IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI,
Petitioner and Respondent/Plaintiff-Appellant,

vs.

LEAH SKAPINOK,
Respondent and Petitioner/Defendant-Appellee.

SCWC-19-0000476

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-19-0000476; CASE NO. 1DTA-19-01048)

JUNE 3, 2022

DISSENTING OPINION BY WILSON, J.[1]

In this trio of cases the Majority eviscerates the constitutional protection afforded those in Hawaiʻi 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

[1] Identical dissenting opinions have been filed in the following cases: State v. Sagapolutele-Silva, SCWC-19-0000491 and State v. Manion, SCWC-19-0000563.

("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 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

[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.

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 (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

[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.

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]

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

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[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.

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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

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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.

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

[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.

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 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

[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, Hawaiʻi 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 Hawaiʻi, 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 Hawaiʻi'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.

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

[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").

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 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

[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

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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 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

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questions"; and that he was not permitted to conduct the SFST without first asking the questions.

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

[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.

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 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

[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

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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.

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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.

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 Hawaiʻi 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 Hawaiʻi 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 Hawaiʻi 482, 493-94, 128 P.3d 795, 806-07 (2006). The two triggers for the Miranda requirement are "custody" and "interrogation." Trinque, 140 Hawaiʻi 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 Hawaiʻi 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 Hawaiʻi at 277, 400 P.3d at 478. Additionally, as the Skapinok 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 (1990)) and it is incorrect to conclude that "neither an affirmative or negative response to these questions is incriminating." State v. Uchima, 147 Hawaiʻi 64, 84 464 P3d 852, 872 (2020). Rather,

[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.

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]

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[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 (explaining the holding in Estelle v. Smith, 451 U.S. 454 (1981) ("we

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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 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

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(. . . continued)

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).

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.

/s/ Michael D. Wilson