*** NOT FOR PUBLICATION ***

NO. 22978

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

ANDRIAN RODRIGUEZ, Defendant-Appellant

APPEAL FROM THE SECOND CIRCUIT COURT
(CR. NO. 99-0266)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, and Nakayama, JJ., Circuit Judge Blondin, assigned by reason of vacancy, and Acoba, J., concurring separately)

Defendant-appellant Andrian Rodriguez appeals from the October 28, 1999 judgment of the circuit court of the second circuit, the Honorable Shackley F. Raffetto presiding, convicting Rodriguez of and sentencing him for: (1) terroristic threatening in the first degree, in violation of Hawai'i Revised Statutes (HRS) § 707-716(1)(d) (1993)[1] (Count I); (2) promoting a dangerous drug in the third degree, in violation of HRS § 712-1243(1) (1993)[2] (Count II); (3) prohibited acts related to drug paraphernalia, in violation of HRS § 329-43.5(a) (1993)[3] (Count

[1] HRS § 707-716(1)(d) provides that "[a] person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening . . . [w]ith the use of a dangerous instrument."

[2] HRS § 712-1243(1) provides that "[a] person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount."

[3] HRS § 329-43.5(a) provides:

> It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack,

(continued...)

III); and (4) failure to acquire a firearm permit, in violation of HRS § 134-2 (Supp. 1998)[4] (Count IV). On appeal, Rodriguez argues that the circuit court erred by denying his motion to suppress his statement and the evidence recovered. Rodriguez bases his arguments on the contentions that: (1) his constitutional rights against unreasonable searches and seizures were violated by Officer Darrell Ramos's (Officer Ramos) initial and subsequent intrusion into his home without probable cause, consent, or exigent circumstances; (2) there were no exigent circumstances to excuse the failure to apprise him of his rights as required by Miranda v. Arizona, 384 U.S. 436 (1966); and (3) the incriminating evidence found would not have been inevitably discovered. Rodriguez further contends that Finding of Fact

[3](...continued)
store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter. Any person who violates this section is guilty of a class C felony and upon conviction may be imprisoned pursuant to section 706-660 and, if appropriate as provided in section 706-641, fined pursuant to section 706-640.

[4] HRS § 134-2 provides in relevant part:

(a) No person shall acquire the ownership of a firearm, whether usable or unusable, serviceable or unserviceable, modern or antique, registered under prior law or by a prior owner or unregistered, either by purchase, gift, inheritance, bequest, or in any other manner, whether procured in the State or imported by mail, express, freight, or otherwise, until the person has first procured from the chief of police of the county of the person's place of business or, if there is no place of business, the person's residence or, if there is neither place of business nor residence, the person's place of sojourn, a permit to acquire the ownership of a firearm as prescribed in this section.

(FOF) No. 29 was clearly erroneous[5] because the circuit court

[5] Rodriguez also argues that the following FOFs were clearly erroneous:

> [FOF] 2. On May 19, 1999, at 11:57 p.m., 15-year old Ariel Trinidad ("Trinidad") placed a 911 call from a park near his home located at 941 Olioli Street, Haliimaile, Hawaii. Trinidad reported that he needed police right away because his mom and dad were arguing and because his dad had a gun.
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> [FOF] 3. Police were dispatched to respond to an abuse type case which involved a gun. At 12:04 a.m., Officer Darrell Ramos ("Officer Ramos") was the first officer to arrive at the residence.
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> [FOF] 4. Officer Ramos immediately made checks of the residence and located Trinidad's mother and step-father, Olivia Rodriguez ("Olivia") and Defendant, in the master bedroom.
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> [FOF] 5. The bedroom door was locked, but after a few minutes of speaking to them through the door, the couple emerged and everyone stepped out into the well-lighted garage area where Officer Oran Satterfield ("Officer Satterfield") met them.
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> . . . .
>
> [FOF] 7. Officer Satterfield spoke with Olivia while Officer Ramos spoke with Defendant. Officer Ramos obtained statistical information on Defendant and asked simply if everything was all right at the residence.
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> . . . .
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> [FOF] 9. Defendant took a seat on a plastic patio chair in the garage while Officer Satterfield interviewed Olivia. Defendant was not under arrest at this stage of the investigation.
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> . . . .
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> [FOF] 14. Officer Satterfield then spoke briefly with Olivia's son, Trinidad, who returned from the park where he used the phone. Trinidad confirmed that he saw a gun. Officer Satterfield noted 15-year old Trinidad to be tearful, angry and upset. Shortly after speaking with Officer Satterfield, Trinidad ran away from the area.
>
> [FOF] 15. Officer Satterfield asked Olivia about whether there was a gun, as stated by Trinidad. After several minutes, Olivia finally said that at about 11:55 p.m., she sat on the bed in the master bedroom when Defendant appeared to be upset and paced in the room. They started to argue, and Defendant suddenly approached Olivia while she still sat on the bed.
>
> [FOF] 16. Olivia said that Defendant forced a pistol barrel against her right temple area with his right hand, causing pain to her temple. Olivia further stated that Defendant said, "If we die, we die." She stated that she was very frightened and confused by Defendant's actions. She nodded affirmatively when Officer Satterfield asked if she was afraid she would be shot in the head.

(continued...)

should not have taken judicial notice that "domestic abuse situations are often explosive, potentially violent, and potentially irrational." For the reasons discussed infra, in section III, the circuit court's October 28, 1999 judgment is vacated and this case is remanded for further proceedings.

I. BACKGROUND

A. Factual Background

On May 18, 1999, shortly before midnight, Rodriguez and his wife, Olivia Rodriguez (Olivia) were embroiled in an argument about Olivia's failure to cook dinner. During the argument, Olivia's fifteen-year-old son, Ariel Trinidad (Ariel), saw Rodriguez holding a gun. Afraid for his mother's life, Ariel ran out of the house, in his pajamas, to a nearby park and called

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[5](...continued)

> . . . .
> [FOF] 19. Defendant quietly said, "O.K., there's a gun but it's in my bedroom." Officer Ramos did not know for sure who used the gun, and Defendant's demeanor was still calm and relaxed.
> . . . .
> [FOF] 30. The responding officers took immediate and necessary action to determine what the nature of the situation was, and received conflicting evidence, specifically:
> (a) Defendant appeared cool, casual, and relaxed;
> (b) Defendant's wife, Olivia, appeared excited and described a confrontation with a gun;
> (c) Olivia's son reported the presence of a gun to the dispatcher and confirmed that report with responding officers; and
> (d) Defendant denied that a gun was at the premises and denied was [sic] a confrontation involving a gun.

However, Rodriguez fails to direct specific arguments to any of these FOFs. Rodriguez, instead, generally argues the issues addressed infra. As such, this court need not address the contested FOFs individually. See Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7) ("Points not argued may be deemed waived.").

911.

Maui Police Department's (MPD) Officer Ramos was the first to respond to MPD's dispatch regarding a possible domestic abuse involving a heated argument between a husband and wife and a possible gun at 941 Olioli Street. Arriving approximately four minutes after the dispatch, Officer Ramos spoke to a few people in the garage of the residence who directed him to a little corridor that led to a small house behind the garage. The house was dark and quiet. Unsuccessful in getting anyone to answer him, Officer Ramos entered the house through a closed but unlocked door and again called out for someone. With still no response, Officer Ramos proceeded down the hallway of the house and knocked on a closed, locked door announcing, "I'm police, checking. Is everybody all right?" Rodriguez opened the door, and Officer Ramos asked Rodriguez and Olivia to step outside into the garage.

At that point, Officer Oran Satterfield arrived. Officer Ramos remained in the garage with Rodriguez and Officer Satterfield spoke to Olivia in the lawn area. Shortly thereafter, Ariel returned to the residence. Officer Ramos questioned Rodriguez, who appeared very calm and denied the presence of a gun. Meanwhile, after separate conversations with Olivia and Ariel, Officer Satterfield determined that a gun was involved.

Officer Satterfield informed Officer Ramos of the situation, and both officers approached Rodriguez. When Officer Ramos asked Rodriguez about the weapon, Rodriguez began crying, admitted that the gun was in the bedroom, and then led the

officers to the bedroom. In the bedroom, Rodriguez pointed toward the mattress of his bed. Officer Satterfield lifted the mattress and recovered a gun, a crystal meth pipe, and a black canvas bag.[6] Officer Ramos placed Rodriguez under arrest and transported him to the Wailuku Police Station.

On May 19, 1999, at approximately 1:15 a.m., Olivia provided a written statement stating, "He pointed the gun on [illegible] head and he hit the gun on my head." Ariel also provided a written statement stating, "[W]hen I was sleeping on the floor my step Dad open the door so hard, and open the light and he went to his room and pull out a gun and I thought my Dad is going to shoot my mom." At approximately 2:30 a.m., Rodriguez was apprised of his Miranda rights.

B. Procedural Background

On June 1, 1999, Rodriguez was indicted on Counts I-IV. On July 20, 1999, Rodriguez filed a motion to suppress his statements and all evidence recovered. During the suppression hearing, Officer Satterfield testified, in relevant part, as follows:

> [Prosecution:] Okay. At that point in time did [Olivia] say whether or not Defendant had said anything to her?
> [Officer Satterfield:] When he pointed the weapon?
> [Prosecution:] Yes.
> [Officer Satterfield:] I believe my report said, "if we die, we die." That is what she told me.
> [Prosecution:] Were you clear on exactly who did what when?
> [Officer Satterfield:] As far as the story she told me?

[6] A search warrant was obtained and executed for the black canvas bag. The search produced three packets of crystal methamphetamine, an empty Ziploc packet, a pink colored container, an electronic gram scale, and one cut up playing card.

> [Prosecution:] Yes.
> [Officer Satterfield:] They were -- her and her husband were within the bedroom. She was sitting on the bed and they was arguing over family matters. At that point he pulled out a handgun and pointed it to her head and stated, "If we die, we die."

On cross-examination, Officer Satterfield testified as follows:

> [Defense Attorney:] And Ariel's statement was consistent with Olivia's statement, correct?
> [Officer Satterfield:] He told me that he was within his bedroom and sleeping at the time and he had -- [Rodriguez] had walked into his bedroom, turned on the light, and then closed the door, and at that point Ariel got up, went to his doorway, looked into the family's bedroom, inside the parents' bedroom, and he saw [Rodriguez] appeared to be loading a pistol.

On August 13, 1999, the circuit court denied Rodriguez's motion to suppress, concluding that "the police acted on the basis of specific, articulable facts and exigent circumstances which justified their search to secure any weapon before proceeding further with their investigation." The circuit court further concluded that the gun and drug paraphernalia would inevitably have been discovered. The circuit court's FOFs and conclusions of law (COLs), in relevant part, are as follows:

> [FOF] 29. The Court took judicial notice that domestic abuse situations are often explosive, potentially violent and potentially irrational.
> . . . .
> [COL] 5. In the present case, the police acted on the basis of specific, articulable facts and exigent circumstances which justified their search to secure any weapon before proceeding further with their investigation.
> [COL] 6. The gun, drug paraphernalia and black hip pouch and its contents are additionally admissible under the "inevitable discovery" exception to the exclusionary rule adopted in State v. Lopez, 78 Hawaii 433, 896 P.2d 889 (1995). Based on Olivia's statement to police that a gun was used in the bedroom, Trinidad's 911 call to police reporting a gun and his later confirmation to police at the scene that he saw a gun in the bedroom, police would inevitably have discovered the gun and the items hidden alongside it "'within a short time' in essentially the same condition as it was actually found." State v. Lopez, 78 Hawaii 433, 448, 896 P.2d 889, 904[] (1995), citing Nix v.

> Williams, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

On August 31, 1999, Rodriguez entered a conditional plea of no contest. On October 28, 1999, the circuit court entered its judgment of guilty conviction and sentence. Rodriguez filed a timely notice of appeal.

II. STANDARD OF REVIEW

A. Motion to Suppress

"We 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). The circuit court's conclusions of law underlying the motion to suppress are reviewed de novo under the right and wrong standard. State v. Lopez, 78 Hawai'i 433, 440, 896 P.2d 889, 896 (1995). However, the circuit court's findings of fact are reviewed under the clearly erroneous standard. Id. "Under this standard, a finding of fact is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction in reviewing the entire evidence that a mistake has been committed." Id. at 440-41, 896 P.2d at 896-97 (brackets and internal quotation marks omitted).

B. Judicial Notice

> [D]ifferent standards of review must be applied to trial court decisions regarding the admissibility of evidence, depending on the requirements of the particular rule of evidence at issue. When application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard.

State v. West, 95 Hawai'i 22, 24-25, 18 P.3d 884, 886-87 (2001)

(citations omitted) (brackets in original).

III. DISCUSSION

A. Because exigent circumstances existed, the initial entry into Rodriguez's residence was not unreasonable.

Rodriguez argues that the prosecution failed to show that exigent circumstances existed to justify the initial warrantless entry into his residence, inasmuch as Officer Ramos did not hear any yelling, screaming, gunshots, breaking glass, or objects smashing. Rodriguez's argument is without merit.

The fourth amendment to the United States Constitution[7] and article I, section 7 of the Hawai'i Constitution[8] guarantee the right to be free from unreasonable searches and seizures. Lopez, 78 Hawai'i at 441, 896 P.2d at 897. To determine whether a governmental activity violates this right, this court must ask (1) whether the governmental activity was a "search" in the constitutional sense, and, if so, (2) whether the search was "reasonable." Id. That Officer Ramos's initial entry into Rodriguez's residence was a "search" in the constitutional sense

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[7] The fourth amendment to the United States Constitution provides:

> 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.

[8] Article I, section 7 of the Hawai'i State Constitution provides:

> 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.

is uncontested. As such, our inquiry turns to whether the search was reasonable.

"Determining whether a search is reasonable depends primarily on whether prior judicial approval has been obtained. It is well-established that a search by law enforcement officials without a judicial warrant issued upon probable cause is 'presumptively unreasonable' under both the United States and Hawai'i Constitutions." Id. at 442, 896 P.2d at 898. Thus, a warrantless search is invalid unless the prosecution can overcome the initial presumption of unreasonableness by showing that the search falls "within one of the narrowly drawn exceptions to the warrant requirement." Id. "One such well-recognized and narrowly-defined exception to the warrant requirement occurs when the government has probable cause to search and exigent circumstances exist necessitating immediate police action." State v. Pulse, 83 Hawai'i 229, 245, 925 P.2d 797, 813 (1996) (citations, formatting, and internal quotation marks omitted). "Probable cause to search exists when the facts and circumstances within one's knowledge and of which one has reasonable trustworthy information are sufficient in themselves to warrant a person of reasonable caution to believe that an offense has been committed." Id. (brackets omitted) (quoting State v. Navas, 81 Hawai'i 113, 116, 913 P.2d 39, 42 (1996)). The exigent circumstances exception

> exists when the demands of the occasion reasonably call for an immediate police response. More specifically, it includes situations presenting an immediate danger to life or serious injury or an immediate threatened removal or destruction of evidence. However, the burden, of course, is upon the government to prove the justification . . . , and whether the requisite conditions exist is to be measured from the totality of the circumstances. And in seeking to

> meet this burden, the police must be able to point to specific and articulable facts from which it may be determined that the action they took was necessitated by the exigencies of the situation.

Pulse, 83 Hawai‘i at 245, 925 P.2d at 813 (quoting State v. Clark, 65 Haw. 488, 494, 654 P.2d 355, 360 (1982) (internal citations, quotation marks, and brackets omitted)).

In the instant case, Ariel's phone call to the police stating that his parents were fighting and that his dad had a gun gave Officer Ramos probable cause to believe that a crime had been committed. In addition, the record contains evidence sufficient to support the circuit court's determination that, under the totality of the circumstances, exigency existed. During the hearing on Rodriguez's motion to suppress, evidence was adduced that the following factors contributed to Officer Ramos's decision to enter Rodriguez's residence: (1) a possible domestic abuse was occurring at 941 Olioli Street; (2) husband and wife were in a heated argument; (3) a gun was involved; (4) Officer Ramos arrived at 941 Olioli Street within four minutes of the dispatch; (5) upon arrival, Officer Ramos was directed to the house behind the garage; (6) the house was dark and quiet; and (7) no one responded to his verbal calls. Although none of these factors, taken alone, may have risen to the level of exigent circumstances, considered together, it was not unreasonable for a trier of fact to determine that Officer Ramos was presented with a situation where he feared an immediate danger to life or serious injury. Thus, Officer Ramos's initial entry into Rodriguez's residence was not unreasonable.

B. Because Rodriguez was not "in custody," Officer Ramos was not required to provide Rodriguez with a Miranda warning before questioning him.

Rodriguez argues that he should have been given a Miranda warning before the officers questioned him about the gun, and that no exigent circumstances existed to justify the officers' failure to Mirandize him. Conversely, the prosecution argues that, although the officers should have apprised Rodriguez of his Miranda rights, the "public safety" exception to the Miranda rule applies. Both arguments miss the mark; the point is that, inasmuch as Rodriguez was not subjected to custodial interrogation, the officers were not required to give Rodriguez Miranda warnings at all.

"It is by now a fundamental tenet of criminal law that 'the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." State v. Paahana, 66 Haw. 499, 502, 666 P.2d 592, 595 (1983).

> In determining whether a defendant's statement was made in a custodial context, the totality of circumstances must be considered, including the time, place and length of the interrogation, the nature of the questions asked, the conduct of the police at the time of the interrogation, and any other pertinent factors. . . . In determining whether an officer's questions constitute interrogation, the test is whether the officer should have known that his words and actions were reasonably likely to elicit an incriminating response from the defendant.

Id. at 502-03, 666 P.2d at 595-96 (citations omitted). In determining whether a person is "in custody," this court has explained that

> an individual may very well be "seized," within the meaning

> of article I, section 7 of the Hawai‘i Constitution (inasmuch as, "given the totality of the circumstances, a reasonable person would have believed that he or she was not free to leave") and yet not be "in custody," such that Miranda warnings are required as a precondition to any questioning. Thus, generally speaking, a person lawfully subjected to a temporary investigative detention by a police officer -- who has a reasonable suspicion that is based on specific and articulable facts that criminal activity is afoot -- is not subjected to "custodial interrogation" when the officer poses noncoercive questions to the detained person that are designed to confirm or dispel the officer's reasonable suspicion. Indeed, "[i]t is the very purpose of [such an] investigatory stop to allow the officer to confirm or deny [his or her reasonable] suspicions by reasonable questioning, rather than forcing in each instance the 'all or nothing' choice between arrest and inaction."

State v. Ah Loo, 94 Hawai‘i 207, 211, 10 P.3d 728, 732 (2000) (citations omitted) (some brackets in original). There is no absolute line delineating between custodial interrogation and on-the-scene questioning. State v. Ketchum, 97 Hawai‘i 107, 122, 34 P.3d 1006, 1021 (2001). The question whether a person was "in custody" must, instead, be decided on a case-by-case basis. Id. at 123, 10 P.3d at 1022.

Looking at the totality of the circumstances, it is clear that, while in his garage, Rodriguez was subjected to lawful investigation rather than custodial interrogation. When Officer Ramos responded to a possible domestic abuse situation involving a gun, he encountered Rodriguez and Olivia, who were very calm and denied the use of a gun. After speaking to Olivia, Officer Satterfield determined that a gun may have been involved and informed Officer Ramos. Officer Ramos testified that, at that point, he did not know if Rodriguez was the victim, witness, or perpetrator. Officer Ramos then told Rodriguez that "if there is a gun involved, I need to know where the gun is." This statement was necessary to confirm or dispel Officer Ramos's

reasonable suspicion that a gun was used. In addition, the officers did not direct Rodriguez to sit or restrict his movement in any way. The officers did not touch Rodriguez or draw their weapons. The questioning period lasted for five to ten minutes and was conducted in an open garage. Moreover, Rodriguez gave no indication that he did not wish to participate. Thus, based on the totality of the circumstances, although Rodriguez may have been seized, inasmuch as a reasonable person would not feel free to leave, he was not "in custody" so as to require Officer Ramos to provide him with a Miranda warning prior to questioning him regarding the location of the gun.

Contrary to the prosecution's argument, the "public safety" exception is inapplicable in the instant case. In State v. Kane, 87 Hawai'i 71, 79, 951 P.2d 934, 942 (1998), this court disapproved the prosecution's argument that the defendant's statement was admissible for public safety purposes for two reasons:

> First, while the United States Supreme Court has adopted the "public safety" exception as a limitation on the procedural safeguards necessary for the protection of the rights afforded by the fifth amendment to the United States Constitution, this court has never formally adopted an analogous limitation on the protections afforded to criminal defendants by article I, section 10 of the Hawai'i Constitution. Second, on the facts of this case, the "public safety" exception to the Miranda requirements, as set forth by the United States Supreme Court in [New York v.] Quarles, [467 U.S. 649 (1984)], is not applicable, and, therefore, cannot render [the defendant's] statements admissible even under federal constitutional analysis.

Id. at 79, 951 P.2d at 942. This court then discussed Quarles:

> In Quarles, the police apprehended a suspected rapist after a chase through a supermarket. Because the victim had indicated that her assailant had carried a gun, the police searched him for the weapon, but found only an empty shoulder holster. Concerned that the unlocated gun posed a threat to public safety, the arresting officer immediately

> asked, before reading the suspect his Miranda rights, where the gun was. When the suspect told him, the officer first retrieved the gun and, only afterward, formally arrested the suspect and informed him of his fifth amendment rights as required by Miranda. The Quarles Court reasoned that the exigency created by having a gun freely available in a public place, where it could be found by and cause injury to anyone in the area, justified the police in questioning the suspect for the limited purpose of neutralizing the immediate danger without first giving the warnings required by Miranda.

Id. Finally, this court concluded that Quarles was inapposite to Kane.

> . . . Unlike the police officer in Quarles, [the officer] had ascertained the location of [the defendant's] device and was aware that it was an explosive. Armed with this knowledge, [the officer] did not require additional information from [the defendant] in order to verify the need to call the bomb squad. Accordingly, [the officer's] questions cannot be said to have been designed solely for the purpose of addressing the danger posed by the explosive. The "public safety" exception to Miranda being inapplicable to this case, we hold that [the defendant's] answers to [the officer's] questions pertaining to what the explosive was and why [the defendant] was in possession of it are inadmissible in evidence.

Id.

Even if this court were to adopt the "public safety" exception to the requirement of Miranda warnings, the exception would be inapplicable in the instant case. The officers were informed by Olivia and Ariel that the gun was used in the bedroom. The record is devoid of any evidence that the gun was removed from the bedroom. Rodriguez's bedroom obviously was not a public place. In addition, Rodriguez and Olivia were questioned by the officers in the garage, without access to the gun. As such, the unlocated gun could not have posed a threat to public safety.

C. Although the subsequent entry into Rodriguez's residence was merely further investigation, the warrantless search of Rodriguez's mattress was unreasonable.

In its COL No. 5, the circuit court concluded that "[i]n the present case, the police acted on the basis of specific, articulable facts and exigent circumstances which justified their search to secure any weapon before proceeding further with their investigation." Rodriguez argues that COL No. 5 was wrong because the subsequent entry into his residence, the search for the gun, and the recovery of the gun and drug paraphernalia were illegal. Conversely, the prosecution argues that the police were authorized to seize the gun pursuant to HRS § 709-906(4)(f). Although the subsequent entry into Rodriguez's residence was merely further investigation, the warrantless search of Rodriguez's mattress was unreasonable.

Following Rodriguez's statement that the gun was in the house, Rodriguez escorted the officers into the house and pointed at the mattress in the bedroom. This subsequent entry into the house was merely further investigation and, thus, was not illegal. However, the officers' actions became questionable when Officer Satterfield conducted a warrantless search by lifting Rodriguez's mattress revealing a gun and drug paraphernalia.

As discussed supra in section III.A., a warrantless search is presumptively unreasonable unless the prosecution can prove that the search falls "within one of the narrowly drawn exceptions to the warrant requirement." Lopez, 78 Hawai'i at 442, 896 P.2d at 898. As an exception, "[e]xigent circumstances exist when immediate police response is required to prevent

imminent danger to life or serious damage to property, or to forestall the likely escape of a suspect or the threatened removal or destruction of evidence." State v. Texeira, 62 Haw. 44, 50, 609 P.2d 131, 136 (1980). "In order for the State to take advantage of this particular exception, the State must be able to point to specific and articulable facts from which it may be determined that the officers' actions were necessitated by the exigencies of the situation which called for an immediate police response." Paahana, 66 Haw. at 506, 666 P.2d at 597.

In the instant case, the prosecution failed to point to any articulable facts that would support the immediate search of Rodriguez's mattress without a warrant. According to the record, the officers were aware of the fact that a gun was used in the bedroom and there was no indication that the gun was removed from the bedroom. The officers detained Rodriguez, Olivia, and Ariel in the garage area, away from the gun. In addition, Rodriguez appeared to be calm and cooperative. The record is devoid of any evidence that it would have been impracticable to obtain a warrant or that delay would endanger lives. Moreover, there is no indication that the evidence would be lost, destroyed, or removed before the warrant could be obtained. Although these events occurred in the middle of the night, "[i]nconvenience to the police or to a judge, for that matter, has never been a very convincing reason to by-pass the warrant requirement." Id. (explaining that "while the events occurred in the evening, it is inconceivable that none of the judges in the first circuit would have been available for the purpose of entertaining an application for a warrant"). Based on the foregoing, the

prosecution failed to meet its burden of proving that exigent circumstances existed to justify the warrantless search. As such, the circuit court's COL No. 5 was wrong and, thus, the gun and drug paraphernalia recovered were inadmissible as evidence.

The prosecution's claim that HRS § 709-906(4)(f) authorized the officers' seizure of the gun is misguided. HRS § 709-906 provides in relevant part:

> (4) Any police officer, with or without a warrant, may take the following course of action where the officer has reasonable grounds to believe that there was physical abuse or harm inflicted by one person upon a family or household member, regardless of whether the physical abuse or harm occurred in the officer's presence:
>
> . . . .
>
> (f) The officer may seize all firearms and ammunition that the police officer has reasonable grounds to believe were used or threatened to be used in the commission of an offense under this section.

HRS § 709-906(4)(f) (emphasis added). HRS § 709-906(4)(f) does not provide for warrantless searches. In addition, HRS § 709-906(4)(f) may not be executed at the expense of Rodriguez's constitutional right against unreasonable searches and seizures. Cf. State v. Peseti, 101 Hawai'i 172, 181, 65 P.3d 119, 128 (2003) (holding that a statutory privilege must bow to the defendant's constitutional rights in the context of cross-examination). Thus, in the instant case, because the search of Rodriguez's mattress was conducted without a warrant and HRS § 709-906(4)(f) is inapplicable, the gun and drug paraphernalia should have been suppressed.

D. The inevitable discovery exception to the exclusionary rule is inapplicable.

In COL No. 6, the circuit court concluded that the evidence would have been inevitably discovered by lawful means,

and, thus, was admissible. Rodriguez argues that the circuit court erred by concluding that the evidence obtained would have been inevitably discovered, inasmuch as the police officers lacked sufficient evidence to obtain a search warrant. Rodriguez further argues that, even if the officers had sufficient evidence to obtain a search warrant, "the record in this case lacks the requisite clear and convincing evidence to demonstrate that the evidence would still have been in the place that it had been located." Although probable cause existed to obtain a search warrant, the prosecution failed to present clear and convincing evidence that the evidence recovered would inevitably have been discovered.

The inevitable discovery exception to the exclusionary rule "prevents the setting aside of convictions that would have been obtained in the absence of police misconduct . . . ." Lopez, 78 Hawai'i at 451, 896 P.2d at 907. "[T]he prosecution [must] present clear and convincing evidence that any evidence obtained in violation of article I, section 7, would inevitably have been discovered by lawful means before such evidence may be admitted under the inevitable discovery exception to the exclusionary rule." Id. "[C]lear and convincing evidence means such evidence as will produce in the mind of a reasonable person a firm belief as to the facts sought to be established." Id. at 451 n.5, 896 P.2d at 907 n.5 (citations and internal quotation marks omitted).

In the instant case, although the record evinces that the officers could have obtained a warrant to search for the gun, inasmuch as Olivia's and Ariel's statements that Rodriguez used a

gun against Olivia provided probable cause, the record is simply devoid of any evidence that the officers would have obtained a search warrant. Nothing in the record suggests that the officers took any steps to obtain a warrant or, as discussed supra, that the circumstances necessitated an immediate search. Instead, the record indicates that the officers could have obtained a search warrant, but simply chose not to. The inevitable discovery exception cannot excuse the failure to obtain a search warrant. See United States v. Mejia, 69 F.3d 309, 320 (9th Cir. 1995) ("This court has never applied the inevitable discovery exception so as to excuse the failure to obtain a search warrant where the police had probable cause but simply did not attempt to obtain a warrant. . . . To apply the inevitable discovery doctrine whenever the police could have obtained a warrant but chose not to would in effect eliminate the warrant requirement."); United States v. Echegoyen, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986) ("[T]o excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the fourth amendment."). Based on the foregoing, the prosecution failed to present clear and convincing evidence that the evidence recovered would inevitably have been discovered and, thus, COL No. 6 was wrong.

E. The circuit court clearly erred by taking judicial notice in FOF No. 29 that "domestic abuse situations are often explosive, potentially violent, and potentially irrational."

In its FOF No. 29, the circuit court "took judicial notice that domestic abuse situations are often explosive,

potentially violent and potentially irrational." Rodriguez argues that FOF No. 29 is clearly erroneous, inasmuch as it "seems to be general circumstances that typically surround a domestic abuse case, rather than a specific fact that is not subject to reasonable dispute." Rodriguez further argues that "the trial court appears to have injected his personal opinion of that fact into the present case." Because judicial notice is inappropriate in this instance, FOF No. 29 was clearly erroneous.

Hawai‘i Rules of Evidence (HRE) Rule 201 (1993) provides in relevant part that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." HRE Rule 201(b). "[T]he purpose of the judicial notice rule, and it would appear to be a wholesome one, is to eliminate the necessity of taking the time of the court and jury to make formal proof of a fact which cannot be disputed." State v. Moses, 102 Hawai‘i 449, 454, 77 P.3d 940, 945 (2003) (quoting In re Estate of Herbert, 90 Hawai‘i 443, 466, 979 P.2d 39, 62 (1999) (citations omitted) (block quote format omitted)).

> A court should take judicial notice in very limited circumstances:
>
> . . . .
>
> (1) Matters which are actually so notorious to all that the production of evidence would be unnecessary;
>
> (2) Matters which the judicial function supposes the judge to be acquainted with, in theory at least;
>
> (3) Sundry matters . . . capable of such instant and unquestionable demonstration . . . that no party would think of imposing a falsity on the tribunal in

> the face of an intelligent adversary.

Moses, 102 Hawai‘i at 455, 77 P.3d at 946 (quoting 9 John Henry Wigmore, Evidence in Trials at Common Law § 2571, at 732 (Chadbourn rev. 1981)).

Although the circuit court's statement that "domestic abuse situations are often explosive, potentially violent and potentially irrational" may echo a generally accepted proposition, it is not the kind of information appropriate for judicial notice. Such a statement is subject to dispute by the defendant through cross-examination and introduction of evidence. In other words, the matter is not so notorious that all production of evidence is unnecessary so as to warrant judicial notice. Thus, FOF No. 29 was clearly erroneous; nevertheless, the error was harmless, because FOF No. 29 has no bearing upon the resolution of the issues on appeal.

IV. CONCLUSION

Accordingly, the circuit court's October 28, 1999 judgment is vacated, and this case is remanded for further proceedings.

DATED: Honolulu, Hawai'i, March 24, 2004.

I concur in the result.

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