). In this regard, the accused has the right "to be free of uncounseled interrogation." *Kansas v. Ventris*, 556 U.S. 586, 592 (2009). An interrogation, in turn, is a question "deliberately designed to elicit incriminating remarks." *Bey v. Morton*, 124 F.3d 524, 531 (3rd Cir. 1997). Thus, the right to counsel "renders inadmissible in the prosecution's case in chief statements deliberately elicited from a defendant without an express waiver of the right to counsel." *Michigan v. Harvey*, 494 U.S. 344, 348 (1990) (internal quotation marks omitted). The exclusionary rule and fruit of the poisonous tree doctrines apply to violations of the constitutional right to counsel. *Nix v. Williams*, 467 U.S. 431, 442 (1984).

Here, as explained above, Defendant was accused of the crime of robbery when he was taken to the police station and placed in custody. Accordingly, Defendant was entitled to the advice of counsel during a police interrogation. *Ventris*, 556 U.S. at 592. It is beyond dispute that Defendant was subjected to interrogation without counsel throughout the afternoon and evening of January 24. During the course of the interrogation, Defendant led police to the gun. The following morning, Defendant was questioned specifically about the discovered gun and, in response to such questions, gave an incriminating statement. Under these circumstances, suppression of the gun and the January 25 statements is necessary. *Nix*, 467 U.S. at 442.

III. *Miranda* Warnings

Having found that the Constitution requires suppression of the challenged, the Court declines to address whether suppression is warranted due to a violation of Defendant's *Miranda* rights.

CONCLUSION

For the reasons set forth above, Defendant's Motion to Suppress is **GRANTED.** The gun and the statements issued on January 25, 2012, are hereby **SUPPRESSED**.