OPINION OF ACOBA, J., CONCURRING IN PART AND DISSENTING IN PART, WITH WHOM RAMIL, J., JOINS

I concur in the result reached, but must disagree with the totality of circumstances formulation seemingly adopted in this case. The facts of this case call for a straightforward application of fundamental precepts established in Miranda v. Arizona, 384 U.S. 436 (1966), and certain of its progeny. Basic Miranda-related propositions bear recounting (1) to demonstrate their applicability to this case, (2) to elucidate the perplexity that may result from reformulating them, and (3) to highlight the harm that would be caused by their misapplication.

I.

Miranda extends the constitutional privilege against self-incrimination to out-of-court statements obtained from an individual during custodial interrogation. See id. at 461 (holding that the privilege against self-incrimination protects individuals from "informal compulsion exerted by law-enforcement officers during in-custody questioning"). That decision defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his [or her] freedom of action in any significant way." Id. at 444. Hawai‘i has adopted this definition of custodial interrogation. See State v. Melemai, 64 Haw. 479, 481, 643 P.2d 541, 543 (1982); State v. Sugimoto, 62 Haw. 259, 264-65, 614 P.2d 386, 391 (1980); State v. Amorin, 61

Haw. 356, 360, 604 P.2d 45, 48 (1979); State v. Kalai, 56 Haw. 366, 368, 537 P.2d 8, 11 (1975). Interrogation has been described as express questioning or its functional equivalent. See Arizona v. Mauro, 481 U.S. 520, 526-27 (1987). "Functional equivalent" means "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980). An incriminating response is "any response -- whether inculpatory or exculpatory -- that the *prosecution* may seek to introduce at trial." Id. at 301 n.5 (emphasis in original). The response protected must be testimonial in nature. A testimonial response is a "communication [that], explicitly or implicitly, relate[s] a factual assertion or disclose[s] information[,]" Pennsylvania v. Muniz, 496 U.S. 582, 594 (1990) (quoting Doe v. United States, 487 U.S. 201, 210 (1988)), and includes "both verbal and nonverbal conduct[,]" id. at 595 n.9 (citations omitted).

Accordingly, in my view, the appropriate framework in which Miranda issues should be resolved is whether (1) after having been either (a) taken into custody or (b) deprived of freedom of action in a significant way by the police, see 384 U.S. at 444, (2) the individual was subjected to (a) express questioning or conduct or action that (b) the police knew or

should have known would lead to an incriminating response, see Innis, 446 U.S. at 300-02,[1] that (3) is testimonial in nature, see Muniz, 496 U.S. at 600. This framework rests on our long-held view that "the protections which the United States Supreme Court enumerated in *Miranda* have an independent source in the Hawaii Constitution's privilege against self-incrimination," State v. Santiago, 53 Haw. 254, 266, 492 P.2d 657, 664 (1971), in article I, section 10 of the Hawai‘i Constitution,[2] and that, in its application, we have "consistently provided criminal defendants with greater protection under Hawaii's version of the privilege against self-incrimination . . . than is otherwise ensured by the federal courts under *Miranda* and its progeny," State v. Valera, 74 Haw. 424, 433, 848 P.2d 376, 380 (1993) (citations omitted). Also relevant to this case is the so-called "booking" exception to Miranda. However, this exception to the Miranda requirements does not apply if a booking question would elicit an incriminating response. See Muniz, 496 U.S. at 602 n.14 (stating that "the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions").

[1] I agree that the ultimate interrogation issue is whether the police know or should know that any express questioning or the functional equivalent thereof would have elicited an incriminating response under the circumstances.

[2] Article 1, section 10 of the Hawai‘i Constitution states in pertinent part that no person "shall . . . be compelled in any criminal case to be a witness against oneself."

II.

Proceeding from the foregoing framework, this case may be directly resolved.

A.

The police executed a search warrant for drugs at a Fort Weaver Road residence. In this context, a search warrant for drugs would only issue on probable cause to believe drugs would be found on the premises at the time the warrant was executed. See Hawai‘i Rules of Penal Procedure (HRPP) Rule 41(a); Hawai‘i Revised Statutes (HRS) § 803-31 (Supp. 2000); State v. Scott, 87 Hawai‘i 80, 85, 951 P.2d 1243, 1248 (1998) (explaining that HRPP Rule 41 requires that search warrants be supported "by probable cause to believe that the person or property is on the premises" to be searched). The parties and the court do not contend otherwise.

According to Detective Robert Towne, during the execution of the warrant, none of the persons found on the premises were permitted to leave and were considered, in his words, "suspects," because the discovery of any illicit drugs on the premises would subject them to criminal liability for constructive possession of drugs. Officer Alan Masaki, who first "secured" Defendant-Appellee Burt T. Ketchum, did not permit him to leave and asked for Ketchum's address, which Ketchum confirmed

was the residence searched. At this point, Ketchum obviously was deprived of his freedom in a significant way and had been subject to express questioning: Officer Masaki knew (or at that point should have known) that his question was likely to elicit an incriminating response, and Ketchum's disclosure of his address provided "information," and thus was testimonial in nature.

Detective Towne ordered an unnamed officer to conduct "field booking" of Ketchum at the premises, apparently a process in which Ketchum's address was obtained and recorded on a preprinted booking form. At the point where Ketchum was apparently again questioned about his address, he was handcuffed and plainly in custody. Detective Towne agreed that, at that point, Ketchum was in "custody." Ketchum's custody status for the purposes of Miranda did not change thereafter. Detective Towne conceded, and the field booking officer should have known, that express questioning concerning Ketchum's address would elicit an incriminating statement.

Officer Michael Kaya obtained the field booking sheet and transported Ketchum to the police station for formal booking because he was under "arrest." At the police station, Detective Renold Itomura, through the constitutional rights form, confirmed that Ketchum was in "custody." Detective Itomura gave Ketchum the Miranda warnings. Although Ketchum indicated he did not want to relate "what happened," the detective requested that Defendant

write his address on the form. While this request was not an express question, it was the functional equivalent of interrogation, that is, "words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response[,]" Innis, 446 U.S. at 301, and Defendant's response, although nonverbal, was of a testimonial character. Because Ketchum declined to comment further, interrogation (including its functional equivalent aspect) should have been terminated by Itomura. Itomura was aware of the incriminating nature of Ketchum's written responses.

B.

Although Plaintiff-Appellant State of Hawai'i (the prosecution) contends that the address request fell within the "booking exception" to Miranda, i.e., that such a request usually would not be considered interrogation, that exception does not apply if the officer knew or should have known the booking question would elicit an incriminating response.[3] As the Supreme Court said in Muniz,

[3] Miranda principles are not curbs on police investigations. They relate only to matters that the prosecution later seeks to introduce at trial, matters that may be provable through sources and by evidence other than communications compelled under inherently coercive circumstances. The police are forewarned as to when such warnings are required, inasmuch as warnings are necessary only if the police know or should know that the response they seek will be incriminating. Thus, whether the police choose to give Miranda warnings in any situation is something only they can determine in light of their assessment of the case.

> [a]s amicus United States explains, "recognizing a 'booking exception' to Miranda does not mean, of course, that any question asked during the booking process falls within that exception. Without obtaining a waiver of the suspect's Miranda rights, the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions." Brief for United States as Amicus Curiae 13. See, e.g., United States v. Avery, 717 F.2d 1020, 1024-1025 (6th Cir. 1983); United States v. Mata-Abundiz, 717 F.2d 1277, 1280 (9th Cir. 1983); United States v. Glen-Archila, 677 F.2d 809, 816, n.18 (11th Cir. 1982).

496 U.S. at 601 n.14; see also Avery, 717 F.2d at 1025 ("Even a relatively innocuous series of questions may, in light of the factual circumstances and the susceptibility of a particular suspect, be reasonably likely to elicit an incriminating response."); Mata-Abundiz, 717 F.2d at 1280 ("[The] exception for routine booking procedures . . . arises because background questions rarely elicit an incriminating response. If, however, the questions are reasonably likely to elicit an incriminating response in a particular situation, the exception does not apply."). Even in our jurisdiction, the booking question has been acknowledged as a generally accepted exception to Miranda. See, e.g., Amorin, 61 Haw. at 359 n.4, 604 P.2d at 48 n.4 ("Additional exceptions to the *Miranda* rule, not relevant here, have been recognized by courts in other jurisdictions. These exceptions include . . . statements made in response to police questioning seeking basic booking information[.]" (Citations omitted.)). The booking exception is widely-accepted, long-established, and serves as a useful, shorthand analytical tool. With the established qualification on its scope set forth in

Muniz, I see no reason for its absorption into a "totality of the circumstances" test.

Whereas the address booking question in this case was one that the police knew or should have known would elicit an incriminating response, the booking question exception would not apply. See Muniz, 496 U.S. at 602 n.14 ("[R]ecognizing a 'booking exception' to Miranda does not mean, of course, that any question asked during the booking process falls within that exception.") Therefore, Ketchum having been (1) initially deprived of freedom of action in a significant way, (2) subsequently taken into custody, and (3) subjected to interrogation via express questions or a functional equivalent thereof which (4) the police knew or should have known would elicit an incriminating response, the (5) absence of constitutional warnings pertinent to self-incrimination (6) require that his verbal and nonverbal responses to the questions be suppressed. In conclusion, this case should be decided within the settled legal framework set forth above.

III.

The deprivation of freedom of action aspect of Miranda was implicated, but not directly addressed, in State v. Ah Loo, 94 Hawai'i 207, 210, 212, 10 P.3d 728, 731, 733 (2000). In that case, this court determined that "seizure" and "custody" are

"[not] synonymous" and the so-called investigative detention of Ah Loo was not "custodial" in the Miranda sense. Although acknowledging that "two criteria" governed, i.e., that "(1) the defendant must be under interrogation; and (2) the defendant must be in custody", the "dispositive issue" was framed as "whether 'interrogation' is 'custodial,'" a question to be determined by "look[ing] to the totality of the circumstances[.]" Id. at 210, 10 P.3d 731. It was said then, that "an individual may very well be 'seized' . . . 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[.]" Id. at 211, 10 P.3d at 732 (citation omitted) (emphasis added).

While I joined in Ah Loo because a seizure does not necessarily mean a person is "in custody," Miranda is not limited to instances where a person "is taken into custody" as recited supra, but also extends to instances in which "a person . . . has been . . . otherwise deprived of his [or her] freedom of action in any significant way." 384 U.S. at 444. "Taking a person into custody," then, may be distinguished from "depriv[ation] of freedom of action in any significant way," and as its text suggests, the latter describes restraint that is of a lesser qualitative degree than that involved in "taking [someone] into custody." Id. Accordingly, the coercive environment identified

in Miranda is present not only when a person is taken into custody, but also in the deprivation of freedom described in Miranda that is short of physically taking an individual into custody.

A purported "seizure" then that deprives a person of his or her freedom of action in any significant way satisfies the first Miranda precondition in the same way as taking a person into custody. See United States v. Salvo, 133 F.3d 943, 949 (6th Cir. 1998) ("[T]he very cursory and limited nature of a Terry [v. Ohio, 342 U.S. 1 (1968) investigative detention] stop, [in which] a suspect . . . is not entitled to full custody Miranda rights . . . does not equate to . . . detentions of a more lengthy, substantive nature."). In that regard, the terms "seizure," "investigative encounter," and "investigative detentions" do not substantially advance analysis under Miranda. They are essentially conclusions embodying the belief that the person concerned was not in custody or deprived of freedom of action in a significant way.

IV.

Thus, in applying the principles embodied in Miranda, we have examined whether the defendant was deprived of his or her freedom of action in any significant way. In State v. Russo, 67 Haw. 126, 681 P.2d 553 (1984), this court decided that police

should have advised the defendant of his Miranda rights. See id. at 134-35, 681 P.2d at 560. The police had determined that Russo was associated with a car seen at the scene of a shooting. See id. The defendant had allowed the police who were investigating the incident to enter his apartment. See id. It was held that Russo's "freedom of action definitely was restricted" despite the fact that he "was in a familiar environment of his own habitat" and that "an arrest is hardly a 'condition precedent' to custodial interrogation." Id. at 133, 136, 681 P.2d at 560, 561. This court reasoned that "[s]ince Russo could not have had a reasonable belief that he was 'free to go,' [it could] only conclude he had then been 'deprived of his freedom of action in . . . [a] significant way.'" Id. at 136, 681 P.2d at 561 (quoting Miranda, 384 U.S. at 444). Russo's statement was ordered suppressed because the police failed to read him his Miranda warnings "when they learned from [him] that he had purchased a .38 caliber revolver and that it was in the [suspect] vehicle." Id. at 136 n.7, 681 P.2d at 561 n.7.

Similarly, in the instant case, it cannot be reasonably disputed that from the moment the police entered Ketchum's bedroom and told him he could not leave, Ketchum could not have had a reasonable belief that he was "free to go" and, thus, was deprived of his freedom of action in a significant way. Because the deprivation of freedom standard gives lucid and

comprehensible guidance to individuals, the police, counsel, and our trial courts, there is nothing to be gained, in applying Miranda principles, from absorbing it into a unified "custody" test that eliminates the distinction between being taken into custody and being deprived of freedom of action in any significant way.

Hence, I do not agree that the question of whether Ketchum was "taken into custody" by Officer Masaki "is admittedly a difficult one." Majority opinion at 35. Rather, that Ketchum had been significantly deprived of his freedom of action by Officer Masaki would appear self-evident, for, coupled with Masaki's actions, the police expressly confirmed that all persons present on the premises at the time of the search warrant's execution were not free to leave and were suspects in the crime of drug possession. Thus, resort to a totality of circumstances test beyond this point is unnecessary and only invites confusion, not clarity, in applying Miranda.

V.

Although in any particular case, the circumstances as they relate to a particular aspect of the Miranda rule may be relevant, in the sense that the factual context must be consulted to resolve any ambiguity as to whether a coercive setting exists, a formulaic totality of the circumstances approach is not called

for in every case, and, therefore, should not be incorporated into a governing test. Thus, a totality of circumstances approach that involves inter alia whether (1) the police "questions were so sustained or coercive[4] as, in and of themselves, [to] impliedly . . . accuse Ketchum," majority opinion at 35, (plainly, that was not the case here); (2) "probable cause" was present (the point in time at which this was reached is not established)[5] (3) there was a "show of force and authority far exceeding that which inhered in the officers' mere presence," majority opinion at 37, (the conduct of police was not claimed to be disproportionate to the execution of a search warrant); and (4) the situation had reached "the point of . . . arrest," majority opinion at 37, (the deprivation of freedom of action in a significant way preceded this), is

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[4] The seminal Hawai'i case that suggests that a person faces custodial interrogation when "the questioning has ceased to be brief and casual and becomes sustained and coercive" is State v. Patterson, 59 Haw. 357, 363, 581 P.2d 752, 756 (1978). Patterson divined this standard from People v. Manis, 74 Cal. Rptr. 423 (Cal. Ct. App. 1969). The Manis court held that

> persons temporarily detained for brief questioning by police officers who lack probable cause to make an arrest or bring an accusation need not be warned about incrimination and their right to counsel, until such time as the point of arrest or accusation has been reached or the questioning has ceased to be brief and casual and become sustained and coercive.

Id. at 433. The Manis decision relied on Miranda to reach this conclusion and also referred in a footnote to a New York statute and the Uniform Arrest Act that explained that police may ask a suspect for general information such as his or her name, address, and "an explanation of his [or her] actions." Id. at 433 n.5. However, Miranda nowhere premises the alternative coercive settings it posits on sustained and coercive questioning.

[5] While probable cause was required to support the search warrant, probable cause to arrest Ketchum would constitute a separate matter.

extraneous to this case. The conclusion reached from the foregoing that custodial interrogation took place, majority opinion at 34, because, "given the totality of the circumstances . . . , an 'innocent person [in Ketchum's position] could [indeed, would] reasonably have believed that he [or she] was not free to go and that he [or she] was being taken into custody[,]" majority opinion at 37 (quoting Kraus v. County of Pierce, 793 F.2d 1105, 1109 (9th Cir. 1986)) (brackets in original), takes us no further in analytical span than the pronouncement in Miranda that its warnings apply if a person has been deprived of freedom in a significant way. I fear that the path chosen leads into a totality of circumstances thicket in which our discussion and analysis will cause confusion, but worse, in which the defined guidelines of Miranda will be lost.

VI.

As the Supreme Court has indicated, the Miranda doctrine was intended "to give concrete constitutional guidelines for law enforcement agencies and courts to follow." 384 U.S. at 441-42. Cf. Muniz, 496 U.S. at 610 ("The far better course would be to maintain the clarity of the doctrine by requiring police to preface all direct questioning of a suspect with Miranda warnings if they want his [or her] response to be admissible at trial." (Marshall, J., concurring in part and dissenting in part)). With

all due respect, I find no help, and, in my view, individuals, the police, counsel, and the trial courts would not be aided by the substitution of a multi-headed test for "custody" dependent upon (1) the "questions of the police" (thus melding the independent precondition of interrogation in Miranda into the custody requirement) or (2) whether "the point of arrest" has arrived, majority opinion at 31, in place of the plain and understandable direction of Miranda that the warnings are triggered in its custody aspect when the individual is taken into custody or that person's freedom of action has been deprived to a significant extent.

VII.

Moreover, in its formulation, the holding in the instant case adopts a "custody" test that imposes significant limitations on the protections afforded by Miranda. See majority opinion at 33. As to its first prong, an "implied[] accus[ation]" because of "sustained and coercive" questioning,[6] majority opinion at 33, is nowhere set forth in Miranda as a basis for inferring custody, and, like the second prong, adds not only a further layer of inquiry to a doctrine intended to

[6] See also supra note 1.

simplify the administration of police-obtained statements,[7] but elevates the showing necessary for Miranda warnings to be given. See Miranda, 384 U.S. at 441 ("We granted certiorari in these cases . . . in order to . . . give concrete constitutional guidelines for law enforcement agencies and courts to follow.").

Nor is the second prong of "point of arrest" explicative of the Miranda preconditions for establishing a coercive setting. As to the subcategories of this prong, "probable cause to arrest" may exist in certain situations, but it is not a Miranda precondition and in reality raises the threshold for mandatory warnings, inasmuch as being taken into custody or deprived of freedom of action would otherwise suffice to invoke Miranda. As to the second subcategory, the presence of an unlawful "de facto" arrest begs the question; if the circumstances are sufficient to establish what is in fact an arrest, then the individual has either been "taken into custody" or otherwise deprived of freedom of action in a significant way under the existing Miranda precepts.

[7] Of course, insofar as questioning is relevant in the Miranda context, even a single question suffices to invoke the Miranda strictures if the officer knew or should have known that an incriminating statement would be elicited, see Innis, 446 U.S. at 301, as we hold here.

VIII.

For the foregoing reasons, I concur in the result in this case but not in the methodology by which it is reached or in the test that ostensibly emerges.