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10 IN THE SUPERIOR COURT
11 FOR THE
12 COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

13 COMMONWEALTH OF THE NORTHERN) CRIM. CASE NO. 93-153F
14 MARIANA ISLANDS,)
15 Plaintiff,)
16 v.)
17 MICHAEL AULERIO,)
18 Defendant.)
19

20 ORDER DENYING DEFENDANT'S
21 MOTION TO EXCLUDE EVIDENCE

22
23 The Defendant, Michael Aulerio, moves for the exclusion of
24 all statements he made to a police officer during the morning of
25 September 6, 1993. The motion is premised upon Article I, §§ 4(a)
26 and (c) of the C.N.M.I. Constitution, the Fifth, Sixth and
27 Fourteenth Amendments of the United States Constitution, and Rule
28 12(b)(3) of the Commonwealth Rules of Criminal Procedure.

29 I. FACTS

30 During the early morning hours of September 6, 1993,
31 Herman Teriong was allegedly stabbed in his chest with a knife at
32 the Blue Lei Apartments. He died shortly thereafter.

33
34 FOR PUBLICATION

1 At approximately 1:26 a.m., Sgt. Jose Rios and Officer Manuel
2 Berki responded to a call that there was a disturbance at the Blue
3 Lei Apartments. They were the first officers to arrive on the
4 scene. Upon arrival, they learned that someone had been stabbed
5 and immediately sought to secure the area.

6 Officer Berki interviewed Ms. Elmera Susutaro, the common law
7 wife of the Defendant, inside apartment # 1 of the Blue Lei
8 Apartments. Ms. Sustaro told the officer that she and the
9 Defendant were arguing outside their apartment when the victim,
10 Mr. Teriong, tried to break up the argument. She said that the
11 Defendant then pushed the victim and that the two men began to
12 fight. Ms. Susutaro told the officer that the victim punched the
13 Defendant several times, the Defendant pulled a knife out from his
14 lower back area and stabbed the victim in his chest.

15 After the interview, Officer Berki and Ms. Susutaro walked
16 out of the apartment. At that time, the officer noticed a man,
17 later identified as the Defendant, wearing underwear and sitting
18 down immediately outside the apartment. Ms. Susutaro identified
19 the man as the assailant who had stabbed the victim. Officer
20 Berki conveyed the information obtained from Ms. Susutaro to Sgt.
21 Rios.

22 At approximately 1:40 a.m., Captain Jose C. Camacho, Jr.,
23 arrived at the apartments. Captain Camacho asked Sgt. Rios
24 whether there were any witnesses to the incident. There is some
25 dispute as to the manner in which Sgt. Rios responded. According
26 to Captain Camacho's testimony, Sgt. Rios merely pointed to the
27 Defendant. Sgt. Rios, on the other hand, claims that he informed
28 Captain Camacho that the Defendant was a suspect in the incident.

1 It is undisputed, however, that none of the officers had spoken
2 with the Defendant by this time.

3 When Captain Camacho approached the Defendant, he noticed the
4 Defendant had red stains on his underwear, chest and hands.
5 Captain Camacho then asked the Defendant if he had seen what had
6 happened. In response, the Defendant stated that "[he] was
7 struggling with the victim and at the same time holding a knife
8 and just stab the victim." The officer then advised the Defendant
9 to stop talking and informed him of his constitutional rights. At
10 approximately 1:52 a.m., Capt. Camacho arrested the Defendant with
11 the offense of assault with a dangerous weapon.

12

13 **II. ISSUE**

14 The Court will consider the following issues: (1) whether
15 the Defendant was in "custody" for purposes of the Fifth Amendment
16 privilege against self-incrimination; and (2) whether the
17 Defendant's right to counsel under Article I, Section 4(a) of the
18 C.N.M.I. Constitution attaches before the initiation of adversary
19 judicial proceedings.

20

21 **III. ANALYSIS**

22 The United States Constitution and the Constitution of the
23 Northern Mariana Islands guarantee to the people of this
24 Commonwealth the right to counsel. U.S. CONST. amend. V; U.S. CONST.
25 amend. VI; C.N.M.I. CONST. art. I, § 4(a) and (c). The law makes a
26 distinction between the right to counsel arising under the Fifth
27 Amendment privilege against self-incrimination, U.S. CONST. amend.
28 5 and see C.N.M.I. CONST. art. I, § 4(c), and the right to counsel

1 guaranteed by the Sixth Amendment and its counterpart, C.N.M.I.
2 CONST. art. I, § 4(a).
3

4 A. Privilege against Self-Incrimination Under the Fifth
5 Amendment to the United States Constitution and Under
6 Article I, Section 4(c) of the C.N.M.I. Constitution

7 Defendant submits that he made an incriminating statement to
8 Captain Camacho during a custodial interrogation before his
9 Miranda rights were read to him. *Miranda v. Arizona*, 384 U.S. 436
10 (1966). He, therefore, concludes that the Government obtained the
11 statement in violation of the Fifth Amendment to the U.S.
12 Constitution and Article I, Section 4 (c), and as such, the
13 statement should be excluded.

14 The Fifth Amendment of the United States Constitution and
15 Article I, § 4(c) of the C.N.M.I. Constitution secures the
16 privilege against self-incrimination.^{1/} This privilege ensures
17 that no person shall be compelled to be a witness against himself
18 or herself in a criminal case, U.S. CONST. Art. V; C.N.M.I. CONST.
19 ART. I, § 4(c), and applies only to communicative or testimonial
20 acts. *Analysis to the C.N.M.I. Constitution*, at 15 (1976). It
21 applies at every stage of police or other investigation, pre-trial
22 hearings, and trials. *Id.* at 14.

23 In its landmark decision of *Miranda v. State of Arizona*, 384 U.S.
24 S.Ct. 1602 (1966), the United States Supreme Court enunciated
25 that:

26

^{1/} The *Analysis to the N.M.I. Constitution* states that "no
27 substantive change from the relevant provision of the Fifth
28 Amendment or the interpretation of that provision by the United
 States Supreme Court [was] intended." *Analysis to the N.M.I.*
 Const. at 14 (1976). This Court will, therefore, turn to case law
 interpreting the Fifth Amendment in analyzing the instant case.

1 [t]he prosecution may not use statements, whether
2 exculpatory or inculpatory, stemming from custodial
3 interrogation of the defendant unless it demonstrates
4 the use of procedural safeguards effective to secure the
privilege against self-incrimination. By custodial
interrogation, we mean questioning initiated by law
enforcement officers after a person has been taken into
custody or otherwise deprived of his freedom of action
5 in any significant way.

6 *Id.* at 1612 (footnote omitted) (emphasis added); accord *Analysis to*
7 the C.N.M.I. Const. at 14. In so ruling, the *Miranda* Court sought
8 to protect the "privilege against compelled self-incrimination
9 from the coercive pressures that can be brought to bear upon a
10 suspect in the context of custodial interrogation." *Berkemer v.*
11 *McCarty*, 104 S.Ct. 3138, 3144 (1984) (citing *Miranda*, 86 S.Ct.
12 1602).

13 The ultimate issue is, therefore, whether "there is a 'formal
14 arrest or restraint on freedom of movement' of the degree
15 associated with a formal arrest." *California v. Beheler*, 103
16 S.Ct. 3517, 3520 (1983) (*per curiam*) (citing *Oregon v. Mathiason*,
17 97 S.Ct. 711, 714 (1977)). A suspect is entitled to the *Miranda*
18 warnings when he is formally placed under arrest and directed to
19 go into the police car. *Berkemer*, 104 S.Ct. at 3147. Also, where
20 the questioning takes places in a suspect's home, the right
21 attaches once he has been arrested and is no longer free to go
22 where he pleases. *Orozco v. Texas*, 89 S.Ct. 1095 (1966).

23 A determination as to whether a suspect is in custody turns
upon the perception of a reasonable person in the suspect's
25 position. *Berkemer*, 104 S.Ct. at 3151. Therefore, an individual
26 is not "in custody" simply because he or she is the focus of an
27 investigation. *Beheler*, 103 S.Ct. at 3519 n. 2 and 3520; *Beckwith*
28 *v. United States*, 96 S.Ct. 1612, 1616 (1976).

1 In support of his assertion that he was in custody, the
2 Defendant directs the Court's attention to three factors: (1)
3 that "no one was allowed to leave the crime scene";^{2/} (2) that he
4 was the "prime 'suspect'" even before Capt. Camacho questioned
5 him; and (3) that he was "surrounded" by a number of police
6 officers when Capt. Camacho questioned him.^{3/}

7 In the case at bar, there is nothing in the record to suggest
8 that the Defendant should have received the *Miranda* warnings any
9 earlier than he did. The Defendant had not been placed under
10 arrest at the time he made the incriminating statement. Nor does
11 it appear that the manner in which the officers treated the
12 Defendant was the functional equivalent of a formal arrest.
13 Assuming arguendo that the Defendant was indeed a suspect and that
14 Captain Camacho intended to arrest him when Captain Camacho first
15 approached the Defendant, this suspicion and intention were never
16 communicated to him. See *Berkemer*, 104 S.Ct. at 3151 ("A
17 policeman's unarticulated plan has no bearing on the question
18 whether a suspect was 'in custody' at a particular time"); accord
19 *Beckwith*, 96 S.Ct. at 1616-17. Further, when Capt. Camacho asked
20 him what he had seen, the Defendant was located in the front of
21 the apartment building in which he apparently lived; he was
22 neither secluded nor separated from his family and friends during
23

24 ^{2/} The Defendant emphasizes that a witness to the incident
25 "was stopped and later escorted back to the crime scene for
26 questioning." Defendant's Supplemental Memorandum of Law, at 3,
lines 6 - 10 (Nov. 5, 1993).

27 ^{3/} As far as the Court can discern at this time, the record
28 only supports a conclusion that many officers were present on the
scene. There is no indication that the officers stood in a circle
around the Defendant, in relatively close proximity to the
Defendant.

1 the period preceding his arrest.^{4/}

2 The facts that many officers were on the scene and that
3 possible eye-witnesses to the incident had to remain on the scene
4 so that the officers could interview them cannot support the
5 conclusion that the Defendant's freedom of movement was restricted
6 in a significant way. To rule otherwise would unnecessary expand
7 the scope of *Miranda* and would most likely impair the ability of
8 law enforcement officers; such a ruling would impose a duty on the
9 officers to "Mirandize" every individual on the scene. This
10 result was clearly not intended by the *Miranda* Court. See
11 *Miranda*, 86 S.Ct. at 1629-30 (safeguards do not apply to general
12 on-the-scene questioning because "[i]t is an act of responsible
13 citizenship for individuals to give whatever information they may
14 have to aid in law enforcement."); *Oregon v. Mathiason*, 97 S.Ct.
15 711, 714 (1977) ("police officers are not required to administer
16 *Miranda* warnings to everyone whom they question."); *Lowe v. United
17 States*, 407 F.2d 1391, 1393-94 (9th Cir. 1969).

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19

20 ^{4/} These facts lessen, to some degree, the extent of the
21 "police-dominated" atmosphere common in the cases involved in
22 *Miranda* and its progeny. See *Berkemer*, 104 S.Ct. at 3149 - 50 and
23 n.28 (citing *Orozco v. Texas*, 89 S.Ct. 1095, 1096 (1969) (suspect
24 arrested and questioned in his bedroom by four police officers);
25 *Mathis v. United States*, 88 S.Ct. 1503, 1503-04 (1968) (defendant
26 questioned by a Government agent while in jail)). Where
27 questioning occurs in surroundings that are familiar to the
28 suspect, it is less likely that custody will be found. *Criminal
Procedure Project*, 81 GEO. L.J. 996 n.573 (1993), and cases cited
therein. The Court, therefore, agrees with the prosecution that
the facts of this case lack the inherent coerciveness of a
custodial interrogation. See *Minnesota v. Murphy*, 104 S.Ct. 1136,
1144 (1984) (citation omitted) (safeguards enunciated in *Miranda*
"'[do] not apply outside the context of the inherently coercive
custodial interrogations for which it was designed.'"); *Miranda*,
86 S.Ct. at 1629-30 ("compelling atmosphere inherent in the
process of in-custody interrogation is not necessary present"
where general on-the-scene questioning is conducted).

1 For these reasons, the Court holds that the Defendant was not
2 taken into custody until he was arrested. As such, the
3 Defendant's right to counsel based on the privilege against self-
4 incrimination was not violated.

5

6 B. Right to Counsel Under Article I, Section 4(a) of the
7 C.N.M.I. Constitution

8 The Defendant posits that his right to counsel under Article
9 I, Section 4(a) of the C.N.M.I. Constitution had already attached
10 when Captain Camacho "interrogated" him. The Defendant stresses
11 that the *Analysis* to Article I, Section 4 (a) states that the
12 "right attaches when the investigation is no longer a general
13 inquiry into an unsolved crime but has begun to focus on a
14 particular suspect." See *Analysis to the C.N.M.I. Const.*, at 11.
15 In essence, he is seeking a ruling from this Court that the right
16 to counsel under Section 4(a) attaches before the initiation of
17 adversary proceedings.

18 The C.N.M.I. Constitution guarantees to the accused the right
19 to assistance of counsel in all criminal prosecutions. C.N.M.I.
20 CONST., art. I, § 4 (a). Although Article I, Section 4(a) is
21 expressly premised upon the Sixth Amendment of the United States
22 Constitution, this section affords broader protection to an
23 accused than the Sixth Amendment. *Analysis to the C.N.M.I.*
24 *Const.*, at 11.

25 Under the Sixth Amendment to the United States Constitution,
26 it is firmly established that the right to counsel attaches only
27 at or after the initiation of adversary judicial proceedings
28 against the defendant. *United States v. Gouveia*, 104 S.Ct. 2292,

1 2297 (1984). The proceedings may be initiated by way of formal
2 charge, preliminary hearing, indictment, information, or
3 arraignment. *Id.*; *Brewer v. Williams*, 97 S.Ct. 1232, 1239 (1977);
4 *Massiah v. United States*, 84 S.Ct. 1199, 1202 (1964); see, e.g.,
5 *Maine v. Moulton*, 106 S.Ct. 477 (1985). The rationale is that the
6 initiation of such proceedings constitutes the very first point in
7 time that the "government has committed itself to prosecute, and
8 only then that the adverse positions of government and defendant
9 have solidified." *Kirby v. Illinois*, 92 S.Ct. 1877, 1882 (1972)

10 The interpretation as to when the right attaches is congruous
11 with the literal language of the Sixth Amendment as well as the
12 purposes underlying the right to counsel. *Gouveia*, 104 S.Ct. at
13 2297-98. The primary purpose of this right is "to assure aid at
14 trial, when the accused [is] confronted with both the intricacies
15 of the law and the advocacy of the public prosecutor." *Id.* at
16 2298 (citing *United States v. Ash*, 93 S.Ct. 2568, 2573 (1973)).

17 The language in the *Analysis of the C.N.M.I. Constitution*
18 upon which the Defendant relies appears to derive from *Escobedo v.*
19 *State of Illinois*, 84 S.Ct. 1758, 1765 and 1766 (1964). This case
20 is one of only two United States Supreme Court cases which have
21 deviated from general rule as to when the right attaches.
22 *Gouveia*, 104 S.Ct. at 2297 n.5 (citing *Miranda*, 86 S.Ct. 1602,⁵
23 and *Escobedo*, 84 S.Ct. 1758) (footnote added). Even though
24 *Escobedo* was originally decided as a Sixth Amendment case, the
25 United States Supreme Court "in retrospect perceived that the

26
27 ⁵ It is essential to note that counsel was required in
28 *Miranda* because of the privilege against self-incrimination.
Gouveia, 104 S.Ct. at 2297 n.5. It is exclusively a Fifth
Amendment case. *Moran*, 106 S.Ct. at 1145.

1 'prime purpose' of *Escobedo* was not to vindicate the
2 constitutional right to counsel as such, but, like *Miranda*, 'to
3 guarantee full effectuation of the privilege against self-
4 incrimination.' *Moran v. Burbine*, 106 S.Ct. 1135, 1145 (1986)
5 (quoting *Kirby*, 92 S.Ct. at 1882). The United States Supreme
6 Court has, therefore, expressly ruled out any reliance on *Escobedo*
7 and *Miranda* for the proposition that the right to counsel attaches
8 before the initiation of adversary judicial proceedings. *Moran*,
9 106 S.Ct. at 1145

10 This examination of Sixth Amendment cases brings the Court to
11 a pivotal issue; whether Article I, Section 4(a) should be
12 interpreted in a manner different from the Sixth Amendment due to
13 inclusion of the language of *Escobedo* in the Analysis. For three
14 reasons, this Court holds that the right to counsel under Article
15 I, Section 4(a) attaches at the initiation of adversary
16 proceedings.⁶ First, the C.N.M.I. Constitution is a living
17 document and is not static in time. Since the decision in
18 *Escobedo*, the case law interpreting the right to counsel of an
19 accused has fully developed. It would therefore be unwise to take
20

21 ⁶ Even if the Court adopted *Escobedo* as the controlling
22 authority for purposes of interpreting Section 4(a), the
23 Defendant's right to counsel under Section 4(a) had not attached
24 by the time that Capt. Camacho asked him if he had seen what had
25 happened. *Miranda* clarified what the *Escobedo* Court meant when it
26 talked about an investigation which had focused on an accused. 86
27 S.Ct. at 1612 n. 4. This phrase refers to a custodial
28 interrogation which is defined as "questioning initiated by law
enforcement officers after a person has been taken into custody or
otherwise deprived of his freedom of action in any significant
way." *Id.* at 1612.

The Court held *supra* that the Defendant's right to counsel
the Fifth Amendment and under Section 4(c) was not violated
because he was not in custody. Therefore, his efforts and
reliance on *Escobedo* would not be availing for him for purposes of
this suppression motion.

1 a snapshot of the law at that time and declare that that is what
2 the state of the law shall always be. Second, given that the
3 United States Supreme Court has disavowed its understanding of the
4 applicable law in *Escobedo*, see *Kirby*, 92 S.Ct. at 1882 (limiting
5 reach of *Escobedo*), *Moran*, 106 S.Ct. at 1145, this Court sees no
6 reason to adopt an admittedly erroneous interpretation of the law.
7 Third, if the Court were to agree with the Defendant's
8 interpretation of his right to counsel under Section 4(a), the
9 right to counsel based upon the privilege against self-
10 incrimination under Section 4(c) and that under Section 4(a) would
11 overlap. Both constitutional provisions would apply to custodial
12 interrogations. Such an outcome would create confusion especially
13 where issues of waiver and resumption of interrogation arise.

14 Here, the Defendant concedes that he made the inculpatory
15 statement before the formal initiation of adversary judicial
16 proceedings. This Court, therefore, rejects the Defendant's
17 contention that his right to counsel under Article 1, Section 4(a)
18 has been violated.

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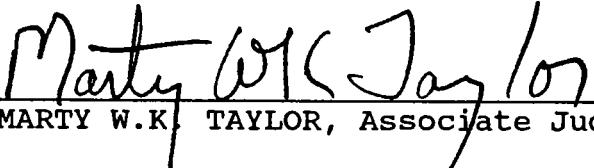
20 **IV. CONCLUSION**

21 The Defendant's motion to suppress is hereby DENIED.

22

23 So ORDERED this 11th day of January, 1994.

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25 
MARTY W.K. TAYLOR, Associate Judge

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