SCWC-16-0000797

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI`I,

Respondent/Plaintiff-Appellant,

v.

JOSHUA LEE,

Petitioner/Defendant-Appellee.

CRIMINAL NO. 15-1-1959
CAAP-16-0000797

APPLICATION FOR WRIT OF CERTIORARI FROM THE MEMORANDUM OPINION OF THE INTERMEDIATE COURT OF APPEALS, filed on May 31, 2019

HONORABLE LISA M. GINOZA
Chief Judge
HON. ALEXA D. M. FUJISE
HON. DERRICK H. M. CHAN
Associate Judges

APPLICATION FOR WRIT OF CERTIORARI

APPENDICES "A" - "C"

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APPLICATION FOR WRIT OF CERTIORARI

Petitioner/Defendant-Appellee Joshua Lee ("Defendant"), in the Intermediate Court of Appeals ("ICA"), pursuant to Hawai'i Rules of Appellate Procedure ("HRAP") Rule 40.1, respectfully prays that a writ of certiorari be issued by this Court to review the ICA's Memorandum Opinion ("MO"), filed on May 31, 2019. (CAAP Dkt #64[1]; a copy is attached hereto as Appendix "A"). As the ICA's Judgment on Appeal ("JOA") was filed on July 2, 2019 (CAAP Dkt #66; a copy is attached hereto as Appendix "B") an extension was granted by the Clerk, this Application may be filed on or before September 3, 2019 (the extended due date is August 31, 2019, which is a Saturday and September 2, 2019, the following Monday, is a holiday), pursuant to HRAP Rules 26(a) and 40.1(a). This Court has jurisdiction to entertain this application pursuant to Hawai'i Revised Statutes ("HRS") §§ 602-5 and 602-59.

I. QUESTIONS PRESENTED

1. Whether the ICA gravely erred in reversing the Circuit Court's Findings Of Fact And Conclusions Of Law And Order Granting Defendant's Motion To Suppress Evidence And Statements?

II. STATEMENT OF PRIOR PROCEEDINGS

Defendant was charged by Indictment, filed on December 15, 2015, with Count 1, Terroristic Threatening in the First Degree, HRS §§ 707-716(1)(c) and/or 707-716(1)(e); Count 2, Assault Against a Law Enforcement Officer in the First Degree, HRS § 707-712.5; and Count 3, Resisting Arrest, HRS § 710-1026(1)(a). (CAAP Dkt #16: 15-16).

On April 25, 2016, Defendant filed his Motion to Suppress Evidence. (CAAP Dkt #16: 75-96).

After an evidentiary hearing, the Circuit Court granted Defendant's motion to suppress. (CAAP Dkt #22: 59-68).

On October 13, 2016, the Circuit Court issued its Findings Of Fact And Conclusions Of Law And Order Granting Defendant's Motion To Suppress Evidence And Statements ("Order Granting Motion To Suppress"). (CAAP Dkt #16: 141-53; a copy is attached hereto as Appendix "C").

The State appealed the Order Granting Motion To Suppress and on May 31, 2019, the

[1] Citations to documents filed in the JEFS record for the underlying ICA appeal, CAAP-16-0000797, will be cited as "CAAP Dkt # [ ]."

ICA issued its MO vacating the order and remanding the case to the circuit court for further proceedings. (CAAP Dkt #64; Appendix "A", attached).

III. STATEMENT OF THE CASE

In its SDO, the ICA adopted the Circuit Court's findings of fact ("FOF") #7 through #28. FOFs #7 through #28, with the exception of FOF #15[2] from the Circuit Court's Order Granting Motion To Suppress are hereby incorporated by reference as setting forth the relevant facts adduced at the hearing on Defendant's Motion To Suppress Evidence. (CAAP Dkt #16: 141-53; Appendix "C", attached).

In the Order Granting Motion To Suppress, the Circuit Court suppressed "all statements, evidence, observations and actions that were observed or obtained after the unlawful entrance into Defendant's bedroom, and all the fruits thereof is hereby suppressed and precluded from use at trial." (CAAP Dkt #16: 41-53; Appendix "C", attached). The observations and actions that occurred after the officers made their unconsented-to, warrantless entry into Defendant's bedroom were described as follows. After Sgt. Cobb unlocked the door using a paper clip, he and Officer Kahao looked into the bedroom and saw Defendant holding an object in his hand.[3] Defendant was not injured and did not appear to be in any pain. (CAAP Dkt #22: 17; CAAP Dkt #34: 50). and forced his way into Defendant's room, Defendant swung the wooden sword he was holding at Sgt. Cobb.[4] Based on his speculation that Defendant might grab one of the samurai

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[2] In Answering Brief ("AB"), Defendant challenged FOF #15 as clearly erroneous. (CAAP Dkt #48: 22, n. 5). That FOF reads as follows:

> 15. When Sergeant Cobb arrived, he spoke to Defendant's mother ("Linda") who related that Defendant had tried to commit suicide before. Linda did not indicate when the prior suicide attempt may have occurred.

The court permitted this evidence at the hearing for the limited purpose of explaining the officer's subsequent actions, not as substantive evidence that Defendant had actually previously tried to commit suicide. To the extent that the FOF does not reflect the limited purpose of the testimony it is clearly erroneous.

[3] Gavan, Defendant's brother, testified that when the door opened, they could see Defendant standing by his desk, holding a wooden sword in his right hand. The sword was at Defendant's side with the tip pointing down. (CAAP Dkt #22: 37). The officers ordered Defendant to drop the sword but Gavan asked the officers to leave as they could see that Defendant was okay. (Id.: 38-46). The officers refused and then entered the room. (Id.: 39).

[4] Sgt. Cobb admitted that until Defendant swung the wooden sword at him, he had no probable cause that Defendant had committed any criminal offense. (CAAP Dkt #22: 25-26).

swords on the couch, Sgt. Cobb grabbed Defendant's left hand and pushed him away from the couch. Defendant flipped Sgt. Cobb over his shoulder onto the bed (actually a mattress on the floor) and kneed Sgt. Cobb twice in the head. (CAAP Dkt #34: 16, 53; Dkt #14: 13-14). Defendant tossed Officer Kahao onto the couch as she and Officer Takahashi were trying to subdue him. Officer Kahao then sprayed Defendant with pepper spray. (CAAP Dkt #34: 17-18, 36; Dkt #14: 14).

IV. ARGUMENT

A. THE ICA GRAVELY ERRED IN HOLDING THAT THE CIRCUIT HAD ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS.

In the instant case, the Circuit Court properly granted Defendant's Motion Suppress Evidence and Statements, where the police conducted an illegal warrantless search[5] of his bedroom.

The fourth and fourteenth amendments to the U.S. Constitution and article I, section 7 of the Hawai`i Constitution protect individuals against unreasonable searches and seizures. These constitutional provisions mandate that government agents obtain warrants based on probable cause[6] before they effect a search and seizure of persons or places. Bailey v. U.S., 133 S.Ct. 1031, 1037, 185 L.Ed.2d 19, 28 (2013); In the Interest of Doe, 77 Hawai`i 435, 887 P.2d 645 (1994); State v. Dias, 62 Haw. 52, 609 P.2d 637 (1980); State v. Barrett, 67 Haw. 650, 701 P.2d 1277 (1985). In fact, the Hawai`i Supreme Court has held that article I, section 7, which explicitly protects against invasions of privacy, provides greater protection of individual's right against unreasonable searches and seizures than is provided under the federal constitution. State v. Endo, 83 Hawai`i 87, 93, 924 P.2d 581, 583 (1996) (quoting State v. Lopez, 78 Hawai`i 433, 445-46, 896 P.2d 889, 901-902 (1995)). To that end, any warrantless search or seizure is presumed to be unreasonable, invalid and unconstitutional, and the burden always rests with the government to prove that such actions fall within a specifically established and well-delineated exception to the warrant requirement. State v. Rodrigues, 128 Hawai`i 200, 215, 286 P.3d 809, 824 (2012) (citing State v. Ortiz, 67 Haw. 181, 184, 683 P.2d 822, 825 (1984)). Furthermore,

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[5] The ICA correctly found that the officers' warrantless entry into Defendant's bedroom constituted a search. (MO: 13-14).

[6] Police officers have probable cause only when: "The facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that a crime was being committed." *State v. Texeira*, 50 Haw. 138, 142, 433 P.2d 593, 597 (1967).

under Hawaii law, any properly conducted search or seizure must be no broader than absolutely necessary to satisfy the objective of each narrow exception to the warrant requirement. State v. Eleneki, 106 Hawai`i 177, 195, 102 P.3d 1075, 1093 (2004) (citing State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974)).

When the government fails to meet this burden, evidence gathered from the presumptively illegal search must be suppressed as "tainted fruits of the poisonous tree." State v. Prendergast, 103 Hawai`i 451, 454, 83 P.3d 714, 717 (2004) (citing State v. Fukusaku, 85 Hawai`i 462, 475, 946 P.2d 32, 45 (1997)); *see also* Wong Sun v. United States, 371 U.S. 471, 484-85, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963).

In the instant case, it is not disputed that the officers conducted a warrantless search of Defendant's bedroom. (MO: 13-14). That search was presumptively illegal absent proof by the State that the officers' actions fell within a "specifically established and well-delineated exception to the warrant requirement." The Circuit Court properly rejected the State's contention that "exigent circumstances" justified the warrantless search because the State failed at the outset to establish probable cause that a crime was or is being committed. *See e.g.* State v. Line, 121 Hawai`i 74, 85, 214 P.3d 613, 624 (2009) (citations omitted) ("Because of the special privacy interest in the home, '[i]t is now settled that any warrantless entrance of a private dwelling by the police can only be justified under the 'exigent circumstances' exceptions to the warrant requirement of the Fourth Amendment …'"); State v. Bonnell, 75 Haw. 124, 137, 856 P.2d 1265, 1273 (1993) ("no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances'" or some other recognized exception to the warrant requirement."); State v. Kapoi, 64 Haw. 130, 141, 637 P.2d 1105, 1114 (1981) (citing Coolidge v. New Hampshire, 403 U.S. 443, 461-62 (1971) (holding that, "no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'") The officers were dispatched to the residence on a report that Defendant had locked himself in his room and that he might be suicidal. However, the officers admitted that committing suicide or attempting to commit suicide was not a crime and that they had not been called to the residence to investigate any criminal activity. The officers also admitted that it was not illegal to possess a wooden sword or samurai swords or to hold a wooden sword and that there was no indication that any crime was being committed in the bedroom. Even when Sgt. Cobb unlocked the door and Defendant opened it, the officers did not observe any illegal activity occurring in the room.

Based on the testimony of the State's witnesses, there was no probable cause that a crime was being committed in the bedroom.

In addition to the absence of probable cause that there was a crime being committed, the State also failed to establish exigent circumstances to justify the warrantless search. The alleged exigent circumstance that had been advanced by the State was that the officers suspected that Defendant might be trying to commit suicide. It is conceivable that under some circumstances, an emergency might provide the requisite exigency to justify a warrantless search however, there was no such emergency in this case. The lack of urgency in the situation was evidenced by Officer Takahashi's admission that when he arrived at the residence, he decided to wait for Officer Kahao to arrive, rather than to go immediately upstairs. Officer Kahao and Officer Takahashi then spoke with Defendant for at least ten minutes before Sgt. Cobb arrived. Then, even after all the officers arrived at the residence, Sgt. Cobb spoke with Defendant for another ten minutes. The fact that officers chose to negotiate with Defendant is telling, as they acknowledged that they would have broken down the door if they believed a true emergency existed. By all accounts, Defendant was speaking calmly and rationally and told the officers that he was not "okay," "fine," and "not hurt" and that he just wanted the officers to leave. There was no indication that Defendant was in any distress, injured or in pain. In fact, Defendant's demeanor only changed when Sgt. Cobb arrived, banged on the door, spoke loudly to Defendant and began to antagonize him by challenging him to "grow up" and "be a man." Even at that point, when Defendant opened the door, there was no indication that he was bleeding, injured or in any pain. While Defendant was holding a wooden sword in his hand, it was not a crime to possess or hold a wooden sword, and Officer Kahao reholstered her firearm when she realized that Defendant was only holding a wooden sword. Further, the officers did not observe any illegal items or paraphernalia when they looked into Defendant's bedroom. In sum, the officers had no basis to believe that any criminal activity had occurred in the bedroom prior to their entry or that any emergency existed, therefore there were no exigent circumstances to justify their warrantless search.

In its Memo Op, the ICA reaffirms its adoption of the "emergency aid" exception to the warrant requirement that it adopted in State v. Wilson, 141 Hawai`i 385, 410 P.3d 865 (App. 2017). First, the Hawai`i Supreme Court should decline to adopt the "emergency aid" exception and overrule the ICA's holding in Wilson and herein (Wilson was not reviewed on certiorari by

the Hawai`i Supreme Court). At the outset, the development of such an exception under the lesser-protections of the Fourth Amendment is inconsistent with the enhanced protections afforded under Article I, Section 7, which provides broader protections for the privacy rights of Hawai`i citizens based on its explicit protection against invasions of privacy. Doe, 77 Hawai`i at 439, 887 P.2d 649. Moreover, the ICA's adoption of the "emergency aid" exception in Wilson, which the ICA appears to analyze as separate from an exigent circumstances analysis[7], is inconsistent with the Hawai`i Supreme Court's holding that the only justification for a warrantless entry into a home is if the entry falls under the exigent-circumstances exception to the warrant requirement. Line, 121 Hawai`i at 85, 214 P.3d at 624. As an exigent-circumstances analysis already requires an evaluation of whether the "demands of the occasion reasonably call for an immediate police response … [such as] to prevent imminent danger to life or serious damage to property, or to forestall the likely escape of a suspect or the threatened removal or destruction of evidence"[8] the adoption of the "emergency aid" exception is unnecessary.[9] In fact, the ICA herein found that the "emergency aid" exception applied even though there were no exigent circumstances to justify the officers' entry (*see* discussion set forth *infra*). As such, the "emergency aid" exception actually diminishes the protections that the supreme court has already established under Article I, Section 7 because it would allow the admission of evidence gained as a result of a warrantless entry even if exigent circumstances were not present. For example, in Sutterfield v. City of Milwaukee, 751 F.3d 542 (7th Cir. 2014), the case cited extensively by the ICA in the MO, the 7th Circuit Court of Appeals concluded that there was no probable cause for arrest nor even conclusive evidence that an emergency existed but still sanctioned the warrantless entry and warrantless seizure of a handgun. It takes no stretch to imagine the potential for abuse created by an exception. Police could simply claim a belief that an emergency existed, even if the ultimate facts of the situation did not support such a claim (as

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[7] Wilson, 141 Hawai`i at 392-93, 410 P.3d at 872-73.

[8] State v. Lloyd, 61 Haw. 505, 512, 606 P.2d 913, 918 (1980).

[9] The "emergency aid" exception described by the U.S. Supreme Court in Brigham City v. Stuart, 547 U.S. 398, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006) (the case cited by the ICA in Wilson and in the instant case) did not obviate the need for an exigent circumstances analysis but was a specific instance where an exigency can exist. Id., 547 U.S. at 403-404, 126 S. Ct. at 1947. Under the Supreme Court's analysis, the invocation of the exception did not obviate a need for an evaluation of the "totality of the circumstances" as the claimed exception must still be objectively evaluated to determine whether the officer's actions were "plainly reasonable under the circumstances." Id., 547 U.S. at 404-07, 126 S. Ct. at 1948-49.

herein) and effect illegal warrantless entries in disregard of the privacy rights guaranteed under Article I, Section 7. Further, there is no danger that law enforcement officers would delay entry in emergency situations in the absence of such an explicit exception, i.e. the ICA's unjustified assertion that "[i]t does not meet the needs of law enforcement or the demands of public safety to require officers to walk away from a situation like the one they encountered here." Wilson, 141 Hawai`i at 393, 410 P.3d at 393. The lack of such an exception would not preclude officers from entering a dwelling in an emergency situation but would only preclude the admission of evidence that was gained as a result of such a warrantless entry if exigent circumstances were not found. The exception only deals with the admissibility of evidence gained as a result of a warrantless entry, not whether such an entry can occur. The determination of whether evidence gained as a result of an emergency entry is admissible can ultimately be analyzed under an exigent-circumstances analysis which would still be harmonious with and preserve existing Hawai`i Supreme Court case-law under Article I, Section 7. Hence, the adoption of an "emergency aid" exception which diminishes the protection of individual privacy rights under Article I, Section 7, apart from the already-existing, totality-of-the-circumstances exigent circumstances analysis under Hawai`i law is unnecessary[10] and the Hawai`i Supreme Court should overrule the ICA's adoption of the "emergency aid" exception in Wilson.[11]

Second, even if the "emergency aid" exception were to be applied on the facts presented in the instant case, it would not apply. Courts that have applied the exception have done so in "emergency" situations that are sufficient to establish an exigency for a warrantless entry/search are those in which immediate intervention by the police is necessary. *See e.g.* Duquette v. Godbout, 471 A.2d 1359 (R.I. 1984); Brigham City, *supra*; Sutterfield, *supra*. By contrast, in the instant case, Officer Kahao and Officer Takahashi spoke with Defendant for at least ten

[10] In a similar situation the Hawai`i Supreme Court declined to adopt such a *per se* exception as unnecessary. *See e.g.* State v. Ketchum, 97 Hawai`i 107, 119-20, 34 P.3d 1006, 1018-19 (2001) (Hawai`i Supreme Court declines to adopt the "routine booking question exception" under state constitutional law as such questions are "merely one consideration among many relevant to an assessment of the totality of the circumstances")

[11] While the ICA recognized that the "emergency aid" exception still requires an evaluation of the "totality of the circumstances" to determine whether "there was an objectively reasonable basis for the officers to conclude that [Defendant] was in need of emergency aid when the officers conducted the warrantless search" (MO: 13), the danger is that identifying such a specific exception could lead to an interpretation that it is a *per se* exception to the warrant requirement.

minutes before Sgt. Cobb arrived. There was no indication that Defendant was injured or in any distress. Defendant was not agitated, reassured the officers that he was fine and simply asked them to leave. The lack of urgency was evidenced by the fact that Sgt. Cobb then spoke with Defendant for at least another ten minutes before he attempted to open the door. There was no justification for this change in tactics because, other than the fact that Sgt. Cobb was antagonizing Defendant[12], there was no change in the situation from the previous twenty minutes during which the officers were content with talking to Defendant rather than attempting to force their way into the room. Even when Sgt. Cobb unlocked the door, there was no indication that Defendant was in any distress or injured, it appeared that Sgt. Cobb, whose suicide counseling skills were questionable at best, simply got fed up and decided to make a warrantless entry (to quote Sgt. Cobb, "We don't need a warrant, dumbass.") Thus, the officers had no reason to then force their way into the room. While Sgt. Cobb claimed that Defendant had swung the wooden sword at him, this occurred only after Sgt. Cobb had forced his way into the room and after he had spent the preceding ten minutes antagonizing Defendant. Again, the State should not be permitted to rely on such a "police-created exigency" to then claim an emergency situation existed.

The ICA did not disturb the Circuit Court's conclusion that the exceptions to the warrant requirement did not apply (MO: 11-12). As such, the State failed to meet its burden of proving that the presumptively unreasonable warrantless entry/search of Defendant's bedroom fell within a specifically and well-delineated exception to the warrant requirement. Accordingly, the Circuit Court properly granted the motion to suppress and all statements, evidence, observations and actions that were observed or obtained after the illegal entry into Defendant's bedroom, and the fruits therefrom, must be suppressed and precluded from use at trial. Prendergast, 103 Hawai`i at 454, 83 P.3d at 717 (citing Fukusaku, 85 Hawai`i at 475, 946 P.2d at 45 (1997).

While not specifically addressed by the ICA, in its Opening Brief ("OB"), The State contended that the "exclusionary rule" does not apply to "testimony describing a defendant's

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[12] "Under the 'police-created exigency' doctrine, which lower courts have developed as an exception to the exigent circumstances rule, exigent circumstances do not justify a warrantless search when the exigency was 'created' or 'manufactured' by the conduct of the police. The lower courts have not agreed, however, on the test for determining when police impermissibly create an exigency." Kentucky v. King, 563 U.S. 452, 452-53, 131 S.Ct. 1849, 1852, 179 L.Ed.2d 865 (2011).

own illegal actions following an unlawful search and seizure." (OB: 30-35; Dkt #42: 36-41). In support of its contention, the State cites numerous cases interpreting the federal exclusionary rule that hold that the exclusionary rule does not apply to a defendant's illegal acts that occur subsequent to an unlawful search and seizure or warrantless entry by the police. (OB: 30-34; Dkt #42: 36-40).

On the federal level, the primary purpose of the exclusionary rule is to deter illegal police conduct. State v. Lopez, 78 Hawai`i 433, 446, 896 P.2d 889, 902 (1995) (citing United States v. Leon, 468 U.S. 897, 916, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984)). By contrast, Hawai`i's exclusionary rule serves the additional purpose of protecting the "extensive" privacy rights of the people of Hawai`i.

> Significantly, this court has declared that, compared to the Fourth Amendment, article I, section 7 of the Hawai'i Constitution guarantees persons in Hawai'i a "more extensive right of privacy[.]" State v. Navas, 81 Hawai'i 113, 123, 913 P.2d 39, 49 (1996); see also State v. Dixon, 83 Hawai'i 13, 23, 924 P.2d 181, 191 (1996) (noting that "article I, section 7 of the Hawai'i Constitution provides broader protection than the [F]ourth [A]mendment to the United States Constitution because it also protects against unreasonable invasions of privacy"); State v. Tanaka, 67 Haw. 658, 661-62, 701 P.2d 1274, 1276 (1985) ("In our view, article I, § 7 of the Hawai'i Constitution recognizes an expectation of privacy beyond the parallel provisions in the Federal Bill of Rights.").
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> Hence, it would be violative of the "extensive right to privacy" guaranteed by the Hawai'i Constitution for this court to permit seizures to occur on the basis of a suspicion that a motorist was avoiding a police confrontation by making a lawful turn. Unlike the exclusionary rule on the federal level, Hawaii's exclusionary rule serves not only to deter illegal police conduct, but to protect the privacy rights of our people. See Lopez, 78 Hawai'i at 446, 896 P.2d at 902.

State v. Heapy, 113 Hawai`i 283, 298-99, 151 P.3d 764, 779-80 (2007).

In the instant case, the police were called to investigate a possible suicide, there was no criminal activity alleged or involved (until after the officers' illegal warrantless entry into Defendant's bedroom). When they arrived at the residence, there was no indication of any criminal activity or emergency situation. Defendant assured them that he was okay and there was no indication that he was hurt or in distress. The situation did not escalate until Sgt. Cobb antagonized Defendant and threatened to break down the door. Sgt. Cobb then unlocked the door and forced his way into the room. Any supposed "emergency" at that point had been

created by the police and did not justify a warrantless search.[13] The police forcing their way into Defendant's room without a warrant and without any exigent circumstances (except for those which they created), is the prototypical "unreasonable invasion of privacy" which Article I, Section 7 protects against. Accordingly, contrary to the State's assertion, the exclusionary rule under Article I, Section 7 applies herein and requires suppression of all statements made to HPD officers after the illegal entry into the room and all actions initiated by illegal observations made by the officers.[14]

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[13] "Under the 'police-created exigency' doctrine, which lower courts have developed as an exception to the exigent circumstances rule, exigent circumstances do not justify a warrantless search when the exigency was 'created' or 'manufactured' by the conduct of the police. The lower courts have not agreed, however, on the test for determining when police impermissibly create an exigency." King, 563 U.S. at 452-53, 131 S.Ct. at 1852. In the instant case, Sgt. Cobb antagonized Defendant and then arbitrarily decided that it was necessary to unlock the door and force his way into the room.

[14] The exclusionary rule applies to "indirect as well as direct products of [] unlawful actions." Wong Sun v. United States, 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1962).

> The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in Silverman v. United States, 365 U.S. 505, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of "papers and effects." Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. McGinnis v. United States, 227 F.2d 598. Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the "fruit" of official illegality than the more common tangible fruits of the unwarranted intrusion. See Nueslein v. District of Columbia, 115 F.2d 690. Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence. Either in terms of deterring lawless conduct by federal officers, Rea v. United States, 350 U.S. 214, or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained, Elkins v. United States, 364 U.S. 206, the danger in relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction.

Id. at 485-86, 83 S.Ct. at 416.

V. CONCLUSION

For the foregoing reasons, Petitioner/Defendant-Appellee Joshua Lee prays that this Honorable Court issue a writ of certiorari vacating the ICA's Memorandum Opinion, filed on May 31, 2019, vacating the Circuit Court's Order Granting Motion To Suppress.

DATED: Honolulu, Hawai'i, September 3, 2019.

Respectfully submitted,

ALEN M. KANESHIRO, ATTORNEY AT LAW

BY: /s/ Alen M. Kaneshiro
ALEN M. KANESHIRO

ATTORNEY FOR PETITIONER/DEFENDANT-APPELLEE

APPENDIX “A”

NO. CAAP-16-0000797

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellant, v.
JOSHUA LEE, Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 15-1-1959)

MEMORANDUM OPINION
(By: Ginoza, Chief Judge, Fujise and Chan, JJ.)

Plaintiff-Appellant State of Hawaiʻi (State) appeals from the Circuit Court of the First Circuit's (Circuit Court)[1] October 13, 2016 "Findings of Fact [FOF] and Conclusions of Law [COL] and Order Granting Defendant's Motion to Suppress Evidence and Statements" (Order).

On appeal, the State contends the Circuit Court erred in suppressing evidence stemming from the police entry into Defendant-Appellee Joshua Lee's (Lee) bedroom without a warrant where they were investigating a report that he was attempting to commit suicide.

I.

A. **Factual Background**

On October 26, 2015, Honolulu Police Department (HPD) officers Sergeant Michael Cobb (Sergeant Cobb), Corporal Craig Takahashi (Corporal Takahashi), and Officer Summer Kahao (Officer Kahao) were dispatched on a "suicidal male call" to Lee's

[1] The Honorable Rom A. Trader presided.

residence. Lee's mother Linda Matsuo (Linda) and brother Gavan Lee (Gavan) were also present. The following facts, as found by the Circuit Court, are, with one noted exception, undisputed by the State:

> 7. Officer Kahao and Corporal Takahashi responded to Defendant's residence located at 98-569 Aloalii Street on a "suicidal male call."
>
> 8. It was related through HPD dispatch that a male had locked himself in his bedroom, was threatening suicide and had samurai swords in the room.
>
> 9. Corporal Takahashi arrived at 98-569 Aloalii Street approximately 1:30 p.m. and Officer Kahao arrived a few minutes later. Corporal Takahashi waited for Officer Kahao to arrive before entering the residence. When Corporal Takahashi and Officer Kahao arrived, they were greeted by a male who they believed to be Defendant's brother. The male led Corporal Takahashi and Officer Kahao into the residence. Corporal Takahashi and Officer Kahao had consent to enter the residence of 98-569 Aloalii Street.
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> 10. Once entering the residence, both Officer Kahao and Corporal Takahashi met with Defendant's mother, "Linda," who explained the circumstances to the officers. Linda was in the upstairs kitchen, approximately 10 to 15 feet away from Defendant's bedroom door. Officer Kahao began communicating with Defendant through the bedroom door and called out to him, "Joshua, this is Officer Kahao. Could you please open the door?" Defendant told the officers to go away, and that he did not want to talk to anyone. Defendant did not want to engage with the officers.
>
> 11. Officer Kahao spoke to Defendant through his bedroom door for approximately 10 minutes. Officer Kahao spoke to Defendant in a calm voice, trying to establish a rapport with him. Defendant repeatedly told Officer Kahao, "I'm okay. I just don't want to talk to you," "I'm not hurt, just leave."
>
> 12. Officer Kahao did not hear any signs of distress coming from inside the room. It did not sound like Defendant was in pain or injured.
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> 13. Officer Kahao and Corporal Takahashi's goal was to visibly see that Defendant was okay. Officer Kahao also wanted to speak to Defendant to see whether or not he was suicidal. While Officer Kahao was speaking to Defendant, Corporal Takahashi also spoke to Defendant through the door and explained, "We just want to see you."
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> 14. After Officer Kahao had been attempting to speak to Defendant through his bedroom door for approximately 10 minutes Sergeant Cobb arrived at the residence. Defendant's brother, Gavan Lee ("Gavan"), met Sergeant Cobb at the front door and led him up to Defendant's bedroom door. Sergeant Cobb had consent to enter 98-569 Aloalii Street.

15. When Sergeant Cobb arrived, he spoke to Defendant's mother ("Linda") who related that Defendant had tried to commit suicide before. Linda did not indicate when the prior suicide attempt may have occurred.

16. When Sergeant Cobb arrived, he took over speaking to Defendant through the bedroom door. Sergeant Cobb was more demanding, and a little bit louder than Officer Kahao. Sergeant Cobb told Defendant that he needed to open the door, that "he needed to grow up," and that "he needed to be a man." Sergeant Cobb told Defendant that if he did not open the door, they would break the door down. Defendant asked Sergeant Cobb, "Do you have a warrant?" Sergeant Cobb responded, "We don't need a warrant, dumbass."

17. None of the HPD personnel heard signs of injury, distress or any other indication that Defendant was hurt or harming himself. All of the officers confirmed that if there was any indication that Defendant was harming himself, they would have broken the bedroom door down.

18. After Sergeant Cobb had been talking to Defendant for approximately 10 minutes he noticed that Defendant's bedroom door could be unlocked from the outside by sticking a "pin or some type of small item into it." Sergeant Cobb asked Linda for something he could use to open the door. Linda gave Sergeant Cobb a paperclip.

19. Sergeant Cobb was successful at unlocking the door from the outside by using the paperclip, however, someone or something on the inside of Defendant's room was preventing Sergeant Cobb from opening the door.

20. Eventually, Defendant opened his bedroom door approximately four to six inches. All three officers could see parts of Defendant's person/body, but they could not see his entire body. From what the officers could see, Defendant did not appear to be injured. The officers also observed what appeared to be the handle to a samurai sword in Defendant's right hand. When Officer Kahao observed the handle, she put her hand on her firearm but did not draw it. When the door opened wider, the officers could see Defendant's full body. The officers could see that Defendant was not injured, in pain or hurt. Officer Kahao and Corporal Takahashi also observed that Defendant was holding a wooden sword in his right hand. When Officer Kahao observed that the sword Defendant was holding was a wooden sword, she took her hand off her firearm.

21. The officers observed that Defendant was holding a wooden sword, not a real samurai sword, before they entered Defendant's bedroom.

22. It is not a crime to possess wooden or real samurai swords in a bedroom.

23. The officers did not observe any illegal items or paraphernalia in Defendant's bedroom prior to entering. There was no information known to the officers before entering Defendant's bedroom that criminal activity was occurring within the bedroom.[2]

24. Defendant's home at 98-569 Aloalii Street has four bedrooms: one bedroom was converted into a sewing room; one bedroom belonged to Gavan; one bedroom belonged to Linda; and the third bedroom belonged to Defendant.

25. Defendant was locked in his bedroom.

26. Gavan was not allowed in his bedroom. Linda was not allowed in Defendant's bedroom without his consent.

27. There were times when Linda or a house cleaner would enter Defendant's bedroom however, it was with Defendant's consent.

28. None of the officers had obtained a warrant for 98-569 Aloalii Street or Defendant's bedroom prior to entering Defendant's bedroom.

The Circuit Court did not make any findings regarding the events that occurred after Lee's bedroom door was opened. However, the court also heard the following testimony regarding those events:

Corporal Takahashi testified that he responded to dispatch who reported an argument, which turned into a male who locked himself in a room and who had threatened suicide and had samurai swords in the room. He was the first officer on the scene and spoke to Lee's mother who told him Lee "had depression" and had tried to commit suicide before and hurt himself before. Corporal Takahashi was behind the other officers when Lee opened the door. When he moved closer he saw a wooden stick raised up at a ninety degree angle in Lee's hand. Sergeant Cobb tried to grab the stick and Lee flipped Sergeant Cobb to the floor. After wrestling with Lee, Officer Kahao and Corporal Takahashi sprayed Lee with pepper spray. The officers then backed out of the room but maintained visual contact with Lee.

Officer Kahao testified that she took the call seriously because she believed "that suicide was probable at that time." As the door was cracked open, she saw what she initially thought was a samurai sword and reached for her handgun before

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[2] The State challenges this FOF as clearly erroneous. However, as will be seen, this finding is not relevant to our analysis.

realizing it was a wooden sword. Lee was holding the sword up in a way "he would have used it to strike[,]" and she told him to drop the sword. Meanwhile, after Sergeant Cobb pushed his way into the room, Officer Kahao saw Sergeant Cobb flip onto the floor, but she was not sure what happened to the sword. Following Sergeant Cobb into the room, Officer Kahao saw Lee bending over Sergeant Cobb, and she attempted to place Lee in a hold but was thrown to the couch. Officer Kahao then sprayed Lee with pepper spray.

Sergeant Cobb testified that when he arrived at Lee's residence, he spoke with Lee's mother, who was a little bit "frantic," and said Lee had fought with his brother, "and now he wants to commit suicide. And, you know, she's worried - she said she's worried because he's done this before and he's actually cut himself[.]" Sergeant Cobb asked for, and Lee's mother produced a paper clip which Sergeant Cobb used to unlock the bedroom door. However, something on the other side of the door prevented Sergeant Cobb from opening the door.

Eventually, Lee cracked the door open about four to six inches and although Lee tried to hide it behind the door jamb, Sergeant Cobb saw the handle of what he believed could have been a samurai sword. Fearing for the officers' safety, Sergeant Cobb moved to grab the sword, pushing the door open, and shoving Lee in the process. Lee took a swing at Sergeant Cobb with the wooden samurai sword and Sergeant Cobb placed his hand on his gun. Lee then said in an agitated voice, "Shoot me. Shoot me. That's what I want." As Sergeant Cobb talked to Lee, trying to calm him down, Lee reached for metal samurai swords that were on the couch causing Sergeant Cobb to grab for Lee's left hand. Lee raised the wooden sword in a threatening manner and Sergeant Cobb pushed him back and away from the real swords. As Sergeant Cobb was pushing Lee back, Lee ducked down and flipped Sergeant Cobb over, and the officer landed partially on the bed. When Sergeant Cobb was on the floor, Lee kneed him twice in the head. The other officers attempted to subdue Lee physically but both used pepper spray when their efforts failed.

Gavan testified the door was opened and officers entered Lee's room. Gavan moved up and could see Lee was holding the wooden sword with the tip down. Gavan did not see Lee swing the sword. Police told Lee to drop the stick for a couple of minutes. Lee dropped the wooden sword when Sergeant Cobb grabbed his left arm and reached for his neck. On cross, Gavan acknowledged that Lee threw Sergeant Cobb on the floor.

B. Procedural History

On December 15, 2015, Lee was charged with Terroristic Threatening in the First Degree, in violation of Hawaii Revised Statutes (HRS) § 707-716(1)(c) and/or (e)[3] (2014), Assault Against a Law Enforcement Officer in the First Degree, in violation of HRS § 707-712.5(1)[4] (2014), and Resisting Arrest, in

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[3] HRS § 707-716 provides, in relevant part:

> **Terroristic threatening in the first degree.** (1) A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:
>
> . . . .
>
> (c) Against a public servant arising out of the performance of the public servant's official duties. . . .
>
> . . . .
>
> (e) With the use of a dangerous instrument or a simulated firearm. . . .

HRS § 707-715 (2014) provides, in pertinent part,

> **Terroristic threatening, defined.** A person commits the offense of terroristic threatening if the person threatens, by word or conduct, to cause bodily injury to another person or serious damage or harm to property, including the pets or livestock, of another or to commit a felony:
>
> (1) With the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person[.]

HRS § 707-700 (2014) defines "Dangerous Instrument" as "any firearm, whether loaded or not, and whether operable or not, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury."

[4] § 707-712.5 provides, in relevant part:

> **Assault against a law enforcement officer in the first degree.** (1) A person commits the offense of assault against a law enforcement officer in the first degree if the person:

(continued...)

violation of HRS § 710-1026(1)(a)[5] (2014).

On April 25, 2016, Lee moved to suppress the evidence and statements. Lee argued the police made warrantless entry into a place in which he had a reasonable expectation of privacy. Lee further argued that no exception to the warrant requirement applied because Linda's consent to enter was either ineffective and/or withdrawn, Lee only consented to entry under coercive threat, and there were no exigent circumstances justifying entry. On May 27, 2016, the State opposed, arguing that there were exigent circumstances and/or Lee consented to the search by opening the door, and pursuant to those exceptions evidence of Lee's criminal conduct toward officers was in plain view. The court heard the motion over three days on July 5, 2015, August 23, 2016, and September 1, 2016.

The Circuit Court rejected the State's argument that exigent circumstances justified the search because the State failed to establish that there was probable cause that a crime was being committed. The court further held that Sergeant Cobb coerced Lee into opening the door. The Circuit Court made, amongst others, the following COL that are contested by the State:

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[4](...continued)

(a) Intentionally or knowingly causes bodily injury to a law enforcement officer who is engaged in the performance of duty; or

(b) Recklessly or negligently causes, with a dangerous instrument, bodily injury to a law enforcement officer who is engaged in the performance of duty.

[5] HRS § 710-1026 provides, in relevant part:

Resisting arrest. (1) A person commits the offense of resisting arrest if the person intentionally prevents a law enforcement officer acting under color of the law enforcement officer's official authority from effecting an arrest by:

(a) Using or threatening to use physical force against the law enforcement officer or another; or

(b) Using any other means creating a substantial risk of causing bodily injury to the law enforcement officer or another.

9. The State's assertion that there were exigent circumstances and that police could enter Defendant's bedroom without a warrant is without merit because the exigent circumstances exception to the warrant requirement mandates that the police must have probable cause that a crime was or is being committed. State v. Kapoi, 64 Haw. 130, 141, 637 P.2d 1105, 1114 (1981) (citing Coolidge v. New Hampshire, 403 U.S. 443, 461-62 (1971).

10. While police responding to a suicide call could be considered exigent circumstances, in the instant case Defendant was communicating with officers through his bedroom door for at least 20 minutes. He was in his room for at least 10 minutes prior to Corporal Takahashi and Officer Kahao's arrival. Defendant did not sound hurt, injured or in distress. Defendant repeatedly told the officers that he was okay and he did not want to talk to them. In response to Officer Kahao's statement, that "she just wanted to see that he was okay," Defendant told Officer Kahao he was not hurt and he wanted to them to leave. All of the officers testified that if they believed that Defendant was actually harming himself in his bedroom, they would have broken down the bedroom door.

11. Whether or not there was an exigency is independent from the requirement that the police must also have probable cause that a crime was or is being committed. In the instant case, the police did not have probable cause that a crime was being committed. Sergeant Cobb testified that committing suicide and attempting to commit suicide are not criminal offenses. All of the officers testified that there was no indication that criminal activity was occurring inside of Defendant's bedroom. When the bedroom door opened, the officers did not observe any illegal activity occurring inside the bedroom prior to entering.

12. There was no probable cause Defendant was engaging in criminal conduct in the bedroom. Thus, exigent circumstances did not exist.

13. The State's argument that Defendant or his family consented to the entry into Defendant's bedroom is without merit because Defendant's mother, Linda, and brother, Gavan, did not have authority to consent to the police entering Defendant's bedroom and Defendant's consent was not freely and voluntarily given.

14. Defendant had an actual, subjective expectation of privacy in his bedroom. That expectation is one that society would recognize as objectively reasonable. Thus, even though Linda and Gavan may have consented to entry into the residence at 98-569 Aloalii Street, neither Linda, nor Gavan could have consented to the police entering Defendant's bedroom. It is clear that Defendant did not want the officers to enter his bedroom. Defendant did not open his door for at least 30 minutes. He repeatedly told the officers to leave. Defendant asked the police if they had a warrant and once Sergeant Cobb unlocked the bedroom door from the outside, Defendant blocked the door to prevent Sergeant Cobb from entering his bedroom.

. . . .

> 21. The State's argument that the "plain view" doctrine is applicable in this case is without merit because there was no prior lawful justification for the intrusion into Defendant's bedroom.
>
> . . . .
>
> 23. There was no justification for the intrusion into Defendant's bedroom. There were no exigent circumstances to justify the intrusion and Defendant did not freely and voluntarily consent to the intrusion. See COL 12 and 19. "Without prior justification for their presence, police officers may not enter constitutionally protected premises in order to seize evidence in plain view." Meyer, 78 Hawai'i at 317, 893 P .2d at 168.
>
> 24. There was no probable cause to believe that there was evidence of a crime or contraband in Defendant's bedroom. It was not unlawful for Defendant to possess real or wooden samurai swords in his bedroom. None of the items observed in Defendant's bedroom before or after the unlawful intrusion were contraband.
>
> 25. Once officers unlawfully stepped into Defendant's bedroom, any subsequent criminal activity that officers may have observed cannot fall into the plain view exception to the warrant requirement because they did not observe the activity and/or evidence from a position they were lawfully permitted to be in.

The Circuit Court suppressed "all statements, evidence, observations and actions that were observed or obtained after the unlawful entrance into Defendant's bedroom, and all the fruits thereof is hereby suppressed and precluded from use at trial."

This appeal followed.

II.

The State raises a single point on appeal, that the Circuit Court erred in suppressing evidence stemming from the police entry into Lee's bedroom without a warrant where exigency existed under the circumstances of this case.

III.

A. Motion to Suppress

> We review questions of constitutional law de novo, under the right/wrong standard. State v. Hauge, 103 Hawai'i 38, 47, 79 P.3d 131, 140 (2003). "Accordingly, '[w]e review the circuit court's ruling on a motion to suppress de novo . . .'" Id. (quoting State v. Locquiao, 100 Hawai'i 195, 203, 58 P.3d 1242, 1250 (2002)).

State v. Phillips, 138 Hawai'i 321, 357, 382 P.3d 133, 169 (2016).

B. Pretrial FOF and COL

> Appellate courts review a circuit court's pretrial findings of fact under the clearly erroneous standard. State v. Naititi, 104 Hawai'i 224, 233, 87 P.3d 893, 902 (2004) (citing []Locquiao, 100 Hawai'i [at] 203, 58 P.3d [at] 1250 (2002)). "A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made." Id. (internal citation omitted). Substantial evidence is "credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998) (citation and internal quotation mark omitted).
>
> Pretrial conclusions of law are reviewed under the de novo standard. Naititi, 104 Hawai'i at 233, 87 P.3d at 902; see State v. Kauhi, 86 Hawai'i 195, 197, 948 P.2d 1036, 1038 (1997) ("We review the circuit court's ruling on a motion to suppress de novo to determine whether the ruling was 'right' or 'wrong'"). "A conclusion of law that is supported by the trial court's findings of fact and that reflects an application of the correct rule of law will not be overturned." Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994) (citation and internal quotation marks omitted).

State v. Ramos-Saunders, 135 Hawai'i 299, 302, 349 P.3d 406, 409 (App. 2015) (brackets added).

IV. DISCUSSION

A. The Circuit Court Erred in Granting Lee's Motion to Suppress Because Officers Acted Under the Emergency Aid Exception to the Warrant Requirement

The State contends that the Circuit Court erred in granting Lee's motion to suppress evidence and statement. Specifically, the State argues officers had sufficient exigent circumstances to enter Lee's room because of the need to render emergency aid because Lee was suicidal. In the alternative, the State contends that even if the police entry into Lee's room was unlawful, the evidence of crimes against officers should not have been excluded.

1. Hawai'i Supreme Court Law on Warrantless Searches in the Home

It is well established in this jurisdiction that warrantless searches are unreasonable unless they fall within one of the specifically established and well-delineated exceptions. E.g. State v. Jenkins, 62 Haw. 660, 662, 619 P.2d 108, 110

(1980). The established exceptions to the warrant requirement in Hawai'i are: when there is probable cause and exigent circumstances, probationary status, consensual searches, preincarceration searches, open view, "automobile exception[,]" stop and frisk, and plain view. See State v. Meyer, 78 Hawai'i 308, 312, 893 P.2d 159, 163 (1995). "Because of the special privacy interest in the home, '[i]t is now settled that any warrantless entrance of a private dwelling by the police can only be justified under the 'exigent circumstances' exception[] to the warrant requirement of the Fourth Amendment[.]'" State v. Line, 121 Hawai'i 74, 85, 214 P.3d 613, 624 (2009) (citation and internal quotation marks omitted). The exigent circumstances exception arises where the investigating officer has probable cause and exigent circumstances to justify a search or seizure. E.g. Jenkins, 62 Haw. at 662, 619 P.2d at 110. Probable cause exists

> where "the facts and circumstances within their (the officers) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.

State v. Agnasan, 62 Haw. 252, 255-56, 614 P.2d 393, 396 (1980) (quoting Brinegar v. United States, 338 U.S. 160, 175-76 (1949)). Exigent circumstances must be determined on a case by case basis. Jenkins, 62 Haw. at 662, 619 P.2d at 110. It is the government which bears the burden of proving a warrantless search to be reasonable, a task it may accomplish by showing that "the facts of the case justified the police in searching without a warrant and that the search itself was no broader than necessary to satisfy the need which legitimized departure from the warrant requirement in the first place." State v. Kaluna, 55 Haw. 361, 363, 520 P.2d 51, 55 (1974) (citing Cupp v. Murphy, 412 U.S. 291, 295 (1973) (citations and quotes omitted)).

2. The Circuit Court's Decision Turned on a Lack of Probable Cause

In this case, the Circuit Court determined officers searched Lee's room without a warrant, and that the exceptions of exigent circumstances, consent, and plain view did not apply. Regarding exigent circumstances, applying precedent the court

specifically held the exception did not apply because there was no probable cause to believe Lee was engaged in criminal conduct. See Jenkins, 62 Haw. at 662, 619 P.2d at 110. Therefore, the Circuit Court did not determine whether or not an exigency existed. On appeal, citing federal and out-of-state case law, the State argues that the existence of probable cause was irrelevant because the potential for Lee's suicide created exigency such that the officers needed to enter to provide emergency aid. Lee responds by citing the greater protections for privacy under the Hawai'i Constitution and factually distinguishing the cases on which the State relies. E.g., State v. Endo, 83 Hawai'i 87, 93, 924 P.2d 581, 583 (App. 1996) (citation omitted) (unlike the federal constitution the Hawai'i constitution specifically provides against invasions of privacy).

3. The Emergency Aid Exception to the Warrant Requirement Has Been Recognized in Hawai'i

Subsequent to the Circuit Court's decision in this case, in State v. Wilson, 141 Hawai'i 385, 392, 410 P.3d 865, 872 (App. 2017), this court recognized an emergency aid exception to the warrant requirement under Article I, Section 7 of the Hawai'i Constitution. We adopted the United States Supreme Court's reasoning which recognized an emergency aid exception to the warrant requirement of the Fourth Amendment to the federal constitution set forth in Brigham City v. Stuart, 547 U.S. 398, 403 (2006). Id. In Brigham City, the Supreme Court held "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." 547 U.S. at 403.

> "This 'emergency aid exception' does not depend on the officers' subjective intent or the seriousness of any crime they are investigating when the emergency arises." [Michigan v. Fisher, 558 U.S. 45, 47 (2009)]. Rather, the test is an objective one that focuses on whether law enforcement officers had "'an objectively reasonable basis for believing' that medical assistance was needed, or persons were in danger." Id. at 49 (citation omitted).

Wilson, 141 Hawai'i at 393, 410 P.3d at 873 (brackets added).

In Wilson, we concluded the officer's warrantless entry was justified, without respect to the existence of probable cause, because he had an objectively reasonable basis for believing a woman was in need of emergency aid. 141 Hawai'i at 393, 410 P.3d at 873.[6] Here, without the benefit of Wilson, the Circuit Court granted Lee's motion on the basis that the exigent circumstances exception could not apply because there was no probable cause that a crime was being committed. Therefore, the issue is whether under the totality of the circumstances presented there was an objectively reasonable basis for the officers to believe that Lee was in need of emergency aid when the officers conducted the warrantless search.

4. The Warrantless Search Occurred When Lee Opened the Bedroom Door

As an initial point, the Circuit Court's order does not clearly identify when the warrantless search took place. Reviewing the Order and the hearings, there are two points in time when officers could be deemed to have conducted a search: (1) when Sergeant Cobb talked Lee into opening his bedroom door;[7] or (2) when the officers physically entered Lee's room to neutralize the perceived threat from Lee's wooden samurai sword, described above.[8] We will analyze both.

In Phillips, the Hawai'i Supreme Court recognized changes in federal constitutional jurisprudence under the Fourth Amendment and Hawai'i Constitution. 138 Hawai'i at 337, 382 P.3d at 149. The court now requires two different tests: "(1) the

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[6] In Wilson, we noted the defendant did not argue whether there was probable cause to search his residence. Id. at 392 n.6, 410 P.3d at 872 n.6. However, we joined other jurisdictions that have recognized the existence of the emergency aid exception to the Fourth Amendment "when they reasonably believe that a person within is in need of immediate aid." Id. at 392-93, 410 P.3d at 872-73 (quoting Mincey v. Arizona, 437 U.S. 385, 392 (1978)); see also Sutterfield v. City of Milwaukee, 751, F.3d 542, 564 (7th Cir. 2014) ("[I]n emergency aid cases, where the police are acting to protect someone from imminent harm, there frequently is no suspicion of wrongdoing at the moment that the police take action.").

[7] Although Sergeant Cobb first unlocked the door, because he did not open the door without Lee's assistance, we analyze these two events together.

[8] The Circuit Court's order does not make this distinction, referring to the officers' "entering the Defendant's bedroom" to mean both coercing Lee into opening the door and the officers physically entering into the bedroom.

'[(Katz v. United States, 389 U.S. 347, 351 (1967))] reasonable expectation of privacy test,' State v. Kender, 60 Haw. 301, 303, 588 P.2d 447, 449 (1978), and (2) the Jones/Jardines trespass-intrusion test, Florida v. Jardines, [569] U.S. [1] (2013); United States v. Jones, [565] U.S. [400] (2012)." Id. at 336-37, 382 P.3d at 148-49 (brackets added). "The Katz doctrine provides that only government intrusions into areas, objects, or activities in which an individual has exhibited a 'reasonable expectation of privacy' are searches subject to the protections of the Fourth Amendment." Id. at 337, 382 P.3d at 149 (citing Katz, 389 U.S. at 360). Under Katz, to determine whether a person's expectation of privacy is reasonable, a person must exhibit an actual (subjective) expectation of privacy, and that expectation must be one that society is prepared to recognize as objectively reasonable. Id.

Here, we agree with the Circuit Court's conclusion that Lee showed a subjective expectation of privacy in his bedroom by denying his family access and initially refusing to open the door for police. Further, in State v. Vinuya, this court held a resident adult child has an objectively reasonable expectation of privacy in the bedroom kept in a parent's home. 96 Hawai'i 472, 482, 32 P.3d 116, 126 (App. 2001). Thus, the search occurred for constitutional purposes when, at the insistence of the police, "[Lee] opened his bedroom door approximately four to six inches" because the government intruded into an area in which Lee had a reasonable expectation of privacy.[9] We need not address the Jones/Jardines trespass-intrusion test because we conclude a search occurred under Katz.

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[9] The State challenges the part of FOF 23 as clearly erroneous, which states, "There was no information known to the officers before entering Defendant's bedroom that criminal activity was occurring within the bedroom." The State argues FOF 23 is in conflict with FOF 20, which states, *inter alia*, Lee was holding the wooden samurai sword after opening the door. Lee's threatening officers with the sword forms the basis for the terroristic threatening count. However, FOF 23 is not in conflict with FOF 20 unless the phrase "entering the Defendant's bedroom[,]" is read to mean when the officers physically entered the bedroom after they had already unlocked the door and convinced Lee to open the door. We read the phrase to refer to the opening of the door and not the physical entry and therefore see no conflict between the FOF. Thus, FOF 23 is not clearly erroneous.

5. **Police Had An Objectively Reasonable Basis for a Search to Render Aid**

With regard to the opening of Lee's bedroom door, we evaluate the totality of circumstances that existed at that time to determine whether officers had an objectively reasonable basis to believe Lee was in need of emergency aid. Wilson, 141 Hawai'i at 393, 410 P.3d at 873. In Wilson, the officer had an objectively reasonable basis for believing a woman had been stabbed, injured, restrained, or was otherwise in critical need of assistance because the 911 call reported domestic abuse involving a man brandishing a knife, police located and detained the man at his house, police did not locate the woman but heard a woman's cries from within the house, and the officer entered the house only after his calls of "police . . . where are you?" went unanswered. Id. at 387, 393, 410 P.3d at 867, 873.

Other jurisdictions have held credible threats of suicide provide a basis for invoking the emergency aid exception to the warrant requirement. See, e.g., Sutterfield v. City of Milwaukee, 751, F.3d 542 (7th Cir. 2014); Rice v. ReliaStar Life Ins. Co., 770 F.3d 1122 (5th Cir. 2014) (no Fourth Amendment violation where officers entered house in attempt to prevent suicide); United States v. Timmann, 741 F.3d 1170, 1180 (11th Cir. 2013) (discussing Roberts v. Spielman, 643 F.3d 899, 902 (11th Cir. 2011) (warrantless entry justified on sister-in-law's report of possible suicide based on prior attempts, bipolar disorder, presence of vehicle, televisions on, and no answer at door)); United States v. Uscanga-Ramirez, 475 F.3d 1024 (8th Cir. 2007) (warrantless entry into locked bedroom justified by potential for suicide where wife told officers husband was not suicidal but was armed with gun and distraught over end of marriage); Seibert v. State, 923 So.2d 460, 467-68 (Fla. 2006) (officers' forced entry justified by roommate report of suicidal threat with large kitchen knife nearby); cf. Bailey v. Kennedy, 349 F.3d 731, 740 (4th Cir. 2003) (third-party 911 report that plaintiff was attempting suicide "[w]ithout more" could not

support probable cause[10] sufficient to justify warrantless entry and arrest for emergency medical evaluation).

In Sutterfield, police took over eight hours to find Sutterfield after her psychiatrist reported her leaving an appointment having voiced suicidal thoughts. 751 F.3d at 545-46. Officers began a search for Sutterfield pursuant to a state statute[11] which authorized taking a person into custody when there is "cause to believe that the person is mentally ill and evidences '[a] substantial probability of physical harm to himself or herself as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm.'" 751 F.3d at 546. Despite a subsequent call by the doctor relaying Sutterfield's message that she was not in need of assistance and the doctor should "call off" the police search, officers knocked on Sutterfield's front door. 751 F.3d at 545-46. About a half-hour later, when attempts to convince Sutterfield to allow them into her house had failed, and after Sutterfield had opened the inner door to her house but not the locked outer storm door, the police yanked the door open and a struggle ensued, resulting in her being handcuffed and taken into custody. 751 F.3d at 547. A protective sweep of her kitchen resulted in the discovery of, among other things, a semi-automatic handgun bearing a yellow "smiley-face" sticker on the barrel. Id.

In an extensive, thoughtful decision on the subject of police action upon a report of a possible suicide, the United States Court of Appeals for the Seventh Circuit analyzed this case, *inter alia*, under the emergency aid doctrine and noted,

> As in [Fitzgerald v. Santoro, 707 F.3d 725 (7th Cir. 2013)], the officers in this case had objectively reasonable grounds on which to believe that Sutterfield might harm herself. The police had been advised by Sutterfield's physician that she had threatened to take her own life. Based on that report, they had completed a statement of emergency detention that authorized officers to take Sutterfield into custody for a mental health evaluation. When officers arrived at Sutterfield's home that evening and tried to talk to her, she would not allow them into her

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[10] Some jurisdictions' case law predating Brigham City fit the need to enter to provide aid within a probable cause determination that a person is in danger. See generally Roberts, 643 F.3d at 905 (discussing United States v. Holloway, 290 F.3d 1331, 1334 (11th Cir. 2002)).

[11] Wisconsin Statutes section 51.15.

> home. Sutterfield contends that she was not acting "erratically," as the district court put it, but simply wished to be left alone. Perhaps so. But the relevant point, for our purposes, is that nothing transpired at the front door of her home that might have put the police on notice that the emergency that had been reported by Sutterfield's physician, and which was the basis for the section 51.15 statement of emergency detention, had dissipated. It was objectively reasonable for police on the scene to believe that the danger to Sutterfield's well-being was ongoing and that, in the absence of Sutterfield's cooperation, they needed to enter the home forcibly, as they did.
>
> To say, as Sutterfield does, that given the passage of time and her own assurances to the officers that she was fine, that there was no longer any emergency, and that the officers should have heeded her demands that they leave, is to engage in the very sort of second-guessing that we eschewed in Fitzgerald. How were the officers to know that Sutterfield was competent to assess the state of her own mental health or that, regardless of what she herself said, there was no longer any risk that she might harm herself? Only a medical professional could make that judgment, and the officers had prepared and were executing a section 51.15 statement for the very purpose of having her evaluated by such a professional.

751 F.3d at 561-62.

The Sutterfield court went on to address head-on the passage of several hours between first report and entry:

> [I]t is a reasonable and important question how long the police may claim that a putative emergency justifies warrantless action. . . . [I]t would be folly for us to try to declare *ex ante* some arbitrary cut-off that would apply to all emergency aid cases. Even in this case, it is not at all clear to us, nor would it have been to the police, that the mere passage of time without apparent incident was sufficient to alleviate any concern that Sutterfield might yet harm herself[,] . . . [a]nd the parties have given us no information about how long a threat of suicide could be thought to impose an imminent danger of harm to the person who made it; certainly nothing in this record suggests that such a threat necessarily diminishes with the passage of a few hours or with the suicidal individual's assurances that she is fine.

751 F.3d at 562-63.

Moreover, the court posited that there was no warrant available, or arguably even applicable, under the circumstances:

> But a more fundamental question raised by this case is the relevance of the warrant requirement. . . . [I]n emergency aid cases, where the police are acting to protect someone from imminent harm, there frequently is no suspicion of wrongdoing at the moment that the police take action. Even in a case like Brigham City, for example, where there actually were signs of criminal activity (juveniles drinking beer in the backyard, and people fighting inside of the house), and the occupants of the house ultimately were arrested and charged with criminal

> offenses, the relevant point vis-a-vis the warrantless entry was that immediate action was required in order to protect someone from harm. Brigham City thus articulated the justification for the entry not in terms of reason to believe that any crime was taking place, or that evidence was about to be destroyed, but rather as reason to believe that an occupant of the home needed their assistance. 547 U.S. at 403, 406, 126 S.Ct. at 1947, 1949. It may be, then, that probable cause in the emergency aid context is not reason to believe a crime is occurring or has been committed, but reason to believe that someone is in need of aid and there is a compelling need to act. This framing of the inquiry suggests that whether there was time to seek a warrant loses its relevance in the emergency aid subset of exigency cases. The passage of time may remain relevant as a measure of whether there was a true emergency justifying the intrusion into someone's home, but not in terms of whether a warrant could have been sought.
>
> Reinforcing that point in this case is the unanswered question as to what type of warrant would have been available to the police, given that Sutterfield was not suspected of any crime. . . .
>
> . . . .
>
> To be clear then, what Sutterfield is arguing for is the creation of a particular type of warrant that does not currently exist.

751 F.3d at 564 (some citations omitted); see also, State v. Jenkins, 93 Hawai'i 87, 101 n.9, 997 P.2d 13, 27 n.9 (2000) (traffic stop not for "investigatory purpose", therefore analysis under Terry v. Ohio, 392 U.S. 1 (1968) unnecessary).

Here, reviewing the Circuit Court's Order and the record in light of the foregoing authority, we conclude there were circumstances that objectively support the officers' insistence that Lee open his bedroom door. The officers responded to a 911 report of a suicidal male; dispatch informed the officers that Lee was locked in his room with samurai swords; Lee's mother, who was on the scene, informed Sergeant Cobb that Lee had previously attempted suicide by cutting himself;[12] and Sergeant Cobb and Corporal Takahashi testified police procedure for a suicide call requires both a physical and mental evaluation

[12] Although he has not appealed from the Circuit Court's decision, Lee argues FOF 15 is clearly erroneous because evidence of Linda's statement was admitted for the limited purpose of Sergeant Cobb's state of mind and subsequent actions. This is exactly the purpose for which Linda's statements were used. This information came from a person who was in a position to know of Lee's prior suicide attempt and, without more, Sergeant Cobb could reasonably rely on this information in taking action. The Circuit Court's decision does not depend on whether this information was true.

of the subject person to ensure he is no longer a threat to himself.

Other facts found by the Circuit Court are at best neutral: That Lee repeatedly made statements to the effect of "I'm okay. I just don't want to talk to you," and "I'm not hurt, just leave[,]" was not inconsistent with an intent to commit suicide. That Lee's demeanor was calm towards the officers through the door; that they did not hear sounds of distress or other indications that Lee was actually harming himself; and they would have broken down the door if they thought so did not eliminate the reasonable possibility Lee was still actively intending to kill or harm himself.

We conclude under the totality of circumstances that the officers had an objectively reasonable basis for insisting that Lee open his bedroom door because of the potential for "imminent injury" as identified in the Brigham City analysis. Accord Sutterfield, 751 F.3d at 567 ("the circumstances generally meet the criteria for a warantless entry . . . in that it was objectively reasonable for the officers to believe that their intervention was required in order to prevent Sutterfield from harming herself, notwithstanding her own protestations to the contrary.").

Nor was the warrantless search "broader than necessary to satisfy the need which legitimized departure from the warrant requirement in the first place." Kaluna, 55 Haw. at 363, 520 P.2d at 55. The officers acted in order to ensure that Lee was not a danger to himself. Both Sergeant Cobb and Corporal Takahashi stated that officers must make a physical and mental evaluation of a suicidal person. Specifically, Corporal Takahashi detailed that officers must consult a police psychologist to determine whether to take a suicidal person to the hospital to get mental health treatment.

This policy is consistent with police statutory duties and powers. Under HRS § 334-59(a)(1) (Supp. 2017),[13] law enforcement officers "shall" consult mental health emergency workers where the officer "has reason to believe that a person is imminently dangerous to self or others[.]" Further, that section gives officers discretion to take a suicidal person into custody. Id.; see also HRS § 703-308 (2014) (authorizing the use of force to prevent another person from committing suicide or inflicting serious bodily harm on him or herself). Therefore, under the facts of this case, the officers were reasonably seeking to conduct an inquiry to enable them to evaluate Lee physically and mentally and if necessary take Lee into custody. Exactly what occurred after Lee opened the door is the subject of the underlying charges and conflicting testimony. However, it is clear on this record that the officers had not yet completed the investigation necessary to ensure that Lee no longer posed a danger to himself before they entered the bedroom and the situation escalated. Therefore, insisting that Lee open his bedroom door was no broader than necessary to reasonably enable the officers to fulfill their responsibilities.

Lee makes the counter-argument that the officers' actions evince a "lack of urgency" because Corporal Takahashi waited for Officer Kahao to arrive and officers spoke to Lee for over 20 minutes before opening the door. However, that the

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[13] HRS § 334-59 provides, in relevant part:

> **Emergency examination and hospitalization.** (a) Initiation of proceedings. An emergency admission may be initiated as follows:
>
> (1) If a law enforcement officer has reason to believe that a person is imminently dangerous to self or others, the officer shall call for assistance from the mental health emergency workers designated by the director. Upon determination by the mental health emergency workers that the person is imminently dangerous to self or others, the person shall be transported by ambulance or other suitable means, to a licensed psychiatric facility for further evaluation and possible emergency hospitalization. A law enforcement officer may also take into custody and transport to any facility designated by the director any person threatening or attempting suicide.

officers chose to "talk down" Lee rather than immediately break into his room, does not take away from their need to ascertain whether the threat of suicide had passed.

Lee also argues that any exigency was caused by Sergeant Cobb's aggressive behavior, and, thus, should not be recognized under the "police-created exigency" doctrine, citing Kentucky v. King, 563 U.S. 452, 452-53 (2011). Here, similar to King, "the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment." 563 U.S. at 462. Cobb testified that after Lee cracked the door open, it appeared Lee was trying to hide an object behind the door and Cobb believed he saw a handle of possibly a sword. Cobb testified he pushed the door open "for our safety, and fearing that he might actually have a samurai sword in his hand". Officer Kahao testified that, although she recognized that Lee was holding a wooden sword, Lee was holding it up by his chest "in a manner as where he would have used it to strike, say, anyone who entered the bedroom" and that Lee had not lowered the wooden sword when Cobb pushed the door open. Corporal Takahashi testified that he saw a wooden stick raised up at a ninety degree angle in Lee's hand. Thus, the exigency, i.e., the danger Lee presented to himself as well as the officers, given his aggressive stance with the wooden sword, existed before Sergeant Cobb pushed into the room. Police are allowed to take limited action to protect officer safety. See, Sutterfield, 751 F3d. at 566 ("Given our conclusion that the forced entry was reasonable, the [protective] sweep . . . was also reasonable[.]"). In short, we recognize that police conduct cannot create the exigency justifying a search, but given the totality of the circumstances that did not occur here. Therefore, Lee's counter-arguments are without merit.

Based on the foregoing, we hold that under the totality of the circumstances, officers had an objectively reasonable basis to believe that Lee was in need of aid from the danger

posed by his threat of suicide, and, therefore, the Circuit Court erred by granting his motion to suppress.

V. CONCLUSION

For these reasons, we vacate the Circuit Court of the First Circuit's October 13, 2016 Findings of Fact and Conclusions of Law and Order Granting Defendant's Motion to Suppress Evidence and Statements, and remand for further proceedings.

DATED: Honolulu, Hawai'i, May 31, 2019.

On the briefs:

Stephen K. Tsushima,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for Plaintiff-Appellant.

Alen M. Kaneshiro,
for Defendant-Appellee.

Chief Judge

Associate Judge

Associate Judge

APPENDIX “B”

NO. CAAP-16-0000797

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellant, v.
JOSHUA LEE, Defendant-Appellee

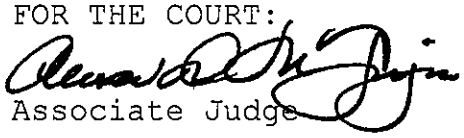
APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 15-1-1959)

JUDGMENT ON APPEAL
(By: Fujise, J., for the court[1])

Pursuant to the Memorandum Opinion of the Intermediate Court of Appeals of the State of Hawai'i entered on May 31, 2019, the Circuit Court of the First Circuit's October 13, 2016 Findings of Fact and Conclusions of Law and Order Granting Defendant's Motion to Suppress Evidence and Statements is vacated and remanded for further proceedings consistent with the memorandum opinion.

DATED: Honolulu, Hawai'i, July 2, 2019.

FOR THE COURT:



Associate Judge

[1] Ginoza, Chief Judge, Fujise and Chan, JJ.

APPENDIX “C”

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff, vs. JOSHUA LEE, Defendant.	CR NO.: 15-1-1959 COUNT I: TERRORISTIC THREATENING IN THE FIRST DEGREE (HRS § 707-716(1)(c)) HPD NO. 15427198 COUNT II: ASSAULT AGAINST A LAW ENFORCEMENT OFFICER IN THE FIRST DEGREE (HRS § 707-712.5) HPD NO. 15427199 COUNT III: RESISTING ARREST (HRS § 710-1026(1)(a)) HPD NO. 15427200 FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER GRANTING DEFENDANT'S MOTION SUPPRESS EVIDENCE AND STATEMENTS HONORABLE ROM A. TRADER, JUDGE

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER GRANTING DEFENDANT'S MOTION SUPPRESS EVIDENCE AND STATEMENTS

Defendant's Motion to Suppress Evidence and Statements filed on April 25, 2016, was heard on July 5, 2016, August 23, 2016 and September 1, 2016, before the Honorable ROM A. TRADER. Present were Deputy Prosecuting Attorney LAWRENCE SOUSIE, representing the State of Hawai'i, and ALEN M. KANESHIRO, representing Defendant, who was present. Based on the Defendant's Motion to Suppress Evidence and Statements, the State's Memorandum in Opposition to Defendant's Motion to Suppress Evidence and Statements, the testimony of witnesses, the evidence adduced at the hearing and arguments of counsel, Defendant's Motion to Suppress Statements is hereby GRANTED, in its entirety.

When a Finding of Fact can be construed as a Conclusion of Law, it is so intended. When a Conclusion of Law can be construed as a Finding of Fact, it is so intended.

FINDINGS OF FACT

1. The offense in the instant case allegedly occurred on October 26, 2015.
2. On April 25, 2016, Defendant filed a Motion to Suppress Evidence and Statements. Defendant requested that "the above mentioned statements, evidence, observations and actions, and all fruits thereof be precluded from use at trial."
3. The first hearing on Defendant's Motion to Suppress Evidence and Statements was held on July 5, 2016. Honolulu Police Department Officer Summer Kahao (hereinafter "Officer Kahao") testified. Honolulu Police Department Sergeant Michael Cobb (hereinafter "Sergeant Cobb") gave his direct testimony but was not cross-examined by defense counsel due to time constraints.
4. The second hearing on Defendant's Motion to Suppress Evidence and Statements was held on August 23, 2016. Honolulu Police Department Corporal Kurt Takahashi (hereinafter "Corporal Takahashi") testified. Defense counsel could not resume his cross-examination

of Sergeant Cobb because he was on injured leave.

5. The final hearing on Defendant's Motion to Suppress Evidence and Statements was held on September 1, 2016. Sergeant Cobb resumed his testimony and Defendant's brother Gavan Lee testified.

6. This Court makes the following Findings of Fact:

7. Officer Kahao and Corporal Takahashi responded to Defendant's residence located at 98-569 Aloalii Street on a "suicidal male call."

8. It was related through HPD dispatch that a male had locked himself in his bedroom, was threatening suicide and had samurai swords in the room.

9. Corporal Takahashi arrived at 98-569 Aloalii Street approximately 1:30 p.m. and Officer Kahao arrived a few minutes later. Corporal Takahashi waited for Officer Kahao to arrive before entering the residence. When Corporal Takahashi and Officer Kahao arrived, they were greeted by a male who they believed to be Defendant's brother. The male led Corporal Takahashi and Officer Kahao into the residence. Corporal Takahashi and Officer Kahao had consent to enter the residence of 98-569 Aloalii Street.

10. Once entering the residence, both Officer Kahao and Corporal Takahashi met with Defendant's mother, "Linda," who explained the circumstances to the officers. Linda was in the upstairs kitchen, approximately 10 to 15 feet away from Defendant's bedroom door. Officer Kahao began communicating with Defendant through the bedroom door and called out to him, "Joshua, this is Officer Kahao. Could you please open the door?" Defendant told the officers to go away, and that he did not want to talk to anyone. Defendant did not want to engage with the officers.

11. Officer Kahao spoke to Defendant through his bedroom door for approximately 10 minutes.

Officer Kahao spoke to Defendant in a calm voice, trying to establish a rapport with him. Defendant repeatedly told Officer Kahao, "I'm okay. I just don't want to talk to you," "I'm not hurt, just leave."

12. Officer Kahao did not hear any signs of distress coming from inside the room. It did not sound like Defendant was in pain or injured.

13. Officer Kahao and Corporal Takahashi's goal was to visibly see that Defendant was okay. Officer Kahao also wanted to speak to Defendant to see whether or not he was suicidal. While Officer Kahao was speaking to Defendant, Corporal Takahashi also spoke to Defendant through the door and explained, "We just want to see you."

14. After Officer Kahao had been attempting to speak to Defendant through his bedroom door for approximately 10 minutes Sergeant Cobb arrived at the residence. Defendant's brother, Gavan Lee ("Gavan"), met Sergeant Cobb at the front door and led him up to Defendant's bedroom door. Sergeant Cobb had consent to enter 98-569 Aloalii Street.

15. When Sergeant Cobb arrived, he spoke to Defendant's mother ("Linda") who related that Defendant had tried to commit suicide before. Linda did not indicate when the prior suicide attempt may have occurred.

16. When Sergeant Cobb arrived, he took over speaking to Defendant through the bedroom door. Sergeant Cobb was more demanding, and a little bit louder than Officer Kahao. Sergeant Cobb told Defendant that he needed to open the door, that "he needed to grow up," and that "he needed to be a man." Sergeant Cobb told Defendant that if he did not open the door, they would break the door down. Defendant asked Sergeant Cobb, "Do you have a warrant?" Sergeant Cobb responded, "We don't need a warrant, dumbass."

17. None of the HPD personnel heard signs of injury, distress or any other indication that

Defendant was hurt or harming himself. All of the officers confirmed that if there was any indication that Defendant was harming himself, they would have broken the bedroom door down.

18. After Sergeant Cobb had been talking to Defendant for approximately 10 minutes he noticed that Defendant's bedroom door could be unlocked from the outside by sticking a "pin or some type of small item into it." Sergeant Cobb asked Linda for something he could use to open the door. Linda gave Sergeant Cobb a paperclip.

19. Sergeant Cobb was successful at unlocking the door from the outside by using the paperclip, however, someone or something on the inside of Defendant's room was preventing Sergeant Cobb from opening the door.

20. Eventually, Defendant opened his bedroom door approximately four to six inches. All three officers could see parts of Defendant's person/body, but they could not see his entire body. From what the officers could see, Defendant did not appear to be injured. The officers also observed what appeared to be the handle to a samurai sword in Defendant's right hand. When Officer Kahao observed the handle, she put her hand on her firearm but did not draw it. When the door opened wider, the officers could see Defendant's full body. The officers could see that Defendant was not injured, in pain or hurt. Officer Kahao and Corporal Takahashi also observed that Defendant was holding a wooden sword in his right hand. When Officer Kahao observed that the sword Defendant was holding was a wooden sword, she took her hand off her firearm.

21. The officers observed that Defendant was holding a wooden sword, not a reàl samurai sword, before they entered Defendant's bedroom.

22. It is not a crime to possess wooden or real samurai swords in a bedroom.

23. The officers did not observe any illegal items or paraphernalia in Defendant's bedroom prior to entering. There was no information known to the officers before entering Defendant's bedroom that criminal activity was occurring within the bedroom.

24. Defendant's home at 98-569 Aloalii Street has four bedrooms: one bedroom was converted into a sewing room; one bedroom belonged to Gavan; one bedroom belonged to Linda; and the third bedroom belonged to Defendant.

25. Defendant was locked in his bedroom.

26. Gavan was not allowed in his bedroom. Linda was not allowed in Defendant's bedroom without his consent.

27. There were times when Linda or a house cleaner would enter Defendant's bedroom however, it was with Defendant's consent.

28. None of the officers had obtained a warrant for 98-569 Aloalii Street or Defendant's bedroom prior to entering Defendant's bedroom.

CONCLUSIONS OF LAW

1. "The Fourth Amendment, applicable through the Fourteenth Amendment to the States, provides: 'The right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause ... particularly describing the place to be searched, and the persons or things to be seized.'" Bailey v. U.S., 133 S.Ct. 1031, 1037, 185 L.Ed.2d 19, 28 (2013).

2. Article I, section 7 of the Hawai'i State Constitution provides that, "[T]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated." These constitutional provisions mandate that government agents obtain warrants based on probable cause before they effect

a search and seizure of persons or places. In the Interest of Jane Doe, 77 Hawai`i 435, 887 P.2d 645 (1994); State v. Dias, 62 Haw. 52, 609 P.2d 637 (1980); State v. Barrett, 67 Haw. 650, 701 P.2d 1277 (1985).

3. The Hawai`i Supreme Court has held that the Hawai`i Constitution provides greater protection of individual's right against unreasonable searches and seizures than is provided under the federal constitution. See e.g. State v. Won, 137 Hawai`i 330, 356, 372 P.3d 1065, 1091 (2015) ("We have a rightfully proud tradition under our constitution of providing greater protections to our citizens than those afforded under the United States Constitution.")
4. Unlike its federal counterpart, article I, section 7, of the Hawai`i Constitution specifically protects against invasions of privacy. The "exclusionary rule" applies to violations of a citizen's privacy rights. State v. Endo, 83 Hawai`i 87, 93, 924 P.2d 581, 583 (1996).
5. In the instant case, Defendant had an actual, subjective expectation of privacy in his bedroom. That expectation is one that society would recognize as objectively reasonable. Defendant's privacy interest met the criteria set forth in State v. Hauge, 103 Hawai`i 38, 50-51, 79 P.3d 131, 143-44 (2003).
6. "It is well settled that an area in which an individual has a reasonable expectation of privacy is protected by the Fourth Amendment of the United States Constitution and by article 1, § 7 of the Hawai`i Constitution and cannot be searched without a warrant." State v. Biggar, 68 Haw. 404, 407, 716 P.2d 493, 495 (1986) (citing Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); State v. Wong, 68 Haw. 221, 223, 708 P.2d 825, 828 (1985); State v. Stachler, 58 Haw. 412, 415, 570 P.2d 1323, 1326 (1977)).

7. Because Defendant had a reasonable expectation of privacy in his bedroom, the police were required to obtain a warrant prior to entering Defendant's bedroom unless there was an exception to the warrant requirement.

8. Governmental intrusions into the personal privacy of citizens of the State of Hawai`i must be "no greater in intensity than absolutely necessary." State v. Kaluna, 55 Haw. 361, 369, 520 P.2d 51, 58-59 (1974). Thus, "each proffered justification for a warrantless search must meet the test of necessity inherent in the concept of reasonableness." State v. Fields, 67 Haw. 268, 282-83, 686 P.2d 1379, 1390 (1984).

EXIGENT CIRCUMSTANCES

9. The State's assertion that there were exigent circumstances and that police could enter Defendant's bedroom without a warrant is without merit because the exigent circumstances exception to the warrant requirement mandates that the police must have probable cause that a crime was or is being committed. State v. Kapoi, 64 Haw. 130, 141, 637 P.2d 1105, 1114 (1981) (citing Coolidge v. New Hampshire, 403 U.S. 443, 461-62 (1971).

10. While police responding to a suicide call could be considered exigent circumstances, in the instant case Defendant was communicating with officers through his bedroom door for at least 20 minutes. He was in his room for at least 10 minutes prior to Corporal Takahashi and Officer Kahao's arrival. Defendant did not sound hurt, injured or in distress. Defendant repeatedly told the officers that he was okay and he did not want to talk to them. In response to Officer Kahao's statement, that "she just wanted to see that he was okay," Defendant told Officer Kahao he was not hurt and he wanted to them to leave. All of the officers testified that if they believed that Defendant was actually harming himself in his bedroom, they would have broken down the bedroom door.

11. Whether or not there was an exigency is independent from the requirement that the police must also have probable cause that a crime was or is being committed. In the instant case, the police did not have probable cause that a crime was being committed. Sergeant Cobb testified that committing suicide and attempting to commit suicide are not criminal offenses. All of the officers testified that there was no indication that criminal activity was occurring inside of Defendant's bedroom. When the bedroom door opened, the officers did not observe any illegal activity occurring inside the bedroom prior to entering.

12. There was no probable cause Defendant was engaging in criminal conduct in the bedroom. Thus, exigent circumstances did not exist.

CONSENT

13. The State's argument that Defendant or his family consented to the entry into Defendant's bedroom is without merit because Defendant's mother, Linda, and brother, Gavan, did not have authority to consent to the police entering Defendant's bedroom and Defendant's consent was not freely and voluntarily given.

14. Defendant had an actual, subjective expectation of privacy in his bedroom. That expectation is one that society would recognize as objectively reasonable. Thus, even though Linda and Gavan may have consented to entry into the residence at 98-569 Aloalii Street, neither Linda, nor Gavan could have consented to the police entering Defendant's bedroom. It is clear that Defendant did not want the officers to enter his bedroom. Defendant did not open his door for at least 30 minutes. He repeatedly told the officers to leave. Defendant asked the police if they had a warrant and once Sergeant Cobb unlocked the bedroom door from the outside, Defendant blocked the door to prevent Sergeant Cobb from entering his bedroom.

15. The Hawai`i Supreme Court has repeatedly recognized that an individual has a constitutional right to refuse consent to a search. State v. Kearns, 75 Haw. 558, 570, 867 P.2d 903, 909 (1994).

16. The Hawai`i Supreme Court held that, "Consent in the constitutional sense means more than the absence of an objection on the part of the person to be searched; it must be shown that such consent was voluntarily given." State v. Bonnell, 75 Haw. 124, 147-48, 856 P.2d 1265, 1277 (1993). The Court has defined voluntariness as a "free and unconstrained choice," State v. Shon, 47 Haw. 158, 166, 385 P.2d 830, 836 (1963) and has held that "for consent to be in fact, freely and voluntarily given, the consent must be uncoerced." Nakamoto, 64 Haw. at 21, 635 P.2d at 951.

17. In State v. Price, 55 Haw. 442, 443, 521 P.2d 376, 377 (1974), the supreme court stated, "consent may not be gained by explicit or implicit coercion, implied threat, or covert force."

18. A "totality of the circumstances" test is employed to determine whether consent was freely and voluntarily given. Kearns, 75 Haw. at 571, 867 P.2d at 909.

19. If a person submits to a search under the belief that the search will occur regardless of an objection to the search or the person reasonably believed that there was no other alternative to prevent forfeiture of a right, that consent is coerced. Won, 137 Hawai`i 342, 372 P.3d at 1077. In the instant case, Sergeant Cobb's threats to break the door down and his actions in unlocking Defendant's bedroom door from the outside without Defendant's consent amounted to coercion.

20. Based on the totality of the circumstances, Defendant did not freely and voluntarily consent to the police entering his bedroom.

PLAIN VIEW

21. The State's argument that the "plain view" doctrine is applicable in this case is without merit because there was no prior lawful justification for the intrusion into Defendant's bedroom and there was no probable cause to believe that there was evidence of a crime or contraband in Defendant's bedroom.

22. In State v. Meyer, 78 Hawai`i 308, 314, 893 P.2d 159, 165 (1995), the Hawai`i Supreme Court recognized the ruling by the United States Supreme Court in Coolidge, where they held that three factors are required to merit a legitimate plain view observation: (1) prior justification for the intrusion; (2) inadvertent discovery; and (3) probable cause to believe the item is evidence of a crime or contraband.

23. There was no justification for the intrusion into Defendant's bedroom. There were no exigent circumstances to justify the intrusion and Defendant did not freely and voluntarily consent to the intrusion. See COL 12 and 19. "Without prior justification for their presence, police officers may not enter constitutionally protected premises in order to seize evidence in plain view." Meyer, 78 Hawai`i at 317, 893 P.2d at 168.

24. There was no probable cause to believe that there was evidence of a crime or contraband in Defendant's bedroom. It was not unlawful for Defendant to possess real or wooden samurai swords in his bedroom. None of the items observed in Defendant's bedroom before or after the unlawful intrusion were contraband.

25. Once officers unlawfully stepped into Defendant's bedroom, any subsequent criminal activity that officers may have observed cannot fall into the plain view exception to the warrant requirement because they did not observe the activity and/or evidence from a position they were lawfully permitted to be in.

ORDER

IT IS HEREBY ORDERED that the Defendant's Motion to Suppress Evidence and Statements is GRANTED in its entirety, and all statements, evidence, observations and actions that were observed or obtained after the unlawful entrance into Defendant's bedroom, and all the fruits thereof is hereby suppressed and precluded from use at trial.

DATED: Honolulu, Hawai'i, OCT 13 2016.

HONORABLE ROM A. TRADER
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

LAWRENCE SOUSIE
DEPUTY PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the present motion shall be duly served upon Deputy Prosecuting Attorney, City and County of Honolulu.

Dated: September 9, 2016

OFFICE OF THE PROSECUTING ATTORNEY
City and County of Honolulu
1060 Richards Street, 10th Floor
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ALEN M. K. KANESHIRO
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