(c) A qualifying out-of-state patient and a caregiver of a qualifying out-of-state patient shall be authorized to obtain cannabis for medical use only from retail dispensing locations of dispensaries licensed pursuant to chapter 329D. [L 2015, c 241, pt of §5; am L 2017, c 41, §4 and c 170, §2; am L 2018, c 116, §12]

Hawai'i Administrative Rules (HAR) for Caregivers and Tagging Plants

- Under HAR Section 11-160-26, attached hereto, a caregiver can only be a caregiver for one qualifying patient.
- There is no current limitation on the number of patients growing at particular parcel, but HB477 seeks to change this as detailed above.
- Under HAR Section 11-160-31, all medical cannabis plants must be tagged according to the DOH with registration number, expiration date in a legible size and font.

Guidelines for Proper Identification Tags per DOH website:

1. Tag Material/Durability – Each tag shall be made of a durable water and weather resistant material.

2. Tag Color: Each tag shall be of SOLID color with black or blue lettering.

3. Tag Face Size: Each tag face shall be at least 3" long by 1/4" wide.

4. Tag Location: Each tag shall be hung from or around the bottom of the plant.

5. Tag Visibility: Each tag shall be easily visible from the outside of the plant.

6. Tag Content: Each tag shall be CLEARLY marked with the 329 registration number and expiration date.

7. Lettering: • Shall be large and legible enough to be readable. • Shall remain readable if/when plant is subjected to watering or the elements. If any lettering on the tag becomes difficult to read then the tag shall be replaced immediately with the same registration number and expiration date.

8. Updating Tags: Tags shall be updated immediately upon issuance of a new registration card (i.e. renewal, change of information on card = reissue of card and a change of registration number) or anytime the tag contents are no longer legible.

Search and Privacy Rights In Hawai'i

Hawai'i Constitution Affords More Rights Than the US Constitution as to Privacy

Article I, section 7 of the Hawai`i Constitution protects the right of the people to be free from "unreasonable searches, seizures and invasions of privacy." Haw. Const. art. I, § 7. The basic purpose of article I, section 7 "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." State v. Wallace, 80 Hawai`i 382, 392, 910 P.2d 695, 705 (1996) (quoting *State v. Bonnell*, 75 Haw. 124, 136, 856 P.2d 1265, 1272 (1993)). If an action taken by the government intrudes on an individual's reasonable expectation of privacy, such an intrusion is a "search" in a constitutional sense, and must be supported by a warrant, or

an applicable exception to the warrant requirement, and probable cause in order to be constitutional. *Bonnell*, 75 Haw. at 137, 856 P.2d at 1273 ("It is well settled that an area in which an individual has a reasonable expectation of privacy is protected by article I, section 7 of the Hawaii Constitution and cannot be searched without a warrant.").

The Hawai'i Supreme Court has previously recognized that "[c]urtilage is usually defined as a small piece of land, not necessarily enclosed, around a dwelling house and generally includes buildings used for domestic purposes in the conduct of family affairs." *State v. Kender*, 60 Haw. 301, 304, 588 P.2d 447, 449 (1978). "[O]ne's back yard may be part of one's curtilage[.]" *Id.* An individual's curtilage is protected by article I, section 7 of the Hawai`i Constitution when he or she has a reasonable expectation of privacy therein. *See id.*, 588 P.2d at 449-50.

The Hawaii Supreme Court has adopted the two-part test that Justice Harlan articulated in his concurring opinion in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), to determine whether an individual has a reasonable expectation of privacy. *Bonnell*, 75 Haw. at 139, 856 P.2d at 1273-74. Under this test: **"First, one must exhibit an actual, subjective expectation of privacy. Second, that expectation must be one that society would recognize as objectively reasonable."** *Id.*, 856 P.2d at 1274 (quoting *State v. Biggar*, 68 Haw. 404, 407, 716 P.2d 493, 495 (1986)).

Practice Tip: To show you have a subjective expectation of privacy, make sure that your cooperative's property remains locked, gated, fenced and any medical cannabis growing or being processed cannot be seen or smelled from the neighboring parcels or the street. The key is that a person on the ground would be unable to detect the presence of the plants form outside the residence. You should install no trespassing signs on all sides/areas of the property that anyone would approach from the adjacent areas. To best protect your privacy rights on the parcel, it is best to grow under some covering, if possible, such as greenhouse.

Setup of parcel with growing medical cannabis must be "indicative of your subjective intent to avoid the public gaze" into the curtilage of the property. *State v. Kaaheena*, 59 Haw. 23, 29, 575 P.2d 462, 467 (1978) (holding that the defendants' drawn curtains and closed Venetian blinds were indicative of their subjective expectation of privacy); *see also Biggar*, 68 Haw. at 407, 716 P.2d at 495 (determining that the defendant exhibited a subjective expectation of privacy by closing the door to a toilet stall, and the fact that the door did not close completely did not eliminate this expectation).

It is not necessary to cover the marijuana plants with a tarp or other structure to preclude their visibility from above as long as they are out of view from the public. *State v. Davis*, 360 P.3d 1161, 1180 (N.M. 2015) (Chavez, J., concurring) (reasoning that "an individual's subjective expectation of privacy from ground-level surveillance is coextensive with his or her subjective expectation of privacy from aerial surveillance" because "[i]f an individual has taken steps to ward off inspection from the ground, the individual has also manifested an expectation that the visibility of his or her property that he or she sought to block off from the ground should also be private when seen from the air," due to the fact that "members of the general public generally do not intently scrutinize other peoples' curtilages, even when they do fly over private property").

The Hawai'i Supreme Court has established that whether an individual has an expectation of privacy that is objectively reasonable is subject to a case by case analysis, based on the totality of the circumstances in each case. *Kender*, 60 Haw. at 304, 588 P.2d at 449-50 (agreeing with the California Supreme Court that whether an individual has a reasonable expectation of privacy in a certain place will depend upon "[a] number of factors" that will "arise on a case by case basis"); *State v. Ward*, 62 Haw. 509, 515, 617 P.2d 568, 571-72 (1980) (holding that the reasonable expectation of privacy test requires courts to consider "all factors on a case-by-case basis").

The Hawai'i Supreme Court in adopt the rule in *State v. Quiday*, 405 P. 3d 552 (2017) established by the California Supreme Court in *Cook*, and hold that an individual has a reasonable expectation of privacy from governmental aerial surveillance of his or her curtilage and residence, when such aerial surveillance is conducted with the purpose of detecting criminal activity therein. Such purposeful aerial surveillance of an individual's residence and curtilage qualifies as a "search" under article I, section 7 of the Hawai`i Constitution.

Police Right to Enter Property Without a Search Warrant

Under most circumstances the police must have a search warrant signed by a judge to enter a property that is not open to the public. The law as to medical marijuana card holders and their caregivers is not an exception. *** The legislature in Hawaii is currently trying to give the DOH more enforcement and inspection powers. This may be open to constitutional challenge if passed.

The right of the people to be free from unreasonable searches and seizures is firmly embedded in both the Fourth Amendment to the United States Constitution and article I, section 7 of the Hawai`i Constitution *State v. Pau`u,* 72 Haw. 505, 509, 824 P.2d 833, 835 (1992). Determining whether a particular governmental activity violates this right involves answering a two-step inquiry: (1) was the governmental activity in question a "search" in the constitutional sense; and, if so, (2) was it a "reasonable" search. *See State v. Kaaheena,* 59 Haw. 23, 28, 575 P.2d 462, 466 (1974).

Did a search occur?

Before a Court addresses the reasonableness of a given governmental activity, it first must determine whether the activity in question amounts to a "search" in the constitutional sense. *United States v. Sharpe,* 470 U.S. 675, 682, 105 S.Ct. 1568, 1573, 84 L.Ed.2d 605 (1985); *Kaaheena,* 59 Haw. at 28, 575 P.2d at 466. In making this determination, the Court focuses on the privacy expectations of the individual whose person or property is being examined. *Kaaheena,* 59 Haw. at 28, 575 P.2d at 466. Indeed, the primary purpose of both the Fourth Amendment and article I, section 7 "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *State v. Bonnell,* 75 Haw. 124, 136, 856 P.2d 1265, 1272 (1993) (quoting *Camara v. Municipal Court,* 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930 (1967)). In ascertaining whether an individual's expectation of privacy brings the governmental activity at issue into the scope of constitutional protection, the court utilizes the following two-prong test, borrowed from Justice Harlan's concurring opinion in *Katz v. United States,* 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967): "First,

one must exhibit an actual, subjective expectation of privacy. Second, that expectation must be one that society would recognize as objectively reasonable." *Bonnell,* 75 Haw. 124, 139, 856 P.2d 1265, 1274 (1993) (citations and internal quotations omitted).

Was the search was reasonable?

Determining whether a search is reasonable depends primarily on whether prior judicial approval has been obtained. It is well-established that a search by law enforcement officials without a judicial warrant issued upon probable cause is "presumptively unreasonable" under both the United States and Hawai`i Constitutions. *Katz,* 389 U.S. at 357, 88 S.Ct. at 514; *State v. Paahana,* 66 Haw. 499, 504, 666 P.2d 592, 596 (1983). Indeed, such searches are invalid unless they fall within one of the narrowly drawn exceptions to the warrant requirement. *State v. Mahone,* 67 Haw. 644, 646, 701 P.2d 171, 173 (1985). In this case, there is no question that Detective Guillermo did not obtain a search warrant prior to entering the Hauanios' home. Thus, "the [prosecution] has the burden of overcoming [the] initial presumption of unreasonableness by proving that the search falls within one of the well-recognized and narrowly-defined exceptions to the general warrant requirements[.]" *Paahana,* 66 Haw. at 504, 666 P.2d at 596 (citing *Chimel v. California,* 395 U.S. 752, 762, 89 S.Ct. 2034, 2039-40, 23 L.Ed.2d 685 (1969)).

A search conducted pursuant to a voluntary and uncoerced consent by the person whose property is being searched is one such exception to the warrant requirement. *Mahone,* 67 Haw. at 646, 701 P.2d at 173.."

Hawai`i requires actual authority.

While the concept of apparent authority is well-recognized on the federal level, the Hawai;I Supreme Court has always required a showing of "actual authority" to satisfy article I, section 7 of the Hawai`i Constitution. *See Mahone,* 67 Haw. at 647, 701 P.2d at 173-74 ("A third party cannot waive another's constitutional right to privacy unless authorized to do so. Thus, the consent of a third party cannot validate a warrantless search unless the third party possessed authority to consent."); *State v. Matias,* 51 Haw. 62, 67, 451 P.2d 257, 260 (1969) (holding that an individual's constitutional right to privacy cannot be waived by another unless he or she has authorized that other person to do so). To be sure, consent of a third party is only effective if "it is shown `that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.'" *State v. Brighter,* 63 Haw. 95, 99 n. 3, 621 P.2d 374, 378 n. 3 (1980) (citations omitted).

Practice Tip: Never allow the police or any other government agency on your property without a search warrant. You must step off your property to address them. It is best to be polite, but tell them firmly and unchangingly that they are not allowed to enter. Make sure you tell them you have a lawyer, that you do not want to make any other statements and then call attorney immediately. If you allow them on voluntarily you essentially lose all or many privacy protections.

The legislature is currently trying to add investigative powers via HB 477 to the statute. I think this would be ripe for a constitutional challenge if passed.

As the ultimate judicial tribunal in the state, the Hawai'i Supreme Court possesses the final and unreviewable authority to interpret and enforce the Hawai`i Constitution. *Bonnell,* 75 Haw. at 136, 856 P.2d at 1272 (quoting *State v. Quino,* 74 Haw. 161, 177, 840 P.2d 358, 365 (1992) (Levinson J., concurring), *cert. denied,* ___ U.S. ___, 113 S.Ct. 1849, 123 L.Ed.2d 472 (1993)). In exercising this authority, it is well-established that as long as we afford defendants the minimum protection required by the federal constitution, we are free to provide broader protection under our state constitution. *Quino,* 74 Haw. at 170, 840 P.2d at 362 (citing *State v. Texeira,* 50 Haw. 138, 142 n. 2, 433 P.2d 593, 597 n. 2 (1967)); *see also State v. Bowe,* 77 Hawai`i 51, 57, 881 P.2d 538, 544 (1994) (emphasizing that "`[w]hen the United States Supreme Court's interpretation of a provision present in both the United States and Hawai`i Constitutions does not adequately preserve the rights and interests sought to be protected, we will not hesitate to recognize the appropriate protection as a matter of state constitutional law.'").

In the area of searches and seizures under article I, section 7, the Hawai'i Supreme Court often exercised this freedom. *See, e.g., Quino,* 74 Haw. at 170, 840 P.2d at 362 (declining to adopt the definition of seizure employed by the United States Supreme Court and, instead, choosing to afford greater protection to the citizens of Hawai`i); *State v. Kim,* 68 Haw. 286, 289-90, 711 P.2d 1291, 1293-94 (1985) (declining to adopt the federal standard and requiring police officers to have a "reasonable basis of specific articulable facts to believe a crime has been committed" before ordering a driver to get out of the car after a traffic stop); *State v. Tanaka,* 67 Haw. 658, 661-62, 701 P.2d 1274, 1276 (1985) (holding on independent state grounds that there is a reasonable expectation of privacy in trash bags and thus warrantless seizure of them violates article I, section 7, absent exigent circumstances); *State v. Fields,* 67 Haw. 268, 282, 686 P.2d 1379, 1390 (1984) (providing broader protection on the state level for probationers subject to warrantless searches); *State v. Kaluna,* 55 Haw. 361, 367-69, 520 P.2d 51, 57-58 (1974) (providing broader protection under article I, section 7, in the area of warrantless searches incident to a valid custodial arrest than is provided on the federal level).

The Hawai'i Supreme Court's willingness to afford greater protection of individual privacy rights than is provided on the federal level arises from "our view [that] the right to be free of `unreasonable' searches and seizures under article I, section 5 of the Hawai[`]i Constitution is enforceable by a rule of reason which *requires that governmental intrusions into the personal privacy of citizens of this State be no greater in intensity than absolutely necessary." Kaluna,* 55 Haw. at 369, 520 P.2d at 58-59 (emphasis added). Thus, "each proffered justification for a warrantless search must meet the test of *necessity* inherent in the concept of reasonableness." *State v. Fields,* 67 Haw. 268, 282-83, 686 P.2d 1379, 1390 (1984) (emphasis added).

One Exception to the Rule Police Must Have Search Warrant to Enter Without Authority

The first and perhaps the most general of all exceptions occurs when the government has probable cause to search, and exigent circumstances exist which advise against delay in

proceeding to do so. *United States v. Chadwick, supra,* 433 U.S. at 11, 97 S.Ct. at 2483; *State v. Elderts,* 62 Haw. 495, 500, 617 P.2d 89, 92 (1980).

While "the term `exigent circumstances' is incapable of precise definition," *State v. Elliott,* 61 Haw. 492, 495-96, 605 P.2d 930, 933 (1980), "[g]enerally speaking ... [it] may be said to exist when the demands of the occasion reasonably call for an immediate police response." *State v. Lloyd,* 61 Haw. 505, 512, 606 P.2d 913, 918 (1980). More specifically, it includes situations presenting an immediate danger to life or of serious injury or an immediate threatened removal or destruction of evidence. *State v. Dorson,* 62 Haw. at 385, 615 P.2d at 746. However, "[t]he burden, of course, is upon the government to prove the justification ..., and whether the requisite conditions exist is to be measured from the totality of the circumstances." *State v. Lloyd,* 61 Haw. at 512, 606 P.2d at 918. And in seeking to meet this burden, "[t]he police must be able to point to specific and articulable facts from which it may be determined that the action they took was necessitated by the exigencies of the situation." *State v. Dias,* 62 Haw. 52, 57, 609 P.2d 63[illegible] 640 (1980).

Practice Tip: I do not think the police or the government agency could claim there is any exigency as they have already been to the property and came on site for observation.