Petitions for rehearing are usually summarily denied, but, when clarification may be useful, some reasons may be given. Lee v. Kosrae, 20 FSM R. 229, 231 (App. 2015); Iriarte v. Individual Assurance Co., 18 FSM R. 406, 408 (App. 2012); Goya v. Ramp, 14 FSM R. 305, 307 (App. 2006). This petition warrants a summary denial. We have carefully reviewed the Setiks' petition and our previous order granting the writ of mandamus and conclude that we have neither overlooked nor misapprehended any essential points of law or fact.

We do, however, wish to address two novel "points" raised by the Setiks, which may be useful in the future. First, is the spurious claim that no writ of mandamus could be directed towards Temporary Justice Materne because she is not an article XI, section 3 justice, and thus not a judicial or other officer. She is not an article XI, section 3 justice, but she is an article XI, section 9(b) justice because she is a judge of another court to whom the then acting Chief Justice gave a special assignment. That is enough. Second, we find the contention that a court order "dies" when the justice who signed it dies to be so outlandish as to be utterly absurd.

Lastly, the Setiks also question the composition of this appellate panel. This point is without merit. Arguments that a later appellate panel must consist of three completely new justices who were not involved in a previous appeal, are devoid of merit. Heirs of Henry, 21 FSM R. at 314.

III. CONCLUSION

Accordingly, the Setiks' petition for rehearing is denied.

* * * *

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,	)	CRIMINAL CASE NO. 2019-3503
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
FRANCIS TAMAG CHAOY,	)	
	)	
Defendant.	)	
_____	)	

ORDER DENYING SUPPRESSION OF EVIDENCE

Larry Wentworth
Associate Justice

Hearing: September 10, 2020
Decided: September 25, 2020

APPEARANCES:

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* * * *

HEADNOTES

Criminal Law and Procedure – Right to Confront Witnesses

The use of a two-way video-conference to conduct a suppression hearing does not violate a defendant's due process, fair trial, or confrontation rights or Criminal Procedure Rules 43 and 26. FSM v. Chaoy, 23 FSM R. 34, 38 n.1 (Yap 2020).

Criminal Law and Procedure – Motions

When a defendant has made a timely motion to suppress evidence, it will then ordinarily be necessary for the judge to conduct a public hearing at which evidence is received on the issues raised. FSM v. Chaoy, 23 FSM R. 34, 39 (Yap 2020).

Search and Seizure; Search and Seizure – Warrants

When a search or seizure is conducted without a warrant the burden is on the government to justify the search or seizure, but when the search or seizure is conducted pursuant to a judicially-issued warrant the burden rests with the defendant to prove the illegality of the search or seizure. FSM v. Chaoy, 23 FSM R. 34, 39 (Yap 2020).

Criminal Law and Procedure – Motions; Search and Seizure

Although it was the defendant's motion to suppress, the government, since it had the burden, presented its side first at the suppression hearing. FSM v. Chaoy, 23 FSM R. 34, 39 (Yap 2020).

Criminal Law and Procedure – Standard of Proof; Evidence – Burden of Proof

In a criminal prosecution, the government's burden to overcome a motion to suppress evidence, and to show that the evidence seized was lawfully obtained and thus admissible, is to show this by a preponderance of the evidence, not by the beyond-a-reasonable-doubt standard. The court uses the beyond-a-reasonable-doubt standard to make its finding of whether someone is guilty of having committed a crime. FSM v. Chaoy, 23 FSM R. 34, 39 (Yap 2020).

Criminal Law and Procedure – Motions; Criminal Law and Procedure – Standard of Proof; Evidence – Burden of Proof

In a hearing on a motion to suppress evidence, the prosecution generally has the burden to show by a preponderance of the evidence that the evidence sought to be suppressed is admissible. FSM v. Chaoy, 23 FSM R. 34, 39 (Yap 2020).

Criminal Law and Procedure – Standard of Proof; Evidence – Burden of Proof; Search and Seizure – By Consent

There is some authority that the higher clear-and-convincing-evidence standard may be required when the prosecution's claim is that the search was consented to, that the evidence was obtained after a voluntary abandonment of it by the defendant, or that the illegally obtained evidence would inevitably have been lawfully discovered. FSM v. Chaoy, 23 FSM R. 34, 39 n.2 (Yap 2020).

Evidence – When Evidence Rules Apply

The FSM Rules of Evidence do not apply in a suppression of evidence hearing because preliminary questions concerning the admissibility of evidence are determined by the court, and in making its determination, it is not bound by the rules of evidence except those with respect to privileges. FSM v. Chaoy, 23 FSM R. 34, 40 (Yap 2020).

Criminal Law and Procedure – Motions; Evidence – When Evidence Rules Apply

The Evidence Rules (other than with respect to privileges) do not apply to the determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104 or to preliminary examinations in criminal cases. A suppression hearing is both a determination of questions of fact preliminary to the admissibility of evidence and a preliminary examination in a criminal case. FSM v. Chaoy, 23 FSM R. 34, 40 (Yap 2020).

Search and Seizure – Warrants

A contention that a search was conducted before the search warrant was issued and on a date it did not authorize a search which was based on the return about the search, that was dated "22 October 2019," and the search warrant, issued in the evening of October 22, 2019, and authorized the search be conducted on October 23, 2019, will be rejected when the officer, who wrote the report, testified that the "22 October" date was a typographical error that he later corrected to "23 October," and he further testified that three separate searches were being conducted simultaneously at different locations on Yap on the morning of October 23, 2019, and that this search was one of those, and the other two witnesses' testimony corroborated the first officer's testimony about the multiple, simultaneous searches. FSM v. Chaoy, 23 FSM R. 34, 40 (Yap 2020).

Search and Seizure – Warrants

Generally, it is enough if the description of the place to be searched is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended. FSM v. Chaoy, 23 FSM R. 34, 41 (Yap 2020).

Search and Seizure – Warrants

Since the FSM Constitution's article IV, section 5 protection against unreasonable searches and seizures is based on the comparable provision in the U.S. Constitution's fourth amendment, the FSM Supreme Court may consider U.S. authority to help it determine whether a search or a seizure is unreasonable and thus prohibited by the FSM Constitution. FSM v. Chaoy, 23 FSM R. 34, 41 n.3 (Yap 2020).

Search and Seizure – Warrants

The affidavit supporting a search warrant (and thus the search warrant itself) must describe with particularity the place to be searched. FSM v. Chaoy, 23 FSM R. 34, 41 (Yap 2020).

Search and Seizure – Warrants

The test for determining the adequacy of the description of the location to be searched is whether the description is sufficient to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched.

FSM v. Chaoy, 23 FSM R. 34, 41 (Yap 2020).

Search and Seizure – Warrants

The test of the description of the premises to be searched is whether or not it will enable an officer to locate the place to be searched and thus prevent the officer from searching the wrong premises. The test is not whether the description is completely accurate in every detail but rather whether it furnishes a sufficient basis for identification of the property so that it is recognizable from other adjoining and neighboring properties. FSM v. Chaoy, 23 FSM R. 34, 41 (Yap 2020).

Search and Seizure – Warrants

The obvious purpose of requiring a particular description of the place to be searched is to minimize the risk that the officers executing search warrants will by mistake search a place other than the place intended by the magistrate. But there is no constitutional requirement that the warrant name the person who owns or occupies the described premises. FSM v. Chaoy, 23 FSM R. 34, 41 (Yap 2020).

Search and Seizure – Warrants

Though desirable, it is not essential to a search warrant's validity that the owner or occupant of the premises be named. Identifying the owner of the premises is relevant only to assist and aid in particularizing the place to be searched. FSM v. Chaoy, 23 FSM R. 34, 41 (Yap 2020).

Search and Seizure – Warrants

A search warrant is not invalid because it incorrectly names the house's owner, and an error in naming the occupant of the premises does not vitiate any otherwise valid warrant. FSM v. Chaoy, 23 FSM R. 34, 41 (Yap 2020).

Search and Seizure – Warrants

Aerial photographs showing the place to be searched may help ascertain that the place intended to be searched was, in fact, the place that was searched. FSM v. Chaoy, 23 FSM R. 34, 42 (Yap 2020).

Search and Seizure – Warrants

When there was an error in the name of the residence's occupant on the warrant, but all the evidence before the court is that that name referred to the person who resided there and that the police obtained a search warrant for that person's residence, and that was the residence that was searched, the variance in names does not invalidate the search warrant and make the search a warrantless one. FSM v. Chaoy, 23 FSM R. 34, 42 (Yap 2020).

Search and Seizure – Warrants

Although a warrant-executing officer's personal knowledge of the place to be searched will not cure a vitally deficient description, of the place to be searched, when the error is at the worst innocent and technical such personal knowledge ought to be considered. Thus, when the error in defendant's name was at worst innocent and technical, and an officer executing the warrant had personal knowledge that the person whose residence they were searching was the person who was meant by the name in the search warrant application and the search warrant and that the place being search was his residence, the court should consider this as further evidence that the correct residence was the one that was searched. FSM v. Chaoy, 23 FSM R. 34, 42 (Yap 2020).

Search and Seizure – Warrants

The general rule is that the police can only seize evidence that a search warrant authorizes them to search for and seize. The police, in the course of their search for this evidence, may open and search closed containers for the evidence they are authorized to seize. A search into boxes and any number of other conceivable hiding places is permissible, but only if at least one of the items described in the warrant as an

object of the search could be concealed therein. FSM v. Chaoy, 23 FSM R. 34, 42-43 (Yap 2020).

Search and Seizure – Plain View; Search and Seizure – Warrants

If, while lawfully searching the premises and those containers they might lawfully open and search, the police encounter any reasonably identifiable contraband, they may also lawfully seize that contraband under the plain view doctrine. FSM v. Chaoy, 23 FSM R. 34, 43 (Yap 2020).

Search and Seizure – Plain View; Weapons

All firearms are contraband in Yap. FSM v. Chaoy, 23 FSM R. 34, 43 (Yap 2020).

Criminal Law and Procedure – Controlled Substances; Search and Seizure – Plain View

Marijuana is contraband under the FSM Code, 11 F.S.M.C. 1142. FSM v. Chaoy, 23 FSM R. 34, 43 (Yap 2020).

Search and Seizure – Plain View; Search and Seizure – Warrants

When a rifle's gun barrel was visibly protruding from the ceiling storage area, the rifle was found in an area where the police could lawfully search because the ceiling storage area was large enough that the 12 gauge shotgun, that was the object of the search warrant, could be concealed there. FSM v. Chaoy, 23 FSM R. 34, 43 (Yap 2020).

Search and Seizure – Plain View; Search and Seizure – Warrants

When the boxes and packages that were in a ceiling storage area and in which the .22 ammunition and the marijuana were found were large enough that the shotgun ammunition, that the search warrant authorized the police to seize, might be concealed inside any of those boxes and packages, the police could lawfully open those containers to search for concealed shotgun ammunition and could lawfully seize any reasonably identifiable contraband found therein. FSM v. Chaoy, 23 FSM R. 34, 43 (Yap 2020).

Criminal Law and Procedure – Controlled Substances; Criminal Law and Procedure – Standard of Proof; Search and Seizure – Plain View

To be lawfully seized, the alleged marijuana had to be reasonably identifiable as contraband. It did not have to be proven, beyond a reasonable doubt, that it was contraband, although to obtain a conviction, the government must, at trial, prove each of the elements of the crime beyond a reasonable doubt, and thus must prove beyond a reasonable doubt that the seized material is, in fact, marijuana. FSM v. Chaoy, 23 FSM R. 34, 44 (Yap 2020).

* * * *

COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

On September 10, 2020, the court heard defendant Francis Tamag Chaoy's motion to suppress evidence by video-conference[1] with Chaoy present in Yap; with his counsel, the prosecutor, and the testifying witnesses present in Pohnpei; and with the presiding judge present in Chuuk. The hearing proceeded once the court was assured that Chaoy and his counsel had a separate, secure telephone line over which they

[1] The use of a two-way video-conference to conduct a suppression hearing does not violate a defendant's due process, fair trial, or confrontation rights or Criminal Procedure Rules 43 and 26. United States v. Burke, 345 F.3d 416, 420-26 (6th Cir. 2003); *see also* FSM v. Halbert, 20 FSM R. 42, 48 (Pon. 2015) (two-way video platform used to preserve evidence for criminal trial).

could confer before and during the hearing. The court would not have proceeded with the hearing if Chaoy and his counsel could not readily communicate and confer during the hearing.

National Police Capt. Kasner Aldens, Officer Jeffrey Panuel, and Lt. Darney Phillip testified for the prosecution. Officer Panuel was recalled to testify during the defense's case-in-chief.

After considering the motion, the testimony and the evidence admitted during the hearing, Chaoy's motion to suppress is denied. The court's reasoning follows.

I. SUPPRESSION HEARING CONDUCT

"When a defendant has made a timely motion to suppress evidence . . . then it will ordinarily be necessary for the judge to conduct a public hearing at which evidence is received on the issues raised." 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.2(d), at 65 (4th ed. 2004) (footnotes omitted). As noted above, the public hearing was held, with the parties' consent, by video-conference on September 10, 2020.

A. *Government's Burden*

When a search or seizure is conducted without a warrant the burden is on the government to justify the search or seizure, but when the search or seizure is conducted pursuant to a judicially-issued warrant the burden rests with the defendant to prove the illegality of the search or seizure. FSM v. Aiken, 16 FSM R. 178, 184 (Chk. 2008); FSM v. Joseph, 9 FSM R. 66, 69 (Chk. 1999); FSM v. Santa, 8 FSM R. 266, 268 (Chk. 1998). Although a search warrant was issued in this case, two of Chaoy's three challenges to the seizure of the evidence against him are that the search was conducted before the warrant was issued or that it was conducted at a time that the warrant did not authorize, and that it was conducted at the residence of someone not named in the warrant, and was thus a warrantless search and seizure. This shifts the burden to the prosecution to prove the search and seizure was lawful. Although it was the defendant's motion to suppress, the government, since it had the burden, presented its side first at the suppression hearing. FSM v. Sam, 15 FSM R. 491, 493 (Chk. 2008).

In a criminal prosecution, the government's burden to overcome a motion to suppress evidence, and to show that the evidence seized was lawfully obtained and thus admissible, is to show this by a preponderance of the evidence, FSM v. Ezra, 19 FSM R. 497, 510 (Pon. 2014); FSM v. Suzuki, 17 FSM R. 70, 74-75 (Chk. 2010); FSM v. Kansou, 14 FSM R. 150, 151-52 (Chk. 2006), not, as the defense suggests, by the beyond-a-reasonable-doubt standard. The court uses the beyond-a-reasonable-doubt standard to make its finding of whether someone is guilty of having committed a crime. *E.g.*, Joker v. FSM, 2 FSM R. 38, 47 (App. 1985); Buekea v. FSM, 1 FSM R. 487, 492 (App. 1984); Alaphonso v. FSM, 1 FSM R. 209, 217-23 (App. 1982). But, in a hearing on a motion to suppress evidence, the prosecution generally has the burden to show by a preponderance of the evidence that the evidence sought to be suppressed is admissible. 6 LAFAVE, *supra*, § 11.2(c).[2]

[2] There is some authority that "the higher clear-and-convincing-evidence standard" may be required "when the prosecution's claim is that the search was consented to, that the evidence was obtained after a voluntary abandonment of it by the defendant, or that the illegally obtained evidence would inevitably have been lawfully discovered," 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.2(c), at 64 (4th ed. 2004) (footnotes omitted), but, in this case, the prosecution does not make any of those claims, so the court will not consider whether the higher clear-and-convincing-evidence standard might be required.

B. *Evidence Rules Do Not Apply*

As in any hearing about the admissibility of evidence, the FSM Rules of Evidence do not apply in a suppression of evidence hearing. This is because "[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court," and "[i]n making its determination it is not bound by the rules of evidence except those with respect to privileges." FSM Evid. R. 104(a). "The [evidence] rules (other than with respect to privileges) do not apply" to "(1) . . . [t]he determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104" or to "(3) . . . preliminary examinations in criminal cases." FSM Evid. R. 1101(d). A suppression hearing is both a determination of questions of fact preliminary to the admissibility of evidence and a preliminary examination in a criminal case. Accordingly, the FSM Evidence Rules did not apply during the September 10, 2020 suppression of evidence hearing.

II. ANALYSIS

Chaoy raises three issues about the validity of the government's seizure of a .22 rifle, .22 ammunition, and some marijuana in his home. Chaoy contends that this evidence must be suppressed for any of three reasons. First, is that the search was conducted on the morning of October 22, 2019, although the warrant was issued in the evening of October 22, 2019, and it authorized the government to conduct its search on October 23, 2019. Second, the search warrant was for the home of Frances Tamag Bandang, but the home searched was that of defendant Francis Tamag Chaoy. And third, the warrant authorized the government to search for and seize a 12 gauge shotgun and ammunition for a 12 gauge shotgun, but the items seized were not any of those items for which the government was authorized to conduct its search or to seize.

A. *Date of Search*

Chaoy contends that the search was conducted before the search warrant was issued and on a date it did not authorize a search. He bases this on the return ("Supplementary Report") about the search, filed by National Police Officer Jeffrey Panuel, which was dated "22 October 2019." Ex. A. The search warrant, issued in the evening of October 22, 2019, authorized the search be conducted on October 23, 2019.

Officer Panuel testified that the "22 October" date on his Supplementary Report was a typographical error that he did not notice until he reviewed his filed report when he returned to Yap in December 2019. Panuel said he then refiled an identical Supplementary Report but with the date corrected to "23 October." Ex. B. Panuel further testified that three separate searches were being conducted simultaneously at different locations on Yap on the morning of October 23, 2019, and that the search of Chaoy's house was one of these. The other two witnesses' testimony corroborated Panuel's testimony about the multiple, simultaneous searches.

The court therefore concludes that the prosecution has met its burden to show that the search was conducted at a time authorized by the warrant.

B. *Alleged Misnomer on Search Warrant*

Chaoy contends that the search was invalid because the search warrant was for the residence of Frances Tamag Bandang, but the residence searched was his and his name is Francis Tamag Chaoy. Chaoy asserts that Bandang is a name known in Yap. Chaoy implies that, because a name other than his was on the search warrant, the warrant was not valid to search his place, as it did not correctly describe his place as the place to be searched.

Capt. Aldens testified that he had known defendant Francis Tamag Chaoy before the search and he

recognized Chaoy's face, but that he may have been uncertain of Chaoy's name because he had known Chaoy by another name, Bandang. Aldens testified that Chaoy had been a person of interest from the start of the investigation that led to the search warrant application. Aldens also testified that no one else on Yap had that same combination of names, so there was no mistake about whether they had identified the right person, and thus about whether they had searched the correct residence.

Generally, "[i]t is enough if the description [of the place to be searched] is such that the officer with a search warrant can, with reasonable effort ascertain and identify the place intended." Steele v. United States, 267 U.S. 498, 503, 45 S. Ct. 414, 416, 69 L. Ed. 757, 760 (1925).[3] The affidavit supporting a search warrant (and thus the search warrant itself) must describe with particularity the place to be searched. FSM Const. art. IV, § 5; In re Search of All Electronically Stored Information, 21 FSM R. 192, 193 (Pon. 2017); Santa, 8 FSM R. at 268.

> The test for determining the adequacy of the description of the location to be searched is whether the description is sufficient "to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched.

United States v. Bonner, 808 F.2d 864, 866 (1st Cir. 1986) (quoting United States v. Turner, 770 F.2d 1508, 1510 (9th Cir. 1985); United States v. McCain, 677 F.2d 657, 660 (8th Cir. 1982); United States v. Gitcho, 601 F.2d 369, 371 (8th Cir.), *cert. denied*, 444 U.S. 871 (1979)). "The test of the description of the premises to be searched is whether or not it will enable an officer to locate the place to be searched and thus prevent the officer from searching the wrong premises." State v. McColgan, 631 S.W.2d 151, 154 (Tenn. Crim. App. 1981). "The test is not whether the description is completely accurate in every detail but rather whether it furnishes a sufficient basis for identification of the property so that it is recognizable from other adjoining and neighboring properties." State v. Daniels, 217 A.2d 610, 615 (N.J. 1966) (citing United States v. Pisano, 191 F. Supp. 861 (S.D.N.Y. 1961)).

"The obvious purpose of requiring a particular description of the place to be searched is to minimize the risk that the officers executing search warrants will by mistake search a place other than the place intended by the magistrate." State v. Mehner, 480 N.W.2d 872, 875 (Iowa 1992). But "[t]here is no constitutional requirement that the warrant name the person who owns or occupies the described premises." United States v. Besase, 521 F.2d 1306, 1308 (6th Cir. 1975). "Though desirable, it is not essential to the validity of a search warrant that the owner or occupant of the premises be named." Dixon v. United States, 211 F.2d 547, 549 (5th Cir. 1954). "Identifying the owner of the premises is relevant only to assist and aid in particularizing the place to be searched." Williams v. State, 583 So. 2d 620, 624 (Miss. 1991).

In this case, the name Frances Tamag Bandang was used to help identify the property to be searched. A search warrant is not invalid because it incorrectly names the house's owner. Power v. State, 605 So. 2d 856, 863 (Fla. 1992) (search warrant named "Donald McNeal" as house's owner when it was actually "Donna McNeal" who rented the house; error in name did not invalidate warrant). An "error in naming the occupant of the premises . . . does not vitiate any otherwise valid warrant." Williams, 583 So. 2d at 624; *see also* McColgan, 631 S.W.2d at 154 ("fact that wrong occupier is named in the warrant does

[3] Since the FSM Constitution's article IV, section 5 protection against unreasonable searches and seizures is based on the comparable provision in the U.S. Constitution's fourth amendment, the FSM Supreme Court may consider U.S. authority to help it determine whether a search or a seizure is unreasonable and thus prohibited by the FSM Constitution. Alexander v. Pohnpei, 18 FSM R. 392, 398 n.4 (Pon. 2012); FSM v. Aliven, 16 FSM R. 520, 527 n.2 (Chk. 2009); FSM v. Kansou, 14 FSM R. 136, 138 (Chk. 2006); FSM v. Wainit, 11 FSM R. 424, 434 (Chk. 2003).

not change the premises to be searched").

The property to be searched was further identified in an aerial photograph (as "Residence 2") and as "Tamag's" [Bandang's] residence.[4] This aerial photograph was attached to the search warrant application. Aerial photographs showing the place to be searched may help ascertain that the place intended to be searched was, in fact, the place that was searched. Mehner, 480 N.W.2d at 876.

In this case, there was an error in the name of the residence's occupant, but all the evidence before the court is that the names "Frances Tamag Bandang" and "Francis Tamag Chaoy" refer to the same person and that the police obtained a search warrant for that person's residence, and that was the residence that was searched and where the evidence Chaoy wishes to suppress was seized. The variance in names does not invalidate the search warrant and make the search a warrantless one. *See* Power, 605 So. 2d at 863.

Further bolstering the conclusion that the correct residence was searched is that the residence was also identified and located in an aerial photograph attached to the warrant application and that that photograph did depict the residence that was intended to be searched and that was searched. The court is therefore confident that the search warrant located and accurately identified the premises to be searched and that there was no reasonable probability that Chaoy's premises was mistakenly searched.

Lastly, although a warrant-executing officer's personal knowledge of the place to be searched will "not cure a vitally deficient description," of the place to be searched, where "the error is at the worst innocent and technical . . . such [personal] knowledge ought to be considered." Daniels, 217 A.2d at 615. Here, the error in Chaoy's name was at worst innocent and technical, and Capt. Kasner, who was among those executing the warrant, had personal knowledge that the person whose residence they were searching was the person who was meant by the name Bandang in the search warrant application and the search warrant and that the place being search was his residence. The court should consider this as further evidence that the correct residence was the one that was searched.

Accordingly, the name Frances Tamag Bandang on the search warrant does not invalidate the warrant and make the search of Chaoy's residence a warrantless search.

C. *Seizure of Items Not Authorized by Search Warrant*

Chaoy contends that the items seized cannot be used as evidence against him because the search warrant did not authorize their seizure – the search warrant authorized the police to search the premises for a 12 gauge shotgun and 12 gauge shotgun ammunition and the items seized during the search were not any of these items. Chaoy also contends that the plain view doctrine cannot be applied to make valid the seizure of the .22 rifle, the .22 ammunition, and the marijuana because those items were, except for the rifle, in containers stored in the ceiling area, and thus not in plain view. Chaoy further contends that the rifle also could not be considered in plain view because it too was stored in the ceiling area. Chaoy also contends that the police have not shown, beyond a reasonable doubt, that the dried leafy material that they seized is actually marijuana, and therefore it must be suppressed.

1. *Whether Evidence Lawfully Seized*

The general rule is that the police can only seize evidence that a search warrant authorizes them to search for and seize. The police, in the course of their search for this evidence, may open and search closed

[4] "Frances Tamag Bandang" was, after the first mention of him in the search warrant affidavit, usually referred to as "Tamag."

containers for the evidence they are authorized to seize. A search into boxes and any number of other conceivable "hiding places is permissible, but *only* if at least one of the items described in the warrant as an object of the search could be concealed therein." 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 4.10(d), at 753-54 (4th ed. 2004) (footnotes omitted) (emphasis in original). Thus, the police may open and search only those containers that might contain the evidence sought. For instance, if the search warrant authorized the seizure of an allegedly stolen outboard motor, the police could not open a bathroom medicine cabinet or open some other container too small to contain an outboard motor.

If, while lawfully searching the premises and those containers they might lawfully open and search, the police encounter any reasonably identifiable contraband, they may also lawfully seize that contraband under the plain view doctrine. As another court succinctly put it:

> When officers, in the course of a bona fide effort to execute a valid search warrant, discover articles which, although not included in the warrant, are reasonably identifiable as contraband, they may seize them whether they are initially in plain sight or come into plain sight subsequently, as a result of the officers' efforts.

Skelton v. Superior Court, 460 P.2d 485, 494 (Cal. 1969) (in bank); People v. Scott, 257 P.3d 703, 730 (Cal. 2011); Ex parte Jenkins, 26 So. 3d 464, 470 n.4 (Ala. 2009); State v. Traxler, 315 N.W.2d 440, 443 (Neb. 1982); *see also* Hernandez v. People, 385 P.2d 996, 1000 (Colo. 1963) (en banc); Bigler v. State, 540 N.E.2d 32, 34 (Ind. 1989).

The court takes judicial notice that, under Yap state law, all firearms are contraband in Yap. The court further notes that marijuana is contraband under the FSM Code, 11 F.S.M.C. 1142. The seized .22 rifle, .22 ammunition, and the marijuana were thus readily identifiable as contraband.

The plain view doctrine therefore applies in this instance. According to uncontradicted testimony, when the police entered the premises, the rifle's gun barrel was visibly protruding from the ceiling storage area, where it rested on a two by six about seven feet above the floor. But, even if it had not been visible at that point, the rifle was found in an area where the police could lawfully search because the ceiling storage area was large enough that the 12 gauge shotgun, that was the object of the search, could be concealed there. The .22 rifle was therefore lawfully seized.

Boxes and packages were visible in the ceiling storage area and in which the .22 ammunition and the marijuana were found. *See* Exs. C and D (photos of unopened boxes in the ceiling storage are that someone could see from ground level).[5] These containers were large enough that the 12 gauge shotgun ammunition, that the police were authorized to seize, might be concealed inside any of those boxes and packages. The police could therefore lawfully open these containers to search for concealed 12 gauge shotgun ammunition and could lawfully seize any reasonably identifiable contraband found therein.

Thus, the seizure of the .22 rifle, the .22 ammunition, and the marijuana was lawful because those items were found in places where the police might lawfully search for and find the 12 gauge shotgun and the shotgun ammunition that the search warrant authorized them to search for and seize.

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[5] But even if these containers had not been visible from ground level, they were still located in a storage area where the police could lawfully search because the evidence sought – 12 gauge shotgun and 12 gauge shotgun ammunition – could be concealed there.

2. *Whether Seized Evidence Is Actually Marijuana*

Chaoy further contends that the alleged marijuana should be suppressed because the prosecution has not shown beyond a reasonable doubt that what was seized is actually marijuana, and thus contraband. No scientific tests have been run to prove it was marijuana.

But to be lawfully seized, the alleged marijuana had to be reasonably identifiable as contraband. It did not have to be proven, beyond a reasonable doubt, that it was contraband. Officer Phillip testified that he was familiar with marijuana and that the alleged marijuana looked and smelled like marijuana and that marijuana has a very distinctive smell. It was thus reasonably identified as contraband during the search and thus lawfully seized and admissible as evidence.

Of course, to obtain a conviction, the government must, at trial, prove each of the elements of the crime beyond a reasonable doubt. Ludwig v. FSM, 2 FSM R. 27, 35 (App. 1985). Thus, to convict Chaoy on the marijuana possession charge, the government must prove beyond a reasonable doubt that the material, which the police seized, is, in fact, marijuana.

III. CONCLUSION

None of Chaoy's three issues warrant the suppression of any of the evidence seized. Accordingly, the defendant's motion to suppress the evidence is denied.

* * * *

FSM SUPREME COURT TRIAL DIVISION

BIARITA ROBERT,	)	CIVIL ACTION NO. 2015-1001
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CHUUK PUBLIC UTILITY CORPORATION,	)	
	)	
Defendant.	)	
_____	)	

ORDER INDICATING THE COURT'S WILLINGNESS TO GRANT VACATUR

Larry Wentworth
Associate Justice

Decided: September 28, 2020

APPEARANCES:

For the Plaintiff: Daniel Rescue, Jr., Esq.
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