SCWC-16-0000460

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

STATE OF HAWAI`I, Plaintiff-Appellee, vs. CYRINA HEWITT, Defendant-Appellant.	CASE NO. 3DTA-15-00745 MOTION FOR RECONSIDERATION OF OPINION OF THE COURT FILED MARCH 15, 2023 SUPREME COURT OF THE STATE OF HAWAI`I HON. MARK E. RECKTENWALD, Chief Justice, HON. PAULA A. NAKAYAMA HON. MICHAEL D. WILSON HON. SABRINA S. MCKENNA HON. TODD W. EDDINS, Associate Justices

MOTION FOR RECONSIDERATION

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and

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STATE OF HAWAI`I,	)	CASE NO. 3DTA-15-00745
	)	
Plaintiff-Appellee,	)	MOTION FOR RECONSIDERATION
	)	OF OPINION OF THE COURT
	)	FILED MARCH 15, 2023
vs.	)	
	)	SUPREME COURT OF THE STATE OF
CYRINA HEWITT,	)	HAWAI`I
	)	
Defendant-Appellant.	)	HON. MARK E. RECKTENWALD,
	)	Chief Justice,
	)	HON. PAULA A. NAKAYAMA
	)	HON. MICHAEL D. WILSON
	)	HON. SABRINA S. MCKENNA
	)	HON. TODD W. EDDINS,
	)	Associate Justices

MOTION FOR RECONSIDERATION

Petitioner-Plaintiff-Appellee, the State of Hawai'i, (hereinafter "State") respectfully moves this Honorable Court, pursuant to Hawai`i Rules of Appellate Procedure Rule 40, for reconsideration of the Opinion of the Court filed in this case on March 15, 2023 (hereinafter "the Majority Opinion") on the basis that the Majority Opinion overlooked or misapprehended several points of law. In particular, the Majority Opinion erred with respect to the following points of law:

1. The Majority Opinion overlooked the jurisdictional limits imposed by Hawai`i Revised Statutes (hereinafter "HRS") Section 641-16(a) and (c);

2. The Majority Opinion misapplied the exception to the "mootness doctrine" as outlined in *Johnston v. Ing*, 50 Hawai`i 379 (1968);

3. The Majority Opinion misapplied and overlooked the relevant Hawai`i and federal case law with respect to the issue of "custody" under *Miranda v. Arizona*, 384 U.S. 436 (1966) and the U.S. and Hawai`i constitutions; and

4. The Majority Opinion misapprehended *U.S. v. Infante*, 701 F.3d 386 (2012), as well as overlooked the full holding of *Infante* as it applies in this case.

I. ARGUMENT

1. The Majority Opinion overlooked the jurisdictional limits imposed by HRS 641-16

The Majority Opinion failed to consider the jurisdictional limits imposed by HRS Section 641-16(a) and (c) in finding the Hawai`i Supreme Court retained jurisdiction in this case in spite of the State's dismissal of the charges against Defendant-Appellant Hewitt (hereinafter "Hewitt") in the District Court case.

In Hawaii, there is no constitutional right to an appeal, rather, defendant's who are "aggrieved by a district or circuit court judgment" are granted the right to appeal by statute. *Briones v. State*, 74 Hawai`i 442, 460 (1993) (citations omitted). Under HRS Section 641-16(a), the Hawai`i Supreme Court may affirm, reverse, or modify the order, judgment, or sentence of a trial court in a criminal matter. Further, under HRS Section 641-16(c), the Hawai`i Supreme Court is restricted to reversing or modifying an order, judgment, or sentence to those circumstances when an error was committed that "injuriously affected the substantial rights of the appellant," and further, no reversals are permitted "for any matter held for the benefit of the appellant."

In this case, the Majority Opinion notes that the charges against Hewitt have already been dismissed and remand is no longer appropriate. Additionally, the Majority Opinion states that, because the charges have been dismissed, it is "unnecessary to determine when custodial interrogation of Hewitt actually commenced." The Majority Opinion acknowledges that there is no order or judgment to reverse, and there is no substantial right of Hewitt that remains "injuriously affected." In effect then, the Majority Opinion is an advisory opinion not authorized by statute. As has been noted by the Hawai`i Supreme Court, advisory opinions create "concerns 'about the proper-and properly limited-role of courts in a democratic society' and contravenes the 'prudential rules of judicial self-governance.'" *Kapuwai v. City and County of Honolulu,*

Dept. of Parks and Recreation, 121 Hawai`i 33, 41 (2009) (quoting *State v. Fields*, 67 Hawai`i 268, 274 (1984)).

Hewitt has no right to appeal aside from those granted by statute. And in this case, by the time the Majority Opinion was issued, there was no injury to her substantial rights, nor order or judgment available to be reversed. Even Hewitt appears to have recognized this given her Motion to Set Aside Notice of Setting for Oral Argument and/or Motion for Clarification filed August 24, 2021. *See* SCWC-16-460, Dkt. #13. After the dismissal of her charges with prejudice, she was no longer asserting legally recognized interests, personal and peculiar to her. As such, the Hawai`i Supreme Court lacked any jurisdiction in this case and the Majority Opinion erred by failing to take this into account.

2. The Majority Opinion misapplied the exception to the "mootness doctrine" as outlined in *Johnston v. Ing*, 50 Hawai`i 379 (1968)

In addition to failing to recognize the Hawai`i Supreme Court's lack of jurisdiction, the Majority Opinion misapplied the "mootness doctrine." The Majority Opinion correctly noted that the question of "mootness" applied in this case, but the Majority Opinion concluded that there is "a well-recognized exception to the mootness doctrine...for matters 'affecting the public interest.'" However, this only addresses part of the public interest exception to the "mootness doctrine." In *Johnston v. Ing*, the Hawai`i Supreme Court established that the exception to the "mootness doctrine" arises:

> When the question involved affects the public interest, and it is likely in the nature of things that similar questions arising in the future would likewise become moot before a needed authoritative determination by an appellate court can be made, the exception is invoked.

Johnston v. Ing, 50 Hawai`i 379, 381 (1968) (emphasis added).

Beginning with the question of whether this case affects the public interest, The Majority Opinion erred by finding that the circumstances in this case extend beyond Hewitt to impact the

broader public. As noted in the Majority Opinion, the facts establishing whether Hewitt was in custody are particular to her and her circumstances, both as to whether probable cause to arrest existed and as to whether the totality of the circumstances in the hospital equated to "custody." And the ICA's opinion, which the Majority Opinion reverses, also focuses on the particular facts relevant to Hewitt's case, not the broader implications of *Miranda* and custodial interrogation. Even Hewitt's Application for Writ of Certiorari focused on the "totality of the circumstances" to argue she was in custody, not that the existence of probable cause alone equating to custody. *See* SCWC-16-460 Dkt. #1.

Contrary to the claim that further review in this case is in the public interest, the Majority Opinion actually serves to undermine the public interest. As noted by the Majority Opinion (citing to *Ocean Resort Villas Vacation Owners Ass'n v. County of Maui*) the public interest is affected by procedures which lead to the "loss of precedential value for judicial decisions, and a diminished respect for the judicial process." *Ocean Resort Villas Vacation Owners Ass'n v. County of Maui*, 147 Hawai`i 544, 560 (2020). While the Majority Opinion indicates it is acting to correct "errors of law," by overturning *State v. Sagapolutele-Silva*, 151 Hawai`i 283 (2022), decided on June 3, 2022, for the reasons outline in points 3 and 4, it is the Majority Opinion committing errors of law. Moreover, the *Sagapolutele-Silva* decision was issued mere months prior to the decision in this case, and nearly nine months after oral arguments in this case. *See* SCWC-16-460, Dkt. #19. It is hard to conceive of how it is in the public's interest that so recent a Supreme Court decision should be overturned, especially by a case in which the Appellant has had her charges dismissed and the only change has been the composition of the Court deciding the case. This undermines precedential value and judicial clarity, rather than enhancing it. It also does not enhance respect for the judicial process, but in fact, could call it into question.

Even assuming that the Majority Opinion is right with respect to the issue of whether the case affects the public interest, the Majority Opinion still failed to apply the second part of the

exception to the "mootness doctrine." The Majority Opinion does not consider or explain how the questions in this case are likely to arise in the future and "likewise become moot before a needed authoritative determination by an appellate court can be made." *Johnston*, 50 Hawai`i at 381. In fact, the questions arising in this case are quite likely to arise again in the future and not become moot prior to appellate court review. Issues revolving around *Miranda*, the right against self-incrimination, and the question of what amounts to custodial interrogation are not novel or infrequent in Hawai`i, and have been addressed recently by the appellate courts of this State. *See* (among many others) *State v. Manion,* 151 Hawai`i 267 (2022); *State v. Skapinok*, 151 Hawai`i 170 (2022); *State v. Vasconcellos*, 152 Hawai`i 25 (2022); *State v. Tronson*, 152 Hawai`i 25 (2022); and *State v. Kazanas*, 138 Hawai`i 23 (2016).

3. The Majority Opinion misapplied and overlooked the relevant Hawai`i and federal case law with respect to the issue of "custody" under *Miranda v. Arizona*, 384 U.S. 436 (1966) and the U.S. and Hawai`i constitutions

The Majority Opinion in this case not only misapplied the relevant Hawai`i case law regarding "custody" under *Miranda*, but also overlooked relevant Hawai`i and federal case law on the issue. It must be noted at the outset that while Hewitt appealed on the grounds that her Fifth Amendment right under the U.S. Constitution, as well as her rights under the Hawai`i Constitution, were violated, the ICA opinion did not indicate whether it was considering the issue under the U.S. or Hawai`i constitutions, or both. And the Majority Opinion did not indicate why or how the two should be treated differently with respect to the issue of "custody."

A. Hawai`i and *Miranda*

The *Miranda* decision was grounded in the Fifth Amendment to the U.S. Constitution's right against self-incrimination, and the Hawai`i Supreme Court has held that *Miranda*'s protections have an "independent source in the Hawai`i Constitution's privilege against self-incrimination." *State v. Santiago*, 53 Hawai`i 254, 265-66 (1971). In fact, the Hawai`i constitution's right against self-incrimination, framed under Article I, Section 10, mirrors the

language of the Fifth Amendment. *State v. Miyasaki*, 62 Hawai`i 269, 273. And the framers of Article I, Section 10 had "a definite intent to also adopt the interpretations of the Fifth Amendment." *Id.* at 281. Additionally, Hawai`i appellate courts have often been guided by U.S. Supreme Court and federal court decisions in construing *Miranda* and Article I, Section 10 as it applies in Hawai`i. *Id.* See also: *State v. Wallace*, 105 Hawai`i 131, 141 (2005)[1]; *State v. Nelson*, 69 Hawai`i 461, 467 fn. 3 (1987)[2]; *State v. Mailo*, 69 Hawai`i 51, 53 (1987)[3]; *State v. Russo*, 67 Hawai`i 126, 134 (1984)[4]; and *State v. Kazanas*, 138 Hawai`i 23, 35 (2016)[5].

In *Miranda*, the U.S. Supreme Court found that in-custody interrogation of criminal suspects "contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). *Miranda* defines custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. It is the compulsion "inherent in custodial surroundings" that gives rise to the necessity of the *Miranda* warnings, "not the strength or content of the government's suspicions at the time the questioning was conducted." *Beckwith v. U.S.*, 425 U.S. 341, 346-47 (1976) (citations omitted). Specifically, in *Santiago* the Hawai`i Supreme Court endorsed the protections of *Miranda* "[i]n order to encourage the police to inform persons accused of crimes of their rights." *Santiago*, 53 Hawai`i at 266 (emphasis added).

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[1] Citing *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977); *United States v. Stanley*, 597 F.2d 866, 869 (4th Cir.1979); *Berkemer v. McCarty*, 468 U.S. 420 (1984)
[2] Citing *Johnson v. Zerbst*, 304 U.S. 458 (1938).
[3] Citing *Edwards v. Arizona*, 451 U.S. 477 (1981); *Smith v. Illinois*, 469 U.S. 91 (1984); *Solem v. Stumes*, 465 U.S. 638 (1984).
[4] Citing *Orozco v. Texas*, 394 U.S. 324 (1969)
[5] Citing *Rhode Island v. Innis*, 446 U.S. 291 (1980)

B. Hawai`i Case Law and "Custody"

In *Santiago* the Hawai`i Supreme Court held that the purpose of *Miranda* protections is to ensure an "individual's right to choose between silence and speech remains unfettered," even under the "inherently compelling pressures" found in the custodial situation. *Santiago*, 53 Hawai`i at 262. *Miranda*'s protections are premised on the existence of circumstances in which an individual's will is at the mercy of law enforcement. This is *Miranda* and *Santiago*'s meaning of "custody." *Santiago* specifically notes the protections are required for "persons accused of crimes." *Id.* at 267. A person accused of a crime is aware of that fact. It is not equivalent to probable cause to arrest unconveyed to the suspect. The Majority Opinion misapprehends or ignores this distinction.

In *State v. Kalai,* the Hawai`i Supreme Court noted that the question of custody "necessarily depends upon the circumstances of the particular case; and whether the compulsive factors with which *Miranda* was concerned are present must be determined from the totality of the circumstances." *State v. Kalai,* 56 Hawai`i 366, 369 (1975) (citing *Orozco v. Texas,* 394 U.S. 324 (1969) and *United States v. Montos,* 421 F.2d 215, 222-23 (5th Cir. 1970)) (emphasis added). In *State v. Patterson*, the Hawai`i Supreme Court recounted the decision in *Kalai*, before going on to cite the U.S. Supreme Court decision in *Beckwith* which rejected "the focus test" as conclusive on the question of "custody." *State v. Patterson*, 59 Hawai`i 357, 359-360 (1978) (citation omitted). The Court in *Patterson* went on to endorse the U.S. Supreme Court decision in *Mathiason*'s observation that:

> "[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...the questioning took place in a 'coercive environment'...Nor is the requirement of warnings to be imposed...because the questioned person is one whom the police suspect."

Id. at 360 (quoting *Mathiason*, 429 U.S. at 495). The Court continued, noting that when police have facts sufficient to arrest an individual without a warrant (i.e., probable cause) before

questioning the individual, "it is less likely that the person confronted would be allowed to come and go as he pleases." *Id.* at 361 (emphasis added). Ultimately, *Patterson* concluded that custody must be determined from the totality of the circumstances, including the place and time of interrogation, the length of the interrogation, the nature of the questions asked, the conduct of police, and "all other relevant circumstances." *Id.* (citing to *Lowe v. United States*, 407 F.2d 1391 (9th Cir. 1969) and *State v. Tsukiyama*, 56 Hawai`i 8 (1974)). Contrary to the Majority Opinion, the *Patterson* Court stated "[n]o precise line can be drawn" on the issue of what is or is not custody, and each case turns on "its own facts and circumstances," not any one factor. *Id.* at 362. In fact, the Court in *Patterson* specifically rejected the defendant in *Patterson*'s contention that once police had probable cause to arrest, *Miranda* was triggered. *Id.* at 364, fn. 3.

Following *Patterson*, the Hawai`i Supreme Court continued to apply the totality of the circumstances test when addressing the issue of custody, without singling out probable cause to arrest as conclusive. See *State v. Sugimoto*, 62 Hawai`i 259, 265 (1980) (Custody determinations are "to be made by objectively appraising the totality of the circumstances"); *State v. Melemai*, 64 Hawai`i 479, 481 (1982) ("Among the relevant circumstances to be considered are whether the investigation has focused on the suspect and whether police have probable cause to arrest"); *State v. Paahana*, 66 Hawai`i 499, 502-03 (1983) ("In determining whether a defendant's statement was made in a custodial context, the totality of circumstances must be considered"); and *State v. Russo*, 67 Hawai`i 126, 134 (1984) ("Due consideration of all the circumstances surrounding" the questioning of the defendant indicated he was in custody). In particular, the Court in *Melemai* noted that neither the focus of police on a defendant, nor probable cause to arrest, were determinative as to the issue of custody, though both may play a role. *Melemai*, 64 Hawai`i at 544. Both of these factors were present in *Melemai*, yet the Court still based its determination of "custody" on the totality of the circumstances, which "created...[a] coercive atmosphere." *Id.*

The same cannot be said of the Majority Opinion. Through its "bright-line rule," the Majority Opinion abandons the intent of *Miranda* to counter the "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak." Determining whether such "compelling pressures" or "coercive atmosphere" are present can only be done by objectively analyzing how a reasonable person in the defendant's position would view the situation, not how the police viewed it, or how a judge post-facto views it. *Berkmer,* 468 U.S. at 442. Yet, the Majority Opinion's "bright-line rule" ignores this reality, and divorces the question of custody from whether a defendant's will has been overcome by the "totality of circumstances." In doing so, the Majority Opinion has either overlooked or disregarded the meaning of "custody" in *Miranda*, as well as the cases cited above. No where in the Majority Opinion are these Hawai`i cases overruled, called into question, or even addressed with respect to how they contradict the Majority Opinion's "bright-line rule," as well as the Majority Opinion's general assessment of the totality of the circumstances in Hewitt's case.

Admittedly, the Majority Opinion's "bright-line rule" is not pulled from the aether. As noted in the Majority Opinion, *Ketchum* did state that a person is in custody under the Hawai`i constitution "if an objective assessment of the totality of the circumstances reflects...the point of arrest has arrived because...probable cause to arrest has developed." *Ketchum*, 97 Hawai`i at 126. This holding in *Ketchum* arose from the Court's reference to *State v. Loo*. *Id.* at 124 (citing *State v. Loo*, 94 Hawai`i 207, 212 (2000)). However, this was not the holding of *Loo*. Rather, the Court in *Loo* specifically stated that "if the detained person's responses to a police officer's questions provide the officer with probable cause to arrest," then *Miranda* applies. *Loo*, 94 Hawai`i at 212. *Loo* concerns a situation in which a suspect (temporarily detained on reasonable suspicion) provides answers to an officer's questions which clearly implicate the suspect in a crime. This implication is clear to both the officer and the suspect. In other words, by virtue of the suspect's initial answers, the situation becomes more akin to the "coercive atmosphere" *Miranda* was

designed to address. This is not a novel interpretation, but precisely the same as is found in *Melemai* and cited by the *Loo* opinion itself. *Id.* at 211 (citing to *Melemai*, 64 Hawai`i at 482). In fact, the *Loo* opinion reiterates the applicability of the totality of the circumstances test articulated in *Melemai*, *Sugimoto*, and *Patterson*, without claiming to add or modify those holdings in anyway. *Id.* at 210-11.

Ketchum itself acknowledged that *Melemai*, et al., laid out a variety of factors to determine custody, and that probable cause to arrest is a relevant consideration (but not conclusive). *Ketchum*, 97 Hawai`i at 123 (citations omitted). *Ketchum* also noted that "determining the precise point at which a temporary investigative detention has ripened into a warrantless arrest," (i.e., probable cause) is not susceptible to a "bright-line rule." *Id.* at 124 (citing to *United States v. Sharpe*, 470 U.S. 675, 685 (1985)). *Ketchum* then repeats that "there is no simple or precise bright line delineating when 'the point of arrest' has arrived." *Id.* at 125. Later the Court in *Ketchum*, agreeing with the 9th Circuit, notes that in "determining whether an arrest has occurred, a court must evaluate all the surrounding circumstances." *Id.* at 126 (citing *United States v. Torres-Sanchez*, 83 F.3d 1123, 1127 (9th Cir.1996)).

On the one hand, the Majority Opinion's reading of *Ketchum* might be flawed, ignoring the full details of the opinion, while being too focused on a poorly worded and confusing "summary." In footnote 19, the *Ketchum* majority (in response to the concurring and dissenting opinion) reaffirms the totality of the circumstances test, and rejects the assertion that the decision adopts a new approach to determining if there has been custodial interrogation. *Id.* at 117, fn. 19. The majority also acknowledged, again, there was no "concrete answer" on custody in any given situation. *Id.* The concurring and dissenting opinion lends support to the theory that the Majority Opinion has misread *Ketchum* as well. The concurrence/dissent notes that the majority "leads into a totality of circumstances thicket" that will cause confusion. *Id.* at 134. It also notes that the "probable cause to arrest...is not a *Miranda* precondition." *Id.* On the other hand, the Majority

Opinion's reading of *Ketchum* may be accurate, but the holding of *Ketchum* is itself in error. In this scenario, *Ketchum* misreads *Loo*, fails to follow prior Hawai`i case law, and fails to apply the reasoning behind *Miranda*. Moreover, the *Ketchum* decision misstated the test for interrogation, and did not "constitute 'the clear state of Hawai`i law,'" so it is entirely reasonable to conclude it also got it wrong on the standard for custody. *Kazanas*, 138 Hawai`i at 37-38. Either way, the Majority Opinion's reliance on *Ketchum* should be reconsidered, as it overlooks or misapprehends other, better reasoned Hawai`i cases.

C. Federal Case Law and "Custody"

The Majority Opinion also overlooks federal case law on the issue of "custody" with respect to *Miranda*. While Hawai`i cases claim to source their interpretation of *Miranda* independently in the Hawai`i constitution, as noted above, nearly all relevant considerations of custody cite to federal cases, at least in part. In particular, *Beckwith*, *Berkemer,* and *Stansbury v. California* should have been considered by the Majority Opinion. In *Beckwith*, the U.S. Supreme Court reiterated that it is the '[c]ustodial nature of the interrogation which trigger[s]" the need to adhere to *Miranda*. *Beckwith*, 425 U.S. at 346. The U.S. Supreme Court stated succinctly that it is this "compulsive aspect...not the strength or content of the government's suspicions at the time [of] questioning" which led to the requirements in *Miranda*. *Id. Stansbury* reiterated this point, further explaining that "[i]t is well settled...that a police officer's subjective view...if undisclosed, does not bear upon the question whether the individual is in custody for purposes of *Miranda*. *Stansbury v. California*, 511 U.S. 318, 324 (1994).

In *Berkemer*, the U.S. Supreme Court noted that even in the case of a traffic stop, where a driver's freedom of action is limited, the other circumstances (exposure to public view, the limited number of police present, the initial expectation of a limited interaction, etc.) all mitigate the atmosphere such that it is not "custodial" as understood under *Miranda*. *Berkemer*, 468 U.S. at 437-39. Further, the Supreme Court found that, even though the officer in *Berkemer* intended

to arrest the defendant from the outset, because such an intention was not communicated to the defendant, it had "no bearing on the question [of] whether [the] suspect was 'in custody.'" *Id.* at 442. The Supreme Court in *Berkemer* also addressed an alternative argument by the defendant that *Miranda* is required when probable cause to arrest exists, but found this theory "has little to recommend it." *Id.* at 435, fn. 22. In the case of Hewitt, she was in a public space, only two police were present, and a reasonable person in her position would likely think the interaction would be temporary. And, neither officer ever articulated a plan or intent to arrest her for any crime until she actually was arrested. But the Majority Opinion did not consider *Beckwith, Stansbury,* and *Berkemer*, and thus, did not compare Hewitt's case to the holdings in those cases. For that reason, the Majority Opinion should be reconsidered in order to take into account *Beckwith, Stansbury,* and *Berkemer.*

4. The Majority Opinion misapprehended *U.S. v. Infante*, 701 F.3d 386 (2012), as well as overlooked the full holding of *Infante* as it applies in this case

The Majority Opinion cites to *Infante* with respect to the issue of how to apply the "totality of the circumstances" test to a person in a hospital or receiving medical treatment, going on to "generally adopt the First Circuit's approach for purposes of the article I, section 10 right against self-incrimination." *Majority Opinion* at pg. 28. However, the Majority Opinion misapprehended the *Infante* holding, as well as overlooked the full-context of that decision.

In *Infante*, local fire department personnel responded to the home of the defendant following reports of a "propane explosion," and while en route, located the defendant who was driving himself to the hospital. *U.S. v. Infante*, 701 F.3d 386, 389 (1st Cir.2012). Fire personnel noticed the defendant had superficial shrapnel wounds, and was missing part of a finger, and while being treated, the defendant informed fire personnel he was filling a butane lighter when it exploded. *Id.* Fire personnel asked where this occurred and the defendant indicated inside his house, but was vague about the specific location. *Id.* Fire personnel proceeded to the defendant's

house and found neither a fire or signs of an explosion, but observed the doors locked and decided to enter the house to ensure there were no other hazards. *Id.* at 390. Once inside, the fire personnel observed a trail of blood and followed it to the cellar where they found marijuana plants and concealed pipe bombs. *Id.*

Supplied with this information, an armed fire marshal investigator, along with an armed Maine DEA agent, interviewed the defendant at the hospital twice while the defendant was receiving treatment. *Id.* at 391. Both interviews occurred without *Miranda* warnings and while the defendant was being administered morphine. *Id.* In the first interview, the fire marshal informed the defendant he did not have to give a statement and was not in custody, but acknowledged the defendant could not leave. *Id.* The fire marshal also explained that they had concerns "because of some of the stuff we found at your residence." *Id.* During the interview, the defendant at one point said "I may as well just plead the 5th and go for a lawyer," and after the fire marshal said that the bomb squad and drug enforcement agents were on the way to the hospital, the defendant said he nothing else to say. *Id.* In spite of this, the fire marshal told the defendant he wanted to know how the defendant injured his hand, but could not talk to him unless he revoked his request for an attorney, which the defendant then did. *Id.* The first interview ended when the defendant asked for more pain medication, but a second interview being about an hour later. *Id.* at 391-92. During the second interview, hospital personnel came and went. *Id.* In neither the first or second interview did officers explicitly say the defendant could terminate the interview (in fact, they kept questioning him after he invoked his 5th Amendment rights), nor did they tell the defendant he could ask them to leave.

The defendant in *Infante* argued that his statements in both interviews at the hospital amounted to custodial interrogation, and that the interrogation should have ended once he invoked his right to remain silent and asked for a lawyer. *Id.* at 395. The First Circuit then noted the requirements of *Miranda*, including the line cited by the Majority Opinion that when a

suspect is receiving medical treatment the question of custody is "whether he or she was at liberty to terminate the interrogation and cause the [officers] to leave.'" *Id.* at 396. The First Circuit then noted that the test for custody under *Miranda* was one of "the totality of the circumstances," and identified factors guiding the analysis as "whether the suspect was questioned in familiar or at least neutral surroundings, the number of law enforcement officers present at the scene, the degree of physical restraint placed upon the suspect, and the duration and character of the interrogation." *Id.* (citation omitted). This is in line with Hawai`i cases regarding the factors to be reviewed in the "totality of the circumstances" test, but not the Majority Opinion's "bright-line rule." Analyzing all these factors as they applied to the defendant in *Infante*, the First Circuit found the atmosphere non-confrontational, the surroundings neutral, and that the officers did nothing to restrict the defendant's movements themselves. *Id.* at 397-98. The First Circuit noted that a reasonable person in the defendant's position would have felt free to terminate the interview and ask the officers to leave. *Id.* at 397. The First Circuit did note that some facts, "taken in isolation, may suggest an inference of custody," but ultimately found that under the totality of the circumstances, the defendant was not in custody for purposes of *Miranda*. *Id.* at 397-98. The First Circuit also found that because of this fact, the officers were under no obligation to respect his attempted invocation of his right to an attorney and to remain silent. *Id.* at 398.

The Majority Opinion, of course, reached the exact opposite conclusion in Hewitt's case, in spite of very similar circumstances. While the officers in *Infante* did inform the defendant he did not have to answer questions and the same was not conveyed to Hewitt, the fact the *Infante* defendant felt the need to invoke his right to an attorney and to remain silent indicates he saw the circumstances surrounding his interrogation as more confrontational than Hewitt. Still, the *Infante* Court found that a reasonable person in the defendant's position would have felt free to terminate the interview and ask officers to leave. The Majority Opinion, citing to Hewitt and her

"incoherence," as opposed to a "reasonable person" in her position, found she was not at liberty to terminate the interview and have the officer's leave. As such, the Majority Opinion misapplied the holding of *Infante*. Moreover, Hewitt's incoherence speaks less to her being subject to the "compelling pressures" or "coercive atmosphere" of custody where *Miranda* is meant to apply, and more to the voluntariness of her statements more generally, as the ICA concluded.

Going further, the Majority Opinion either overlooked or misapprehended the *Infante* decision generally, because *Infante* affirmed that determining whether a defendant in a hospital is in custody still must be done through a review of the totality of the circumstances. Not by some modified version of it, and certainly not utilizing a "bright-line rule" related to probable cause. If the Majority Opinion truly means to "generally adopt the First Circuit's approach," then a defendant invoking his right to remain silent and right to an attorney will not equate to custody Hawai`i, and police will not be obliged to respect the invocation. If that is the intent of the Majority Opinion, then it should make that clear, along with all of its logical consequences with respect to prior Hawai`i case law. Otherwise, the Majority Opinion should be reconsidered with respect to its interpretation of and reliance on *Infante*.

II. CONCLUSION

Based on the forgoing argument and authority, and pursuant to Hawai`i Rules of Appellate Procedure Rule 40, the State requests this Honorable Court reconsider the Opinion of the Court filed in this case on March 15, 2023.

DATED: Kailua-Kona, Hawai`i, March 23, 2023.

Respectfully Submitted,

By: /s/ Charles E. Murray III
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Plaintiff-Appellee

SCWC-16-0000460

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

STATE OF HAWAI`I,	)	CASE NO. 3DTA-15-00745
	)	
Plaintiff-Appellee,	)	MOTION FOR RECONSIDERATION
	)	OF OPINION OF THE COURT
	)	FILED MARCH 15, 2023
vs.	)	
	)	SUPREME COURT OF THE STATE OF
CYRINA HEWITT,	)	HAWAI`I
	)	
Defendant-Appellant.	)	HON. MARK E. RECKTENWALD,
	)	Chief Justice,
	)	HON. PAULA A. NAKAYAMA
	)	HON. MICHAEL D. WILSON
	)	HON. SABRINA S. MCKENNA
	)	HON. TODD W. EDDINS,
	)	Associate Justices

DECLARATION OF COUNSEL

Charles E. Murray III hereby declares:

1. I am the Deputy Prosecuting Attorney for the County of Hawai`i assigned to this case, representing the State of Hawai`i;

2. On March 15, 2023, this Honorable Court issued its opinion in *State v. Hewitt*, SCWC-16-0000460, --- P.3D ---, (2023), WL 2523652;

3. Declarant agrees with the analysis of Associate Justice Nakayama set forth in her dissent, to which Chief Justice Recktenwald joined, this case, as well as the reasoning and holdings of other Hawai`i and federal cases that contrast with the opinion in this case as outlined in the Motion for Reconsideration;

4. Accordingly, Declarant submits the Motion for Reconsideration of Opinion of the Court filed March 15, 2023 in good faith and not for purposes of delay.

I, Charles E. Murray III, declare under penalty of law that the foregoing is true and correct.

DATED: Kailua-Kona, Hawai`i, March 23, 2023.

Respectfully Submitted,

By: /s/ Charles E. Murray III
CHARLES E. MURRAY III
DEPUTY PROSECUTING ATTORNEY
FOR THE STATE OF HAWAI`I
Plaintiff-Appellee

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CERTIFICATE OF SERVICE

I hereby certify that an unfiled copy of the foregoing document was served upon the party identified below via the Judiciary Electronic Filing System on the date set forth below.

Taryn R. Tomasa
Deputy Public Defender
1130 N. Nimitz Highway, Suite A254
Honolulu, HI 96817

On March 23, 2023.

/s/ Charles E. Murray III
CHARLES E. MURRAY III
DEPUTY PROSECUTING ATTORNEY
FOR THE STATE OF HAWAI`I
Plaintiff-Appellee