*** FOR PUBLICATION ***

DISSENTING OPINION BY NAKAYAMA, J.,
WITH WHOM MOON, C.J., JOINS

I respectfully dissent. I believe that the application for writ of certiorari filed by Petitioner-Appellee Harvey Ababa (Ababa) should be dismissed as improvidently granted, inasmuch as (1) the Intermediate Court of Appeals (ICA) did not gravely err in concluding that the circuit court's finding of fact that Ababa did not request an attorney, which was unchallenged and supported by the record on appeal, obligated the ICA to hold that Hawai'i Revised Statutes (HRS) § 803-9(2) (1993)[1] was not triggered, and (2) even assuming that Ababa's equivocal response constituted a request triggering HRS § 803-9(2), the ICA did not gravely err because there was no demonstrated connection between the alleged statutory violation and statements made by Ababa after he waived his constitutional right against self-incrimination[2] pursuant to

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[1] HRS § 803-9(2) provides in relevant part:

> It shall be unlawful in any case of arrest for examination:
> . . . .
> (2) To unreasonably refuse or fail to make a reasonable effort, where the arrested person so requests and prepays the cost of the message, to send a telephone, cable, or wireless message through a police officer or another than the arrested person to the counsel or member of the arrested person's family[.]

[2] As the ICA properly held, Ababa's right to counsel pursuant to the sixth amendment of the United States Constitution and article I, § 14 of the Hawai'i Constitution was not violated, as this right does not attach until the initiation of adversarial judicial criminal proceedings, which had not been initiated when Ababa made the statements sought to be suppressed. See State v. Ababa, No. 24127, slip. op. at 31 (Haw. Ct. App. Nov. 29, 2002). The right to counsel at issue in this appeal derives from the right against self-incrimination pursuant to the fifth amendment of the United States Constitution and article I, § 10 of the Hawai'i Constitution, which requires that prior to custodial interrogation, the arrested person be informed of, inter alia, the right to remain silent and the right to the presence of an attorney, whether retained or appointed. See State v. Hoey, 77 Hawai'i 17, 32-33, 881 P.2d 504, 519-20 (1994). Thus, the terms "right against self-incrimination" and "right to counsel" are utilized interchangeably as referring to the right pursuant to the fifth amendment and article I, § 10.

the fifth amendment of the United States Constitution[3] and article I, § 10 of the Hawai‘i Constitution.[4]

I. The ICA did not gravely err because the finding that Ababa did not request an attorney, unchallenged and supported by the record on appeal, obligated the ICA to hold that HRS § 803-9(2) was not triggered.

Pursuant to HRS § 803-9(2), when an arrested person requests that a police officer send a message to an attorney, the police officer is obligated to make a reasonable effort "to send a telephone, cable, or wireless message" to an attorney. HRS § 803-9(2). One of the legislature's purposes for imposing such an obligation was to facilitate attorney-client communication while in custody. See Hse. Stand. Comm. Rep. No. 324, in 1941 House Journal, at 1249. This obligation, however, is not unlimited. It is triggered only when the arrested person makes a request, and thus, it is imperative that this request be clear and unequivocal.

In this case, Ababa's assertion that he would rather

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[3] The fifth amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for use without just compensation.

[4] Article I, § 10 of the Hawai‘i Constitution provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury or upon a finding of probable cause after a preliminary hearing held as provided by law, except in cases arising in the armed forces when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy; nor shall any person be compelled in any criminal case to be a witness against oneself.

talk to an attorney, in response to Honolulu Police Department (HPD) Detective Mark Wiese (Detective Wiese) setting forth Ababa's alternatives (i.e. that he could either talk to Detective Wiese or talk to an attorney, thereby requiring the interrogation to cease), was equivocal at best. Based on the record, a reasonable trier-of-fact could find that when Ababa stated that he would rather talk to an attorney, he was not only asserting his right against self-incrimination but was also asking Detective Wiese to actually call an attorney for him. On the other hand, the record also reasonably supports a conclusion that Detective Wiese believed Ababa's response to mean simply that he was asserting his right against self-incrimination, and thus, opting for the alternative that required the cessation of interrogation. This is reasonable, inasmuch as the response was equivocal and a phone was readily available for Ababa to use to contact an attorney on his own.

Even though Ababa's equivocal response could possibly be interpreted either way, in finding of fact no. 8, the circuit court ruled that "Mr. Ababa did not make any request to call an attorney. He did not know any attorney." The majority sees the latter statement as a qualifying statement and points to, inter alia, the finding that Ababa invoked his constitutional right, as indicating that the circuit court did not really mean that Ababa did not make a request. I agree that the circuit court's order is not a picture of clarity. However, Ababa's knowledge regarding the identity of a specific attorney does not affect the absence of an actual request to contact an attorney, as a general request for a public defender could have been made. In addition, Ababa's assertion of his constitutional right against self-

incrimination is independent of whether Ababa actually requested that Detective Wiese contact an attorney for him.

As the circuit court ruled in finding of fact no. 8, Ababa did not make a request for an attorney, and because this finding was not challenged on appeal, it stands. Even if Ababa had challenged this finding on appeal, it is not clearly erroneous because the record does not lack substantial evidence that Ababa failed to make a request. It is undisputed that Ababa did not ever specifically ask Detective Wiese to call an attorney for him. As the circuit court's finding was unchallenged and supported by the record, this court should adhere to the finding that Ababa did not request an attorney pursuant to HRS § 803-9(2). As there was no request, the ICA did not gravely err in holding that HRS § 803-9(2) was not triggered.

II. The ICA did not gravely err because there was no demonstrated connection between the alleged statutory violation and statements made by Ababa after he waived his constitutional right against self-incrimination.

The conclusion that a statutory violation has occurred does not lead inexorably to a ruling suppressing the evidence sought to be admitted. State v. Pattioay, 78 Hawai'i 455, 466, 896 P.2d 911, 922 (1995). Thus, a violation of HRS § 803-9 does not require suppression unless the arrested person can demonstrate "a connection between the alleged statutory violations and the evidence to be suppressed." State v. Edwards, 96 Hawai'i 224, 239-40, 30 P.3d 238, 253-54 (2001).

In this case, Ababa seeks to suppress statements made to HPD detectives after he waived his right against self-incrimination. Ababa, however, fails to demonstrate a sufficient connection between the statutory violation (i.e. the failure of

HPD detectives to make reasonable efforts to contact an attorney) and the evidence to be suppressed (i.e. Ababa's statements made after his voluntary, intelligent, and knowing waiver of his right against self-incrimination). The only evidence offered of a connection was Ababa's statement that he waived his right because he felt that he was not going to be provided with an attorney. A review of the record, however, reveals the questionable nature of this statement. Not once during the three hour time period between invoking his right against self-incrimination and waiving this right did Ababa inquire about his alleged request for an attorney or the delay in obtaining an attorney. At no time did Ababa say he was giving up his right because he felt an attorney would not be provided. The finding that "Ababa exclaimed, 'Fuck the lawyer,' because an attorney had not yet come to the station" evidences at most Ababa's change of heart and not his belief that an attorney would not be provided. As such, I do not believe that a sufficient connection has been demonstrated.

Even assuming that Ababa initially felt that an attorney would not be provided, it is significant that he was the one to initiate further discussion with HPD detectives and to assert that he would be waiving his right to counsel. It is also significant that, upon initiating the subsequent discussion with HPD detectives, Ababa was told, inter alia, that an attorney would be provided for him if he was unable to afford one, as evidenced via an HPD Form 81. Ababa then voluntarily, intelligently, and knowingly, and not in reliance on the belief that an attorney would not be provided, waived his constitutional right against self-incrimination. Because there was no demonstrated connection between the alleged violation of HRS §

803-9(2) and Ababa's statements made after his voluntary, intelligent, and knowing waiver of his right against self-incrimination, suppression was not warranted. Based on the foregoing, I believe that the ICA did not gravely err and would dismiss the application for writ of certiorari as improvidently granted. Accordingly, I dissent.