For Publication

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, **Plaintiff,** **v.** **FRANCISCO AGUON PUA,** **Defendant.**	**CRIMINAL CASE NO. 05-0132 D** **ORDER DENYING DEFENDANT'S MOTION FOR STAY**

Defendant Francisco Aguon Pua, through counsel Edward C. Arriola, moves this Court for a stay on litigation so that he may pursue a motion for reconsideration of the CNMI Supreme Court's August 3, 2006 decision in the instant case.[1] That decision granted the appeal of the Commonwealth (through Deputy Attorney General Gregory Baka), thereby reversing this Court's decision to exclude testimony based on an illegally recorded conversation.

Mulling over a motion for a stay is abnormal for me. The August 3, 2006 decision, however, has encouraged me to consider carefully how to proceed in this case. I was heartened by Justice Kennedy's recent statement that guidance is the basis of the U.S. Supreme Court's decision to grant certiorari. In the infantile stage of our judiciary and the crucial era of our political, social, and economic development, we all need to be guided. For guidance to have meaning, decision-makers must be free to speak their mind and be heard. Discussion and debate should be the foundation for all determinations. Perhaps my upbringing has made me appreciate the value of verbal interactions.

[1] The main purpose of the reconsideration motion is to draw attention to *State v. Williams*, 617 P.2d 1012 (Wash. 1980), an analogous case in which the Washington Supreme Court reached a conclusion similar to that of the Superior Court. Defense counsel had failed to call attention to the *Williams* case during the appeal of the instant case.

If I were to write a book, I would begin by saying, "Tataho yan nanaho, hamyo na dos munahi yu ni este na regalo para munga yu maahanao kumentos qi risonable na manera." *(Dad and Mom, you were the ones who gave me this gift to be unafraid to speak in a reasonable manner.)*

In this opinion, I speak my mind regarding the rights accorded by our CNMI Constitution. I have undertaken the difficult task of interpreting these rights. Our highest court, presented with such an opportunity, would strive to do the same.

A. Events Leading to Trial

On May 6, 2005, Special Agent Joseph E. Auther of the Federal Bureau of Investigations contacted Defendant at his residence to conduct an interview concerning the May 22, 2002 homicide and robbery at Candi's Poker Parlor. Also present at this interview was Detective John Santos of the Department of Public Safety. After being advised of the identity of the interviewer, and the purpose of the visit, Defendant consented to the interview. Agent Auther recorded the interview without Defendant's knowledge, using a concealed recording device.

Based on this recording and other evidence, Defendant was charged with Murder in the First Degree, in violation of 6 CMC § 1101(a)(3), and with Robbery, in violation of 6 CMC § 1411(a).

B. The Superior Court's Exclusion of Tape Recorded Evidence

In a January 31, 2006 order, the Superior Court granted Defendant's motion to suppress evidence gained from the recording. This decision was based on the Commonwealth Constitution's unique prohibition of the use of recordings made without the consent of all parties being recorded, [2] which contrasts which Federal and state law permitting "one-sided" recordings.[3] While there are

[2] Article I Section 3(b) of the Commonwealth Constitution provides that, "No wiretapping, electronic eavesdropping or other comparable means of surveillance shall be used except pursuant to a warrant."

[3] *See, e.g.* ARS 13-3005.A(1)(2) (Arizona law permitting recorded evidence where one party consents to the recording).

states [4] that require all parties to a conversation authorize its recording, none of these states have constitutional provisions to that effect. Further, most of these states' laws permit exceptions to the rule.[5]

The First CNMI Constitutional Convention coincided with the U.S. Central Intelligence Agency's wiretapping of the Micronesian status delegation (which was later disclosed in a December 11, 1976 Washington Post report). The delegates to the Convention, including Dr. Francisco Palacios, Justice Pedro Atalig, Jose Mafnas, Prudencio Manglona, Magdalena Camacho, Benusto Kaipat, and Justice Ramon Villagomez, intended to reflect our people's desire to be free from improper investigation. Our jurisprudence reflects the idea that the CNMI Constitution extends greater rights to its citizens than those granted by the United States Constitution. *See Sirilan v Castro,* 1 CR 1089, 1111 (Dist. Ct. 1984): "[W]hen the circumstances of a case are such that the provisions of the U.S. Constitution as they have been interpreted by the United States Supreme Court do not reflect the values of the people of the Commonwealth, we will not hesitate to look to the Commonwealth's Constitution for the protections and guaranties placed therein by and for the people."

As noted in *CNMI v. DeLeon Guerrero*, No. 02-0064 (Supr. Ct. May 27, 2004), the language of the CNMI Constitution goes beyond that of the Fourth Amendment to the U.S. Constitution by specifically requiring a warrant for wiretapping and other electronic surveillance. "It seems clear that the C.N.M.I. founders intended to afford greater protection against this form of government intrusion." *Id.*; s*ee also CNMI v. Shimabukuro*, No. 02-0254 (Supr. Ct. Dec. 10, 2003)

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[4] These states are California, Connecticut, Delaware, Florida, Massachusetts, Maryland, Michigan, Montana, New Hampshire, Pennsylvania, and Washington.

[5] *See, e.g.*, 18 Pa. Cons. Stat. Ann. Sec. 5704(4) (any individual may record a phone conversation without the other party's consent if the non-consenting party commits any criminal action).

(Order Granting Motion to Suppress). In *Shimabukuro*, the court acknowledged that the federal case law permitting the introduction of one-sided recordings would be binding on matters litigated in the ***federal district court*** of the Commonwealth. But because that case was litigated in a ***Commonwealth*** court, the court was constrained to comply with the heightened restrictions of Commonwealth law. Accordingly, the court suppressed the one-sided recording.

Following this decision, the Commonwealth made no motions to procure the admissibility of testimony detailing the contents of the illegally recorded statement.

C. The Commonwealth's Attempt to Introduce Excluded Evidence through Alternative Means

At trial, the Commonwealth sought to introduce the excluded tape-recorded statements by having Agent Auther, the police officer who heard the statement, testify as to its content. The Commonwealth argued that this testimony was admissible hearsay under Com. R. Evid. 801(d)(2), which allows the admission of statements made by a party to the case when used against that party.

The Court heard arguments on the matter for several hours. The Commonwealth made valid points regarding the distinction between the jury hearing an officer's testimony and that of the defendant himself (on tape). The Commonwealth also argued that the testimony of the officer was a unique and independent source of evidence. Ultimately, however, the Court found that the thrust of the Commonwealth Constitution was to exclude any statements made under unauthorized electronic surveillance.[6] The Superior Court decided not to allow what it perceived to be the circumvention of an important constitutional protection in the guise of adherence to the Rules of Evidence. The basis of this decision is clarified below.

[6] The parties and the Court agreed that there was no case law on point, as no other jurisdiction has a similar constitutional provision, and the CNMI courts had yet to address the issue.

D. The Rationale for Excluding Evidence Procured by an Illegal Act

Statements otherwise admissible under the Rules of Evidence are prohibited if they violate a defendant's constitutional right. As Justice Holmes stated in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920), "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it should not be used at all." In that case, agents of the United States illegally entered defendant's office "and made a clean sweep of all the books, papers, and documents found there." *Id.* at 390. The Court ordered the originals returned, but the government made copies and used them to subpoena Silverthorne Lumber to produce the originals. *See id.*, at 390-391. The Court held that forcing the company to produce the records through this trick "reduces the Fourth Amendment to a form of words." *Id.* at 392. Upholding the subpoena in *Silverthorne* would have made a mockery of the company's privacy. *Id.*

The federal Confrontation Clause (Amendment VI of the U.S. Constitution), which prohibits admission of testimonial evidence unless the defendant had a prior opportunity to cross-examine the declarant, is a prime example of this concept. *See Crawford v. Washington*, 541 U.S. 36, 50 (2004) (the Confrontation Clause, providing that accused has right to confront and cross-examine witnesses against him, applies not only to in-court testimony, but also to out-of-court statements introduced at trial, regardless of admissibility of statements under law of evidence).

This basic principle applies in cases concerning tape-recorded evidence. For instance, in *Nelson v. State*, 490 So.2d 32 (Fla. 1986) the Florida Supreme Court held that the admission of the tape-recorded statement of an alleged coconspirator implicating the defendant on trial was not permitted under statement against interest hearsay exception. The court held that the statement-against-interest exception expressly excludes statements or confessions offered against accused in a

criminal action made by codefendant or other person implicating himself and the accuser. *Cf. State v. Wille*, 559 So.2d 1321, 1331 (La.1990) (the fact that an officer acted on information obtained during the investigation may not be used as an indirect method of bringing before the jury the substance of the out-of-court assertions of the defendant's guilt that would otherwise be barred by the hearsay rule).

In a case with close parallels to the instant case, the Supreme Court of Washington (which has two-party consent statute) upheld the trial court's exclusion of testimony based on an illegally recorded conversation. *See State v. Williams*, 617 P.2d 1012 (Wash. 1980), cited in Defendant's Motion for Stay at 2. The Court held that the State Privacy Act precludes dissemination of information obtained in violation of Act by federal agents and an informant who participated in conversations, and thus federal agents and the informant could not testify as to contents of the illegally recorded conversations. *Id.* at 542.

In the instant case, the Superior Court determined that, if the statement had come from a separate, unrecorded conversation, or if the statement could be independently corroborated, it would be admissible. *See, e.g., U.S. v. Gio*, 7 F.3d 1279 (7th Cir. 1993) (tape-recorded statement of codefendant was admissible against the defendant under the statement-against-interest exception in view of other evidence at trial independently verifying the codefendant's statement). The Commonwealth did not demonstrate, however, that such a circumstance applied to the instant case. The purpose of the proposed testimony was only to introduce the tape-recorded statement. There was no other conversation that could have been an independent source of the statement.

D. The CNMI Supreme Court's Reversal

The CNMI Supreme Court's August 3, 2006 opinion reversed the Superior Court's decision. The Superior Court understands that the Supreme Court made its decision without the benefit of a

written record. *See* 2006 MP 19 at ¶ 6n.2 (the Court relied on "counsels' recollection of the trial court's oral suppression decision.") Through the instant decision, the Superior Court wishes to clarify any misunderstanding that may have affected the Supreme Court's decision.

Much of the Supreme Court's decision is based on its opinion that the "fruit of the poisonous tree" doctrine did not prevent Agent Auther from testifying on the contents of the excluded tape. At trial, however, the only reference to this doctrine was the Deputy Attorney General's statement that the tape recording may be excluded, but "fruit of the poisonous tree refers to evidence gathered as a result of the tape recording." Judge Lizama did not refer to this doctrine; nor did it influence his decision.

If the doctrine were applicable, the Superior Court is not convinced that the "independent source" exception (*see* 2006 MP 19 at ¶ ¶ 25-26) would allow the evidence to be admitted. As discussed above, there was never a separate or "independent" conversation from which Agent Auther garnered the information pertinent to his testimony.

The Superior Court also questions the premise that the Defendant would have said exactly the same thing to the police had he been informed that he was being recorded. *See* 2006 MP 19 at ¶ 27. This supposition ignores the fact that most people are more cautious in making recorded statements (whether they are recorded electronically or in writing) than they are in making statements off-the-cuff. The fact that Defendant consented to talking with police officers did not terminate his rights with respect to being recorded.

In its opinion, the Supreme Court notes that the suppression of the evidence would not only punish the "officers who committed the misstep," but also "the Commonwealth public for whom justice would go unserved." *Id.* at ¶ 27.The Superior Court does not believe that the instant case differs from numerous cases in which evidence has been excluded on account of police misconduct.

Presumably, these cases also punish the public of the jurisdiction "for whom justice would go unserved."

E. Actions Following the Submission of Defendant's Motion for Reconsideration and for a Stay to Superior Court Litigation

The Superior Court expressed its willingness to both counsel to stay the trial court proceedings while defense counsel pursued the motion for reconsideration. This willingness was based on the Superior Court's concern that the Supreme Court's decision may have been made without the benefit of all pertinent facts and jurisprudence (especially as defense counsel did not site the closely-related *State v. Williams* case in its appellee brief). The Superior Court stated on the record reasons why the motion for reconsideration might be successful, and provided both counsel with additional jurisprudence and argument on the manner.

Thereafter, defense counsel informed the Court that it was not earnestly pursuing the reconsideration motion, and would likely move the Court to lift any stay that it might grant to accommodate Defendant's motion before the Supreme Court. Both counsel agreed that they would like to proceed with the trial.

While the Superior Court disagrees with the decision on the appeal, it is not the duty of the Superior Court to argue for Defendant before the Supreme Court. The Superior Court is concerned by what it perceives to be defense counsel's apparent unwillingness to vigorously pursue the motion for reconsideration, paired with a willingness to have the Superior Court submit a brief to the Supreme Court on the matter. The Superior Court wonders whether a stay, premised on the need to advance justice, may actually be a litigation tactic designed to draw the Superior Court into a battlefield where it does not belong. The Superior Court does not wish to participate in such tactics. Nor does the Superior Court bear a vendetta against the Supreme Court that could be exercised by submitting a litigious brief in the appellate proceedings.

Thus, Defendant's Motion to Stay Proceedings is DENIED.

So ordered this 9th day of August, 2006.

/s/_____
Juan T. Lizama
Associate Judge, Superior Court