SCWC No. 23-185

In the Supreme Court of the State of Hawai‘i

State of Hawai‘i, Respondent-Appellant-Plaintiff, vs. **Randall Hoffman,** Petitioner-Appellee-Defendant.	5CPC-21-264 Appeal from the Judgment of Appeal of the Intermediate Court of Appeals Hon. Judge Keith K. Hiraoka Hon. Judge Clyde J. Wadsworth Hon. Judge Kimberly T. Guidry

Reply to Response to Application for Writ of Certiorari

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The prosecution's defense of a categorical exception to the test used to determine an "interrogation" is meritless. It confirms that the Intermediate Court of Appeals has gravely erred by using an exception out of step with Hawai'i law. Further review is needed to clarify that the 40-year-old test still controls the lower courts, prosecutors, and police officers in determining when *Miranda* warnings must be given to suspects in custody.

This Court has repeatedly rejected attempts to adopt exceptions to the test used to determine when an officer's words and actions amount to an "interrogation."

For decades Hawai'i courts have used a fact-specific inquiry to determine when a police officer's actions arise to an "interrogation" triggering *Miranda* warnings:

> In determining whether an officer's questions constitute interrogation, the test is whether the officer should have known that [their] words and actions were reasonably likely to elicit an incriminating response from the defendant.

State v. Pa'ahana, 66 Haw. 499, 503, 666 P.2d 592, 596 (1983). *See also Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). This is an objective test meant "to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." *State v. Joseph*, 109 Hawai'i 482, 495, 128 P.3d 795, 808 (2006) (cleaned up).

The Respondent claims that this Court changed the test in *Pa'ahana* and has held that an officer's words and actions "normally attendant to arrest and custody" are not an "interrogation" as a matter of law. Docket No. 4 at 6-9. The prosecution is wrong.

The Court's first rejected a categorical exception in *State v. Ketchum*, 97 Hawai'i 107, 34 P.3d 1006 (2001). The Court disagreed with the routine-booking-question exception used by the

Supreme Court of the United States in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), and imported to Hawai‘i by the ICA.[1] *Ketchum*, 97 Hawai‘i at 119, 34 P.3d at 1018.

The Court explained the routine-booking-question exception improperly focuses on the officer's intent:

> We expressly decline to adopt, as a broad "exception" to the required warnings, the rule that, if an officer expressly asks an arrestee for biographical data necessary for booking or pretrial services, the arrestee's response is not, as a *per se* matter, suppressible under article I, section 10 so long as the officer did not specifically intent—or, to use Justice Brennan's word, did not "design"—the question to elicit an incriminating response. *See Muniz*, 496 U.S. at 602 n. 14, 110 S.Ct. 2638. Rather, we agree with Justice Marshall that "[t]he far better course [is] to maintain the clarity of the doctrine by requiring police to preface all [interrogation] of a suspect with *Miranda* warnings if they want his [or her] responses to be admissible at trial." *Id.* at 610, 110 S.Ct. 2638. . . . [W]e believe that in focusing the inquiry upon whether an officer "designed" a question to elicit an incriminating response, the formulation of the rule in the lead opinion in *Muniz* misdirects the inquiry to the officer's subjective intent.

Id. at 120 n. 21, 34 P.3d at 1019 n. 21 (cleaned up). The Court's rejection was based on the greater protections in the Hawai‘i Constitution:

> This court has never expressly adopted the "routine booking question exception" as a matter of state constitutional law. Nor do we perceive any need for this court to do so. . . . Thus, to the extent that, under article I, section 10, the ultimate question regarding "interrogation" is whether the questioning officer knew or reasonably should have known that his or her question was likely to elicit an incriminating response, the fact that a question is in the nature of a "routine booking question" is merely one consideration among many relevant to an assessment of the totality of the circumstances.

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[1] Booking officers ask arrestees to provide basic biographical information about themselves such as their name, address, height, weight, eye color, date of birth, current age, and social security number. *See State v. Blackshire*, 10 Haw. App. 123, 134, 861 P.2d 736, 742 (1993).

Id. at 119-20, 34 P.3d at 1018-19 (cleaned up).

The Court has since then consistently held that the officer's subjective reasons for their words and conduct does not determine an "interrogation" under the *Pa'ahana* test. *See State v. Kazanas*, 138 Hawai'i 23, 39-40, 375 P.3d 1261, 1277-78 (2016).

The prosecution claims, however, that this Court adopted a categorical exception in *State v. Trinque*, 140 Hawai'i 269, 400 P.3d 470 (2017). *See* Dkt. No. 4 at 6-7. There, a police officer introduced himself to the arrested suspect as an officer working on his daughter's case, insisted that he would neither "lie to him" nor "jerk his chain," and "would be completely honest with him." *Id.* at 273, 400 P.3d at 474. He told him not to make any statements until they got back to Lihue. *Id.* The suspected responded with an incriminating statement. *Id.* Before applying the *Pa'ahana* test, the Court identified "important considerations" associated with an interrogation:

> There are several important considerations in this court's definition: "interrogation" under *Miranda* refers to (1) any words, actions, or practice on the part of the police, not only express questioning, (2) other than those normally attendant to arrest and custody, and (3) that the police should know is reasonably likely to invoke an incriminating response.

Id. at 277, 400 P.3d at 478.

The Court found that even if the officer's actions were "normally attendant to arrest and custody," the *Pa'ahana* test controlled:

> While Lt. Rosa's introduction of himself to Trinque as a police officer may have been normal procedure that typically attends arrests, all of the words and actions that Lt. Rosa directed to Trinque cannot be characterized as anything other than an attempt to erode Trinque's guard so that Trinque would freely talk in a manner that would incriminate himself. . . .
> . . . .
> Although Lt. Rosa testified that his intent in initiating the conversation with Trinque was merely to identify himself as a

> police officer, as he was unshaven and in civilian clothing, Lt. Rosa's intent is not determinative in analyzing whether his words and conduct amounted to interrogation.

Id. at 278, 400 P.3d at 479.

The issue arose again in *State v. Skapinok*, 151 Hawai‘i 170, 510 P.3d 599 (2022), when the Court held that medical-rule-out questions police officers routinely ask drunk-driving suspects were not categorically excluded. *Id.* at 183-84, 10 P.3d at 612-13. Although questions "attendant to arrest and custody" may have been carved out of the definition of an "interrogation," they are still subject to the *Pa‘ahana* test:

> While we have explicitly recognized the "attendant to arrest and custody" carve-out to the definition of "interrogation," **Hawai'i law points against eliminating the "incriminating response" inquiry even when the police ask questions "attendant to" a routine, legitimate procedure.**

State v. Skapinok, 151 Hawai‘i at 182, 510 P.3d at 611.

The Court ultimately rejected the prosecution's attempt to create a categorical exception to the *Pa‘ahana* test:

> We therefore hold that under the self-incrimination clause of the Hawai‘i Constitution, police question that is attendant to a legitimate police procedure, is interrogation if the officer knows or reasonably should know that the question is likely to elicit an incriminating response. In other words, being attendant to a police procedure, standing along, does not obviate the need to examine whether the officer knew or should have known that the questions were reasonably likely to elicit an incriminating response. If such questions are reasonably likely to elicit an incriminating response, they must be preceded by *Miranda* warnings in order to be admissible.

Id. at 183-84, 510 P.3d at 612-13. Accordingly, *Ketchum*, *Trinque*, and *Skaponik* do not exempt an officer's words or conduct "attendant to arrest and custody" from the *Pa‘ahana* test.

The prosecution also claims that this Court distinguishes police action "normally attendant to arrest and custody" lying outside the *Pa'ahana* test from action "attendant to legitimate police procedures" that are subject to the test. Dkt. No. 4 at 8-9. This makes little sense. Perfecting an arrest is part of being a police officer. *See* Hawai'i Revised Statutes § 803-6. Conduct "normally attendant to arrest and custody" is a type of legitimate police procedure.

> [W]e see no reason to treat questions 'attendant to' police procedures differently than 'booking questions' under the Hawai'i Constitution—the inquiry in both circumstances is whether the question is reasonably likely to elicit an incriminating response.

State v. Skapinok, 151 Hawai'i at 183, 510 P.3d at 612.

The Court is not in "lockstep with the Supreme Court's interpretation of the federal constitution." *State v. Wilson*, 154 Hawai'i 8, 13, 543 P.3d 440, 445 (2024). There is no categorical exception for words or actions attendant to the arrest and custody of a suspect in Hawai'i. The prosecution is mistaken.[2]

Conclusion

The ICA gravely erred and the prosecution's opposition shows that further review is needed. This Court should accept certiorari, resolve any lingering confusion between *Ketchum*, *Trinque*, *Skaponik*, and the *Pa'ahana* test, and reinstate the suppression order.

Dated: Honolulu, Hawai'i: May 7, 2024.

/s/ Benjamin Lowenthal .
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[2] Even if the prosecution's distinction had legal significance, further review is needed to pinpoint when an officer's actions "attendant to arrest and custody" ends and when action furthering a "legitimate police procedure" begins.