DISSENTING OPINION OF ACOBA, J.,
WITH WHOM RAMIL, J., JOINS

We believe that in the public interest, this case should be published. See Torres v. Torres, No. 23089, 2002 WL 31819669, at *36 (Hawai‘i Dec. 17, 2002) (Appendix A) (Acoba, J., dissenting, joined by Ramil, J.).

In reaching the disposition in this case, this court cannot avoid implicitly deciding two significant issues of first impression -- first, whether a court may limit a criminal defendant's freedom to consult with his or her attorney during a recess from testimony concerning a juror question, and second, whether a prosecutor may adversely comment during closing argument about a defendant's constitutional right to be present at trial. As to the former, there is no reported decision in the United States; as to the latter, there is no reported decision in this state. In arriving at its holding, the majority must, of necessity, (1) identify these issues as presenting error and (2) assess the impact of these errors (or assumed errors) in deciding they are harmless. In that process, the majority must determine the nature, scope, and effect of the case law as to these issues in light of the circumstances of the instant case. It cannot otherwise ultimately dispense with these assessments.

It is in the nature of stare decisis that, when this court in effect decides matters of first impression, we in fact establish precedent and, therefore, should publish our opinion.

I.

This is the second case in which the question of whether a prosecutor may adversely comment on a defendant's presence has arisen. See State v. Camacho, No. 23834, (Hawai'i Aug. 12, 2002) (SDO). We decided Camacho by summary disposition order while this case was under consideration and the opinion attached hereto already circulated. This dissenting opinion is comprehensive in its length because a majority of this court had at one point previously approved publication. See, e.g., People v. Para, No. CRA 15889, slip op. at 34 (Cal. Ct. App. Aug. 1979) (Jefferson, J., dissenting) (objecting to the majority's reversal of its earlier decision to publish a case after the dissenting opinion had been circulated).

Because we do not publish in this case, the questions will continue to go unaddressed in any authoritative manner, and error may compound in other, similar cases. We have the opportunity to decide these issues of first impression, but, as this case demonstrates, the majority's decision will leave counsel and the courts once more to guess at the law to apply. Therefore, with all due respect, I must disagree with the majority's decision not to publish this case.

II.

The question in this case is not a close one. Counsel lamented on the record in the instant case that, as to the "tailoring" issue, there was no precedent in this state to guide counsel or the court, when the matter arose at trial. See infra Section VII. In light of this and other circumstances recounted supra, we responsibly can do no less than publish. Ultimately, a published opinion will settle questions that are the subject of pending appeals, or will be the subject of future appeals.

III.

As for the majority's evaluation of the merits of the instant case, I must disagree.

A.

1.

With due respect to the mjority, there are substantial and cogent reasons for holding that the errors complained of here were not harmless. "Under the harmless-beyond-a-reasonable-doubt standard, the question is 'whether there is a reasonable possibility that error may have contributed to conviction.'" State v. Crail, 97 Hawai'i 170, 182, 35 P.3d 197, 209 (2001) (citations omitted); see also State v. Holbron, 80 Hawai'i 27, 32, 904 P.2d 912, 917 (1995); State v. Chun, 93 Hawai'i 389, 394, 4 P.3d 523, 528 (App. 2000). As to the first error, the court prohibited Defendant-Appellant Daniel Sipe Sisneros, Jr. from conferring with his counsel on a juror's question concerning the route Sisneros took to the scene of the crime and from responding

with evidence to that question. The question was pivotal to the theory of Plaintiff-Appellee State of Hawai‘i (the prosecution) that Sisneros's assault on the complaining witness was a result of "road rage." However, the majority determined that the court's error was harmless. See majority opinion at 3.

While the majority may dismiss the effect of the question, the jury clearly did not, or the juror would not have asked the question about how Sisneros arrived at the scene. See United States v. Johnson, 892 F.2d 707, 712 (8th Cir. 1989) (Lay, J., concurring) ("A jury frustrated in its pursuit of 'truth' might well speculate on the defendant's probable answer, perhaps inferring more from the failure to answer than it would have gleaned from the answer itself."); DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512, 517 (4th Cir. 1985) (observing that, over the course of a trial, a jury develops a sense of cohesiveness and camaraderie, placing more importance on the reactions and questions of each other than on questions and answers presented in the normal adversarial process). Further, the prosecutor also did not think the matter was insignificant, or he would not have argued such matters in rebuttal argument, after Defendant could not respond.

2.

As to the second error, the prosecution argued to the jury, in contravention of Sisneros's constitutional right to be present at his criminal trial, that, because Sisneros was the

only witness present throughout the proceedings, his testimony was tailored to that of the other witnesses.[1] The court instructed the jury that Sisneros was to be treated like any other witness. Consequently, the prosecution's erroneous argument, buttressed by the authority of the court, invited the jury to disbelieve Sisneros's testimony, thus infecting his entire defense. Under the foregoing circumstances, and as more specifically discussed infra, I respectfully disagree that the errors were harmless.

B.

I would hold that (1) any order prohibiting a criminal defendant from conferring with his or her attorney concerning a juror question, at least where that communication would not interfere with the orderly and expeditious progress of trial, is a per se violation of a defendant's right to counsel under article I, section 14 of the Hawai‘i Constitution, but in any event, prejudicial in this case; and (2) the prosecution's argument to the jury that Sisneros's presence during the entire trial enabled him to tailor his testimony to that of previous witnesses infringed on Sisneros's constitutional rights to

[1] I discuss the United States Supreme Court's decision in Portuondo v. Agard, 529 U.S. 61 (2000), the leading case on the "tailoring" argument, because the prosecution, pursuant to HRAP Rule 28(j), submitted a letter on March 8, 2000, indicating that "the opinion . . . may be relevant to this Court's determination of whether the prosecutor's statement that [Sisneros] had the opportunity to hear all the witnesses testify before testifying constituted misconduct."

confront the evidence against him and to testify in his own defense.

IV.

A.

The following relevant evidence was adduced at trial.

Clifford Lanphier testified that, on Saturday, July 27, 1998, he and his wife went to a market in "Chinatown" where Mrs. Lanphier received a stick of sugar cane from a vendor. The Lanphiers then proceeded on the H-1 freeway in their Honda Civic to the Waikele Shopping Center. Lanphier noticed a truck swerving in front of them. He passed the truck and got a few car lengths in front of it. Later, the truck began to pass the Lanphiers. Looking over to the truck, Lanphier saw that the passenger, James Ilae[2] (Ilae), "was yelling something" and made an obscene gesture with his finger. Lanphier returned the gesture. Sisneros, the driver of the truck, however, was not shouting or gesturing. The truck then cut in front of the Lanphiers. Lanphier let the truck get a half mile or so ahead.

Approximately five to six miles later, Lanphier observed the truck pulled over on the right side of the road, at the Waipahu exit off of the H-1. After Lanphier and a second car drove past, Lanphier noticed the truck pull back onto the highway.

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[2] Lanphier described Ilae as "a couple inches taller [than himself], 6'1", [weighing] about 275 to 285 pounds." At the time of the incident, Lanphier weighed approximately 210 pounds.

When Lanphier entered the Waikele exit, the truck was approximately two to three car lengths behind. Lanphier turned right at the first traffic light. The Lanphiers stopped at the second traffic light, in the middle of the Waikele Shopping Center, K-Mart, and factory outlets. The truck pulled up to the traffic light in a different lane, two or three cars behind.

Lanphier saw "the passenger[, Ilae,] get out of the passenger side of the vehicle and run toward [his] car." When Lanphier rolled down his window, Ilae said "something . . . unintelligible[,]" and Ilae started hitting Lanphier through the open window, breaking Lanphier's glasses.

Lanphier then noticed that the truck was in front of him, cutting him off. Lanphier picked up the sugar cane stick and began hitting Ilae on the forearms. Mrs. Lanphier exited the car and pushed Ilae, distracting him. At that time, Lanphier left the car and started walking towards Ilae with the cane stalk in his hand. Lanphier attempted to swing it at Ilae, and the two began struggling.

Lanphier testified that he felt something hit him "across the back[.]" "It was only one blow that . . . [went] across [his] right shoulder and up and hit [him] in the face[.]" Lanphier turned and saw Sisneros, who was putting a pole down. Lanphier's left shoulder was dislocated, and he had a deep cut on his right cheek, under his eye.

Robert Corneau, testifying for the prosecution, related that he drove up to the intersection in time to notice the

scuffle between Mrs. Lanphier and Ilae. Corneau saw Lanphier and Ilae begin to struggle. "And [Lanphier] got knocked back four or five feet . . . and touched [his left] shoulder[.]" Corneau observed Sisneros standing apart from the struggle, and then walking back towards the truck. Sisneros pulled "a large stick" from the back of the truck and struck Lanphier "on the left side."[3] According to Corneau, Sisneros appeared "stunned" and "his eyes were kinda bulging." Subsequently, Ilae "ran . . . back [to] the . . . truck, . . . [Sisneros] ran over to the truck, threw the [stick] in the truck[, and t]hen they took off."

Lynn Corneau also testified for the prosecution. She observed Sisneros removing the stick from the back of his truck "holding it high." She did not, however, remember whether the swing "went high, [or] whether it went low[.]" It did not appear to her to be that hard of a swing, and it appeared that it was somewhat awkward for Sisneros to wield the stick or move it around. After Lanphier was struck, Mrs. Corneau saw Mrs. Lanphier "c[o]me out of the car [and] started . . . yelling at [Sisneros]."

Karla Tucker testified that she came upon the altercation while Ilae was punching Lanphier through the window. She saw Mrs. Lanphier exit the car and begin hitting Ilae. She related that Mr. Lanphier "had a brown . . . stick in his hand.

[3] On cross-examination, defense counsel asked, "[I]s it possible that [Lanphier] may have got[ten] struck on the right side?" to which Corneau responded, "No."

[It] looked like it would [have] come off a furniture table." Lanphier hit Ilae with the stick, but "the[hits] landed very lightly." When Lanphier got out of the car "they were still throwin [sic] punches at one another." At this point, the truck passed her and pulled up in front of the Lanphier's car. Ms. Tucker observed Sisneros retrieve the pole from the truck, and testified that Sisneros swung the pole "[s]ideways[.]"

Rampheung Lanphier, Lanphier's wife, testified to essentially the same events leading up to the altercation. Mrs. Lanphier recounted that Ilae and her husband were facing each other, still struggling, when Sisneros hit Lanphier with the stick.

B.

Sisneros's defense was that he did not intend to harm Lanphier, but only to disarm him; he was not acting as Ilae's accomplice and his actions constituted defense of others, because he only became involved when he saw Ilae being struck with what he believed was a weapon.

Sisneros testified that he was a landscape gardener, and Ilae worked with him once in a while. They were on the freeway driving to Eagle Hardware (Eagle), at the Waikele Shopping Center. A customer of Sisneros's had suggested that they go to Eagle to purchase a chain link gate. While driving on the H-1, Sisneros noticed the Lanphiers' car behind him, pass him on the left, and pull into the lane in front of him, slowing

down. Ilae told Sisneros that the driver had made an obscene gesture at them, and Ilae began swearing at the driver. Sisneros, meanwhile, was speaking on his cellular phone with a new customer, Mr. Harris. Ilae reached down into a toolbox to grab something to throw at the Lanphiers' car. To prevent Ilae from doing this, Sisneros moved the truck in front of the Lanphiers' car.

Later, Sisneros sped up to pull over to the side of the freeway, just after the North Shore exit, to write down information his customer was giving him over the phone. Sisneros did not notice the Lanphiers drive past him. After finishing his call, Sisneros told Ilae to forget about the incident, and got back onto the freeway to go to Eagle. After pulling into Waikele Shopping Center, Ilae pointed out the Lanphiers' car. Because the traffic light was red, the truck stopped three cars behind the Lanphiers.

Surprising Sisneros, Ilae jumped out of the truck and ran towards the other car. Sisneros moved his truck to the front of the intersection to see what was going on. Watching the altercation, Sisneros detected that Lanphier had a "weapon" in his right hand. Sisneros returned to his truck to call the police. When he got there, however, he turned and observed that the two were struggling away from the car. Sisneros also saw Lanphier hit Ilae "three times on the head, and [keep] on swinging." "[Ilae]'s fat, 300 pounds, and he's slow" and "all

[that Sisneros] wanted to do was be a peacemaker and stop the fight."

Sisneros retrieved a wooden pole. Although other tools and equipment were available, "picks, shovel, . . . potato rake, iron rake, machetes, sickles[,]" Sisneros chose the pole because "[a]ll [he] wanted to do was disarm [Lanphier], not hurt him." Sisneros "went up to the driver's right side . . . [and] swung the pole to disarm [Lanphier], his right hand." "When [Sisneros] swung the pole, [he] missed [Lanphier's] hand, . . . hit his right arm[,] and [Lanphier] fell back. As [Lanphier] fell back to the end of the pole, [Sisneros's] right hand on the pole slid[] down . . . [,] caus[ing] the end of the pole to move up [Lanphier's] right arm and hit his right cheek."

Sisneros was "shocked" after hitting Lanphier, because he "didn't wanna hurt him. . . . [He] just stood there with the pole, went back to the truck and then [Mrs. Lanpier] came over, [put her hand on the pole,] said to go." Sisneros knew that Lanphier was "all right[,]" although hurt, because "[he had] seen the way [Lanphier] pushed himself up, so [he] figured [Lanphier] was okay." Sisneros took Ilae home, and "jumped into another car to go back to Eagles to . . . pick up [the] gate."

On July 24, 1998, Sisneros was charged with Assault in the First Degree, HRS § 707-710 (1993), and Assault in the Second Degree, HRS § 707-711(1)(d) (1993).

V.

Prior to trial, the court told defense counsel and the prosecution that it would permit jurors to ask questions of witnesses after each witness had testified. Defense counsel stated that "[the defense] would object to any questioning[.]" The court posed no restrictions on Sisneros's communications with defense counsel with respect to these questions.

VI.

Following re-direct examination of Sisneros by defense counsel, the court requested questions for Sisneros from the jury. The court excused the jury and apparently recessed. After discussing the first juror question, of which there were several, the prosecution requested that the court direct defense counsel "not to discuss his client's further testimony with him," explaining that "[j]ust because we've taken a break doesn't meant that he can now engage in discussing the questions that are going to be asked by the [c]ourt." The court agreed, stating to defense counsel, "I'll ask the questions and afterwards, after we get done with the response and so forth, both of you can take a look at the questions after that and take whatever action."

However, the prosecution objected to this procedure, stating, "I don't think it's proper to allow [defense counsel] to discuss the questions that the [c]ourt's going to be asked [sic] with the defendant before he goes on the stand. He's had time to prepare . . . . In the interim, I don't think it's proper for

[defense counsel] to be discussing those questions with the defendant." Defense counsel responded that

> it's just as if we took a break during the examination. I think I should be allowed to discuss the questions with the defendant, especially these questions. . . . I think the defendant should be involved in all the questions actually, even those directed to the other witnesses, because he has a stake in it. But I think more so now that . . . these are the questions directed to him.

The court replied that, "that's a point that is in this innovative process is [sic] still in the works. And in that the person is asked the question after direct, or whatever the examination is, and really does not consult with anybody. I mean, that's just follow-up of his testimony." (Emphasis added.) Accordingly, the court concluded that Sisneros did not have a right to consult with defense counsel as to the juror questions:

> We can call the jury back in and finish up the questions . . . before taking a break, but I do agree there really should not be any further discussion as to what [Defendant] might respond and all of that.
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> So while that's something that I can understand from your point the defendant may want to do, at this point, and as far as I understand the innovations, I think the witness does not get to consult with someone else with respect to answers and what the questions are.

(Emphases added.) Following up on this point, the court further instructed that the rest of the discussion regarding juror questions would be at the bench, "out of the hearing of the defendant."

One of the juror questions requested to be posed to Sisneros was, "[C]ouldn't you have taken the first entrance to Eagle?" Defense counsel informed the court that "this is a question that I had to discuss with the defendant . . . [be]cause I needed his advice as well as pros and cons whether there is . . . an entrance there or not[.]" Defense counsel expressed

concern that, if Sisneros did not answer the question, the prosecution would use the omission to its advantage, a concern that later proved accurate. "[I]f [the prosecution] is probably going to use the diagram,[4] the diagram's going to get into evidence the fact that it appears from the diagram that there is an entrance and the juror knows that there's an entrance there, I'd ask that that question be asked at this point."

The prosecution protested, stating,

> [W]e've already decided that it wasn't going to be done and now [defense counsel has] had an opportunity to talk to the defendant about it, and I think that taints his testimony. It's clear that -- from [defense counsel's] own representations that they discussed it, that what his answer's gonna be has been discussed, and I think that's inappropriate because he's basically being coached.

(Emphases added.) Defense counsel pointed that he did not intend to coach Sisneros, but needed to discuss the relevance of the question with him. "[T]he thing is that I needed to know to confirm whether there was an entrance, if that's true, et cetera, and to see if there's any relevance to that. [T]he defendant is part of my defense team, as well as I am." (Emphasis added.)

Although defense counsel indicated that Defendant wished to answer the question, the court ruled that he would not be allowed to answer. Defense counsel subsequently requested that the prosecutor be "precluded from arguing [in closing,] then[,] that there's an entrance here . . . , because I would imagine that's what he's going to do, that [Sisneros] should have turned right at this [first] entrance." The court suggested

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[4] One of the prosecution's exhibits, State's Exhibit 16, depicted a map of the Waikele Shopping Center.

that, if the prosecution argued this, "it could be countered that there's no evidence to show that [Sisneros] knew about it. He didn't say that he knew about it."

At this point, defense counsel requested to reopen testimony in order to ask Defendant about "that one area at that point[.]" The prosecution objected on the same basis, that Sisneros had discussed his answer, and the court denied the request.

Defense counsel then asked for an admonishment or a ruling so that "the prosecutor doesn't even refer to" the question of why Sisneros did not take the first entrance, because, "since there is no evidence, [the prosecution] could be precluded from stating that [Sisneros] could have turned over there. And I just want that made quite clear so I don't have to object during his closing argument." The court, however, declined to do so, stating, "If there's [sic] arguments or objections, then I'll rule at that time." After discussing the remainder of the proposed juror questions, defense counsel again indicated his discomfort with the court's ruling:

> I cannot stress again that if a juror has a question . . . as to that entrance, I think the defendant should have an opportunity to explain why he didn't use that entrance. There's a presumption now or the assumption by that one juror which could poison the other jurors is that he wanted to follow Lanphier. And if there's a reasonable explanation, or an explanation of any kind, then so be it.

(Emphasis added.)

During closing argument, the prosecution did characterize the case as one "about road rage" and maintained during rebuttal argument, in support of this, that Sisneros could

have taken the first driveway into Waikele Shopping Center, rather than the second one used by the Lanphiers.

> [PROSECUTION]: Defendant's not believable again, he says he was not following Mr. Lanphier. But, first of all, if he was going to Eagle, why would he be in this lane?
> He wouldn't. Doesn't make sense.
> And what about the first entrance to Eagle's?
> This is in evidence. This is State's Exhibit 16.
> [DEFENSE COUNSEL]: Okay. Your Honor, I'm going to object. This is not evidence, Your Honor. We don't know whether that entrance was crowded, whether it was opened or closed.
> [PROSECUTION]: Your Honor, no argument. He's --
> COURT: Okay. No arguments.
> But, ladies and gentlemen, I'm going to instruct you that you only consider the evidence presented. Okay? As to what was not presented, that should not enter into your mind. You should not speculate or surmise. Just on what was presented here in the evidence.
> . . . .
> [PROSECUTION]: Thank you, Your Honor.
> This is in evidence, ladies and gentlemen. You can consider it for whatever you like. There's an opening right here that leads to Eagle Hardware. Why didn't he take that . . . if he's not following [the Lanphiers]?
> Of course he is.

(Emphases added.)

VII.

Also during its closing rebuttal argument, the prosecution argued that Sisneros tailored his testimony to that of the evidence, as follows:

> And, finally, the witness's means and opportunity of acquiring information. Who's the only witness in this case that got to see all the other witnesses testify? . . . . Who's the only witness who got to hear all the other witnesses testify and tailor his testimony?
> That man seated right over there. The other witnesses are excluded from the courtroom. They can't talk about their testimony. They can't sit in here and watch.
> But let's see, is his version supported by the evidence?

(Emphases added.) Defense counsel objected, stating, "I think it's improper argument." The court ruled, "I'll allow it." After closing arguments, defense counsel moved for a mistrial as

to the foregoing prosecution's comment, arguing that

> there is no case on point [in Hawai'i]. There is a case [i]n another jurisdiction. I believe it's one of the U.S. Court of Appeals that indicates that that [argument] was improper and that constituted a violation of defendant's right to a fair trial, because basically he has a right to testify and not testify. He's always in a position to go last, Your Honor, and he exercised his right to testify. But at the . . . disadvantage, so to speak, as to having to hear everybody else.

(Emphases added.) The court denied the motion for mistrial.

In its instructions, given prior to closing arguments, the court informed the jury that Sisneros's testimony should be treated in the same way as any other witness:

> It is your exclusive right to determine whether and to what extent a witness should be believed and to give weight to his or her testimony accordingly.
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> In evaluating the weight and credibility of a witness's testimony, you may consider the witness's appearance and demeanor; the witness's manner of testifying; the witness's intelligence; the witness's candor or frankness, or lack thereof; the witness's interest, if any, in the result of this case; the witness's relation, if any, to a party; the witness's temper, feeling, or bias, if any has been shown; the witness's means and opportunity of acquiring information; the probability or improbability of the witness's testimony; the extent to which the witness is supported or contradicted by other evidence; the extent to which the witnesses made contradictory statements, whether at trial or at other times; and all other circumstances surrounding the witness and bearing upon his or her credibility.
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> . . . .
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> The defendant in this case has testified. When a defendant testifies, his credibility is to be tested in the same manner as any other witness.

(Emphases added.) No instruction was given, either before or after closing arguments, regarding a defendant's right to be present at trial.

VIII.

Sisneros was subsequently convicted of both counts of assault. Following his conviction, Sisneros moved for a new

trial on the basis of the prosecution's comment during rebuttal argument on Sisneros's presence at trial. The motion was denied. At sentencing, the court dismissed the charge of Assault in the Second Degree, Count II. Sisneros timely appealed.

Defendant raises a number of points on appeal. I believe two of these points, previously mentioned, are dispositive.

IX.

In my view, the court's order precluding defense counsel from conferring with Sisneros, refusing to ask the subject juror question on the basis that Sisneros and defense counsel had discussed it, and declining the defense's request to reopen testimony to ask the question constituted a per se violation of Sisneros's right to counsel under article I, section 14 of the Hawai'i Constitution.

Both the federal and state constitutions provide for the right to assistance of counsel at critical stages in criminal cases. "It is well established that '[t]he right of one charged with [a] crime to counsel [is] . . . deemed fundamental and essential to [a] fair trial[] . . . in [our country].'" State v. Silva, 78 Hawai'i 115, 124, 890 P.2d 702, 711 (App. 1995) (quoting Gideon v. Wainwright, 372 U.S. 335, 344 (1963)) (other citations omitted).[5] "Counsel is recognized as essential because

[5] See also Briones v. State, 74 Haw. 442, 460, 848 P.2d 966, 979 (1993); State v. Aplaca, 74 Haw. 54, 66, 837 P.2d 1298, 1305 (1992); State v. (continued...)

experience has shown that a defendant requires the guiding hand of counsel at every step in the proceedings against him [or her]." Id. (brackets, internal quotation marks, and citations omitted).

Although the sixth amendment of the federal constitution and article I, section 14 are textually similar, we may afford the people in our state more protection than required by the federal constitution "'when the United States Supreme Court's interpretation of a provision present in both the United States and Hawai'i Constitutions does not adequately preserve the rights and interests sought to be protected.'" State v. Bowe, 77 Hawai'i 51, 57, 881 P.2d 538, 544 (1994) (quoting State v. Lessary, 75 Haw. 446, 453, 865 P.2d 150, 154 (1994) (citations omitted)); see also State v. Arceo, 84 Hawai'i 1, 28, 928 P.2d 843, 870 (1996); State v. Lopez, 78 Hawai'i 433, 445, 896 P.2d 889, 901 (1995); State v. Kam, 69 Haw. 483, 481, 748 P.2d 372, 377 (1988).

In that regard, this court has held that, "under Hawaii's Constitution, defendants are clearly afforded greater protection of their right to effective assistance of counsel." State v. Aplaca, 74 Haw. 54, 67 n.2, 837 P.2d 1298, 1305 n.2 (1992). With respect to an indigent's right to appointed counsel, our state constitution provides that such assistance attaches if the charged offense is punishable by a term of

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[5](...continued)
Dicks, 57 Haw. 46, 47, 549 P.2d 727, 729 (1976).

imprisonment, whereas, under the federal constitution, the right of an indigent defendant to be provided with appointed counsel is triggered only if the defendant is actually sentenced to a term of imprisonment. See State v. Dowler, 80 Hawai‘i 246, 249, 909 P.2d 574, 577 (App. 1995), cert. dismissed, 80 Hawai‘i 357, 910 P.2d 128 (1996). However, inasmuch as this court has consistently recognized its "obligation to 'afford defendants the minimum protection required by federal interpretations of the [f]ourteenth [a]mendment to the Federal Constitution[,]'" id., (quoting State v. Texeira, 50 Haw. 138, 142 n.2, 433 P.2d 593, 597 n.2 (1967)), the federal interpretation of the six amendment right to counsel is relevant.

X.

In Geders v. United States, 425 U.S. 80 (1976), the seminal case pertaining to a sequestration order against a criminal defendant, the United States Supreme Court considered the question of "whether a trial court's order directing [a criminal defendant] not to consult his attorney during a regular overnight recess, called while [the defendant] was on the stand as a witness and shortly before cross-examination was to begin, deprived him of the assistance of counsel in violation of the Sixth Amendment." Id. at 81. In that case, the defendant, John Geders, testified on his own behalf. See id. at 82. When defense counsel concluded direct examination, the court recessed for the night. See id. The prosecution requested the judge to

instruct Geders not to discuss the case overnight with anyone. See id. The court had given the same instruction to every witness whose testimony was interrupted during the trial. See id.

Geders' attorney objected, explaining that he believed he had a right to confer with his client about matters other than Geders' impending cross-examination. See id. The trial judge indicated that he did not believe Geders would understand the distinction, stating, "I just think it is better that he not talk to you about anything." Id. at 82. Defense counsel again objected, but said that he would comply with the order. See id. at 82-83.

The following morning, defense counsel asked to reopen his direct examination of Geders, which the court granted. See id. at 83. The prosecution followed with cross-examination. See id. Geders was ultimately convicted of the drug offenses charged. See id. He subsequently appealed to the Fifth Circuit Court of Appeals, which affirmed his convictions on the basis that Geders had failed to claim any prejudice from his inability to communicate with his attorney over the seventeen hour recess. See id. The United States Supreme Court granted certiorari. See id.

The Court first affirmed that a trial judge's power to control the process and shape of trial "includes broad power to sequester witnesses before, during, and after their testimony." Id. at 87 (citations omitted). According to the Court, the use

of such orders serves three purposes: (1) "[i]t exercises a restraint on witnesses 'tailoring' their testimony to that of earlier witnesses"; (2) "it aids in detecting testimony that is less than candid"; and (3) it "prevent[s] improper attempts to influence the testimony in light of the testimony already given." Id.

As applied to a criminal defendant, however, the Court cautioned that "[a] sequestration order affects a defendant in quite a different way from the way it affects a nonparty witness who presumably has no stake in the outcome of the trial." Id. at 88. Not only must a defendant in a criminal trial "often consult with his [or her] attorney during the trial[,]" but the policies behind a sequestration order may not pertain to a criminal defendant, because "the defendant as a matter of right can be and usually is present for all testimony and has the opportunity to discuss his [or her] testimony with his [or her] attorney up to the time he [or she] takes the witness stand." Id.

Moreover, the Court observed that consultation with counsel often occurs during recesses. See id. "Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his [or her] client information made relevant by the day's testimony, or he [or she] may need to pursue inquiry along lines not fully explored earlier." Id. Such consultation is inherent in a defendant's right to counsel, inasmuch as "the role of counsel is important precisely because ordinarily a defendant

is ill-equipped to understand and deal with the trial process without a lawyer's guidance." Id.

As for the concern that consultation regarding a defendant's testimony may result in inappropriate coaching of the defendant, the Court related that such concerns may be addressed by other measures:

> There are other ways to deal with the problem of possible improper influence on testimony or "coaching" of a witness short of putting a barrier between client and counsel for so long a period as 17 hours. The opposing counsel in the adversary system is not without weapons to cope with "coached" witnesses. A prosecutor may cross-examine a defendant as to the extent of any "coaching" during a recess, subject, of course, to the control of the court. Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination. In addition the trial judge, if he doubts that defense counsel will observe the ethical limits on guiding witnesses, may direct that the examination of the witness continue without interruption until completed. [If] the judge considers the risk high he may arrange the sequence of testimony so that direct- and cross-examination of a witness will be completed without interruption. . . . Inconvenience to the parties, witnesses, counsel, and court personnel may occasionally result if a luncheon or other recess is postponed or if a court continues in session several hours beyond the normal adjournment hour. In this day of crowded dockets, courts must frequently sit through and beyond normal recess; convenience occasionally must yield to concern for the integrity of the trial itself.

Id. at 89-91 (emphases added).

Consequently, the Court held that, "[t]o the extent that conflict remains between the defendant's right to consult with his [or her] attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of improper 'coaching,' the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of

counsel." Id. at 91 (citation omitted) (emphasis added).

In a concurring opinion, Justice Marshall, joined by Justice Brennan, clarified that, under the majority's holding, "a defendant who claims that an order prohibiting communication with his [or her] lawyer impinges upon his [or her] Sixth Amendment right to counsel need not make a preliminary showing of prejudice." Id. at 92 (Marshall, J., concurring, joined by Brennan, J.). As to the justification that such orders would prevent unethical coaching of defendants by their attorneys, Justice Marshall opined, "I find it difficult to conceive of any circumstances that would justify a court's limiting the attorney's opportunity to serve his [or her] client because of fear that he [or she] may disserve the system by violating accepted ethical standards." Id. at 93.

Furthermore, Justice Marshall observed that the length of the recess should not delineate what was a constitutional infirmity from what was not. "In my view, the general principles adopted by the Court today are fully applicable to the analysis of any order barring communication between a defendant and his [or her] attorney, at least where that communication would not interfere with the orderly and expeditious progress of the trial." Id. at 92 (emphasis in original).

XI.

Eleven years later, in Perry v. Leeke, 488 U.S. 272 (1989), the Supreme Court again considered the question of

whether a trial court's order prohibiting a criminal defendant, Donald Ray Perry, from conferring with defense counsel constituted an impermissible violation of the sixth amendment. In that case, the trial court's sequestration order encompassed a fifteen-minute recess. See id. at 274.

Perry took the witness stand and testified on his own behalf. See id. At the conclusion of direct examination, the trial court ordered a fifteen-minute recess, and ordered that Perry not speak to anyone, including his attorney, during the break. See id. When the trial resumed, defense counsel moved for a mistrial on the basis of the order. See id. The motion was denied, the court ruling that Perry "was not entitled to be cured or assisted or helped approaching his cross examination." Id. (internal quotation marks and citation omitted).

The United States Supreme Court granted certiorari.[6] See id. at 277. A majority of the Court distinguished between the overnight recess in Geders and the 15-minute "break" in Perry's testimony. See id. While "[a]dmittedly, the line between the facts of Geders and the facts of this case is a thin

[6] Perry had appealed to the Supreme Court of South Carolina, which affirmed his conviction. See Perry, 488 U.S. at 274 (citation omitted). Perry petitioned for federal habeas corpus review in the District Court of the Fourth Circuit. See id. at 275-76. The district court granted his petition for habeas corpus, determining that, "although a defendant has no right to be coached on cross-examination, he [or she] does have a right to counsel during a brief recess and he [or she] need not demonstrate prejudice from the denial of that right in order to have his [or her] conviction set aside." Id. at 276 (citation omitted). The Fourth Circuit Court of Appeals, however, reversed the district court, determining that, although a constitutional error had occurred, the error was not prejudicial. See id. Four judges dissented on the basis of the prejudice analysis, reasoning that "the prejudice inquiry was particularly inappropriate in this context because it would almost inevitably require a review of private discussions between client and lawyer." Id.

one[, i]t is, however, a line of constitutional dimension." Id. at 280. "[N]either [a defendant] nor his [or her] lawyer has a right to have the testimony interrupted in order to give him [or her] the benefit of counsel's advice." Id. at 281. Unlike the majority in Geders, the Perry majority declared that a sequestration order would avoid "grant[ing] the witness an opportunity to regroup and regain a poise and sense of strategy that the unaided witness would not possess." Id. at 282.

Although "[i]t is the defendant's right to unrestricted access to his [or her] lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess[,]" id. at 284 (citing Geders, 425 U.S. at 88), the majority concluded that, "in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice[,]" id. Accordingly, it held that "the Federal Constitution does not compel every trial judge to allow the defendant to consult with his [or her] lawyer while his [or her] testimony is in progress if the judge decides that there is a good reason to interrupt the trial for a few minutes." Id. at 284-85.

In a dissenting opinion, Justice Marshall, joined by Justices Brennan and Blackmun, objected to the majority's distinction between a "short" recess and the "long" recess in Geders, "[b]ecause this distinction has no constitutional or logical grounding, and rests on a recondite understanding of the

role of counsel in our adversary system[.]" Id. at 285 (Marshall, J., dissenting, joined by Brennan, J., and Blackmun, J.) (citation omitted). Reiterating his position in Geders, that "any order barring communication between a defendant and his [or her] attorney, at least where that communication would not interfere with the orderly and expeditious progress of the trial" is forbidden by the sixth amendment, id. (emphasis in original), Justice Marshall noted that "[t]his view is hardly novel; on the contrary, every Court of Appeals to consider this issue since Geders, including the en banc Fourth Circuit in [Perry] has concluded that a bar on attorney-defendant contact, even during a brief recess, is impermissible if objected to by counsel." Id. (emphasis in original) (citing Sanders v. Lane, 861 F.2d 1033, 1039 (7th Cir. 1988) (collecting cases), cert. denied, 489 U.S. 1057 (1989)).

Justice Marshall related that, "[w]ith very few exceptions, the state appellate courts that have addressed this issue have agreed." Id. Observing that a "long line of [Supreme Court] cases . . . stand[ing] for the proposition that a defendant has the right to the aid of counsel at each critical stage of the adversary process[] is conspicuously absent from the majority's opinion[,]" Justice Marshall objected to "[t]he majority's conclusory approach [as] ill befit[ting] the important rights at stake in this case." Id. at 286-87 (citations omitted).

Contrary to the majority's assertion that, when testifying, defendants should be afforded only the same treatment as other witnesses, Justice Marshall observed that "the Six Amendment accords defendants constitutional rights above and beyond those accorded witnesses generally." Id. at 289. Additionally, the "truth-seeking" function of cross-examination as seen by the majority was also flawed, according to Justice Marshall, inasmuch as "[c]entral to our Sixth Amendment doctrine is the understanding that legal representation for the defendant at every critical stage of the adversary process enhances the discovery of truth because it better enables the defendant to put the State to its proof." Id. at 291. Thus, "[w]ith this understanding of the role of counsel in mind, it cannot persuasively be argued that the discovery of truth will be impeded if a defendant regain[s] . . . a sense of strategy." Id. (citation omitted).

> If that were so, a bar order issued during a 17-hour overnight recess should be sustained. Indeed, if the argument were taken to its logical extreme, a bar on any attorney-defendant contact, even before trial, would be justifiable. Surely a prosecutor would have greater success "punch[ing] holes" in a defendant's testimony under such circumstances.

Id. at 291-92 (internal citations omitted).

XII.

I believe that the constitutional distinction made by the majority in Perry, between a "short" and a "long" break, is untenable for the reasons suggested by Justice Marshall. At trial, our adversarial process requires that the accused be

assisted by counsel in order to ensure that the prosecution has met its burden of proof as to all elements of the crime charged:

> The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth--as well as fairness--is "best discovered by powerful statements on both sides of the question." Absent representation, however, it is unlikely that a criminal defendant will be able adequately to test the government's case, for, . . . even the intelligent and educated lay[person] has small and sometimes no skill in the science of law.

Perry, 488 U.S. at 291 (Marshall, J., dissenting, joined by Brennan, J., and Blackmun, J.) (some internal citations omitted) (quoting Penson v. Ohio, 488 U.S. 75, 84 (1988)). Moreover, separation from counsel by the court during a recess effectively curtails an accused's right to be heard, as many times only counsel may be able to speak competently to matters arising at trial:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . [A defendant] is unfamiliar with the rules of evidence. . . . He [or she] lacks both the skill and knowledge adequately to prepare his [or her] defense, even though he [or she may] have a perfect one. [A defendant] requires the guiding hand of counsel at every step in the proceedings against him [or her].

Geders, 425 U.S. at 88-89 (some brackets in original and some added) (emphasis added) (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

In my view, the majority rule in Perry, that a trial court may prohibit a criminal defendant from conferring with his or her counsel during the course of trial, even while the trial is in recess, does not adequately protect an accused's right to counsel as guaranteed in our state constitution.

Accordingly, I agree with the proposition that "any order barring communication between a defendant and his [or her] attorney, at least where that communication would not interfere with the orderly and expeditious progress of the trial[,]" violates a criminal defendant's right to counsel, and would construe article I, section 14 as embodying such a proposition. Perry, 488 U.S. at 285 (Marshall, J., dissenting, joined by Brennan, J., and Blackmun, J.) (emphasis in original) (quoting Geders, 425 U.S. at 92 (Marshall, J., concurring, joined by Brennan, J.)).

Thus, as with other occasions pertaining to the right to counsel, see Aplaca, 74 Haw. at 66, 837 P.2d at 1305; Dowler, 80 Hawai'i at 249, 909 P.2d at 577, this court should not follow the questionable precedent set in federal constitutional law.

XIII.

I conclude, then, that the type of sequestration order imposed by the court in the instant case is a violation of a defendant's right to counsel under article I, section 14. Such a violation is per se prejudicial, rather than being subject to a harmless error analysis, cf. Chapman v. California, 386 U.S. 18, 23 (1967) (stating that the right to counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error"), or necessitating that a defendant show prejudice, see Glasser v. United States, 315 U.S. 60, 76 (1942) ("The right to have the

assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.").[7]

Here, however, even under a prejudice inquiry advocated by some courts,[8] see Sanders, 861 F.2d at 1039, Sisneros was substantially prejudiced by the court's order that he and his defense counsel were not to discuss the proposed juror question. The court ruled that Sisneros would not be allowed to answer the question, and testimony in "that one area" would not be reopened only because counsel had discussed the juror question with Sisneros.

The prosecution, in rebuttal argument (to which there is no surrebuttal), raised the question of why Sisneros had not taken the earlier route. This bolstered the prosecution's theory that the case was one of road rage and that Sisneros and Ilae were acting in concert. The prosecution's argument rested on the lack of an explanation for this course of action. This permitted

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[7] Obviously, placing the burden on a defendant to make such a showing may invade the attorney-client relationship. See Mudd v. United States, 798 F.2d 1509, 1513 (D.C. Cir. 1986) ("The only way that a defendant could show prejudice would be to present evidence of what he and counsel discussed, what they were prevented from discussing, and how the order altered the preparation of his defense. Presumably the government would then be free to question defendant and counsel about the discussion that *did* take place, to see if defendant nevertheless received adequate assistance." (Emphasis in original.)). Consequently, I believe that under article I, section 14 of the Hawai'i Constitution, the court's order prohibiting communication regarding the subject jurors' questions during a recess was a per se violation of Sisneros's right to counsel. See id. at 1513 ("We find that a per se rule best vindicates the right to the effective assistance of counsel.").

[8] In State v. Soto, 84 Hawai'i 229, 933 P.2d 66 (1997), this court adopted a "realistic possibility of injury to defendants or benefit to the State" analysis when the prosecution obtains otherwise confidential information as a result of the government's intrusion into the attorney-client relationship. Id. at 242, 933 P.2d at 79 (internal quotation marks and citation omitted).

the jury to draw the conclusion that, because the first driveway was available to Sisneros, and he had taken the second entrance, Sisneros must have been following the Lanphiers.

Contrary to the prosecution's contention that Sisneros and Ilae were acting in concert, Sisneros maintained that it was Ilae who was the aggressor, and that Sisneros was not involved in the altercation until he became concerned that his friend might be in danger. The juror's question directly focused on whether Sisneros, as the driver of the truck, had followed the Lanphiers, and, thus, was not the by-stander he claimed to be. Because Sisneros was unable to answer the juror's question, he was unable to rely upon any evidence introduced at trial to present an alternative explanation.

Sisneros also claimed that he was defending Ilae at the point Lanphier had, what Sisneros believed to be a weapon in his hand, and was striking Ilae. The juror question bore directly on whether Sisneros acted in concert with Ilae and thus intended to cause injury to Lanphier, or whether Sisneros acted in what he believed to be appropriate action in defense of Ilae, who carried no implements in his altercation with Lanphier.

Thus, the decision to preclude Sisneros from answering the juror's question or reopening testimony on the basis of the attorney-client communication substantially prejudiced Sisneros. See Morrison v. State, 845 S.W.2d 882, 895-96 (Tex. Crim. App. 1992) (en banc) (determining that, where a juror question was ruled inadmissible by the trial judge and therefore not asked,

and the prosecution "was able to capitalize on the unanswered question by recalling [a witness] to provide what the prosecution intended to be [a] satisfactory answer for the juror[,]" the fact that "any correlative *advantage* actually gained by the prosecution was the direct result of the question raised by the juror cannot reasonably be disputed--especially since the State had no known evidence that would directly answer the question") (emphasis in original).

XIV.

Additionally, the rationale for applying the same sequestration rule for witnesses to defendants put forth by both the Geders and Perry courts are inapplicable in the context of juror questioning. The Perry court justified the authority of a trial judge to prohibit a criminal defendant from conferring with his or her counsel between direct and cross examinations on the basis that "[c]ross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the right time, in just the right way." Perry, 488 U.S. at 282. Juries, however, do not serve the same role as that of a prosecutor or a defense counsel, inasmuch as a jury should not advocate. The purpose of juror questioning is said to be to clarify testimony,[9] see State v. Culkin, 97

[9] The procedure implemented in the circuit court pilot program allowing for juror questions was described by the majority in State v. Culkin, 97 Hawai'i 206, 35 P.3d 233 (2001):

(b) In the discretion of the Participating Judge,

(continued...)

Hawai‘i 206, 225 n.23, 35 P.3d 233, 252 n.23 (2001) ("If a juror is unclear as to a point in the proof, it makes good common sense to allow a question to be asked about it." (Citation omitted.)), not to "punch holes in a witness' testimony[,]" Perry, 488 U.S. at 282.

In the present case, however, both the trial court and the prosecution justified the sequestration order entirely upon the purposes set forth in Geders, that conferring regarding testimony would be unethical witness "coaching." The prosecution argued that, "now [defense counsel has] had an opportunity to talk to the defendant about it[.] I think that taints his testimony. It's clear . . . from [defense counsel's] own representations that they discussed it, that what his answer's gonna be has been discussed[;] I think that's inappropriate because he's basically being coached." (Emphases added.) As noted by the Geders court, however, concerns about unethical coaching may be addressed in other ways than an over-inclusive ban on discussing testimony. See Geders, 425 U.S. at 89-90. The fear of unethical coaching, however, cannot be a sufficient justification to abrogate the rights due a criminal defendant.

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[9](...continued)

> jurors in criminal cases may be allowed to ask questions of witnesses during trial, provided that the questions shall be screened by the Participating Judge and subject to objection by attorneys. The Participating Judge may ask the questions over objection after allowing the objections to be placed on the record by the attorneys.

Id. at 224, 35 P.3d at 252 (emphases added) (quoting Amended Order Authorizing Implementation of the Pilot Project in Jury Innovations, filed September 4, 1998).

See id. at 92-93 (Marshall, J., concurring, joined by Brennan, J.).

Inasmuch as the decision of whether to object to juror questions constitutes a crucial stage of trial, counsel should be able to assist a defendant in these decisions. Here, the court predicated its decision upon its authority to prohibit a witness from conferring during testimony. Witnesses, however, unlike criminal defendants, do not possess a right to counsel, and, thus, a criminal defendant is not similarly situated with other witnesses. Therefore, the court in the present case should have allowed Sisneros and defense counsel to discuss the proposed juror question. Not doing so is per se reversible error and, alternatively, substantially prejudicial for the reasons set forth supra.

XV.

Sisneros further objects to remarks by the prosecutor during closing argument that Sisneros's presence at trial enabled him to tailor his testimony. While the prosecution could argue that Sisneros tailored his testimony to the other witnesses if there was evidence to sustain such an allegation, I believe it could not permissibly make a general allegation -- that is, a generic accusation of that nature based only on the fact that Sisneros was present throughout the trial -- without infringing on Sisneros's right of confrontation and right to testify. By, in effect, arguing to the jury that Sisneros's presence gave him

an unfair advantage, the prosecution invited the jury to condemn Sisneros for what, in my view, is guaranteed to him, at least under our State constitution.

Article I, section 14 of the Hawai‘i Constitution provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against the accused . . . ." The confrontation clause confers "a right to meet face to face all those who appear and give evidence at trial." State v. Apilando, 79 Hawai‘i 128, 131, 900 P.2d 135, 138 (1995) (internal quotation marks omitted) (quoting Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (quoting California v. Green, 399 U.S. 149, 175 (1970))). Further, our State constitution guarantees a defendant the right to testify in his or her own defense. See Tachibana v. State, 79 Hawai‘i 226, 231-32, 900 P.2d 1293, 1298-99 (1995) (citations omitted); Silva, 78 Hawai‘i at 122-23, 890 P.2d at 709-10. Accordingly, a defendant charged with a crime has the right to be present at trial for the purpose of confronting witnesses and to testify in his or her defense.

XVI.

Although this court has allowed the prosecution wide latitude in closing remarks, this leeway pertains only to comments upon the evidence and not to direct attacks on a defendant's constitutional rights. In State v. Clark, 83 Hawai‘i

289, 926 P.2d 194, reconsideration denied, 83 Hawai‘i 545, 928 P.2d 39 (1996), this court stated,

> a prosecutor, during closing argument, is permitted to draw reasonable inferences from the evidence and wide latitude is allowed in discussing the evidence. It is also within the bounds of legitimate argument for prosecutors to state, discuss, and comment on the evidence as well as to draw all reasonable inferences from the evidence.

Id. at 304-05, 926 P.2d at 209-10. Under Hawai‘i law, the prosecution, then, is permitted to discuss the evidence and inferences from the evidence. Occasionally, prosecutors have strayed from discussion of evidence into prohibited areas. See Pacheco, 96 Hawai‘i at 97, 26 P.3d at 586 (prosecution's repeated reference to the defendant as an "asshole" during both cross-examination and closing argument was improper); Rogan, 91 Hawai‘i at 412-15, 984 P.2d at 1238-41 (prosecution's appeal to racial prejudice improperly injected issue of defendant's race, constituted emotional appeal that could have inflamed the jury's passions and prejudices, and, thus, constituted egregious misconduct that denied defendant a fair trial); State v. Marsh, 68 Haw. 659, 661, 728 P.2d 1301, 1302 (1986) (prosecutor expressing personal opinions regarding guilt of the defendant and credibility of the witnesses improper). This court has not yet addressed whether the prosecution may comment, not upon the evidence at trial, but upon the defendant's right to be present at trial.

XVII.

The United States Supreme Court has addressed the issue of so-called "generic" comments in Portuondo, and determined that, under the federal constitution, the prosecution's comment upon the defendant's presence during witness testimony does not unconstitutionally impinge upon a defendant's right to confrontation under the sixth amendment. In Portuondo, the defendant was charged with sodomy and weapons violations. See 529 U.S. at 63. Under New York law, the defendant was required to be present at his trial. See id. at 74. After the alleged victim and her friend testified, the defendant testified that he and the alleged victim had engaged in consensual intercourse, that during an argument he had struck her in the face once, but denied raping her or threatening either woman with a gun. See id. at 63.

During closing arguments, defense counsel asserted that both women were lying, and the prosecution also challenged the credibility of the defendant. See id. The prosecution stated, over the objection of the defense, that defendant had the "big advantage" of sitting through the testimony of the witnesses:

> You know, ladies and gentleman, unlike all the other witnesses in this case[,] the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies.
> . . . .
> That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence.

Id. at 64 (internal quotation marks and citation omitted). The

defendant asserted that these comments unfairly burdened his right to be present at trial.

On certiorari to the United States Supreme Court,[10] the majority held that testifying witnesses should be treated the same, and, thus, such comments did not violate the defendant's constitutional rights. See id. at 65, 73. It observed that,

> it is natural and irresistible for a jury, in evaluating the relative credibility of a defendant who testifies last, to have in mind and weigh in the balance the fact that he [or she] heard the testimony of all those who preceded him [or her]. . . . [I]t is something else (and quite impossible) for the jury to evaluate the credibility of the defendant's testimony while blotting out from its mind the fact that before giving the testimony the defendant had been sitting there listening to the other witnesses.

Id. at 67-68. According to the majority, then, forbidding the prosecution from arguing that a defendant's unique position allows him or her to fabricate his or her testimony "either prohibits inviting the jury to do what the jury is perfectly entitled to do; or it requires the jury to do what is practically impossible." Id. at 68.

The Portuondo dissent, however, characterized the majority's holding as "transform[ing] a defendant's presence at trial from a Sixth Amendment right into an automatic burden on his credibility." Id. at 76 (Ginsburg, J., dissenting). Citing the Court's earlier decisions in Griffin v. California, 380 U.S. 609 (1965) (a defendant's refusal to testify at trial may not be

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[10] The defendant had appealed, and the New York Supreme Court reversed one of the convictions, but affirmed the remaining convictions. See Portuondo, 529 U.S. at 64. The New York Court of Appeals denied leave to appeal, and the defendant subsequently filed a petition in federal court, claiming that the prosecutor's comments in closing arguments violated his fifth and sixth amendment rights. See id. at 64-65. The Second Circuit reversed. See id. at 65.

used as evidence of his guilt), and Doyle v. Ohio, 426 U.S. 610 (1976) (a defendant's silence after receiving Miranda warnings did not warrant a prosecutor's attack on his credibility), Justice Ginsburg contended that, "where the exercise of constitutional rights is 'insolubly ambiguous' as between innocence and guilt, a prosecutor may not unfairly encumber those rights by urging the jury to construe the ambiguity against the defendant." Portuondo, 529 U.S. at 77 (Ginsburg, J., dissenting).

Unlike the majority, the dissent distinguished between accusations of tailoring of testimony made during cross-examination and those made during closing arguments, because "the interests of truth are not advanced by allowing a prosecutor, at a time when the defendant cannot respond, [i.e., in the prosecution's rebuttal argument], to invite the jury to convict on the basis of conduct as consistent with innocence as with guilt." Id. at 79.

In my view, the majority's stance in Portuondo paints with too broad a brush. I believe, as does Justice Ginsburg, that, simply because a jury has a "natural or irresistible" inclination to draw the inference that a defendant who testifies has tailored his or her own testimony, "it would not follow that prosecutors could urge juries to draw it[,]" id. at 86, or that the jury should go uninstructed as to such matters. As Justice Ginsburg points out, although arguably a jury may be inclined to infer something about a defendant, such as a defendant's choice

to remain silent after receiving Miranda warnings, and a defendant's failure to testify, a jury instruction will direct them not to draw it. See id. at 85-87.

Of course, Portuondo pertains only to the federal constitution. See id. at 76. As emphasized in the concurrence by Justice Stevens, joined by Justice Breyer, "[t]he Court's final conclusion . . . does not, of course, deprive States or trial judges of the power either to prevent such argument entirely or to provide juries with instructions that explain the necessity, and the justifications, for the defendant's attendance at trial." Id. (emphasis added).

XVIII.

As mentioned previously, this court is not forbidden from adopting a more protective stance with regards to constitutional rights under the Hawai‘i Constitution. See cases cited supra Section IX. Other state courts have addressed this issue and concluded that comments regarding defendants' trial presence do infringe upon the right to confrontation. See, e.g., State v. Jones, 580 A.2d 161, 163 (Me. 1990) (basing its decision upon both federal and state constitutions); Hart v. United States, 538 A.2d 1146, 1149 (D.C. 1988); State v. Hemingway, 528 A.2d 746, 747-748 (Vt. 1987); Commonwealth v. Person, 508 N.E.2d 88, 90-92 (Mass. 1987); State v. Johnson, 908 P.2d 900, 903 (Wash. App. 1996); Commonwealth v. Elberry, 645 N.E.2d 41, 42-43 (Mass. App. Ct.), cert. or review denied, 646 N.E.2d 1071 (Mass.

1995). These courts have prohibited arguments by the prosecution which invite the jury to draw inferences based only upon the defendant's presence.

In my view, the reasoning of the Portuondo majority does not adequately preserve the right to confrontation guaranteed under article I, section 14 of the Hawai‘i Constitution, or the right to testify under various state constitutional guarantees. See Bowe, 77 Hawai‘i at 57, 881 P.2d at 544. Further, I find Justice Ginsburg's reasoning persuasive. A generic accusation that a defendant tailored testimony because of his or her presence during trial, made during closing argument so as not to give the defendant an opportunity to refute the charge, does not serve the truth seeking function of a trial, inasmuch as "[a]n irrebuttable observation that can be made about any testifying defendant cannot sort those who tailor their testimony from those who do not, much less the guilty from the innocent." Portuondo, 529 U.S. at 78 (Ginsburg, J., dissenting).

Thus, I would reject an interpretation of a defendant's right to confrontation and to testify under the Hawai‘i Constitution that permits such an accusation and places the defendant in the position of making a Hobson's choice between exercising his or her right to be present at trial and to testify, and sequestering himself or herself in order to prevent the taint of that accusation. Allowing the prosecution to comment upon the defendant's presence as a "unique opportunity" to tailor his or her testimony for the purpose of deceiving the

jury carries significant weight in cases where credibility of the defendant is an important issue.

XIX.

A.

In the instant case, the comments by the prosecutor were generic in nature and not based on the evidence. In Johnson, the Washington Court of Appeals considered the issue of a prosecutor's comments during closing arguments that a testifying defendant had a unique opportunity to tailor his testimony. See 908 P.2d at 902. The prosecutor included the following comments in his rebuttal:

> Members of the jury, I would like to submit to you that the one and only witness who had a bird's eye view of everything that happened, the only witness that could watch the entire proceeding take place, to fit his testimony to suit the evidence that was entered earlier, and that's the defendant.

Id. (emphases added). In determining that these statements amounted to constitutional error, the appellate court explained that

> [t]he prosecutor's comments about the defendant's unique opportunity to be present at trial and hear all the testimony against him impermissibly infringed his exercise of his Sixth Amendment rights to be present at trial and confront witnesses. He did not merely argue inferences from the defendant's testimony, but improperly focused on the exercise of the constitutional right itself.

Id. at 903 (emphasis added). It distinguished between permissible comments "on a witness's credibility . . . based on the evidence" and impermissible comments, such as "arguing unfavorable inferences from the exercise of a constitutional right [or] argu[ing] a case in a manner which would chill a

defendant's exercise of such a right." Id. at 902 (emphasis added).

Following Johnson, the Washington Court of Appeals decided State v. Smith, 917 P.2d 1108 (Wash. App. 1996), review denied by 930 P.2d 1231 (1997). In Smith, the defendant was charged with second degree rape. See id. at 1109. During the defendant's direct examination, both the defendant and defense counsel referred to state's exhibits of the victim's apartment, which was the crime scene. See id. at 1111. On cross-examination, the prosecutor asked the defendant questions about the photographs and his ability to conform his testimony to the evidence presented and the testimony of the other witnesses. See id. at 1111-12.[11] Distinguishing Johnson, the appellate court further observed that, "[t]he State's questions in this case raised an inference from [the defendant]'s testimony; they were

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[11] The following exchange took place:

> [PROSECUTION]: You looked at State's Exhibit Number 6, that showed a wine bottle on a counter didn't you?
> [DEFENDANT]: Yes, I did.
> . . . .
> [PROSECUTION]: So before you decided to testify that Ms. Brown had two or three glasses of wine out of that bottle, you had a chance to see that that bottle wasn't all the way full, didn't you?
>
> The court overruled [the defendant]'s objection to this question. The prosecutor continued:
>
> [PROSECUTION]: Isn't it fair to say that after you looked at all the photographs in the case and you had a chance to read the discovery and see what people were going to say and hear what they had to testify to, it was only then that you crafted your story about what happened, how it would fit with the pictures and the evidence that you heard?
>
> When [the defendant]'s second objection was overruled, he responded:
>
> [DEFENDANT]: [Defense counsel] and I went over the evidence. He told me to tell the truth and that's what I did. I didn't craft anything.

Smith, 917 P.2d at 1111-12 (emphasis added).

not 'focused on the exercise of the constitutional right itself.' The State could have asked the same questions of any witness aware of the State's evidence." Id. at 1112 (quoting Johnson, 908 P.2d at 900).

B.

In the instant case, however, the comments made during the prosecution's rebuttal argument that "[t]he other witnesses are excluded from the courtroom. They can't talk about their testimony. They can't sit in here and watch", were "focused on the exercise of the constitutional right itself." Johnson, 908 P.2d at 903. By distinguishing Sisneros from other witnesses, for the foregoing reasons, the prosecutor specifically attacked Sisneros's exercise of his constitutional right to be present at trial and to testify on his own behalf.

During cross-examination, the prosecution highlighted points at which Sisneros's testimony was different from that of other witnesses and where Sisneros could not remember a fact testified to by other witnesses. However, the extent of these comments do not raise the "specter of fabrication[,]" Agard v. Portuondo, 117 F.3d 696, 711 (2d Cir. 1997), as the questions did in Smith. They were mere mentions of other witnesses' testimony, not questions "about [the defendant's] opportunity and motivation to fabricate testimony." Agard, 117 F.3d at 708 n.6. Questions of that nature would "go[] to the witness' credibility," and,

hence, "the witness is afforded an opportunity to respond and repair the attack."[12] Id. Accord Smith, 917 P.2d at 1111-12.

Here, there was no attack by the prosecution that Sisneros could respond to. Cross-examination raised inconsistencies among the witnesses' statements, but not that Sisneros had listened to the other witnesses and fabricated his testimony to be consistent with their testimony. Thus, the prosecution's cross-examination of Sisneros did not, as in Smith, provide "evidence" of tailoring and an opportunity for Sisneros to refute such charges, conditions necessary to establish the basis for a tailoring argument during the prosecution's argument.

In sum, in its rebuttal argument, the prosecution did not indicate that Sisneros's opportunity to tailor his statements was in any way evidenced by Sisneros's testimony or connected to

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[12] Generic assertions of tailoring, as occurred here, are not a permissible comment on the evidence within the meaning of Clark. See 83 Hawai'i at 304-05, 926 P.2d at 209-10. In Agard, the Second Circuit Court of Appeals discusses what would be considered evidence of tailoring:

> If a prosecutor's concern about the defendant's credibility is legitimate, she [or he] has readily available alternate means of questioning [the defendant]. For example, [the prosecutor] is free to cross-examine [the defendant] about discrepancies between his [or her] pre-trial account of events and his [or her] testimonial account. Having introduced this evidence, [the prosecutor] may then remark upon those discrepancies during [his or] her summation. [The prosecutor] is also free, of course, to point out that [the defendant] has motive to lie . . . . Only those comments which specifically target and cast suspicion upon the defendant's unique Sixth Amendment right to be present at his [or her] trial and hear all testimony are forbidden by the Constitution; those remarks are not simple commentary upon credibility, nor are they necessary to a prosecutor's argument that the defendant lacks credibility, if that argument has a basis in fact and not only in innuendo.

Agard, 117 F.3d at 711-12 (emphasis added). Thus, evidence of a defendant's tailoring of testimony would include discrepancies between prior statements and testimony at trial, such as where the defendant had given one version and then later altered his or her story after learning of the prosecution's case. See id. at 715 (Winter, J., concurring).

its cross-examination of Sisneros. The prosecution did not connect any accusation to specific evidence of tailoring at trial but, instead, made a general accusation resting not on evidentiary support, but only innuendo. This kind of argument invited the jury to infer that any consistency in Sisneros's testimony with the testimony of other witnesses derived from Sisneros's presence at trial, rather than allowing the jury to weigh the evidence and credibility of the testimony on the merits.

As a result, the prosecution's argument did not permissibly "state, discuss, and comment on the evidence as well as to draw all reasonable inferences from the evidence[,]" Clark, 83 Hawai'i at 304, 926 P.2d at 209, but "focused on the exercise of the constitutional right itself[,]" Johnson, 908 P.2d at 903. As such, these comments impermissibly burdened Sisneros's constitutional rights. This improper argument infected all of Sisneros's testimony, as Sisneros was the only witness for the defense. Under the circumstances, the error here was not harmless beyond a reasonable doubt. See State v. Balisbisana, 83 Hawai'i 109, 114, 924 P.2d 1215, 1220 (1996) ("In applying the harmless beyond a reasonable doubt standard the court is required to examine the record and determine whether there is a reasonable possibility that the error complained of might have contributed to the conviction." (Emphasis added.) (Quoting State v. Holbron, 80 Hawai'i 27, 32, 904 P.2d 912, 917 (1995) (citations and internal quotation marks omitted).)).

XX.

The court here did not instruct the jury as to Sisneros's right to be present at trial in the face of the prosecution's closing arguments. I would observe that other states have held that, although such arguments are improper, an appropriate jury instruction may be sufficient to direct the jury not to draw the inference invited by the prosecution in error. See, e.g., Person, 508 N.E.2d at 92.

Although the judge in the present case gave the general jury instruction directing that the jury was the final judge of a witness's credibility, such an instruction is inadequate to cure these types of improper comments. See Hemingway, 528 A.2d at 748 (holding that a general instruction pertaining to the credibility of the witnesses was insufficient to overcome improper argument by the prosecution that the defendant utilized his position as the last witness at trial in order to tailor his testimony).[13] I believe that, in conjunction with the general instruction as to

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[13] Another example of an instruction given occurred in Elberry, supra, where the court gave the following instruction to the jury after similar improper remarks by the prosecution:

> I will also tell you at this point that during those proceedings we had a sequestration order, which meant that witnesses were not to discuss the case with other witnesses or anything they observed in the courtroom. Of course, the defendant, who was a witness in this case, was here during the testimony of other witnesses, but he's got every right to be here, too. But you should take everything into consideration in determining credibility, but there is nothing untoward about the defendant being present when other witnesses are testifying.

645 N.E.2d at 43 n.3. Although the defendant later characterized the phrase, "[b]ut you should take everything into consideration in determining credibility," as merely affirming the statements made by the prosecutor, the appellate court noted that the phrase "simply reiterat[ed] that evaluation of credibility involved an all-things-considered judgment." Id. at 43.

witnesses, a defendant is entitled to an instruction indicating that a defendant has a constitutional right to be present throughout trial and while other witnesses are testifying and that the jury must not draw any unfavorable inference regarding the credibility of the defendant simply on the basis of the defendant's presence at trial.

XXI.

A.

Regarding the prosecution's impermissible comment upon Sisneros's presence during trial and implication that such presence permitted Sisneros to tailor his testimony, the majority evades this serious constitutional issue by concluding that, "assuming arguendo that the prosecutor's comments violated Sisneros's state constitutional rights, the trial court's error in denying his motion for mistrial was harmless beyond a reasonable doubt[, because] (1) there was overwhelming evidence of Sisneros's guilt[, and] (2) any adverse effect on Sisneros's credibility resulting from the prosecutor's argument was minimal as compared to the numerous instances where Sisneros's credibility was legitimately called into question." Majority opinion at 3.

I would observe that Rogan sets out the test for prosecutorial misconduct.[14] The "harmless beyond a reasonable

[14] In his appeal, Sisneros, citing to Rogan, maintains that such comments by the prosecution, along with other alleged instances, constituted (continued...)

doubt" standard which the majority purports to apply to the present case includes three factors, only one of which is addressed by the majority. "Factors to consider are: (1) the nature of the conduct; (2) the promptness of a curative instruction; and (3) the strength or weakness of the evidence against the defendant." 91 Hawai'i at 412, 984 P.2d at 1238. The majority, however, (1) skips over addressing the error, and (2) entirely ignores the lack of a curative instruction as well as the effect of the jury instruction utilized by the prosecution.

This court has previously stated:

> Allegations of prosecutorial misconduct are reviewed under the harmless beyond a reasonable doubt standard, which requires an examination of the record and a determination of whether there is a reasonable possibility that the error complained of might have contributed to the conviction. Factors to consider are: (1) the nature of the conduct; (2) the promptness of a curative instruction; and (3) the strength or weakness of the evidence against the defendant.
>
> State v. Sawyer, 88 Haw. 325, 329 n.6, 966 P.2d 637, 641 n.6 (1998). . . . We now turn to each factor to be considered separately.

Rogan, 91 Hawai'i at 412, 984 P.2d at 1238 (internal quotation marks and citations omitted) (emphases added). The Rogan court turned first to the question of the nature of the prosecutor's comments in that case, and then to whether a prompt curative instruction was provided. See id. at 412-15, 984 P.2d at 1238-41. The majority, by neglecting to conduct a full Rogan

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[14](...continued)
prosecutorial misconduct. The prosecution, however, citing State v. Robinson, 384 A.2d 569, 570 (N.J. App. Div.), cert. denied, 391 A.2d 498 (N.J. 1978), argues that these comments were proper arguments regarding Sisneros's credibility, dealing with "whether his testimony was tailored to that of other witnesses, a perfectly proper inquiry." Alternatively, the prosecution maintains that, "assuming the remark constituted misconduct, it was harmless[.]"

analysis, and considering only one factor of three, ignores the procedure by which we are to consider allegations of prosecutorial misconduct. The proper course should be to determine whether or not the prosecutor's comments in fact violated Defendant's state constitutional rights, not to just assume so for the sake of argument.

B.

Here, not only did the court not give a curative instruction, but the instructions, as used by the prosecution, actually cloaked the argument with judicial authority. The prosecution argued, regarding "the witness's means and opportunity of acquiring information[,] [w]ho's the only witness in this case that got to see all the other witnesses testify? . . . Who's the only witness who got to hear all the other witnesses testify and tailor his testimony?" The prosecutor's argument tracked the wording of the jury instruction as to judging witness credibility, to the effect that, "[i]n evaluating the weight and credibility of a witness's testimony, you may consider . . . the witness's means and opportunity of acquiring information[.]"

The court, too, denied the defense's motion for a mistrial on the basis of the jury instruction:

> [PROSECUTION]: There's nothing that says that I can't point out the obvious, that the defendant was in fact the only person who got to watch all the witnesses. I mean, that's -- it says that the defendant should not be treated any differently and the instruction, it's --
>
> [COURT]: Yeah, that's the basis, treated like any other witness.

> [PROSECUTION]: Yeah. And the instruction says the ability to acquire information, isn't that an ability to acquire information?

(Emphases added.) "[A]ssuming arguendo that the prosecutor's comments violated Sisneros's state constitutional rights," majority opinion at 3, the jury instruction, and the court's refusal to grant a mistrial on the basis of that jury instruction, are presumptively harmful.[15] The defense argued that Ilae, and only Ilae, had been exhibiting aggression, and Sisneros had remained uninvolved until he believed his passenger was in danger. The prosecutor's comments, cloaked in the authority of the court, invited the jury to disbelieve Sisneros entirely, because of his presence at trial.

C.

The discussion previously set forth herein, see supra, plainly establishes that the prosecutor's misconduct was harmful beyond a reasonable doubt because "there is a reasonable possibility that the error complained of might have contributed to the conviction." Balisbisana, 83 Hawai'i at 114, 924 P.2d at 1220 ("In applying the harmless beyond a reasonable doubt standard the court is required to examine the record and

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[15] "'[E]rroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial.'" State v. Pinero, 70 Haw. 509, 527, 778 P.2d 704, 716 (1989) (quoting Turner v. Willis, 59 Haw. 319, 326, 582 P.2d 710, 715 (1978)). "[T]he real question becomes whether there is a reasonable possibility that error might have contributed to conviction." State v. Heard, 64 Haw. 193, 194, 638 P.2d 307, 308 (1981) (citations omitted). "If there is such a reasonable possibility in a criminal case, then the error is not harmless beyond a reasonable doubt, and the judgment of conviction on which it may have been based must be set aside." State v. Jenkins, 93 Hawai'i 87, 99-100, 997 P.2d 13, 25-26 (2000) (citing Yates v. Evatt, 500 U.S. 391, 402-03 (1991), overruled by Estelle v. McGuire, 502 U.S. 62 (1991)).

determine whether there is a reasonable possibility that the error complained of might have contributed to the conviction." (Emphasis added.) (Quoting Holbron, 80 Hawai‘i at 32, 904 P.2d at 917 (citations and internal quotation marks omitted).)).

XXII.

The effect of the constitutional violations in the present case mandate that we vacate Sisneros's convictions and remand the case for a new trial.