IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,	)	Supreme Court Case **CRA97-005**
	)	Superior Court Case **CF0243-95**
Plaintiff-Appellant,	)	
	)	
vs.	)	**OPINION**
	)	
MELVIN ROSARIO SANTOS,	)	
	)	
Defendant-Appellee.	)	
_____	)	

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Appeal from the Superior Court of Guam

Submitted without oral argument December, 1997

Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, Chief Justice, JANET HEALY WEEKS and BENJAMIN J.F. CRUZ, Associate Justices.

Siguenza, C.J.:

[1] The People of Guam appeal the lower court's decision to suppress drug evidence found during the warrantless search of the home of Melvin Santos, the Defendant-Appellee. The People specifically appeal the trial court's finding that Santos' consent was obtained by coercion. They also appeal the trial court's failure to find that exigent circumstances existed at the time of the search.

[2] The evidence presented at the suppression hearing shows the consent obtained by the police was voluntarily given by Santos. However, our review of the record indicates that probable cause, a prerequisite to a finding of exigent circumstances, was never established by the prosecutor. Consequently, we reverse the lower court's suppression of evidence based on its finding that the consent was coerced. Because probable cause was never established, we do not reach the issue of whether exigent circumstances existed at the time of the search.

I.

[3] On May 8, 1995, the Guam Police Department conducted a warrantless search of the home of Melvin Santos. They acted based on a tip indicating Michael Gimenez, an escaped prisoner, was hiding in a shack located behind Santos' residence. The information received by the police indicated Santos was also providing firearms to the escapee.

[4] Acting upon the information, the police assembled in the late morning of May 8, 1995 near Santos' Mangilao residence. The participating officers were then briefed on the general layout of the residence and given specific assignments as to the search. The briefing took place during a five to ten minute time period.

[5] The police, wearing their regular black battle dress uniforms, entered upon the property with weapons drawn.[1] The officers encountered Santos and another male individual. The police then informed Santos they were looking for the escaped prisoner and requested Santos' consent to search a structure consisting of an office, paint shop, and garage.[2] Santos verbally consented and a search followed. Immediately upon entering the structure, the police observed a weapon on a table. Because the structure was not yet secure, the police began searching for other weapons and found another behind a door. Santos himself, upon police request, retrieved a weapon for inspection. In addition, a gun case was also found with Santos' name on it. The gun case was closed and Santos was asked if the case could be opened. He consented and opened the case himself. When Santos did this, both crystal methamphetamine and drug paraphernalia were found.

[6] Based on the discovered drugs, both a Magistrate's Complaint and an arrest warrant were issued on May 13, 1995. The police apprehended and arrested Santos on May 13, 1995. On May 22, 1995, the Grand Jury indicted Melvin Santos for Possession of a Controlled Substance, a third degree felony.

[7] Santos filed a motion to suppress the evidence obtained during the search. He asserted that his consent was obtained by police coercion rather than his voluntary assent. As support, Santos signed and attached an affidavit to his motion. Through the affidavit, he asserted the police had pointed guns at him and told him to put his hands in the air. The affidavit further indicated that the police told Santos he could either be detained until a search warrant was obtained or he could consent to the search.

[8] As a result of Santos' motion, the trial court held a suppression hearing on December 13, 1996. Santos did not testify, nor was his affidavit introduced or otherwise admitted into evidence during the hearing. Instead, only officer Manuel A. Chong, the People's witness, testified at the

[1]*See* Plaintiff-Appellant's Excerpt of Record, P. 62.

[2]The residence was also searched after consent was obtained.

hearing.

[9] In a Decision and Order issued on February 26, 1997, the trial court suppressed evidence obtained in the search.[3] Essentially, the trial court first held that exigent circumstances did not exist justifying the warrantless search because speed was not essential to the police action. The court emphasized the police had more than a short time to obtain a search warrant as evidenced by their ability to meet and conduct a briefing before the search.

[10] The trial court also found the other warrant exception submitted by the People was not present in this matter. Voluntary consent to search his home, the court held, was not given by Santos. The court wrote " . . . regardless of what was said by Officer Chong, the Defendant was asked if police could search the area while several guns were pointed at him." Thus, the evidence was a product of coercion.

[11] The People consequently filed this timely appeal.

II.

[12] As a threshold issue, the court must consider whether the trial judge properly used and relied upon the affidavit attached to the defendant's motion in deciding to suppress the evidence. This is an evidentiary issue and we begin our review by examining Title 6 of the Guam Code Annotated entitled the Guam Rules of Evidence.[4]

[13] The applicability of the rules of evidence to lower court proceedings is addressed in Rule 1101. The pertinent sections read as follows:

> . . .
>
> (b) **General Applicability**. These Rules apply generally to civil actions and proceedings,

[3]Although the Decision and Order was filed in Superior Court case CF243-95, we treat the appeal as one arising from CF245-95. Both the record and the Decision and Order clearly address the factual and legal issues arising from this latter case. Alternatively, Superior Court case CF243-95 is such a closely related matter involving Santos that the trial court tracked it together with CF245-95.

[4]Although codified as sections of the Guam Code Annotated, we refer and identify the provisions of Title 6 as the Rules of Evidence.

> to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily.
>
> (c) **Rule of privilege**. The Rule with respect to privileges applies at all stages of all actions, cases, and proceedings.
>
> (d) **Rules inapplicable**. The Rules (other than with respect to privileges) do not apply in the following situations:
>
> > (1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under 104.
> >
> > . . .
> >
> > (3) Miscellaneous proceedings. Proceeding for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

6 GCA § 1101 (1994).

[14] Rule 1101(b) broadly applies the Rules of Evidence to all civil actions and proceedings, to criminal cases and proceedings, and to contempt proceedings except those in which the court acts summarily. However, Rule 1101(d)(1)[5] limits this general statement by excluding certain determinations from the application of Guam's evidentiary rules. Specifically, the rules are inapplicable to a court's preliminary determination of a question of fact made prior to the admissibility of evidence and pursuant to Rule 104.

[15] Likewise, Rule 104 reiterates the court's responsibility to make determinations as to the existence of a condition upon which the admissibility of evidence rests.[6] This rule also

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[5]Rule 1101(d)(3) limits the applicability of the rules in specific proceedings.

[6]Rule 104 states:
(a) **Questions of admissibility generally**. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the Rules of Evidence except those with respect to privileges.
(b) **Relevancy conditioned on fact**. When the relevancy of evidence depends upon the fulfilment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfilment of the condition.
(c) **Hearing of jury**. ... Hearings on preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

specifically and unequivocally frees the trial judge from the strictures of the Rules of Evidence in making such a determination.

[16] Rule 104 and Rule 1101(d)(1) govern the scope and use of the rules of evidence in suppression hearings[7]. When read together, these statutes indicate the Rules of Evidence do not apply to suppression hearings. By filing a motion to suppress, a defendant essentially asks a trial court to exclude evidence he asserts was improperly obtained by the police. A proceeding conducted for this purpose is one that necessarily requires the court to determine the existence or nonexistence of specific facts prior to the admission of evidence. This type of determination falls outside the scope of the Guam's evidentiary rules.

[17] The United States Supreme Court has previously addressed the same issue in *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988 (1974). The Court, discussing Federal Rules of Evidence 104 and 1104, reversed decisions of the lower courts suppressing evidence obtained from a warrantless search. *Id.* Hearsay evidence was presented at the suppression hearing. *Id.* at 994. The Court stated "it should be recalled that the rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissibility of evidence." *Id.* at 994. Rules applicable to trials versus evidentiary rules applicable to other types of proceedings were distinguishable because the matters to be proved at these proceedings were different. *Id. citing Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302 (1949) (discussing the distinct differences in a determination of probable cause and a

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> (d) **Testimony by accused**. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examinations to other issues in the case.

6 GCA 104(a), (c) & (d) (1993).

[7]Using the rules of evidence as authority to assert that the very same rules do not apply at a suppression hearing obviously creates what appears to be a problematic analysis. A literal reading of Rule 1101(d) would exclude its own application, as well as the application of Rule 104, to proceedings which these rules were intended to apply. For example, Rule 1101(c) specifically states that privileges shall apply to all stages of all cases. Rule 1101(d), if read literally, would nullify this language by making the entire rule inapplicable to proceedings surrounding preliminary questions of fact. This construction is absurd and such a result is clearly an unintended result. Consequently, we construe these rules in a manner that gives meaning to the legislative intent.

determination of guilt in a criminal trial). "There is a large difference between the two things to be proved, as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them." *Id.*

[18] In discussing the then recently submitted Rule 104(a) of the Federal Rules of Evidence, the *Matlock* Court wrote:

> [t]hat the same rules of evidence governing criminal jury trials are not generally thought to govern hearings before a judge to determine evidentiary questions was confirmed . . . when the Court transmitted to Congress the proposed Federal Rule of Evidence. Rule 104(a) provides that preliminary questions concerning admissibility are matters for the judge and that in performing this function he is not bound by the Rules of Evidence except those with respect to privileges. Essentially the same language on the scope of the proposed Rules is repeated in Rule 1101(d)(1).

Id. at 173-174, 94 S.Ct. at 994. Consequently, in proceedings where the judge considers the admissibility of evidence, the rules, aside from those governing privilege, are not applicable, and the judge should receive and properly weigh evidence based on his judgment and experience. *Id*. at 995. *See United States v. Lee*, 541 F.2d 1145 (5th Cir. 1976); and *State v. Wright*, 843 P.2d 436 (Or. 1992).

[19] We hold that the Guam Rules of Evidence do not apply to suppression hearings. The trial courts should be free to consider all evidence, including affidavits and other reliable hearsay, when making determinations of preliminary facts. *Lee*, 541 F.2d at 1146. A trial judge, based on his or her experience, is in the best position to weigh and determine the credibility of evidence received at a suppression hearing.

[20] Our pronouncement should not be read to say that procedural safeguards that may be embodied in the Rules of Evidence cannot be employed during a suppression hearing. In many instances, due process standards would require these procedural safeguards to be used. For example, in *United States v. Brewer*, 947 F.2d 404, 409 (9th Cir. 1991), the Ninth circuit held that the exclusion of witnesses from the courtroom, pursuant to Federal Rule of Evidence 615, was required during a suppression hearing. Rule 615 was a procedural rule designed to enhance the

search for the truth and went directly to the fairness of the proceeding.[8] *Id.* Consequently, in order to protect the integrity and fairness of the proceedings, trial courts may employ the procedural safeguards of the Rules of Evidence. We believe this pronouncement will enhance the search for truth without hindrance by considerations of admissibility.

[21] While a trial judge may use an affidavit when deciding factual disputes at a suppression hearing, the affidavit nevertheless must first be introduced at the hearing and placed before the court for its consideration. When material facts are disputed, conflicting assertions should be resolved by evidence taken during the hearing. *See eg. United States v. Gardner*, 611 F.2d 770, 774 n.2 (9th Cir. 1980). Receiving evidence allows the trial court to use its judgment and experience to properly weigh that which has been placed before it. *Matlock*, 415 U.S. at 175, 94 S.Ct. at 988.

[22] Conversely, an affidavit in the court's file but not introduced during the hearing, is not evidence for purposes of a suppression hearing. An affidavit used in this context serves a different purpose. Specifically, it is used to help a trial court decide whether, in its discretion, to hold an evidentiary hearing. *See, e.g. United States v. Walczak*, 783 F.2d 852 (9th Cir. 1986). "An evidentiary hearing on a motion to suppress ordinarily is required if the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in issue." *Id.* at 857. After reviewing the motion, opposition, and the attached affidavits, if any, the court must determine if material facts surrounding the search are in dispute. If it so finds, a hearing should be held, the court should receive evidence, pro and con, and resolve the dispute.

[23] Use of an affidavit without notice or presentation calls into question the fundamental fairness of the proceeding. Obviously, all parties are placed at a severe disadvantage when information, not placed before the court during a hearing, is later considered in a decision.

[8]The *Brewer* court also announced that the Rules of Evidence would be applied to hearings on motions to suppress evidence. For the reasons stated in this opinion, we do not adopt the Ninth Circuit's pronouncement.

Without proper notice or introduction of the information, neither party can properly address critical issues nor questions that may otherwise be explained, clarified, or confirmed by receiving the evidence during the hearing.

[24] Even if introduced for the court's consideration, an affidavit should be given little weight, if any, when government witnesses testify at suppression hearings and a defendant, who originally submitted the affidavit, does not.[9] *Gardner*, 611 F.2d 774, n.2. Obviously, giving weight to an affidavit under these circumstances would allow assertions contained in the document to be considered without complete scrutiny as to disputed facts. At the same time, the credibility of the proponent would escape the close investigation that only examination by the opponent could bring. This appears to be the concern behind the long established principle of evidence "[t]hat if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust. 6 GCA § 8101 (1994).

[25] Our review of the record indicates the affidavit attached to the motion was never introduced at the hearing. In addition, notice was not given that the trial court was considering the document for purposes of the decision. Although introduction of an affidavit is absent from the record, it is clear from the trial court's written decision that the document was considered and used as the basis to suppress the evidence. Consequently, the trial court's factual findings will be disregarded to the extent the affidavit was relied upon. Moreover, we give no weight to the assertions contained in the affidavit. Finally, because no evidence was received to contradict the People's position, our decision on the merits is based solely on the testimony of the government's witness and the undisputed facts. *See United States v. Garcia*, 890 F.2d 355, 359 (11th Cir. 1989) (finding that the trial court acted properly by relying on evidence of consent introduced solely by the government witnesses while the defendant did not testify. Thus, the trial

[9]Both Guam law and case authority support the notion that a defendant can testify on his or her own behalf at a suppression hearing without sacrificing his or her personal rights. Guam Rule of Evidence 104(d); *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967 (1968); *United States v. Batiste*, 868 F.2d 1089, 1091 (9th Cir. 1989).

court was compelled to rely on uncontradicted testimony of the government witnesses).

III.

[26] Under 8 GCA § 20.15(a)(4)(1993), a warrantless arrest is permitted when a person escapes from jail or lawful custody. However, this warrantless arrest provision does not apply to searches of a third party's home when agents of the government are looking for the escapee. Either a warrant must be obtained or a recognized exception must be applicable.

[27] The United States Supreme Court addressed a similar issue in *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642 (1981). DEA agents entered the home of the defendant, with an arrest warrant, looking for another named individual. Although the named individual was not found, in the course of searching the home, the DEA agents found cocaine and other evidence of illegal activity. *Id.* at 206-207, 101 S.Ct. at 1644-45.

[28] The *Steagald* court held the search to be unreasonable. *Id.* at 1653. An arrest warrant naming one individual did not permit a search of another individual's home. Thus, for purposes of the search, the intrusion into the home was warrantless and absent consent or exigent circumstances, it was improper. *Id.* at 1648-50.

[29] Two distinct interests are implicated under these circumstances. First, the named individual's interest in being free from an unreasonable seizure; and second, the homeowner's interest in being free from an unreasonable search of his home. *Id.* The arrest warrant only addressed the former interest and did not cover the homeowner's residence. *Id.* Thus, the government's conduct was equivalent to a search without a warrant. *Id.*

[30] The matter before this court is quite similar. Guam police entered Santos' residence in search of a different person. They did so, not pursuant to a warrant, but under the legal authority of 8 GCA § 20.15(a)(4). As in *Steagald*, during the search for the other individual, evidence of illegal activity was found and formed the basis of charges later filed against him. We similarly hold 8 GCA § 20.15(a)(4) does not permit a warrantless search of a third party's home while

looking for an escaped prisoner. The third party's interest in being free from an unreasonable search in his or her home is separate and distinct from the interest implicated in 8 GCA § 20.15(a)(4). Consequently, in order to search the home of another person, we hold that either a search warrant must be obtained or a recognized warrant exception must be applicable to the search.

IV.

[31] The factual findings relied upon by the trial court are generally reviewed for clear error. *People of the Territory of Guam v. Johnson*, 1997 Guam 9, ¶ 3. However, the trial court's application of the facts to the law is reviewed *de novo*. *Id.; United States v. Garcia*, 890 F.2d 355 (11th Cir. 1989)(finding consent voluntary although the defendant was handcuffed and after police initially refused to accept a defendant's conditional search of his home).

[32] Normally deference is given to a judge's findings of fact because credibility issues are involved. *United States v. Garcia*, 890 F.2d 355, 358 (11th Cir. 1989). However, when a defendant does not introduce evidence contradicting the government's evidence regarding the circumstances under which the agents elicited consent, neither credibility nor veracity is at issue. *Id.* at 360. Consequently, the matter becomes an issue of law, rather than fact, and *de novo* review is appropriate. *Id.*

[33] Voluntary consent to search is a recognized exception to the warrant requirement. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041 (1973); *United States v. Rothman*, 492 F.2d 1260 (9th Cir. 1973). Police may search an area, without probable cause, over which the person possesses adequate authority. *Matlock*, 415 U.S. at 171, 94 S.Ct. at 993. Moreover, consent need not amount to a waiver; it can be voluntary without being an "intentional relinquishment or abandonment of a known right or privilege." *Schneckloth*, 412 U.S. at 235, 93 S.Ct at 2052 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938)). The prosecution has the burden of proving the voluntary nature of the consent by a preponderance of

the evidence. *Matlock*, 415 U.S. at 177, 94 S.Ct. at 996.

[34] The test for consent is voluntariness and is determined from all the circumstances of a particular case. *Rothman*, 492 F.2d at 1264 (citations omitted). A court is required to carefully sift through the unique facts and circumstances of each case. *Id.* Thus, a balance can be struck between the defendant's right to be free from coercive conduct and the government's legitimate need to conduct lawful searches. *Schneckloth*, 412 U.S. at 227, 93 S.Ct at 2048.

[35] The federal circuits consider different factors when deciding the issue of voluntariness. For example, the Ninth Circuit in *United States v. Castillo*, 866 F.2d 1071 (9th Cir. 1988) listed several factors for consideration: 1) Whether the defendant was in custody; 2) Whether the arresting officers have their weapons drawn; 3) Whether Miranda warnings have been given; 4) Whether the defendant was told he has a right not to consent, and 5) Whether the defendant was told a search warrant could be obtained. *Id.* at 1072 (citations omitted).

[36] Likewise, the Eighth Circuit has also listed factors for consideration including: 1) Whether the consenting person was detained and the length of time of the questioning; 2) Whether the consenting person was threatened, physically intimidated, or punished by the police; 3) Whether the person relied upon promises or misrepresentations made by the police; 4) Whether the person was in custody or under arrest when the consent was given; 5) Whether the person was in a public or a secluded place; or whether the person objected to the search or stood by silently while the search occurred. *United States v. Chaidez*, 906 F.2d 377, 381 (8th Cir. 1990) (citations omitted).

[37] This court views the listed factors as potential considerations to be used to ascertain the facts and circumstances that determine the voluntariness of consent given in a particular case. While helpful, the above factors are not exhaustive. One factor alone is not dispositive of a particular situation. *Castillo*, 866 F.2d at 1082. "These factors should not be applied mechanically, because '[t]he concept of reasonable suspicion, like probable cause, is not readily, or even usefully, reduced to a neat set of legal rules.'" *Chaidez*, 906 F.2d at 381.

[38] In suppressing the evidence, the judge failed to consider the totality of the circumstances when ruling Santos' consent was coerced. The court seemed to completely disregard both the law and the officer's testimony by writing "[i]t is clear from the evidence that regardless of what was said by Officer Chong, the Defendant was asked if police could search the area while several guns were pointed at him. Based on the case law presented, this Court must find that Defendant's consent was not voluntary and was a product of coercion by the Guam Police Department."

[39] We disagree with this blanket conclusion. The lower court focused upon one factor only when deciding the consent issue -- the manner in which weapons were displayed to the defendant while consent was sought. While this show of force should be properly considered, *see United States v. Chan-Jimenez*, 125 F.3d 1324, 1328 (9th Cir. 1997), this, in and of itself, is not a controlling or determinative factor as to voluntary consent. *United States v. Childs*, 944 F.2d 491 (9th Cir. 1991)(finding voluntary consent although weapons were drawn during the encounter; nothing in the record supported assertion that weapons were drawn at the time of requesting consent); *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985)(finding involuntary consent only after several factors were present: forcing the defendant to his knees, handcuffing defendant, and pointing weapons at the defendant).

[40] We acknowledge that a drawn weapon is an unsettling situation that could intimidate and create apprehension in an individual as to the authority of the police. However, we note that no evidence admitted into the hearing indicates that weapons were **pointing** at Santos at the time consent was obtained. This information was placed before the trial court only via the supporting affidavit which accompanied the motion.

[41] Even if weapons were pointed at the defendant at the time of consent, this single factor alone does not make the consent coerced. The totality of the circumstances test mandates that all relevant circumstances be considered in determining the voluntariness of the consent. For example, other facts that should also be considered include: 1) Santos was told that the search

was for the escaped prisoner; 2) Santos was neither handcuffed nor arrested; 3) Santos, upon police request, was willing to retrieve weapons the police had not yet found; and 4) Finally, Santos himself opened the gun case when asked if it could be searched.

[42] While these facts appear to cut against a finding of coercion, even when balanced against the fact of drawn weapons, we will defer to the trial court and require a second suppression hearing consistent with the standards set forth above. Specifically, the trial court shall use the totality of the circumstances test, balancing relevant factors surrounding consent and the credibility of those witnesses presenting evidence.

V.

[43] For the reasons expressed in the text of this opinion, we need not and do not reach the merits as to whether exigent circumstances existed at the time of the search.

VI.

[44] We therefore **REVERSE** the order suppressing the discovered evidence and **REMAND** the matter back to the trial court for a new suppression hearing conducted consistent with the guidelines set forth above.

JANET HEALY WEEKS
Associate Justice

PETER C. SIGUENZA
Chief Justice

CRUZ, J., concurring in part, dissenting in part.

[45] I concur in the court's finding that the trial court failed to establish probable cause for the warrantless search, a prerequisite to the admissibility of evidence under the exigent circumstances or hot pursuit exception. However, as to the holding that the Rules of Evidence do not apply, or rather that only certain Rules apply to suppression hearings on a piecemeal basis, I disagree and accordingly dissent. Additionally, I do not agree with the court's characterization of Santos' consent as voluntary. The court has chosen to ignore key facts which not only directly put at issue the voluntariness of the consent, but also exhibit the existence of actual coercion by the police.

[46] Unless Guam has become the world's newest neo-Nazi regime in the Pacific, "consent" at the end of the barrel of at least four (4) pistols being wielded by men wearing "black dress uniforms . . . flack jackets, . . . helmets, goggles . . . so you couldn't see [their] eyes," at high noon, can only be "voluntary" in a Robocop sequel but not in a civilized democratic society. Excerpts of Record at page 62.

[47] The trial court correctly concluded that the consent was obtained by coercion. That conclusion was well founded in the trial court's decision, which should have been affirmed by this court. The only error committed by the trial court was allowing defense counsel to prevail in restricting those who could testify at the suppression hearing.

[48] The trial court and the People should remember that the proper standard for determining the validity of a warrantless search based upon consent is that the government bears the burden of proving by a preponderance of the evidence, that the consent was freely and voluntarily given. *Schneckloth*, 412 U.S. at 222, 93 S.Ct. at 2045; *Matlock*, 415 U.S. at 177, 94 S.Ct. at 996. That standard can be met only if the People are given the opportunity to present as witnesses those individuals with personal knowledge of what has transpired. The People undermined their own case when they failed to call Officer Arthur G. Cruz who allegedly recovered the narcotics and Sergeants Jude Remotigue and Ben Acfalle who allegedly supervised this operation. *See*

Plaintiff-Appellant Excerpts of Record at pages 45, 47.

I. Suppression Hearings

[49] In making a motion to suppress, the defendant must identify the items sought to be suppressed and state "with particularity the grounds upon which the motion is based," — evidence was obtained through a Fourth Amendment violation. *State v. Johnson*, 519 P.2d 1053 (Or. 1974).

> A motion to suppress is, in effect, a pleading to the extent that it frames the issues to be determined in a pretrial hearing on the motion. The fundamental role of a pleading is to give an opposing party notice of the pleader's position concerning the facts and law so that the opposing party can begin to prepare his defense. A pleading thus both defines and limits the areas of consideration at trial or other evidentiary hearing. Furthermore, the pleading assists the court in the conduct of the trial, for example, by enabling the court to determine the relevance of offered evidence.

Id. at 1057. Simply stated, "a motion to suppress should be as reasonably specific as possible under the circumstances in order to give the state as much notice as possible of the contentions it must be prepared to meet at the suppression hearing." LaFave, 5 Search & Seizure (3d Ed.) § 11.2.

[50] Some jurisdictions require accompanying affidavits in support of the defendant's allegations presenting a factual basis to sustain the motion. *Id.*; *see State v. Miller*, 521 P.2d 1330 (Or. 1974). Such affidavit, if made by the defendant, also affords the same protection from being introduced at trial against the defendant. *Id.*

[51] The defendant bears the burden of proof when a search or seizure is conducted pursuant to a warrant; however, the People bear the burden of proof when a warrantless search or seizure occurs.[10] *Id.* at p. 3. Accordingly, the Court in *Bumper v. North Carolina*, 391 U.S. 543, 549, 88 S.Ct. 1788, 1792 (1968), noted that, in a search based upon consent, the burden is always on the People and such burden cannot be borne "by showing no more than acquiescence to a claim

[10]The difference in the two situations can be explained by the fact that if a search is made pursuant to a warrant therein lies a presumption of legality, without which the necessity to obtain warrants would be obviated.

of lawful authority." In the situations of warrantless searches, it is incumbent upon the People to justify their position.

> [H]istory shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

McDonald v. United States, 335 U.S. 451, 455-456, 69 S.Ct. 191, 193 (1948). Further support for placing the burden on the government can be found in *Judd v. United States*, 190 F.2d 649, 651 (D.C. Cir. 1951), where the defendant was held in custody at the time consent was given and the court indicated that consent, under the circumstances, was "not in accordance with human experience," and suggested that voluntary consent is so improbable that it is the government who should be required to prove such.

II. Consent: Voluntariness

[52] Having determined that the proper standard for determining the validity of a warrantless search based upon consent is that the government bears the burden of proving, by a preponderance of the evidence, that the consent was freely and voluntarily given,[11] it is also clear that "[a] trial court's finding on voluntariness should not be overturned unless it is clearly erroneous."[12] *United States v. Al-Azzawy*, 784 F.2d at 895. Evidence regarding consent should be viewed in the light most favorable to the trial court. *United States v. Spires*, 3 F.3d 1234, 1236-37 (9th Cir. 1993). In this case, the trial court's ruling that Santos' consent was involuntary was not clearly erroneous.

[53] The majority holds that drawn guns are not dispositive of coercion, warranting a finding of involuntary consent. Instead, they choose to downplay the coercive nature of drawn guns and

[11] *Schneckloth*, 412 U.S. at 222, 93 S.Ct. at 2045; *Matlock*, 415 U.S. at 177, 94 S.Ct. at 996.

[12] I believe there was evidence presented to contradict the government's position. Accordingly, the clearly erroneous standard is applicable.

find that it is but a factor to consider when determining whether consent is voluntarily given. Voluntariness of consent is to be determined based on the totality of the circumstances in any given case. *Rothman*, 492 F.2d at 1264. (citations omitted). However, I believe that such circumstances create an unreasonably coercive situation which warrants great weight to be given to this factor. The trial court relied on cases which supported its position that the consent in this case was not voluntary. In the *Al-Azzawy* case, not only was the defendant approached by police officers with their guns drawn, he was forced to remain on his knees with his hands above his head, and he was not advised of his Miranda rights nor his right not to consent to the search. *Al-Azzawy*, 784 F.2d at 895.

[54] In *Rodriquez v. State*, 559 S.W.2d 925, 926 (Ark. 1978), the defendant was pulled over and consented to the search of his trunk by armed officers. It was disputed as to whether the defendant actually consented to the search and he claimed that after asking the officer if he had a search warrant, the officer patted his gun and said it was the only search warrant he needed. *Id.* The court concluded that it could not sustain a finding that the consent was voluntary. *Id.*

> At the time he [the defendant] was apparently surrounded by armed police officers. We pointed out . . . that the State has the burden of proving that consent was freely and voluntarily given. "This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." We went on to say that consent must be proved by clear and positive testimony. It must also be shown there was no duress or coercion, actual or implied. Here the proof of consent cannot be said to be clear and positive, nor can it fairly be said that there was no implied coercion.

Id. (citations omitted).

[55] Likewise in this case, Officer Chong testified that the officers were dressed in black battle dress uniforms with helmets and goggles on, carrying pistols, Santos was not advised he did not need to consent to the search, and although Santos was not handcuffed, "he was told to stay in one place until we were done searching."[13] Plaintiff-Appellant's Excerpts of Record at 62. Several of the factors enumerated by both the Eighth and Ninth Circuits have been satisfied so

[13]The court in *Stamper v. State*, 662 P.2d 82, 87 n. 7 (1983), observed that "whether guns are drawn or holstered" could be a coercive factor.

as to tip the scale against the People. The facts and circumstances provide sufficient evidence to support the determination that consent was obtained by coercion, thus involuntarily given, and should not be disturbed on appeal. *See also People v. Challoner*, 136 Cal. App. 3d 779, 782, 186 Cal. Rptr. 458, 460 (1982) (holding that "[c]onsent to search given in response to a request by an armed officer whose gun is drawn is suspect. Such consent may well be obtained by coercion and hence not voluntary. A person so confronted might reasonably believe that he was not free to refuse the permission sought."). The trial court was in the best position to gauge credibility of the witness and acted within its authority in making the legal determination that the consent was not valid.

III. Guam Rules of Evidence

[56] The court has taken the position that the question of admissibility of evidence is a preliminary question of fact to which the Rules of Evidence do not apply, and that it is up to the trial court to determine admissibility based on a trial judge's own experience and good judgment. The court, citing *Brewer*, also recognizes that in order to ensure due process it may be necessary for the Rules of Evidence to apply to suppression hearings. In order to protect the integrity and fairness of the proceedings, the majority would have the trial courts apply only portions of the Rules of Evidence at suppression hearings.

[57] In the *Brewer* case, the Ninth Circuit examined Federal Rule of Evidence (FRE) 104 and determined that because the Rule did not specifically exclude the FREs from applying to suppression hearings[14] the Rules were therefore applicable. *Id.* at 408-409. I believe that the court's position in this case does not enhance the search for the truth, but instead creates a breeding ground for complications and inconsistencies. Confusion is created by loosely applying such language as "trial courts may employ the procedural safeguards of the Rules of Evidence."

[14] 6 GCA § 1101(d)(1).

To make such a ruling provides the trial courts with no real guidance for determining when to apply what may or may not be a seemingly "procedural safeguard" provided by the Rules of Evidence. The wide latitude of discretion given to the trial judges opens the door to a problem which occurs all too often in the legal system — the exception swallowing the rule. To first say the Rules of Evidence do not apply, then immediately turn around and contradict that rule by stating the Rules of Evidence do apply when such is necessary to comport with standards of due process, causes the initial rule to become ineffective and leave the trial courts with an exception that is illusory.

IV. CONCLUSION

[58] Based on the foregoing, I cannot, in good conscience, join in the majority's opinion. Although I agree with the majority's ruling that exigent circumstances was not a proper exception to the warrant requirement in this case because no probable cause was determined, its analysis and decision as to the consent issue is flawed. Considering the totality of the circumstances and giving deference to the trial court, the voluntariness of the consent is highly questionable. Furthermore, in order to provide the trial courts with proper guidance as to conducting suppression hearings, the Rules of Evidence must apply and must apply in its entirety.

BENJAMIN J. F. CRUZ
Associate Justice