CONCURRING AND DISSENTING OPINION BY FUJISE, J.

As I believe the facts as found by the circuit court did not support its conclusion that Lorna Alvarez was in custody, requiring *Miranda*[1] warnings before she answered the initial questions posed to her by Sergeant Evangelista, I must respectfully dissent. However, as I agree his subsequent warning that she would be arrested for hindering prosecution should a warrant be obtained and Dion found by the police, was coercive, I concur with the majority that her subsequent response was properly suppressed.

The facts, as taken from the circuit court's findings of fact, are these: On January 3, 2002, Sergeant Jeremy Evangelista (Sergeant Evangelista) went to Defendant-Appellee Lorna Alvarez's (Alvarez) residence and told her that her son Dion Alvarez (Dion) was wanted for a recently committed felony and that it was best if he turned himself in to police.

On January 16, 2002, Sergeant Evangelista received information placing Dion in Alvarez's home. That same day, Sergeant Evangelista gathered six other officers to seek Dion at Alvarez's home. The officers had no warrant, were armed, and surrounded Alvarez's home. All officers were either in uniform or clearly identified as police.

Two officers approached the house. They heard voices, indicating people were in the home. Officer Joseph Feliciano

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

(Officer Feliciano) heard "a female voice say, 'Ya Dion' and laughter in a conversational tone" as he approached the porch.

Officer Feliciano and another uniformed officer knocked on Alvarez's door. "The door was opened and eventually contact was made" with Alvarez, "who appeared to be nervous." Officer Feliciano "asked" Alvarez if Dion was there, and she replied, "No, he [is] not here, rumors were he was in Puna." Alvarez denied Officer Feliciano's "request[] for permission" to enter the home. Officer Feliciano then withdrew to report to Sergeant Evangelista.

Sergeant Evangelista, after conferring with Officer Feliciano, suspected Alvarez was harboring Dion. While another officer waited on the steps leading to the porch and Officer Feliciano remained in front of the porch area, Sergeant Evangelista knocked on the door; Alvarez answered. He "requested" that Alvarez come out of the house and onto the front porch; she "complied." While they were on the porch, Sergeant Evangelista "again questioned" Alvarez about Dion and "during the questioning" Alvarez said, "No, you can't come into my house. He's not here. He's in Puna." Alvarez also denied Sergeant Evangelista's request to search the house. Sergeant Evangelista subsequently told Alvarez "that if he had to seek a search warrant and [Dion] was found in [Alvarez's] home, [Alvarez] could be arrested for Hindering Prosecution." To this she replied,

"well, go do that then." Sergeant Evangelista, upon conferring with his superiors, left to seek a search warrant.

In ruling on Alvarez's Motion to Suppress Statements, the circuit court concluded that Officer Feliciano's questions did not require "Miranda Rights"[2] and so did not suppress the statements made to him. The court did, however, suppress the above-described statements made to Sergeant Evangelista.

On appeal, the State of Hawai'i challenges only the circuit court's sixth conclusion of law:

> Given the totality of the circumstances including the police officer's behavior and knowledge, [SERGEANT] EVANGELISTA'S questioning became expressly and/or implicitly accusatory and his questions were sustained and coercive, therefore requiring Miranda warnings to have been given to DEFENDANT. State v. Ah Loo, 94 Hawai[']i, 207 at 212; State v. Ketchum, 97 Hawai[']i 107, 34 P.3d 1006 and State v. Kaleohano, 99 Hawai[']i 370, 56 P.3d. 138 (2002).

(Bracketed material added.) Conclusions of law are reviewed *de novo* on appeal. State v. Ah Loo, 94 Hawai'i 207, 209, 10 P.3d 728, 730 (2000).

It was Alvarez's burden to establish that her statements were the result of "interrogation" conducted while she was "in custody." State v. Ketchum, 97 Hawai'i 107, 118, 34 P.3d 1006, 1017 (2001). Assuming, for the purposes of this case, that Alvarez was interrogated,[3] our review narrows to whether she was

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[2] The court concluded, "OFFICER FELICIANO's questioning was reasonably designed to confirm or dispel as briefly as possible and without any coercive connotations his suspicions of criminal activity and therefore Miranda Rights were not required; State v. Ah Loo, 94 Hawai[']i 207, 10 P.3d 728 (2000)."

[3] The circuit court did not specifically rule that Alvarez was interrogated.

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in custody at the time Sergeant Evangelista's questions were posed.

The underlying reason for requiring Miranda warnings when a person is "in custody" is the "coercive element of a custodial setting." United States v. Warner, 971 F.2d 1189, 1201 n.2 (6th Cir. 1992). While it is true that "custody" is not limited to a formal arrest, but includes the situation where a person has been "deprived of his [or her] freedom of action in a significant way," Miranda v. Arizona, 384 U.S. 436, 444 (1966), "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[4] Warner, 971 F.2d at 1201.

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[3](...continued)

> Generally speaking, "'interrogation,' as used in a *Miranda* context, [means] 'express questioning or its functional equivalent.'" However, whether a police officer has subjected a person to "interrogation" is determined by objectively assessing the "totality of the circumstances." With a focus upon the conduct of the police, the nature of the questions asked, and any other relevant circumstances, the ultimate question becomes "whether the police officer should have known that his [or her] words or actions were reasonably likely to elicit an incriminating response" from the person in custody.

State v. Ketchum, 97 Hawai'i 107, 119, 34 P.3d 1006, 1018 (2001) (citations omitted; brackets in original). As Alvarez was being questioned about the whereabouts of her son and not about her own activities, it is doubtful that the questions posed by Officer Feliciano and, at least initially, by Sergeant Evangelista, qualified.

[4] The United States Supreme Court has noted that where the suspect is not in custody for Miranda purposes, "special circumstances" may merit further analysis to determine whether the confession is voluntary:

> We recognize, of course, that noncustodial interrogation might possibly in some situations, by virtue of some special circumstances, be characterized as one where "the behavior of . . . law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined . . . ." Rogers v. Richmond, 365 U.S. 534, 544, 81 S.Ct. 735, 741, 5 L.Ed.2d 760, 768 (1961). When such a claim is raised, it is the duty of an appellate court, including this

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The Hawai'i Supreme Court has long adhered to a similar formulation in discussing the parameters of custody for purposes of the Miranda rule:

> "Such[5] a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.'. . . *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited." *Oregon v. Mathiason*, [429] U.S. [492], 97 S.Ct. 711, 714 (1977).

Doe v. Chang, 58 Haw. 94, 97, 564 P.2d 1271, 1274 (1977) (emphasis in original; footnote added). Hawai'i courts use a "totality of the circumstances" test in determining whether a person was in custody such that Miranda warnings were required before police interrogation could properly commence. Ketchum, 97

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[4](...continued)
Court, "to examine the entire record and make an independent determination of the ultimate issue of voluntariness." Davis v. North Carolina, 384 U.S. 737, 741-742, 86 S.Ct. 1761, 1764, 16 L.Ed.2d 895, 898 (1966). Proof that some kind of warnings were given or that none were given would be relevant evidence only on the issue of whether the questioning was in fact coercive. Frazier v. Cupp, 394 U.S. 731, 739, 89 S.Ct. 1420, 1424, 22 L.Ed.2d 684, 693 (1969); Davis v. North Carolina, supra, 384 U.S. at 740-741, 86 S.Ct. at 1763-64, 16 L.Ed.2d at 897-98.

Beckwith v. United States, 425 U.S. 341, 347-48 (1976)

[5] In Doe v. Chang, Plaintiffs challenged the State's procedures for investigating welfare fraud, on grounds that they were improperly promulgated and also did not require that those suspected of fraud be given Miranda warnings before state personnel conducted their "investigatory interviews." The Hawai'i Supreme Court noted,

> Plaintiffs have not alleged any deprivation of their freedom of action in connection with the investigatory interrogations complained of here, other than the constraint imposed by their assumption that cooperation with the questioners was a condition of continued welfare benefits, nor have they alleged that they were informed that failure to provide such cooperation would result in any disadvantage to them.

Doe v. Chang, 58 Haw. 94, 97, 564 P.2d 1271, 1273-74 (1977).

Hawai'i 117 n.19, 34 P.3d 1016 n.19 and cases cited therein.

The relevant circumstances include "the place and time of the interrogation, the length of the interrogation, the nature of the questions asked, the conduct of the police, and all other relevant circumstances." State v. Melemai, 64 Haw. 479, 481, 643 P.2d 541, 544 (1982). See also Ketchum, 97 Hawai'i at 122, 34 P.3d at 1021. "[W]hether the investigation has focused on the suspect and whether the police have probable cause to arrest him [or her] prior to questioning" are also significant, but not determinative. Melemai, 64 Haw. at 481, 643 P.2d at 544, citing State v. Patterson, 59 Haw. 357, 361, 581 P.2d 752, 755 (1978).[6]

Although each case turns on its own facts and circumstances, the facts underlying the Patterson case are instructive. There, police were called at 3:00 a.m. to

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[6] The Court of Appeals of Alaska analyzes the facts in a custody determination this way:

> A determination of custody for *Miranda* purposes is an objective test: would a reasonable person believe he or she was not free to leave or break off questioning. *Hunter v. State*, 590 P.2d 888, 895 (Alaska 1979). The trial court must consider three groups of facts to answer the question. The first are facts inherent to the interrogation: the location and length of the interview, who was present, what the police and the defendant said and did, the presence of any physical restraint on the defendant or things equivalent to actual restraint (i.e., drawn weapons, a guard at the door), and whether the defendant was led to believe that he or she was being questioned as a suspect or as a witness. Events preceding the questioning are also relevant, especially how the defendant arrived at the interview site--whether he came on his own, in response to an officer's request, or escorted by police officers. Finally, what happened after the questioning is considered; whether the defendant left freely, was detained or arrested. Id. We review the evidence in the light most favorable to upholding the superior court's decision. *Beagel v. State*, 813 P.2d 699, 704 (Alaska App.1991).

Aningayou v. State, 949 P.2d 963, 967 (Alaska App. 1997).

investigate a burglary in progress. The first officer on the scene stopped his vehicle behind an automobile parked just outside the carport of the residence in question. As the officer arrived, Patterson approached him. Recognizing Patterson,

> [t]he officer immediately asked the defendant what he was doing there but received no answer. The officer next asked whether he lived there and whether he had permission to be there and the defendant answered both questions in the negative. The officer then asked about the ownership of the vehicle in the driveway and the defendant said it belonged to a friend. At that point Sgt. Kenneth Uyeda, who had been looking around, called Officer Pereira's attention to a woman's purse lying on the front seat of the vehicle. In this connection Officer Pereira testified:
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> > "I observed, also, the numerous farm tools, inside of the car--in the rear seat and in the trunk area of the car. Which I asked the defendant, if these things had belonged to him, being that it was in his friend's vehicle. And he told me, 'no.'"
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> That was the extent of the police interrogation, and it was at that point that Officer Pereira placed the defendant under arrest "for examination burglary."

Patterson, 59 Haw. at 358, 581 P.2d at 753.

As in Doe, the Patterson court made quite clear that the mere fact coercive aspects may be present in the environment in which the questioning takes place, does not turn a noncustodial situation into custody for Miranda purposes. Patterson, 59 Haw. at 360, 581 P.2d at 754, quoting with approval Oregon v. Mathiason, 429 U.S. 492, 495 (1977)(questioning at the stationhouse) and Doe v. Chang, 58 Haw. 94, 564 P.2d 1271 (1977).

Noting that "focus" of the investigation is an important but not determinative factor, the court looked at the lack of information confirming that Patterson was the burglar and the need for the police to make an on the spot decision as to how

to proceed, and concluded that the temporary "detention," coupled with a "minimum amount of questioning," was necessary under the circumstances. The facts, in the court's view, did not constitute "coercive circumstances":

> No guns were drawn and kept upon the defendant. Neither was he confronted and subjected to an overbearing show of force. After greeting the defendant with a "Hi, Jay," Officer Pereira made his inquiries while the other two officers were looking about the premises. The interview itself was brief. What he was doing on the premises (to which the defendant made no response); whether he lived there, whether he had permission to be there; to whom the Chevrolet automobile in the driveway belonged; and whether the tools in his friend's car belonged to him, were the only questions asked of the defendant. The questions were not couched in accusatory terms. These were factfinding inquiries designed to clarify the situation rather than to confirm information which the police already had in their possession or to coerce the defendant into making statements of an incriminatory nature. The police at the time were without knowledge of tools having been taken from the premises, and no probing questions were asked as to where the tools had come from, or how they happened to be in his friend's car, or what the defendant's exact connections with the tools were. Officer Pereira's questioning was properly confined and limited to that which was minimally necessary for him to decide upon a reasonable course of investigatory action.[3/]
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> [3/] The defendant argues that when he admitted that he had no permission to be on the premises, the police then had probable cause to arrest him for the offense of trespass (a violation and not a crime in this case, see HRS §§ 701-198(5) and 708-815), thereby triggering the application of the Miranda rule. Under other factual circumstances, this contention might well have been entirely meritorious. The police, however, were directed to investigate and to confirm or deny a possible burglary report, and the defendant's presence on the premises without permission was only a threshold element of a possible burglary offense. Moreover, it was the fact of his admittedly unauthorized presence which confirmed the authority of the police to detain him for further limited questioning. The only questions asked thereafter concerned the ownership of the vehicle and whether the tools in his friend's car belonged to him.

Patterson, 59 Haw. at 363-64, 581 P.2d at 756 (footnote in original).

Here, the police were looking for Dion and received information that day that Dion was at Alvarez's residence. The

quality of the information is unknown[7] but could not have been strong. There were approximately seven officers on the property and as many as four in the vicinity of the exchange between Alvarez and Sergeant Evangelista. No guns were drawn, nor was any show of force made. As found by the court, two questions, whether Dion was in the home and whether the police could enter the home, were asked, first by Officer Feliciano, and again by Sergeant Evangelista.

These facts, in my view, do not support the conclusion that the initial questioning by Sergeant Evangelista constituted a restraint of liberty or, as concluded by the circuit court, was "sustained and coercive." There was no finding that Alvarez was physically seized. The circuit court found she was asked, and she complied with the request, to come out on her front porch to talk to the sergeant. The court did not indicate the tone used was forceful nor that the questions were phrased in terms of orders instead of requests. Although Sergeant Evangelista's exchange with Alvarez was essentially a repeat of Officer Feliciano's, both were individually so brief that even in their repetition, they cannot reasonably be taken as coercive.

Sergeant Evangelista's threat, "that if he had to seek a search warrant and [Dion] was found in [Alvarez's] home,

[7] The circuit court made no findings in this regard, but did specifically conclude that Sergeant Evangelista did not have probable cause to arrest Alvarez at the time he took her statements. This conclusion is not contested on appeal. Logic would dictate that this conclusion was based on the circuit court's determination that, whatever information the police had, including the voices and sounds heard as they approached the residence, it did not rise to the level of probable cause to believe Dion was in the residence.

[Alvarez] could be arrested for Hindering Prosecution," is another matter, however. By that point, Sergeant Evangelista had heard for himself that Alvarez was denying Dion's presence and their situation was at a stalemate, as Alvarez had refused the police entry into the home to look for themselves. His threat to arrest her if Dion was found in her home, it could reasonably be concluded, was coercive beyond that inherent in merely asking after the whereabouts of her son. I therefore agree that Alvarez's statement in response to this threat was properly suppressed under these circumstances.

Associate Judge