

DEC - 9 2003

For The Northern Mariana Islands  
By \_\_\_\_\_  
(Deputy Clerk) *[Signature]*

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN MARIANA ISLANDS

UNITED STATES OF AMERICA,	)	Criminal No. 02-0013
	)	
Plaintiff	)	
	)	DECISION RE:
v.	)	DENIAL OF 28 U.S.C. § 2255
	)	MOTION TO VACATE, SET
MUN, Deuk Kyu,	)	ASIDE, OR CORRECT
	)	SENTENCE
Defendant	)	
_____	)	

BY ORDER dated December 8, 2003, the court denied defendant Mun's 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence and indicated that this written decision would be forthcoming. Plaintiff has appeared by and through its attorney, Assistant U.S. Attorney Gregory Baka; defendant has appeared through counsel F. Matthew Smith.

1 Defendant Mun Deuk Kyu alleged ineffective assistance of counsel, in  
2 violation of his Sixth Amendment rights. In his motion, he sought an order (1)  
3 directing that he be immediately brought before the court to hear and determine  
4 the legality of his restraint, (2) discharging him from further custody, (3)  
5 allowing him to post bail pending the hearing on this motion, (4) an order  
6 appointing his current counsel to continue representing him, (5) and an  
7 evidentiary hearing. For the following reasons, defendant's motion was denied.  
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10 Defendant made five claims in support of his motion that he was denied  
11 ineffective assistance of counsel. The court will discuss each in turn.  
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14 First, defendant claimed that his original trial counsel failed to move for  
15 dismissal of the indictment on the ground that the unavailability of alien  
16 witnesses deprived him of his right to compulsory process. It is sufficient to  
17 dispose of this claim to note that defendant failed to make a "plausible showing  
18 that the testimony of the witnesses would have been material and favorable to  
19 his defense[.]" United States v. Valenzuela-Bernal, 458 U.S. 858, 872-873, 102  
20 S.Ct. 3440 (1982). As important, defendant failed to make the required showing  
21 of bad faith by plaintiff in regards to this claim. See United States v. Dring, 930  
22 F.2d 687, 693 (9th Cir. 1991).  
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1           Second, defendant argued that his trial counsel was ineffective because he  
2 failed to “properly discover, investigate, compel, or call as defense witnesses  
3 those alleged aliens who [defendant] allegedly brought or attempted to bring to  
4 the United States as their testimony might have shown that they were tourists,  
5 were not going to Guam, were not aliens and/or other material matters  
6 favorable to [the] defense; and improperly stipulated that the fourteen were  
7 aliens of the United States.” During the trial one of the aliens did testify and  
8 was cross-examined by defendant’s trial counsel. Testimony of more witnesses  
9 would have been cumulative. As to the stipulation of the alienage of the  
10 fourteen persons who had been smuggled into the Commonwealth, the court  
11 cannot speculate as to the reasons for it. However, as plaintiff pointed out in its  
12 opposition memorandum, it is entirely possible that trial counsel concluded that  
13 it would have been easy for plaintiff to prove that the aliens were not legally in  
14 the Commonwealth and that to allow drawn out evidence of that fact would  
15 have only been more damning to his client’s chances. Defendant’s argument  
16 about what “might have been shown” was insufficient to assist him in this  
17 motion, particularly in light of the well-developed record.  
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1 Defendant next claimed that his trial counsel failed to object to the  
2 hearsay testimony of Zheng, an alleged co-conspirator, and that the testimony  
3 unfairly prejudiced him by linking him with a conspiracy “at which he was  
4 merely present.” Such testimony is non-hearsay under Fed.R.Evid. 801(d)(2)(E):  
5 a statement by a co-conspirator during the course and furtherance of a  
6 conspiracy is not hearsay.  
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9 Fourth, defendant argued that his trial counsel should have withdrawn  
10 when defendant objected to his continued representation, and that the court  
11 should have allowed him to represent himself.<sup>1</sup> The latter argument was  
12 rejected by the Ninth Circuit and need not be re-visited here. See United States  
13 v. Mun Deuk Kyu, No. 02-10667 (Oct. 17, 2003). As to the former, the record  
14 in this matter discloses that defendant sought to dismiss his trial counsel when  
15 all that remained for him to do was give his closing argument. The motion was  
16 at that point untimely. See e.g. Moore v. Calderon, 108 F.3d 261, 262-263 (9th  
17 Cir. 1997) (establishing a “bright line” rule that a request to represent oneself is  
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24 Defendant, by not appealing the denial of his oral motion for substitute  
25 appointed counsel at the time he sought to dismiss his trial counsel, has waived  
26 the issue. United States v. Martini, 31 F.3d 781, 782 n.2 (9th Cir. 1994), *quoting*  
In re Riverside-Linden Inv. Co., 945 F.2d 320, 325 (9th Cir. 1991).

1 timely if made before the jury is empaneled); United States v. Bishop, 291 F.3d  
2 1100, 1114 (9th Cir. 2002); United States v. McKenna, 327 F.3d 830, 844 (9th  
3 Cir. 2003).

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5 Last, defendant argued that his trial counsel's performance was  
6 constitutionally deficient for failure to bring a Fed.R.Crim.P. 29 motion for a  
7 judgment of acquittal due to insufficient evidence to sustain the claim.  
8 Defendant has not supported this argument with anything to show how this  
9 alleged failure harmed him. The court presided at this jury trial and is familiar  
10 with the evidence presented. The court then and now concluded, as did the  
11 jury, that the evidence of defendant's guilt was overwhelming.

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13 Defendant failed to make the requisite showings of deficient performance  
14 by his counsel and that such deficient performance was so serious as to deprive  
15 him of a fair trial. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052  
16 (1984). For that reason, his requests for an order (1) directing that he be  
17 immediately brought before the court to hear and determine the legality of his  
18 restraint, (2) discharging him from further custody, (3) allowing him to post bail  
19 pending the hearing on this motion, and (4) and a pre-trial hearing to establish  
20 the process for scheduling an evidentiary hearing were denied. However, upon  
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1 further consideration, the court grants defendant's motion for an order  
2 appointing attorney Matthew Smith as his counsel, *nunc pro tunc* to October 15,  
3 2003.  
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5 IT WAS AND IS SO ORDERED.  
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7 DATED this 9th day of December, 2003.  
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11 ALEX R. MUNSON  
12 Judge  
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