IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

vs.

STEPHEN FRITZ MURITOK,
Defendant-Appellant.

Supreme Court Case No.: CRA02-001
Superior Court Case No.: CF0527-00

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on April 30, 2003
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; PETER C. SIGUENZA, JR., Justice *Pro Tempore*

TYDINGCO-GATEWOOD, J.:

[1] The Defendant-Appellant, Stephen F. Muritok, appeals from his convictions and sentence on the charges of Driving Under the Influence of Alcohol Causing Bodily Injuries (As a 3rd Degree Felony), Driving While Under the Influence of Alcohol With Child a on Board (As a 3rd Degree Felony), Driving While Under the Influence of Alcohol (B.A.C.) (As a Misdemeanor), Driving While Under the Influence of Alcohol (As a Misdemeanor) and Reckless Driving (As a Misdemeanor). Muritok argues that: (1) the reference to Muritok's pre-custodial silence was a violation of his Fifth Amendment privilege against self-incrimination and the trial court erred in failing to provide a curative instruction to the jury; (2) the lower court erred in admitting the evidence of Muritok's blood alcohol test results; and (3) the lower court erred in sentencing Muritok under the extended terms statute, in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). We affirm the convictions, but remand for resentencing within the statutory maximum found in Title 9 GCA 80.30(c), for the charges of Driving Under the Influence of Alcohol Causing Bodily Injuries and Driving While Under the Influence of Alcohol With a Child on Board.

I.

[2] This criminal case stems from an auto accident witnessed by two Superior Court marshals on September 18, 2000. On that day, Marshals Vince Naputi and Harold Cruz witnessed a van veer off the roadway and collide into a political sign and telephone pole. Following the accident, the driver and the child passenger were transported to the Guam Memorial Hospital for treatment. At the hospital, blood was drawn from the driver of the van, later identified as Muritok, and a blood-alcohol test was performed on the blood sample. Muritok's blood-alcohol quotient was .295, more than three times above the legal limit.

[3] Muritok was indicted on the following charges:

1. Driving While Under the Influence of Alcohol Causing Bodily Injuries (As a 3rd Degree Felony), in violation of 16 G.C.A. §§ 18102(c) and 18110;
2. Driving While Under the Influence of Alcohol With a Child on Board (As a 3rd Degree Felony), in violation of 16 G.C.A. § 18109;
3. Driving While Under the Influence of Alcohol (BAC) (As a Misdemeanor), in violation of 16 G.C.A.§ 18102(a).
4. Driving While Under the Influence of Alcohol (As a Misdemeanor), in violation of 16 G.C.A. § 18102(b);
5. Reckless Driving (As a Misdemeanor), in violation of 16 G.C.A. §§ 9107(a) and (b);
6. Improper Storage of an Open Container (As a Misdemeanor), in violation of 16 G.C.A. § 18122.

Appellant's Excerpts of Record, tab 1 (Amended Indictment).

[4] On January 2, 2002, after a jury trial, the jury returned a verdict of not guilty on the charge of Improper Storage of an Open Container (As a Misdemeanor) and a verdict of guilty on all other charges. Appellant's Excerpts of Record, tab 2 (Judgment).

[5] On April 9, 2002, in accordance with the jury verdict, the lower court sentenced Muritok as follows:

> As to the charge of Driving Under the Influence of Alcohol Causing Bodily Injuries (As a 3rd Degree Felony), ten (10) years imprisonment; three (3) years shall be suspended.
>
> As to the charge of Driving While Under the Influence of Alcohol With a Child on Board (As a 3rd Degree Felony), ten (10) years imprisonment; three (3) years shall be suspended, concurrent with the sentence imposed above.
>
> As to the charge of Driving While Under the Influence of Alcohol (B.A.C.) (As a Misdemeanor), one (1) year imprisonment, concurrent with sentences imposed above.
>
> As to the charge of Driving While Under the Influence of Alcohol (As a Misdemeanor), one (1) year imprisonment, concurrent with the sentences imposed above.
>
> As to the charge of Reckless Driving (As a Misdemeanor), one (1) year imprisonment, concurrent with the sentences imposed above.

Appellant's Excerpts of Record, tab 2 (Judgment).

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[6] Muritok filed a timely notice of appeal on April 17, 2002. In this appeal, Muritok seeks a reversal of the judgment of conviction and sentence and an order remanding for a new trial, based on several grounds.

II.

[7] We have jurisdiction over this appeal from a final judgment pursuant to Title 7 GCA §§ 3107 and 3108 and Title 8 GCA § 130.60.

III.

[8] On appeal, Muritok challenges his convictions and sentences by arguing that his Fifth Amendment privilege against self-incrimination was violated and the trial court erred in failing to provide the requested curative instruction. He also contends that the trial court erred in admitting the evidence of Muritok's blood alcohol test results. Finally, Muritok argues that he was improperly sentenced pursuant to the extended terms statute, without a factual finding by the jury to support the enhancement, in violation of the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000).

A. Muritok's Silence

[9] The first issue we address is whether the reference to Muritok's pre-custodial silence was a violation of his Fifth Amendment privilege against self-incrimination and whether the trial court erred in failing to instruct the jury that no inferences of guilt may be drawn from such silence. Specifically, Muritok argues that Officer Santo Tomas' testimony, that Muritok refused to answer certain questions posed to him, impinged upon his Fifth Amendment privilege and impeached his alibi defense and thus a reversal of his convictions is required. We disagree.

[10] An alleged violation of the Fifth Amendment is reviewed de novo. *United States v. Mares*, 940 F.2d 455, 461 (9th Cir. 1991). The trial court's failure to give a requested instruction is also subject to de novo review. *United States v. Hairston*, 64 F.3d 491, 493-94 (9th Cir. 1995).

[11] The Fifth Amendment to the United States Constitution provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The United States Supreme Court, in recognition of the Fifth Amendment privilege against self-incrimination, forbids the use of a defendant's silence while "in custody." *See Miranda v. Arizona*, 384 U.S. 436, 467-68 n.37, 86 S.Ct. 1602, 1624-25 n.37 (1966). The *Miranda* case prohibits the use of a defendant's post-custodial silence as substantive evidence of guilt.[1] However, the issue of whether a defendant's pre-custodial silence may be used as substantive evidence of guilt is not clear.

[12] As a threshold matter, we must ascertain whether Muritok was "in custody" at the time of the questioning by Officer Santo Tomas.[2] In doing so, we turn to *Miranda*,[3] which holds that an individual is in custody when he or she is "taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444, 86 S.Ct. at 1612. The custodial test includes looking at the circumstances surrounding the situation and assessing whether "'a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.'" *People v. Santos*, 2003 Guam 1, ¶ 51 (*quoting Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 465 (1995)).

[13] It is clear that the concept of custodial interrogation extends beyond the confines of the police station. *See Mathis v. United States*, 391 U.S. 1, 88 S.Ct. 1503 (1968) (a prison inmate serving a state sentence was "in custody" for the purpose of questioning by a federal tax agent). *See also Orozco v. Texas*, 394 U.S. 324, 89 S.Ct. 1095 (1969) (finding that a person who was interrogated while on his own bed, at home, in familiar surroundings, was "in custody" for the

[1] Moreover, where a defendant chooses to take the stand, the use of the defendant's postarrest silence for impeachment purposes is also forbidden. *See Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240 (1976).

[2] There is no evidence in the record that Muritok was formally arrested at the time of the interview by Officer Santo Tomas.

[3] Although *Miranda* and the cases which follow it focus on "custody" in terms of when *Miranda* warnings must be issued, they are determinative of when one's Fifth Amendment right to remain silent in the face of accusation comes into play. *See United States v. Velarde-Gomez*, 269 F.3d 1023, (9th Cir. 2001) ("[T]he warnings mandated by *Miranda* are a prophylactic means of safeguarding Fifth Amendment rights --they are not the genesis of those rights, therefore, once the government places an individual in custody, that individual has a right to remain silent in the face of government questioning, regardless of whether the *Miranda* warnings are given.") (internal citations and quotation marks omitted).

purposes of interrogation by four police officers when he was under arrest and not free to leave at the time of questioning). In assessing whether a hospitalized individual is in custody, other courts have looked to the atmosphere and physical surroundings at the hospital to determine whether there was restraint or compulsion by police officers or other state actors. *See, e.g., State v. Fields*, 294 N.W.2d 404, 408 (N.D. 1980); *State v. Brunner*, 507 P.2d 233 (Kan. 1973); *State v. Hoskins*, 193 N.W.2d 802 (Minn.1972); *Wofford v. State*, 952 S.W.2d 646 (Ark. 1997).

[14] In this case, the trial testimony reveals that Muritok was transported from the accident scene to the hospital by ambulance and medical personnel. Officer Santo Tomas arrived at the hospital "to make a check on all parties involved." Transcript, vol. II of VI, p. 107 (Trial, Dec. 27, 2001). Upon his arrival, he was directed to the trauma room. Muritok was being treated there. Muritok "was being attended to or people were coming in and going out of the Trauma Room, attending to him." Transcript, vol. II of VI, p. 108 (Trial, Dec. 27, 2001). When the officer approached Muritok, he "detected an extremely strong odor of alcoholic beverage." Transcript, vol. II of VI, p. 109 (Trial, Dec. 27, 2001). He asked Muritok if he had been drinking and Muritok refused to answer. Transcript, vol II of VI, p. 109 (Trial, Dec. 27, 2001). The officer then asked Muritok if he would be willing to submit a blood sample for a blood-alcohol analysis and Muritok refused to answer. Transcript, vol. II of VI, p. 109 (Trial, Dec. 27, 2001).

[15] It appears from the record that the deprivation of Muritok's freedom of action was the result of his physical condition and not police action. Hospital personnel went in and out of his room. He was not separated from other patients nor was a police officer or other law enforcement officer posted to prevent his leaving. Furthermore, there is no evidence in the record that Officer Santo Tomas controlled the atmosphere, either by physically restraining Muritok or by ordering the trauma room personnel to restrain him in any way. Accordingly, the court holds that Muritok was not in custody at the time of the interview conducted by Officer Santo Tomas. *See Fields*, 294 N.W.2d at 408 (holding that interview by police officer was not custodial interrogation where defendant was not taken to the hospital by police, but was at hospital as a result of medical advice, was interviewed

by the officer as part of the accident investigation and in the presence of a friend and a nurse). *Brunner*, 507 P.2d 233 (holding defendant was not in custody where trooper did not restrain, or order medical personnel to restrain defendant in any way, did not control the atmosphere and remained in view of others who were not police officers). *Hoskins*, 193 N.W.2d 802 (holding that interrogation was not custodial where defendant was confined in hospital under police protection for his own safety, the officer was performing routine investigative procedure, and no compelling atmosphere or pressure was exerted on him). *Wofford*, 952 S.W.2d 646 (holding that the defendant was not in custody where she was not escorted to hospital by police, she was not restrained or threatened with weapons, only one officer asked questions, questions were not hostile, and hospital personnel were in and out of the hospital room).

[16] In light of our holding that Muritok was not in custody, we now turn to the relevant case law with respect to the use of a defendant's pre-custodial silence by the People. In *Jenkins v. Anderson*, the defendant took the stand and the prosecutor made reference to the defendant's failure to speak before he was taken into custody and given his *Miranda* warnings. *See Jenkins v. Anderson*, 447 U.S. 231, 240, 100 S.Ct. 2124, 2130 (1980). The Court held that the use of pre-custodial silence to impeach the credibility of a defendant does not violate the Fifth and Fourteenth Amendments because "impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial." *Jenkins*, 447 U.S. at 238, 100 S.Ct. at 2129.

[17] However, the *Jenkins* Court declined to address whether, or to what extent, pre-custodial silence is protected under the Fifth Amendment, insofar as its use as substantive evidence of guilt is concerned, including whether, as in the present situation, the *Jenkins* rationale applies to a defendant who chooses not to take the stand. *See id.* at 236 n.2. The circuit courts are divided on this issue. The Ninth Circuit allows a defendant's silence to be used and holds, with respect to the use of pre-arrest silence as substantive evidence of guilt, "'[n]either due process, fundamental fairness, nor any more explicit right contained in the Constitution is violated by the admission of the

silence of a person, not in custody or under indictment, in the face of accusations of criminal behavior.'" *United States. v. Oplinger*, 150 F.3d 1061, 1066 (9th Cir. 1998) (*quoting United States v. Giese*, 597 F.2d 1170, 1197 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979). The Fifth and Eleventh Circuits similarly hold. *See United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996); *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir.1991).

[18] In contrast, a majority of the circuits, including the First, Sixth, Seventh and Tenth Circuits, holds that the introduction of a defendant's pre-custodial silence as substantive evidence of guilt violates the Fifth Amendment. *See Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir.), *cert. denied*, 493 U.S. 969, 110 S.Ct. 418 (1989); *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir.), *cert. denied*, *Bagley v. Combs*, 531 U.S. 1035 (2000); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987); *but cf. United States v. Davenport*, 929 F.2d 1169 (7th Cir. 1991); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir.), *cert. denied*, 502 U.S. 1031 (1991). The Second Circuit has also expressed some agreement with this position. *See United States v. Caro*, 637 F.2d 869, 876 (2nd Cir. 1981).

[19] Because the United States Supreme Court has not ruled on whether a defendant's pre-custodial silence may be used as substantive evidence of guilt, we look to other United States Supreme Court decisions addressing self-incrimination issues for guidance. The Fifth Amendment privilege against self-incrimination "must be accorded liberal construction in favor of the right it was intended to secure." *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818 (1951). No special combination of words are required to invoke the privilege. *See Quinn v. United States*, 349 U.S. 155, 162, 75 S.Ct. 668, 673 (1955). Furthermore, the privilege can be asserted in any investigatory or adjudicatory proceeding. *See Kastigar v. United States*, 406 U.S. 441, 444, 92 S.Ct. 1653, 1656, 32 (1972). However, the Supreme Court has firmly held that when a defendant chooses to take the witness stand, the prosecution may comment on the defendant's silence. *See Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (asserting that due process is not violated when a state cross-examines a defendant as to postarrest silence when defendant chooses to take witness stand); *Raffel*

v. United States, 271 U.S. 494, 496-97 (1926) (stating that when a defendant testifies, he waives privilege against self-incrimination); *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1900) (holding that defendants who voluntarily testify cannot refuse to answer questions on cross-examination if the questions are reasonably related to subject matter of direct examination).

[20] The United States Supreme Court precedent requires that we distinguish between impeachment and substantive use of pre-custodial silence. First, when a defendant takes the stand, use of the defendant's prior silence for impeachment addresses perjury concerns that do not come into play when a defendant does not take the stand. *See Harris v. New York*, 401 U.S. 222 (1971) (where the Supreme Court acknowledged that although statements would be inadmissible in the prosecutor's case-in-chief, the prosecutor could use the statements for impeachment). The *Harris* Court explained, "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury." *Id.* at 225, 91 S.Ct. at 645.

[21] Second, the use of a defendant's silence for impeachment has historically been justified on the ground that when a defendant chooses to testify, he or she waives the privilege against self-incrimination and cannot subsequently reassert the privilege in the face of questioning by the prosecutor. *See Raffel*, 271 U.S. at 497, 46 S.Ct. at 568. "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." *Id.* at 499. The Supreme Court reaffirmed its *Raffel* holding in *Jenkins*. *See Jenkins*, 447 U.S. at 235-36, 100 S.Ct. at 2127-28.

[22] In sum, if a defendant such as Muritok chooses not to testify at his own trial, he cannot be deemed to have waived his Fifth Amendment privilege, and thus the *Raffel* justification for impeachment use does not apply. Indeed, the *Raffel* Court suggested that if the defendant had not testified at his second trial, his silence at his first trial would not have been admissible. *See Raffel*, 271 U.S. at 497, 46 S.Ct. at 568 ("[w]e may concede, without deciding, that, if the defendant had not taken the stand on the second trial, evidence that he had claimed the same immunity on the first

trial would be probative of no fact in issue, and would be inadmissible.").

[23] Application of the above principles to the issues before us leads us to agree with the majority of the circuit courts. We therefore conclude that the introduction of a defendant's pre-custodial silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination. *See Caro*, 637 F.2d at 876 ("we are not confident that *Jenkins* permits even evidence that a suspect remained silent before he was arrested or taken into custody to be used in the Government's case in chief."); *Combs*, 205 F.3d at 283 (holding that Fifth Amendment applies whenever an individual's comments could produce incriminating evidence, regardless of whether it is a pre-arrest or post-arrest setting); *Burson*, 952 F.2d at 1201 (holding that pre-arrest silence is inadmissible under the Fifth Amendment and principles of *Griffin v. California*, 380 U.S. 609 (1965), that no inference of guilt can be drawn from an accused's failure to take the stand at trial). We find that the evidence of Muritok's silence in response to questioning by Officer Santo Tomas was a violation of his Fifth Amendment privilege against self-incrimination. This violation requires a reversal of Muritok's convictions unless this court concludes that the error was harmless beyond a reasonable doubt. *See United States v. Hasting* (1983) 461 U.S. 499, 507-509, 103 S.Ct. 1974; *Chapman v. California*, 86 U.S. 18, 87 S.Ct. 824 (1967).

1. Harmless Error Analysis

[24] To determine whether improper testimony regarding a defendant's silence is harmless, three factors are considered: "(1) the extent of the comments made; (2) whether an inference of guilt from silence was stressed to the jury; (3) the extent of other evidence suggesting the defendant's guilt." *United States v. Pino-Noriega*, 189 F.3d 1089, 1099 (9th Cir. 1999).

[25] The testimony regarding Muritok's silence is as follows:

> Q. [by the People]
> What did you observe in the – Well, let's focus on the male, the male adult. Okay, when you went to the Trauma Room and saw the male adult, tell us about your observations.
> A. [Officer Santo Tomas]
> When I got there he was being attended to or people were coming in and going out of the Trauma Room, attending to him. I started to ask

> him questions. On his – When I first approached him, I could detect an extremely strong odor of alcoholic beverage. *I asked him if he had been drinking. He refused to answer that question. I asked him if he were willing to provide blood for the purpose of determining alcohol percentage. He again refused to answer.* It was at that time that I asked him as to what his son's name was. He was identified as "Frankie.". . .
> . . .
> [Mr. Van De Veld]:
> Your Honor, at this time I'd like the court to advise the jury that the defendant's refusal to answer certain questions is within his right under the Fifth Amendment privilege of the Constitution of the United States and that they are to draw no inference from his refusal to provide answers to those questions.
> [The Court]:
> I think Counsel just told them; okay?

Transcript, vol. II of VI, pp. 108-10 (Trial, Dec. 27, 2001) (emphasis added).

[26] Turning to the harmless error analysis, the court finds that the reference to Muritok's silence by Officer Santo Tomas was not extensive. Defense counsel requested a curative instruction from the court "that the defendant's refusal to answer certain questions is within his right under the Fifth Amendment privilege of the Constitution of the United States and that they are to draw no inference from his refusal to provide answers to those questions." Transcript, vol. II of VI, pp. 110 (Trial, Dec. 27, 2001). Although the trial court arguably ratified defense counsel's statement of the law by his response, "I think Counsel just told them; okay?," the court should have properly charged the jury pursuant to its clear "duty to instruct the jury in a criminal case on the applicable law." Transcript, vol. II of VI, pp. 108-10 (Trial, Dec. 27, 2001); *United States v. McGill*, 604 F.2d 1252 (9th Cir. 1979). Notwithstanding the judge's duty to instruct on the law, Muritok's trial counsel "bore primary responsibility for ensuring that the error was cured in the manner most advantageous to his client," including making a timely objection, moving to strike the testimony or requesting a special jury instruction at the close of the evidence. *Greer v. Miller*, 483 U.S. 756, 766 n.8, 107 S.Ct. 3102, 3109 n.8 (1987). Despite the failures of both the court and trial counsel to adequately remedy the erroneous reference to Muritok's silence, we find that such reference was not extensive. Moreover, Muritok's silence was not stressed to the jury. The trial transcript portion quoted above

was the only reference made to Muritok's silence.

[27] Finally, there is overwhelming evidence of Muritok's guilt. Superior Court Marshals Cruz and Naputi witnessed the van run off the road and "crash into a political sign, then hit a telephone" pole. Transcript, vol. I of VI, p. 30 (Trial, Dec. 26, 2001). Marshal Cruz saw the driver of the van "fly out of the car", make contact with the telephone pole, "then fly back into his seat." Transcript, vol. I of VI, p. 30 (Trial, Dec. 26, 2001). The van began to roll backwards down a steep hill and Muritok's son was ejected from the van and saved by the marshals. Transcript, vol. I of VI, pp. 31-32 (Trial, Dec. 26, 2001). The marshals checked the driver and child for injuries. Transcript, vol. I of VI, pp. 32, 155 (Trial, Dec. 26, 2001). Marshal Cruz detected an odor of alcohol upon examining the driver. Transcript, vol. I of VI, p. 33 (Trial, Dec. 26, 2001). According to Marshals Cruz and Naputi, there was no other person in the van. Transcript, vol. I of VI, pp. 28, 149 (Trial, Dec. 26, 2001). Officer Delfin confiscated an open can of beer from the interior of the van. Transcript, vol. II of VI, p. 60 (Trial, Dec. 27, 2001). The driver and child were transported by ambulance and medical personnel to the hospital for treatment. Transcript, vol. II of VI, p. 75 (Trial, Dec. 27, 2001). Officer Santo Tomas arrived at the scene and was dispatched to the hospital, where he was directed to Muritok, whom he interviewed, as discussed *supra*. Transcript, vol. II of VI, pp. 108-10 (Trial, Dec. 27, 2001). Almia Fernandez, the hospital medical lab technician, drew blood from Muritok and turned it over to the lab for analysis. Transcript, vol. III of VI, p. 15 (Trial, Dec. 28, 2001). Bernie Solidum, the hospital lab technologist, performed the blood-alcohol test on a sample of Muritok's blood. Transcript, vol. III of VI, p. 51 (Trial, Dec. 28, 2001). Dr. Aurelio Espinola extrapolated the blood-alcohol test results and determined that Muritok's blood-alcohol quotient was .295, more than three times above the legal limit. Transcript, vol. III of VI, pp. 71-72 (Trial, Dec. 28, 2001).

[28] In light of the minimal extent of the reference to Muritok's silence, the fact that such silence was not stressed to the jury, and the overwhelming evidence of Muritok's guilt, we hold that the erroneous comment regarding Muritok's silence and the court's failure to properly instruct the jury

was harmless beyond a reasonable doubt. *See Hasting*, 461 U.S. at 507-09, 103 S.Ct. at 1979-81; *Chapman*, 386 U.S. at 23-26, 87 S.Ct. at 827-29.

2. Alibi Defense

[29] In seeking reversal of his conviction, Muritok also asserts that the reference to his silence was an impermissible attack on his alibi defense. We disagree. Muritok relies on case law which holds that attacks on a defendant's failure to previously disclose an alibi defense are "so flagrant a violation of defendant's right to remain silent that [the] conviction cannot stand." *New Jersey v. Aceta*, 537 A.2d 1317, 1321 (N.J. Super. Ct. App. Div. 1988). However, Muritok's argument, and logically, the line of cases cited in support of his argument, are inapplicable to any and all versions of the facts as they exist in the trial record before us. The definition of an "alibi defense" is unambiguous and widely recognized: An alibi is "[a] defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time." BLACK'S LAW DICTIONARY 72 (7th Ed. 1979) "An alibi defense denies that defendant committed the charged offense by reason of having been somewhere other than the scene of the crime when the crime occurred." MOORE'S FEDERAL PRACTICE, 3rd Ed., ¶ 612.1.02[2]. *See also*, 21 AM. JUR.2D, *Criminal Law* §192 (1981); *United States v. Chambers*, 922 F.2d 228, 240 (5th Cir. 1991) (holding that the trial court committed no error in refusing the requested alibi defense instruction when defendant did not claim he was not at the scene of the crime and stating that "[a]n alibi defense precludes the defendant's guilt by placing him, when the offense occurred, at a location different from that at which he allegedly committed the crime.") (citations omitted).

[30] In sum, the record shows that Muritok presented no evidence or argument that Muritok was, at the relevant time, somewhere other than the scene of the crime. We find that Muritok does not have an alibi defense and his claim of error in this respect is without any merit.

B. Admission of Blood Alcohol Test Results

[31] The second issue we address is whether the trial court erred in admitting the evidence of Muritok's blood alcohol test results. Muritok argues that the trial court erred when it allowed the

evidence based on a particular exception to the hearsay rule; that he was not advised of his *Miranda* rights at the time of interrogation; and that the People failed to prove compliance with the Implied Consent Law.

1. Hearsay exception

[32] Muritok argues that the lower court improperly admitted the blood-alcohol test results under the medical diagnosis and treatment exception to the hearsay rule, found in Rule 803(4) of the Guam Rules of Evidence. Title 6 GCA § 803(4)(1994). We review the trial court's evidentiary ruling for an abuse of discretion, which will not be reversed absent prejudice affecting the verdict. *People v. Fisher*, 2001 Guam 2, ¶ 7. "[A]buse of discretion exists when the reviewing court is firmly convinced that a mistake has been made regarding admission of evidence." *People v. Santos*, 2003 Guam 1, ¶ 29 n.6.

[33] Rule 803(4) excepts from the hearsay rule, "[s]tatements for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." 6 GCA § 803(4). Muritok contends that the blood alcohol test was not performed for purposes of medical diagnosis or treatment because the test was not ordered by his treating physician, Dr. Ramahni, but was ordered by the emergency room physician, Dr. Nordensjo.

[34] In the People's attempt to lay the proper foundation in order to avail itself of the Rule 803(4) hearsay exception, the hospital lab technician, Bernie Solidum, testified that when a doctor orders a test, it is usually for medical care. Transcript, vol. III of VI, p. 53 (Trial, Dec. 28, 2001). Although defense counsel's *voir dire* examination revealed that Bernie Solidum had no knowledge of whether or not the blood draw was in furtherance of Muritok's medical treatment, he did not think there was any other reason an emergency room doctor would request for a blood sample other than for purposes of medical care. Transcript, vol. III of VI, p. 56 (Trial, Dec. 28, 2001). Finally, in response to defense counsel's continued objection and distinction between the ordering physician and the treating physician, the lower court conducted *voir dire* examination of Mr. Solidum, who

then testified that in an emergency room setting, it is common to have more than one doctor treating a patient. Transcript, vol. III of VI, p. 66 (Trial, Dec. 28, 2001).

[35] Upon review of the trial transcripts, we hold that the trial court properly determined that the foundation for the hearsay exception was adequately established by the People, specifically, that the blood-alcohol tests were performed for medical treatment.[4] Thus, we find no abuse of discretion.

2. Miranda rights

[36] Muritok next argues that Officer Santo Tomas' failure to advise him of his *Miranda* rights prior to interviewing him and requesting a blood sample rendered the blood alcohol test results inadmissible. Muritok's claim of error, raised for the first time on appeal, is reviewed for plain error. *See People v. Ueki*, 1999 Guam 4, ¶ 17.

[37] In order to safeguard an accused's Fifth Amendment privilege against self-incrimination, *Miranda* requires that an accused be informed of the right to remain silent and the right to counsel before custodial interrogation takes place . *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *People v. Santos*, 2003 Guam 1, ¶ 45.

[38] The privilege protects the accused only from compulsion to give testimony against himself or to provide "evidence of a testimonial or communicative nature." *Schmerber v. California*, 384 U.S. 757, 761, 86 S.Ct. 1826, 1830 (1966). The United States Supreme Court held in *Schmerber* that a state-compelled blood test to determine the presence and level of alcohol concentration is physical evidence, not testimony or a communicative act, and thus it is not afforded protection by

[4] Upon the admission of the evidence of the blood alcohol results, the lower court did not expressly indicate that it was doing so based on the Rule 803(4) exception to the hearsay rule although the objections which preceded the admission centered on the foundation necessary to employ Rule 803(4). However, the court earlier alluded to the admission of the blood-alcohol evidence pursuant to Rule 803(6), the "records of regularly conducted activity" exception to the hearsay rule. Transcript, vol. II of VI, p.103. Case law in jurisdictions which interpret the federal counterpart of Rule 803(6) or a similar rule hold that blood alcohol test results from blood samples taken from defendants while in the hospital are admissible under this exception to the hearsay rule. *See, e.g., Baber v. State*, 738 So. 2d 379 (Fla. Dist. Ct. App. 1999); *Harkins v. State*, 735 So. 2d 317 (Miss. 1999).

the Fifth Amendment. *See id.* at 760-65, 86 S.Ct. at 1830-33. Moreover, in *South Dakota v. Neville*, 459 U.S. 553, 103 S.Ct. 916 (1983), the Supreme Court stated, "[i]n the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda*." *Id.* at 564 n.15, 103 S.Ct. at 923 n.15. Therefore, we hold that Muritok's blood alcohol test results are not protected by the Fifth Amendment privilege against self-incrimination and thus, *Miranda* warnings were not required.[5]

3. Implied Consent Law

[39] Muritok argues that the trial court improperly admitted the blood test results because Officer Santo Tomas failed to comply with the Implied Consent Law found in Title 16 GCA § 18201(f). *See* Title 16 GCA § 18201(f) (amended by Guam Pub. L. 24-127 (May 6, 1998)). Muritok raises this claim of error for the first time on appeal. Thus, we review for plain error. *See Ueki*, 1999 Guam 4, ¶ 17.

[40] Section (f) of the Implied Consent Law reads:

> *If a person under arrest* refuses to submit to a breath or blood or urine test, none shall be given. The person shall be warned, however, that his or her failure to be tested may be used in evidence against him or her in any charge arising from the arrest.

16 GCA § 18201(f) (amended by Guam Pub. L. 24-127 (May 6, 1998)) (emphasis added).

[41] "An arrest is made by an actual restraint of the person, or by submission to the custody of the person making the arrest. . . ." Title 8 GCA § 20.10 (1993). Officer Santo Tomas asked Muritok during his pre-custodial interview at the hospital if he was willing to provide a blood sample and Muritok refused to answer. Transcript, vol. II of VI, p. 109. Because Muritok was not under arrest, Officer Santo Tomas' request of Muritok did not implicate the Implied Consent Law. For this

[5] With respect to a *Miranda* claim of error, Muritok only challenges the admission of the blood-alcohol test results and not the interrogation itself. To be sure, our previous determination that Muritok was not in custody at the time of the interview by Officer Santo Tomas renders the *Miranda* warnings unnecessary at the time of the questioning by Officer Santo Tomas. *See People v. Santos*, 2003 Guam 1, ¶ 45 (where we held that the ultimate test for determining whether Muritok was "in custody" which necessitates *Miranda* warnings is whether he was arrested or whether his freedom was restricted so "as to render him 'in custody.'"); *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138, 3150 (1984).

reason, he was not required to warn Muritok that his "failure to be tested may be used in evidence against him . . . ." 16 GCA §18201(f) (amended by Guam Pub. L. 24-127 (May 6, 1998)). As previously held, the blood sample and blood alcohol analysis were performed for medical treatment purposes and were admissible under the Rule 803(4) exception to the hearsay rule. The lower court committed no error in admitting the blood test results.

C. *Apprendi* and the Extended Terms Statute

[42] Muritok's final argument is that the lower court erred in sentencing Muritok to an extended term where the facts which support the extended sentence were not charged in the indictment and proved to the jury beyond a reasonable doubt, in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). The issue of a whether the trial court has violated the "constitutional rule established in *Apprendi* is a question of law that we review *de novo*." *United States v. Martin*, 278 F.3d 988, 1005 (9th Cir. 2002) (citation omitted).

[43] The *Apprendi* Court held that "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490 (emphasis added). *Apprendi* further affirmed that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *Id.*

[44] Prior to *Apprendi*, various circuit courts of appeal consistently held that only "elements" of an offense must be charged in the indictment and proven beyond a reasonable doubt, thus leaving "penalty factors" in the realm of the sentencing judge's discretion to be considered by a mere preponderance of the evidence. *See United States v. Jackson*, 207 F.3d 910, 920-21 (7th Cir. 2000); *United States v. Thomas*, 204 F.3d 381, 384 (2d Cir. 2000); United States v. Hester, 199 F.3d 1287, 1291 (11th Cir. 2000); *United States v. Williams*, 194 F.3d 100, 107 (D.C. Cir. 1999); *United States v. Mabry*, 3 F.3d 244, 250 (8th Cir. 1993); *United States v. Underwood*, 982 F.2d 426, 429-30 (10th

Cir. 1992); *United States v. Moreno*, 899 F.2d 465, 472-73 (6th Cir. 1990); *United States v. Barnes*, 890 F.2d 545, 551 n.6 (1st Cir. 1989); *United States v. Powell*, 886 F.2d 81, 85 (4th Cir. 1989); *United States v. Gibbs*, 813 F.2d 596, 599-600 (3d Cir. 1987); *United States v. Morgan*, 835 F.2d 79, 81 (5th Cir. 1987); *United States v. Normandeau*, 800 F.2d 953, 956 (9th Cir. 1986). This logic has been rejected by *Apprendi* and thus it makes no difference whether facts are construed as "elements" or as "sentencing factors." *Apprendi*, 530 at 485-86, 120 S.Ct. at 236-61. If the fact increases the maximum penalty allowable upon conviction, then it must be proven to a jury beyond a reasonable doubt. *See id.*

[45] In this case, Muritok was convicted of, *inter alia*, Driving While Under the Influence of Alcohol Causing Bodily Injuries (As a 3rd Degree Felony) and Driving While Under the Influence of Alcohol With a Child on Board (As a 3rd Degree Felony). Each of these third degree felony convictions carries a five year maximum allowable sentence of imprisonment. *See* Title 9 GCA § 80.30(c) (1996). Muritok, however, received an extended sentence term of ten years[6] for each of the two convictions, pursuant to Title 9 GCA §§ 80.32(c) and 80.38.[7] Therefore, the five year

[6] Muritok was sentenced to ten years (three years suspended) for each of the two convictions, however, the second sentence runs concurrently with the first.

[7] Title 9 GCA § 80.32(c) states, "[i]n the cases designated in §§ 80.38 and 80.42, a person who has been convicted . . . . of a felony of the third degree, the court may impose a sentence of not less than three (3) years and not more than ten (10) years." Title 9 GCA § 80.32(c) (1996).

Section 80.38, which addresses the extended term sentence for felony convictions, reads in full:

> The court may sentence a person who has been convicted of a felony to an extended term of imprisonment if it finds one or more of the grounds specified in this Section. The finding of the court shall be incorporated in the record:
>
> > (a)The offender is a persistent offender whose commitment for an extended term is necessary for protection of the public. The court shall not make such a finding unless the offender is over twenty-one (21) years of age and has previously been convicted as an adult of two (2) felonies or of one (1) felony and two (2) misdemeanors.
> >
> > (b) The offender is a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted. The court shall not make such a finding unless:
> >
> > > (1) the offender is being sentenced for two (2) or more felonies, or is already under sentence of imprisonment for felony, or admits in open court the commission of one or more other felonies and asks that they be taken into account when he is sentenced; and

maximum allowable prison term for each of the two felony convictions, found in section 80.30(c), was exceeded through the application of the extended terms statute for felonies found in section 80.38, and thus falls within the confines of an *Apprendi* analysis.

[46] Applying the *Apprendi* doctrine to section 80.38, an examination of the statutory language reveals that the court is authorized to sentence a defendant to an extended term, after the court itself makes various findings specified in the statute. *See* 9 GCA § 80.38 (1996) ("*The court* may sentence a person who has been convicted of a felony to an extended term of imprisonment *if it finds one or more of the grounds* specified in this Section. The *finding of the court* shall be incorporated in the record.") (emphasis added). Moreover, the only fact found in the statute that is excepted from *Apprendi* is found in subsection (a), which refers to a defendant's previous conviction "as an adult of two (2) felonies or of one (1) felony and two (2) misdemeanors." *Id.* The remainder of the "facts" in the statute, however, must be proven to a jury beyond a reasonable doubt, in compliance with *Apprendi*. *See id*.

[47] Therefore, we hold that Title 9 GCA § 80.38 is unconstitutional and a violation of the rule expressed in *Apprendi* because it impliedly removes from the jury and prescribes to the court the duty to "assess[] [the] facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2364 (internal quotation marks and citations omitted). We recognize that the enactment of section 80.38 reflects the legislative policy that certain factors weigh in favor of increasing a defendant's sentence beyond the prescribed

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> (2) the longest sentences of imprisonment authorized for each of the offender's crimes, including admitted crimes taken into account, if made to run consecutively, would exceed in length the maximum of the extended term imposed.
>
> (c) The offender is a dangerous, mentally abnormal person whose commitment for an extended term is necessary for protection of the public. The court shall not make such a finding unless the offender has been subjected to a psychiatric examination resulting in the conclusions that his mental condition is gravely abnormal; that his criminal conduct has been characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive behavior with heedless indifference to consequences; and that such condition makes him a serious danger to others.

Title 9 GCA § 80.38 (1996).

statutory maximum. However, in the wake of *Apprendi*, the manner in which the Legislature has implemented this policy is now constitutionally infirm.[8] The ability to correct section 80.38, which embraces this legislative policy, lies with the Guam Legislature, not this court, as we have no authority in that regard. *See Carlson v. GTA*, 2002 Guam 15, ¶ 46 n.7 (recognizing that policy arguments are more properly directed to the legislature, as "[c]ourts are not in the business of judicial legislation.").

[48] Muritok also contends that *Apprendi* requires the People to charge in the indictment any fact which increases the statutory maximum penalty for the offense. We disagree. In *Apprendi*, the Court recognized that the appellant did not assert a constitutional claim based on failure to charge the sentencing enhancement facts in the indictment, but instead relied entirely on the due process clause of the Fourteenth Amendment, and thus declined to address the indictment question, finding that the Fourteenth Amendment "has not . . . been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury.'" *See Apprendi*, 530 U.S. at 476-77 n.3, 120 S.Ct. at 2355-56 n.3 (internal quotation marks and citations omitted). Therefore, *Apprendi*'s logic, but not its holding, requires federal indictments to charge all facts that raise maximum sentences. *See id.* This rule does not bind state courts, nor does it bind this court, because the Grand Jury Clause of the Fifth Amendment does not apply to states. *See Alexander v. Louisiana*, 405 U.S. 625, 633 (1972) (Fourteenth Amendment Due Process Clause requires fair trial but does not require state indictment by grand jury); *Fields v. Soloff*, 920 F.2d 1114, 1118 (2d Cir. 1990) (Fifth Amendment right to grand jury does not apply to states because it is not incorporated by Fourteenth Amendment); *United States v. Floresca*, 38 F.3d 706, 709 (4th Cir. 1994) (The Grand Jury Clause

[8] Justice Thomas, concurring with the Majority in *Apprendi*, suggested that trial courts may bifurcate trials to keep juries from learning of aggravating facts until after a conviction on the underlying offense. *Apprendi*, 530 U.S. at 521 n.10, 120 S.Ct. at 2379 n.10 (citation omitted) (Thomas, J., concurring). We adopt this procedure for sentencing schemes that fall within the realm of *Apprendi*. Thus, only if a jury convicts a defendant of the underlying offense should the same jury be reconvened for the second stage of the trial, at which the People must prove to the jury beyond a reasonable doubt any fact, except the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum. *Id.* at 490. However, this procedure cannot be followed with respect to section 80.38, which, for the reasons discussed in this Opinion, is unconstitutional.

is one of few Bill of Rights protections which does not apply to states); *Wilkerson v. Whitley*, 28 F.3d 498, 502-03 (5th Cir. 1994) (en banc) (Fourteenth Amendment Due Process Clause does not require state grand jury indictment); *Lucas v. O'Dea*, 179 F.3d 412, 417 (6th Cir. 1999) (the right to be charged by indictment is a federal right and does not apply to states); *Cooksey v. Delo*, 94 F.3d 1214, 1217 (8th Cir. 1996) (Fourteenth Amendment Due Process Clause does not require indictment for state prosecution because Fifth Amendment is not incorporated); *Jeffries v. Blodgett*, 5 F.3d 1180, 1188 (9th Cir. 1993) (indictment by grand jury not part of due process guarantees of Fourteenth Amendment that apply to state defendants); *Clanton v. Cooper*, 129 F.3d 1147, 1155 (10th Cir. 1997) (Fourteenth Amendment Due Process Clause does not incorporate the Fifth Amendment right to grand jury indictment with respect to state prosecutions). We hold that, unless otherwise required by law,[9] the penalty enhancing facts which fall within the *Apprendi* rule need not be charged in the indictment.

[49] Accordingly, because Title 9 GCA § 80.38 is unconstitutional, we hold that the lower court erred in sentencing Muritok to an extended term pursuant to section 80.38, which increases the statutory maximum found in section 80.30(c), without the People first submitting and proving to the jury beyond a reasonable doubt the facts (other than the fact of a prior conviction) which support an extended term.

IV.

[50] We hold that Officer Santo Tomas' reference to Muritok's pre-custodial silence, although a violation of his Fifth Amendment privilege against self-incrimination, was harmless error. We further hold that the trial court's failure to provide a curative instruction to the jury with respect to Muritok's Fifth Amendment privilege was harmless error. Additionally, we hold that the trial court did not err in admitting the evidence of Muritok's blood alcohol test results. Finally, pursuant to

[9] *See e.g.*, Title 8 GCA § 55.40 (discussing the charge of a prior conviction, when such conviction changes the punishment which can be imposed upon a defendant).

Apprendi, we hold that Title 9 GCA § 80.38 is unconstitutional and thus, the lower court erred in sentencing Muritok to an extended term pursuant to section 80.38, which increases the statutory maximum found in section 80.30(c), without the People first proving to the jury beyond a reasonable doubt the facts which support the extended terms. Accordingly, we **AFFIRM** the convictions, **VACATE** the sentencing with respect to the charges of Driving Under the Influence of Alcohol Causing Bodily Injuries and Driving While Under the Influence of Alcohol With a Child on Board, and **REMAND** for resentencing for these respective offenses within the statutory maximum found in Title 9 GCA § 80.30(c).