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STATE of Hawai‘i, Petitioner and Respondent/Plaintiff-Appellant,
v.
Tiana F.M. SAGAPOLUTELE-SILVA, Respondent and Petitioner/Defendant-Appellee.

SCWC-19-0000491

Supreme Court of Hawai‘i.

JUNE 3, 2022

Brian R. Vincent for Petitioner and Respondent State of Hawai‘i

Alen M. Kaneshiro for Respondent and Petitioner Tiana F.M. Sagapolutele-Silva

RECKTENWALD, C.J., NAKAYAMA, J., AND CIRCUIT JUDGE WONG, ASSIGNED BY REASON OF VACANCY, WITH McKENNA, J., DISSENTING SEPARATELY, WITH WHOM WILSON, J., JOINS, AND WILSON, J., DISSENTING SEPARATELY

OPINION OF THE COURT BY RECKTENWALD, C.J.

I. INTRODUCTION

Tiana Sagapolutele-Silva was arrested after a traffic stop in 2018 and charged with Operating a Vehicle Under the Influence of an Intoxicant (OVUII) and excessive speeding. Sagapolutele-Silva moved to suppress any statements she made during the traffic stop on the ground that she was not advised of her Miranda [1] rights during the encounter. The district court granted the motion, concluding that Sagapolutele-Silva was in custody during the investigation for OVUII because the investigating officers had probable cause to arrest her for excessive speeding, a

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petty misdemeanor. The Intermediate Court of Appeals (ICA) affirmed.

On appeal, the State asks us to clarify when a suspect is in custody for purposes of administering the prophylactic warnings against self-incrimination required by article I, section 10 of the Hawai‘i Constitution. Although our cases have consistently stated that the custody test is one of totality of the circumstances, some of our precedent has nonetheless indicated that the presence of probable cause alone is dispositive.

We hereby clarify that a court must evaluate the totality of the circumstances to determine whether a suspect is in custody such that Miranda warnings are required before a police officer may interrogate them. That formulation is consistent with the purposes of Miranda since it focuses the inquiry on whether police have created a "coercive atmosphere." See, e.g., State v. Melemai, 64 Haw. 479, 482, 643 P.2d 541, 544 (1982) (Miranda warnings are required when "the totality of circumstances created the kind of coercive atmosphere that Miranda warnings were designed to prevent"); State v. Wyatt, 67 Haw. 293, 299, 687 P.2d 544, 549 (1984) ("the ultimate test is whether the questioning was of a nature that would subjugate the individual to the will of his examiner and thereby undermine the privilege against compulsory self-incrimination" (citations omitted) (internal quotation marks omitted)).

Almost forty years ago, we considered the coerciveness of roadside questioning in Wyatt. The defendant there was ordered to pull over after officers observed her driving at night with no headlights on, and officers then smelled alcohol emanating from her vehicle. We held that Miranda warnings were not required at that point since the circumstances were not intimidating or coercive, but rather constituted "on-the-scene questioning of brief duration conducted prior to arrest in public view." Wyatt, 67 Haw. at 300, 687 P.2d at 550 ; see also State v. Kuba, 68 Haw. 184, 188, 706 P.2d 1305, 1309 (1985) (holding, under facts "almost

indistinguishable" from Wyatt, that Miranda warnings were not required before the police began asking questions). Wyatt and Kuba have not been overruled and their totality-of-the-circumstances approach should be applied here. Accordingly, probable cause is relevant but not dispositive to determining whether a person is in custody.

This case illustrates why it is important to assess the relevance of probable cause in light of all the circumstances. Sagapolutele-Silva was observed driving at thirty-two miles per hour over the speed limit; if she had been driving just three miles per hour slower, the officer would not have had probable cause to arrest her for the offense of excessive speeding. Hawai'i Revised Statutes (HRS) § 291C-105(a)(1) (2007).[2] That three-mile-per-hour difference had no effect on the coerciveness of the situation from Sagapolutele-Silva's point of view. Under the totality of the circumstances, Sagapolutele-Silva was not in custody when she was pulled over or during the administration of the standardized field sobriety test (SFST). Accordingly, Miranda warnings were not required, and there was no illegality which would taint her subsequent statements as fruit of the poisonous tree.

We therefore vacate the district court's order suppressing Sagapolutele-Silva's statements, vacate the judgment of the ICA affirming that Sagapolutele-Silva was in custody during the traffic stop, and remand the case to the district court for further proceedings.

II. BACKGROUND

Sagapolutele-Silva was arrested after a traffic stop on March 31, 2018. She was charged in the District Court of the First Circuit[3] with one count of OVUII, in violation of HRS §§ 291E-61(a)(1) and/or (a)(3) (Supp. 2015),[4] and one count of excessive

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speeding, in violation of HRS § 291C-105(a)(1) (2007).[5]

Sagapolutele-Silva moved to suppress any statements she made during the traffic stop on the ground that she was not advised of her Miranda rights during the encounter. At the hearing on the motion, the Honolulu Police Department (HPD) officers involved in the traffic stop, Officers Franchot Termeteet and Bobby Ilae, testified. Officer Termeteet testified to pulling over Sagapolutele-Silva after observing her driving seventy-seven miles per hour in an area where the speed limit was forty-five miles per hour, and drifting between lanes without signaling on the H-1 freeway in Honolulu. On cross-examination, Officer Termeteet testified that based on his observations of her speeding, he had probable cause to arrest Sagapolutele-Silva for excessive speeding and that after being stopped, she was not free to leave.

Officer Termeteet informed Sagapolutele-Silva "that I was stopping her for speeding"; in response, she acknowledged that she had been speeding. Officer Termeteet testified that he smelled "a strong odor of alcohol coming from within the vehicle," but he could not determine from whom the odor emanated because there were four passengers in the car. He asked Sagapolutele-Silva for her license, vehicle registration, and proof of insurance. She produced a permit for a commercial driver's license, and explained that she had a regular license but did not have it with her; she also provided him with a safety-inspection card. Officer Termeteet observed that Sagapolutele-Silva had red, watery, and glassy eyes. Officer Termeteet asked Sagapolutele-Silva if she would participate in the SFST; she agreed to do so.

Officer Ilae testified that he was "covering Officer Termeteet on a traffic stop" and administered the SFST to Sagapolutele-Silva.[6] After asking her again whether she would be willing to participate in the SFST, he asked a series of "preliminary questions" sometimes referred to as the medical rule-out questions: (1) "[d]o you have any physical defects or speech impediments," (2) "are you taking medication," (3) "are you under the care of a doctor or dentist," (4) "are you under the care of an eye doctor," (5) "are you epileptic or diabetic," (6) "[do you have an] artificial or glass eye," (7) "are

you wearing any contact lenses or corrective lenses," and (8) "are [you] blind in any eye." Officer Ilae testified that these questions are asked "to help [him] gauge whether or not the impairment [he is] seeing is medically related or if ... there's a medical emergency." He testified he would not administer the SFST if there were a medical emergency, but if someone did not want to answer the medical rule-out questions, he would nonetheless continue with the test. On cross-examination, however, he testified he had never in fact administered the SFST without asking the medical rule-out questions.

Officer Ilae then administered the SFST. He instructed Sagapolutele-Silva on each of the three components – the horizontal gaze nystagmus, the walk-and-turn, and the one-leg stand – to which she replied that she understood and had no questions. After completing the SFST and giving Sagapolutele-Silva a preliminary alcohol screening, Officer Ilae then told her "that she was over" and was being arrested. As Officer Ilae walked back to his car with Sagapolutele-Silva following him, he heard her state that "she's not going to lie, she had a few beers but her friends [were] more impaired than she was."

The district court orally granted the motion to suppress, concluding that Sagapolutele-Silva

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was in custody and subject to interrogation because Officer Termeteet had probable cause to arrest her when he pulled her over. In its written order, the district court made, as relevant here, the following findings of fact and conclusions of law:

> **FINDINGS OF FACT**
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> ...
>
> 2. Officer Termeteet ... measure[d] Defendant's speed at 77 miles per hour in a 45 mile per hour zone.
>
> ...
>
> 5. While following Defendant's vehicle, Officer Termeteet observed Defendant drift into lane number 1, completing a lane change without signals and then drift from lane 1 back to lane 2, completing another lane change without signals.
>
> 6. Officer Termeteet activated his blue flashing lights and Defendant's vehicle came to a complete stop in the right shoulder lane.
>
> 7. Officer Termeteet approached Defendant's driver's side window and noticed the odor of alcohol coming from her breath. ... [and] from within the vehicle. ...
>
> 8. Officer Termeteet asked Defendant for her driver's license. ... Officer Termeteet asked Defendant if she would be willing to participate in a [SFST]. Defendant verbally consented to participate in the SFST. Defendant exited her vehicle and HPD Officer [Ilae] took over the investigation.
>
> 9. When Officer Ilae arrived on scene, Officer Termeteet apprised him of his observations. Officer Ilae approached Defendant's vehicle and began conversing with her. Officer Ilae asked Defendant if she would be willing to participate in an SFST. Defendant verbally consented to participate in the SFST....
>
> 10. Defendant was not free to leave while she waited for Officer Ilae to arrive.
>
> 11. Prior to Defendant exiting the vehicle, she was not free to leave.
>
> 12. Defendant was the focus of an OVUII investigation.
>
> 13. Officer Termeteet had probable cause to arrest or cite Defendant for

> the petty misdemeanor offense of Excessive Speeding as soon as he stopped her vehicle.
>
> ...
>
> **CONCLUSIONS OF LAW**
>
> ...
>
> 7. At the time that Defendant was sitting in her vehicle, prior to the administration of the SFST, she was not free to leave, she was the focus of an OVUII investigation and officers had probable cause to arrest [her] for at least Excessive Speeding. Officer[s] Termeteet and Ilae did not need the results of the SFST to arrest and/or cite Defendant for Excessive Speeding. Legal custody had attached.

(Footnotes omitted.)

The district court concluded that both the officers' initial questions, asking if Sagapolutele-Silva would consent to the SFST, and the medical rule-out questions, asking whether she understood the instructions, were interrogation; accordingly, Sagapolutele-Silva's answers to those questions were suppressed. The district court also suppressed all evidence obtained thereafter as fruit of the poisonous tree.

The State appealed the order granting the motion to suppress, and the ICA affirmed in part and vacated in part in a published opinion. State v. Sagapolutele-Silva, 147 Hawai'i 92, 104, 464 P.3d 880, 892 (App. 2020). As relevant here, the ICA concluded that Sagapolutele-Silva was in custody for excessive speeding "[u]nder the totality of the circumstances" because Officer Termeteet had probable cause to arrest her for that offense when she was initially stopped. Id. at 100, 464 P.3d at 888. The ICA held, additionally, that "due to Sagapolutele-Silva being in custody for Excessive Speeding, the medical rule-out questions, which were asked in relation to the OVUII investigation here, constituted interrogation."[7] Id. at 101, 464 P.3d at 889. The ICA further reasoned that although

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"the investigation for OVUII in this case constituted a separate and distinct investigation" from the investigation for excessive speeding, and Officer Termeteet only had reasonable suspicion of OVUII, "the failure to provide a Miranda warning when required for one crime will taint a subsequent interrogation even if the interrogation relates to a different crime for which Miranda warnings were not yet required, if a defendant is still in custody." Id. at 100-01, 464 P.3d at 888-89.

The State and Sagapolutele-Silva filed applications for writs of certiorari, both of which this court accepted. The State asks us to revisit our precedent establishing an "either/or" test in which the existence of probable cause, standing alone, is enough to establish that a suspect was in custody.[8] Sagapolutele-Silva agrees that "the fact of probable cause for arrest is not determinative on the issue of 'custody' for the purposes of Miranda — the determination as to whether an individual is in 'custody' requires an objective determination of the totality of the circumstances." But Sagapolutele-Silva contends that the ICA erred by holding that she was not in custody during the "separate and distinct" investigation for OVUII.[9]

III. STANDARD OF REVIEW

"An appellate court reviews a ruling on a motion to suppress de novo to determine whether the ruling was 'right' or 'wrong.' " State v. Weldon, 144 Hawai'i 522, 530, 445 P.3d 103, 111 (2019) (quoting State v. Tominiko, 126 Hawai'i 68, 75, 266 P.3d 1122, 1129 (2011)).

IV. DISCUSSION

The self-incrimination clause of article I, section 10 of the Hawai'i Constitution[10] ensures that "a police officer may not undermine a person's privilege against compelled self-incrimination by subjugating his or her will to that of examining police officer." State v. Ah Loo, 94 Hawai'i 207, 210, 10 P.3d 728, 731 (2000). This privilege

"provides us with some of our most treasured protections — preservation of our autonomy, privacy, and dignity against the threat of state action." State v. Kamana'o, 103 Hawai'i 315, 320, 82 P.3d 401, 406 (2003) (quoting State v. Reyes, 93 Hawai'i 321, 329, 2 P.3d 725, 733 (App. 2000)). In order to safeguard this right, before police can interrogate a suspect in custody, "the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) ;

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id. at 455, 86 S.Ct. 1602 ("Even without employing brutality, ... the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.").

Miranda warnings are also mandated under the Hawai'i Constitution, State v. Santiago, 53 Haw. 254, 265–66, 492 P.2d 657, 664 (1971) ("We hold today that the protections which the United States Supreme Court enumerated in Miranda have an independent source in the Hawai[']i Constitution's privilege against self-incrimination."), and we have provided broader protections under our constitution than exist under the United States Constitution, id. at 263, 266, 492 P.2d at 662, 664 (rejecting Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), and holding that defendant who testifies cannot be impeached with statements obtained in violation of Miranda).

The threshold question for a Miranda analysis is whether the defendant was subjected to "custodial interrogation," defined 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." Melemai, 64 Haw. at 481, 643 P.2d at 543 (quoting Miranda, 384 U.S. at 444, 86 S.Ct. 1602). Here, the district court and ICA held that Sagapolutele-Silva was both (1) in custody and (2) interrogated, and therefore, Miranda warnings were required. For the following reasons, we disagree with the first conclusion.

A. Although Our Cases Emphasize That the Relevant Inquiry is the Totality of the Circumstances, Some Decisions Have Suggested That the Existence of Probable Cause is Determinative

As noted above, both parties agree that the existence of probable cause should not be outcome determinative when analyzing whether a suspect is in custody for purposes of Miranda. But when the ICA homed in on whether probable cause had developed in this case, it did so because, although this court has repeatedly stated that the test turns on the totality of the circumstances, some of our precedent also suggests that probable cause, standing alone, is enough to establish a suspect was in custody:

> [W]e hold that a person is "in custody" for purposes of article I, section 10 of the Hawai'i Constitution if an objective assessment of the totality of the circumstances reflects either (1) that the person has become impliedly accused of committing a crime because the questions of the police have become sustained and coercive, such that they are no longer reasonably designed briefly to confirm or dispel their reasonable suspicion or (2) that the point of arrest has arrived because either (a) probable cause to arrest has developed or (b) the police have subjected the person to an unlawful "de facto" arrest without probable cause to do so.

State v. Ketchum, 97 Hawai'i 107, 126, 34 P.3d 1006, 1025 (2001) (emphases added).

We take this opportunity to clarify. To determine whether a suspect is in custody for Miranda purposes under article I, section 10 of the Hawai'i Constitution, a court must consider the totality of the circumstances, objectively

appraised. The relevant circumstances are those that "betoken[ ] a significant deprivation of freedom, 'such that an innocent person could reasonably have believed that he or she was not free to go and that he or she was being taken into custody indefinitely.' " Id. at 125, 34 P.3d at 1024 (alterations omitted) (quoting Kraus v. County of Pierce, 793 F.2d 1105, 1109 (9th Cir. 1986)). While the existence of probable cause is relevant, it is not dispositive in every case.

1. Our cases have never abrogated the totality-of-the-circumstances inquiry, although they recognize the relevance of probable cause to arrest

Our cases have consistently emphasized that the totality of the circumstances should be evaluated in determining when a person is in custody for Miranda purposes. They have also consistently noted that the existence of probable cause to arrest is relevant to that analysis. Although Ketchum indicated that the existence of probable cause is determinative of custody, it never abrogated the totality-of-the-circumstances test – to the contrary, it explicitly affirmed it. Moreover, far

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from overruling cases like Wyatt and Kuba, which applied the test to traffic stops, Ketchum cited them in support.

Fifty years ago, in State v. Kalai, police went to the defendant's home to ask what he knew about a shooting that had occurred two days prior. 56 Haw. 366, 369, 537 P.2d 8, 11 (1975). We noted that:

> What constitutes custodial interrogation outside of the police station, however, 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. One important factor is the degree to which the investigation has focused upon a specific individual, for once a particular individual becomes a prime suspect, he must be advised of his constitutional rights before any attempt is made to interrogate him.

Id. (citations omitted).

We observed that the investigation had not yet "zeroed in" on the defendant, that the defendant voluntarily let the officers into his home, spoke with them freely, and that "[n]o questions were asked which might have been calculated to elicit admissions placing him at the scene" or linking him to the weapon that was used. Id. at 370, 537 P.2d at 12. Considering all the circumstances, we concluded that defendant was not in custody.

Even after the United States Supreme Court held the following year, in Beckwith v. United States, 425 U.S. 341, 347, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976), that whether or not the defendant is the "focus" of the investigation is immaterial,[11] this court continued to recognize that the focus of the investigation is a significant factor. See, e.g., Melemai, 64 Haw. at 481, 643 P.2d at 544 ; State v. Patterson, 59 Haw. 357, 361, 581 P.2d 752, 755 (1978). In Patterson, police responding to a report of a burglary in progress at 3 a.m. briefly questioned the defendant outside of a home; we held that Miranda warnings were not required. Citing Beckwith, 425 U.S. at 347, 96 S.Ct. 1612, we noted that the "focus of the investigation upon the defendant, standing alone, will not trigger the application of the Miranda rule," but acknowledged that it continued to be an "important factor." Patterson, 59 Haw. at 361, 581 P.2d at 755. We emphasized that the test requires consideration of the totality of the circumstances, including probable cause:

> Where the police, prior to questioning the individual, are in possession of facts sufficient to effect an arrest without a warrant based on probable cause, it is less likely that the person confronted would be allowed to come and go as he pleases. The degree of this likelihood may, of course, depend

> upon the nature and gravity of the offense, as well as other circumstances. In any event, whether the defendant was in custody or otherwise deprived of his freedom of action for Miranda purposes is to be determined from the totality of the circumstances, objectively appraised. These would include the place and time of the interrogation, the length of the interrogation, the nature of the questions asked, the conduct of the police, and all other relevant circumstances.

Id. (emphasis added) (citations omitted).

Patterson thus indicated that probable cause was suggestive of custody – a circumstance that might serve as an indicator that the point of arrest has arrived.[12]

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Following Patterson, this court continued to hold that "[p]robable cause to arrest is ... not determinative, but it may play a significant role in the application of the Miranda rule." Melemai, 64 Haw. at 481, 643 P.2d at 544.[13] In Melemai, the police were investigating a hit and run in which a jogger was struck by a pickup truck. Id. at 480, 643 P.2d at 543. The license plate of the vehicle involved in the accident was registered to the defendant. Police went to the defendant's home, and the defendant arrived in a vehicle matching the description given by a witness to the accident. Officers asked the defendant to exit his vehicle and for his driver's license. When the defendant complied, they asked him "if he had hit anyone with his car, and defendant answered in the affirmative." Id. The police officers then asked why the defendant had left the scene, and the defendant answered. Id.

We held that the defendant's admission that he hit the jogger gave the police probable cause. "Inasmuch as the totality of circumstances created the kind of coercive atmosphere that Miranda warnings were designed to prevent, custody attached and Miranda warnings were required. Based upon our analysis, the defendant's answer to the first question was admissible while his answer to the second was not." Id. at 482, 643 P.2d at 544.

We later revisited this issue in Ah Loo. The defendant there was observed by police holding a beer while he stood with a group of people; when officers "detained the group" and asked the defendant his name, age, and residential address, he admitted he was underage. 94 Hawai‘i at 209, 10 P.3d at 730. We held that a defendant is not in custody if, during a "temporary investigative detention," the police officer "poses noncoercive questions to the detained person that are designed to confirm or dispel the officer's reasonable suspicion." Id. at 211, 10 P.3d at 732. In other words, we clarified that "an individual may very well be ‘seized’ " pursuant to search and seizure doctrine "and yet not be ‘in custody,’ such that Miranda warnings are required as a precondition to any questioning." Id. This court cited the rule from Melemai that "if neither probable cause to arrest nor sustained and coercive interrogation are present, then questions posed by the police do not rise to the level of ‘custodial interrogation’ requiring Miranda warnings." Ah Loo, 94 Hawai‘i at 210, 10 P.3d at 731. In a parenthetical, we cited Melemai for the proposition that " ‘custody’ did not occur until after defendant's admission of culpability — uttered in response to [the] police officer's question — gave [the] officer probable cause to arrest." Id. at 211, 10 P.3d at 732.

Accordingly, citing Melemai, we formulated the rule as follows:

> [I]f the detained person's responses to a police officer's questions provide the officer with probable cause to arrest or, alternatively, if officer's questions become sustained and coercive (such that the officer's questions are no longer reasonably designed to briefly confirm or dispel his or her reasonable suspicion), the officer is — at that time — required to inform the detained person of his or her constitutional rights against

> self-incrimination and to counsel, as mandated by Miranda and its progeny.

Id. at 212, 10 P.3d at 733 (first emphasis added).

Thus, up to and including our decision in Ah Loo, our cases did not indicate that the existence of probable cause alone was dispositive. Rather, it was a factor to be considered in light of all the circumstances. Where probable cause developed during the course of the officer's questioning of the defendant — such

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as when the defendant admitted hitting a jogger in Melemai — custody would attach.

That approach makes sense, since the questions and responses would factor into assessing the coerciveness of the situation from the defendant's point of view. In Melemai, probable cause developed at the scene, in the presence of the defendant, when the defendant answered affirmatively to the officer's question "if he had hit anyone with his car." 64 Haw. at 480, 643 P.2d at 543. That question and the defendant's answer contributed to a coercive atmosphere of which the defendant was aware. Id. at 482, 643 P.2d at 544 ; see also State v. Hoffman, 73 Haw. 41, 54, 828 P.2d 805, 813 (1992) (applying Melemai to hold that custody attached when the police obtained probable cause because defendant admitted to possessing a bottle of beer in a public park); State v. Russo, 67 Haw. 126, 135-36 & n.6, 681 P.2d 553, 560-61 & n.6 (1984) (officers went to defendant's apartment at 4 a.m. to question him about a murder; Miranda warnings required after defendant told them that he had recently purchased a handgun and that it was in his car, which "matched" the description of a car used during the murder).

A year after Ah Loo, we considered custody under vastly different circumstances in Ketchum. There, a search warrant was executed by at least 60 officers at a home at 7 a.m. Ketchum, 97 Hawai‘i at 111, 34 P.3d at 1010. The officers broke into the house, encountered Ketchum and a co-defendant in a bedroom, ordered them to show their hands, and within a minute asked Ketchum for personal information including his address. Considering all of the circumstances, including the display of force by the officers, we concluded that Ketchum had been "de facto" arrested since a reasonable person in his position would have understood that they were being detained indefinitely. Id. at 111-12, 127, 34 P.3d at 1010-11, 1026.

During the course of our analysis, we reviewed our precedent, including Ah Loo, which we characterized as holding that a detainee is in custody when they are "expressly or impliedly accused of having committed a crime." Id. at 124, 34 P.3d at 1023 (emphasis added). We acknowledged that "we look to the totality of the circumstances," id. at 122, 34 P.3d at 1021 (quoting Ah Loo, 94 Hawai‘i at 210, 10 P.3d at 731), that "there is no simple or precise bright line delineating when ‘the point of arrest’ has arrived," and that "no single factor, in itself, is dispositive as to when a temporary investigative detention has morphed into an arrest," id. at 125, 34 P.3d at 1024. We then adopted the following two-part, either/or test to determine at what point the investigatory detention becomes custody:

> In summary, we hold that a person is "in custody" for purposes of article I, section 10 of the Hawai‘i Constitution if an objective assessment of the totality of the circumstances reflects either (1) that the person has become impliedly accused of committing a crime because the questions of the police have become sustained and coercive, such that they are no longer reasonably designed briefly to confirm or dispel their reasonable suspicion or (2) that the point of arrest has arrived because either (a) probable cause to arrest has developed or (b) the police have subjected the person to an unlawful "de facto" arrest without probable cause to do so.

Id. at 126, 34 P.3d at 1025 (first emphasis

added).[14]

Although seemingly adopting a bright-line rule that the existence of probable cause is dispositive, Ketchum did not explicitly overrule our precedent indicating that the determination of custody requires an evaluation of all the circumstances. To the contrary, Ketchum expressly affirmed not only the totality-of-the-circumstances

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test, but also Wyatt and Kuba, both of which evaluated the totality of the circumstances surrounding traffic stops:

> The concurring and dissenting opinion "disagree[s] with the totality of the circumstances formulation seemingly adopted" by us "in this case." Acoba and Ramil, JJ., concurring in part and dissenting in part ..., at 129, 34 P.3d at 1028. However, this court consistently addresses the question whether a defendant has been subjected to custodial interrogation within the context of the totality of the circumstances.... We therefore do not understand our opinion to be "adopt[ing]" a new approach in analyzing whether custodial interrogation has occurred for Miranda purposes.

Id. at 117 n.19, 34 P.3d at 1017 n.19 (emphasis added) (citations omitted) (citing Ah Loo, 94 Hawai‘i at 210, 10 P.3d at 731 ; Kuba, 68 Haw. at 188-90, 706 P.2d at 1309-10 ; Wyatt, 67 Haw. at 299, 687 P.2d at 549 ; Patterson, 59 Haw. at 361, 581 P.2d at 755 ; Kalai, 56 Haw. at 369, 537 P.2d at 11).

Furthermore, Ketchum did not present the circumstances present here, where the officer had probable cause to arrest before engaging with the defendant and did not communicate that fact to the defendant.[15]

2. The totality-of-the-circumstances approach, applied in Wyatt and Kuba , is valid and applies to this case

We hereby clarify that the totality-of-the-circumstances approach to traffic stops adopted in Wyatt and Kuba and affirmed in Ketchum remains valid and applies to this case. The existence of probable cause, while relevant, is not dispositive, and the proper inquiry in determining whether a defendant is in custody for Miranda purposes remains the totality of the circumstances.

Both our cases and federal courts are in accord that traffic stops are treated under a totality-of-the-circumstances analysis. In Berkemer v. McCarty, the United States Supreme Court rejected a "rule under which questioning of a suspect detained pursuant to a traffic stop would be deemed ‘custodial interrogation’ if and only if the police officer had probable cause to arrest the motorist for a crime," explaining:

> The threat to a citizen's Fifth Amendment rights that Miranda was designed to neutralize has little to do with the strength of an interrogating officer's suspicions. And, by requiring a policeman conversing with a motorist constantly to monitor the information available to him to determine when it becomes sufficient to establish probable cause, the rule proposed by respondent would be extremely difficult to administer.

468 U.S. 420, 435 n.22, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

The defendant in Berkemer was pulled over after a state trooper saw him weaving in and out of traffic. After the defendant exited his vehicle, the officer noticed he had trouble standing and decided to charge him with a traffic offense and to prevent him from leaving the scene. Id. at 423, 104 S.Ct. 3138. The Supreme Court held that Miranda warnings were not required, and distinguished roadside stops from the circumstances at issue in Miranda and its progeny. Id. at 441, 104 S.Ct. 3138. First, during

ordinary traffic stops, detentions are usually brief and presumptively temporary; second, traffic stops are usually conducted in public, where the atmosphere is "substantially less 'police dominated.' " Id. at 439-40, 104 S.Ct. 3138. While roadside stops may morph into custodial situations if the defendant is "subjected to treatment that renders him 'in custody' for practical purposes," the Court did not find those circumstances present here. Id. at 440, 104 S.Ct. 3138 (citation omitted). The Court explained,

> Only a short period of time elapsed between the stop and the arrest. At no point during that interval was respondent informed that his detention would not be

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> temporary. Although [the arresting officer] apparently decided as soon as respondent stepped out of his car that respondent would be taken into custody and charged with a traffic offense, [the officer] never communicated his intention to respondent. A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.

Id. at 441-42.

As we explained in Wyatt, "the ultimate test is whether the questioning was of a nature that 'would "subjugate the individual to the will of his examiner" and thereby undermine the privilege against compulsory self-incrimination.' " 67 Haw. at 299, 687 P.2d at 549 (quoting Rhode Island v. Innis, 446 U.S. 291, 299, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)). The question of custody therefore turns on the perceptions of a reasonable person in the detainee's position.[16] Ketchum, 97 Hawai'i at 125, 34 P.3d at 1024 (reciting the test as whether "[an] innocent person could reasonably have believed that he [or she] was not free to go and that he [or she] was being taken into custody indefinitely" (quoting Kraus, 793 F.2d at 1109)). While "[a]n officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned," they "are relevant only to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her ' "freedom of action." ' " Stansbury v. California, 511 U.S. 318, 325, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) (citations omitted) (quoting Berkemer, 468 U.S. at 440, 104 S.Ct. 3138). The existence of probable cause that is not disclosed to the suspect — as opposed to when a suspect is confronted with the officer's suspicions, or the evidence supporting them — is unlikely to impact the suspect's perceptions of the encounter.[17] By the same token, an after-the-fact determination that the police could have arrested the detainee should play little role in determining whether or not the detainee felt they were under arrest.

As discussed earlier, see supra section IV.A.1, our cases recognize that it is

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highly relevant when probable cause develops during the course of questioning the defendant. See, e.g., Melemai, 64 Haw. at 482, 643 P.2d at 544 (holding Miranda warnings were required where probable cause developed at the scene and custody attached); see also Ah Loo, 94 Hawai'i at 212, 10 P.3d at 733 ("[I]f the detained person's responses to a police officer's questions provide the officer with probable cause to arrest ... the officer is — at that time — required to [provide Miranda warnings]."). The defendant is present during that questioning, and both the officer's questions and the defendant's answers can contribute to a coercive atmosphere of which the defendant is aware.

However, probable cause developed prior to the officer's questioning of the suspect is a far different matter. While we have recognized that it is relevant to assessing whether the defendant was in fact free to leave, see Patterson, 59 Haw.

at 361, 581 P.2d at 755 ("Where the police, prior to questioning the individual, are in possession of facts sufficient to effect an arrest without a warrant based on probable cause, it is less likely that the person confronted would be allowed to come and go as he pleases."), it has limited relevance to assessing the coerciveness of the encounter from the defendant's point of view. The instant case provides a good example: although Officer Termeteet told Sagapolutele-Silva that she had been "speeding," and although she acknowledged that to be the case, there is nothing to indicate that Sagapolutele-Silva understood that she had implicated herself in a crime. Indeed, had she been going only three miles per hour slower, Officer Termeteet would not have had probable cause to arrest her for excessive speeding.

In Wyatt, we considered whether Miranda warnings were required for "roadside questioning of the defendant after she was stopped for operating a motor vehicle on a street in Waikiki without lighted headlamps in violation of the City's traffic code." 67 Haw. at 298, 687 P.2d at 549. The officer there directed the defendant to pull her vehicle over, asked for her documents, and noticed a smell of liquor emanating from the vehicle. He asked the defendant if she had been drinking, which she "readily admitted." Id. at 296-97, 687 P.2d at 547-48. He then asked if she would be willing to perform a field sobriety test, and she agreed. The test indicated she might have been under the influence of intoxicants, and she was arrested. Id. at 297, 687 P.2d at 548.

We held that the officer was not required to advise the defendant of her Miranda rights before asking her if she had been drinking, noting:

> [T]he record does not reveal the intimidating or inherently coercive factors usually extant when interrogation is conducted in a custodial setting. Rather, what transpired here may be more aptly described as on-the-scene questioning of brief duration conducted prior to arrest in public view. In short, the circumstances surrounding the incident cannot support an inference that Miranda rights were triggered yet ignored; for nothing in the record suggests the setting was custodial or that the interrogation was of a nature likely to subjugate the defendant to the will of her examiner and undermine the constitutionally guaranteed privilege against self-incrimination.

Id. at 300-301, 687 P.2d at 550 (footnote omitted).

A year later, we affirmed the holding in Wyatt under "almost indistinguishable" facts in Kuba. There, the defendant was stopped by police after straddling two lanes and traveling five miles per hour in a twenty-five mile per hour zone. Kuba, 68 Haw. at 185, 706 P.2d at 1307. An officer stopped the defendant, requested his license, and asked him to step out of the vehicle. The officer observed that the defendant appeared disoriented and unsteady on his feet. The officer told the defendant the reason for the stop and informed him that he suspected the defendant of driving while intoxicated. The defendant responded that he had consumed four beers at a downtown bar, and the officer asked him if he "normally gets wasted on four beers." Id. In response, the defendant stated that he had "also smoked some marijuana." Id. at 185-86, 706 P.2d at 1307. After failing a field sobriety test, the defendant was arrested for driving under the influence of alcohol in violation

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of HRS § 291-4 (1976).[18] Id. at 186, 706 P.2d at 1308.

As in Wyatt, we held that the officer was not required to advise Kuba of her Miranda rights before asking questions. Id. at 189, 706 P.2d at 1310. We noted that the officer's roadside questioning, "similar to that in Wyatt," was composed of "legitimate, straightforward, and noncoercive question[s] necessary to obtain information to issue a traffic citation." Id. at 188-89, 706 P.2d at 1309-10.

Nothing in Wyatt or Kuba suggests that the existence of probable cause should be dispositive of whether the defendant was in custody. Significantly, the defendant in Wyatt had been observed by the officer driving without her lights on, which we noted was defined by the Traffic Code of the City and County of Honolulu as a misdemeanor punishable by up to ten days in prison for a first offense. Wyatt, 67 Haw. at 296 n.3, 687 P.2d at 547 n.3. Yet the existence of probable cause to arrest for that criminal offense did not enter into this court's consideration in either case.[19] Rather, this court focused on the coerciveness of the encounter viewed in light of the totality of the circumstances. Wyatt, 67 Haw. at 299, 687 P.2d at 549 ; see also Kuba, 68 Haw. at 189, 706 P.2d at 1309-10.

That approach should be upheld, especially in the traffic context, because it allows police to adequately investigate before deciding whether to arrest a suspect or to simply issue a citation. See Patterson, 59 Haw. at 361-362, 581 P.2d at 755 ("The adoption of the Miranda rule ... was never intended to hamper law enforcement agencies in the exercise of their investigative duties or in the performance of their traditional investigatory functions."). A rule that a detainee is in custody from the moment probable cause exists, and must accordingly be advised of their Miranda rights before any questioning can take place, effectively requires police officers to make an " 'all or nothing' choice between arrest and inaction," which is precisely the situation that investigatory detentions were intended to prevent. Ah Loo, 94 Hawai'i at 211, 10 P.3d at 732 (quoting Patterson, 59 Haw. at 363, 581 P.2d at 756); see also Kernan v. Tanaka, 75 Haw. 1, 38 n.23, 856 P.2d 1207, 1226 n.23 (1993) ("We do not require the police to have probable cause to arrest prior to the administration of the field sobriety test because such a requirement unduly burdens law enforcement.").

Here, when Officer Termeteet approached Sagapolutele-Silva's vehicle, he noticed the odor of alcohol coming from inside and, during the course of requesting her documents, noted that she had red, watery, and glassy eyes. He suspected she may have been drinking, and asked "if she can do the field sobriety test to make sure she was safe to drive." Under the bright-line, either/or rule applied by the district court here, Officer Termeteet would have been required to give Miranda warnings to Sagapolutele-Silva as soon as he approached her vehicle, before he could question her. If she had invoked her right to remain silent or to have counsel present, Officer Termeteet would not have been able to conduct a field sobriety test to determine whether she was safe to drive and would have been forced to decide on other facts whether to arrest her or to simply cite her and allow her to drive away.[20]

A bright-line test focusing on probable cause does not, therefore, serve the purpose of the Miranda rule: to prevent the police from coercing suspects into answering

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incriminating questions against their will. See Howes v. Fields, 565 U.S. 499, 508–09, 132 S.Ct. 1181, 182 L.Ed.2d 17 (2012) (" '[C]ustody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion."); Melemai, 64 Haw. at 482, 643 P.2d at 544 (holding Miranda warnings were required when "the totality of circumstances created the kind of coercive atmosphere that Miranda warnings were designed to prevent"). In this case, Officer Termeteet's questioning was properly limited to "that which was minimally necessary for him to decide upon a reasonable course of investigatory action." Patterson, 59 Haw. at 364, 581 P.2d at 756.

For the foregoing reasons, we reaffirm that whether or not a defendant is "in custody" requires "objectively appraising the totality of the circumstances." Melemai, 64 Haw. at 481, 643 P.2d at 544. Courts may consider probable cause as part of that inquiry — and indeed, they should if the circumstances warrant it, such as when the suspect is confronted with the facts that establish probable cause. But the ultimate touchstone is whether, under an objective view of the totality of the circumstances, the de facto point of arrest has arrived. Ketchum, 97 Hawai'i

at 125, 34 P.3d at 1024.

B. Under the Totality of the Circumstances, Sagapolutele-Silva Was Not in Custody

The totality-of-the-circumstances custody analysis looks for "any ... event[s] or condition[s] that betoken[ ] a significant deprivation of freedom, 'such that an innocent person could reasonably have believed that he or she was not free to go and that he or she was being taken into custody indefinitely.' " Id. (alterations omitted) (quoting Kraus, 793 F.2d at 1109). And "the ultimate test is whether the questioning was of a nature that 'would "subjugate the individual to the will of his examiner" and thereby undermine the privilege against compulsory self-incrimination.' " Wyatt, 67 Haw. at 299, 687 P.2d at 549 (quoting Innis, 446 U.S. at 299, 100 S.Ct. 1682). Relevant factors include: "the time, place and length of the interrogation, the nature of the questions asked, and the conduct of the police at the time of the interrogation." Id. (alterations omitted) (quoting State v. Paahana, 66 Haw. 499, 503, 666 P.2d 592, 595 (1983)). "[W]hether the investigation has focused on the suspect and whether the police have probable cause to arrest him prior to questioning" may be relevant, but not dispositive. Melemai, 64 Haw. at 481, 643 P.2d at 544. A temporary investigative detention — such as a routine traffic stop — is often not custodial under a totality-of-the-circumstances analysis. Ah Loo, 94 Hawai'i at 211, 10 P.3d at 732 ("[G]enerally speaking, a person lawfully subjected to a temporary investigative detention by a police officer ... is not subjected to 'custodial interrogation' when the officer poses noncoercive questions to the detained person that are designed to confirm or dispel the officer's reasonable suspicion." (Citation omitted.)).

In considering whether a temporary detention has "morphed into an arrest," this court looks for factors traditionally associated with arrest, such as "handcuffing, leading the detainee to a different location, subjecting him or her to booking procedures, ordering his or her compliance with an officer's directives, using force, or displaying a show of authority beyond that inherent in the mere presence of a police officer." Ketchum, 97 Hawai'i at 125, 34 P.3d at 1024 (quoting Kraus, 793 F.2d at 1109); see also People v. Null, 233 P.3d 670, 676-77 (Colo. 2010) (holding traffic stop became custodial after the defendant failed several sobriety tests, including a portable breath test, police surrounded the defendant and prevented him from walking away, and the defendant was detained for fifteen minutes).

Here, the totality of the circumstances show that Sagapolutele-Silva was not in custody for purposes of article I, section 10 of the Hawai'i Constitution until after the SFST. Although the district court concluded that "legal custody had attached," it made no finding that Sagapolutele-Silva's freedom of movement had been curtailed to a degree "that betoken[ed] a significant deprivation of freedom such that an innocent person could reasonably have believed that he or she was not free to go and that he or she was being taken into custody indefinitely." Ketchum, 97 Hawai'i at 125, 34 P.3d at 1024 (quotation

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marks, citation, and alterations omitted). And indeed, the relevant circumstances did not support such a finding. Although the officers had probable cause to arrest Sagapolutele-Silva for excessive speeding and she had become the focus of an OVUII investigation, the officers' conduct did not suggest that she was in fact under arrest until after the SFST. Before the SFST, Sagapolutele-Silva was not told she was being arrested; she was not handcuffed or taken to the police station; there were, at most, two officers present during the traffic stop, which occurred "in public view," Wyatt, 67 Haw. at 300, 687 P.2d at 550, and neither officer used physical force or displayed "a show of authority beyond that inherent in the mere presence of a police officer," Ketchum, 97 Hawai'i at 125, 34 P.3d at 1024 ; see Patterson, 59 Haw. at 363-64, 581 P.2d at 756 (finding no custody where "[n]o guns were drawn and kept upon the defendant," "he [was not] confronted and subjected to an overbearing show of force," "[t]he interview itself was brief," and "[t]he questions were not couched in accusatory terms"). Although Sagapolutele-Silva exited her vehicle, that does

not necessarily turn the traffic stop into a custodial arrest. See Kernan v. Tanaka, 75 Haw. 1, 38, 856 P.2d 1207, 1226 (1993) ("Ordering the driver to exit the vehicle is an extension of the [temporary investigative] seizure that must be accompanied by sufficient facts to support the officer's action.").

Under a totality-of-the-circumstances analysis, Sagapolutele-Silva was not in custody up to and during her performance on the SFST. Objectively viewed, the circumstances of the traffic stop did not rise to the level of a de facto arrest until after that point. Ketchum, 97 Hawai‘i at 125, 34 P.3d at 1024. "Custody" is a necessary component of custodial interrogation, and so the conclusion that Sagapolutele-Silva was not in custody ends the inquiry — we need not and do not consider whether the officers "interrogated" her during the encounter. Her statements made during this pre-arrest period accordingly need not be suppressed for want of Miranda warnings. In light of our conclusion that there was no custody in this case until after the SFST, any evidence suppressed as fruit of the poisonous tree likewise need not be suppressed. We therefore vacate the district court's order suppressing all of Sagapolutele-Silva's statements up to, during, and after her performance on the SFST.[21]

V. CONCLUSION

For the foregoing reasons, the ICA's June 19, 2020 judgment on appeal and the June 22, 2020 amended judgment on appeal are affirmed in part and vacated in part, and the district court's June 7, 2019 judgment and August 26, 2019 amended judgment are vacated. This case is remanded to the district court for further proceedings consistent with this opinion.

DISSENTING OPINION OF McKENNA, J., IN WHICH WILSON, J., JOINS

I. Introduction

In 1967, this court recognized that

> the Hawaii Supreme Court, as the highest court of a sovereign state, is under the obligation to construe the state constitution, not in total disregard of federal interpretations of identical language, but with reference to the wisdom of adopting those interpretations for our state. As long as we afford defendants the minimum protection required by federal interpretations of the Fourteenth Amendment to the Federal Constitution, we are unrestricted in interpreting the constitution of this state to afford greater protection.

State v. Texeira, 50 Haw. 138, 142 n.2, 433 P.2d 593, 597 n.2 (1967).[1] Since then, this court has chosen to provide additional protections to Hawai‘i's people, especially due to the increasing limitation on constitutional rights provided by federal courts under the United States Constitution.

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Today, instead of providing additional protection under our constitution, the majority chooses to curtail an existing protection. Under the guise of clarifying precedent, the majority actually overrules well-established Hawai‘i precedent protecting the fundamental constitutional right against self-incrimination under article I, section 10 of the Hawai‘i Constitution. For many years, people here have enjoyed the protection of a bright-line rule requiring law enforcement to provide Miranda warnings when probable cause to arrest exists, even when an arrest is not made. Today, the majority actually overrules the bright-line rule, thus reducing the constitutional rights of Hawai‘i's people.

I respectfully but strongly disagree with the majority decision to overrule this precedent. This court has traditionally interpreted our constitution to provide greater protections than provided by the federal constitution. Bright-line rules enhance the rule of law as they provide predictability and equality in law enforcement's treatment of defendants. Thus, a bright-line rule requiring the giving of Miranda warnings upon the development of probable cause is more

effective in bolstering citizen confidence in law enforcement and in the justice system. "Totality of circumstances" tests should be eschewed when possible, as they involve appellate judges in a fact-finding process. Elimination of the bright-line rule will increase the need for litigation regarding whether a person is in "custody" when interrogation occurred under "a totality of circumstances."

In ruling, the majority relies on factually distinguishable precedent arising out of traffic stops that allowed questioning without Miranda warnings before the existence of probable cause. Yet, until today, to protect the fundamental right against self-incrimination, our case law had required Miranda warnings to avoid suppression of statements made in response to interrogation after development of probable cause.

After abrogating the bright-line rule, the majority then engages in a fact-finding process, applying the "totality of circumstances" standard to determine when Sagapolutele-Silva was actually in custody for custodial interrogation purposes. The majority rules she was not in custody until her formal arrest after completion of the standardized field sobriety tests ("SFSTs").

State v. Skapinok, SCWC-19-0000476, also filed today, involves a defendant that was clearly in "custody" at the time of the medical rule-out ("MRO") questions preceding the SFSTs. We held that the MRO questions were reasonably likely to elicit an incriminating response and therefore constituted custodial interrogation.

In this case, however, the majority rules that because Sagapolutele-Silva was not in custody, her responses to the MRO questions are not subject to suppression. I disagree with the majority's application of the test. Even based on the totality of circumstances, Sagapolutele-Silva was "in custody" at the time of the MRO questions. Whether or not probable cause existed, her responses to those questions were therefore also properly suppressed based on a "totality of circumstances." Her statements after the SFSTs were also properly suppressed as they were "fruit of the poisonous tree" of the MRO questions.

For all of these reasons, I would affirm the district court's suppression of statements made by Sagapolutele-Silva after her initial stop for excessive speeding, except as to the questions and responses regarding whether Sagapolutele-Silva would participate in the SFSTs and whether she understood the instructions. Pursuant to Skapinok, these questions were not "interrogation" because they were not reasonably likely to lead to incriminating responses.

II. Discussion

A. The majority unnecessarily chooses to overrule the bright-line rule requiring Miranda warnings when probable cause to arrest exists, thus reducing the constitutional rights of Hawai‘i citizens

In State v. Ketchum, 97 Hawai‘i 107, 34 P.3d 1006 (2001), we held that a person is in

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custody for purposes of the right against self-incrimination under article I, section 10 of the Hawai‘i Constitution:

> [I]f an objective assessment of the totality of the circumstances reflects either (1) that the person has become impliedly accused of committing a crime because the questions of the police have become sustained and coercive, such that they are no longer reasonably designed briefly to confirm or dispel their reasonable suspicion or (2) that the point of arrest has arrived because either (a) probable cause to arrest has developed or (b) the police have subjected the person to an unlawful "*de facto* " arrest without probable cause to do so.

97 Hawai‘i at 126, 34 P.3d at 1025 (emphases added). Therefore, at least for the last twenty years, our case law has clearly held a person is

in "custody" for purposes of requiring Miranda warnings once probable cause to arrest has developed.

Especially for cases like this one, Ketchum set out a clear, easily applied, bright-line rule: When probable cause to arrest exists upon an initial stop or detention, Miranda rights must be given before "interrogation" occurs.

As explained by the late Justice Antonin Scalia in an oft-cited University of Chicago Law Review article, bright-line rules foster uniformity and predictability. Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1179 (1989). Uniformity and predictability are hedges against uneven and arbitrary application of the law. Bright-line rules foster equality of treatment under the law, which increases public confidence in the justice system. Justice Scalia opined that the most significant role of judges is to protect the individual criminal defendant against the occasional excesses of popular will, and to preserve the checks and balances within our constitutional system that are designed to inhibit that popular will. I agree with him that in terms of constitutional rules of criminal procedure, in order to preserve checks and balances, we should strive for bright-line rules:

> I had always thought that the common-law ["totality of circumstances"] approach had at least one thing to be said for it: it was the course of judicial restraint, "making" as little law as possible in order to decide the case at hand. I have come to doubt whether that is true. For when, in writing for the majority of the Court, I adopt a general rule, and say, "This is the basis of our decision," I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle. In the real world of appellate judging, it displays more judicial restraint to adopt such a course than to announce that, "on balance," we think the law was violated here—leaving ourselves free to say in the next case that, "on balance," it was not. It is a commonplace that the one effective check upon arbitrary judges is criticism by the bar and the academy. But it is no more possible to demonstrate the inconsistency of two opinions based upon a "totality of the circumstances" test than it is to demonstrate the inconsistency of two jury verdicts. Only by announcing rules do we hedge ourselves in.
>
> While announcing a firm rule of decision can thus inhibit courts, strangely enough it can embolden them as well. Judges are sometimes called upon to be courageous, because they must sometimes stand up to what is generally supreme in a democracy: the popular will. Their most significant roles, in our system, are to protect the individual criminal defendant against the occasional excesses of that popular will, and to preserve the checks and balances within our constitutional system that are precisely designed to inhibit swift and complete accomplishment of that popular will. Those are tasks which, properly performed, may earn widespread respect and admiration in the long run, but — almost by definition — never in the particular case. The chances that frail men and women will stand up to their unpleasant duty are greatly increased if they can stand behind the solid shield of a firm, clear principle enunciated in earlier cases. It is very difficult to say that a particular convicted

> felon who is the object of widespread hatred must go free because, on balance, we think that excluding the defense attorney from the line-up process in this case may have prevented a fair trial. It is easier to say that our cases plainly hold that, absent exigent circumstances, such exclusion is a per se denial of due process.

56 U. Chi. L. Rev. at 1179-80.

In retrenching from the bright-line "probable cause as custody" rule of Ketchum, the majority relies on Hawai‘i traffic stop cases in which questioning was allowed before probable cause had developed. Cases involving investigatory stops without probable cause can present issues in determining when probable cause developed. In this case, however, it is undisputed that probable cause existed at the time of the initial stop. Thus, this case does not support overruling precedent based on alleged difficulties in ascertaining whether and when probable cause developed.

In addition, as discussed in Section II.B below, determining whether a defendant is in custody under a totality of circumstances requires consideration of many factors other than the existence of probable cause. The majority eliminates the clear "probable cause" test for custody and requires analyzing "custody" for purposes of custodial interrogation based on multiple factors, making it more difficult to ascertain when "custodial" interrogation begins. This change may result in increased litigation and appeals.

Until today, this court has "consistently provided criminal defendants with greater protection under Hawaii's version of the privilege against self-incrimination (article I, section 10 of the Hawaii Constitution) than is otherwise ensured by the federal courts under Miranda and its progeny." State v. Valera, 74 Haw. 424, 434, 848 P.2d 376, 380 (1993). The current bright-line rule is one that is easy to understand and apply, especially in cases like this one, in which probable cause to arrest existed at the time of the original stop.

Under the majority's ruling, however, an officer with probable cause to arrest upon the initial stop - who may have already decided to later effectuate the arrest – can now delay the giving of Miranda warnings to elicit incriminating evidence. The majority's ruling allows an officer to delay Miranda warnings and conduct questioning. But see State v. Melemai, 64 Haw. 479, 643 P.2d 541 (1982) (holding an officer had probable cause to arrest the defendant after he admitted to hitting someone with his car, that custody attached, and Miranda warnings were required).

The previous bright-line rule supported protection of our citizens’ constitutional rights and equal treatment under the law, which enhances confidence in law enforcement, the justice system and, thus, in our democratic form of government. Courts should enhance, not reduce, citizen confidence in our justice system.

Hence, I disagree with the majority.

B. Under a totality of circumstances, Sagapolutele-Silva was "in custody" at the time of the MRO questions

The majority abrogates the bright-line "development of probable cause" test for custody, and instead rules the existence of custody must be determined by the general "totality of circumstances" test. Quoting Ketchum, the majority notes the totality of the circumstances analysis looks for "any other event or condition that betokens a significant deprivation of freedom, such that an innocent person could reasonably have believed that [they were] not free to go and that [they were] being taken into custody indefinitely." Ketchum, 97 Hawai‘i at 125, 34 P.3d at 1024 (cleaned up, brackets added). As summarized by the ICA:

> Whether interrogation was carried on in a custodial context is dependent on the totality of circumstances surrounding the questioning. The relevant circumstances, we have said, include

> the time, place and length of the interrogation, the nature of the questions asked, and the conduct of the police at the time of the interrogation. But the ultimate test is whether the questioning was of a nature that would subjugate the individual to the will of his examiner

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> and thereby undermine the privilege against compulsory self-incrimination.

State v. Sagapolutele-Silva, 147 Hawai‘i 92, 98, 464 P.3d 880, 886 (App. 2020) (quoting State v. Wyatt, 67 Haw. 293, 298, 687 P.2d 544, 549 (1984)) (cleaned up).

The majority rules that, under the totality of the circumstances, Sagapolutele-Silva was not in custody until after the SFSTs and she was actually arrested. I also disagree with the majority regarding this ruling.

At the motion to suppress hearing, Officer Termeteet not only testified he had probable cause to arrest Sagapolutele-Silva for excessive speeding when he stopped her, he also testified that she was not free to leave the scene. Officer Ilae also testified Sagapolutele-Silva was not free to leave while he conducted the SFSTs. In determining Sagapolutele-Silva was in custody under the totality of the circumstances, the ICA also cited Officer Termeteet's testimony that Sagapolutele-Silva "was not free to leave from the time she was stopped." Sagapolutele-Silva, 147 Hawai‘i at 100, 464 P.3d at 888.

In this case, Sagapolutele-Silva was pulled over, not for a minor traffic violation, but for excessive speeding, a crime. Without the Miranda warnings required by Ketchum, she had already admitted to that crime. She then consented to the SFSTs and exited her car. The officers testified that Sagapolutele-Silva was not free to leave from the point she was stopped. Thus, by the time she was asked the MRO questions, a reasonable person in Sagapolutele-Silva's position would therefore believe that their freedom had been restrained as in a formal arrest. In the context of this case, the MRO questions were of a nature that would subjugate her to the will of the officer and undermine her privilege against self-incrimination.

Thus, under the totality of the circumstances of this case, Sagapolutele-Silva was in custody at the time of MRO questions, which constituted custodial interrogation. See Skapinok, SCWC-19-0000476 (holding MRO questions were reasonably likely to elicit an incriminating response and therefore constituted custodial interrogation for a defendant whose custody status was not at issue). Her statements after the SFSTs were also properly suppressed as they were "fruit of the poisonous tree" of the MRO questions.

III. Conclusion

For these reasons, I believe the majority's decision is misguided. I would affirm the district court's suppression of statements made by Sagapolutele-Silva after her initial stop for excessive speeding, except as to the questions and response regarding whether Sagapolutele-Silva would participate in the SFSTs and whether she understood the instructions.

DISSENTING OPINION BY WILSON, J.[1]

In this trio of cases the Majority eviscerates the constitutional protection afforded those in Hawai‘i who government agents seek to interrogate. In so doing, the Majority reverses orders entered by the district court that protected the rights of Petitioners Tiana Sagapolutele-Silva ("Sagapolutele-Silva"), Leah Skapinok ("Skapinok") and James Manion ("Manion") to be free from interrogation by government agents.

A. The Majority in Sagapolutele-Silva rejects the settled constitutional protection against self-incrimination previously afforded those in Hawai‘i who face arrest: the people of Hawai‘i who government agents have probable cause to believe have committed a crime are no longer due the settled presumption that probable cause to arrest

means a person is not free to leave police custody; the Majority's erasing of the presumption removes the protection of the right against self-incrimination heretofore accorded Hawai'i's people.

In Sagapolutele-Silva the Majority rescinds the right against self-incrimination previously afforded to those who police have probable cause to believe committed a

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crime.[2] To do so, the Majority opines that a woman pulled over at 2:50 a.m. by a police officer who witnessed her commit excessive speeding, who is without her license, who is told that she was pulled over for speeding, who admits that she was speeding, who shows signs of intoxication, who is questioned while standing outside of her vehicle and who is approached by as many as two police officers, is not in custody. To reach the conclusion that Sagapolutele-Silva was not in custody the Majority holds that, faced with these circumstances, it would not be reasonable for her to believe she was in custody; instead, as a matter of law, the Majority finds it would only be reasonable for her to believe she was free to return to her car and drive away. Of note is the sensible testimony of the two officers at the scene who contradict the conclusion of the Majority and candidly acknowledge that Sagapolutele-Silva was not free to leave from the time her vehicle was initially stopped. Specifically, Officer Franchot Termeteet ("Officer Termeteet") testified that from the time he "approached the window" of Sagapolutele-Silva's vehicle, "she was not free to leave the scene[.]" Officer Bobby Ilae ("Officer Ilae") further testified that throughout the time that he was with Sagapolutele-Silva, she was not free to leave. Consistent with the conclusion of the officers, the District Court of the First Circuit ("district court") and the Intermediate Court of Appeals ("ICA") found—contrary to the Majority's application of the facts—that Sagapolutele-Silva was in custody.

The rule of law relied upon by the district court and the ICA has been settled for over twenty years. This court held that at the point of arrest, the right against self-incrimination attaches: "persons temporarily detained for brief questioning by police officers who lack probable cause to make an arrest or bring an accusation need not be warned about incrimination and their right to counsel, until such time as the point of arrest or accusation has been reached." State v. Patterson, 59 Haw. 357, 362-63, 581 P.2d 752, 756 (1978) (emphasis added).[3] This court then affirmed that the accused is protected from self-incrimination at the point the police have probable cause to arrest: "[I]f the detained person's responses to a police officer's questions provide the officer with probable cause to arrest ... the officer is—at that time—required to inform the detained person of his or her constitutional rights against self-incrimination and to counsel, as mandated by Miranda and its progeny." State v. Loo, 94 Hawai'i 207, 212, 10 P.3d 728, 733 (2000) (citing Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). Within a year, the right of the accused facing arrest to be free from police questioning was specifically applied pursuant to article I, section 10 of the Hawai'i Constitution: "In summary, we hold that a person is "in custody" for purposes of article I, section 10 of the Hawai'i Constitution if an objective assessment of the totality of the circumstances reflects ... that the point of arrest has arrived because either (a) probable cause to arrest has developed or (b) the police have subjected the person to an unlawful "*de facto* " arrest without probable cause to do so." Ketchum, 97 Hawai'i at 126, 34 P.3d at 1025 (emphasis added).[4]

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In contravention of clear precedent to the contrary, the Majority for the first time opens wide interrogation without the protection of the right against self-incrimination of people who police have probable cause to believe have committed a crime. In so doing the Majority reverses the conclusions of the district court and the ICA that Sagapolutele-Silva was in custody[5] and approves the interrogation of Sagapolutele-Silva by police who—having probable cause to believe she committed a criminal offense—seek additional information in pursuit of her

prosecution.

In apparent contradiction of its finding that Sagapolutele-Silva was not in custody, the Majority accepts that petitioners Skapinok[6] and Manion[7] were in custody under facts no less pregnant with indicia of custody than those confronted by Sagapolutele-Silva. In other words, under the facts in Skapinok and Manion the Majority's remaking of the right against self-incrimination would also remove any protection from incriminatory questioning by police who had probable cause to arrest them. Manion's plight was less infused with facts establishing custody than Sagapolutele-Silva's, and Skapinok's plight was ringingly similar to Sagapolutele-Silva's. Unlike Sagapolutele-Silva, Manion committed no offense in the presence of the police. He was found sitting in his car with damage to the vehicle. Only circumstantial evidence provided the probable cause for his arrest. Nor was he told that he was under arrest. Probable cause to arrest Skapinok for reckless driving arose from the officer's observation of her speeding and crossing multiple lanes of traffic. Like Sagapolutele-Silva, Skapinok was told that she was stopped for speeding and that she smelled of alcohol. Consistent with the Majority's deeming unreasonable Sagapolutele-Silva's belief that she was in custody, the belief of both Manion and Skapinok that they were in custody would also be deemed unreasonable under the Majority's analysis. As in Sagapolutele-Silva, the district court and the ICA found both Manion and Skapinok to be in custody. However, unlike Sagapolutele-Silva the Majority chose not to reverse the custody analysis of the lower courts in Manion and Skapinok. The reason for the distinction is not apparent. However, application of the Majority's revised custody analysis to Manion and Skapinok is problematic because in Manion and Skapinok, the government conceded that the facts supported the custody determination.[8]

The new rule established by the Majority upends settled constitutional protection against self-incrimination afforded those whom police have probable cause to arrest; the new rule is unmoored from the axiomatic common-sense constitutional precept that a person whom police have reason to arrest—based on probable cause to believe the person has committed a crime, and who therefore

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is not free to leave police control—is in police custody and thus, is constitutionally entitled to be free from police interrogation. Like Justice McKenna, I dissent to the Majority's unsupported cast-aside of a fundamental right to be free from questioning by a government agent formally poised to gather evidence against one for whom they have probable cause to arrest.[9] Accordingly, with Justice McKenna, the district court, and the ICA, I find that Sagapolutele-Silva was in custody when she was subjected to the MRO questions. I join with Justice McKenna to conclude that Sagapolutele-Silva's statement that she "had a few beers[,]" made soon after the MRO questions, was properly suppressed as "fruit of the poisonous tree" of the MRO questions.[10]

I also dissent to the Majority's holding in Sagapolutele-Silva, Manion, and Skapinok that the conclusion of the district court that the SFST questions[11] and SFST performances of the defendants in all three cases must be suppressed as "fruit of the poisonous tree" was error. The SFST questions are interrogation, and thus, the questions and the responses should be suppressed inasmuch as all three defendants were in custody and no Miranda warnings were given.

B. The SFST questions and SFST performance are fruit of the poisonous tree.

As previously noted in Justice McKenna's dissent, the Majority holds that Sagapolutele-Silva was not in custody at the time of the MRO interrogation, but without explanation, conversely finds Skapinok and Manion were in custody at the time they were subjected

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to MRO interrogation. Because Skapinok and Manion were in custody at the time the MRO

interrogation occurred, and no Miranda warnings were provided, the Majority concedes that the defendants' answers to the MRO questions were properly suppressed by the district court in these cases. While the Majority correctly suppresses Skapinok's and Manion's answers to the MRO questions, the Majority finds that the evidence gathered after the illegal MRO questions is not fruit of the poisonous tree because the officers did not exploit the illegal interrogation.

Respectfully, the evidence gathered after the MRO questions, including the SFST questions and SFST performances, is fruit of the poisonous tree stemming from the unwarned MRO questions and should also be suppressed. The fruit of the poisonous tree doctrine "prohibits the use of evidence at trial which comes to light as a result of the exploitation of a previous illegal act of the police." State v. Fukusaku, 85 Hawai'i 462, 475, 946 P.2d 32, 45 (1997). Under the fruit of the poisonous tree doctrine, "[a]dmissibility is determined by ascertaining whether the evidence objected to as being 'fruit' was discovered or became known by the exploitation of the prior illegality or by other means sufficiently distinguished as to purge the later evidence of the initial taint." Id. (citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). To demonstrate that evidence is not a "fruit" of a prior illegality, the government must prove that "the evidence was discovered through information from an independent source or where the connection between the illegal acts and the discovery of the evidence is so attenuated that the taint has been dissipated[.]" Id. "In other words, the ultimate question that the fruit of the poisonous tree doctrine poses is as follows: Disregarding the prior illegality, would the police nevertheless have discovered the evidence?" Poaipuni, 98 Hawai'i at 393, 49 P.3d at 359.

Here, the relevant question is would the police have obtained the defendants' answers to whether they understood the SFST instructions, whether they had any questions about the SFST, and their performances on the SFST ("SFST evidence") had the police not violated their constitutional rights in obtaining their responses to the MRO questions? See Trinque, 140 Hawai'i at 281, 400 P.3d at 482. Officer Ilae asked Sagapolutele-Silva the following MRO questions: (1) "[d]o you have any physical defects or speech impediments," (2) "are you taking medication," (3) "are you under the care of a doctor or dentist," (4) "are you under the care of an eye doctor," (5) "are you epileptic or diabetic," (6) "[do you have an] artificial or glass eye," (7) "are you wearing any contact lenses or corrective lenses," and (8) "are [you] blind in any eye[?]"[12] Sagapolutele-Silva and Manion answered "no" to all of the MRO questions, and Skapinok answered "no" to most of the questions, except she replied that she was taking a certain medication and seeing a doctor.

Because the MRO questions contributed to the subsequently gathered SFST evidence, the SFST questions and performances should have been suppressed as fruit of the poisonous tree. As the defendants argue, the MRO questions are necessary to perform the SFST safely.[13] That is, an officer will generally not perform the SFST without first receiving satisfactory answers to the MRO questions. Furthermore, the defendants' responses to the MRO questions allowed the officers to draw a different conclusion from the defendants' performances on the SFST than the officers otherwise would have been able to. Without knowing what medical conditions a suspect has, poor performance on the SFST alone cannot lead to a conclusion that the suspect is intoxicated.

Factors relevant to determining whether subsequently gathered evidence is "sufficiently

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attenuated from the illegality ... include: (1) the temporal proximity between the official misconduct and the subsequently procured statement or evidence, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct." Trinque, 140 Hawai'i at 281, 400 P.3d at 482. Under these factors, in all three cases, no time passed between the MRO questions and the

SFST questions and performances. There is also no evidence of any intervening circumstances that attenuated the connection between the illegalities and the SFST questions and performances. For example, Officer Ilae testified that he asked Sagapolutele-Silva the MRO questions, then proceeded to explain the SFST instructions and clarify to her that she understood those instructions, before administering the SFST itself. Thus, the SFST evidence is not sufficiently attenuated from the illegally obtained answers to the MRO questions. Additionally, the MRO questions serve an incriminatory purpose: to aid the officer's investigation into whether they can focus on the results of the SFSTs as caused by intoxication.

What is more, the officers exploited the answers to the MRO questions in analyzing the defendants' performances on the SFSTs and answers to the SFST questions. Poaipuni, 98 Hawai'i at 393, 49 P.3d at 359. As the Majority stated in Skapinok, "the sweep of the seven medical rule-out questions....ensure[ ] not only that the officer [can] administer the test, but that all other possible explanations [are] systemically ruled-out as causes of the test's results." That is, the answers to the MRO questions allow officers to interpret the SFST results and ultimately draw the inference of intoxication from the SFST performance. Officer Ilae in Sagapolutele-Silva testified that if a person answers "no" to all of the MRO questions, it eliminates the possibility that the results of the SFST are caused by "the categories of medical conditions" asked about.[14] Thus, the officers profited from the defendants' answers to the MRO questions by being able to direct their attention to the SFST results as caused by intoxication. The MRO questions are "only there to help [the officers] gauge whether or not the impairment [ ]is caused by medical" reasons rather than intoxication. Consequently, the SFST was an "exploitation of the previous illegality," Poaipuni, 98 Hawai'i at 393, 49 P.3d at 359, and a "benefit gained or an advantage derived" from the previous unwarned MRO questions. Trinque, 140 Hawai'i at 281, 400 P.3d at 482.

In Skapinok and Manion, the Majority contends that when the officers gathered the SFST evidence they were simply "continuing to gather evidence that they had already set out to gather" at the time of the illegally asked MRO questions. In other words, the Majority argues that because the officers had already begun the SFST procedure when they illegally asked the MRO questions, that any illegally obtained evidence in the course of that SFST procedure is not subject to suppression under the fruit of the poisonous tree doctrine. There is no such exception to the privilege against self-incrimination. Merely because the officers had decided to gather the SFST evidence at the time the officers illegally asked the MRO questions does not mean that the officers did not exploit the defendants' answers to the MRO questions in obtaining and analyzing the SFST evidence. Despite the officers having decided to administer the SFST before asking the MRO questions, the officers still profited from the answers to the MRO questions by being able to draw the conclusion that the defendants were intoxicated from the SFST results.

If officers were simply continuing the same evidence-gathering procedure, then the defendants' responses to the MRO questions and the SFST questions would not have an effect on how the officers administered the SFST. However, if the defendant responds affirmatively to certain MRO questions, the SFST may not be safe to perform. Moreover, Corporal Chang testified in Skapinok that if the suspect does not understand the SFST

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instructions, he would ask them what they do not understand and clarify further. The SFST does not begin until the individual indicates that they do not have any questions.[15] In sum, based on the officer's testimony, the SFST would not be conducted if the individual continued to not understand the SFST instructions, if the individual continued to have questions, or if the individual had certain medical conditions. Consequently, the SFST was not simply a continuation of the same evidence gathering, but rather a means through which the officers were able to gather additional evidence that the defendants were intoxicated.

Furthermore, the Majority's conclusion that the SFST and SFST questions were simply a continuation of evidence gathering undermines the fruit of the poisonous tree doctrine. The Manion Majority, for example, concedes that Manion's answers to the MRO "questions provided information germane to the SFST" yet concludes that the SFST evidence is not fruit of the poisonous tree based on the reasoning that "the illegally-obtained evidence is relevant to interpreting subsequently-obtained evidence [but that] does not mean that discovery of the latter 'exploit[s]' the former." This distinction is contrary to the purpose of the fruit of the poisonous tree doctrine. Adequately deterring police misconduct—a key purpose of the exclusionary rule and the fruit of the poisonous tree doctrine—requires ensuring that police cannot profit from a constitutional violation by gaining an undue investigative edge that they would not have otherwise had without the illegality. See State v. Lopez, 78 Hawai'i 433, 446, 896 P.2d 889, 902 (1995). The police did obtain an "investigative edge" by asking the MRO questions: the police were able to rule out other exculpatory reasons for the defendants' performances on the SFST and further confirm their suspicions that the defendants committed an operating a vehicle under the influence of an intoxicant ("OVUII") offense.

C. The SFST questions are interrogation because they are reasonably likely to lead to an incriminating response.

In order to protect the privilege against self-incrimination guaranteed under the fifth amendment to the United States Constitution and article I, section 10 of the Hawai'i Constitution, Miranda warnings must "be given to an accused in order for statements obtained during custodial interrogation to be admissible at trial." State v. Joseph, 109 Hawai'i 482, 493-94, 128 P.3d 795, 806-07 (2006). The two triggers for the Miranda requirement are "custody" and "interrogation." Trinque, 140 Hawai'i at 277, 400 P.3d at 478.

After asking the MRO questions, the officers in these three cases asked the defendants if they understood the SFST instructions and also asked if they had any questions about the procedure ("SFST questions"). Aside from being fruit of the poisonous tree of the unwarned MRO questions, the SFST questions themselves constitute interrogation, and thus if a defendant is in custody, require Miranda warnings.

As explained above, Sagapolutele-Silva, as well as Skapinok and Manion, were in custody at the time of the MRO questions and at the time of the SFST questions and performance. Given that the defendants were in custody at the time of the SFST questions, it must be determined whether the SFST questions were "likely to invoke an incriminating response," the paradigmatic indicator of interrogation. Joseph, 109 Hawai'i at 495, 128 P.3d at 808.

Interrogation is defined as: (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. Trinque, 140 Hawai'i at 277, 400 P.3d at 478. Additionally, as the Skapinok

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Majority notes, "[t]he contents of the answer, as opposed to the manner in which the answer is given, communicate the information that may or may not be used to support the incriminating inference of impairment." The SFST questions are reasonably likely to elicit an incriminating response. If a person indicates that she does not understand the SFST instructions, the content of that answer supports the incriminating inference of impairment. Indeed, Officer Ilae testified that if a person has difficulty understanding the MRO questions or SFST instructions, it could be a sign of intoxication, which he would write in his report.[16] Similarly, if a defendant does have questions about the SFST, this may indicate a lack of understanding and impaired mental faculties. Finally, as Officer Ilae and Corporal Chang testified, if a person indicates that they do understand the instructions but then that person does not perform the test as instructed, the officers might conclude that the suspect is impaired by an intoxicant. These questions are

not "limited and focused inquiries" as the Majority contends in Skapinok (quoting Pennsylvania v. Muniz, 496 U.S. 582, 605, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990)) and it is incorrect to conclude that "neither an affirmative or negative response to these questions is incriminating." State v. Uchima, 147 Hawai'i 64, 84, 464 P.3d 852, 872 (2020). Rather, as the officers testified, either an affirmative or negative response may be incriminating.

Moreover, the inference of intoxication is not just from the fact of any slurred speech, but rather stems from a testimonial statement of the defendant regarding her mental understanding at the time. And, "[a]lthough the 'incriminating inference' may be indirect, the questions nevertheless adduce evidence to establish that intoxication caused"[17] the lack of understanding or failure to follow instructions.[18]

Finally, officers should know that the SFST questions are likely to elicit an incriminating response. Trinque, 140 Hawai'i at 277, 400 P.3d at 478 (defining interrogation to include police practices "that the police should know [are] reasonably likely to invoke an incriminating response") (emphasis added). This is because, at the time the SFST questions are asked, an officer already suspects

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that the person responding may be impaired.

In conclusion, the SFST questions are likely to lead to an incriminating response, either if a person answers in the affirmative or in the negative. Thus, the SFST questions are interrogation of suspects in custody and must be accompanied by Miranda warnings in order to be admissible. In this trio of cases, the SFST questions and SFST performance were also fruit of the illegally obtained answers to the MRO questions. I therefore respectfully dissent to the Majority's failure to affirm the district court's suppression of the MRO questions and the evidence gathered subsequent to the MRO questions in connection with the SFST. Accordingly, as for Sagapolutele-Silva, I would vacate in part the ICA's June 19, 2020 judgment on appeal, and affirm the district court's June 7, 2019 Judgment and August 26, 2019 Amended Judgment. As for Skapinok, I would vacate in part the ICA's June 30, 2020 judgment on appeal, and affirm the district court's July 5, 2019 order granting Skapinok's Motion to Suppress. And as for Manion, I would vacate in part the ICA's December 16, 2020 judgment on appeal and affirm the district court's July 10, 2019 oral order granting in part Manion's Motion to Suppress.

Notes:

[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[2] See infra note 5.

[3] The Honorable Summer M. M. Kupau-Odo presided.

[4] Sagapolutele-Silva was charged with violating HRS §§ 291E-61(a)(1) and/or (a)(3) (Supp. 2015), which provide:

> (a) A person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle:
>
> (1) While under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty; [or] ....
>
> (3) With .08 or more grams of alcohol per two hundred ten liters of breath[.]

[5] Sagapolutele-Silva was charged with violating HRS § 291C-105(a)(1) (2007), which provides: "No person shall drive a motor vehicle at a speed exceeding[ ] [t]he applicable state or county speed limit by thirty miles per hour or more[.]"

HRS § 291C-105(c) provides that "[a]ny person who violates this section shall be guilty of a petty misdemeanor."

[6] The record does not reflect when Officer Ilae arrived on the scene. On cross-examination, Officer Ilae testified that Sagapolutele-Silva was already out of the car when he got there.

[7] With respect to interrogation, the ICA affirmed the district court's conclusion that the medical rule-out questions were interrogation, and held that the defendant's answers to those questions were properly suppressed. State v. Sagapolutele-Silva, 147 Hawai‘i at 102, 464 P.3d at 890. Additionally, the ICA held that the defendant's spontaneous post-arrest statement that she had drunk a few beers was properly suppressed as fruit of the poisonous tree. Id. at 104, 464 P.3d at 892. However, the ICA held that statements made in response to being told why she was stopped were not the product of interrogation. Id. at 103, 464 P.3d at 891. For a discussion of interrogation during an OVUII roadside investigation, see State v. Skapinok, SCWC-19-0000476, ––– Hawai'i ––––, ––– P.3d ––––, 2022 WL 1831259 (Haw. 2022).

[8] The State's application notes that the "either/or" rule, established in State v. Ketchum, 97 Hawai‘i 107, 126, 34 P.3d 1006, 1025 (2001), "is at variance with" Wyatt's "totality of circumstances" rule and internally inconsistent with other parts of Ketchum. The State "asks this Court to clarify that custody for Miranda purposes should be based on a totality of the circumstances and overrule any cases to the extent that they suggest otherwise."

[9] The application suggests that because of this framing, the ICA held Sagapolutele-Silva "was therefore not subjected to 'custodial interrogation.' " To the contrary, the ICA agreed that she was in custody, citing, in part, the existence of probable cause to arrest for excessive speeding, which "taint[ed]" the OVUII investigation. Sagapolutele-Silva, 147 Hawai‘i at 101, 464 P.3d at 889.

Sagapolutele-Silva's application additionally challenges the ICA's holding that only some of the questions asked during the encounter were interrogation and its failure to address fruits of the poisonous tree argument. For the reasons discussed below, we need not reach these issues based on our resolution of this case.

[10] Article 1, section 10 of the Hawai‘i Constitution states in pertinent part that no person "shall ... be compelled in any criminal case to be a witness against oneself."

[11] The Court held that the relevant question is whether the defendant was subjected to a "custodial situation," and noted that it is "the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted," that determines whether Miranda warnings are required. Beckwith, 426 U.S. at 346-347, 96 S.Ct. 2074 (quoting United States v. Caiello, 420 F.2d 471, 473 (2d Cir. 1969)).

[12] Justice Wilson suggests that Patterson adopted a bright-line rule regarding the significance of probable cause. Dissent at 151 Hawai'i at 304-05, 511 P.3d at 804. However, respectfully, he fails to consider the context surrounding the passage he quotes, which suggests to the contrary that all of the circumstances must be considered:

> No precise line can be drawn because each case must necessarily turn upon its own facts and circumstances, but we think that the California court in People v. Manis, 268 Cal.App.2d 653, 669, 74 Cal.Rptr. 423, 433 (1969) came as close as any to delineating, generally, the outer parameters beyond which on-the-scene interviews may not proceed without the Miranda warnings:
>
> "(P)ersons temporarily detained for brief questioning by police officers who lack probable cause to make an arrest or bring an accusation need not be warned about incrimination and their right to counsel, until such

> time as the point of arrest or accusation has been reached or the questioning has ceased to be brief and casual and become sustained and coercive."

Patterson, 59 Haw. at 362-63, 581 P.2d at 755-56 (emphasis added).

[13] In Melemai, we held that two factors — whether the investigation had focused on the defendant and whether probable cause existed — "may play a significant role in the application of the Miranda rule." 64 Haw. at 481, 643 P.2d at 544.

[14] One year after Ketchum, we again relied on Ah Loo in State v. Kaleohano, 99 Hawai'i 370, 378, 56 P.3d 138, 146 (2002). In Kaleohano, we held that the defendant — who had been pulled over for a traffic violation and detained on suspicion of OVUII — was not in custody. Without quoting the either/or test from Ketchum, Kaleohano emphasized the importance of probable cause for determining custody: "Ah Loo recognized that, 'if neither probable cause to arrest nor sustained and coercive interrogation are present, then questions posed by the police do not rise to the level of "custodial interrogation" requiring Miranda warnings.' We, therefore, examine whether [the police officer] had probable cause to arrest [the defendant]." Id. at 377, 56 P.3d at 145 (citation omitted) (quoting Ah Loo, 94 Hawai'i at 210, 10 P.3d at 731).

[15] Although Officer Termeteet told Sagapolutele-Silva that she was "speeding," he did not advise her that her speeding was subject to criminal sanctions. Speeding less than thirty miles per hour over the speed limit is a non-criminal violation. See, e.g., State v. Fitzwater, 122 Hawai'i 354, 378, 227 P.3d 520, 544 (2010), as amended (Apr. 5, 2010) (remanding for entry of judgment of a non-criminal traffic infraction because the evidence did not prove that the defendant exceeded the speed limit by at least thirty miles per hour).

[16] Indeed, Sagapolutele-Silva faults the ICA for treating the OVUII as a "separate and distinct" OVUII investigation in which probable cause had not yet developed, and we agree that this bifurcation of the traffic stop into two investigations for two crimes – while understandable given our either/or test – does not reflect reality. A suspect probably does not perceive two separate and concurrent investigations during a single police encounter, and the existence of probable cause for one crime, but not the other, is unlikely to impact whether a reasonable person in the suspect's position would perceive themselves as effectively under arrest.

[17] Our review of other jurisdictions suggests that, consistent with the principle that the objective perspective of the suspect controls, probable cause usually fits into the totality-of-the-circumstances analysis as follows:

> [W]hile the place of the interrogation is a very significant factor, it must be considered together with the other surrounding circumstances. In ascertaining, as called for by Miranda, whether the deprivation of freedom of action was "significant" (i.e., whether the circumstances were "likely to affect substantially the individual's 'will to resist and compel him to speak where he would not otherwise do so freely' "), it is particularly important whether some indicia of arrest are present. A Court is not likely to find custody for Miranda purposes if the police were not even in a position to physically seize the suspect, but is likely to find custody if there was physical restraint such as handcuffing, drawing a gun, holding by the arm, or placing into a police car. Merely having the suspect move a short distance to facilitate conversion does not itself constitute custody. Also relevant are whether or not the suspect was "confronted with evidence that was at least sufficient to establish probable cause," or was told that there was a warrant for his arrest or, on the other hand, that he

> was free to leave and, if the events occur at the station, whether or not booking procedures were employed.

2 Wayne R. LaFave et al., Criminal Procedure § 6.6(f) (4th ed. 2021) (emphasis added) (footnotes omitted); see, e.g., State v. Williams, 15 A.3d 753, 755 (Me. 2011) (explaining the factors used to determine whether a suspect was in custody, including "the existence or non-existence of probable cause to arrest (to the extent communicated to the defendant)" (emphasis added)); People v. Null, 233 P.3d 670, 677 (Colo. 2010) (holding that the defendant was in custody because, inter alia, defendant knew the police had grounds to arrest him); State v. Ortiz, 382 S.W.3d 367, 373 (Tex. Crim. App. 2012) (noting that a suspect may be in custody "if the officer manifests his belief to the detainee that he is a suspect").

[18] This charge was later amended to a charge of driving while under the influence of drugs in violation of HRS § 291-7 (1976). Id.

[19] We noted in passing that "[t]he obvious violation of the Traffic Code gave [the officers] reason to seek information necessary for the issuance of a citation." Wyatt, 67 Haw. at 300, 687 P.2d at 549. However, under HRS § 803-5 (1982), the officers could have arrested the defendant since it was a criminal offense.

[20] Officer Termeteet was not required by law to arrest Sagapolutele-Silva for excessive speeding — as he testified at the suppression hearing, he had the discretion to issue a citation for excessive speeding and allow her to drive away. But his decision on whether to cite or arrest her had significant public safety consequences. As he testified, he wanted to administer the SFST because "I don't want her, you know, cite her for the excessive speeding and then she hurts herself or another person afterwards."

[21] The district court suppressed Sagapolutele-Silva's statement that she had fewer drinks than her friends on the grounds that it was fruit of earlier improper questioning. At the time she made that statement, she had been advised that she was under arrest. We do not opine on whether some other ground might exist to suppress that statement.

[1] This was ten years before Justice William J. Brennan, Jr.'s seminal article, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977), which spawned an increased reliance by state judges on state constitutions to secure rights unavailable under or increasingly limited by the United States Supreme Court in its interpretations of the United States Constitution.

[1] Identical dissenting opinions have been filed in the following cases: State v. Skapinok, SCWC-19-0000476 and State v. Manion, SCWC-19-0000563.

[2] Chief Justice Recktenwald writes the Majority opinion in Sagapolutele-Silva, which Justice Nakayama and Circuit Judge Wong (assigned by reason of vacancy) join. Justice McKenna writes separately in dissent.

[3] Respectfully, we do not suggest that State v. Patterson, 59 Haw. 357, 581 P.2d 752 (1978) adopted a bright-line rule that the right against self-incrimination attaches at the point police have probable cause to arrest. Rather, Patterson recognized the significance of probable cause in determining whether the right against self-incrimination has attached, and later cases—State v. Loo, 94 Hawai'i 207, 212, 10 P.3d 728, 733 (2000) and State v. Ketchum, 97 Hawai'i 107, 34 P.3d 1006 (2001) —announced the bright line rule, which has been relied upon for the past twenty years.

[4] Notwithstanding this court's application of the totality of the circumstances test in State v. Wyatt, 67 Haw. 293, 687 P.2d 544 (1984) and State v. Kuba, 68 Haw. 184, 706 P.2d 1305 (1985), this court later recognized the bright-line rule that Miranda warnings are required when probable cause to arrest has developed. Loo, 94 Hawai'i at 212, 10 P.3d at 733 ; Ketchum, 97 Hawai'i at 126, 34 P.3d at 1025. The eventual recognition of this bright-line rule stemmed from our case law's important realization of the significance of probable cause in determining when the right against self-

incrimination attaches. See e.g., Patterson, 59 Haw. at 362-63, 581 P.2d at 756.

[5] The district court in Sagapolutele-Silva, Skapinok, and Manion, properly protected the defendants' constitutional rights against self-incrimination, suppressing the defendants' responses to the medical rule-out ("MRO") questions and standard field sobriety test ("SFST") questions, as well as their performances on the SFST as fruit of the poisonous tree of the unwarned MRO questions. The district court found that the defendants, Sagapolutele-Silva, Skapinok, and Manion, were in custody by the time the respective police officers asked if they were willing to participate in the SFST. Further, the district court found that the SFST questions and MRO questions constituted interrogation because they were reasonably likely to elicit incriminating responses, and that the defendants' SFST performances were fruit of the poisonous tree of that custodial interrogation.

> The ICA in all three cases correctly concluded that the defendants were in custody and that the MRO questions constituted custodial interrogation. However, the ICA, like the Majority, undermined the defendants' constitutional rights in reversing the district court's suppression of the SFST questions and SFST performances. The ICA erred in finding that the SFST questions were not interrogation and that the SFST performances were not fruit of the poisonous tree of the MRO questions.

[6] Chief Justice Recktenwald writes the Majority opinion in Skapinok, which Justice Nakayama, Justice McKenna, and Circuit Judge Wong (assigned by reason of vacancy) join.

[7] Chief Justice Recktenwald writes the Majority opinion in Manion, which Justice Nakayama, Justice McKenna, and Justice Eddins join.

[8] Presumably the Majority chose not to reverse the custody analysis of the lower courts in Manion and Skapinok because the government conceded that the facts supported the custody determination.

[9] Notably, the State did not demonstrate a need to weaken the protection against self-incrimination. Indeed, there is no evidence that requiring Miranda warnings at the time that police have probable cause to arrest interferes with the government's ability to gather evidence and prosecute people whom government agents have probable cause to believe have committed a crime. To the contrary, Hawai'i has an incarceration rate of 439 per 100,000 people, which is more than three times the incarceration rates of the following NATO countries: United Kingdom (129 per 100,000), Portugal (111 per 100,000), Canada (104 per 100,000), France (93 per 100,000), Belgium (93 per 100,000), Italy (89 per 100,000), Luxembourg (86 per 100,000), Denmark (72 per 100,000), Netherlands (63 per 100,000), Norway (54 per 100,000) and Iceland (33 per 100,000). Emily Widra & Tiana Herring, States of Incarceration: The Global Context 2021, The Prison Policy Initiative (Sep. 2021), https://www.prisonpolicy.org/global/2021.html. Moreover, as of 2010 in Hawai'i, Native Hawaiians and Pacific Islanders were incarcerated at a rate of 1,615 per 100,000, Black people were incarcerated at a rate of 1,032 per 100,000, while white people were incarcerated at a rate of 412 per 100,000. Leak Sakala, Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity, The Prison Policy Initiative (May 28, 2014), https://www.prisonpolicy.org/reports/rates.html. Thus, the Majority's weakening of the right of people facing arrest to be free from self-incrimination is without any showing of factual justification. Instead, the proven strength of the government to gather evidence and incarcerate Hawai'i's people dictates that judges be vigilant to enforce and protect the core constitutional precept that citizens facing arrest shall not be subjected to incriminating questions by a government that seeks to prosecute them.

[10] After being asked the MRO questions and told she was under arrest, Sagapolutele-Silva stated,

"she's not going to lie, she had a few beers but her friends were more impaired than she was." As Justice McKenna explains, the Majority rules that this statement was improperly suppressed by the district court based on its finding that Sagapolutele-Silva was not in custody. I agree with Justice McKenna that this statement should have been suppressed as fruit of the poisonous tree of the custodial interrogation MRO questions. "Under the fruit of the poisonous tree doctrine, [a]dmissibility is determined by ascertaining whether the evidence objected to as being 'fruit' was discovered or became known by the exploitation of the prior illegality or by other means sufficiently distinguished as to purge the later evidence of the initial taint." State v. Poaipuni, 98 Hawai'i 387, 392-93, 49 P.3d 353, 358-59 (2002). Factors relevant to determining whether subsequently gathered evidence is "sufficiently attenuated from the illegality...include: (1) the temporal proximity between the official misconduct and the subsequently procured statement or evidence, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct." State v. Trinque, 140 Hawai'i 269, 281, 400 P.3d 470, 482 (2017). Sagapolutele-Silva's statement that she "had a few beers" was made very shortly after being illegally asked the MRO questions. Moreover, no intervening circumstances attenuated the connection between the MRO questions and her statement.

[11] After asking the defendants the MRO questions, the officers asked the defendants whether they understood the SFST instructions and also asked if they had any questions about the procedure ("SFST questions").

[12] In large part, both Corporal Ernest Chang ("Corporal Chang"), the officer conducting SFST in Skapinok and Officer Corey Morgan ("Officer Morgan"), the officer conducting SFST in Manion, asked Skapinok and Manion respectively, the same MRO questions.

[13] For example, Skapinok pointed to Corporal Chang's testimony that the MRO questions were, "necessary to perform the [SFST] safely"; that he had never administered the SFST "without first asking the medical rule-out questions"; and that he was not permitted to conduct the SFST without first asking the questions.

[14] Corporal Chang similarly testified that if an individual answered "no" to all of the MRO questions, then the individual's performance on the SFST is seen "more [as] a cause by an intoxicant" rather than "from medical and physical problems[.]" Officer Morgan also acknowledged that because Manion answered "no" to all of the MRO questions, he was able to rule out any medical concerns when making his observations of Manion's SFST performance.

[15] Like Corporal Chang, Officer Ilae testified that if a person indicates that they do not understand the SFST instructions, he will then ask them "what part needs to be clarified." Officer Ilae stated that he will keep clarifying until he receives a response that the person understands. If a person keeps asking the same clarifying question over and over again, Officer Ilae testified that this "could possibly" tell him that the person is impaired by an intoxicant, and it might be something that he writes in the report.

[16] Corporal Chang similarly testified that if a defendant states that she does not understand the instructions, this might "possibly" tell him that she is mentally confused or impaired by an intoxicant.

[17] Skapinok Majority at 35.

[18] The ICA in Sagapolutele-Silva correctly noted that the United States Supreme Court rejected the contention that Miranda warnings are required prior to an inquiry as to whether a defendant understood SFST instructions, because the "focused inquiries were necessarily 'attendant to' the police procedure held by the court to be legitimate." State v. Sagapolutele-Silva, 147 Hawai'i 92, 101, 464 P.3d 880, 889 (App. 2020) (quoting Muniz, 496 U.S. at 603-604, 110 S. Ct. at 2651-2652). However, this court can and has provided Hawai'i's people greater protection of their right against self-incrimination pursuant to article I, section 10 of the Hawai'i Constitution than that afforded under the fifth amendment to the United States Constitution. Importantly, there is no exception

to the interrogation test in Hawai‘i that obviates the need to inquire into whether the question is likely to elicit an incriminating response when the question is attendant to a legitimate police procedure. Ketchum, 97 Hawai‘i at 119-120, 34 P.3d at 1018-1019. Ketchum rejected the existence of such a "booking exception," and instead, permits booking questions without Miranda warnings only if the question is also not reasonably likely to elicit incriminating information. And regardless of any exception, the SFST questions are not "booking" questions to begin with. Routine booking questions inquire into matters such as a person's name, address, height, weight, eye color, date of birth, current age, and social security number. Ketchum, 97 Hawai‘i at 119, 34 P.2d at 1018 (citing Muniz, 496 U.S. at 611, 110 S. Ct. at 2655, 110 L. Ed. 2d at 557). Asking whether a person understands a set of instructions or has any questions about those instructions is different from asking about a person's own basic information. The SFST questions require more cognitive analysis and reveal information related to a defendant's state of mind, rather than preliminary background information. See Muniz, 496 U.S. at 600, n.13, 110 S.Ct. 2638 (explaining the holding in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) ("we held that a defendant's answers...were testimonial in nature" because the answers, in part, revealed his "state of mind"); see also State v. Fish, 321 Ore. 48, 893 P.2d 1023 (1994) (defining testimonial evidence as evidence that discloses a defendant's "beliefs, knowledge, or state of mind, to be used in a criminal prosecution against them.") (emphasis added).
