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3 **FOR PUBLICATION**

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5 **IN THE SUPERIOR COURT**
6 **OF THE**
7 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

8 Commonwealth of the Northern Mariana
9 Islands,

10 Plaintiff,

11 v.

12 Wayne Shimabukuro and
13 Melody Shimabukuro, aka
14 Ester Llita Shimabukuro,

15 Defendants.

Criminal Case No. 02-0254

**ORDER GRANTING MOTION TO
SUPPRESS**

16 **I.**

17 **INTRODUCTION**

18 **THIS MATTER** came before this Court for a hearing on the Commonwealth's *Motion to*
19 *Suppress the Tape Recording of Telephone Conversation and All Evidence Derived Therefrom* on
20 December 4, 2003. Karen Severy, Assistant Attorney General, represented the Commonwealth. G.
21 Anthony Long represented Defendant Wayne Shimabukuro (hereafter "Defendant"). The
22 Defendant's Motion concerns the suppression of a tape recorded phone conversation between an
23 informant and the Defendant, Wayne Shimabukuro. The Court, having considered the arguments
24 of counsel, and being fully informed of the premises, now renders its decision.

25 **II.**

26 **FACTS**

27 On August 15, 2002, the informant Jeffrey Deleon Guerrero placed a telephone call to the
28 residence of Wayne Shimabukuro. At the time of placing this call, the informant was acting as a
cooperating source for CNMI/DEA Drug Task Force and consented to the tape recording of the
telephone call. Government agents attached a tape recorder to the telephone used by the informant,

1 which was used to listen to and record the conversation between the informant and the Defendant.
2 The agents were present at, and conducted the recording of the conversation. No warrant was
3 applied for or obtained prior to the monitoring and recording of the telephone conversation between
4 the two individuals.

5 **III.**
6 **DISCUSSION**

7 The Commonwealth Constitution provides additional protective language concerning both
8 search and seizure and privacy than the United States Constitution. N.M.I. Const. art. I, §§ 3(b) and
9 10; *CMNI v. Dado*, Crim. Case No. 98-0261 (Super. Ct. Feb 23, 2000)(Written Decision Following
10 Bench Trial at 20-21). It is well established that a state may afford greater protections to persons
11 within its jurisdiction than does the federal constitution. *Sirlian v. Castro*, 1 CR 1082, 1108-09
12 (App. Div. 1984); *People v. Brisidine*, 13 Cal.3d 528, 548, 531 P.2d. 1099, 1112 (1975); *State v.*
13 *Santiago*, 53 Haw. 253, 265, 492 P.2d 657, 664 (1971). The Commonwealth Constitution states:

14 **No wiretapping, electronic eavesdropping or other comparable means of**
15 **surveillance shall be used except pursuant to a warrant.**

16 N.M.I. Const. art. I, §§ 3(b). (Emphasis added).

17 The Analysis of our Constitution further states that N.M.I. Const. art. I, §§ 3(b):

18 **[D]oes not cover any interception or recording with consent at the time of the**
19 **interception of recording even if consent is subsequently withdrawn.**

20 ANALYSIS OF THE CONSTITUTION OF THE COMMONWEALTH OF THE NORTHERN MARIANA
21 ISLANDS, art. I, §§ 3(b) (December 6, 1976) (hereafter “Analysis”). (Emphasis Added.).

22 The Analysis was prepared after the Constitutional Convention of the Northern
23 Mariana Islands adopted the Constitution but before the Constitution was submitted
24 to the electorate for approval. The purpose of the Analysis is to explain and
25 summarize the intent of the Constitutional Convention. The Analysis was approved
26 by the Convention on December 6, 1976 and was made available to the electorate
27 before voting on the Constitution. Only the Constitution (and not the Analysis) was
28 submitted to the electorate for approval.

29 *Camacho v. Camacho*, 1 CR 620, 627 (Trial Ct. 1983).

30 While not binding on Commonwealth Courts, the Analysis of the Commonwealth Constitution is
31 considered highly persuasive as an interpretive tool.

32 The crux of this matter centers around the undefined use of the word “consent” in the

1 Analysis. Under federal law, it is clear that consent of only one party is required in order to affect
2 a wiretapping or tape recording of a conversation. *See, United States v. White*, 401 U.S. 745, 749-
3 753 (1971). This means that an informant acting as an agent of the government can alone allow the
4 government to eavesdrop on and record a conversation between himself and a defendant, because
5 there is no reasonable expectation of privacy. *Id.* What this means for the Commonwealth, which
6 offers a higher level of protection, specifically requiring a warrant in all circumstances, is unclear.

7 The Commonwealth cites a string of Ninth Circuit cases all arriving at the same conclusion;
8 consent is only required for one party. *United States v. Trehaile*, 1994 U.S. App. LEXIS 29257 (9th
9 Cir. Haw. Oct. 18, 1994) (affirming admission of tape recordings of telephone calls made from the
10 police station between an unindicted coconspirator and the defendant); *United States v. Jernigan*,
11 582 F.2d 1211, 1212 (9th Cir. 1978), *cert. denied*, 439 U.S. 991 (1978) (defendant conceded, “as
12 he must,” that telephone conversations, recorded without his consent but with the consent of the
13 other party, *i.e.*, the informant or agent, did not violate the Fourth Amendment); *United States v.*
14 *King*, 472 F.2d 1, 4 (9th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973) (no error when taped
15 telephone conversations between defendants and a cooperating unintended coconspirator with his
16 consent, made by connecting the telephone he used as a tape recorder). If this case were in our
17 respective federal jurisdiction these cases would both be binding and persuasive, holding a clear and
18 unambiguous standard that consent of only one individual is required for recording of conversations
19 without first obtaining a warrant. The difficulty with this position arises under the fact that the cases
20 all analyze the federal standard, which does not offer that measure of a constitutionally higher
21 protection for its citizens, as the CNMI does through N.M.I. Const. art. I, §§ 3(b).

22 The Commonwealth also notes that, where greater protections have been afforded, it has
23 occurred by legislative provision. Thirteen states have enacted statutes requiring the consent of both
24 parties to a recording.¹ The Commonwealth has no such statute requiring consent of both parties
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26 ¹*See*, Cal. Penal Code 631(a), 632(a) (West 1996), Conn.Gen.Stat. 52-570d (1997); Del.Code.Ann.tit. 11,
27 1336(b) (1995); Fla.Stat.ch. 934.03(2)(d) (1995); Ga.Code.Ann. 16-11-66(a) (1996); 720 Ill.Comp.Stat. 5/14-2
28 (West 1993); Md.Code.Ann., Cts. & Jud. Proc. 10-402(c)(3) (1995); Mass.Gen.Laws Ann. ch. 272-99(B)(4) (West
1990); Mich.Comp.Laws. Ann. 750.539c (West 1991); Mont. Code Ann. 45-8-216(c) (1995); N.H.Rev.Stat.Ann.
570-A:2 (1986); 18 Pa.Const.Stat.Ann. 5703-04 (West 1995); Wash.Rev.Code Ann. 9.73.030(1)(b) (West 1998).

1 concerning wiretaps or recordings of conversations. It is true that no there is no state ordered
2 requirement of dual consent. Does consent however, per the Analysis, mean consent of the
3 individual who the information is being obtained against, given the higher protections afforded in
4 the Commonwealth Constitution?

5 In *Commonwealth v. Mu Shui Xie*, the Superior Court suppressed a videotaped recording of
6 a conversation between a defendant and a Department of Public Safety (DPS) informant. No. 00-
7 0227 (N.M.I. Super. Ct. April 16, 2001) (Order at 6). The suppression was based upon the
8 application of the ANALYSIS OF THE CONSTITUTION OF THE COMMONWEALTH OF THE NORTHERN
9 MARIANA ISLANDS, as it interpreted art. I, §§ 3(b). The Analysis provided that art. I, §§ 3(b) does
10 not cover conversations or statements that are public or intended to be public. The videotape in
11 question, which was made on a public street in Garapan, Saipan, was acquired without first
12 obtaining a warrant. The court found that the definition of private, as it related to a private
13 conversation, brought the conversation outside the public conversation atmosphere and back within
14 the confines where one can assert a reasonable expectation of privacy. Videotaping may be less
15 intrusive in nature, than a voice recording, but *Commonwealth v. Mu Shui Xie* is not helpful to this
16 Court, because it did not actually use the Constitutional Analysis to arrive at its conclusion. Rather,
17 the determination was reached through defining the concept of private communication, not
18 addressing the application of public conversations.

19 Privacy, another Commonwealth Constitutional concept, is also at issue in this matter. The
20 Commonwealth Constitution, memorializes the judicially created privacy doctrine, thus affording
21 citizens of the Northern Mariana Islands with a distinct right of privacy. N.M.I. Const. art. I, § 10.
22 The right of privacy protects “an individual’s right to physical solitude free from intrusions such as
23 . . . constant and manifest surveillance, and any other intrusions that a reasonable person would find
24 offensive and objectionable.” ANALYSIS at 29. Any inquiry into Constitutional privacy concerns
25 requires a balancing of the individual’s interest versus that of the person or entity attempting to
26 obtain the information. The government here did not obtain a warrant, even though there appears
27 to have been an opportunity to do so. Nothing was presented to this Court on why the government
28 chose not to secure a warrant for the recording of the conversation between the Defendant and their

1 agent. Where there is an opportunity to obtain a warrant, one should be obtained given the
2 heightened privacy and individual right protections afforded by our Constitution. The government
3 would need to show a compelling interest why a warrant should not have been obtained. No such
4 showing has been made. If there is an ability to accomplish the intrusion, by less intrusive means
5 then those means must be chosen; courts have the ability to sanction intrusions in the
6 Commonwealth. Where necessity for warrants is in question, the government should always petition
7 a court for a warrant supported by a showing of probable cause.

8 *U.S. v. White*, established in 1971 the status of consent as it relates to informants and
9 defendants. To some extent, our Constitution is a codification of some of the United States Supreme
10 Court issues regarding individual rights at the time. Our Constitution and subsequent Analysis
11 provide heightened protection of those individual rights. It is not clear that the drafters of our
12 Constitution were attempting to import *White's* definition of consent into our founding document.
13 Neither the Constitution on its face, nor the Analysis provide a sufficient answer to our legal
14 conundrum. Conversely, it is clear that the drafters intended the citizen's of the Northern Mariana
15 Islands to have enhanced individual rights. Those prized rights are central to the ideals that
16 comprise the Commonwealth. The Analysis of the Constitution is not binding on this Court. *Sirlian*
17 *v. Castro*, 1 CR 1082, 1111 (Dist. Ct. 1984). What is binding, is the black letter of the law present
18 in the Constitution. The Constitution specifically states that no electronic surveillance shall be
19 affected by the government unless a warrant is first obtained. This Court cannot ignore that premise
20 by turning to the Analysis, only to guess at the meaning of consent contained therein.

21 The situation at hand involved not just a private citizen monitoring the calls of another
22 individual, but governmental monitoring of an individual. In short, there was no reason why a
23 warrant should not have been obtained. Prejudice to the government in this instance is minimized,
24 by the fact the informant is available as a witness for trial, and, in fact, has been subpoenaed by the
25 parties to testify. The Court finds that in view of the foregoing analysis and reasoning, the evidence
26 obtained, specifically the tape recorded conversation between the government informant and the
27 Defendant, shall be suppressed.

28 **IV.**

ORDER

The Defendant's *Motion to Suppress* is **GRANTED**.

SO ORDERED this 10th day of December 2003.

/s/ _____
David A. Wiseman
Associate Judge

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