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SCRU-11-0000083

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

In the Matter of the
HAWAI‘I RULES OF PENAL PROCEDURE

ORDER AMENDING RULE 41 OF THE
HAWAI‘I RULES OF PENAL PROCEDURE

(By: Recktenwald, C.J., Nakayama, Acoba, Duffy, and McKenna, JJ.)

IT IS HEREBY ORDERED that Rule 41 of the Hawai‘i Rules of Penal Procedure, is amended, effective January 1, 2012, as follows (deleted material is bracketed and stricken; new material is underscored):

Rule 41. SEARCH AND SEIZURE.

(a) Authority to Issue Warrant. A search warrant [~~authorized by this rule~~] may be issued by any district or circuit judge (1) within the circuit wherein the property sought is located; or (2) within the circuit where the property is anticipated to be located. Application therefor should be made to a district judge wherever practicable.

(b) Property Which May Be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of an offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing an offense. The

term 'property' includes documents, books, papers, ~~and~~ any other tangible objects, ~~and information.~~

(c) Issuance and Contents. A warrant shall issue only on an affidavit or affidavits sworn to before the judge and establishing the grounds for issuing the warrant. If the judge is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, ~~he~~ the judge shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the judge may require the affiant to appear personally, and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a police officer or some other officer authorized to enforce or assist in enforcing any law of the State of Hawai'i or any political subdivision thereof. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall contain a prohibition against execution of the warrant between 10:00 p.m. and 6:00 a.m., unless the judge permits execution during those hours in writing on the warrant. A warrant may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing a warrant that authorizes the seizure of electronic storage media or the seizure or copying of electronically stored information refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review. † The warrant shall designate the judge to whom it shall be returned.

(d) Execution and Return With Inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge shall upon request cause to be delivered a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied.

(e) Motion ~~[for]~~ to return [of] property~~[and to suppress evidence]~~. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move the court having jurisdiction to try the offense for the return of the property~~[-or to suppress for use as evidence anything so obtained, or both]~~. The judge shall receive evidence on any issue of fact

necessary to the decision of the motion. If the motion is granted, the property shall be ~~[restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial]~~ returned unless otherwise subject to lawful detention, but the judge may impose reasonable conditions to protect access to the property and its use in later proceedings.

(f) Motion to Suppress. A person aggrieved by an unlawful search and seizure of property may move the court having jurisdiction to try the offense to suppress for use as evidence by the State anything unlawfully obtained. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall not be admissible in the State's evidence at any hearing or trial.

[(f)](g) Return of papers to clerk. The judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the court having jurisdiction of the case.

[(g)](h) Warrant issuance on oral statements. In lieu of the written affidavit required under section (c) of this rule, a sworn oral statement, in person or by telephone, may be received by the judge, which statement shall be recorded and transcribed, and such sworn oral statement shall be deemed to be an affidavit for the purposes of this rule. Alternatively to receipt by the judge of the sworn oral statement, such statement may be recorded by a court reporter who shall transcribe the same and certify his transcription. In either case, the recording and the transcribed statement shall be filed with the clerk.

[(h)](i) Duplicate warrants on oral authorization. The judge may orally authorize a police officer to sign the signature of the judge on a duplicate original warrant, which shall be deemed to be a valid search warrant for the purposes of this rule. The judge shall enter on the face of the original warrant the exact time of issuance and shall sign and file the original warrant and, upon its return, the duplicate original warrant with the clerk.

[(i)](j) Scope. This rule does not modify any statute or ordinance, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made.

DATED: Honolulu, Hawai'i, October 19, 2011.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Simeon R. Acoba, Jr.

/s/ James E. Duffy, Jr.

/s/ Sabrina S. McKenna

