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**STATE of Hawai'i, Respondent/Plaintiff-  
Appellant,**

**v.**

**Joshua LEE, Petitioner/Defendant-Appellee.**

**SCWC-16-0000797**

**Supreme Court of Hawai'i.**

**FEBRUARY 9, 2021**

Alen M. Kaneshiro for petitioner

Stephen K. Tsushima, Honolulu, for respondent

RECKTENWALD, C.J., NAKAYAMA AND  
McKENNA, JJ., AND WILSON J., DISSENTING<sup>1</sup>

OPINION OF THE COURT BY NAKAYAMA, J.

Petitioner/Defendant-Appellee Joshua Lee (Lee) appeals the judgment of the Intermediate Court of Appeals (ICA) vacating the Circuit Court of the First Circuit's<sup>2</sup> (circuit court) Order granting Lee's motion to suppress evidence obtained in a search of Lee's bedroom. On certiorari, Lee raises a single point of error and argues that the ICA erred in applying an emergency aid exception, which Lee contends is inconsistent with article I, section 7 of the Hawai'i Constitution.

Even if the police officers unlawfully searched Lee's bedroom, however, the circuit court erred in suppressing all evidence obtained by the State. The evidence did not constitute suppressible "fruit of the poisonous tree." The State did not gain any benefit from the police officers' entry into Lee's bedroom. Moreover, Lee's actions following the officers' entry into Lee's bedroom severed any causal link between the officers' purportedly unlawful entry and the evidence recovered. Therefore, the ICA did not err in vacating the Order entered by the circuit court on October 13, 2016, and we affirm the

ICA's Judgment on Appeal on different grounds.

## **I. Background**

### **A. Factual Background**

On October 26, 2015, Honolulu Police Department (HPD) dispatched Corporal Craig<sup>3</sup> Takahashi (Corporal Takahashi), Officer Sommer<sup>4</sup> Kahao (Officer Kahao), and Sergeant

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Michael Cobb (Sergeant Cobb) (collectively, the officers) to respond to a "suicidal male call" at a home in 'Aiea. The dispatcher informed the officers that Lee had locked himself in his bedroom, where he kept samurai swords, and was threatening suicide.

After the officers entered the home with Lee's family's consent, the officers attempted to persuade Lee to open the door so that they could visually confirm that Lee was unharmed, as required by HPD training. Officer Kahao spoke with Lee first, using phrases like "Joshua, this is Officer Kahao, Could you please open the door?" Instead of opening the door, Lee responded that he was okay and that the officers should leave. After Officer Kahao spoke with Lee for approximately ten minutes, Sergeant Cobb took over speaking with Lee. The circuit court found that "Sergeant Cobb was more demanding" and told Lee that he "needed to grow up" and "to be a man." When Lee asked if the officers had a warrant, Sergeant Cobb responded, "We don't need a warrant, dumbass."<sup>5</sup>

Despite Lee's requests that the officers leave, the officers were required to ensure that Lee was neither harmed nor at imminent risk of injuring himself. Sergeant Cobb therefore picked the lock on the door so that the officers could at least see Lee. However, Sergeant Cobb could not open the door because it was being obstructed.

Once the door opened, however, the situation rapidly changed. Lee opened the door approximately four to six inches. From the hallway, the officers saw Lee holding a sword

handle in his right hand. Based on the officers' positioning, Sergeant Cobb could only see the sword handle. However, Officer Kahao and Corporal Takahashi both saw that the sword was made of wood. Officer Kahao instructed Lee to drop the sword, but Lee did not immediately comply.

Concerned for the officers' safety, Sergeant Cobb pushed open the door and entered the room, simultaneously pushing Lee away from the officers. Once Sergeant Cobb was inside the room, Lee swung the sword at Sergeant Cobb, but missed. Sergeant Cobb attempted to calm Lee down, but Lee maintained an aggressive stance. Sergeant Cobb tried to grab Lee's arm. However, Lee flipped Sergeant Cobb onto Sergeant Cobb's back. Lee then started kneeling Sergeant Cobb in the head. From the time Lee opened the door to the time Lee flipped Sergeant Cobb over, mere seconds had passed.

After seeing Sergeant Cobb suddenly flip over, Officer Kahao attempted to grab Lee from behind. However, Lee threw Officer Kahao onto a couch in the room. Officer Kahao and Corporal Takahashi ultimately subdued Lee using pepper spray.

A grand jury indicted Lee with Terroristic Threatening in the First Degree,<sup>6</sup> Assault Against a Law Enforcement Officer in the First Degree,<sup>7</sup> and Resisting Arrest.<sup>8</sup>

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## B. Circuit Court Proceedings

Lee moved the circuit court to suppress all evidence gathered from Lee's bedroom, all statements made to the officers after they entered Lee's room, and "all actions initiated by illegal observations made by HPD Officers." Lee asserted that he possessed a reasonable expectation of privacy in his bedroom and that any evidence of his actions was obtained from a warrantless search.

The circuit court granted Lee's motion. In particular, the circuit court determined that Lee possessed a reasonable expectation of privacy in

his bedroom, that Sergeant Cobb coerced Lee into opening his bedroom door, and that "all statements, evidence, observations and actions that were observed or obtained" after entry into Lee's bedroom should be suppressed.

## C. ICA Proceedings

The State appealed to the ICA, arguing that the circuit court erred in granting Lee's motion to suppress because (1) the exigent circumstances exception applied, (2) the federal emergency aid exception applied, and (3) alternatively, if the officers unlawfully entered Lee's room, Lee's actions were not protected as they constituted a new crime.

The ICA agreed with the State's claim that an emergency aid exception applied. Notably, the ICA determined that a warrantless search occurred when Lee opened his bedroom door. Nevertheless, the ICA held that the search was reasonable because an emergency aid exception justified the warrantless search, and the circuit court therefore erred in granting Lee's motion to suppress.

## II. Standard of Review

### A. Motion to Suppress

"[W]e review questions of constitutional law under the 'right/wrong' standard." State v. Jenkins, 93 Hawai'i 87, 100, 997 P.2d 13, 26 (2000) (citing State v. Toyomura, 80 Hawai'i 8, 15, 904 P.2d 893, 900 (1995) ). Accordingly, "[w]e review the circuit court's ruling on a motion to suppress de novo to determine whether the ruling was 'right' or 'wrong.'" State v. Kauhi, 86 Hawai'i 195, 197, 948 P.2d 1036, 1038 (1997) (citing State v. Navas, 81 Hawai'i 113, 123, 913 P.2d 39, 49 (1996) ).

### III. Discussion

On certiorari, Lee argues that the ICA erred in vacating the circuit court's order granting Lee's motion to suppress evidence. Specifically, Lee contends that "the State ... failed to establish exigent circumstances to justify the warrantless search." Lee adds that the ICA improperly relied

upon the federal emergency aid exception because it "is inconsistent with the enhanced protections afforded under Article I, Section 7" of the Hawai'i Constitution.

We accepted certiorari in this case to reinforce our precedent regarding the exclusionary rule and the fruit of the poisonous tree doctrine. Assuming that the officers' entry into Lee's bedroom was unlawful, the State bore the burden of showing that the evidence gathered was not tainted by their unlawful entry. The State satisfied this burden. The officers did not receive any benefit from entering Lee's bedroom. Additionally, Lee's decision to assault the officers constituted an intervening circumstance which dissipated the causal link between the officers' entry and the evidence gathered. Because the evidence at issue did not constitute fruit of the poisonous tree regardless of the legality of the officers' entry, we do not address the issue of whether the emergency aid exception justified the officers' entry.

#### **A. The Exclusionary Rule and the Fruit of the Poisonous Tree Doctrine.**

The Hawai'i exclusionary rule serves the dual purposes "of deterring governmental officials from circumventing the protections afforded by the Hawai'i Constitution" and of "protect[ing] the privacy rights of our citizens." State v. Lopez, 78 Hawai'i 433, 446, 896 P.2d 889, 902 (1995) (citing State v. Furuyama, 64 Haw. 109, 122, 637 P.2d 1095, 1104 (1981) ). Relatedly, "the 'fruit of the poisonous tree' doctrine 'prohibits the use of evidence at trial which comes to light as a result of the exploitation of a previous illegal act of the police.'" State v. Fukusaku, 85 Hawai'i 462, 475, 946 P.2d 32, 45 (1997).

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#### **B. The circuit court erred in granting Lee's motion to suppress because there was no fruit of the poisonous tree.**

Under the federal constitution, in order to prevent evidence from being suppressed as "fruit of the poisonous tree," the prosecution

must "show that its evidence is untainted" by the government's purportedly unlawful act. Id. The State may achieve this goal either by showing that the police did not exploit the illegal activity to gather evidence, id., or by demonstrating that there is no causal link between the illegal activity and the evidence gathered, Wong Sun v. United States, 371 U.S. 471, 488, 83 S. Ct. 407, 417, 9 L.Ed.2d 441 (1963). We have adopted a similar formulation under the state constitution:

"[T]he 'fruit of the poisonous tree' doctrine 'prohibits the use of evidence at trial which comes to light as a result of the exploitation of a previous illegal act of the police.'" State v. Fukusaku, 85 Hawai'i 462, 475, 946 P.2d 32, 45 (1997) (quoting State v. Medeiros, 4 Haw. App. 248, 251 n.4, 665 P.2d 181, 184 n.4 (1983) ). "Under the fruit of the poisonous tree doctrine, [a]dmissibility is determined by ascertaining whether the evidence objected to as being 'fruit' was discovered or became known by the exploitation of the prior illegality or by other means sufficiently distinguished as to purge the later evidence of the initial taint." State v. Poaipuni, 98 Hawai'i 387, 392-93, 49 P.3d 353, 358-59 (2002) (alteration in original) (quoting Fukusaku, 85 Hawai'i at 475, 946 P.2d at 45 ).

State v. Trinque, 140 Hawai'i 269, 281, 400 P.3d 470, 482 (2017).

Here, both exceptions to the "fruit of the poisonous tree" doctrine apply.

#### **1. The State did not obtain any benefit from opening Lee's bedroom door.**

As previously stated, one of the purposes of the Hawai'i exclusionary rule is to deter the circumvention of the Hawai'i Constitution's protections. Lopez, 78 Hawai'i at 446, 896 P.2d at 902. Thus, this court has explained that evidence may be excluded where "the State [is] unable to meet its burden of showing that the

discovery of the challenged evidence was not a benefit derived from the prior illegality." Trinque, 140 Hawai'i at 282, 400 P.3d at 483 (emphasis added).

Opening Lee's bedroom door did not confer any benefit upon the officers or the State. Notably, the officers were not summoned to Lee's home for the purpose of conducting a criminal investigation. Rather, the officers were responding to a "suicidal male call." Assuming arguendo that the officers unlawfully opened Lee's bedroom door, they did not do so for the purpose of gathering evidence, but to administer care. The officers did not gain any benefit from opening Lee's bedroom door or exploit that illegal entry to procure the relevant evidence – their observations of Lee's actions – because the entry did not lead the officers to search for that evidence nor direct any investigation into its discovery. Consequently, any evidence obtained cannot be suppressed on the basis that the State derived a benefit from the prior illegality. See Trinque, 140 Hawai'i at 282, 400 P.3d at 483.

## **2. Lee's independent actions purged any potential taint from the officers' allegedly unlawful entry.**

In addition to the fact that the police did not derive any benefit from opening Lee's bedroom door, Lee's independent actions purged any taint from the officers' entry. In its brief before the ICA, the State argued that the exclusionary rule does not exclude "testimony describing [Lee's] own illegal actions following an unlawful search and seizure." We agree.

The State primarily relied upon United States v. Waupekenay, 973 F.2d 1533 (10th Cir. 1992), to assert that Lee had no reasonable expectation of privacy once the officers entered his bedroom, and thus, evidence of Lee's actions did not constitute fruit of the poisonous tree. In Waupekenay, the United States Court of Appeals for the Tenth Circuit noted that state and federal courts have relied upon three rationales for allowing prosecutors to utilize evidence of new crimes committed by defendants after illegal government intrusions. Id. at 1537-38. First,

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some courts have held, as the Tenth Circuit did in Waupekenay, that defendants "could not have had a reasonable expectation of privacy for any actions initiated subsequently to [the government agents' unlawful entry] in their presence." Id. at 1537. Second, a number of courts have instead held that "the intervening act of the defendant [is] so separate and distinct from the illegal entry or arrest as to break the causal chain." Id. at 1538. Third, other courts have focused on "the limited objective of the exclusionary rule ... and the strong public interest in preventing and punishing force or threats of force directed against police officers." Id.

The Tenth Circuit explained that "[t]he rationale that is most applicable depends upon the underlying facts of the encounter." Id. However, the Tenth Circuit noted, "whatever rationale is used, the result is the same: Evidence of a separate, independent crime initiated against police officers in their presence after an illegal entry or arrest will not be suppressed under the Fourth Amendment." Id. at 1538.

Although we disagree with the Tenth Circuit's determination regarding a defendant's expectation of privacy, we agree that evidence of a separate, independent crime after an illegal entry will not be suppressed under either the Fourth Amendment of the United States Constitution or article I, section 7 of the Hawai'i Constitution. By the Waupekenay court's logic, a defendant would lack a reasonable expectation of privacy in a home for any action initiated in the presence of government agents after the government agents unlawfully entered the home. See id. at 1537. Such an exception would swallow the rule. Neither the Fourth Amendment of the United States Constitution nor article I, section 7 of the Hawai'i Constitution would deter government intrusions into the privacy of an individual's home so long as government agents could conceivably identify a newly initiated action following an illegal entry.

The Waupekenay court attempted to rectify this

issue by explaining that the individual would still have an expectation of privacy in any pre-existing activities as well as any acts that are "extension[s] of the previously initiated illegal activity." *Id.*<sup>9</sup> However, this leads to a questionable exercise in line drawing between pre-existing and newly initiated activities. Notably, the *Waupekenay* court provided, as an example, that if an individual was cultivating marijuana in his living room prior to the unlawful government intrusion, the police would not be allowed seize the pre-existing contraband. *Id.* The *Waupekenay* court added that "an effort to dispose of preexisting contraband following an illegal entry does not validate the seizure of the contraband because the disposal effort is viewed not as a new or independent criminal act but rather as an extension of the previously initiated illegal activity." *Id.* On the one hand, the disposal of the evidence of a previous crime is inextricably linked to the previous crime itself, and could therefore be considered an extension of the past criminal activity. However, it is not clear why such a connection alone neutralizes the fact that disposal of evidence is a distinct crime. Compare 21 U.S.C. § 841(a)(1) (making it unlawful to knowingly or intentionally manufacture, distribute, or dispense, possess with the intent to manufacture, distribute, or dispense, a controlled substance), with 18 U.S.C. § 2232(a) (criminalizing the "[d]estruction or removal of property to prevent seizure"). Thus, we disagree with the Tenth Circuit's reasoning that an individual lacks a reasonable expectation of privacy for actions initiated in the presence of police officers who unlawfully entered the individual's home.

Instead, this court finds persuasive our sister courts' reasoning that defendants' subsequent criminal acts, committed of their own free will, sever the causal link between the illegal entry and the evidence. See, e.g., *State v. Saavedra*, 396 N.W.2d 304, 305 (N.D. 1986) ; *State v. Bale*, 267 N.W.2d 730, 732-33 (Minn. 1978) ;

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*People v. Townes*, 41 N.Y.2d 97, 390 N.Y.S.2d 893, 359 N.E.2d 402, 406 (1976). The causal connection between the State's unlawful activity

and the discovery of the challenged evidence obtained "may ... become so attenuated as to dissipate the taint." *Nardone v. United States*, 308 U.S. 338, 341, 60 S. Ct. 266, 268, 84 L.Ed. 307 (1939). Thus, "the more apt question [here] is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at ... by means sufficiently distinguishable to be purged of the primary taint.'" *Wong Sun*, 371 U.S. at 488, 83 S. Ct. at 417 (quoting Maguire, *Evidence of Guilt*, 221 (1959)).

The Minnesota Supreme Court has posited that "[n]umerous factors bear on the application of this test, including the temporal proximity of the illegality and the fruit of that illegality, the presence of intervening circumstances, and the purpose and flagrancy of the physical misconduct." *Bale*, 267 N.W.2d at 733. The *Bale* court emphasized that the "last factor is especially important, because the aim of the exclusionary rule is to deter police misconduct by removing the incentive to disregard constitutional guarantees." *Id.* We agree.

The factors identified by the *Bale* court militate against granting Lee's motion to suppress. Based on the record before this court, Lee committed two intervening acts that severed the causal chain between the officers' entry and the resulting evidence. First, after speaking with the officers through his bedroom door for approximately twenty minutes, Lee opened his bedroom door while holding a wooden sword in a threatening manner.<sup>10</sup> Second, once the officers entered the room, Lee attempted to strike Sergeant Cobb with the sword. Each of these acts was sufficient to transform the welfare check into an exigent circumstance.

Furthermore, the officers merely sought to ensure that Lee was unharmed, and therefore had no interest in gathering evidence to support a criminal investigation. See also *Bale*, 267 N.W.2d at 733 ("More important is the fact that no intent to secure evidence motivated the decision to custodially arrest defendant on the misdemeanor charge."). Consequently, any evidence obtained by the State was collected "by means sufficiently distinguishable to be purged

of the primary taint," Wong Sun, 371 U.S. at 488, 83 S. Ct. at 417, because any search of Lee's room was neither purposeful nor sufficiently flagrant to merit suppressing the evidence found, see Bale, 267 N.W.2d at 733.

#### IV. Conclusion

For the foregoing reasons, the circuit court erred in suppressing the evidence of Lee's intervening and independent assault against the officers. Crucially, this opinion does not legalize the State's intrusion into the privacy of an individual's bedroom. Rather, it merely allows the State to offer evidence resulting from a person's own unlawful actions following the entry. Because the evidence should not have been suppressed even if the officers unlawfully entered Lee's bedroom, we do not address the issue of whether an emergency aid exception justified the search. We therefore affirm the ICA's July 2, 2019 Judgment on Appeal on different grounds.

#### DISSENTING OPINION BY WILSON J.

The Majority creates a new suicide exception to the constitutional right to privacy in a home or bedroom. All people of the State of Hawai'i ("the State") are now at risk of unconsented, warrantless entry into their homes or bedrooms by police who have been told that the person residing in the home or the bedroom might be suicidal. The decision of the Majority significantly reduces the protection afforded to Hawai'i's law-abiding citizens by the constitutions of the State of

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Hawai'i and the United States to be free from unconsented invasion of the home and bedroom by government agents.

Mr. Lee had committed no crime at the time his bedroom was entered against his will. Nor was he under investigation for criminal activity. A member of his family, concerned that he was suicidal, called the police to obtain the State's assistance to investigate. In his room with the door locked, Mr. Lee was asked by the police

standing on the other side of the door whether he was in need of assistance. His response was unequivocal: he did not want the police to enter his room; he was "fine." He told the police to "go away." Mr. Lee's clear denial of the police's entry into his room was an assertion of his right to privacy; his right to be free from unreasonable search and seizure; and his right to be free from government invasion of the room where he alone conducted his personal, private affairs. See, e.g., State v. Lopez, 78 Hawai'i 433, 441, 896 P.2d 889, 897 (1995) ("The right of the people to be free from unreasonable searches and seizures is firmly embedded in both the Fourth Amendment to the United States Constitution and article I, section 7 of the Hawai'i Constitution."); State v. Curtis, 139 Hawai'i 486, 497, 394 P.3d 716, 727 (2017) (noting that this court has "often recognized broader protections '[i]n the area of searches and seizures under article I, section 7' than our federal counterparts. ... This is because article I, section 7 is 'enforceable by a rule of reason which requires that governmental intrusions into the personal privacy of citizens of this State be no greater in intensity than absolutely necessary.'" (citations omitted)). The rights asserted by Mr. Lee are all constitutional rights that heretofore protected the privacy of citizens in their bedrooms and homes. See, e.g., State v. Iona, 144 Hawai'i 412, 416, 443 P.3d 104, 108 (2019) ("Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Hawai'i Constitution 'safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'" (citations omitted)); State v. Navas, 81 Hawai'i 113, 122, 913 P.2d 39, 48 (1996), as amended (Mar. 19, 1996) ("Article I, section 7 of the Hawaii Constitution[, which expressly guarantees the right to privacy,] protects people from unreasonable government intrusions into their legitimate expectations of privacy." (citations omitted)). Moreover, Hawai'i provides greater protection of the right to privacy under the Hawai'i Constitution than is afforded under the United States Constitution. See Lopez, 78 Hawai'i at 446, 896 P.2d at 902 (holding that unlike the "federal rationale" that the "primary purpose of the exclusionary rule on the federal

level is to deter illegal police conduct," under the Hawai'i Constitution "an equally valuable purpose of the exclusionary rule under article I, section 7, is to protect the privacy rights of our citizens").

Suicide is understandably a matter of great concern to a person's family and friends, and the broader community. However, privacy in the home—particularly privacy in the bedroom—remain the protected province of the citizen who declares to the police that the concerns of loved ones and friends are unfounded.<sup>1</sup> A citizen reposing in the privacy of a bedroom who the police have probable cause to believe has committed a crime—unlike Mr. Lee who the police did not have probable cause to believe committed a crime—is protected by the constitutions of the State of Hawai'i and the United States from unconsented, warrantless invasion of the privacy of the bedroom. Mr. Lee, who was by all accounts a law-abiding citizen before the police entered his bedroom, was entitled to no less protection from intrusion into his bedroom once he declared unequivocally that he was not in need of assistance.

The exclusionary rule's purpose of deterring police misconduct is of particular relevance to the police's treatment of Mr. Lee. In the course of asserting his right to be free

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from illegal invasion of his privacy, Mr. Lee was ridiculed by the representatives of the State who thereafter forced entry into his room. After he told the police he was "fine," asked the police to "go away," and asked if they had a warrant, the police responded, "[w]e don't need a warrant, dumb ass." Notwithstanding his suspected vulnerable suicidal condition, the police told Mr. Lee that he "needed to grow up[,] "be a man[,] and "stop being a baby[.]"

The Majority concedes that one of the purposes of the exclusionary rule is to deter the circumvention of the Hawai'i Constitution's protections. See Lopez, 78 Hawai'i at 446, 896 P.2d at 902. However, the Majority endorses the conduct of the police: "Despite Lee's requests

that the officers leave, the officers were required to ensure that Lee was neither harmed nor at imminent risk of injuring himself." Majority at --- Hawai'i at ---, 481 P.3d at 55. Respectfully, the Majority's assertion that the police were "required" to take action against Mr. Lee's will after he made clear from behind his locked door that he was not in need of police assistance, and after he asked the police to leave him alone, is unsupported by authority and contravenes the right to privacy oft acknowledged by this court. See, e.g., Lopez, 78 Hawai'i at 446, 896 P.2d at 902 ("Although we acknowledge that the Hawai'i exclusionary rule serves the valuable purpose of deterring governmental officials 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. Clark, 65 Haw. 488, 493, 654 P.2d 355, 359 (1982) ("The 'Fourth Amendment ... protects people from unreasonable government intrusions into their legitimate expectations of privacy[.]' ... and such description well illustrates that there is no expectation of privacy of greater legitimacy than that which we have in our 'private parts.' " (internal citations omitted)). Notably, Mr. Lee's brother also testified that after he saw that Mr. Lee was unharmed, he asked the police to leave. Specifically, he testified that he said to the police, "We see Josh is okay. That was our goal. Can you guys please leave?"

Thus, the police had no justification to pursue the unconsented entry of Mr. Lee's bedroom. Mr. Lee's brother's entreaty to the police is unrefuted evidence that Mr. Lee was no longer in need of assistance and any authority granted to police to be in the home was withdrawn. Having been told to leave Mr. Lee's bedroom, the police also received confirmation that he "was fine"; when the door was opened they witnessed that he was not harmed or at imminent risk of harm. The record contains no support for the proposition that the officers were required to continue their apparent strategy to enter Mr. Lee's bedroom and confront him.

The Majority asserts that Mr. Lee's brother's

withdrawal of his consent for the officers to be in the home "was legally irrelevant because Lee had already committed an intervening act."<sup>2</sup> Majority --- Hawai'i at ----

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n.10, 481 P.3d at 59 n.10. In particular, the Majority points to two alleged "intervening acts": "First, after speaking with the officers through his bedroom door for approximately 20 minutes, Lee opened his bedroom door while holding a wooden sword in a threatening manner. Second, once the officers entered the room, Lee attempted to strike Sergeant Cobb with the sword." Majority at --- Hawai'i at ----, 481P.3d at 59. Respectfully, the Majority ignores evidence in the record that the first alleged "intervening act" was not actually an intervening act because Mr. Lee was not holding the wooden sword in a threatening manner. According to Mr. Lee's brother, Mr. Lee was holding the stick with his arm straight down, the tip was facing the floor, and he never observed Mr. Lee swing the sword at anyone. The Majority contends that "Lee's brother did not testify that he could see into the room from where he sat [in the dining room]" and "that he only saw Lee after the officers had entered Lee's room." Majority at --- Hawai'i at ---- n.10, 481 P.3d at 59 n.10 (emphasis in original). However, the circuit court did not find that Mr. Lee was holding the wooden sword in a threatening manner. In fact, the circuit court found that "[w]hen Officer Kahao observed that the sword Defendant was holding was a wooden sword, she took her hand off her firearm." This occurred prior to the officers illegally entering Mr. Lee's bedroom. Thus, Officer Kahao's actions in taking her hand off her weapon demonstrate that the officers did not feel threatened. The circuit court also found in Finding of Fact No. 21 that "[t]he officers observed that Defendant was holding a wooden sword, not a real samurai sword, before they entered Defendant's bedroom[,]" which indicates that the officers did not feel threatened given that the officers entered Mr. Lee's room after seeing the wooden sword was not a real samurai sword. These circuit court findings are uncontested, and the evidence does not support

a holding by this court that the findings are clearly erroneous.<sup>3</sup> Thus, the Majority is mistaken in asserting that Mr. Lee had already committed an intervening act prior to Mr. Lee's brother's withdrawal of consent.<sup>4</sup> Mr. Lee was not engaging in an illegal act by standing in his bedroom with a stick in his hand by his side.

The Majority's ruling that Mr. Lee lost his right to privacy notwithstanding his family's pleas that the police officers leave their home and leave Mr. Lee alone portends consequences replete with danger, violence, and loss of respect for law enforcement the exclusionary rule was meant to prevent. As demonstrated by the facts of this case, without his right to privacy and his right to be free from unreasonable search and seizure, Mr. Lee fell victim to the use of police violence and subsequent criminal prosecution arising

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from his opposition to the unconsented entry by police into his bedroom.

### Conclusion

The police were not required to take action against Mr. Lee. He was constitutionally protected from their intrusion into his bedroom after he declared he did not need assistance and asked the police officers to leave. The circuit court correctly recognized Mr. Lee's right, under the Fourth Amendment to the United States Constitution and article I, section 7 of the Hawai'i Constitution, to be free from the illegal entry into his bedroom by the police when it applied the exclusionary rule to preclude introduction of evidence gained from the illegal entry.

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Notes:

<sup>1</sup> Associate Justice Richard W. Pollack, who was a member of the court when the oral argument was held, retired from the bench on June 30, 2020.

<sup>2</sup> The Honorable Rom A. Trader presided.



<sup>3</sup> The record identifies Corporal Takahashi as both "Kurt Takahashi" and "Craig Takahashi." This court will use the given name Corporal Takahashi provided in his own testimony.

<sup>4</sup> The record identifies Officer Kahao as both "Sommer Kahao" and "Summer Kahao." This court will use the spelling utilized in the indictment.

<sup>5</sup> Sergeant Cobb testified that using aggressive language in response to suicide calls is permitted by HPD training. This court expresses no opinion on the propriety of Sergeant Cobb's methods.

<sup>6</sup> Hawai'i Revised Statutes (HRS) § 707-716(1) (2013) provides in relevant part

Terroristic threatening in the first degree. (1) A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:

...

(c) Against a public servant arising out of the performance of the public servant's official duties....

...

(e) With the use of a dangerous instrument or a simulated firearm. ...

<sup>7</sup> HRS § 707-712.5(1)(a) (2003) provides

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[.]

<sup>8</sup> HRS § 710-1026(1)(a) (2001) provides

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[.]

<sup>9</sup> The Tenth Circuit appears to base this reasoning on the United States Court of Appeals for the Eleventh Circuit's articulation of a "new crime" exception. See United States v. Bailey, 691 F.2d 1009 (11th Cir. 1982). However, as discussed infra, this is problematic because it is not necessarily clear where the line between a pre-existing crime and a new crime should be drawn.

<sup>10</sup> The Dissent asserts that the officers should have left once Lee's brother withdrew his consent for the officers to be in the home. Assuming Lee's brother actually withdrew his consent, the withdrawal was legally irrelevant because Lee had already committed an intervening act.

The Dissent also argues that there is evidence in the record that this "was not actually an intervening act because Lee was not holding the wooden sword in a threatening manner." Respectfully, no such evidence appears in the record. At the time Lee opened his door, Lee's brother was sitting in the dining room. Lee's brother did not testify that he could see into the room from where he sat. Instead, Lee's brother testified that he only saw Lee after the officers had entered Lee's room.

<sup>1</sup> The license granted by the Majority to surrender another's right to privacy in the bedroom or home is not limited to family or friends. Presumably any person who wishes the police to enter a home or bedroom to investigate whether the occupant is considering suicide may employ the Majority's new suicide exception to the right to privacy. Those with illegitimate intent to cause police intrusion into another's

home or bedroom using the suicide exception as a ruse are thus empowered.

<sup>2</sup> The Majority endorses the approach taken by sister courts that "defendants' subsequent criminal acts, committed of their own free will, sever the causal link between the illegal entry and the evidence. See, e.g., State v. Saavedra, 396 N.W.2d 304, 305 (N.D. 1986) ; State v. Bale, 267 N.W.2d 730, 732-33 (Minn. 1978) ; People v. Townes, [41 N.Y.2d 97, 390 N.Y.S.2d 893] 359 N.E.2d 402, 406 (N.Y. 1976)." Majority --- Hawai'i at ---, 481 P.3d at 58. When explaining the test, the Majority cites the Minnesota Supreme Court, which "posited that '[n]umerous factors bear on the application of this test, including the temporal proximity of the illegality and the fruit of that illegality, the presence of intervening circumstances, and the purpose and flagrancy of the physical misconduct.' ... [T]he 'last factor is especially important, because the aim of the exclusionary rule is to deter police misconduct by removing the incentive to disregard constitutional guarantees.'" Majority at --- Hawai'i at ---, 481 P.3d at 59 (quoting Bale, 267 N.W.2d at 733 ) (emphases added). However, the Majority's opinion ignores relevant factors such as the temporal proximity and the flagrancy of the misconduct factors. Respectfully, by doing so, the Majority contravenes the purpose of the test, which is intended to be more protective of constitutional rights in the face of illegal police conduct.

As the Minnesota Supreme Court indicated in its opinion, the test is fact specific. Id. at 733 ("Under the peculiar facts and circumstances of this case, the causal chain between the initial arrest and the physical evidence seized appears so attenuated that it would not serve the purpose of the exclusionary rule to exclude the evidence were we to decide that issue in defendant's favor." (emphasis added)). The facts of this case indicate that the causal link was not severed. For the temporal proximity factor, the record repeatedly reflects, based on the testimony of multiple witnesses, that the events

that occurred after the door was opened happened very quickly. Witness testimony demonstrates that there was confusion about what actually occurred first because of how quickly events unfolded. Sergeant Cobb acknowledged how quickly the events occurred when he stated that "it happened all at the same time." Thus, very little time passed between the police's illegal entry into Mr. Lee's bedroom and the resulting evidence. The other relevant factor posited by the Minnesota Supreme Court is the "flagrancy of the physical misconduct." Here, the flagrancy is apparent. Mr. Lee's brother testified that after he asked the police to leave, the police said, "Why did you call us then?" indicating that the officers believed they had free reign to engage in activity, regardless of its illegality, once they were called to assist. Most significantly, Sergeant Cobb's behavior was flagrant by goading Mr. Lee into opening the door as well as trying to pick open a locked bedroom door that he was already denied entry to. Consequently, when considering the temporal factor and the flagrancy of the illegal police behavior, even under the test posited by the Majority, the causal chain between the police's illegal entry and the physical evidence is not "so attenuated" nor were there any intervening acts that "sever the causal link between the illegal entry and the evidence."

<sup>3</sup> "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.'" State v. Enos, 147 Hawai'i 150, 158-59, 465 P.3d 597, 605-06 (2020) (quoting State v. Rapozo, 123 Hawai'i 329, 336, 235 P.3d 325, 332 (2010) ).

<sup>4</sup> The second alleged intervening act relied upon by the Majority-Mr. Lee allegedly attempting to strike Sergeant Cobb with the sword-also occurred after Mr. Lee's brother withdrew his consent to the officers' entry to the home.

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