IN THE SUPREME COURT OF THE STATE OF HAWAI'I

---o0o---

STATE OF HAWAI'I,
Respondent/Plaintiff-Appellee,

vs.

CHARLES TUNG MING YUEN,
Petitioner/Defendant-Appellant.

SCWC-21-0000679

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-21-0000679; CASE NO. 1DTA-18-03510)

AUGUST 20, 2024

DISSENTING OPINION BY RECKTENWALD, C.J.,
IN WHICH GINOZA, J., JOINS

I. INTRODUCTION

This appeal involves an alleged violation of the Posse Comitatus Act (PCA) by military police (MP) officers at the entrance to Hickam Air Force Base. The majority suggests that the failure to file a motion to suppress based on that alleged PCA violation was an "obvious" error by defendant Charles Yuen's counsel. I respectfully disagree.

Instead, I conclude that there was no clear violation of the PCA that would have warranted filing a motion to suppress evidence on that basis. Here, the MPs were investigating a vehicle collision fifty feet from the entrance, in which Yuen rear-ended a vehicle driven by a service member with two young children in the back seat. Contrary to the majority's opinion, the record shows the MPs did not violate the PCA because they had an independent military purpose for their actions: protecting service members and guests on the base from a potential threat to their safety. For the reasons outlined below, I disagree with the majority that Yuen's counsel was ineffective for failing to file a motion to suppress asserting a PCA violation. On the record before us, there was no such violation.

Further, to the extent that there is any doubt as to whether there was a PCA violation that warranted a motion to suppress, we should not resolve that issue on direct appeal. Instead, as the Intermediate Court of Appeals (ICA) held, Yuen should be permitted to further develop the record on his counsel's representation of him via a Hawaiʻi Rules of Penal Procedure (HRPP) Rule 40 petition.

Accordingly, I would affirm the judgment of the ICA.

II. DISCUSSION

A. On the Record Before Us, Defense Counsel was Not Ineffective

While waiting to enter Hickam, Yuen rear-ended the vehicle in front of him. That car was driven by an active-duty Air Force service member with an eleven-year-old child and a two-year-old child in the back seat. An ambulance was called to the scene, which was fifty feet from the entrance of the base. The MPs approached Yuen's vehicle, observed that he appeared to be intoxicated, and then conducted a Standard Field Sobriety Test (SFST) to confirm their suspicions. The MPs called the Honolulu Police Department (HPD) to report the accident, waited with Yuen until the police officers arrived, and then turned the scene over to HPD. HPD conducted its own SFSTs, which Yuen failed, and subsequently arrested him.

There was no PCA violation because the MPs had an independent military purpose to investigate the accident, which involved an active-duty Air Force service member and his two minor children. The MPs observed that Yuen was possibly intoxicated and confirmed their suspicions by performing an SFST and then waited for HPD to arrive. They acted with an independent military purpose to protect other service members on base, who could be endangered by an intoxicated driver if the MPs allowed Yuen to enter. The MPs not only acted reasonably in

detaining an intoxicated driver who had already crashed into a service member's car and was waiting to enter the base, but in doing so also acted with an independent military purpose such that there was no PCA violation.

Trial counsel was not ineffective for failing to file a motion to suppress the evidence on the basis of an alleged PCA violation, given that such a motion would have been meritless. See People v. Thompson, 231 P.3d 289, 327 (Cal. 2010) ("Counsel is not ineffective for failing to make frivolous or futile motions.") The applicable federal policy, Department of Defense (DoD) Instruction No. 3025.21, provides guidance on permissible and impermissible actions under the PCA:

> [T]his Instruction:
>
> a. Establishes DoD policy, assigns responsibilities, and provides procedures for DoD support to Federal, State, tribal, and local civilian law enforcement agencies, including responses to civil disturbances within the United States . . . .
>
> . . . .
>
> ENCLOSURE 3
>
> PARTICIPATION OF DoD PERSONNEL IN CIVILIAN LAW ENFORCEMENT ACTIVITIES
>
> 1. GUIDING STATUTORY REQUIREMENTS AND SUPPORTING POLICIES
>
> . . . .
>
> b. Permissible Direct Assistance. Categories of active participation in direct law-enforcement-type activities (e.g., search, seizure, and arrest) that are not restricted by law or DoD policy are:
>
> (1) Actions taken for the primary purpose of furthering a DoD or foreign affairs function of the United States, regardless of incidental benefits to civil authorities. This does not include actions taken for the

> primary purpose of aiding civilian law enforcement officials or otherwise serving as a subterfuge to avoid the restrictions of the Posse Comitatus Act. Actions under this provision may include (depending on the nature of the DoD interest and the authority governing the specific action in question):
>
> (a) Investigations and other actions related to enforcement of Chapter 47 . . . (also known as "the Uniform Code of Military Justice").
>
> (b) Investigations and other actions that are likely to result in administrative proceedings by the DoD, regardless of whether there is a related civil or criminal proceeding. . . .
>
> (c) Investigations and other actions related to a commander's inherent authority to maintain law and order on a DoD installation or facility.
>
> (d) Protection of classified defense information or equipment or controlled unclassified information (e.g., trade secrets and other proprietary information), the unauthorized disclosure of which is prohibited by law.
>
> (e) Protection of DoD personnel, equipment, and official guests.
>
> (f) Such other actions that are undertaken primarily for a military or foreign affairs purpose.

Dep't of Def. Instruction 3025.21 (2013) (emphases added), https://www.hsdl.org/c/view?docid=732255 [https://perma.cc/SW8X-426U].[1]

This accident occurred fifty feet outside of the O'Malley gate, and occurred while Yuen was "waiting to enter Hickam Air Force Base." The driver of the car that Yuen rear-ended was an active-duty member of the Air Force. Thus, it

[1] The instruction was updated in February 2019, but those changes are not material to the cited portion. See Dep't of Def. Instruction 3025.21 (2019), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/302521p.pdf [https://perma.cc/XC7P-DRZS].

would be reasonable for defense counsel to infer that the MPs acted with a valid military purpose by investigating a car crash that happened just outside the entrance to the base and involved an active member of the Air Force, as well as his children. These actions were permissible both to "maintain law and order" on the base, and to protect DoD personnel and their guests. Enclosure 3 (1)(b)(1)(c), Dep't of Def. Instruction 3025.21.

The majority contends that the Instruction only applies to investigations that occur "on a DoD installation or facility." (Emphasis added.) This cramped reading implies that any military involvement in an investigation that occurs off base would be impermissible. But see United States v. Chon, 210 F.3d 990, 994 (9th Cir. 2000) (finding no PCA violation where Naval Criminal Investigative Service (NCIS) agents conducted off-base investigation to recover stolen military property because NCIS agents' activities were permissible since "there was an independent military purpose for their investigation — the protection of military equipment"); Applewhite v. U.S. Air Force, 995 F.2d 997, 1001 (10th Cir. 1993) ("[The PCA] is not intended to limit the military in preventing illicit drug transactions by active duty military personnel, whether such conduct occurs on or off a military installation.").

I do not read the Instruction to require that any investigation under that provision can only occur on a military

base. Section (1)(b)(1)(c) states in full that permissible indirect military assistance includes "[i]nvestigations and other actions related to a commander's inherent authority to maintain law and order on a DoD installation or facility." (Emphasis added.) It does not state that these investigations must occur on a DoD facility. Rather, these investigations must be "related to" the authority to maintain law and order on a DoD facility. If the Instruction intended for the military only to have authority to conduct investigations on DoD property, then it would simply state "investigations and other actions on a DoD installation or facility," rather than making the distinction that investigations must be "related to a commander's inherent authority to maintain law and order." See Mandato v. United States, No. 1:19-cv-00772 (AJT/JFA), 2019 WL 13251552, at *5 (E.D. Va. Oct. 3, 2019) (writing that the Instruction "provides more specific guidance as to what a member of the military may or may not do off-installation. But the Instruction does not categorically prohibit any off-installation actions by a military member. Instead, the Instruction articulates certain 'active participation in direct law-enforcement-type activities (e.g., search and seizure, and arrest)' that DoD personnel may take outside of a military installation.").

The majority itself recognizes that its reading of the Instruction is too narrow. According to the majority, the MPs

were permitted to approach the motor vehicle collision to "see who was involved, check injuries, and ensure there was no one involved intending harm to [Hickam Air Force Base]." This implicitly recognizes that threats from outside the base can implicate a commander's authority to maintain law and order on the base. For example, if Yuen was observed to have an AR-15 in his back seat, the majority presumably would agree that some action by the MPs could be taken even though Yuen remained off base.

Of course, Yuen did in fact pose a threat, albeit of a different kind. He was intoxicated: when HPD administered its SFSTs, he "fell into the bushes" in the median of the road and was "slurring some of his words." And, he was trying to drive his car onto the base while in that condition. But, according to the majority, after checking in with the drivers, the "proper response [from the MPs] would have been to call local authorities and let them handle it from there." Apparently, the majority would say that if Yuen tried to drive off in the meantime, the MPs should simply let him go. It is unclear whether the majority would reach the same result even if someone who approached the entrance gate had an AR-15 lying in the back seat of his car. The majority's opinion thus fails to distinguish what level of perceived threat, if any, would justify the MPs' further involvement.

Fortunately, the MPs did not follow the course outlined by the majority. Rather, they administered sobriety tests to confirm their suspicion that Yuen was intoxicated, and then detained him until HPD arrived.[2] Respectfully, on the current record I cannot conclude that the MPs' actions were "obvious[ly]" – or even possibly – a PCA violation. As I note below, the circumstances here are far removed from the facts in State v. Pattioay, 78 Hawai'i 455, 896 P.2d 911 (1995), where there was a conscious effort by military investigators to target civilians who lived off base in a narcotics investigation. The majority's holding here sets a precedent that is contrary to nearly every other jurisdiction and will only confuse military personnel about their ability to ensure the safety of service members on base from threats that are right on their doorstep.

This case is similar to Mun. of Anchorage v. King, 754 P.2d 283 (Alaska Ct. App. 1988). There, the defendant approached the entrance to a military base and was stopped by an MP for a routine identification check. The MP noticed signs of intoxication, and performed several sobriety tests on defendant.

[2] While the majority suggests that the MPs provided direct assistance by performing preliminary alcohol screening and a standardized field sobriety test, those were explicitly excluded from evidence. Indeed, the district court specifically warned against the prosecution's introduction of testimony about those preliminary tests. However, to the extent the majority contends that those tests were PCA violations, I believe they also fall under the primary military purpose of protecting military personnel on base because the MPs were assessing Yuen's ability to drive and his potential threat to the safety of others.

Id. at 284. The defendant then "offered to leave his vehicle at the entrance, or turn around and leave the base altogether," but the MP placed the defendant under arrest and transported him to the local police department. Id. at 284–85. The trial court ordered suppression of evidence under the PCA, but the appellate court reversed. Id. It concluded that there was no PCA violation because the MPs "had an independent military duty and purpose to protect the welfare of persons who were on base" and were therefore "entitled to arrest [the defendant] and turn him over to the authorities in order to protect persons on base from drunk drivers." Id. at 286.

The court in King determined that there was no PCA violation because the MPs had a valid military purpose, and thus the trial court's suppression order was reversed. Id. at 287. Here, there is an even clearer military purpose than in King because Yuen was waiting to enter the Hickam base when he rear-ended another vehicle driven by an air force member and MPs observed signs that Yuen was intoxicated. The MPs in this case clearly had an "independent military duty and purpose to protect the welfare" of people on base in investigating the motor vehicle collision and detaining Yuen until HPD arrived. Id. at 286. In King, there was no collision but the defendant exhibited signs of intoxication when trying to enter a base. The MPs arrested and transported the intoxicated defendant to

the local police, and the appellate court held that those actions did not violate the PCA. Id. Here, after the collision near the base entrance involving a service member, the MPs conducted their own sobriety tests to confirm their suspicions that Yuen was intoxicated, called HPD, and detained Yuen until local law enforcement arrived, but neither arrested nor transported him to HPD. Under the rationale of King, those actions do not violate the PCA because the MPs acted with a valid, independent military purpose to protect not only the second driver, but also other personnel who were on or attempting to enter the base. See id. King's reasoning suggests that here, there was no PCA violation that would have warranted Yuen's counsel to file a motion to suppress, given that it would have been unsuccessful.

The majority attempts to distinguish King because the defendant was already at the entrance gate and had been stopped for a routine identification — that is, he was slightly closer to the base than Yuen was. Id. at 284. But that distinction is not persuasive. The line between "in line for the gate" and "at the gate" does not seem to be worth drawing. Instead, the focus should be on whether there was a valid military purpose in the MPs' involvement. The majority notes that the record "does not support that there were other exigent circumstances requiring further MP involvement before the arrival of HPD." Yet this

analysis misses the mark: Yuen was an intoxicated driver who had already endangered military personnel (such as the second driver and his minor children) and continued to pose an active threat to other members of the military (by being in close proximity and who had been trying to enter the base). Accordingly, the MPs' detention of Yuen to prevent further harm to members of the military until HPD could respond is not a violation of the PCA.

Our holding in Pattioay is not to the contrary, since the circumstances there were clearly distinguishable. In Pattioay, we concluded there was a PCA violation where military police officers of the Army's Criminal Investigation Department (CID officers) were involved in joint operations with HPD to target suspected civilian drug dealers. 78 Hawai'i at 456, 896 P.2d at 912. There, the CID officers were involved in coordinated and repeated investigations into drug sales that were off base, and in which military personnel were only sometimes involved. The CID officers were "given guidelines for 'targeting' civilians in military investigations," and the officers themselves often acted undercover to purchase drugs from civilian dealers and suppliers. Id. at 457, 896 P.2d at 913. One HPD officer testified that he "participated in over one hundred joint investigations with the Schofield Drug Suppression Team," and would regularly "initiate cases, document them," and collect evidence from the undercover military CID

personnel "for storage and subsequent civilian criminal prosecution." Id. at 457–58, 896 P.2d at 913–14.

This court first determined that there was a PCA violation in Pattioay because there was no valid military purpose that justified the MPs' involvement in drug investigations that targeted only civilians, who lived off base. Id. at 462, 896 P.2d at 918. We noted that "all of the persons 'targeted' by the aforesaid undercover . . . operation involved herein were civilians; no military personnel were involved as 'targets' of the investigation," and therefore there was no military purpose that justified the MPs' involvement. Id. at 463, 896 P.2d at 919 (brackets and emphases omitted). We held, "[w]here the target of a military investigation is a civilian and there is no verified connection to military personnel, the PCA prohibits military participation in activities designed to execute civilian laws." Id. at 464, 896 P.2d at 920.

Second, we concluded that this blatant PCA violation warranted suppression of evidence obtained by the military CID personnel and evidence obtained via warrants based on the military CID personnel's transactions. We first noted that a PCA violation does not necessarily require exclusion as the remedy. Id. at 466-67, 896 P.2d at 922-23 ("[W]here a violation of the PCA is found or suspected, courts have generally found that creation or application of an exclusionary rule is not

warranted." (brackets and quotation omitted)). We also wrote that,

> there are other independent and compelling state grounds that militate in favor of suppression in this case. The purpose of the exclusionary rule, as we see it, is primarily to deter illegal police conduct and secondarily to recognize that the courts of this State have the inherent supervisory power over criminal prosecutions to ensure that evidence illegally obtained by government officials or their agents is not utilized in the administration of criminal justice through the courts. . . . Consonant with these policies, we now hold that the evidence at issue in the instant case, which was obtained in violation of the PCA and then proferred in criminal proceedings against the Defendants-Appellees, must be suppressed under the authority of this court's supervisory powers in the administration of criminal justice in the courts of our state. Consequently, we uphold the circuit court's order suppressing the evidence — although it was based on the erroneous conclusion that the joint civilian-military investigations reflected a "repeated, pervasive pattern of conduct" — because the court was right for the wrong reasons.
>
> As discussed above, the actions of the military CID personnel in concert with the HPD clearly violated the PCA and were therefore illegal. Evidence obtained as a result of illegal governmental action is tainted. . . . We hold that it is imperative in this case to suppress the evidence obtained in violation of the PCA because to ignore the violation and allow the evidence to be admitted would be to justify the illegality and condone the receipt and use of tainted evidence in the courts of this state. In this instance, where government agents have clearly violated federal law, we conclude that the principles supporting the exclusionary rule in this state mandate suppression of the evidence.
>
> . . . .
>
> Where as here, evidence is obtained by the military and is offered in a civilian criminal proceeding, but the actions of the military personnel in acquiring the evidence are not shown to have been of such a manner as to be consistent with a military purpose in conformance with the PCA, the evidence is not admissible.

Id. at 468-70, 896 P.2d at 924-26 (emphases added) (brackets, ellipses, quotation, citations, and footnotes omitted).

Pattioay is factually distinguishable from this case. There, we addressed a situation in which the military was involved in purely civilian affairs with no valid, independent military purpose, and therefore concluded that the evidence must be suppressed. Here, by contrast, the MPs were not involved in purely civilian law enforcement – instead, they were investigating a motor vehicle accident fifty feet from the entrance to a busy military base. The MPs had a valid military purpose to investigate because Yuen rear-ended a vehicle driven by an active-duty Air Force member while attempting to enter the base. And once the MPs engaged Yuen, they had reason to suspect he was intoxicated, confirmed their suspicions, and then detained him until civilian authorities could respond. This was far removed from the conscious flouting of the PCA that occurred in Pattioay.

We stated in Pattioay that "[w]here an investigation targeting civilians does not have the primary purpose of furthering a military function, even military involvement that falls short of participation in the search, seizure, or arrest of civilians may constitute a violation of the PCA." Id. at 465 n.21, 896 P.2d at 921 n.21 (emphasis added). In Pattioay, there was a record that showed a PCA violation and therefore we ordered exclusion as the remedy. See id. at 468-69, 896 P.2d at 924-25 (applying the exclusionary rule "to deter illegal police

conduct" "where government agents [had] clearly violated federal law"). But here, we do not have a record that suggests there was a PCA violation. To the contrary, the record shows that there was a clear military purpose for the MPs, and in turn, there would be no reason to apply the exclusionary rule to the MPs' involvement.

Other jurisdictions have similarly held that there is no PCA violation when defendants who are approaching a military base when intoxicated are detained by military police. See Kenny v. Easley, 166 F. App'x 898, 899, 901 (9th Cir. 2006) (mem.) (holding no violation of PCA when military police detained plaintiff "near" a naval base because "[b]y preventing [plaintiff] from driving under the influence, [MPs] acted in their capacity as federal officers to ensure the safety of the [naval base] and the public at large. Despite the incidental benefit to the [local police], [MPs'] primary purpose was to ensure the security of [the naval base]."") (emphasis added); United States v. Bennett, No. 8:11-CR-00014-T-33AEP, 2011 WL 1690122, at *4 (M.D. Fla. Apr. 19, 2011) (concluding military action "was not so pervasive as to rise to the level of violating the [PCA], and nevertheless satisfied an independent military purpose" when MP "merely held the Defendant while [local police] could arrive and proceed with their own independent investigation in furtherance of the DUI laws" where

defendant was stopped at the entrance to the military base and MP determined defendant "appeared to be drunk"), report and recommendation adopted, No. 8:11-cr-14-T-33AEP, 2011 WL 1700397 (M.D. Fla. May 4, 2011).

Because there was a valid, independent military purpose based on the record before us, I disagree with the majority that there was a clear PCA violation that warranted a motion to suppress evidence of the HPD investigation as fruit of the poisonous tree. Such a motion would have been meritless, and Yuen's counsel was not ineffective in failing to file it. See Wilson v. Henry, 185 F.3d 986, 992 (9th Cir. 1999) ("Because the motion almost certainly would have been denied, no prejudice accrued to [petitioner] from his counsel's failure to make a motion on these grounds.").

B. Yuen's Conviction Should be Affirmed, Without Prejudice to Him Filing an HRPP Rule 40 Motion Based on the Alleged Ineffective Assistance of Counsel Claim to Further Develop the Record

I also disagree with the majority that we should decide whether Yuen's counsel was ineffective based on the record before us. Instead, I would affirm the ICA's holding that Yuen should have the opportunity to further develop the record on his ineffective assistance of counsel claim in an HRPP Rule 40 proceeding, and where trial counsel could be required to

explain his actions.[3] See Briones v. State, 74 Haw. 442, 463, 848 P.2d 966, 977 (1993) ("If the record is unclear or void as to the basis for counsel's actions, counsel shall be given the opportunity to explain his or her actions in an appropriate proceeding before the trial court judge."); State v. Poaipuni, 98 Hawai'i 387, 395, 49 P.3d 353, 361 (2002) (determining ineffective assistance of counsel claim on direct appeal where record was clear that defendant's confession should have been suppressed and defense counsel failed to suppress because "this is not a case in which [defendant's] ineffective assistance of counsel claim cannot be decided until the record is further developed in a subsequent post-conviction proceeding.").

While ineffective assistance of counsel claims may be brought on direct appeal, courts generally prefer to hear such claims via post-conviction petitions. See State v. Silva, 75 Haw. 419, 439, 864 P.2d 583, 592 (1993) (holding this court will "entertain ineffective assistance of counsel claims for the first time on appeal. We acknowledge, however, that not every

[3] When accepting certiorari, this court ordered Yuen to serve trial counsel with copies of the appellate briefs and the certiorari application, so that trial counsel could respond to the ineffective assistance of counsel claims. Based on the lack of further filings, it seems trial counsel chose not to respond to these claims. That is not necessarily surprising – perhaps defense counsel was reluctant to offer information that could be contrary to his former client's interest, unless compelled to do so by a subpoena. A subpoena would be available in an HRPP Rule 40 proceeding, although not here while the case is on appeal. In any event, we are limited to the current record and do not have the benefit of counsel's explanation of his actions.

trial record is sufficiently developed to determine whether there has been ineffective assistance of counsel"); Massaro v. United States, 538 U.S. 500, 504-05 (2003) ("When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose.").

In cases where "the record on appeal is insufficient to determine whether there has been ineffective assistance of counsel," the proper remedy is to affirm the conviction without prejudice to a subsequent HRPP Rule 40 petition on that claim. State v. Abihai, 146 Hawai'i 398, 407, 463 P.3d 1055, 1064 (2020).

As we noted in Abihai,

> With respect to a defendant's assertion of ineffective assistance of counsel on a direct appeal, we have held:
>
> > Not every trial record is sufficiently developed to determine whether there has been ineffective assistance of counsel; indeed, a defendant is often only able to allege facts that, if proved, would entitle them to relief. Therefore, we hold that where the record on appeal is insufficient to demonstrate ineffective assistance of counsel, but where: (1) the defendant alleges facts that if proven would entitle them to relief, and (2) the claim is not patently frivolous and without trace of support in the record, the appellate court may affirm defendant's conviction without prejudice to a subsequent [HRPP] Rule 40 petition on the ineffective assistance of counsel claim.

Id. at 407, 463 P.3d at 1064 (brackets and footnote omitted) (quoting Silva, 75 Haw. at 439, 864 P.2d at 592-93).

We have also recognized that "in some instances, the ineffective assistance of counsel may be so obvious from the record that a[n HRPP] Rule 40 proceeding would serve no purpose except to delay the inevitable and expend resources unnecessarily." Silva, 75 Haw. at 438–39, 864 P.2d at 592.

However, we have reviewed ineffective assistance of counsel claims on direct appeal only when there is clear evidence in the appellate record of counsel's substantial impairment of a potentially meritorious defense. Such cases have generally involved the failure to call a witness, elicit testimony from a witness, object to prosecution's improper comments, or exclude a defendant's inadmissible confession. See, e.g., State v. Aplaca, 74 Haw. 54, 72, 837 P.2d 1298, 1307–08 (1992) (holding counsel ineffective where outcome depended on defendant and complainant's credibility, and holding if "trial counsel had investigated the potential defense witnesses and reviewed the materials he received during discovery, he would have realized the value of such witnesses to [defendant's] defense," namely, to present character evidence on behalf of defendant); State v. Salavea, 147 Hawai'i 564, 579, 465 P.3d 1011, 1026 (2020) ("[D]efense counsel's error was a failure to

adduce evidence that the [complaining witness] was using methamphetamine at the time when the offense allegedly occurred, which certainly may have significantly affected the reliability of the [complaining witness's] account."); Silva, 75 Haw. at 442, 864 P.2d at 594 ("Having reviewed the record, particularly [witness's] post-trial affidavit regarding the incident, we believe that [witness's] testimony could have significantly bolstered [defendant's] version of the incident and supported his justification theories of defense of another and self-defense."); State v. Wakisaka, 102 Hawai'i 504, 517, 78 P.3d 317, 330 (2003) ("Defense counsel's failure to object to these constitutionally improper comments could not conceivably have been based upon a legitimate tactic to benefit [defendant's] defense."); Poaipuni, 98 Hawai'i at 395, 49 P.3d at 361 (2002) (holding defendant's trial counsel provided ineffective assistance because "there is no doubt that [the defendant's] confession was, on the record before the circuit court and before us on appeal, inadmissible at trial. Defense counsel's failure to identify and seek to exclude the confession as inadmissibly tainted evidence that was derived from the unlawful search warrant did not and could not have been calculated to benefit [the defendant's] case.").

Based on the current record, Yuen has not established that trial counsel was ineffective. However, I agree with the

ICA that he should have the opportunity to develop the record further, and would affirm his conviction without prejudice to his pursuing an ineffective assistance of counsel claim via a subsequent HRPP Rule 40 petition. Federal courts have repeatedly explained that ineffective assistance of counsel claims are best suited for post-conviction proceedings to ensure that there is sufficient evidence in the record and to improve judicial efficiency. See, e.g., Massaro, 538 U.S. at 506–07 ("Even meritorious [ineffective assistance of counsel] claims would fail when brought on direct appeal if the trial record were inadequate to support them. Appellate courts would waste time and resources attempting to address some claims that were meritless and other claims that, though colorable, would be handled more efficiently if addressed in the first instance by the [trial] court on collateral review."); United States v. Agboola, 417 F.3d 860, 864 (8th Cir. 2005) ("Generally, ineffective assistance of counsel claims are better left for post-conviction proceedings. . . . We do so because facts from outside the original record usually must be developed to decide such a claim." (citations and quotation omitted)).

III. CONCLUSION

For the reasons above, I conclude that Yuen's conviction should be affirmed without prejudice to his filing a

post-conviction challenge related to his ineffective assistance of counsel claim, and therefore, I respectfully dissent.

/s/ Mark E. Recktenwald

/s/ Lisa M. Ginoza