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STATE OF HAWAI'I,
Petitioner and Respondent/Plaintiff-Appellant,

vs.

TIANA F.M. SAGAPOLUTELE-SILVA,
Respondent and Petitioner/Defendant-Appellee.

SCWC-19-0000491

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-19-0000491; 1DTA-18-01227)

JUNE 3, 2022

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.

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

[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.

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 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 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.

/s/ Sabrina S. McKenna

/s/ Michael D. Wilson