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NO. CAAP-16-0000797

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

STATE OF HAWAII,)	CRIMINAL NO. 15-1-1959
)	
Plaintiff-Appellant,)	APPEAL FROM THE FINDINGS OF
)	FACT AND CONCLUSIONS OF LAW
vs.)	AND ORDER GRANTING
)	DEFENDANT'S MOTION SUPPRESS
JOSHUA LEE,)	EVIDENCE AND STATEMENTS filed on
)	October 13, 2016
Defendant-Appellee.)	
)	FIRST CIRCUIT COURT
)	
)	HONORABLE ROM A. TRADER
)	Judge
)	
)	

OPENING BRIEF OF DEFENDANT-APPELLANT

APPENDICES "A" - "C"

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)	HONORABLE ROM A. TRADER
)	Judge
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)	

ANSWERING BRIEF OF DEFENDANT-APPELLEE

I.

STATEMENT OF THE CASE

Defendant-Appellee Joshua Lee was charged by Indictment filed on December 15, 2015 with: Count 1, Terroristic Threatening in the First Degree, Hawai‘i Revised Statutes (“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). [Documents for CAAP-16-0000797, Dkt #16 (“Dkt #16”): 15-16].

On April 25, 2016, the defense filed a Motion to Suppress Evidence. (Dkt #16: 75-96).

The motion sought,

... an Order suppressing and precluding from use at trial all evidence obtained from the defendant’s room recovered by Honolulu Police Department (“HPD”) personnel on October 26, 2015, on the grounds that the search of Defendant’s room constituted a warrantless search in violation of Defendant’s constitutional right to be free from unreasonable searches and seizures under the fourth amendment to the United States Constitution and article I, section 7 of the

Hawai'i Constitution. Defendant also seeks suppression of all statements made to HPD Officers after the illegal entry into the room and all actions initiated by illegal observations made by HPD Officers.

(Dkt #16: 75-76).

On May 27, 2016, the State filed its Memorandum in Opposition to Defendant's Motion to Suppress Evidence and Statements. (Dkt #16: 104-16).

On July 5, 2016, the Circuit Court commenced the hearing on the motion to suppress. Prior to the testimony of the witnesses on the motion, the court received State's Exhibits "1" through "5" and "8" through "12" into evidence. (Dkt #16: 5).

The first witness to testify at the hearing on the motion to suppress was **HPD Officer Summer Kahao**. On October 16, 2015, at around 1:20 p.m. Officer Kahao was called to 98-569 Aloalii Street based on a report from dispatch that there was a "suicidal male locked in a bedroom with samurai swords." (Dkt #34: 8-9). Officer Kahao took the call seriously because she "believed that suicide was probable at that time." (Dkt #34: 19). Officer Kahao arrived at 98-569 Aloalii Street at 1:30 p.m., about ten minutes after she had received the call. At that point Joshua had been in his bedroom for at least ten (10) minutes. (Dkt #34: 24). A male met Officer Kahao and led her to the residence. (Dkt #34: 10). Officer Takahashi had arrived previously and had been trying to communicate with Joshua through the door. Officer Takahashi was calm and was trying to build a rapport with Joshua. (Dkt #34: 24). Officer Kahao spoke to a female who she believed was Joshua's mother ("Linda"). Officer Kahao asked where the alleged suicidal male was and she was directed to a bedroom that was near the kitchen. Linda remained in the kitchen/dining room area that was about ten to fifteen feet away from the bedroom. Officer Kahao went to the bedroom door and found that it was locked. (Dkt #34: 11-12). The bedroom door was a "hollow core door" and Officer Kahao would have been able to

break through the door if necessary. (Dkt #34: 25). Officer Kahao identified herself and asked Joshua to open the door. Officer Kahao claimed that she just wanted to make sure that Joshua was okay. (Dkt #34: 11-12, 25). Joshua told Officer Kahao to “go away” and that he didn’t want to speak with anyone. (Dkt #34: 12). Joshua said, “I’m okay. I just don’t want to talk to you” and “I’m not hurt. Just leave.” (Dkt #4: 26). Joshua was speaking in a “regular voice,” but loud enough so that he could be heard through the door. (Dkt #34: 12-13). Officer Kahao disregarded Joshua’s request that she leave because she “needed to make sure that [Joshua] was safe.” Officer Kahao intended to “visibly see” that Joshua was not hurt and wanted to “speak to him and get more information from him as far as whether or not he was suicidal.” (Dkt #34: 13, 22). Officer Kahao had been given “suicide training” thirteen (13) years earlier at the police academy and “believe[d]” that she had been trained to make sure that the alleged suicidal individual was okay. (Dkt #34: 13, 22). She also “believe[d]” that he had been given “policies and handouts” during her training. (Dkt #34: 22-23). Officer Kahao had annual re-training, however, dealing with suicide calls was not covered every year. (Dkt #4: 23). Officer Kahao continued to speak with Joshua to attempt to build a rapport so that Joshua would open the door. (Dkt #34: 14). If Officer Kahao had really believed that Joshua was harming himself or committing suicide, she and Officer Takahashi would have attempted to break down the door. (Dkt #34: 26-27).

Subsequently, Sergeant Cobb, Officer Kahao’s supervisor, arrived. Officer Kahao told Sgt. Cobb that they had been trying to get Joshua to open the door, but Joshua had not yet complied. (Dkt #34: 34). Sgt. Cobb began speaking to Joshua through the door. Sgt. Cobb was being “a little more demanding, a little bit louder.” (Dkt #34: 14). It was not proper protocol be loud and demanding when dealing with someone who was possibly suicidal. The proper

protocol was to try to talk to the person and establish a rapport. (Dkt #34: 27-28). In fact, Joshua's tone of voice changed and he appeared to become more agitated by Sgt. Cobb's demands. (Dkt #34: 14, 27). Sgt. Cobb tried to unlock the door, but was unsuccessful. (Dkt #34: 14). Eventually the door was "cracked open." Sgt. Cobb was closest to the door at that time, but Officer Kahao did not see whether Sgt. Cobb or Joshua had opened the door. (Dkt #34: 39-40). Officer Kahao could see Joshua "from waist up" through the crack of the door and saw something in Joshua's hand. (Dkt #34: 15, 28-29). Officer Kahao moved to draw her "duty weapon," but then realized that Joshua was holding a "wooden sword," not a samurai sword. Joshua was holding the wooden sword in his right hand, with his fist at about chest height and the length of the sword extended above his head. (Dkt #34: 31). Officer Kahao acknowledged that it would be pretty hard for someone to kill themselves with a wooden sword. (Dkt #34: 30). Even though it was not illegal for Joshua to hold the wooden sword, Officer Kahao told Joshua to drop the wooden sword and he complied "after a few verbal warnings." (Dkt #34: 16, 29-30). Officer Kahao speculated that Joshua could have used the sword to strike someone if they entered the bedroom. (Dkt #34: 30). At that point none of the officers had entered Joshua's room and Joshua was not making any movements toward the officers. (Dkt #34: 16, 29, 31). Sgt. Cobb then pushed through the doorway and Officer Kahao followed him. (Dkt #34: 40). As Sgt. Cobb entered the bedroom, he appeared to "go head over heels" and "flipped onto the floor." (Dkt #34: 16). Officer Kahao did not see how Sgt. Cobb fell or what had happened to the wooden sword. Officer Kahao did not see Joshua swing the sword at Sgt. Cobb. (Dkt #34: 32). Joshua was bent over Sgt. Cobb, so Officer Kahao came up from behind Joshua and tried to grab his arms. Joshua pulled his arms away and Officer Kahao attempted a "vascular neck restraint." (Dkt #34: 17). Joshua "tossed" Officer Kahao over the couch and Officer Kahao

sprayed Joshua with “OC pepper spray.” The officers then left the bedroom because they had all become “incapacitated.” (Dkt #34: 18, 36). Joshua was sitting on the couch with his head down in his hands. Joshua was sitting next to the samurai swords but was not in a position to threaten himself or anyone else at that point. Officer Kahao did not try to remove the swords, but kept “visual contact” with Joshua to make sure that he did not grab the swords. (Dkt #34: 37-38). The OC spray made it very uncomfortable for Joshua to breathe and see, but did not affect his muscles, so Officer Kahao speculated that Joshua could have still grabbed the swords. (Dkt #34: 38-39). Officer Kahao was not sure whether Linda was in the bedroom, but she heard Linda telling them (the officers) to leave Joshua alone and to leave the house. (Dkt #34: 18). Officer Kahao maintained that the officers could not leave until they made sure that was Joshua okay and that after the “physical confrontation,” they could no longer just leave him. (Dkt #34: 18-19).

HPD Sergeant Michael Cobb testified that on October 16, 2015, at approximately 1:30 p.m., he was called to what dispatch characterized as “a male attempting suicide” at 98-569 Aloalii Street in Aiea. The dispatcher alleged that the male had locked himself in his room and was going to commit suicide with samurai swords. (Dkt #34: 42). Sgt. Cobb acknowledged that it was not illegal to commit suicide or attempt to commit suicide. (Dkt #22: 6). It was Sgt. Cobb’s understanding that Joshua was in his room by himself. Sgt. Cobb was not going to the residence to investigate any criminal activity. (Dkt #14: 7).

When Sgt. Cobb arrived at the residence he knocked at the door. A male, apparently Joshua’s brother, answered the door. The male took Sgt. Cobb upstairs. (Dkt #22: 4-5). Officer Takahashi was in the dining room area with what Sgt. Cobb assumed was Joshua’s mother (“Linda”). Officer Kahao was at the bedroom door talking to someone through the closed door. (Dkt #34: 43). Based on the information Sgt. Cobb received, Joshua had locked himself in his

own bedroom. (Dkt #22: 5). Sgt. Cobb asked Linda, “why does he want to do this[?]” Over the objection of the defense, Sgt. Cobb was allowed to testify that Linda had stated that Joshua had fought with his brother and then expressed that he wanted to commit suicide. Linda said that she was worried because he had cut himself or attempted suicide before. (Dkt #34: 44). The court allowed Sgt. Cobb’s testimony only to explain the officers’ subsequent actions, and not for the truth of the matter asserted. (Dkt #34: 44). Linda seemed anxious. (Dkt #34: 45). Officer Kahao was unable to convince Joshua to open the door, so Sgt. Cobb decided to take over. Sgt. Cobb began knocking on the door with his fist and speaking loudly to Joshua through the door. Sgt. Cobb claimed his voice was “calm,” but was louder because he was talking through the door. (Dkt #34: 45-46; Dkt #14: 8). Although he claimed to be “calm,” Sgt. Cobb admitted that he told Joshua “stop being a baby,” and “be a man,” and “grow up.” He denied calling Joshua a “fag.” (Dkt #14: 7). Sgt. Cobb had been trained in handling suicide calls at the police academy and in his yearly “ART” (“Annual Recall Training”). (Dkt #22: 8-9). He claimed that calling a suicidal individual a “baby” and telling them to “be a man” could be used. (Dkt #22: 9-10). Sgt. Cobb wasn’t sure whether Joshua was harming himself in the room, but still maintained that it was a good idea to degrade Joshua to get him to open the door. (Dkt #22: 10). Joshua said that he was fine and asked the officers to leave. (Dkt #34: 46). Joshua’s voice was “[k]ind of agitated like he wanted [the officers] to leave.” (Dkt #34: 49). Sgt. Cobb denied that Joshua seemed to grow more agitated when he took over. (Dkt #14: 8). Sgt. Cobb acknowledged that the locked door and all the surrounding circumstances indicated that Joshua didn’t want anyone to enter the room. (Dkt #22: 11-13). However, Sgt. Cobb alleged that the officers could not leave until they verified that Joshua was okay and was not in any danger related to the samurai swords in the room. (Dkt #34: 46; Dkt #22: 21-22). There was also no indication that Joshua had hurt himself.

(Dkt #22: 15). If Sgt. Cobb had been sure that Joshua was hurting himself the officers would have broken down the door. (Dkt #22: 15-16). However, Sgt. Cobb did not consider it an emergency situation where it was necessary to break down the door. (Dkt #22: 16). Sgt. Cobb then asked Linda for something that he could use to open the door. Linda was standing in the living room, about ten to fifteen feet away at that time. Linda left, and then returned with a paper clip. She gave Sgt. Cobb the paper clip and he used it to unlock the door. (Dkt #34: 47-48). Sgt. Cobb did not get Joshua's consent to open his door. (Dkt #22: 14). Sgt. Cobb unlocked the door and could turn the doorknob, but it appeared that something was blocking the door from the other side. (Dkt #34: 48-49). As Sgt. Cobb turned the doorknob, Joshua was still telling Sgt. Cobb to leave him alone. (Dkt #22: 13-14). Joshua eventually "cracked the door open" about four to six inches. (Dkt #34: 49). Sgt. Cobb could see Joshua through the partially-open door. Sgt. Cobb could not see Joshua's entire body, but Sgt. Cobb could not see any blood and Joshua did not appear to be in pain. (Dkt #22: 17). Joshua was standing near the door with an object in his right hand. Joshua appeared to be trying to hide the object behind the door jamb. Sgt. Cobb believed the object he saw was the "handle of possibly a sword." Sgt. Cobb could not see the full length of the sword. (Dkt #34: 50). It was not illegal for Joshua to be holding a sword in his bedroom, but, ostensibly for the officers' safety and "fearing that he might actually have a samurai sword in his hand," Sgt. Cobb forced the door open, shoved Joshua backwards and entered the bedroom. (Dkt #34: 50-51; Dkt #22: 17). Sgt. Cobb saw that Joshua was holding a wooden sword. Joshua swung the sword at Sgt. Cobb. When Sgt. Cobb put his hand on his gun¹, Joshua said, "Shoot me. Shoot me. That's what I want." Joshua was yelling in an

¹ Sgt. Cobb conceded that in a hearing on July 5, 2016, he had testified that he had his hand on his gun when he entered the room. He then admitted that he "[m]ay have" had his hand on his gun when he entered the room, but claimed that Lee had swung the wooden sword at him when

“agitated” tone. (Dkt #34: 51; Dkt #22: 18). Sgt. Cobb could see Joshua’s entire body at that point and recognized that Joshua was not injured or bleeding. Sgt. Cobb did not see any illegal items or paraphernalia in the room. (Dkt #22: 20). Sgt. Cobb told Joshua to calm down and that they were there to make sure that he was okay, not to arrest him. (Dkt #34: 51-52). Sgt. Cobb believed that Joshua could still swing the wooden sword, so he stepped toward him. Sgt. Cobb kept talking to Joshua and then saw that he was reaching slowly toward the couch. Sgt. Cobb noticed for the first time that there were samurai swords on the couch and speculated that Joshua was reaching for the swords with his left hand. (Dkt #34: 52). Sgt. Cobb grabbed Joshua’s left hand and Joshua raised the wooden sword up as if he was going to strike Sgt. Cobb. Sgt. Cobb pushed Joshua toward the bed, away from the samurai swords. As Sgt. Cobb was pushing him, Joshua ducked and flipped Sgt. Cobb over him. Sgt. Cobb landed on the bed (actually a mattress on the floor) and Joshua kned him twice on the top of his head. (Dkt #34: 53). Officers Kahao and Takahashi tried to subdue Joshua, but he fought them off so they sprayed him with OC pepper spray. Throughout the incident, Joshua was telling the officers that he was okay and asking them to “just leave.” Sgt. Cobb did not hear Linda tell them to leave. (Dkt #34: 54). Sgt. Cobb claimed that there was no reason for him to believe that Joshua was not suicidal. (Dkt #34: 56). However, Sgt. Cobb admitted that he did not have probable cause that Joshua had committed any criminal offense until after Joshua had swung the wooden sword at him. (Dkt #22: 25-26).

HPD Officer Craig Takahashi testified that on October 16, 2015, at approximately 1:30 p.m., he was called to an “argument” call at 98-569 Aloalii Street in Aiea. (Dkt #14: 5-6). The dispatcher eventually changed the description of the incident to “a male locked himself in a room

he entered the room. (Dkt #22: 18-19).

that threatened to commit suicide and he had samurai swords in his room.” Officer Takahashi drove to the residence and met with Linda and Joshua’s brother, Gavin. (Dkt #14: 6). Linda and Gavin offered to take Officer Takahashi to Joshua’s room, but he told them to wait for his “beat partner” to arrive.² (Dkt #14: 7). Over the objection of the defense, Officer Takahashi testified that Linda told him that Joshua had depression and that he had tried to commit suicide or hurt himself before. Linda said that Joshua had samurai swords. The court held that it would allow Officer Takahashi’s hearsay testimony only to explain his subsequent actions and not for the truth of the matter asserted. (Dkt #14: 7-8). When Officer Kahao arrived about two to three minutes later, Linda and Joshua’s brother took the officers upstairs to Joshua’s bedroom. (Dkt #14: 8, 22). The officers tried to open the door but found that it was locked. (Dkt #14: 9, 24). Officer Takahashi recognized that the door was a “hollow core” door. The other officers could have broken the door down, but did not feel the need to because Joshua was talking with them. (Dkt #14: 35-36). The officers knocked on the door, identified themselves as police officers and told Joshua that they just wanted to talk to him, “find out what’s going on” and that they would leave when they saw that he was alright. (Dkt #14: 9, 24). The officers were trying to be friendly and build a rapport with Joshua. (Dkt #14: 24). Linda was standing in the “kitchen area” about ten feet behind the officers. (Dkt #14: 9-10). Joshua responded, “I’m fine, leave me alone, go away.” (Dkt #14: 10, 25). Joshua was not upset and was just telling the officers to go away and not bother him. (Dkt #14: 25). Officer Takahashi had no reason to believe that Joshua was threatening suicide at that point, but “wanted to see him visibly” to make sure that he wasn’t hurt. Officer Takahashi continued to explain to Joshua that they just wanted him to open the door

² Officer Takahashi claimed that he would have waited for Officer Kahao to arrive even if he thought there was an imminent threat of suicide because he didn’t know what to expect. (Dkt #14: 23).

so that Joshua's mother could make sure that he was alright. (Dkt #14: 10-11, 36). Officer Takahashi believed that suicide was a potential issue at that point. After the officers had been talking to Joshua for about ten minutes, Sgt. Cobb arrived and also began to talk to Joshua and convince him to open the door. Officer Kahao was to the left of Sgt. Cobb and Officer Takahashi was to the left of Officer Kahao and about two feet behind her. (Dkt #14: 11, 25, 37-38). Sgt. Cobb told Joshua, "don't be a baby, be a man[.]" (Dkt #14: 26). Joshua continued to assure the officers that he was fine and that he just wanted to be left alone. (Dkt #14: 25). Joshua never said that he was going to kill himself or gave any indication that he was going to hurt himself. (Dkt #14: 27-28). There was no indication that Joshua was in danger, but Officer Takahashi "wasn't taking a chance." (Dkt #14: 28). Sgt. Cobb asked Linda for a paper clip and used it to attempt to open the door. (Dkt #14: 11-12). Sgt. Cobb was unable to open the door, but a couple minutes later Joshua opened the door. (Dkt #14: 28-29). Officer Takahashi saw Officer Kahao unholster her gun and then re-holster it, apparently because she realized Joshua was not holding a real sword. (Dkt #14: 38). As he moved up, Officer Takahashi saw that Joshua had a "wooden stick" in his hand, not a samurai sword. (Dkt #14: 12, 30). It was not illegal to possess a wooden sword or hold a sword. (Dkt #14: 30). Joshua had the stick raised, with his arm at a 90-degree angle. (Dkt #14: 12-13). The officers had still not entered the room at that point and Joshua had not committed any crime. (Dkt #14: 30, 33). Sgt. Cobb then entered the room, approached Joshua and tried to grab the stick. (Dkt #14: 13). Officer Takahashi did not see any illegal objects when he entered the room. (Dkt #14: 32-33). Officer Takahashi did not see Joshua try to swing the wooden sword at Sgt. Cobb. (Dkt #14: 32). As Sgt. Cobb was trying to grab the stick, Joshua flipped him onto the floor. (Dkt #14: 13-14). Officer Kahao jumped on Joshua and tried to pull him off Sgt. Cobb. Officer Takahashi and Officer Kahao wrestled with

Joshua for a while and then both officers sprayed him with pepper spray. The officers backed out of the room, but kept “a visual” of Joshua. (Dkt #14: 14). Officer Takahashi did not see where Joshua sat down, but knew that Joshua was in the room with the samurai swords. (Dkt #14: 35). At that point Officer de la Forrest arrived, took out her taser and ordered Joshua to come out. Joshua put his hand behind his back and the officers handcuffed him. (Dkt #14: 15). Officer Takahashi had annual “recall training” from the “police psychologist” on suicides. (Dkt #14: 15-16). Officer Takahashi claimed that his only purpose was to make sure that Joshua was all right and that he got help. (Dkt #14: 16). Officer Takahashi did not hear Linda tell him at any point to leave the room or stop what he was doing. (Dkt #14: 15). He would not have left even if Linda had asked because, “it’s going to come right back to me ‘cause she’s going to say, I called the police, they didn’t do nothing.” (Dkt #14: 17).

The various photographs entered into evidence at the hearing were described by Officer Takahshi as follows:

- State’s Exhibit “1”: View looking into Joshua’s bedroom.
- State’s Exhibit “2”: Joshua’s bed and the area near the bed.
- State’s Exhibit “3”: The couch in the bedroom where the samurai swords were located.
- State’s Exhibit “4”: The wooden sword.
- State’s Exhibit “5”: The samurai sword that was on the couch.
- State’s Exhibit “8”: Throwing knives.
- State’s Exhibit “9”: Throwing stars.
- State’s Exhibit “10”: An airsoft replica of an AR15 found in the bedroom closet.
- State’s Exhibit “11”: A second airsoft gun that was found in Joshua’s bedroom.

(Dkt #14: 17-22). Officer Takahashi acknowledged that none of the items were illegal and that they did not discover the airsoft guns, throwing stars or throwing knives until after the incident. (Dkt #14: 30-31).

Gavin Lee, Joshua's younger brother, testified that he lived at 98-569 Aloalii Street with Joshua and his mother, Linda. (Dkt #22: 28-29). Gavin, his brother Bryce and Linda worked at Shiro's, the family business. Joshua worked at "the Noodle Factory," which was also a family business. (Dkt #22: 40-41). It was a four-bedroom house, but one of the bedrooms had been converted into a "sewing room." (Dkt #22: 28-29). Gavin, Joshua and Linda all had their own rooms. (Dkt #22: 29). Joshua had made it clear that he didn't want anyone going into his room and each of them respected the other persons' privacy. (Dkt #22: 29-30). Joshua did consent to allow the maids who periodically came to the house clean his room. (Dkt #22: 45). Joshua closed his door when he left the house and when he was at home in his room. (Dkt #22: 30). Joshua's door locked from the inside. (Dkt #22: 43).

On October 16, 2015, Gavin met Officer Kahao and Takahashi in the driveway and took them upstairs to Joshua's room. (Dkt #22: 30-31). The officers arrived within a few minutes of each other. (Dkt #22: 31). Linda had told him that Bryce and Joshua had a fight and that Joshua wasn't opening the door and she was afraid that he might hurt himself. (Dkt #22: 41-42). Linda did not say that Joshua had threatened to commit suicide and Gavin had never heard Joshua threaten to commit suicide. Bryce had not told Gavin anything and Bryce was not there when the police arrived. (Dkt #22: 42, 44). The officers talked to Joshua through the door and tried to convince him to open the door. The officers' demeanors were calm and they told Joshua that the family was worried and they just wanted to see if he was okay before they left. (Dkt #22: 31-32). Officer Kahao was doing most of the talking. Gavin estimated that Officer Kahao was

talking to Joshua for about ten minutes. Joshua said that he was okay, that he wanted to be left alone and asked if the officers would “please leave.” Joshua was not agitated and did not sound hurt or injured. (Dkt #22: 32). At that point, Gavin and Linda were both seated at the dining room table, about ten feet away from the bedroom. (Dkt #22: 33). When Sgt. Cobb arrived, Gavin met him and took him upstairs. Sgt. Cobb began talking to Joshua. Sgt. Cobb was “more aggressive” and was “banging on the door.” Sgt. Cobb demanded that Joshua open the door and said that Joshua “was 26, ‘stop acting like a baby.’” Joshua asked Sgt. Cobb if they had a warrant and Sgt. Cobb responded, “We don’t need a warrant, dumb ass.” Sgt. Cobb also used the terms, “be a man” and “grow up.” Sgt. Cobb was not speaking in a calm manner. (Dkt #22: 34). Sgt. Cobb told Joshua that if he didn’t open the door, they would break the door. Joshua began to get “more agitated” by Sgt. Cobb’s comments. Joshua continued to tell the officers to leave and said that he was okay. After Sgt. Cobb had been talking to Joshua for about ten minutes, Sgt. Cobb looked around the room for something, returned to the door and the door opened. (Dkt #22: 35). Gavin stood up from the table and stood behind the officers, about a step away from the doorway into Joshua’s bedroom. Joshua was standing near his desk which was a few feet away from the doorway. (Dkt #22: 36). Joshua was holding a wooden sword in his right hand. The sword was “down into his side,” which Gavin described as Joshua’s arm straight down with the tip of the sword pointing down. (Dkt #22: 37). The officers told Joshua to drop the wooden sword and Gavin told them, “We see [Joshua] is okay. That was our goal. Can you guys please leave?” At that point, nothing physical had occurred. (Dkt #22: 38, 46). Officer Takahashi turned to Gavin and said, “You guys were the ones who called us” or “Why did you call us then – if you want us to leave?” Officer Takahashi then turned his back on Gavin. (Dkt #22: 38). Sgt. Cobb got closer to Joshua, grabbed Joshua’s left hand and reached for Joshua’s

neck. At the same time, Joshua dropped the wooden sword. (Dkt #22: 39). Gavin did not see Joshua reach toward the couch. (Dkt #22: 44). Joshua could not see the couch until Joshua “had thrown” Sgt. Cobb, but he could not see any samurai swords on the couch. (Dkt #22: 44). Gavin felt the “tension seemed kind of high” because Sgt. Cobb had been aggressive when he was talking to Joshua and still seemed aggressive when he entered the room and faced Joshua. Sgt. Cobb’s actions made Gavin worried about what was going to happen. (Dkt #22: 39).

The Circuit Court granted the motion to suppress. (Dkt #22: 59-68; the transcript of the court’s ruling is attached hereto as Appendix “A”).

On October 13, 2016, the Circuit Court issued its Findings of Fact and Conclusions of Law and Order Granting Defendant’s Motion Suppress Evidence and Statements. (Dkt #16: 141-53; a copy is attached hereto as Appendix “B”).

II.

STANDARDS OF REVIEW

Motion to suppress:

"We answer questions of constitutional law by exercising our own independent judgment based on the facts of the case. . . . Thus, we review questions of constitutional law under the 'right/wrong' standard." State v. Jenkins, 93 Hawai'i 87, 100, 997 P.2d 13, 26 (2000) (citations, some quotation signals, and some ellipsis points omitted). Accordingly, "we review the circuit court's ruling on a motion to suppress de novo to determine whether the ruling was 'right' or 'wrong.'" *Id.* (citations and some quotation signals omitted).

State v. Locquiao, 100 Hawai'i 195, 203, 58 P.3d 1242, 1250 (2002) (quoting State v. Poaipuni, 98 Hawaii 387, 392, 49 P.3d 353, 358 (2002)).

State v. Hauge, 103 Hawai'i 38, 47, 79 P.3d 131, 140 (2003).

Findings of fact, conclusions of law:

[A] trial court's findings of fact are subject to the clearly erroneous standard of review. A finding of fact is clearly erroneous when, despite evidence

to support the finding, the appellate court is left with a definite and firm conviction that a mistake has been committed.

A conclusion of law is not binding upon an appellate court and is freely reviewable for its correctness. This court ordinarily reviews conclusions of law under the right/wrong standard. Thus, 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. However, a conclusion of law that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the court's conclusions are dependent upon the facts and circumstances of each individual case.

State v. Gabalis, 83 Hawai'i 40, 46, 924 P.2d 534, 540 (1996) (citations, internal quotation marks, brackets and ellipses omitted).

IV.

ARGUMENT

A. THE CIRCUIT COURT PROPERLY GRANTED THE DEFENSE'S MOTION TO SUPPRESS WHERE THE POLICE CONDUCTED AN ILLEGAL WARRANTLESS SEARCH OF JOSHUA'S BEDROOM.

In the instant case, the Circuit Court properly granted Defendant's Motion Suppress Evidence and Statements, where the police conducted an illegal warrantless search³ of Joshua's bedroom.

"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).

Similarly, 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

³ The term "search" as used herein describes the officers' warrantless entry into Joshua's bedroom.

searches, seizures and invasions of privacy shall not be violated." These constitutional provisions mandate that government agents obtain warrants based on probable cause⁴ 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). Indeed, 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.

Our willingness to afford greater protection of individual privacy rights than is provided on the federal level arises from our view that the right to be free of 'unreasonable searches and seizures under article I, section 7 of the Hawai'i Constitution is enforceable by a rule of reason which requires that governmental intrusions into the personal privacy of citizens of this State be no greater than absolutely necessary. Thus, each proffered justification for a warrantless search must meet the test of necessity inherent in the concept of reasonableness.

Moreover, unlike its federal counterpart, article I, section 7, specifically protects against invasions of privacy.

Although we acknowledge that the Hawai'i exclusionary rule serves the valuable purpose of deterring governmental official from circumventing the protections afforded by the Hawai'i Constitution, we now pronounce that an equally valuable purpose of the exclusionary rule under article I, section 7, is to protect the privacy rights of our citizens.

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)).

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

⁴ 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. Teixeira, 50 Haw. 138, 142, 433 P.2d 593, 597 (1967).

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, 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).

1. There were no exigent circumstances to justify the officers' warrantless search.

In the instant case, it is not disputed that the officers conducted a warrantless search of Joshua's bedroom. 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 Joshua 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 Joshua opened it, they 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 Joshua might be trying to commit suicide.⁵ 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

⁵ There was no substantive evidence presented that Joshua had threatened to commit suicide. During the officers’ testimony, the court held that it would only take Linda’s alleged statements that Joshua was suicidal and that he had cut himself and attempted suicide before to explain the officers’ subsequent actions, not for the truth of the matter asserted. Hence, there was no substantive evidence that Joshua had threatened suicide. (Dkt #34: 44; Dkt #14: 7-8). To that extent, the court’s Finding of Fact #15 (Dkt #16: 144; Appendix “B”, attached) is clearly erroneous to the extent that it does not clarify that Linda’s statements were not entered for the truth of the matter asserted. Assuming, *arguendo*, that there was some substantive proof that the officers had a basis for believing that Joshua had threatened suicide, this was still not an exigency under the facts of this case.

Officer Kahao to arrive, rather than to go immediately upstairs. Officer Kahao and Officer Takahashi then spoke with Joshua for at least ten minutes before Sgt. Cobb arrived. Then, even after all the officers arrived at the residence, Sgt. Cobb spoke with Joshua for another ten minutes. The fact that officers chose to negotiate with Joshua is telling as they acknowledged that they would have broken down the door if they believed a true emergency existed. By all accounts, Joshua 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 Joshua was in any distress, injured or in pain. In fact, Joshua’s demeanor only changed when Sgt. Cobb arrived, banged on the door, spoke loudly to Joshua and began to antagonize him by challenging him to “grow up” and “be a man.” Even at that point, when Joshua opened the door, there was no indication that he was bleeding, injured or in any pain. While Joshua 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 Joshua was only holding a wooden sword. Further, the officers did not observe any illegal items or paraphernalia when they looked into Joshua’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 the Opening Brief (“OB”), the State contends that the officers’ warrantless search was objectively reasonable because the officers were faced with an “emergency” and were required to make split-second judgment. (OB: 24-30; Dkt #42: 30-36). The State cites a plethora of cases which establish an “emergency” exception and support actions taken by the police to deal with imminent, serious or life-threatening injuries. The cases cited by the State are inapposite

because, as argued *supra*, in the instant case there was no reasonable basis to conclude that an emergency existed or where the circumstances required a split-second decision by the police.

For example, in Duquette v. Godbout, 471 A.2d 1359 (R.I. 1984), the police responded to a report of a woman screaming in a hallway at an apartment complex. The woman, Marjorie Benton, was screaming and banging on the plaintiff's apartment door. Benton insisted that her sixteen-year-old daughter was in the apartment. She also stated that she had heard screaming in the building. Benton was "emotionally overwrought" and believed that her daughter was in peril. Officers knocked on the plaintiff's apartment door, identified themselves as police officers and waited for a response. When no response was forthcoming, they knocked on the door again and there was still no response. The police called the building manager. He did not have a key to the apartment, but told the officers to take the necessary steps to get into the apartment. The officers then forced the door open. The officers entered the apartment and searched for the minor girl. No one was present and no evidence of criminal conduct was found. The plaintiff filed a civil trespass suit against the officers. The trial court found that the trespass by the officers was justified and denied the plaintiff any recovery for the intrusion. On appeal, the Supreme Court of Rhode Island agreed. The supreme court held as follows:

The emergency doctrine requires that the responding officer have a reasonable belief that his assistance is required to avert a crisis. People v. Lenart, 91 A.D.2d 132, 134, 457 N.Y.S.2d 878, 880 (1983); State v. Sanders, 8 Wash. App. 306, 312, 506 P.2d 892, 896 (1973). This standard is less stringent than the determination of probable cause which a police officer must make in the typical exigent-circumstances situation. Such a standard is permissible in an emergency situation since the motivation for the intrusion is to preserve life and property rather than to search for evidence to be used in a criminal investigation. People v. Mitchell, 39 N.Y.2d 173, 177, 347 N.E.2d 607, 609-10, 383 N.Y.S.2d 246, 248 (1976).

In the instant case, defendants came upon a very distraught mother. She reported that her minor daughter was missing and that she believed the child to be in peril within the apartment. Under these circumstances, we find that defendants

could, and in fact did, have a reasonable belief that their assistance was necessary in locating the child. Accord State v. Leandry, 151 N.J. Super. 92, 376 A.2d 574 (1977) (officers' entry in belief that a wounded person was within premises justified trespass).

This exception, however, is not without limitation. There must be a legitimate need for the performance of the search. Mincey v. Arizona, 437 U.S. 385, 393-94, 98 S. Ct. 2408, 2414, 57 L. Ed. 2d 290, 301 (1978); Warden v. Hayden, 387 U.S. 294, 298-300, 87 S. Ct. 1642, 1645-46, 18 L. Ed. 2d 782, 787-88 (1967). In the case below, the trial justice correctly stated that there was a need for a search because if the girl had been "in a bad condition for any reason, liquor, drugs or beating * * * [defendants] [**9] could [not] be justified [in waiting for a warrant]." We know with the benefit of hindsight that none of these conditions existed. The defendants, however, were faced with a hysterical mother and properly erred on the side of caution. Wayne v. United States, 115 U.S. App. D.C. 234, 318 F.2d 205, 212 (D.C. Cir. 1963).

In addition, the search must be "carefully tailored" to render only the perceived need for help and should not extend any further. United States v. Booth, 455 A.2d at 1355-56. ...

Id. at 1362-63 (citations omitted).

In another case cited by the State, Brigham City v. Stuart, 547 U.S. 398, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006) the facts were summarized as follows:

When four police officers, responding without a warrant at about 3 a.m. to a call about a loud party at a residence in a Utah city, arrived at the house, the officers heard shouting from inside, proceeded down the driveway, and saw two juveniles drinking beer in the backyard. The officers then entered the yard and saw, through a screen door and windows, an altercation in the kitchen between four adults and a juvenile, who punched the face of one of the adults, causing him to spit blood in a sink. One officer opened the door and announced the officers' presence. Unnoticed amid the tumult, the officer entered the kitchen and again cried out, and as the occupants slowly became aware that the police were present, the altercation ceased. The officers arrested three of the adults and charged these three accused with contributing to the delinquency of a minor, disorderly conduct, and intoxication.

Id. 164 L.Ed.2d at 650. The trial court granted the defense's motion to suppress based on the defendants' argument that the officers' warrantless entry violated the Fourth Amendment. The

Utah Court of Appeals and the Supreme Court of Utah, Brigham City, affirmed the trial court's holding. On certiorari, the U.S. Supreme Court reversed. The Supreme Court held that:

One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury. "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *Id.*, at 392, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (quoting *Wayne v. United States*, 115 U.S. App. D.C. 234, 318 F.2d 205, 212 (CADC 1963) (Burger, J.)); see also *Tyler*, *supra*, at 509, 98 S. Ct. 1942, 56 L. Ed. 2d 486. Accordingly, 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. *Mincey*, *supra*, at 392, 98 S. Ct. 2408, 57 L. Ed. 2d 290; see also *Georgia v. Randolph*, ante at 118, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006) ("[I]t would be silly to suggest that the police would commit a tort by entering . . . to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur").

....

In these circumstances, the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning. Nothing in the Fourth Amendment required them to wait until another blow rendered someone "unconscious" or "semi-conscious" or worse before entering. The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided.

Id., 547 U.S. at 403-04, 406, 126 S.Ct. at 1947, 1949.

The factual bases in the foregoing cases cited by the State, are readily distinguishable from the instant case. Those cases evidence that "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. By contrast, in the instant case, Officer Kahao and Officer Takahashi spoke with Joshua for at least ten minutes before Sgt. Cobb arrived. There was no indication that Joshua was injured or in any distress. Joshua 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 Joshua 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 Joshua⁶, there was no change in the situation from the previous twenty minutes during which the officers were content with talking to Joshua rather than attempting to force their way into the room. Even when Sgt. Cobb unlocked the door, there was no indication that Joshua 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 Joshua 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 Joshua. Again, the State should not be permitted to rely on such a “police-created exigency” to then claim an emergency situation existed.

2. Joshua did not consent to the search.

While the State argued in the lower court that Joshua or Linda had consented to entry into his bedroom, on appeal the State does not challenge the court’s conclusion that no valid “consent” was given. Hence, the State has waived any argument that Joshua or Linda consented to the officers’ entry into his room. Ass’n of Apt. Owners v. Venture 15, Inc., 115 Hawai’i 232, 167 P.3d 225 (2007) (citing HRAP Rule 28(b)(4) and (b)(7) and holding that points not presented will be disregarded and points not argued may be deemed waived). It is not subject to reasonable dispute that Joshua had an actual, subjective reasonable expectation of privacy in his

⁶ “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).

bedroom. Gavin testified that Joshua would close the door to his room when he went out and would close and/or lock the door when he was in the room. Joshua had also made it clear that he did not want anyone going into his room except for the maids who came periodically to clean the house. *See e.g. State v. Vinuya*, 96 Hawai'i 472, 483, 32 P.3d 116, 127 (App. 2001) (the defendant exhibited an actual, subjective expectation of privacy in his room where he kept his bedroom door locked to prevent other family members from entering, even when he was in the house, and other family members did not have access to his room). It is also beyond dispute that Joshua's expectation of privacy in his room was objectively reasonable. *See e.g. Vinuya*, 96 Hawai'i at 483, 32 P.3d at 127 ("It is a well-established principle that the person with a possessory interest in the premises, such as a homeowner or tenant, has a protected privacy interest in his or her home. ... Nor is there any question that the expectation of privacy in one's home is one that society recognizes as objectively reasonable.") The Hawai'i Supreme Court has recognized that an individual has a constitutional right to refuse to consent to a search of areas in which he/she has a reasonable expectation of privacy. *State v. Kearns*, 75 Haw. 558, 570, 867 P.2d 903, 909 (1994). The Hawai'i Supreme Court has delineated the requirements to establish valid "consent."

"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). Voluntariness means a "free and unconstrained choice." *State v. Shon*, 47 Haw. 158, 166, 385 P.2d 830, 836 (1963) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)); accord *State v. Trainor*, 83 Hawai'i at 261, 925 P.2d at 829; *State v. Ramones*, 69 Haw. 398, 405, 744 P.2d 514, 517 (1987).

In Hawai'i, consent is measured under an analysis examining the totality of the circumstances. *Ganal*, 81 Hawai'i at 368, 917 P.2d at 380.

Whether consent to a search was freely and voluntarily given, as in a case where custodial interrogation may be implicated, must be

determined from the totality of circumstances surrounding the defendant's purported relinquishment of a right to be free of unreasonable searches and seizures.

State v. Russo, 67 Haw. 126, 137, 681 P.2d 553, 562 (1984) (emphasis added). Additionally, it is well settled "that when the prosecution seeks to rely upon consent to justify the lawfulness of a search, it has the burden of proving by the preponderance of the evidence that the consent was, in fact, freely and voluntarily given." State v. Patterson, 58 Haw. 462, 468, 571 P.2d 745, 749 (1977).

State v. Won, 137 Hawai'i 330, 340, 372 P.3d 1065, 1075 (2015). Further, "consent" cannot be coerced.

This court has stated unambiguously 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 (emphasis added). Thus, consent may not be gained by explicit or implicit coercion, implied threat, or covert force. State v. Price, 55 Haw. 442, 443, 521 P.2d 376, 377 (1974). While coercion may be indicated where a person's "will has been overborne," Shon, 47 Haw. at 166, 385 P.2d at 836, ultimately, this court "equat[e] voluntary with uncoerced." Price, 55 Haw. at 443, 521 P.2d at 377. "For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified . . . intrusion against which the fourth amendment is directed." Trainor, 83 Hawai'i at 261, 925 P.2d at 829 (quoting Schneckloth, 412 U.S. at 228).

Thus, under circumstances where coercion is present, a search dependent upon consent for legitimacy violates the constitutional proscription of article I, section 7 and offends the values of individual dignity and personal autonomy that it protects.

Won, 137 Hawai'i at 340, 372 P.3d at 1075.

In the instant case, the Circuit Court correctly concluded that based on the totality of the circumstances, Joshua had not consented to the search of his room. When the police arrived, Joshua's door was closed and locked. Joshua did not accede to the officers' demands that he open the door and asked the officers to leave on numerous occasions. Even when Joshua cracked open the door, he only did so after the officers had been berating him for over twenty minutes and after Sgt. Cobb had used a paperclip to unlock the door and tried to push the door open. Joshua continued to speak with the officers through the crack of the door until Sgt. Cobb

and the other officers forced their way into the room. Under these circumstances, Joshua clearly did not consent to the search of his room.

3. There was no “plain view” because there was no prior lawful justification for the officers’ initial warrantless entry into Joshua’s room.

While the State argued in the lower court that the “plain view” doctrine applied, on appeal the State does not challenge the court’s conclusion that the “plain view” doctrine did not apply. Hence, the State has waived any argument that the “plain view” doctrine. Ass’n of Apt. Owners v. Venture 15, Inc., 115 Hawai‘i 232, 167 P.3d 225 (2007) (citing HRAP Rule 28(b)(4) and (b)(7) and holding that points not presented will be disregarded and points not argued may be deemed waived).

“A ‘search’ implies that there is an exploration for an item or that the item is hidden. ... However, neither factor is present in open view or plain view observations, and neither observation involves a search in the constitutional sense. ... In other words, neither open view nor plain view observations involve an invasion of an individual’s reasonable expectation of privacy.” State v. Meyer, 78 Hawai‘i 308, 312, 893 P.2d 159, 163 (1995). the Hawai‘i Supreme Court 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. Id. at 314, 893 P.2d at 165 (citing Coolidge v. New Hampshire, 403 U.S. 443, 465-73, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)).

In the instant case, as argued *supra*, there was no justification for the intrusion into Joshua’s bedroom. There were no exigent circumstances to justify the intrusion and Joshua did not consent. “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. Further, there was no probable cause to believe that there was evidence of a crime or contraband in Joshua’s bedroom. The officers agreed that they did not go to the residence to investigate criminal activity. It was not illegal for Joshua to commit suicide, attempt to commit suicide, or possess any of the items in his bedroom. As the officers had no prior justification or probable cause to believe the items seized were contraband, the “plain view” doctrine does not apply.

In sum, the State failed to meet its burden of proving that the presumptively unreasonable warrantless entry/search of Joshua’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 Joshua’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)).

B. THE “EXCLUSIONARY RULE” APPLIES IN THE INSTANT CASE WHERE THE OFFICERS’ INVASION OF PRIVACY INTO JOSHUA’S BEDROOM WAS UNREASONABLE.

In the OB, the State contends that the “exclusionary rule” does not apply to “testimony describing a defendant’s 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.").

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, Hawai'i'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).

While the State recognizes that Article I, Section 7 provides broader protection than the Fourth Amendment (AB: 34-35; Dkt #42: 40-41), the State contends that no "unreasonable invasion of privacy" occurred. However, as argued *supra*, the police had no viable basis to justify forcing their way into Joshua's room. The police were called to investigate a possible suicide, there was no criminal activity involved. When they arrived at the residence, there was no indication of any criminal activity or emergency situation. Joshua 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 Joshua 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.⁷ The police forcing their way into Joshua'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.⁸

⁷ "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 Joshua and then arbitrarily decided that it was necessary to unlock the door and force his way into the room.

⁸ 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.

IV.

RELEVANT STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Any relevant statutes, rules and constitutional provisions are attached hereto as Appendix “C”.

V.

CONCLUSION

Based on the foregoing arguments and authorities cited, Defendant-Appellee Joshua Lee respectfully requests that this Honorable Court affirm the Circuit Court’s Findings of Fact and Conclusions of Law and Order Granting Defendant’s Motion Suppress Evidence and Statements, filed October 13, 2016.

DATED: Honolulu, Hawai‘i, June 30, 2017.

Respectfully submitted,

ALEN M. KANESHIRO
ATTORNEY AT LAW

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

ATTORNEY FOR DEFENDANT-APPELLEE

STATEMENT OF RELATED CASES

Defendant-Appellee Joshua Lee is unaware of any related cases pending before the Hawai`i courts.

APPENDIX “A”

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1 the sense that there's a crime being committed, but it
2 is --

3 THE COURT: But, essentially, that's what
4 the -- probable cause is a term of art, and that's what
5 it relates to. And I have the *Seibert* decision here,
6 and I can't say that I reviewed it again this morning
7 before the hearing. So I will be taking a short recess
8 to review that, possibly the *Kahoonei* case as well, but
9 I wanted to give you an opportunity to respond to that
10 concern.

11 MR. SOUSIE: Okay. Thank you, Your
12 Honor.

13 THE COURT: All right. Anything further,
14 Mr. Kaneshiro?

15 MR. KANESHIRO: No, Your Honor.

16 THE COURT: Very well. We'll take a
17 recess. Let's make it 20 minutes. Reconvene right at
18 11, okay? We'll stand in recess.

19 (A recess was taken from 10:38 a.m. to
20 11:00 a.m.)

21 THE COURT: All right. We're back on the
22 record. The record will reflect the presence of
23 counsel, of the defendant. And, at this time, you may
24 be seated.

25 The case that the Court was alluding was

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1 *State v. Kahoonei, K-a-h-o-o-n-e-i*, at 83 Hawaii 124.
2 It's a factually distinguishable set of circumstances,
3 but it was a case that I had earlier mentioned. I have
4 had -- also had a chance to review the *Seibert* decision
5 at 923 So.2d 460 (2006) opinion out of the Supreme Court
6 in Florida, and certainly not binding precedent, but I
7 understand, after having reviewed the facts again, why
8 the State encourages the Court to adopt; that is,
9 persuasive authority.

10 In this case, the defense has sought to
11 suppress the evidence based on an unlawful search of the
12 defendant's room as it was accomplished without a search
13 warrant and in violation of the Defendant's Fourth
14 Amendment rights. And that, beyond that, that all
15 evidence seized and any statements made were essentially
16 the fruit of the poisonous tree and should be
17 suppressed. The Court is in agreement with the defense
18 and I will be granting the motion in its entirety.

19 And the Court, first of all, will note that I
20 don't think anyone realistically believes that
21 responding to a call such as the ones that the officers
22 responded to is an easy set of circumstances to deal
23 with. They are charged with many responsibilities in
24 doing their utmost to safeguard the well-being of
25 individuals and even those that have claimed or given

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1 indications that they wish to do harm to themselves.
2 And that places them and others around them not knowing
3 that individual but others around them at potential
4 risk. And certainly the Court can understand where the
5 police officers, in responding to that, are often times
6 operating with less than complete set of facts as it
7 were because they don't know actually what is going on
8 behind a locked door, but they have information that
9 certainly concerns the callers, certainly concerns the
10 officers. And, in this particular case, the officers
11 did what they felt was necessary and, in particular,
12 officer or Sergeant Cobb by essentially attempting to
13 gain entry, and then having made entry following
14 defendant. And I don't think there's any doubt that the
15 defendant opened the door in this particular case that
16 that was their one opportunity to determine whether or
17 not the defendant was in fact all right, or whether or
18 not indications were otherwise.

19 Here, on the issue of -- well, first of all,
20 it's clear there was no warrant. It's also very clear
21 that the officers, all of them, had consent by the
22 homeowners, whether it be the mother or brother to gain
23 entry into the home. They were provided with
24 information. They were led to the room where the
25 defendant was essentially located. The door was locked.

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1 And it was clear based upon the set of circumstances the
2 defendant did not wish to engage with or interact with
3 the officers and simply wanted them to go away.

4 That to the extent that the State is relying
5 on the consent exception to the warrant requirement,
6 here the Court does not find that the facts and
7 circumstances support a finding that consent was given
8 by the defendant to enter the room. In fact, everything
9 is quite to the contrary up until the point where the
10 door is actually opened. And I'll address that in a
11 moment. But, clearly, while the officers were
12 encouraging the defendant, maybe even demanding in some
13 ways that he open the door, he made it plain that he did
14 not wish to do so. He has every right to do that. He
15 had a subjective expectation of privacy within the
16 confines of his room. And that's an expectation that
17 our society easily would find to be objectively
18 reasonable. And so that is subject to the
19 constitutional protections afforded by law.

20 The fact of the matter is is that the act of
21 opening -- and to the extent that the Court relies on
22 consent through the mother, the Court does not find that
23 that to be appropriate in that set of circumstances at
24 all. I have no doubt that the mother owns the home. I
25 have no doubt that the mother granted that access and

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1 maybe has, even on occasion and even recently, been in
2 the room with the defendant's permission, and maybe
3 she's cleaned the room, maybe she's visited him, I don't
4 know. All's I know it's his consent to give and his
5 alone. And simply those circumstances that presented
6 themselves did not authorize her in any way, and there's
7 no indication that the defendant did authorize her to
8 consent on his behalf. And so, on that separate prong,
9 the Court does not feel that consent should be
10 recognized.

11 Even if the Court were to view the act of
12 opening the door and by all accounts had to have been
13 the defendant that opened the door, under that set of
14 circumstances it's very clear -- and the Court does find
15 the testimony of the brother to be credible on the point
16 that, by all accounts, officer -- Sergeant Cobb sort of
17 took a different tact in dealing with this type of
18 situation. The first two officers tried to do what they
19 could to persuade the defendant, cajole him, do whatever
20 was necessary they thought to get him to essentially
21 open the door. Officer Cobb or Sergeant Cobb took an
22 entirely different tact; was much more assertive, I
23 think that's fair to say.

24 And I do agree or in other words find
25 credible the testimony of the brother where he indicated

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1 that various statements were made. And perhaps one
2 could question whether or not they were necessarily
3 proper or not. I wasn't there and I don't fault the
4 Sergeant for thinking that perhaps that was the
5 appropriate tact to take. But at that point in time
6 when he essentially told the defendant that he had
7 better open the door or the officers will essentially
8 break the door down, I can't think of any other
9 statement or statement that might be similarly made in
10 that set of circumstances that would not rise to a level
11 of some level of coercion. And that to the extent that
12 the defendant may have then viewed and consented to the
13 opening of the door that it is deemed by this court to
14 be ineffective consent as it was not freely given, in my
15 view, and was a product or a likely course of conduct on
16 behalf of the police.

17 Beyond that, to the extent that the door was
18 open and then the officers had an opportunity to view
19 the defendant -- had a partial view of the defendant,
20 and that included the defendant standing behind the door
21 apparently armed with some sort of object, and even if
22 we get past that and say that perhaps they were -- they
23 made those observations and that there were some sort of
24 conduct that would have justified the officers
25 immediately entering the room, the Court does not find

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1 that under the circumstances as I've stated previously
2 that the vantage point from which they would have made
3 those observations exceeded essentially what was
4 permissible because in order for them to avail themselves
5 of the plain view exception, they would need to be in a
6 place where they will lawfully locate and
7 then inadvertently make those observations. The Court
8 does not find that to be the case.

9 Lastly, to the extent that the State has
10 relied on the exigency exception for the warrant
11 requirement, *Seibert* is fairly clear that in a
12 circumstance not that dissimilar -- and I think the
13 State has every right to rely on that particular case
14 where there are some circumstances where even though the
15 police may be deemed to have otherwise acted perhaps
16 unlawfully and entered the residence without a warrant
17 to follow-up on a suicide call just to check on the
18 welfare and well-being of the individual involved, and
19 in that set of circumstances they felt that the
20 observations, after performing an inspection or at least
21 a viewing of the interior of the apartment which was not
22 beyond the scope of what their entry would have required
23 to check on the individual, that those observations and
24 the evidence recovered as a result thereof were proper.
25 Here, this court cannot adopt the -- that particular

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1 case as binding precedent on this court. And the
2 primary reason is what Mr. Kaneshiro alluded to at the
3 outset. We're always mindful of the fact that here in
4 Hawaii that our courts have for quite some time, as is
5 reflected in our constitution, have every right to
6 afford individuals to greater protections, and one of
7 those is the right to privacy. And here, when I look at
8 the overall set of circumstances, even if I were to
9 conclude -- and I'm not so sure that I can -- that true
10 exigency existed in this situation. But even if I did
11 reach that, the exception to the warrant requirement
12 requires probable cause coupled with exigency. And
13 lacking probable cause for this particular exception,
14 everything else that flows from that has to be deemed to
15 be unlawful.

16 And here, I have to say that I don't
17 necessarily fault the officers for doing what they did,
18 Mr. Lee. And this is separate and apart from the
19 Court's ruling. But whatever happened that day,
20 whatever caused the police to arrive, whatever
21 information your mother communicated to the police,
22 people were extremely concerned about you. And, in the
23 end, sometimes what the process has to recognize is that
24 there are things that are much more paramount than
25 whether or not evidence that is viewed or seized in a

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1 particular case, whether or not that is going to
2 withstand constitutional scrutiny, okay?

3 Here, in this case, I think in many ways you
4 may disagree, but I think in many ways the police have
5 to make these choices sometimes knowing -- and here they
6 weren't entering your room. And, I think, to give the
7 State credit for pointing this out in the *Seibert*
8 decision is that it's the -- it's the mindset of the
9 officers dealing with it. I have no doubt that they
10 entered that room with every good intention to ensure
11 that you were okay notwithstanding everything that you
12 were doing to get them to get the heck out of your house
13 and leave you alone. And it was only when they entered
14 the room, and as I've stated, unlawfully that the
15 circumstances led to the ultimate charges in this case.
16 But they were put in a difficult set of circumstances.
17 They did the best they could. But here, I think
18 sometimes that's what they need to do because what's the
19 alternative? The alternative is that they leave
20 somebody who is clearly demonstrating or presenting
21 themselves in a way that's causing those around them
22 grave concern for their well-being. And that sometimes
23 their actions, while understandable, may be even
24 entirely appropriate, are not going to necessarily
25 survive a challenge. And that's simply what's happened

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1 in this case.

2 And so I will ask you, Mr. Kaneshiro, to
3 please prepare the appropriate findings and conclusions.

4 MR. KANESHIRO: I will.

5 THE COURT: And, with that, we're here
6 also for trial call. And what I will do is I think the
7 State has every right to review the Court's ruling and
8 determine what, if anything, they may choose to do as
9 far as seeking review or whether or not they have any
10 opportunity given the Court's ruling to go forward on
11 the charge. And so, with that, as we're here for trial
12 call as I've stated, it would make sense to me, counsel,
13 to push trial call back to a particular point in time
14 where, Mr. Kaneshiro, you can prepare the appropriate
15 findings and conclusions in support of the Court's
16 ruling. Allow the State to review that. And then once
17 the State has had a full and fair opportunity to do
18 that, then we can move forward from there. All right.
19 Is that fair enough?

20 MR. KANESHIRO: That is fair, Your Honor.

21 THE COURT: All right. All right. So
22 how much time do you need to draft the findings and
23 conclusions?

24 MR. KANESHIRO: Probably draft in a week.

25 THE COURT: All right. And so if you

APPENDIX “B”

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

2016 OCT 13 AM 11:26

Handwritten initials
N. MIYATA
CLERK

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ATTORNEY FOR THE DEFENDANT

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

STATE OF HAWAII,

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

2016 SEP 16 PM 12:22
FIRST CIRCUIT COURT
STATE OF HAWAII
17TH DIVISION

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 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.
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.

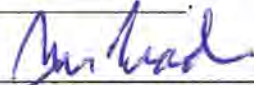
PLAIN VIEW

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

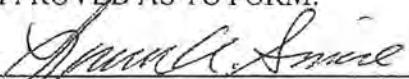
IT IS HEREBY ORDERED that the Defendant's Motion to Suppress Evidence and Statements is GRANTED in its entirety, and all statements, evidence, observations and actions that were observed or obtained after the unlawful entrance into Defendant's bedroom, and all the fruits thereof is hereby suppressed 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
Honolulu, Hawai'i 96813



ALLEN M. K. KANESHIRO
ATTORNEY FOR DEFENDANT

APPENDIX “C”

UNITED STATES CONSTITUTION

Fourth Amendment.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

HAWAII CONSTITUTION

Article I, Section 7, Searches, Seizures and Invasions of Privacy.

The 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; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

HAWAII REVISED STATUTES

§ 707-712.5. 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:

- (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.

(2) Assault of a law enforcement officer in the first degree is a class C felony. The court shall, at a minimum, sentence the person who has been convicted of this offense to:

- (a) An indeterminate term of imprisonment of five years, pursuant to section 706-660; or
- (b) Five years probation, with conditions to include a term of imprisonment of not less than thirty days without possibility of suspension of sentence.

§ 707-716. 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:

- (a) By threatening another person on more than one occasion for the same or a similar purpose;
- (b) By threats made in a common scheme against different persons;

(c) Against a public servant arising out of the performance of the public servant's official duties. For the purposes of this paragraph, "public servant" includes but is not limited to an educational worker. "Educational worker" has the same meaning as defined in section 707-711;

(d) Against any emergency medical services provider who is engaged in the performance of duty. For purposes of this paragraph, "emergency medical services provider" means emergency medical services personnel, as defined in section 321-222, and physicians, physician's assistants, nurses, nurse practitioners, certified registered nurse anesthetists, respiratory therapists, laboratory technicians, radiology technicians, and social workers, providing services in the emergency room of a hospital;

(e) With the use of a dangerous instrument or a simulated firearm. For purposes of this section, "simulated firearm" means any object that:

- (i) Substantially resembles a firearm;
- (ii) Can reasonably be perceived to be a firearm; or
- (iii) Is used or brandished as a firearm; or
- (f) By threatening a person who:

(i) The defendant has been restrained from, by order of any court, including an ex parte order, contacting, threatening, or physically abusing pursuant to chapter 586; or

(ii) Is being protected by a police officer ordering the defendant to leave the premises of that protected person pursuant to section 709-906(4), during the effective period of that order.

(2) Terroristic threatening in the first degree is a class C felony.

§ 710-1026. 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.

(2) Resisting arrest is a misdemeanor.

HAWAII RULES OF APPELLATE PROCEDURE

Rule 28. BRIEFS.

(b) Opening brief. Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:

....

(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. Where applicable, each point shall also include the following:

(A) when the point involves the admission or rejection of evidence, a quotation of the grounds urged for the objection and the full substance of the evidence admitted or rejected;

(B) when the point involves a jury instruction, a quotation of the instruction, given, refused, or modified, together with the objection urged at the trial;

(C) when the point involves a finding or conclusion of the court or agency, either a quotation of the finding or conclusion urged as error or reference to appended findings and conclusions;

(D) when the point involves a ruling upon the report of a master, a quotation of the objection to the report.

Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented. Lengthy parts of the transcripts that are material to the points presented may be included in the appendix instead of being quoted in the point.

....

(7) The argument, containing the contentions of the appellant on the points presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. The argument may be preceded by a concise summary. Points not argued may be deemed waived.