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STATE CONSTITUTIONAL LAW—HAWAI'I SECURES THE RIGHT TO REMAIN SILENT—PROHIBITING THE SUBSTANTIVE USE OF PRE-ARREST SILENCE. *STATE V. TSUJIMURA*, 400 P.3D 500 (HAW. 2017).

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I. INTRODUCTION

Hawai'i's "state court rebellion" against federal self-incrimination law[1] persists with its supreme court decision in *State v. Tsujimura*.[2] In

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1. *See* BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE 101–02 (1991).

Tsujimura, the Supreme Court of Hawai'i extended the right to remain silent in the prearrest setting.[3] Article I, section 10 of the Hawai'i Constitution guarantees the right against compelled self-incrimination and, contemporaneously, the right to remain silent.[4] In *State v. Alo*, the court held that the right to remain silent is fundamental and cannot be used against the accused.[5] Thus, not only is the prosecution prohibited from commenting on a defendant's failure to testify but a "prosecutor may not comment on a defendant's silence in a manner that suggests such silence as evidence of guilt."[6] In *State v. Mainaaupo*, the Supreme Court of Hawai'i held this basic right attaches at arrest.[7] This decision left open the issue of one's silence *before* arrest and whether that silence may be used against that person.[8] In reaching its decision in *Tsujimura*, the majority analyzed the text of the Hawai'i Constitution and utilized its precedent to determine a person's right to remain silent exists prearrest.[9]

This Comment will explain the majority and dissenting opinions of the Supreme Court of Hawai'i on the matter of an individual's right to prearrest silence. A brief overview of the right to remain silent under both federal and Hawaiian law will provide the relevant background information to support the conclusion that Hawai'i now affords its citizens broader protection against self-incrimination than the Federal Constitution. Ultimately, this Comment will illustrate how the decision in *Tsujimura* is compatible with its precedent and current public beliefs on the right to remain silent, as well as how the decision furthers the policy surrounding Hawai'i's guarantee that no "person"[10] shall be compelled in any criminal case to be a witness against oneself.

II. STATEMENT OF THE CASE

In violation of section 291E-61(a)(1) of the Hawai'i Revised Statutes, defendant, Lester Tsujimura ("Tsujimura"), was charged with operating a vehicle under the influence of an intoxicant.[11] The investigating and

2. 400 P.3d 500, 503 (Haw. 2017).
3. *Id.* at 520.
4. HAW. CONST. art. I, § 10.
5. State v. Alo, 558 P.2d 1012, 1016 (Haw. 1976).
6. *Tsujimura*, 400 P.3d at 515 (citing State v. Melear, 630 P.2d 619, 626 (Haw. 1981)).
7. 178 P.3d 1, 18 (Haw. 2008).
8. *Id.* at 18 n.9.
9. *Tsujimura*, 400 P.3d at 503.
10. *See infra* notes 97–99 and accompanying text.
11. *Id.*

arresting officer, Thomas Billins, testified at trial as to his observations when he stopped Tsujimura on January 15, 2014.[12] He testified that Tsujimura was driving on the Moanalua freeway, at which time he witnessed Tsujimura enter the shoulder several times.[13] Officer Billins activated his lights and sirens and proceeded to pull Tsujimura over.[14] During the traffic stop, the officer asked Tsujimura to perform a field sobriety test ("FST").[15] "Before performing the FSTs, Tsujimura told Officer Billins that he had an old injury to his left knee, '[s]omething about his ACL and it was a bad knee,' and that he was taking medication for his high blood pressure and diabetes."[16] Following this, Officer Billins testified as to Tsujimura's performance of the test stating that he was swaying, flushed, and had trouble following the instructions.[17]

On cross-examination Officer Billins admitted that Tsujimura only exhibited one cue out of the twenty-four visual detection cues for drunk driving, and that certain observations of Tsujimura were conceivably due to reasons irrelevant to drinking.[18] However, he also stated he was not aware if Tsujimura's injury could have affected his ability to perform one of the sobriety tests.[19] On redirect, the prosecutor posed the following question: "So did the defendant at that time explain to you he couldn't get out of the car because of an ACL injury?"[20] Although the defense objected immediately for commenting on the defendant's silence, the court allowed it. The prosecutor then rephrased: "Do you recall if the defendant indicated to you he would have difficulty exiting the car because of his previous leg injury?"[21] Officer Billins answered that no statements were made.[22]

The district court dismissed Tsujimura's motion for a judgment of acquittal, and "based on the totality of the circumstances," ruled in the State's favor.[23] Subsequently, Tsujimura appealed to the Hawai'i

12. *Id.* at 504–06.
13. *Id.* at 504.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 504–05.
18. *Id.* at 505 (noting that the only cue Tsujimura demonstrated was "trouble maintaining lane position"). *See generally* DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 808 677, THE VISUAL DETECTION OF DWI MOTORISTS (2010), https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/808677.pdf.
19. *Tsujimura*, 400 P.3d at 505.
20. *Id.*
21. *Id.* at 505–06.
22. *Id.* at 506.
23. *Id.*

Intermediate Court of Appeals ("ICA") challenging four different issues, including "admission of Officer Billins' testimony regarding Tsujimura's failure to state that his injury would prevent him from getting out of his car."[24] Using the *Padilla* test, the ICA found that the officer's testimony was not "an impermissible comment on Tsujimura's assertion of his right to remain silent."[25] It reasoned that the officer's testimony was not intended to comment or imply that an innocent person would have spoken and determined that evidence was sufficient to support the conviction.[26]

Tsujimura appealed to the Supreme Court of Hawai'i, presenting two issues: (1) whether the right to remain silent attaches prearrest; and (2) if so, whether prearrest silence may be utilized by the State in a criminal trial.[27] The majority held that the right to remain silent does attach prearrest and that "the State may not use as substantive proof of guilt a defendant's prearrest silence that occurs at least as of the time of detention."[28]

III. HISTORY OF THE AREA

A. The Right to Remain Silent Under Federal Law

"No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[29] In 1789, Congress included this language as part of the Fifth Amendment of the United States Constitution.[30] In 1964, the Supreme Court established that the

24. *Id.* Tsujimura also appealed the denial of his motion to dismiss his "charge for failure to define the term 'alcohol' in the complaint . . . denial of his motion for judgment of acquittal on the grounds that there was insufficient evidence that he had consumed 'alcohol'; and [] denial of his motion for judgment of acquittal on the grounds that there was insufficient evidence to establish that he was under the influence of alcohol in an amount sufficient to impair his normal mental faculties or ability to care for himself and guard against casualty." *Id.*

25. *Id.* at 507 (quoting State v. Tsujimura, 366 P.3d 173, 179 (Haw. Ct. App. 2016), *vacated*, 400 P.3d 500 (Haw. 2017)). The *Padilla* test called for the ICA to consider whether the prosecutor's question and the response were intended to comment on Tsujimura's right to remain silent or was of such character that would cause the district court to "naturally and necessarily take it to be a comment on" his right. *Id. See generally* State v. Padilla, 552 P.2d 357 (Haw. 1976), *abrogated by* State v. Cabagbag, 277 P.3d 1027 (Haw. 2012). For a thorough discussion of the *Padilla* test, see *infra* Part III.B.

26. *Tsujimura*, 400 P.3d at 507.

27. *Id.* at 503.

28. *Id.* at 512, 515.

29. U.S. CONST. amend. V.

30. *Id.*

Fourteenth Amendment provides the same privilege to the states.[31] One right this privilege incorporates is "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will."[32] A person's right to remain silent is prefaced on the principle that an individual should be able to decline to answer "possibly incriminating questions" without penalty from the government.[33] To protect this belief, the privilege against self-incrimination forbids "comment by the prosecution on the accused's silence."[34]

The right to remain silent has been addressed in a number of different contexts.[35] The most pertinent framework for discussion of *Tsujimura* is police questioning. In its landmark decision, *Miranda v. Arizona*,[36] the Supreme Court established the requirement of *Miranda* warnings,[37] which "have become part of our national culture."[38] Focusing on the inherent compulsion of custodial interrogations, the Supreme Court held a person must be informed of their right to remain silent in such situations prior to being questioned by officers.[39] "The prosecution may not . . . use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation."[40] Accordingly, the prosecution is not permitted to "insist that because he did not speak

31. Malloy v. Hogan, 378 U.S. 1, 8 (1964).

32. *Id.*

33. Aaron R. Pettit, Comment, *Should the Prosecution Be Allowed to Comment on A Defendant's Prearrest Silence in Its Case-in-Chief?*, 29 LOY. U. CHI. L.J. 181, 181 (1997).

34. Griffin v. California, 380 U.S. 609, 615 (1965); *see also Malloy*, 378 U.S. at 8 ("The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in Twining, for such silence.").

35. *See, e.g.*, Kastigar v. United States, 406 U.S. 441, 462 (1972); Harris v. New York, 401 U.S. 222 (1971); Miranda v. Arizona, 384 U.S. 436 (1966); *Griffin*, 380 U.S. at 615.

36. 384 U.S. 436 (1966).

37. *Id.* at 444, 467–73 ("Prior to any questioning, 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.").

38. Tracey Maclin, *The Right to Silence v. The Fifth Amendment*, 2016 U. CHI. LEGAL F. 255, 256 (2016) (quoting Justice Rehnquist, "'[a]t this point in our history, virtually every schoolboy is familiar with the concept, if not the language' of the Fifth Amendment" (alteration in original)); *see also* Dickerson v. United States, 530 U.S. 428, 430 (2000) (stating that *Miranda* is embedded in police practice).

39. *Miranda*, 384 U.S. at 444; *see also What Are Your Miranda Rights?*, MIRANDA WARNING.ORG, http://www.mirandawarning.org/whatareyourmirandarights.html (last visited Feb. 2, 2018) ("You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand the rights I have just read to you? With these rights in mind, do you wish to speak to me?").

40. *Miranda*, 384 U.S. at 468 n.37.

. . . at that time, as he was told he need not do, an unfavorable inference might be drawn" as to his guilt.[41] The *Miranda* Court initially suggested that the purpose of the warnings was to inform the accused of his fundamental right to remain silent before questioning, *not* to trigger that right.[42] Since *Miranda*, however, the Supreme Court has arguably diminished the significance it placed on the right to remain silent in this setting, muddying the waters of when the right exists.[43]

Contrary to popular belief, the Supreme Court has recently affirmed that exercising your right to remain silent by *remaining* silent does not always invoke your privilege.[44] In *Salinas v. Texas*, the plurality lays out just two instances where an express invocation of the right is not required.[45] The defendant in *Salinas* urged the court to "adopt a third exception to the invocation requirement for cases in which a witness stands mute and thereby declines to give an answer that officials suspect would be incriminating."[46] The plurality held: "A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege."[47]

Yet, the real question at issue in *Salinas* concerned the lower court split over the use of prearrest, pre-Mirandized silence.[48] The Court declined to answer that question because there was no invocation of the privilege under the Fifth Amendment in the case.[49] Still, Justice Thomas and Justice Scalia went further than the plurality to state that "even if [defendant] had invoked the privilege[,] because the prosecutor's comments regarding his pre-custodial silence did not compel him to give self-incriminating testimony," his claim would fail.[50]

41. *See* Jenkins v. Anderson, 447 U.S. 231, 240 (1980) (quoting Doyle v. Ohio, 426 U.S. 610, 619 (1976)).

42. Meaghan Elizabeth Ryan, Comment, *Do You Have the Right to Remain Silent?: The Substantive Use of Pre*-Miranda *Silence*, 58 ALA. L. REV. 903, 916 (2007); *see also Dickerson*, 530 U.S. at 439 (reiterating that the safeguards *Miranda* established are intended to ensure protection against self-incrimination and provide certain guideline).

43. *See generally* Salinas v. Texas, 570 U.S. 178, 186 (2013) (plurality opinion); *Berghuis v. Thompkins,* 560 U.S. 370, 381–84 (2010)*; Davis v. United States*, 512 U.S. 452, 461 (1994); *see also* Harvey Gee, Salinas v. Texas*: Pre*-Miranda *Silence Can Be Used Against a Defendant*, 47 SUFFOLK U. L. REV. 727, 741 (2014).

44. *Salinas*, 570 U.S. at 186; *Thompkins,* 560 U.S. at 380–82.

45. *Salinas*, 570 U.S. at 184–85.

46. *Id.* at 186.

47. *Id.* at 188. *See generally Thompkins,* 560 U.S. at 381-82.

48. *Salinas*, 570 U.S. at 183. "The admissibility of pre-*Miranda* silence as substantive evidence is still in dispute in the federal courts." Ryan, *supra* note 42, at 908.

49. *Salinas*, 570 U.S. at 183.

50. *Id.* at 192 (Thomas, J., concurring).

B. The Right to Remain Silent Under State Law in Hawai'i

"It has been settled for decades that the right to remain silent is a fundamental component of the right against compelled self-incrimination guaranteed by . . . the Hawai'i Constitution."[51] Article I, section 10, of the Hawai'i State Constitution, which provides in pertinent part, "nor shall any person be compelled in any criminal case to be a witness against oneself," almost mimics the language of the Federal Constitution.[52] The intent of the privilege is "to protect an individual 'from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government,'" and to ensure the government independently produces the evidence against him and bears its burden of proof.[53]

The Supreme Court of Hawai'i has "consistently provided criminal defendants with greater protection under Hawai'i's version of the privilege against self-incrimination . . . than is otherwise ensured by the federal courts under *Miranda* and its progeny."[54] In the 1970s, the court departed from Supreme Court precedent, prohibiting the use of statements obtained in violation of *Miranda*, not only as direct evidence in the prosecution's case-in-chief, but also during rebuttal or cross-examination.[55] The court further established that "the right to remain silent derives from the Constitution and not from the Miranda warnings themselves."[56]

Furthermore, Hawai'i jurisprudence has determined that post-arrest silence may not be used in the prosecution's case-in-chief.[57]

51. State v. Tsujimura, 400 P.3d 500, 503 (Haw. 2017); *see also* State v. Alo, 558 P.2d 1012, 1016 (Haw. 1976).

52. HAW. CONST. art. I, § 10; *cf.* U.S. CONST. amend. V ("[N]or shall [any person] be compelled in any criminal case to be a witness against himself.").

53. *Tsujimura*, 400 P.3d at 512 (quoting Doe v. United States, 487 U.S. 201, 213 (1988)); State v. Mainaaupo, 178 P.3d 1, 23 (Haw. 2008) ("[T]he rule also safeguards the defendant's right to require the prosecution to shoulder the burden of proving guilt beyond a reasonable doubt.").

54. Marcus L. Kawatachi, *Criminal Procedure Rights Under the Hawaii Constitution Since 1992*, 18 U. HAW. L. REV. 683, 691 (1996) (quoting State v. Valera, 848 P.2d 376, 377 (Haw. 1993)).

55. *Id.*; Mary A. Crossley, Miranda *and the State Constitution: State Courts Take a Stand*, 39 VAND. L. REV. 1693, 1718 (1986); *see* Harris v. New York, 401 U.S. 222, 225–26 (1971) (holding that a defendant's statements obtained in violation of *Miranda* can be used to impeach that defendant when he voluntarily takes the stand even though it is inadmissible as evidence in the prosecution's case-in-chief).

56. *Tsujimura*, 400 P.3d at 512 (quoting *Mainaaupo*, 178 P.3d at 18).

57. State v. Alo, 558 P.2d 1012, 1016 (Haw. 1976) (citing United States v. Fairchild, 505 F.2d 1378, 1383 (5th Cir. 1975)). However, "the prosecution may properly inquire on

Accordingly, in *State v. Mainaaupo*, the court held that the right to remain silent attaches *at least* at the point of a person's arrest, regardless of whether *Miranda* warnings have been read.[58] *Mainaaupo* dealt with the prosecution's comments during closing and rebuttal arguments that certain information the defendant *omitted* while being arrested for driving a stolen vehicle would have been said by an innocent person.[59] The court determined: "In light of the language employed by the DPA, we think that the jury would 'naturally and necessarily' interpret his remarks . . . as comments on [defendant's] post-arrest silence."[60] Thus, the court ruled that the prosecutor's comments—arguing for an inference of guilt from the defendant's post-arrest silence—were improper.[61]

The test the court applied in *Mainaaupo* derived from *State v. Padilla*,[62] in which a defendant alleged that the prosecutor commented on his failure to testify during her closing argument.[63] The court held in *Padilla* that the applicable test was "whether the language used was 'manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'"[64]

Thirty years later, in *State v. Rodrigues*, the court addressed a defendant's right to remain silent in a different context.[65] There, defendant appealed to the Supreme Court of Hawai'i arguing that at trial, the prosecutor's inquiry with the detective on direct examination impermissibly commented on his right to remain silent.[66] The prosecutor asked the detective how the defendant responded upon request to be tape-recorded.[67] The detective answered, "[a]s I recall, he did not wish to be tape-recorded."[68] The first question in the case was

cross-examination into a defendant's earlier silence if the defendant has created, through testimony at trial, the impression that he or she has fully cooperated with police from the beginning and offers exculpatory testimony at trial." State v. Rodrigues, 147 P.3d 825, 832, 835 (Haw. 2006) (citing *Alo*, 558 P.2d at 1016).

58. *Mainaaupo*, 178 P.3d at 18.

59. *Id.* at 8.

60. *Id.* at 20.

61. *Id.*

62. State v. Padilla, 552 P.2d 357, 362 (Haw. 1976), *abrogated on other grounds*, State v. Cabagbag, 277 P.3d 1027 (Haw. 2012).

63. *Mainaaupo*, 178 P.3d at 20 (citing State v. Wakisaka, 78 P.3d 317, 328–29 (Haw. 2003)) (applying the "naturally and necessarily" test that originated with *Padilla*).

64. *Padilla*, 552 P.2d at 362 (quoting United States v. Wright, 309 F.2d 735, 738 (7th Cir. 1962)).

65. State v. Rodrigues, 147 P.3d 825, 826 (Haw. 2006).

66. *Id.*

67. *Id.* at 830.

68. *Id.*

whether denying a request to be taped during a police interview is an invocation of the right to remain silent.[69] Rodrigues gave a voluntary statement to the detective and was asked to repeat the information given on tape.[70] The court found that a "suspect's refusal to do so amounts to an invocation of the right to remain silent precisely because the suspect is refusing to speak further on the matter."[71] Thus, the defendant did invoke his right because evidence showed the denial terminated the conversation.[72] Nevertheless, the court found that the elicited statement regarding such denial was not a comment on the defendant's right to remain silent.[73] Instead, the court found the statement was a part of a line of inquiry meant to establish the reliability of the detective's recollection. The court emphasized that the prosecutor had refrained from further comments implying Rodrigues's guilt due to his "unwillingness to be audiotaped."[74] Accordingly, the court held that the information elicited from the detective during the State's case-in-chief was not an improper comment on the defendant's right to remain silent.[75]

C. Significance of the Right to Remain Silent and Its Present Dilemma

"T[he] use of an arrestee's silence as substantive proof of his guilt is problematic."[76] Silence is ambiguous; as such, there is an array of reasons why one may be silent, especially in the face of a government's accusations.[77] A person "may be shocked or intimidated. He may (and likely does) know that he is under no duty to speak to the police or to declare his innocence and that any statement he does make could later be used against him at his trial."[78]

Thus, silence carries low probative value at trial.[79] In a society where one is aware of and relies on their right to *remain* silent in the face of police questioning, using that very silence as substantive

69. *Id.* at 831–32.
70. *Id.* at 832.
71. *Id.* at 833.
72. *Id.* ("[T]he mere fact that [a defendant] may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." (second alteration in original) (quoting *State v. Hoey,* 881 P.2d 504, 520 (Haw. 1994))).
73. *Id.* at 834.
74. *Id.* at 833–34.
75. *Id.* at 834.
76. Ryan, *supra* note 42, at 904.
77. *Id.*
78. *Id.*
79. *Id.* at 917.

evidence of guilt suggests a person was expected to speak out; it gives no indication of the truth that a trial seeks.[80] In fact, a simple online search reveals websites that suggest "it is almost never in your interest to waive your Miranda rights and speak to the police" as a suspect.[81]

"Given the abundance of police-related television shows and movies, it seems logical that a large percentage of the general population is aware of the rights embodied in the *Miranda* warnings and knows . . . 'the right to remain silent.'"[82] Moreover, in the fifty-three years since the Supreme Court's decision in *Miranda*, individuals have developed their own understanding of the right to remain silent that does not necessarily coincide with the Supreme Court's interpretation.[83] The *Salinas* plurality acknowledged that popular conceptions of the Fifth Amendment's guarantee view the right to remain silent as unqualified.[84] Even so, after the ruling in *Salinas*,[85] those who hold this popular conception may find themselves trapped.[86] Most civilians assume that by possessing the right, all you need to do is exercise it.[87] This is only where the confusion begins: aside from *how* to invoke this right, *when* does it attach?

Federal jurisprudence predominantly addresses an arrested person's silence using language such as "at the time of arrest" or an "arrested person's silence."[88] Additionally, the Supreme Court has provided more protection to silence post-arrest, holding that post-arrest, Mirandized silence may not be used to impeach a defendant.[89] However, a person's prearrest silence is not afforded this same protection; use of prearrest silence to impeach a defendant's credibility does not violate

80. *Id.* at 904, 917–18.

81. *See, e.g.*, *Why the Right to Remain Silent Is Important*, MIRANDAWARNING.ORG, www.mirandawarning.org/whytherighttoremainsilentisimportant.html (last visited Feb. 26, 2018).

82. Ryan, *supra* note 42, at 904.

83. Maclin, *supra* note 38, at 259–60.

84. Salinas v. Texas, 570 U.S. 178, 189 (2013) (plurality opinion) ("But popular misconceptions notwithstanding, the Fifth Amendment guarantees that no one may be compelled in any criminal case to be a witness against himself; it does not establish an unqualified right to remain silent." (internal quotation marks omitted)).

85. *See supra* notes 44–50 and accompanying text.

86. *See* Emily Green, *'You Have the Right to Remain Silent.' Or Do You?*, NAT'L PUB. RADIO, (Oct. 5, 2014), https://www.npr.org/2014/10/05/353893046/you-have-the-right-to-remain-silent-or-do-you.

87. *Id.*

88. *See, e.g.*, Jenkins v. Anderson, 447 U.S. 231, 240 (1980); Doyle v. Ohio, 426 U.S. 610, 618 (1976).

89. *Doyle*, 426 U.S. at 618.

the Federal Constitution.[90] Moreover, in *Jenkins v. Anderson*, the United States Supreme Court would not consider under the Federal Constitution what protections, *if any*, are afforded to prearrest silence by the Fifth Amendment.[91] Thus, silence in the prearrest context remains a subject of doubt under federal law, leaving states like Hawai'i to provide its own citizens with some clarification.[92]

IV. THE COURT'S REASONING

A. The Majority Opinion

On May 31, 2017, the *Tsujimura* majority addressed the issue of prearrest silence and self-incrimination under its state constitution.[93] First, the majority addressed the broad question of whether or not the right to remain silent attaches before an arrest occurs.[94] Acknowledging that the Supreme Court of Hawai'i previously left this question open—holding that "'the right against self-incrimination attache[s] *at least* as of the time of [an] arrest,' regardless of whether Miranda warnings have been given"—the majority turned to the language of the state constitutional provision governing the privilege against self-incrimination and its underlying purpose.[95]

The pertinent language of the provision provides: "nor shall any person be compelled in any criminal case to be a witness against oneself."[96] The majority focused on the words "*any person*."[97] It stressed that this wording is distinguishable from other provisions in the Hawai'i Constitution that specify certain individual categories.[98] For the majority, the "natural sense" of the language here meant the

90. *Jenkins*, 447 U.S. at 240–41 (noting that courts are still free to formulate their own evidentiary rules).

91. *Id.* at 236 n.2.

92. *See* Maria Noelle Berger, *Defining the Scope of the Privilege Against Self-Incrimination: Should Prearrest Silence Be Admissible As Substantive Evidence of Guilt?*, 1999 U. ILL. L. REV. 1015, 1016 (1999).

93. State v. Tsujimura, 400 P.3d 500, 500 (Haw. 2017).

94. *Id.* at 510.

95. *Id.* at 511 (alterations in original) (emphasis added) (quoting State v. Mainaaupo, 178 P.3d 1, 18 (Haw. 2008)).

96. HAW. CONST. art. I, § 10.

97. *Tsujimura*, 400 P.3d at 511 (emphasis added) (stating that Hawai'i's state constitution's words "are presumed to be used in their natural sense" (quoting Haw. State AFL–CIO v. Yoshina, 935 P.2d 89, 91 (Haw. 1997))).

98. *Id.* at 511 & n.15 (noting the distinction from article 1, section 14, HAW. CONST. art. 1, § 14, and the Sixth Amendment of the U.S. Constitution, U.S. CONST. amend. VI, which say "accused").

privilege protects "any person," therefore providing protection before a person is accused or arrested.[99]

The majority reasoned that this allows the privilege against compelled self-incrimination, and thus the right to remain silent, to attach before an arrest.[100] The majority argued that extending the privilege to prearrest fulfills the underlying purposes of the right to remain silent because "it places on the government the onus of producing evidence against individuals that the government intends to punish and correspondingly frees individuals from any obligation to speak."[101]

Next, the majority applied this new holding to the case before them.[102] It ruled that because the right to remain silent attached before arrest, it attached to Tsujimura "at least at the point" when he was seized and continued through his detention.[103] Second, the majority had to decide whether or not the prosecution can use prearrest silence as substantive evidence.[104] The majority discussed that the U.S. Supreme Court has not yet decided whether there is a right to remain silent prearrest, but has held that prearrest silence may be used to impeach defendants.[105] Hence, the majority went on to address the existing circuit and state court split on the issue of what bounds, if any, confine the prosecution with respect to prearrest silence.[106] Ultimately, the majority concluded that it was unconstitutional to use prearrest silence as substantive evidence of guilt.[107] Emphasizing the fact that "the silence used against Tsujimura was not made in response to a question posed by Officer Billins," the majority explained the significant dangers of permitting the use of a *lack* of statement as evidence of guilt.[108] Specifically, it "would engender a result where, in *any* encounter between a law enforcement officer and a citizen, the State would be able

99. *Id.* at 511.
100. *Id.* at 511–12.
101. *Id.* at 512.
102. *Id.*
103. *Id.* (noting that when a person is detained for an investigatory stop, he is seized, and thus Tsujimura's rights were invoked from the time he was seized).
104. *Id.*
105. *Id.* at 512–13 (discussing how the plurality in *Salinas* "left unresolved this split of authority among the federal circuits and held that, even assuming that prearrest silence may not be used as substantive evidence of guilt, the defendant in that case could not take advantage of that protection because he failed to expressly invoke the right").
106. *Id.* (citing to several circuit and state courts that have held it is improper to use prearrest silence as substantive proof of guilt; and those courts holding to the contrary).
107. *Id.* at 513.
108. *Id.* at 514.

to adduce evidence of prearrest silence in myriad ways."[109] Thus, the majority reasoned that this was a view in accordance with the recognized notion that a detained person need not respond to questions by law enforcement[110] and with public policy.[111] Furthermore, the majority concluded its holding would now protect those exercising their legal right.[112]

Subsequently, the majority reiterated that in order to determine if the prosecution unconstitutionally infringed on Tsujimura's right to remain silent, in this specific context of prosecutorial comment, it must use the relevant test.[113] To identify such test, the majority addressed its own precedent.[114] First, the majority explained that the *Padilla* test, which the court applied in the past, was not appropriate for analyzing the facts of the case because it was designed to apply in cases where the prosecutor's comments pertain to a defendant's failure to testify after the close of evidence.[115] The *Padilla* test asks "whether the language used was 'manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'"[116] The majority distinguished *Padilla*'s framework from the "question-and-answer" context presented in *Tsujimura*.[117] Consequently, the *Rodrigues* test, which adjusted *Padilla*'s test, is more suitable in question-and-answer settings "concerning the defendant's pretrial silence."[118] Thus, the majority held the core analysis in cases where the prosecution solicited information regarding the defendant's prearrest silence from a witness "is whether the prosecutor intended for the information elicited to imply the

109. *Id.* at 514–15 (emphasis added). "The prosecutor need only identify a point in time during the defendant's interaction with the police officer when no question was posed and no verbal exchange was had (and, therefore, the defendant was expectedly silent) and use that silence as evidence to infer the defendant's guilt." *Id.* at 514. The majority provided examples of simple scenarios in which a normal person would remain silent and pose such danger: "When she was handing you her driver's license and registration, did she say anything about her injuries?, While she was opening the glove box, did she say anything about her injuries?, While she was outside the car, did she say anything?" *Id.* at 515.

110. *Id.* at 514; *see also* Berkemer v. McCarty, 468 U.S. 420, 439 (1984).

111. *Tsujimura*, 400 P.3d at 513–14 ("To hold otherwise would 'create an incentive for arresting officers to delay interrogation . . . .'" (quoting State v. Mainaaupo, 178 P.3d 1, 18 (Haw. 2008))).

112. *Id.* at 514.

113. *Id.* at 515–16.

114. *Id.*

115. *Id.* at 515; State v. Padilla, 552 P.2d 357, 362 (Haw. 1976), *abrogated on other grounds*, State v. Cabagbag, 277 P.3d 1027 (Haw. 2012).

116. *Tsujimura*, 400 P.3d at 515 (quoting *Padilla*, 552 P.2d at 362).

117. *Id.* at 516.

118. *Id.*

defendant's guilt or whether the character of the information suggests to the factfinder that the defendant's prearrest silence may be considered as inferential evidence of the defendant's guilt."[119] Addressing the dissent, the majority clarified that both the direct *and* indirect use of defendant's silence may unconstitutionally imply the defendant's guilt.[120]

Using the analytical framework put forth by *Rodrigues*, the majority concluded that the ICA wrongfully determined that the information obtained from Officer Billins during the prosecutor's questioning was not a comment on his right to remain silent.[121] The State's purpose in eliciting the fact that Tsujimura did not speak to his injury while exiting his car "was to imply that Tsujimura's injuries did not physically inhibit him from performing the FSTs and to inferentially establish that Tsujimura's diminished faculties during the FSTs were a product of intoxication and not influenced by his injuries."[122] The majority further reasoned that the State admitted it wanted to demonstrate that the FST test could not have been affected by Tsujimura's injury when it elicited the information, thus indicating their intent that this exchange between the prosecutor and officer would produce information about Tsujimura's prearrest silence "as substantive proof of his guilt."[123] Moreover, even assuming this was not the State's purpose, the majority found that the "character of the evidence" still suggested that Tsujimura's prearrest silence about his injury implied that his performance during the FST was the result of alcohol impairment.[124] Therefore, the evidence suggested to the factfinder an impermissible inference of substantive guilt.[125] Specifically, the majority noted that the district court *expressly considered* Officer Billins's testimony that Tsujimura did not indicate difficulty walking when exiting the car in finding Tsujimura guilty.[126]

Lastly, because the majority found a violation of the privilege against compelled self-incrimination, its analysis proceeded to resolve if such an error was harmless beyond a reasonable doubt.[127] To do so, it had to "determine whether there is a reasonable possibility that the

119. *Id.*
120. *Id.* at 518–19.
121. *Id.* at 517; *see* State v. Tsujimura, 366 P.3d 173, 180 (Haw. Ct. App. 2016), *vacated*, 400 P.3d 500 (Haw. 2017).
122. *Tsujimura*, 400 P.3d at 517.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 519; *see* State v. Mainaaupo, 178 P.3d 1, 13–14 (Haw. 2008).

error complained of might have contributed to the conviction."[128] In its determination, the majority focused on the district court's partial reliance on Tsujimura's prearrest silence and its improper assumption that the state could utilize such silence. These factors, in conjunction with the uncompelling totality of the evidence, led the court to conclude that the error was not harmless beyond a reasonable doubt.[129] It decided that even an alternative explanation of the district court's statement regarding Tsujimura's failure to speak would not "eliminate the reasonable possibility that the district court relied on Officer Billins' reference to Tsujimura's prearrest silence and, as such, the reasonable possibility that this error might have contributed to Tsujimura's conviction."[130] Therefore, the court vacated the judgment of the ICA and district court and remanded the case.[131]

B. Justice Nakayama's Opinion, Concurring in Part and Dissenting in Part

Justice Nakayama concurred with the majority's holding that: (1) the right to remain silent under the Hawai'i Constitution attaches at least at the point where an individual is seized, and (2) the State may not elicit evidence of prearrest silence as substantive evidence of guilt; however, she and Chief Justice Recktenwald dissented to the majority's application of the *Rodrigues* test and harmless error determination.[132] While Justice Nakayama agreed with the core analysis the majority identified, she contended that the inquiry should focus on whether the defendant's silence, "in and of itself, was indicative of his or her guilt."[133] In her view, the State is not prohibited from eliciting

128. *Tsujimura*, 400 P.3d at 519 (quoting State v. Balisbisana, 924 P.2d 1215, 1220 (Haw. 1996)).

129. *Id.* at 520. The majority specifically discussed the evidence that opposed Tsujimura's guilt, including the facts that his "vehicle was not changing lanes, was not going over the speed limit, was not slowing down or speeding up, did not follow other vehicles too closely, and did not make any inconsistent signals; it took Tsujimura only eight seconds to pull over from the time Officer Billins turned on his sirens and lights; and out of the 24 NHTSA visual detection clues, Tsujimura exhibited only one—trouble maintaining lane position." *Id.* Additionally, the majority drew attention to Officer Billins's testimony, which revealed that "Tsujimura did not repeat questions or comments, lean on his vehicle, or provide incorrect information or change his answers while being questioned." *Id.*; *cf. Mainaaupo*, 178 P.3d at 21 (finding evidence was "not so overwhelming" to convince the court to hold that the State's intrusion on the defendant's right to remain silent "may not have contributed to his conviction").

130. *Tsujimura*, 400 P.3d at 520.

131. *Id.* at 520–21.

132. *Id.* at 521 (Nakayama, J., concurring in part and dissenting in part).

133. *Id.* at 521–22.

information that inferentially leads to separate and distinct facts from the defendant's silence.[134] Therefore, Justice Nakayama proposed that the evaluation under the *Rodrigues* test should be whether the defendant's prearrest silence was used as direct evidence of guilt *or* used to illustrate separate facts by virtue of defendant's absence of communication.[135]

Applying this test, which Justice Nakayama believed was consistent with the ruling in the *Rodrigues* case, she argued that the State's questioning of Officer Billins did not elicit an improper comment on Tsujimura's right to remain silent, but instead elicited what the officer observed.[136] Specifically, she noted:

> [I]t appears that the State's purpose in posing the question was to legitimately prove a fact that subverted the defense's exculpatory evidence: the State sought to prove that Tsujimura did not demonstrate any signs of discomfort or difficulty in exiting his vehicle, which undermined the defense's evidence tending to support that Tsujimura's leg injuries may have impacted his performance on the field sobriety test.[137]

Next, Justice Nakayama concluded that even if the comment "was an improper comment on Tsujimura's silence, the comment was harmless beyond a reasonable doubt."[138] She reasoned that despite the state's one question regarding silence, which elicited only a single comment, the record as a whole established a list of supporting evidence for the district court's determination that Tsujimura was operating his vehicle while under the influence.[139] She particularly disagreed with the majority's contentions about the district court's findings. She asserted that the district court's statement—referring specifically to the fact that Tsujimura "did not *indicate* any difficulty walking"—could have been made in reliance on Officer Billins's observational testimony rather than the prosecutor's comments about Tsujimura's prearrest silence.[140] Thus, the district court relied on a number of factors to support its

134. *Id.* at 522.
135. *Id.*
136. *Id.* at 522–23.
137. *Id.* at 523.
138. *Id.* at 521.
139. *Id.* at 526.
140. *Id.* at 525. Justice Nakayama discussed how testimony not only revealed that "Tsujimura did not fall down as he exited his vehicle," but that he exited the car without difficulty. She explained that this very evidence could support the district court's finding that "[w]hen [Tsujimura] alighted from the car, he did not *indicate* any difficulty walking." *Id.* (first alteration in original) (emphasis added).

finding that Tsujimura *was* operating his vehicle while under the influence and therefore, the State's comment was harmless beyond a reasonable doubt.[141]

V. AUTHOR'S ANALYSIS

Continuing its long-time expansion of criminal procedure protections beyond its federal counterpart,[142] the *Tsujimura* majority ultimately arrives at a sound decision that conforms to public policy and furthers the intent of the state's constitutional protection. The majority's thorough opinion is consistent with both its state constitution and precedent involving the privilege against self-incrimination.

In achieving this end, the majority analyzes the language of its constitution, fellow circuit and state court opinions, and its own precedent.[143] Although no single factor was determinative, the present case boils down to timing. For the majority, timing is key: both the timing of Officer Billins's questioning and the timing of the prosecutor's questioning affect the holding and the applicable test respectively.[144]

A. Soundness of the Majority's Holding on Prearrest Silence

Hawai'i's constitution is among the youngest of the states, enacted in 1959.[145] Its drafters looked to the Federal Constitution and "drew upon the experience of other states" for guidance.[146] Following this history, the *Tsujimura* majority addressed that the Supreme Court of the United States has not yet resolved the specific issue of prearrest silence under the Fifth Amendment.[147] The court properly noted, however, that it has the authority to enforce and interpret its own state constitution.[148] In fact, Hawai'i has been regarded as one of the states "at the forefront of the aggressive use of State Constitutionalism as a

141. *Id.*
142. Kawatachi, *supra* note 54, at 691.
143. *See Tsujimura*, 400 P.3d at 510–19 (majority opinion).
144. *Id.* at 510 ("In reviewing Tsujimura's contention, it is important to identify the timeframe . . . .").
145. *See generally* HAW. CONST.; Amy K. Trask, Note, *A History of Revision: The Constitutional Convention Question in Hawai'i, 1950-2008*, 31 U. HAW. L. REV. 291, 298–99 (2008).
146. Trask, *supra* note 145, at 299.
147. *Tsujimura*, 400 P.3d at 510.
148. *Id.* at 511; Karen M. Brindisi, *Pre-Arrest Silence and Self-Incrimination Rights: Why States Should Adopt an Implied Invocation Standard Under Their State Constitutions in the Wake of* Salinas v. Texas, 84 MISS. L.J. 431, 446–47 (2015).

tool for expanding civil liberties and limiting unwarranted governmental intrusion."[149]

Therefore, the majority turned to the language of the Hawai'i Constitution.[150] The majority's interpretation of its constitution is consistent with the language of the provision itself, circuit court and state court decisions, and its own precedent.[151] Two words in article I, section 10's guaranteed right to remain silent allowed the majority to extend this right to prearrest.[152] These words, "any person," refer not only to an arrestee or an accused; their plain meaning would extend to any individual, regardless of that person's status in the criminal justice process.[153]

Importantly, the majority was not alone in making this distinction.[154] The Seventh Circuit has noted the difference between the language "no person" in the Fifth Amendment, and the language "an accused" in the Sixth Amendment.[155] Accordingly, the similarities between the language in the Hawai'i Constitution and the Federal Constitution allowed the majority to address other circuit's opinions in its analysis[156] to determine "whether prearrest silence may be used by the State against a defendant and, if so, within what bounds."[157] Five circuit courts have held the prosecution *cannot* use a defendant's prearrest silence in its case-in-chief as substantive evidence of guilt.[158] These courts have held that to do so would be a violation of the Fifth Amendment.[159]

149. Steven H. Levinson, *"There's No Place Like Home": Super-Sizing the State Constitution's Bill of Rights*, 15 LEWIS & CLARK L. REV. 773, 775 (2011).

150. *Tsujimura*, 400 P.3d at 511.

151. *Id.* at 511–14.

152. *Id.* at 511.

153. *See id.* at 511–12. The language used within Hawai'i constitutional provisions is "presumed to be used in [its] natural sense." *Id.* at 511; *see also* State v. Rodrigues, 629 P.2d 1111, 1114 (Haw. 1981).

154. *See* U.S. *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017 (7th Cir. 1987) (using the comparison of the two amendments to stress that the right to remain silent attaches before formal adversary proceedings, which is distinct from the Sixth Amendment's right to counsel).

155. *Tsujimura*, 400 P.3d at 511 (citing *Savory*, 832 F.2d at 1017).

156. *Compare* U.S. CONST. amend. V, *with* HAW. CONST. art. I, § 10.

157. *Tsujimura*, 400 P.3d at 512.

158. These include the First, Second, Sixth, Seventh, and Tenth Circuits. *Id.* at 512–13 (first citing Coppola v. Powell, 878 F.2d 1562, 1568 (1st Cir. 1989); then citing United States v. Caro, 637 F.2d 869, 876 (2d Cir. 1981); then citing Combs v. Coyle, 205 F.3d 269, 283 (6th Cir. 2000); then citing *Savory*, 832 F.2d at 1017; and then citing United States v. Burson, 952 F.2d 1196, 1201 (10th Cir. 1991)).

159. *See Tsujimura*, 400 P.3d at 513 (collecting cases).

By way of example, the First Circuit addressed the subject of prearrest silence in a similar setting to *Tsujimura,* where a comment on the defendant's silence developed through police testimony.[160] There, the defendant was not actually silent, but when asked if investigating officers could speak with him, the defendant stated that he would not confess.[161] The court ruled that allowing the officer to testify about that statement was unconstitutional while acknowledging the "dilemma" that arises in such a situation: "how to accommodate a search for the truth without undermining the purpose of the fifth amendment."[162] The Sixth Circuit was also instructive, holding the Fifth Amendment protects prearrest silence and reasoning "that application of the privilege is not limited to persons in custody or charged with a crime; it may also be asserted by a suspect who is questioned during the investigation of a crime."[163] The Supreme Court of Hawai'i expressed similar considerations in *Tsujimura*.[164] Nonetheless, there is a split over the issue of the right to remain silent prearrest.[165] Circuit courts, such as the Fifth, Ninth, and Eleventh Circuits, have allowed the use of prearrest silence as evidence of guilt.[166] But these courts emphasized the absence of compulsion, reasoning that a person's decision to remain silent absent any "official compulsion to speak" renders the privilege against self-incrimination irrelevant.[167]

Likewise, the state courts that have addressed the issue also remain split on the resolution. In fact, the *Tsujimura* majority cites to nine different states that have disallowed the substantive use of

160. *Coppola*, 878 F.2d at 1567.

161. *Id.* at 1564.

162. *Id.* at 1567–68.

163. *Combs*, 205 F.3d at 283 (quoting *Coppola*, 878 F.2d at 1565) (noting that the Supreme Court gave a broad scope to the privilege against self-incrimination, which "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." (quoting *Kastigar v. United States,* 406 U.S. 441, 444–45 (1972))).

164. *Tsujimura*, 400 P.3d at 511–12.

165. *See* Cameron Oakley, *You Might Have the Right to Remain Silent: An Erosion of the Fifth Amendment with the Use of Pre-Arrest Silence*, 49 CREIGHTON L. REV. 589, 598–608 (2016).

166. *Tsujimura*, 400 P.3d at 513 (first citing United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996); then citing United States v. Oplinger, 150 F.3d 1061, 1066–67 (9th Cir. 1998), *overruled on other grounds by* United States v. Contreras, 593 F.3d 1135 (9th Cir. 2010); and then citing United States v. Rivera, 944 F.2d 1563, 1567–68 (11th Cir. 1991)).

167. *See Oplinger,* 150 F.3d at 1066 (citing Jenkins v. Anderson, 447 U.S. 231, 241 (1980) (Stevens, J., concurring)). The Fifth Circuit in *Zanabria* held, without citing any case law, that the Fifth Amendment did not protect the defendant's prearrest silence because the silence at issue was not induced by the government. *Zanabria,* 74 F.3d at 593.

prearrest silence.[168] The Wyoming Supreme Court, addressing its own state constitution's language, which uses the phrase "[n]o person," found no sensible reason that the right to remain silent was limited to post-arrest or post-*Miranda*.[169] The North Carolina Court of Appeals addressed prearrest silence in the same context as *Tsujimura*—a question-and-answer between the prosecution and officer. In *State v. Taylor*, it stated: "Whether the State may use a defendant's [prearrest] silence at trial depends on the circumstances of the defendant's silence and the purpose for which the State intends to use such silence."[170] The particular facts in that case, however, were such that the defendant never actually came in contact with the detective; the detective's testimony was intended to reveal that she *attempted* to contact the defendant and was unsuccessful.[171] Thus, the *Taylor* court ruled "[p]re-arrest silence has no significance if there is no indication that a defendant was questioned by a law enforcement officer and refused to answer."[172]

Appropriately, the *Tsujimura* majority agreed with the circuits and states that have held the substantive use of prearrest silence unconstitutional.[173] It properly analyzed the limits on the use of such silence based on the analogous court decisions from these other jurisdictions. Those decisions were applicable considering Tsujimura *was* questioned by law enforcement and *did not*, therefore, create a lack-of-compulsion issue.[174] The majority further supports its decision by upholding the intent of article I, section 10. The two main underlying purposes of Hawai'i's constitutional right against compelled self-incrimination are: (1) "to protect an individual 'from having to reveal . . . his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government," and (2) to ensure that the government "produce[s] the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."[175]

168. *Tsujimura*, 400 P.3d at 513. These include New Hampshire, New Jersey, Wyoming, Idaho, Washington, Nebraska, Wisconsin, North Carolina, and Utah, which have all prohibited the substantive use of prearrest silence. *Id.*

169. Tortolito v. State, 901 P.2d 387, 389–90 (Wyo. 1995); *see also* WYO. CONST. art. I, § 11.

170. 780 S.E.2d 222, 224 (N.C. Ct. App. 2015) (quoting State v. Mendoza, 698 S.E.2d 170, 173 (N.C. Ct. App. 2010)).

171. *Id.* at 224–25.

172. *Id.* at 225.

173. *See Tsujimura*, 400 P.3d at 513.

174. *Id.* at 514.

175. *Id.* at 512 (first quoting Doe v. United States, 487 U.S. 201, 213 (1988); and then quoting Miranda v. Arizona, 384 U.S. 436, 460 (1966)). The purposes of the Hawai'i right

The majority opinion allows any person, *at least* at the time they are detained, to keep his knowledge and thoughts of the offense in question to himself, in effect remaining silent as the right confers, without fear of the government using it against them. Additionally, the majority cautioned that a holding to the contrary "would 'create an incentive for arresting officers to delay interrogation in order to create an intervening "silence" that would then be used against the defendant.'"[176] Therefore, the majority's interpretation of its constitutional language furthers the intent of Hawai'i's self-incrimination clause. In doing so, the majority also effectively responds to the dilemma the First Circuit noted about balancing the criminal justice system's search for the truth with the purpose of the right to remain silent.[177]

Furthermore, the majority's decision was also consistent with its own precedent. The Supreme Court of Hawai'i had not directly addressed the particular issue presented in *Tsujimura* but it had addressed similar issues calling for discussion on the right to remain silent. In an earlier decision, *State v. Melear*, the court heard a case dealing with a prosecutor's comment on a defendant's *failure to testify*, an issue already fully addressed under the Fifth Amendment. As such, the court chose not to address its state constitution, but rather looked to the Fifth Amendment.[178] Here, the majority was correct in addressing its state constitution to resolve an issue absent a clear ruling under federal law.[179] Furthermore, the court in *State v. Alo* expressed the fundamental nature of the right to remain silent under the state constitution.[180] The *Tsujimura* majority protects this fundamental state right throughout its opinion, ultimately providing a broader right under

mirror the federal incentives for the Fifth Amendment. *See id.* at 512–13 (citing federal precedent to identify the purposes of Hawai'i right against self-incrimination).

176. *Id.* 513–14 (quoting State v. Mainaaupo, 178 P.3d 1, 18 (Haw. 2008)); *cf.* Tortolito v. State, 901 P.2d 387, 390 (Wyo. 1995) (expressing the view that not protecting prearrest silence "encourages manipulative timing of arrests, does not serve the constitutional provision's purpose of protecting the right to silence during pre-arrest, accusatory interrogation by the state's agents," and "discourages a law enforcement system's reliance upon extrinsic evidence independently secured through skillful investigation and, instead, encourages reliance upon compulsory self-disclosure").

177. *See supra* note 162 and accompanying text.

178. State v. Melear, 630 P.2d 619, 626 (Haw. 1981).

179. *Tsujimura*, 400 P.3d at 512–13. *See generally* Salinas v. Texas, 570 U.S. 178 (2013) (plurality opinion) (issuing a ruling that did not resolve the federal circuit split as to whether prearrest silence may or may not be used as substantive evidence of guilt).

180. 558 P.2d 1012, 1016 (Haw. 1976).

its own constitution than what the Supreme Court offers under the Federal Constitution.[181]

In its reasoning, the *Tsujimura* court expresses the same overarching policy concerns as those articulated in *State v. Mainnaupo*, which held "the right against self-incrimination attached *at least* as of the time of the arrest," regardless of whether the defendant had received *Miranda* warnings.[182] Following this precedent, the *Tsujimura* majority did not emphasize that Tsujimura's silence was pre-*Miranda* because the *Mainnaupo* court had already acknowledged that the right to remain silent does not derive from those warnings.[183] Therefore, the *Tsujimura* majority's holding is a consistent expansion of the holding and reasoning in *Mainnaupo*, where the court evaded the prearrest silence question.[184]

To achieve this expansion, the *Tsujimura* majority underscores the timing of certain facts.[185] First, it highlights the timing of Tsujimura's questioning. It is because questioning occurred during an investigatory stop is what led to the court's determination that an individual should not be punished for asserting his right to remain silent.[186] In this respect, the court again cites to federal case law to support that no person who exercises his or her core right under the Fifth Amendment should be penalized *and* "that a person being questioned by a law enforcement officer during an investigatory stop 'is not obliged to respond.'"[187]

Second, the majority highlights timing in deciding the applicable test to determine whether the prosecutor's elicited remark was an impermissible comment on defendant's right to remain silent.[188] The court's precedent offered two different tests, the *Padilla* test and the *Rodrigues* test, and the proper deciding factor had to do with timing—*when* the alleged comment on the defendant's silence took place.[189] The *Padilla* test concerned a defendant's right not to testify and was designed to address comments "after the close of evidence."[190] The

181. Kawatachi, *supra* note 54, at 691.

182. State v. Mainaaupo, 178 P.3d 1, 18 (Haw. 2008) (emphasis added).

183. *Id.*

184. *Id.* at 18 n.9.

185. *See Tsujimura*, 400 P.3d at 510 ("In reviewing Tsujimura's contention, it is important to identify the timeframe . . . .").

186. *Id.* at 514.

187. *Id.* (quoting Berkemer v. McCarty, 468 U.S. 420, 439 (1984)).

188. *See id.* at 516–17.

189. *Id.* at 516.

190. *Id.* at 515. Hawai'i's precedent supports this; the court had consistently applied the *Padilla* test in such factual situations. *Id.* (first citing State v. Melear, 630 P.2d 619,

Rodrigues test, however, derived from the situation where defendant alleged the prosecutor commented on his post-arrest silence during questioning in its case-in-chief.[191] In that situation, the test "is whether the prosecutor intended for the information elicited to imply the defendant's guilt or whether the character of the information suggests to the factfinder that the defendant's prearrest silence may be considered as inferential evidence of the defendant's guilt."[192] Therefore, because the prosecution elicited the comment from a witness on re-direct in a question-and-answer format, the correct analytical framework derived from the court's *Rodrigues* opinion.[193]

B. Proper Application of the Rodrigues *and Harmless Error Tests*

While the court was unanimous in deciding to use the *Rodrigues* test, two Justices on the court disagreed as to the application of this test to the facts presented in *Tsujimura*.[194] Nevertheless, the majority correctly applied this test in accordance with the court's precedent. The test's initial application in *Rodrigues* established that an inquiry between officer and prosecutor at trial had been designed to establish the testifying officer's custom of transcribing defendants' statements and consequently increase his reliability. Crucially, the court found that this questioning "was unaccompanied by *any* implication of guilt."[195]

For the *Tsujimura* dissenting judges, the State's questioning of Officer Billins was analogous to *Rodrigues*, because it "sought to prove that Tsujimura did not have any difficulty exiting his vehicle," not to show his guilt.[196] But the majority found that not only did the State intend for the elicited information to imply the defendant's guilt, but that the character of the comment could be used as inferential evidence that *implied* his guilt.[197] Contrary to the majority's opinion, Justice Nakayama read the *Rodrigues* test to require "courts to evaluate whether the State elicited evidence of the defendant's silence as *direct* evidence of the defendant's culpability, or whether the State sought to

626 (Haw. 1981); then citing State v. Wakisaka, 78 P.3d 317, 328 (Haw. 2003); and then citing State v. Valdivia, 24 P.3d 661, 678 (Haw. 2001)).

191. *Id.* at 515.

192. *Id.* at 516.

193. *Id.*

194. *Id.* at 521 (Nakayama, J., concurring in part and dissenting in part).

195. State v. Rodrigues, 147 P.3d 825, 833–34 (2006) (emphasis added).

196. *Tsujimura*, 400 P.3d at 524 (Nakayama, J., concurring in part and dissenting in part).

197. *Id.* at 517 (majority opinion).

legitimately illustrate other relevant facts by virtue of the defendant's lack of verbal communication."[198]

This view does not adhere to the *Rodrigues* opinion, which as noted above, did not differentiate between direct or indirect implications.[199] Justice Nakayama argues that the *Rodrigues* court reasoned there was no comment on defendant's silence because the information the prosecutor elicited was supportive of other facts and thus, not meant to imply guilt from the defendant's silence itself.[200] Despite this contention, the *Rodrigues* court reiterated its holding in *Padilla* that if a comment was "manifestly intended" such that "the jury would naturally and necessarily" find it was a comment on the failure of defendant to testify, that comment was improper.[201] In line with this framework, the *Tsujimura* majority recognizes that even an indirect comment can cause this to happen.[202]

Likewise, despite Justice Nakayama's second dispute—that notwithstanding the application of the *Rodrigues* test, the error is harmless—the majority properly examined the record and correctly found that the comment on Tsujimura's silence contributed to his conviction.[203] To illustrate why the majority's determination was proper, it is important to explore its reliance on the district court's statements. The lower court specifically considered Tsujimura's "failure to speak." It noted that "[w]hen Mr. Tsujimura was asked to participate [by Officer Billins] in a field sobriety test, Mr. Tsujimura *did* indicate . . . there was an injury to his left leg," while further stating that "[w]hen [Tsujimura] alighted from the car, he did *not* indicate any difficulty walking."[204] In context, the lower court's verdict partially relied on the improper comment elicited from the prosecution's questioning, which the state conceded in its brief "was to 'show that there was no indication that Tsujimura's leg injury affected the FST test.'"[205] Taken together with the additional evidence that the Supreme

198. *Id.* at 522 (Nakayama, J., concurring in part and dissenting in part) (emphasis added).

199. *Rodrigues*, 147 P.3d at 833–34.

200. *Tsujimura*, 400 P.3d at 522–23 (Nakayama, J., concurring in part and dissenting in part).

201. *Rodrigues*, 147 P.3d at 833 (quoting State v. Wakisaka, 78 P.3d 317, 328 (Haw. 2003)).

202. *Tsujimura*, 400 P.3d at 516 (majority opinion). This is yet another way the majority holds true to its precedent and follows a number of its right to remain silent cases correctly.

203. *Id.* at 518.

204. *Id.* at 520 (alterations in original) (emphasis added) (quoting the district court).

205. *Id.* at 517.

Court of Hawai'i found to frustrate a guilty verdict, these statements support the majority's decision that the error was not harmless.[206]

Interestingly, the majority does not discuss the constitutional alternative the State had in questioning Officer Billins *if* its purpose was to show Tsujimura presented no difficulty exiting his car. Officer Billins was not limited in discussing Tsujimura's demeanor. He could have testified as to his observations of Tsujimura while he exited his car as non-testimonial information. In fact, Officer Billins *did* testify that Tsujimura "got out of his vehicle normally" and did not limp or fall.[207] Thus, asking if Tsujimura had explained that "he couldn't get out of the car because of an ACL injury" only had the effect of discrediting Tsujimura's theory of innocence by drawing attention to the fact he did not say he had an injury while stepping out of his vehicle.[208] Oddly enough, Tsujimura *does* disclose his injury to Officer Billins at some point before performing the test.[209] While no one on the court discussed this fact either,[210] it arguably enhances the argument that the State wanted the jury to draw an inference of guilt from the fact that Tsujimura did not disclose the information earlier.

C. The Public's Belief in the Right to Remain Silent and Its Expansion

Unlike any prior Hawai'i precedent on the matter,[211] Tsujimura was not silent in response to any express question from an officer.[212] Instead, the prosecutor's questioning elicited what he *failed* to say in

206. *Id.* at 519. For example, the court's majority specifically referred to evidence that:

> Tsujimura's vehicle was not changing lanes, was not going over the speed limit, was not slowing down or speeding up, did not follow other vehicles too closely, and did not make any inconsistent signals; it took Tsujimura only eight seconds to pull over from the time Officer Billins turned on his sirens and lights; and out of the 24 NHTSA visual detection clues, Tsujimura exhibited only one—trouble maintaining lane position. Officer Billins' testimony also indicated that Tsujimura did not repeat questions or comments, lean on his vehicle, or provide incorrect information or change his answers while being questioned; red, watery eyes could be caused by a number of factors other than alcohol impairment; and odor of alcohol is a poor indicator of a person's level of impairment and has no bearing on the amount and nature of the alcohol that the person consumed.

Id. at 520.

207. *Id.* at 522 (Nakayama, J., concurring in part and dissenting in part).

208. *Id.* at 505 (majority opinion).

209. *Id.* at 504.

210. *See generally id.* at 515–21; *id.* at 521–26 (Nakayama, J., concurring in part and dissenting in part).

211. *See, e.g.*, State v. Mainaaupo, 178 P.3d 1, 18–19 (Haw. 2008); State v. Padilla, 552 P.2d 357, 359–60 (Haw. 1976).

212. *Tsujimura*, 400 P.3d at 514–15 (majority opinion).

lieu of something that he could have self-proclaimed.[213] For the Supreme Court of Hawai'i, this was his right—the right to decide not to provide the officer with additional information in that moment—especially since the officer did not allow him the *opportunity* to invoke the right.[214] With this decision, the Supreme Court of Hawai'i endorses public notions of the right to remain silent, rejects *Salinas*,[215] and provides more protection than its federal counterpart.

"Every day, people are questioned in the course of police investigations before arrests are made or suspects are named. For those who, guilty or not, are likely to become suspects, it may often be prudent to keep silent."[216] The big picture then, is that people in these situations who remain silent would not know that the jurisdiction in which they live dictates whether their choice will be protected from substantive use against them.[217] The *Tsujimura* majority importantly advocated that the prejudicial effect of not protecting prearrest silence, particularly in this case, would be amplified for "non-native English language speakers, youth, and other individuals detained at a traffic stop who may be reluctant to speak in the presence of law enforcement officers due to age, gender, or linguistic, cultural, or other reasons."[218] The majority further predicted that the burden would fall upon such defendants to clarify their silence in cases where the State exploits it "to imply their guilt, compromising their constitutional right to choose not to testify and raising questions of fundamental fairness."[219]

Thus, substantive use of the silence exhibited by *Tsujimura*—more so than silence in response to a direct question—would allow any state to abuse a defendant's choice not to speak in situations where any person would *expectedly* remain silent as an inference of guilt. In

213. *Id.*

214. *Id.* at 514 n.21 ("Under the facts of this case, where there was no verbal exchange between the police officer and the defendant, there is no requirement that the defendant invoke the right to remain silent because, at that particular juncture, there was no opportunity to do so.").

215. *See id.* at 514 n.21 ("We further reaffirm that, where the prearrest silence occurs in the context of a person's refusal to answer questions, there is no 'express invocation' requirement in order to trigger the right to remain silent under the Hawai'i Constitution; we thus reject the holding of the plurality opinion in Salinas, which requires the defendant to expressly invoke the right to silence . . . ." (quoting Salinas v. Texas, 570 U.S. 178, 184 (2013)).

216. Berger, *supra* note 92, at 1016.

217. *Id.*; *see also* Pettit, *supra* note 33, at 181 ("While most Americans may view the right to remain silent as an inalienable right protected by the United States Constitution, certain circuits of the United States Courts of Appeals have held that prosecutors may use silence occurring before arrest in their case-in-chief to imply the defendant's guilt.").

218. *Tsujimura*, 400 P.3d at 515.

219. *Id.*

addition to all of these potential consequences, silence carries a low probative value at trial,[220] and moreover, "there are many legitimate reasons why a person, innocent or guilty, will remain silent when confronted by police interrogation."[221] Unfortunately, it is common for legal academics to "argue that only guilty offenders exercise this right [to remain silent] . . . [because] an innocent suspect or defendant almost always prefers to speak."[222] The right to remain silent, however, may actually help differentiate those who are guilty from those who are innocent.[223]

According to some, the right to silence can "operate[] as an anti-pooling device that motivates guilty suspects to separate from innocent ones. Alternatively, inducing guilty suspects to confess would also lead to the desired separation; however, incentives for confessing, such as reduction in punishment, generally incur greater social costs than do incentives for silence."[224] This theory proposes that silence can limit the incentive to lie,[225] and it protects the frightened innocent who feels silence "is wiser than taking the chance of making a mistake and suffering an unjustified arrest and prosecution."[226] Therefore, it is fitting that the Hawai'i court seems to refrain from punishing those who believe the right to remain silent is unqualified, and helps the criminal justice system seek the truth by extending the right to remain silent to those who have not yet been arrested.

D. Implications

The *Tsujimura* majority uses open-ended language, leaving open the broad question of exactly when a person's right attaches. It only holds that the right to remain silent attaches "*at least*" at the time an individual is detained, which answers a narrow "prearrest" question.[227] Although it is well established in Hawai'i precedent that a traffic stop is

220. Pettit, *supra* note 33, at 219.

221. Maclin, *supra* note 38, at 292 (footnote omitted); *see also* Ryan, *supra* note 42, at 917.

222. Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 436 (2000).

223. *See generally id.* at 431.

224. *Id.* at 433–34.

225. *See id.*

226. Pettit, *supra* note 33, at 220.

227. *See* State v. Tsujimura, 400 P.3d 500, 503, 512 n.18 (Haw. 2017) (emphasis added).

a seizure of a person,[228] and so here Tsujimura was detained, where will it draw the line? The court has essentially taken one step forward, only to again leave room for further analysis—to what extent does a pre-detained right to remain silent exist?[229] "[W]hat if there was no seizure? What if there was no traffic stop and the officer simply asked a person to stop, and the person said nothing and kept walking?"[230]

Hawai'i's line of precedent has established how to determine if a seizure has occurred.[231] In light of the majority's opinion in *Tsujimura* and reliance on its precedent, it seems reasonable that the court would rely on an established test for whether a seizure has occurred to decide if a person holds the right to remain silent. Conversely, the court has a history of broad state constitutional rights, particularly in the area of criminal procedure, and even more specifically with respect to self-incrimination.[232] This could mean another expansion of the right to remain silent. Nevertheless, that right comes from the protection against *compelled* self-incrimination. This is an important textual distinction going forward.[233] As many of the cases the majority cites indicate, a person's decision to remain silent absent any "official compulsion to speak" renders the privilege against self-incrimination irrelevant.[234] To be sure, the Supreme Court of Hawai'i may have to revisit the persisting dilemma of "how to accommodate a search for the truth without undermining the purpose of the fifth amendment" in the future.[235]

228. *See* State v. Eleneki, 102 P.3d 1075, 1078 (Haw. 2004) (quoting State v. Powell, 603 P.2d 143, 147 (Haw. 1979)).

229. *See* B. Lowenthal, *Pre-Arrest Silence Requires Miranda Warnings*, HAW. LEGAL NEWS (Sept. 11, 2017), http://hawaiiopinions.blogspot.com/2017/09/pre-arrest-silence-requires-miranda.html.

230. *Id.*

231. *See* Levinson, *supra* note 149, at 780 (stating the Hawai'i rule that "a person is seized . . . when a police officer approaches [a] person for the express or implied purpose of investigating him or her for possible criminal violations and begins to ask for information" (alterations in original) (quoting State v. Kearns, 867 P.2d 903, 907 (Haw. 1994)).

232. *See* Kawatachi, *supra* note 54, at 691; *see also* Levinson, *supra* note 149, at 775.

233. In a 2019 case following *Tsujimura*, a defendant moved for a mistrial partly arguing that the prosecution improperly attempted to have him comment on why he did not report something to the police on cross-examination. State v. Abella, 438 P.3d 273, 282–83 (Haw. Ct. App. 2019). The Intermediate Court of Appeals of Hawai'i made it a point to distinguish *Tsujimura* from the case at hand wherein "the State's cross-examination of [defendant] pertained to his actions *prior to being detained* by police" in an attempt to impeach the defendant. *Id.* at 283–84 (emphasis added) (also noting that "the Circuit Court provided a prompt curative instruction" for any improper questioning).

234. United States v. Oplinger, 150 F.3d 1061, 1066–67 (9th Cir. 1998), *overruled on other grounds by* United States v. Contreras, 593 F.3d 1135 (9th Cir. 2010); *see* United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996).

235. Coppola v. Powell, 878 F.2d 1562, 1567 (1st Cir. 1989).

V. CONCLUSION

In *State v. Tsujimura*, the Supreme Court of Hawai'i held that the right to prearrest silence exists and, in the context of the case before it, it did not require invocation to trigger that right under Hawai'i's state constitution.[236] Furthermore, it held that "the State may not use as substantive proof of guilt a defendant's prearrest silence that occurs at least as of the time of detention, for doing so would violate the right against compelled self-incrimination."[237] On an issue of first impression, the majority correctly determined that the State had improperly commented on Tsujimura's prearrest silence, which was not a harmless error.[238] In so holding, the majority defends popular conceptions of what the right to remain silent means and goes beyond what the Supreme Court of the United States has been willing to protect. In sum, Hawai'i continues to use its state constitutional law to broadly protect its citizens and safeguard a defendant's rights at every stage of criminal procedure.

236. *See* State v. Tsujimura, 400 P.3d 500, 511–14 (Haw. 2017).
237. *Id.* at 515.
238. *Id.* at 519.