137 Hawai'i 330
Supreme Court of Hawai‘i.
STATE of Hawai‘i, Respondent/Plaintiff–Appellee,
v.
YONG SHIK WON, Petitioner/Defendant–Appellant.
No. SCWC–12–0000858.
Nov. 25, 2015.

# Synopsis

**Background:** Defendant was convicted in the District Court, Honolulu Division, David Lo, J., of operating a vehicle under the influence of an intoxicant (OVUII). Defendant appealed. The Intermediate Court of Appeals, 134 Hawai'i 59, 332 P.3d 661, affirmed. Defendant petitioned for certiorari review.
**Holdings:** After grant of review, the Supreme Court, Pollack, J., held that:
1 under the implied consent law and the state constitution, a person may refuse consent to submit to a blood alcohol concentration (BAC) test, and the State must honor that refusal, and
2 defendant's election to submit to BAC test was not a product of voluntary consent.
Vacated and remanded.
Wilson, J., filed concurring opinion.
Nakayama, J., filed dissenting opinion in which Recktenwald, C.J., joined.
Opinion, 136 Hawai'i 292, 361 P.3d 1195, republished.

# West Headnotes (32)Collapse West Headnotes

Change View
1**Searches and Seizures**

Taking samples of blood, or other physical specimens; handwriting exemplars
Production of deep lung breath is a search subject to constitutional protection. U.S.C.A. Const.Amend. 4; Const. Art. 1, § 7.
2**Searches and Seizures**

Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant
A legislature may not establish a per se exigency, as would validate a warrantless search, by statute. U.S.C.A. Const.Amend. 4.
3**Searches and Seizures**

Necessity of and preference for warrant, and exceptions in general
Where the purpose of a warrantless search is to generate evidence for law enforcement purposes, the search does not fall within the special law enforcement needs exception to warrant requirement. U.S.C.A. Const.Amend. 4.
4**Arrest**

Scope of Search

The search incident to arrest exception to warrant requirement is limited in scope to a search of the arrestee's person and the area within his immediate control from which he could obtain a weapon or destroy evidence. Const. Art. 1, § 7.
1 Case that cites this headnote
5**Searches and Seizures**

Waiver and Consent
Consent to be searched is a waiver of one's right not to be searched. Const. Art. 1, § 7.
2 Cases that cite this headnote
6**Searches and Seizures**

Waiver and Consent
The right to refuse consent to a search is superseded by a warrant or an exception to the warrant requirement. (Per Pollack, J., with one justice concurring and one justice concurring in result.) Const. Art. 1, § 7.
7**Searches and Seizures**

Voluntary nature in general
"Consent" to a search, in the constitutional sense, means more than the absence of an objection on the part of the person to be searched; it must be shown that such consent was voluntarily given. Const. Art. 1, § 7.
8**Searches and Seizures**

Voluntary nature in general
The "voluntariness" of a consent to a search means a free and unconstrained choice. Const. Art. 1, § 7.
9**Searches and Seizures**

Voluntary nature in general
Whether consent to a search was freely and voluntarily given, as in a case where custodial interrogation may be implicated, must be determined from the totality of circumstances surrounding the defendant's purported relinquishment of a right to be free of unreasonable searches and seizures. (Per Pollack, J., with one justice concurring and one justice concurring in result.) Const. Art. 1, § 7.
1 Case that cites this headnote
10**Searches and Seizures**

Consent in general
When the prosecution seeks to rely upon consent to justify the lawfulness of a search, it has the burden of proving by the preponderance of the evidence that the consent was, in fact, freely and voluntarily given. Const. Art. 1, § 7.
11**Searches and Seizures**

Scope of inquiry or review, in general
**Searches and Seizures**


Questions of law or fact
The question of whether the facts as found amount to legally adequate consent to a search is a question of constitutional law that a court answers by exercising its own independent constitutional judgment based on the facts of the case. Const. Art. 1, § 7.
12**Criminal Law**

Review De Novo
The ultimate issue of whether the defendant provided consent to a search is reviewed de novo on appeal. Const. Art. 1, § 7.
13**Searches and Seizures**

Voluntary nature in general
Consent to a search may not be gained by explicit or implicit coercion, implied threat, or covert force. Const. Art. 1, § 7.
14**Searches and Seizures**

Scope of inquiry or review, in general
Searches alleged by the State to be consensual are subject to the most careful scrutiny, because neglect of such an examination would sanction the possibility of coercion. Const. Art. 1, § 7.
15**Searches and Seizures**

Words or conduct expressing consent; acquiescence
Mere acquiescence to a search, in and of itself, is insufficient to establish consent. Const. Art. 1, § 7.
16**Searches and Seizures**

Voluntary nature in general
Verbal expression of consent to a search may not be determinative of whether submission to a search is voluntary when the totality of circumstances surrounding the purported waiver is implicitly or subtly coercive. Const. Art. 1, § 7.
1 Case that cites this headnote
17**Searches and Seizures**

Consent, and validity thereof
When an individual is in the custody of the government, it is the State's particularly heavy burden to demonstrate that such consent was freely and voluntarily given, free of covert force, explicit or implicit coercion, and implied threat. Const. Art. 1, § 7.
18**Searches and Seizures**

Knowledge of rights; warnings and advice
**Searches and Seizures**

Custody, restraint, or detention issues
Although the mere fact that a suspect is under arrest does not negate the possibility of voluntary consent to a search, proof of voluntary consent remains important, and when the coercive atmosphere of state custody is persistent, it is not dispelled merely by provision of other

constitutional protections to the defendant, such as being advised of *Miranda* warnings shortly before being asked for consent to a search. Const. Art. 1, § 7.

19**Searches and Seizures**

Knowledge of rights; warnings and advice

Informing the person of the right to refuse consent to a search is a relevant factor in determining whether consent was voluntary, but it cannot decide the matter. Const. Art. 1, § 7.

20**Searches and Seizures**

Voluntary nature in general

A request by the State for consent to a search must be more than perfunctory and provide the individual with a genuine and meaningful choice; that is, there must be some intimation that an objection to the search would be significant or that to withhold consent would not be futile. Const. Art. 1, § 7.

21**Searches and Seizures**

Scope and duration of consent; withdrawal

As a corollary of the requirement that consent to a search must be voluntary, consent to a search may be revoked or withdrawn at any time before the search has been completed. Const. Art. 1, § 7.

1 Case that cites this headnote

22**Constitutional Law**

Relation to Constitutions of Other Jurisdictions

As the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the state constitution, Supreme Court recognizes state constitution as an independent source of protection for state's citizens.

1 Case that cites this headnote

23**Automobiles**

Right to take sample or conduct test; initiating procedure

**Automobiles**

Grounds or cause; necessity for arrest

A warrantless blood alcohol concentration (BAC) test may be required by police officers, pursuant to statute, from the operator of any vehicle involved in a collision resulting in injury to or the death of any person; such a test does not offend the state constitution so long as: (1) the police have probable cause to believe that the person has committed a driving under the influence (DUI) offense and that the blood sample will evidence that offense; (2) exigent circumstances are present; and (3) the sample is obtained in a reasonable manner. Const. Art. 1, § 7; HRS § 291E–21.

2 Cases that cite this headnote

24**Automobiles**

Advice or warnings; presence of counsel or witness

Police officers have an affirmative duty to clearly and accurately inform drivers of their implied right to consent to or refuse to submit to a test for blood alcohol concentration (BAC). HRS § 291E–11(a).

3 Cases that cite this headnote

25**Automobiles**

Consent, express or implied

Under the implied consent law and the state constitution, a person may refuse consent to submit to a blood alcohol concentration (BAC) test, and the State must honor that refusal; therefore, in order to legitimize submission to a warrantless BAC test under the consent exception, consent may not be predetermined by statute, but rather it must be concluded that, under the totality of the circumstances, consent was in fact freely and voluntarily given. Const. Art. 1, § 7; HRS § 291E–11(a).

8 Cases that cite this headnote

26**Constitutional Law**

Evidence

A constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment; the power to create presumptions is not a means of escape from constitutional restrictions.

27**Searches and Seizures**

Custody, restraint, or detention issues

Where a search may not be accomplished without consent, a request for consent that subjects the person to imprisonment for refusal is calculated to overbear a defendant's will in order to impel submission. Const. Art. 1, § 7.

1 Case that cites this headnote

28**Arrest**

What constitutes such cause in general

Probable cause for arrest exists when the arresting officer has reasonable grounds to believe, from facts and circumstances personally known to the officer, or of which the officer has trustworthy information, that the person arrested has committed or is committing an offense. Const. Art. 1, §§ 5, 7.

1 Case that cites this headnote

29**Constitutional Law**

Waiver in general

The government may not condition a right guaranteed in the constitution on the waiver of an equivalent constitutional protection.

1 Case that cites this headnote

30**Automobiles**

Consent, express or implied

Defendant's election to submit to blood alcohol concentration (BAC) test, following traffic stop, was not a product of voluntary consent, in case in which defendant was told that, pursuant to

state's implied consent law, he could either submit to test or be subject to arrest, prosecution, and imprisonment for refusal of test, following which defendant elected to submit to test; election presented by state's implied consent law forced defendant to select between fundamental constitutional rights of refusing to be searched or not being subject to search absent a warrant or exception to warrant requirement, and defendant's refusal to provide consent carried with it a significant punishment of up to 30 days in jail and a $1,000 fine. Const. Art. 1, § 7; HRS §§ 291E–11(a), 291E–68.
6 Cases that cite this headnote
31**Searches and Seizures**

Necessity of and preference for warrant, and exceptions in general
The state constitution does not determine whether bodily intrusions are lawful under an indeterminate balancing test for reasonableness; instead, a warrantless search is precluded where no exception rooted in state's law is present. Const. Art. 1, § 7.
32**Courts**

In general; retroactive or prospective operation
When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions.
1 Case that cites this headnote

# Attorneys and Law Firms

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McKENNA, POLLACK, and WILSON, JJ., with WILSON, J., concurring separately, and NAKAYAMA, J., dissenting, with whom RECKTENWALD, C.J., joins.

# Opinion

Opinion of the Court by POLLACK, J.
*333 Under our law, a person has a statutory and constitutional right to refuse to consent to a bodily search unless an exception to the search warrant requirement is present. In this case, the defendant was informed by the police of his right to refuse to consent to a search, but he was also told that if he exercised that right, his refusal to consent would be a crime for which he could be imprisoned for up to thirty days.
Yong Shik Won was stopped by police while driving his vehicle on April 20, 2011. After his arrest for operating his vehicle under the influence of an intoxicant, Won was given a choice. He could either submit to a test for the purpose of determining alcohol concentration, or if he did not submit, he would be arrested, prosecuted, and subject to thirty days of imprisonment for the crime of refusal to submit to a breath, blood, or urine test. After being given this choice, Won

elected to undergo a breath test, the result of which provided the basis for Won's conviction for the offense of operating a vehicle under the influence of an intoxicant.
We consider whether Won's election to submit to the breath test was consensual under the circumstances presented. We hold that it was not.

**I. Introduction**

The prohibition against operating a vehicle under the influence of an intoxicant (OVUII) provides that all drivers are deemed to have given consent to submit to a test of their breath, blood, or urine, for the purpose of determining alcohol concentration or drug content.[1] Hawai‘i Revised Statutes (HRS) § 291E–11(a) (Supp.2006). Before administering a test, the officer must inform the person that "the person may refuse to submit to testing." *Id.*
If a person arrested for OVUII refuses to submit to a test to determine blood alcohol concentration (BAC test), the law provides that "none shall be given," HRS §§ 291E–15 (Supp.2010)[2] and 291E–65 (Supp.2009),[3] except *334 **1069 in circumstances involving a " collision resulting in injury to or the death of any person." HRS § 291E–21(a) (2007).[4]
Hawai‘i law provides two categories of penalties for drivers that refuse to submit to a BAC test.[5] The first is an extended revocation period of the person's driver's license in an administrative process applicable to all persons arrested for OVUII. HRS § 291E–41(d) (Supp.2010); *see generally* HRS Chapter 291E, Part III. The administrative license revocation process is "civil in nature." *State v. Severino,* 56 Haw. 378, 380, 537 P.2d 1187, 1189 (1975). This court has upheld civil license revocation on several occasions. *See, e.g., Dunaway v. Admin. Dir. of Courts,* 108 Hawai‘i 78, 87, 117 P.3d 109, 118 (2005); *Kernan v. Tanaka,* 75 Haw. 1, 22, 856 P.2d 1207, 1218 (1993); *Severino,* 56 Haw. at 380–81, 537 P.2d at 1189. The civil revocation of driver's licenses under HRS Chapter 291E, Part III, is not an issue in this case.
In contrast, the second category of penalties for refusing to submit to a BAC test is a criminal sanction. "Except as provided in section 291E–65, refusal to submit to a breath, blood, or urine test as required by part II is a petty misdemeanor."[6] HRS § 291E–68 (Supp.2010). A petty misdemeanor is punishable by up to thirty days in jail,[7] a fine not exceeding $1,000,[8] and imposition of community service and payment of other assessments and fees.[9]

**II. Arrest and proceedings through trial**

During the early morning hours of April 20, 2011, Won was observed driving at a high rate of speed by an officer of the Honolulu Police Department (HPD).

After pulling Won over, the officer detected the odor of alcohol on Won's breath and observed that Won's eyes were "red" and "watery." Based on this information, the officer concluded that Won was likely intoxicated. A standard field sobriety test and preliminary alcohol screen test were administered, both of which Won failed. Won was arrested for OVUII in violation of HRS § 291E–61(a)(3) and transported by police to the local police station.[10]
At the police station, an officer read to Won a form entitled "Use of Intoxicants While Operating a Vehicle Implied Consent for Testing" (Implied Consent Form).[11] Of foremost relevance to this case, the Implied Consent Form informs arrested persons of certain information, in three sections.

**Pursuant to chapter 291E, Hawaii Revised Statutes (HRS), Use of Intoxicants While Operating a Vehicle, you are being informed of the following:**

1.____ Any person who operates a vehicle upon a public way, street, road, or highway or on or in the waters of the State shall be deemed to have given consent to a test or tests for the purpose

of determining alcohol *335 **1070 concentration or drug content of the persons breath, blood or urine as applicable.
2.____ You are not entitled to an attorney before you submit to any tests [sic] or tests to determine your alcohol and/or drug content.
3.____ You may refuse to submit to a breath or blood test, or both for the purpose of determining alcohol concentration and/or blood or urine test, or both for the purpose of determining drug content, none shall be given [sic], except as provided in section 291E–21. However, if you refuse to submit to a breath, blood, or urine test, you shall be subject to up to thirty days imprisonment and/or fine up to $1,000 or the sanctions of 291E–65, if applicable. In addition, you shall also be subject to the procedures and sanctions under chapter 291E, part III.[12]
(Emphasis added). Thus, the Implied Consent Form has three principal provisions: an informational section, a denial of the right to counsel section, and a refusal to submit section. The Implied Consent Form includes space so that the person can initial each section to indicate acknowledgement. Won initialed both the refusal to submit section, which informed him that refusing to submit to the BAC test is punishable by up to thirty days of imprisonment and a fine of up to $1000, and the informational section. He did not initial the denial of the right to counsel section.[13] The Implied Consent Form separately has space for the person to indicate which BAC test—breath, blood, or urine—the person has agreed or refused to submit and also contains space for both the person and the officer administering the Implied Consent Form to sign. Won initialed next to "AGREED TO TAKE A BREATH TEST AND REFUSED THE BLOOD TEST" and signed the form with his name at the bottom.
A breath test was performed on Won using an Intoxilyzer 8000. Won's BAC was 0.17 grams of alcohol per two hundred ten liters of breath, which is above the limit of 0.08 grams of alcohol per 210 liters of breath under which a person may legally operate a vehicle. *See* HRS § 291E–61(a)(3). Won was charged in the District Court of the First Circuit (district court) in an amended complaint with OVUII, in violation of HRS § 291E–61(a)(3) and HRS § 291E–61(b)(1), as a first offense.[14]
Won filed a "Motion to suppress statements and evidence of [Won's] breath or blood test" (Motion). The following grounds were asserted for suppression of the BAC test: (1) Won was misled and inadequately advised as to his rights "surrounding the chemical test, in violation of not only existing Hawai'i appellate precedent but also his Due Process rights"; (2) Won's constitutional right to be adequately apprised of his rights was violated; (3) Won was deprived of an attorney in violation of HRS § 803–9;[15] and *336 **1071 (4) Won "was presented with a Hobson's Choice, either remain silent or commit a crime."

The State disputed each of Won's arguments, stating in response that (1) Won was adequately advised in regard to his rights prior to the breath test, (2) the breath test did not implicate a right to be advised of one's constitutional rights, (3) the breath test did not implicate a Sixth Amendment right to counsel, and (4) the breath test did not implicate a statutory right to counsel under HRS § 803–9.
On September 20, 2012, the district court heard Won's Motion.[16] The district court denied the Motion without making specific findings of fact or conclusions of law, and the case immediately proceeded to trial. The parties stipulated into evidence the facts as set forth above, as well as that the intoxilyzer result was accurate. Based on the stipulated facts, the district court found Won guilty of violating OVUII, HRS § 291E–61(a)(3).[17] Following conviction, Won's sentence was

stayed pending appeal of the judgment of conviction. Won timely appealed the judgment to the Intermediate Court of Appeals (ICA).

**III. Appellate Proceedings**

While this case was pending before the ICA, the Supreme Court of the United States decided *Missouri v. McNeely,* —— U.S. ——, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). In that case, the Supreme Court held that the natural metabolization of alcohol in the bloodstream does not present a per se exigency that qualifies as an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases. *Id.* at 1556. Won argued that *McNeely* requires nonconsensual blood or breath alcohol tests be justified by exigent circumstances or other exceptions to the warrant requirement in order to comport with the Fourth Amendment. Thus, Won asserted that the State must demonstrate that he consented to the breath test freely and voluntarily, a burden he claims the State failed to discharge because his exercise of the statutory and constitutional right to refuse consent was criminalized. That is, according to Won, his consent was coerced out of him by the threat of criminal prosecution and penalties. Relatedly, Won reasoned that the "claim and exercise of a constitutional right cannot ... be converted into a crime." "Under Hawaii's current implied consent laws, a person must consent to an alcohol concentration test or face criminal prosecution"; thus, according to Won, "HRS § 291E–68 is unconstitutional on its face and as applied."

In response, the State construed the principle articulated by *McNeely* as "blood draws for alcohol concentration testing did not justify a per se exigent circumstances exception to the search warrant requirement." The State submitted that it is an "overly expansive reading" of *McNeely* 's holding to suggest that a police officer cannot "coerce an OVUII arrestee to submit to a breath or blood test" by means other than force. Specifically, according to the State, if it can forcibly compel OVUII testing by acquiring a valid search warrant, the State could similarly coerce OVUII arrestees by employing less physically intrusive methods like criminal penalties.

**A. Decision of the ICA**

The ICA described the Supreme Court's decision in *McNeely* as "address[ing] the narrow question of whether the dissipation of alcohol in the bloodstream establishes a per *337 **1072 se exigent-circumstances exception to the warrant requirement for nonconsensual blood draws for OVUII arrests." *State v. Won,* 134 Hawai'i 59, 77, 332 P.3d 661, 679 (App.2014). According to the ICA's reading of *McNeely,* it did not involve "other potential exceptions to the warrant requirement, the Fourth Amendment implications of breath tests, the validity of implied consent statutes, or the validity of breath tests conducted pursuant to such statutes." *Id.* Hence, the ICA distinguished *McNeely* from this case because "Won agreed to submit to a breath test pursuant to Hawaii's implied consent statute," and he "was not subjected to a compelled nonconsensual blood draw." *Id.*

In upholding Won's BAC test and the statutory scheme imposing sanctions for withdrawing consent, the ICA relied on a balancing analysis through which it was found that the search was reasonable due to its minimal invasiveness and the overriding governmental interest in preventing OVUII violations. The ICA declared, citing *Maryland v. King,* —— U.S. ——, 133 S.Ct. 1958, 1969, 186 L.Ed.2d 1 (2013), that "the ultimate measure of the constitutionality of a governmental search is 'reasonableness.' " *Won,* 134 Hawai'i at 77, 332 P.3d at 679. The ICA referenced a Hawai'i appellate decision involving a search of a student at a school and stated, "In determining whether a warrantless search or seizure is reasonable, the court must balance the government's need to search against the intrusion on the individual's privacy-interests."[18] *Id.* at 78, 332 P.3d at 680 (*In re Doe,* 77 Hawai'i 435, 444, 887 P.2d 645, 654 (1994)).

The ICA also held that because "driving is a privilege, not a right," *id.* at 78, 332 P.3d at 680, "[a]s a matter of law, a person who exercises the privilege to drive and operates a vehicle on a public road is deemed to have given his or her consent to submit to testing of the person's breath, blood, or urine for alcohol or drugs." *Id.* The ICA theorized that "[t]he Legislature presumably could have sought to make the implied consent to breath testing completely irrevocable." *Id.* Thus, the ICA concluded that the statutory right to refuse to submit to testing does not take precedence over the driver's implied consent to testing. The ICA similarly held that the implied consent to testing is not rendered invalid by rights provided by the Hawai'i Constitution. As stated by the ICA, the statutory implied consent prevails over the statutory right to refuse to submit to testing and is not invalidated by article I, section 7 rights. Consequently, while the ICA recognized a "limited statutory right" to refuse a BAC test, it held that this limited right cannot invalidate the consent deemed by statute.

Finally, the ICA found that the statutory implied consent could not be withdrawn, reasoning that "the purpose of the implied consent statute would be defeated if a driver could freely withdraw his or her consent to submit to a breath test after being arrested for OVUII." *Id.* at 79, 332 P.3d at 681. Accordingly, the ICA affirmed Won's conviction and sentence.[19] *Id.* at 80, 332 P.3d at 682. Won timely filed an application for writ of certiorari seeking review of the ICA's judgment, which this Court accepted.

**B. Arguments on Certiorari**

Won argues that the BAC evidence in this case was obtained in an unconstitutional manner and should have been suppressed because no exception to the warrant requirement was applicable under the circumstances. He contends that the search incident to arrest exception and the special law enforcement needs exception to the warrant requirement are not applicable in this case. Won also asserts that the Implied Consent Form's statement that a person " 'shall' be subject to 30 days jail unless he consented" is coercive and precludes a finding of voluntary *338 **1073 consent under article I, section 7 and the Fourth Amendment. According to Won, "[t]here is no Implied Consent exception to the warrant requirement," which means that even if law enforcement officers comply with the State's implied consent statute, it would not validate a warrantless BAC test in impaired driving cases.[20]

The State, on the other hand, submits that "under the totality of the circumstances rule[,] ... Won's consent to provide a breath sample was given freely and voluntarily."

Although the State acknowledged that Won was not permitted to consult an attorney, the State emphasizes that "[t]he police officers followed the proper procedures, there is nothing in the record to indicate that Won's will was overborne ..., and he was informed by the Implied Consent Form that he could refuse to provide a breath or blood sample." The State's position is that it is not against the Constitution "for the [S]tate to enforce the implied consent bargain by providing for a fine or jail time for those drivers who chose to renege on their side of the bargain by refusing to provide a breath or a blood sample when it has been determined that they are OVUII."[21]

**IV. Discussion**

**A. A breath test is a search subject to constitutional constraints**

"An invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.' " *Missouri v. McNeely,* —— U.S. ——, 133 S.Ct. 1552, 1558, 185 L.Ed.2d 696 (2013) (quoting *Winston v. Lee,* 470 U.S. 753, 760, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985)). The Supreme Court has "never retreated ... from [its] recognition that any compelled

intrusion into the human body implicates significant, constitutionally protected privacy interests." *Id.* at 1565.
1 *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), defines a breath test as a search.
In light of our society's concern for the security of one's person, ... it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable....
Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or "deep lung" breath for chemical analysis ... implicates similar concerns about bodily integrity and, like the blood-alcohol test ..., should also be deemed a search.
*Id.* at 616–17, 109 S.Ct. 1402 (emphases and paragraph break added). Thus, production of deep lung breath is a search under well-settled law.[22]
**1074 *339 The right to be free of warrantless searches and seizures is a fundamental guarantee of our constitution.
The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

Haw. Const. art. I, § 7. "We have repeatedly recognized that, if anything is settled in the law of search and seizure, it is that a search without a warrant issued upon probable cause is unreasonable per se." *State v. Ganal,* 81 Hawai'i 358, 368, 917 P.2d 370, 380 (1996).
As early as 1922, this court expressed protection of such constitutional rights in terms of personal autonomy:
[I]t would not be possible to add to the emphasis with which the Supreme Court ... has declared the importance of keeping unimpaired the rights secured to the people by [the Fourth and Fifth Amendments to the U.S. Constitution].... [I]t is said that such rights are indispensable to the full enjoyment of personal security, personal liberty and private property.

*Territory v. Ho Me,* 26 Haw. 331, 335 (Haw.Terr.1922) (emphasis added) (ruling as inadmissible contraband that was seized by an officer after requiring a defendant to open his residence to a search). Accordingly, this court has cast the constitutional right to be free of "unreasonable searches, seizures and invasions of privacy" in the light of "the important fourth amendment values of individual dignity and integrity of the person." *State v. Kaluna,* 55 Haw. 361, 366, 520 P.2d 51, 57 (1974).
These fundamental values are ensured preservation by the Hawai'i Constitution: "The integrity of one's person—including the right to be free of arbitrary probing by government officials ... is at least as significant in terms of human dignity as the right to be free of externally imposed confinement." *Kaluna,* 55 Haw. at 366, 370–71, 520 P.2d at 57, 59–60. Thus, the proscription against "unreasonable searches, seizures and invasions of privacy" in the Hawai'i Constitution draws individual dignity and personal autonomy within its protections.
234 We have also recognized that "the warrant requirement is subject to a few specifically established and well-delineated exceptions." *Ganal,* 81 Hawai'i at 368, 917 P.2d at 380. One of the specific exceptions is a search conducted pursuant to consent.[23] **1075 *340 *Id.* The district court rejected Won's arguments related to consent, and Won challenged the validity of his "consent" both to the ICA and this court. In rejecting Won's challenge, the ICA based its balancing analysis, in part, on its determinations that a driver has impliedly consented to

submission to testing, *id.* at 78, 332 P.3d at 680; the legislature could have made that consent irrevocable, *id.;* and the purpose of the implied consent statute would be defeated if a driver could freely withdraw his or her consent, *id.* at 79, 332 P.3d at 681. We examine the doctrine of consent: first generally and then as applied to the facts of this case.

**B. The consent exception to the warrant requirement**

56 Consent to be searched is a waiver of one's right not to be searched. *Nakamoto v. Fasi,* 64 Haw. 17, 21, 635 P.2d 946, 951 (1981). Thus, in the context of a request by police to submit to a BAC test, consent and waiver have the same result. This court has repeatedly recognized that an individual has a constitutional right to refuse consent to a search when consent is requested by the State. *State v. Kearns,* 75 Haw. 558, 570, 867 P.2d 903, 909 (1994).[24]

78 "Consent" in the constitutional sense means more than the absence of an objection on the part of the person to be searched; it must be shown that such consent was voluntarily given. *State v. Bonnell,* 75 Haw. 124, 147–48, 856 P.2d 1265, 1277 (1993). Voluntariness means a "free and unconstrained choice." *State v. Shon,* 47 Haw. 158, 166, 385 P.2d 830, 836 (1963) (quoting *Schneckloth v. Bustamonte,* 412 U.S. 218, 225–26, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)); *accord State v. Trainor,* 83 Hawai'i at 261, 925 P.2d at 829; *State v. Ramones,* 69 Haw. 398, 405, 744 P.2d 514, 517 (1987).

910 In Hawai'i, consent is measured under an analysis examining the totality of the circumstances. *Ganal,* 81 Hawai'i at 368, 917 P.2d at 380.

Whether consent to a search was freely and voluntarily given, as in a case where custodial interrogation may be implicated, must be determined from the totality of circumstances surrounding the defendant's purported relinquishment of a right to be free of unreasonable searches and seizures.

*State v. Russo,* 67 Haw. 126, 137, 681 P.2d 553, 562 (1984) (emphasis added). Additionally, it is well settled "that when the prosecution seeks to rely upon consent to justify the lawfulness of a search, it has the burden of proving by the preponderance of the evidence that the consent was, in fact, freely and voluntarily given." *State v. Patterson,* 58 Haw. 462, 468, 571 P.2d 745, 749 (1977).

**1076 11 *341 The question of whether the facts as found amount to legally adequate "consent" is a question of constitutional law that a court answers by exercising its "own independent constitutional judgment based on the facts of the case." *Trainor,* 83 Hawai'i at 255, 925 P.2d at 823 (quoting *State v. Lee,* 83 Hawai'i 267, 273, 925 P.2d 1091, 1097 (1996)). This is because there is "no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen." *Trainor,* 83 Hawai'i at 261, 925 P.2d at 829 (quoting *Schneckloth,* 412 U.S. at 224, 93 S.Ct. 2041).

12 "In other words, application of constitutional principles to the facts as found requires [a court] to 'examine the entire record and make an independent determination of the ultimate issue of voluntariness based upon that review and the totality of the circumstances.' " *Id.* (alteration omitted) (quoting *State v. Kelekolio,* 74 Haw. 479, 502, 849 P.2d 58, 69 (1993)). Therefore, the ultimate issue of whether the defendant provided "consent" is reviewed de novo. *Id.*

**1. Consent may not be coerced**

13 This court has stated unambiguously that for consent to be "in fact, freely and voluntarily given," the consent "must be uncoerced." *Nakamoto,* 64 Haw. at 21, 635 P.2d at 951 (emphasis added). Thus, consent may not be gained by explicit or implicit coercion, implied threat, or covert force. *State v. Price,* 55 Haw. 442, 443, 521 P.2d 376, 377 (1974).[25] While coercion may be indicated where a person's "will has been overborne," *Shon,* 47 Haw. at 166, 385 P.2d at 836,

ultimately, this court "equate[s] voluntary with uncoerced." *Price,* 55 Haw. at 443, 521 P.2d at 377. "For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified ... intrusion against which the fourth amendment is directed." *Trainor,* 83 Hawai'i at 261, 925 P.2d at 829 (quoting *Schneckloth,* 412 U.S. at 228, 93 S.Ct. 2041).

Thus, under circumstances where coercion is present, a search dependent upon consent for legitimacy violates the constitutional proscription of article I, section 7 and offends the values of individual dignity and personal autonomy that it protects.

14 Accordingly, searches alleged by the State to be consensual are subject to "the most careful scrutiny" because neglect of such an examination "would sanction the possibility of ... coercion," *Trainor,* 83 Hawai'i at 262, 925 P.2d at 830, which this court has unstintingly protected against. This court has concluded that the contamination of coercion extends even to coercion by private actors: "although no state action is involved where an accused is coerced into making a confession by a private individual, we find that the state participates in that violation by allowing the coerced statements to be used as evidence." *State v. Bowe,* 77 Hawai'i 51, 59, 881 P.2d 538, 546 (1994).

15 Our decisions demonstrate that the totality of the circumstances may indicate that an alleged waiver of a constitutional right was not voluntary even when there is a manifestation of assent by the defendant. For instance, mere acquiescence "in and of itself, is insufficient to establish consent." *Kearns,* 75 Haw. at 571, 867 P.2d at 909; *accord Trainor,* 83 Hawai'i at 260, 925 P.2d at 828; *State v. Quino,* 74 Haw. 161, 175, 840 P.2d 358, 364 (1992); *Nakamoto,* 64 Haw. at 22, 635 P.2d at 951; *Kaluna,* 55 Haw. at 371, n. 7, 520 P.2d at 60 n. 7.

16 Verbal expression also may not be determinative of whether submission to a search is voluntary when the totality of circumstances surrounding the purported waiver is implicitly or subtly coercive. *Russo,* 67 Haw. at 137, 681 P.2d at 562. In *Russo,* despite the fact that the defendant stated "I gave you verbal consent" in response to the police request to search, the court stated that "[w]hile assent could be inferred from these words, the context in which they were uttered leads us to believe they did not represent an essentially free and unrestrained choice." 67 Haw. at 138, 681 P.2d at 562; *see *342 **1077 also Trainor,* 83 Hawai'i at 253, 925 P.2d at 821 (finding submission to a search was nonconsensual despite defendant's statement of "Okay" and opening his arms in response to police request for a pat down); *State v. Pau'u,* 72 Haw. 505, 508, 824 P.2d 833, 835 (1992) (finding submission to a search was nonconsensual despite defendant's assent); *State v. Merjil,* 65 Haw. 601, 606, 655 P.2d 864, 868 (1982) (finding that "consent for [the search] was ... given under duress").

In *Nakamoto,* we considered whether a search by a security guard of a bag of a concert attendee was consensual. *Nakamoto,* 64 Haw. at 19, 635 P.2d at 949. The court distinguished between not being informed of the right to refuse consent and the person's belief that he or she had no right to refuse. The court first noted that

while there is no requirement that the person searched be first informed of his right to refuse consent to the search, the fact that he was not so advised is nevertheless a factor to be considered in evaluating the totality of the circumstances as they bear upon the question of whether such consent was freely and voluntarily given.

*Id.* at 21, 635 P.2d at 951. Thus, although the constitution does not require that individuals be expressly informed of their right to refuse a search, whether they were so informed remains a relevant factor in a determination of whether consent was, in fact, free and voluntary under the totality of the circumstances. Further,

when it is clear that the search will be conducted regardless of the consent of the party searched, there can be no voluntary waiver of his right to be free from unreasonable searches and seizures. So that even where he is asked directly whether he objects to the search, there must be at least some intimation that his objection would be meaningful or that the search is subject to his consent.

*Id.* (emphasis added) (citations omitted). Thus, the process by which the consent to search is obtained must be meaningful and substantive; the request by the State that an individual waive the protections of the constitution must be more than a mere formality. *See Price,* 55 Haw. at 444, 521 P.2d at 377 ("[W]hen the accused is directly asked whether he objects to the search, there must be at least some suggestion that his objection is significant or that the search waits upon his consent."); *Pau'u,* 72 Haw. at 511, 824 P.2d at 836 (holding that a search was invalid where the defendant "felt the futility of withholding any consent or confession").

After examining the totality of the circumstances of the plaintiff's case, the *Nakamoto* court concluded that

[the plaintiff] was not informed by the guard that she had the right to refuse the inspection. She simply assumed that the security guard was acting under an ordinance, statute, or regulation authorizing the inspection. So that while she was unwilling to submit to the inspection of her personal effects, she believed that she had no other alternative but to comply ....

In these circumstances, there was no valid consent to the inspection of her handbag by the security officer. She was not aware of her right to object and she reasonably believed that she had no other alternative but to submit. Consent given in the belief that one would forfeit her right to attend the concert, if she refused to be searched, is an inherent product of coercion and will not validate an otherwise improper intrusion.

*Nakamoto,* 64 Haw. at 22, 635 P.2d at 951 (emphases and paragraph break added). Therefore, although it is not necessary to inform a person of his or her right to refuse consent, if the person submits to the search under the belief that the search will occur regardless of an objection to the search or the person reasonably believed that there was no other alternative to prevent forfeiture of a right, that consent is coerced.

In *Trainor,* this court considered, inter alia, whether a pat-down search was consensual when a defendant contested his arrest and search following a "walk and talk investigation" at the Honolulu Airport. 83 Hawai'i at 252, 925 P.2d at 820. At the outset of the "encounter," it was "represented" to the defendant that "he was not under arrest and was free to leave at any time." *Id.* at 253, 925 P.2d at 821. After concluding that the encounter was an investigative seizure of the *343 **1078 defendant notwithstanding the representation that he was free to leave, *id.* at 256, 925 P.2d at 824, the court also considered whether the encounter and the subsequent pat down of the defendant's person could nonetheless be considered consensual considering that the defendant did not leave the encounter and verbally assented to the search. *Id.* at 260, 925 P.2d at 828.

This court held that the investigative encounter could be deemed "consensual" only if, prior to the start of questioning, the person was informed of the right to decline to participate in the encounter and of the right to leave at any time and thereafter, the person voluntarily participated in the encounter. *Id.* at 260, 925 P.2d at 828.

[T]he determination as to whether the person consented to the questioning is a subjective one. By its very nature, however, the subjective component of the inquiry regarding consent cannot be a matter of whether the seized person has been informed that he or she has the right to decline to participate in the encounter and is free to leave at any time. After all, the person either has or has

not been so informed. Accordingly, the subjectivity of the "consent" determination springs by definition from the question whether, after being given the prerequisite advice by the police, the person voluntarily participates in the encounter.

*Id.* at 260–61, 925 P.2d at 828–29 (emphases added) (alterations and internal quotation marks omitted) (quoting *Kearns,* 75 Haw. at 573–74, 867 P.2d at 910 (Levinson, J., concurring)). Therefore, based on the distinction between the notification of the right to decline and the subjective component of "consent," a court is required to resolve whether the circumstances demonstrate that the submission was consensual. "[E]ven if a seized person is given the prerequisite advice by the police, the court must still determine on the record before it whether the person has participated in the encounter voluntarily." *Id.* at 261, 925 P.2d at 829 (quotation marks omitted) (quoting *Kearns,* 75 Haw. at 573–74, 867 P.2d at 910 (Levinson, J., concurring)). That is, a defendant's objective knowledge of his or her constitutional rights is not a substitute for free and unconstrained consent.

1718 Further, when an individual is in the custody of the government, it is the State's "particularly heavy" burden to demonstrate that such consent was "freely and voluntarily given," free of covert force, explicit or implicit coercion, and implied threat. *Ganal,* 81 Hawai'i at 368, 917 P.2d at 380; *Russo,* 67 Haw. at 137, 681 P.2d at 562. Although the "mere fact that a suspect is under arrest does not negate the possibility of [ ] voluntary consent," proof of voluntary consent remains "important." *Price,* 55 Haw. at 443–44, 521 P.2d at 377. When the "coercive atmosphere" of state custody is persistent, it is not dispelled merely by provision of other constitutional protections to the defendant, such as being advised of "Miranda warnings shortly before being asked for consent to a search." *See id.*

Thus, when a court examines the totality of the circumstances to determine whether a person consented to a search, the decisions of this court provide significant guidance. These decisions protect the free and unconstrained choice to retain or waive the rights afforded by article I, section 7, without compromise of the individual dignity and personal autonomy that inhere within that provision.

1920 The court is obliged to undertake the "most careful scrutiny" of the circumstances in which consent has been alleged to ensure that the State's burden to demonstrate consent has been met, a burden that increases when the person is in custody at the time the purported consent was obtained. Informing the person of the right to refuse consent is a relevant factor, but it cannot decide the matter. Similarly, acquiescence or a manifestation of assent may nonetheless be insufficient to demonstrate consent when coercive elements are present. Finally, the request by the State for consent or waiver of the rights expressed by article I, section 7 must be more than perfunctory and provide the individual with a genuine and meaningful choice; that is, there must be some intimation that an objection to the search would be *344 **1079 significant or that to withhold consent would not be futile.

**2. Consent may be withdrawn**

21 As a corollary of the requirement that consent to a search must be voluntary, consent to a search may be revoked or withdrawn at any time before the search has been completed. "A suspect may of course delimit as he chooses the scope of the search to which he consents." *Florida v. Jimeno,* 500 U.S. 248, 252, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991). "Clearly a person may limit or withdraw his [or her] consent to a search, and the police must honor such limitations." *United States v. Dyer,* 784 F.2d 812, 816 (7th Cir.1986); *see also Burton v. United States,* 657 A.2d 741, 746 (D.C.1994) (citing *Jimeno* and *Dyer* to conclude, "We think these authorities compel the conclusion that when the basis for a warrantless search is consent, consent

may be withdrawn any time prior to completion of the search."); *United States v. McWeeney,* 454 F.3d 1030, 1034 (9th Cir.2006) ("A suspect is free ... to delimit or withdraw his or her consent at anytime."); *United States v. Ho,* 94 F.3d 932, 936 n. 5 (5th Cir.1996) ("A consent which waives Fourth Amendment rights may be limited, qualified, or withdrawn."); *United States v. Carter,* 985 F.2d 1095, 1097 (D.C.Cir.1993) (recognizing a constitutional right to withdraw consent to a search); LaFave, *supra* note 23, § 8.1(c).

22 Additionally, "as the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawai'i Constitution," we recognize our state constitution as an independent source of protection for our citizens. *Kaluna,* 55 Haw. at 369, 520 P.2d at 58. Accordingly, the right provided by article I, section 7 of the Hawai'i Constitution to be free of warrantless searches, when no exception to the warrant requirement is present, carries with it the right to withdraw consent to a search.

In this case, two forms of consent to a bodily search are relevant to the discussion: (1) irrevocable consent allegedly deemed by statute and (2) informed and voluntary consent under the totality of circumstances.

**C. Irrevocable consent to a search allegedly deemed by statute is contrary to our law**

23 Every person who drives on the roads of Hawai'i is deemed to have given consent to a BAC test when suspected of OVUII.

Any person who operates a vehicle upon a public way, street, road, or highway or on or in the waters of the State shall be deemed to have given consent ... to a test or tests approved by the director of health of the person's breath, blood, or urine for the purpose of determining alcohol concentration or drug content of the person's breath, blood, or urine, as applicable.

HRS § 291E–11(a) (emphasis added). However, before administering a BAC test, police must inform the driver that his or her "deemed" consent may be withdrawn by refusing to submit to testing.

The test or tests shall be administered at the request of a law enforcement officer having probable cause to believe the person operating a vehicle ... is under the influence of an intoxicant or is under the age of twenty-one and has consumed a measurable amount of alcohol, only after:

A lawful arrest; and

The person has been informed by a law enforcement officer that the person may refuse to submit to testing under this chapter.

HRS § 291E–11(b) (emphases added). The requirement that police must inform the person that consent may be withdrawn is in accordance with other provisions of the implied consent law: "[i]f a person under arrest refuses to submit to a breath, blood, or urine test, none shall be given, except as provided in section 291E–21."[26] HRS § 291E–15 *345 **1080 (emphasis added); *see also* HRS § 291E–65(a) ("If a person under arrest ... refuses to submit to a breath or blood test, none shall be given ...." (emphasis added)). "Thus, as the statutory language makes clear, a driver's 'implied consent' to an evidentiary chemical alcohol test is qualified by his or her implied right to refuse such a test...." *State v. Wilson,* 92 Hawai'i 45, 49, 987 P.2d 268, 272 (1999) (emphasis added).

24 This court has upheld the State's OVUII "implied consent scheme" only when the driver is "afforded ... the opportunity to make a knowing and intelligent decision whether to take an evidentiary [BAC] test."[27] *Id.* at 49–50, 987 P.2d at 272–73. "[P]olice officers have an affirmative duty to clearly and accurately inform drivers of their implied right to consent or refuse."[28] *Id.* at 52–53, 987 P.2d at 275–76 (emphasis added). Thus, we have recognized that the State's statutory consent scheme carries with it a right to withdraw that consent, such that when

the State requests that an individual submit to a BAC test, that individual must be afforded an opportunity to decide whether to submit to testing. *Id.*
For a person to be deemed by the implied consent law to have irrevocably consented to be searched also conflicts with this court's decision in *Nakamoto.* In *Nakamoto,* this court found that consent given under the "belie[f] that she had no other alternative but to comply," or a "reasonabl[e] belie[f] that she had no other alternative but to submit" could "not validate an otherwise improper intrusion." *Nakamoto,* 64 Haw. at 22, 635 P.2d at 951. Accordingly, if a person waives the right to refuse to be searched under the belief that he or she must waive that right, then the waiver is invalid. Similarly, if the right to refuse is foreclosed by statute, then there is no alternative but to comply and submit; it follows that a waiver of the right to refuse, given under the belief that one's consent is mandated by the statutory consent scheme, will always be invalid as a basis to conduct a search.
2526 Based on the statutory provisions of the implied consent law, *see* HRS §§ 291E–11(b), 291E–15, 291E–65(a), and the protections of the Hawai'i Constitution as interpreted by the decisions of this court, a person may refuse consent to submit to a BAC test, and the State must honor that refusal. Therefore, in order to legitimize submission to a warrantless BAC test under the consent exception, consent may not be predetermined by statute, but rather it must be concluded that, under the totality of the circumstances, consent was in fact freely and voluntarily given.[29]
**1081 *346 **D. Informed and voluntary consent under the totality of circumstances is not present in this case**
**1. Inherent coercion of a request to search conditioned on imprisonment**
27 The decisions of this court jealously protect our citizens from coerced submission to a search, because no matter how subtly the coercion was applied, the resulting "consent" is no more than a pretext for the intrusion forbidden by article I, section 7 of the Hawai'i Constitution. *See Trainor,* 83 Hawai'i at 261, 925 P.2d at 829; *see also Patterson,* 58 Haw. at 467, 571 P.2d at 748–49 ("voluntary" equates to "uncoerced"); *Price,* 55 Haw. at 443, 521 P.2d at 377 ("We equate voluntary with uncoerced."). Where a search may not be accomplished without consent, a request for consent that subjects the person to imprisonment for refusal is calculated to overbear a defendant's will in order to impel submission. *Balogh v. Balogh,* 134 Hawai'i 29, 45, 332 P.3d 631, 647 (2014) (referencing Black's Law Dictionary to define "coercion" as "[c]ompulsion of a free agent by ... threat of physical force"); *see also Bailey v. Alabama,* 219 U.S. 219, 244–45, 31 S.Ct. 145, 55 L.Ed. 191 (1911) (striking a state statute that provided criminal penalties for failure to pay a contractual debt because the "natural operation of the statute ... furnishes a convenient instrument for [ ] coercion" forbidden under the Federal Constitution); *Gompers v. Buck's Stove & Range Co.,* 221 U.S. 418, 442, 31 S.Ct. 492, 55 L.Ed. 797 (1911) (noting in the context of a contempt charge that an "order for imprisonment ... is not to vindicate the authority of the law ... but ... is intended to coerce the defendant to do the thing required"); *Delia v. City of Rialto,* 621 F.3d 1069, 1077 (9th Cir.2010) (finding consent to search was coerced when defendant "was cautioned ... that his failure to cooperate ... could result in charges of insubordination and possible termination of his employment"), *rev'd on other grounds sub nom., Filarsky v. Delia,* —– U.S. ——, 132 S.Ct. 1657, 182 L.Ed.2d 662 (2012); *Inouye v. Kemna,* 504 F.3d 705, 713 (9th Cir.2007) (finding state action requiring participation in a religious program "clearly coercive" based on the threat of imprisonment); *United States v. Ocheltree,* 622 F.2d 992, 994 (9th Cir.1980) (finding consent was not voluntary where a government agent informed a defendant

"that if consent was not forthcoming [the agent] would attempt to secure a search warrant, [with] a clear implication that appellant would be retained in custody until the warrant was obtained"). As noted, the Implied Consent Form that was presented to Won informed him, pursuant to HRS § 291E–68, that "if you refuse to submit to a [BAC] test, you shall be subject to up to thirty-days imprisonment and/or a fine up to $1,000." *See* HRS §§ 291E–68; 701–107. Failing to submit to a search pursuant to HRS § 291E–68 is a petty misdemeanor offense, for which other sanctions in addition to a jail term and a fine may be imposed, including the payment of other court assessments and fees. HRS §§ 706–605(1)(d), (6); 706–640(1)(e).

Where arrest, conviction, and imprisonment are threatened if consent to search is not given, the threat infringes upon and oppresses the unfettered will and free choice of the person to whom it is made, whether by calculation or effect.[30] *See* *347 **1082 *id.* at 261–63, 925 P.2d at 829–31 (finding that a permissive response to a request to search the defendant resulted only from "inherently coercive" circumstances that were "calculated to overbear [the defendant's] will"); *Pau'u,* 72 Haw. at 508, 824 P.2d at 835 (same). Thus, the threat of the criminal sanction communicated by the Implied Consent Form for refusal to submit to a BAC test is inherently coercive.[31]

**2. Coercion inherent in conditioning the preservation of fundamental rights on the waiver of other constitutional rights**

28 Article I, sections 5 and 7 of the Hawai'i Constitution provide a fundamental right not to be arrested except for probable cause.[32] *State v. Barnes,* 58 Haw. 333, 335, 568 P.2d 1207, 1209 (1977) ("[A]n arrest without a warrant will be upheld only where there was probable cause for the arrest."). Probable cause exists when the arresting officer has reasonable grounds to believe, from facts and circumstances personally known to the officer, or of which the officer has trustworthy information, that the person arrested has committed or is committing an offense. *State v. Lloyd,* 61 Haw. 505, 509, 606 P.2d 913, 916 (1980). Thus, as an arrest may be effectuated only when there is reason to believe that a person has committed or is committing an offense, it is self-evident that a person has a right not to be arrested for lawful behavior.

In situations in which police have not obtained a warrant and no other exception to the warrant requirement is present, the choice presented by the Implied Consent Form forces a defendant to elect between fundamental rights guaranteed by the Hawai'i Constitution. On the one hand, the person may exercise the constitutional right to refuse to be searched, thus relinquishing the constitutional right to not be arrested for conduct that is authorized by the constitution. Alternatively, the person may "choose" to be searched in order to prevent being arrested for the refusal crime, thus forfeiting the constitutional right to not be subject to a search absent a warrant or an exception to the warrant requirement.

29 That is, with respect to both alternatives, a person must surrender one constitutional right for preservation of another. However, the government may not condition a right guaranteed in our constitution on the waiver of an equivalent constitutional protection.[33] *State v. Joseph,* 109 Hawai'i 482, 497, 128 P.3d 795, 810 (2006). "[I]t [is] intolerable *348 **1083 that one constitutional right should have to be surrendered in order to assert another." *Id.* (quoting *Simmons v. United States,* 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)).

It is manifestly coercive to present a person with a "choice" that requires surrender of the constitutional right to refuse a search in order to preserve the right to not be arrested for conduct in compliance with the constitution. It is equally coercive to "allow" the person to preserve the fundamental right to refuse a search by requiring the person to relinquish the right to not be arrested for conduct that does not violate the constitution.

**3. Significant punishment magnifies coercion**

In exercising the constitutional right to refuse to be searched, a driver is forced to manifest to the police a willingness to commit a crime. That is, the driver must commit a crime in police presence in order to exercise the refusal allowed by statute and the right to withdraw consent provided by the constitution. The coerciveness present in such circumstances, requiring commission of a new crime in order to preserve the right not to be searched, is enhanced by the severity of the statutory penalty for the refusal offense.

The statute criminalizing refusal to submit to a BAC test, HRS § 291E–68, authorizes imprisonment that is six times greater than that provided by the OVUII offense for a first-time offender. Specifically, the refusal offense is punishable for up to thirty days in jail, whereas a first OVUII offense carries a maximum of five days of imprisonment. *Compare* HRS §§ 701–107, *with* 291E–61 (b)(1)(C)(ii). Thus, the coercion produced by the mandated criminal sanction for refusing to waive a constitutional right is increased as a result of the serious penalties authorized for refusing to waive this right.

**4. Under the totality of the circumstances, Won's election to submit to the BAC test was not voluntary**

30 Our de novo review of the record indicates that while in custody, Won was informed both of his right to refuse to consent and of the fact that should he exercise his right to refuse to submit to a BAC test, his refusal would constitute the commission of a crime: he would be subject to re-arrest for the additional crime of refusal to consent, and he would be subject to up to thirty days of imprisonment, a fine not to exceed $1,000, as well as other sanctions. Under these circumstances, Won marked the Implied Consent Form with a manifestation of assent. However, as in *Trainor,* the fact that the right to refuse the test was communicated and that there was a manifestation of assent by Won does not reduce our duty to determine whether Won voluntarily consented to the search. *See* *Trainor,* 83 Hawai‘i at 260, 925 P.2d at 828.

The circumstances further indicate that the election presented by the Implied Consent Form forced Won to select between fundamental constitutional rights and that refusal to provide consent carried with it a significant punishment.

As in *Russo,* it is apparent that “[w]hile assent could be inferred from” Won's election on the Implied Consent Form, the context in which it was made “leads us to believe [that it] did not represent an essentially free and unrestrained choice.” *See* *Russo,* 67 Haw. at 138, 681 P.2d at 562. Directed to sign a form in the presence of a police officer to indicate either submission to a search or willingness to commit a crime, it is clear that the “circumstances begat an obligation on [the defendant's] part” to comply with the implicit directive of the Implied Consent Form. *See* *Trainor,* at 262, 925 P.2d at 830 (alterations and internal quotation marks omitted).

Where the *Trainor* court found that “it would be simply wrong to suggest that” the defendant was actually able to walk away from the encounter, *id.,* here it would be simply wrong to conclude that an instruction that a person's refusal to consent to a BAC test was a crime, with stated penalties of up to thirty days of incarceration and a $1,000 fine, would not interfere with a person's free and unconstrained choice. The threat of imprisonment is inherently coercive, *see* *State v. Brooks,* 838 N.W.2d 563, 573–74 (Minn.2013, Stras, J., concurring), *cert. denied,* —— U.S. ——, 134 S.Ct. 1799, 188 L.Ed.2d 759 (2014); thus, the present case is more coercive than the circumstances in *Trainor* and *Nakamoto* because rather than speculate whether a refusal *349 **1084 to consent to a search might carry unwanted consequences, Won was informed in no uncertain terms that the consequence of his refusal made him subject to imprisonment.

Thus, as in *Nakamoto,* it is clear that Won had no other alternative to avoid prosecution for the refusal offense but to submit to the search; as in *Pua'a,* withholding consent was futile, as any other course would have resulted in Won's commission of a crime. Consequently, the position in which Won was placed, because of the criminal sanction for refusal, the forced selection between constitutional rights, and the potential significant punishment the sanction entailed, was inherently coercive.[34] *See* *Trainor,* 83 Hawai'i at 263, 925 P.2d at 831; *Ramones,* 69 Haw. at 405, 744 P.2d at 517; *Shon,* 47 Haw. at 166, 385 P.2d at 836.

As the coercion engendered by the Implied Consent Form runs afoul of the constitutional mandate that waiver of a constitutional right may only be the result of a free and unconstrained choice, the choice presented to Won compromised the values of individual dignity and personal autonomy protected by article I, section 7 of the Hawai'i Constitution. For this reason, Won's election on the Implied Consent Form to submit to a BAC test is invalid as a waiver of his right not to be searched.

Therefore, with little or no indication in the record to demonstrate that Won's election to submit to the BAC test was the result of his free and unconstrained choice, the State has not met its particularly heavy burden to demonstrate the voluntary waiver of a constitutional right.[35] Accordingly, Won's election to submit to the BAC test was not based on voluntary consent.[36]

**E. The ICA's analysis was in error**

31 The protections guaranteed in article I, section 7 of the Hawai'i Constitution *350 **1085 "against unreasonable searches and seizures and invasions of privacy" are preserved by the fundamental principle in our law that warrantless searches are unreasonable per se, absent "a few specifically established and well-delineated exceptions." *Ganal,* 81 Hawai'i at 368, 917 P.2d at 380. Hence, under Hawai'i law, it is not accurate to say that "the ultimate measure of the constitutionality of a governmental search is 'reasonableness,' " as stated by the ICA. *Won,* 134 Hawai'i at 78, 332 P.3d at 680 (citing *King,* 133 S.Ct. at 1969). The Hawai'i Constitution does not determine whether bodily intrusions are lawful under an indeterminate balancing test for "reasonableness," *Won,* 134 Hawai'i at 78, 332 P.3d at 661; instead, a warrantless search is precluded where no exception rooted in our law is present.[37] *State v. Wallace,* 80 Hawai'i 382, 393, 910 P.2d 695, 706 (1996).

The ICA asserted that "the Legislature presumably could have sought to make the implied consent to breath testing completely irrevocable." *Won,* 134 Hawai'i at 78–79, 332 P.3d at 680–81. Consequently, the ICA acknowledged the existence of a statutory right to refuse consent under our law, but it concluded that it is ineffective and cannot invalidate the consent deemed by statute. Under the ICA's analysis, it is not clear what remains of a "right" to refuse to submit to a BAC test when that right is "modified." As discussed above, it is well settled that an individual retains the right to consent or to decline to consent to a BAC test at the time the State makes its request. *Garcia,* 96 Hawai'i at 207, 29 P.3d at 926; *Wilson,* 92 Hawai'i at 49–50, 987 P.2d at 272–73; *Nakamoto,* 64 Haw. at 21, 635 P.2d at 951. Thus, contrary to the ICA's assertion, the right to refuse to submit to a BAC test is not rendered ineffectual by the statutory implied consent. HRS §§ 291E–11(b), 291E–15, 291E–65(a).

The ICA also appears to extend the consent allegedly deemed by statute into the protections secured by the Federal and Hawai'i Constitutions, stating that "[t]he limited statutory right to refuse testing also does not mean that the driver's implied consent is not valid for purposes of the Fourth Amendment and Article I, Section 7." *Won,* 134 Hawai'i at 78, 332 P.3d at 680. That is, the ICA asserts that the driver's implied consent is recognized by or affirmed under the constitution, and therefore, there is no right to withdraw consent. However, the right to refuse

consent to a BAC test is not merely a right provided by statute; rather, the right to refuse to consent to be searched and the right to withdraw consent are intrinsic in our constitution. *Nakamoto,* 64 Haw. at 21, 635 P.2d at 951; *Price,* 55 Haw. at 443, 521 P.2d at 377.

The ICA's balancing approach to determine reasonableness has not been adopted in our State and does not comport with an individual's rights against warrantless searches guaranteed by the Hawai‘i Constitution. Further, this approach discounts the statutory and constitutional rights to refuse to submit to a BAC test and does not account for the coercive nature of the threat of imprisonment communicated by the Implied Consent Form, the forced selection between constitutional rights, or the significant punishment authorized for the refusal offense. Accordingly, we conclude that the ICA's analysis is in error.[38]

**1086 *351 **F. The dissent's analysis is erroneous**

**1. The doctrine of unconstitutional conditions does not apply**

The dissent employs the doctrine of unconstitutional conditions,[39] a different balancing test than that used by the ICA, in concluding that the legislature was authorized to criminalize the refusal by a suspected OVUII offender of a BAC test as a condition of the privilege of driving on public roads. Dissent at ——— – ———, 372 P.3d at 1099–1104. Significantly, this Court has never applied this doctrine in criminal cases,[40] for when law enforcement conducts a warrantless search with the intention to discover evidence of a crime, article I, section 7 governs. And as already made clear, the proper inquiry in those instances is whether the State has proven that the warrantless search falls within an exception to the warrant requirement recognized by this Court. *See Ganal,* 81 Hawai‘i at 368, 917 P.2d at 380. Thus, there is a presumption of invalidity when a warrantless search is at issue, *State v. Heapy,* 113 Hawai‘i 283, 307, 151 P.3d 764, 788 (2007), which can be rebutted by the State not by proving that the governmental interest outweighs the unauthorized privacy intrusion, dissent at ———, 372 P.3d at 1099–1100, but by demonstrating that a well-recognized and narrowly defined exception to the warrant requirement applies. *Ganal,* 81 Hawai‘i at 368, 917 P.2d at 380.

Under the dissent's theory—that the government can criminalize the exercise of the constitutional right to withhold or revoke consent because of the government's compelling interest in protecting the public from OVUII offenders—there is nothing to proscribe the government from branding as a crime the exercise of other constitutional rights. The government need only cite dire statistics resulting from a particular crime to claim that there is a serious societal problem, find or create a governmentally provided privilege, attach to that privilege a condition waiving a constitutional right, and then rationalize such a waiver by referring to published reports or articles that have identified its possible benefits.

That is, the dissent relegates constitutionally guaranteed rights to a position in which they may be eliminated any time statistics could be marshalled to profess a need for doing so and the exercise of that right can be associated with a negative societal impact. For example, in the OVUII context, the dissent's analytical rubric could potentially allow the government to eviscerate all constitutionally *352 **1087 guaranteed rights of motorists.[41] If the compelling interest of the government trumps the constitutional right not to be searched without a warrant, it can be extended to similarly defeat the *Miranda* rights or the right to counsel of an OVUII defendant by making their exercise a criminal offense if it can be statistically shown that instances of OVUII-related incidents or casualties are diminished when *Miranda* rights and the right to counsel are waived.[42]

Weighing the constitutional rights of an arrestee against a governmental interest in order to determine the validity of a warrantless search is a particularly dubious enterprise, because “the

needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." *Almeida–Sanchez v. United States,* 413 U.S. 266, 273, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973). As one state appellate court aptly recognized when it refused to apply a balancing approach in a similar case, "the primary purpose of the search ... is for investigation of a crime based on a discretionary determination by a law-enforcement officer that there is probable cause of intoxication." *State v. Villarreal,* 475 S.W.3d 784, 810 (Tex.Crim.App.2014), *reh'g granted* (Feb. 25, 2015). Because the governmental interest when a search is at issue is intertwined with a criminal investigative purpose, the need for a warrant is intensified to preserve the constitutional rights of the person to which the investigation is directed.

Even assuming that the doctrine of unconstitutional conditions could somehow be considered applicable in this case, the dissent's analysis would remain flawed. The condition imposed by the government in this case is implied consent to a warrantless search, in the form of a BAC test on a motorist suspected of OVUII, for the privilege of driving on public roads. *See* HRS § 291E–11(a)–(b); *cf. Nakamoto,* 64 Haw. at 23, 635 P.2d at 952 (stating that the governmentally levied condition was the "submission [by concertgoers] to a search of their persons" in exchange for the privilege of entering a government-owned arena to attend a concert).

According to the dissent, however, the condition imposed by the government is the criminalization of the withdrawal of implied consent. Dissent at ——— – ———, 372 P.3d at 1099. This is a misidentification of the condition implicated, since the criminal refusal sanctions here are akin to the exclusion in *Nakamoto* of a concertgoer from a government-owned arena if he or she had refused a warrantless search of his or her bag. Plainly, the criminal refusal sanctions here and the exclusion from entry in *Nakamoto* are merely the consequences of a person's refusal to abide by the governmentally imposed condition—a warrantless search—and are not the conditions from which an unconstitutional conditions analysis must proceed.[43]

**1088 *353 Further, even if one were to find that the correctly identified condition is criminalizing the withdrawal of implied consent and that it passes muster under the unconstitutional conditions doctrine,[44] these findings are not determinative of the legal propriety of the search.[45] What is dispositive is whether Won's consent, required by HRS § 291E–11(b) (stating that "the person may refuse to submit to testing," i.e., refuse to provide actual consent), was constitutionally valid. This inquiry flows intrinsically from settled law in Hawai'i, which presumes every warrantless search impermissible unless it is demonstrated that the constitutional requirements of a consensual search are complied with or that another recognized exception to the warrant requirement applies. *Ganal,* 81 Hawai'i at 368, 917 P.2d at 380; *see also McNeely,* 133 S.Ct. at 1565 (plurality opinion) (reasoning that "the general importance of the government's interest in this area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case"). Thus, Won's agreement to take the warrantless breath test in this case must be examined under an independent constitutional inquiry.

As already made clear, the government must comply with the constitutional requirements undergirding the procurement and validity of consent and cannot, by statute, alter or reshape the doctrine of consent by rendering meaningless or short-circuiting its constitutional underpinnings—the most essential among which is voluntariness. *See State v. Bonnell,* 75 Haw. 124, 147–48, 856 P.2d 1265, 1277 (1993) (reasoning that consent "means more than the absence of an objection"; rather, "it must be shown that such consent was voluntarily given").

Accordingly, contrary to the dissent's view, actual consent under HRS § 291E–11(b) cannot be secured without regard to the constitutional principles fundamental to the doctrine of consent. *See* *354 **1089 *State ex rel. Anzai v. City & Cnty. of Honolulu,* 99 Hawai'i 508, 522, 57 P.3d 433, 447 (2002) (stating that the legislature is without power to limit constitutional guarantees by way of legislation).

**2. The dissent creates an indefensible per se exception to the warrant requirement**

The dissent's conclusion that Won's consent was valid rests solely upon its finding that the implied consent statute is a legitimate exercise of legislative authority. Dissent at ——— – ———, 372 P.3d at 1103. However, this court has never held that the implied consent statute qualifies as one of the "specifically established and well[-]delineated exceptions" to the warrant requirement under article I, section 7. *State v. Phillips,* 67 Haw. 535, 539, 696 P.2d 346, 349 (1985); *see also Aviles v. State,* 443 S.W.3d 291, 294 (Tex.App.2014) (holding that implied consent statutes are not permissible exceptions to the warrant requirement), *pet. filed* (Aug. 8, 2014); *State v. Fierro,* 853 N.W.2d 235, 243 (S.D.2014) (emphasizing that the court has never held South Dakota's implied consent statute as a recognized exception to the warrant requirement). The dissent asserts that "cooperation with a criminal implied consent regime yields real and voluntary consent that excuses officers from obtaining a warrant." Dissent at ———, 372 P.3d at 1099. This assertion essentially treats compliance with the implied consent statute as one and the same as the constitutionally valid, voluntary consent required by HRS § 291E–11(b).[46] However, the question of whether the implied consent statute is adhered to is separate and distinct from the constitutional inquiry into whether there is actual consent to BAC testing under HRS § 291E–11(b). *Williams v. State,* 296 Ga. 817, 771 S.E.2d 373, 376–77 (2015). The constitutional dimension of consent, therefore, overlays the inquiry into whether the implied consent statute is technically complied with. *Id.*

The dissent effectively renders every warrantless BAC test automatically valid for purposes of the Fourth Amendment and article I, section 7 so long as it is conducted in conformity with the implied consent statute and even if other facts and circumstances would otherwise preclude a finding of actual consent. *See* Dissent at ——— – ———, 372 P.3d at 1103. By ignoring the salient constitutional component of the inquiry, the dissent thus creates a per se exception to the warrant requirement.[47] **1090 *355 Dissent at ——— – ———, 372 P.3d at 1103. The categorical nature of the dissent's exception is incompatible with the principle that the validity of warrantless searches is contingent upon "all of the facts and circumstances of the particular case." *McNeely,* 133 S.Ct. at 1560; *see Weems,* 434 S.W.3d at 665 (holding that Texas' implied consent statute created an impermissible categorical exception to the warrant requirement).

Additionally, the dissent's per se exception is irreconcilable with an authoritative understanding of the consent exception under both the Fourth Amendment and article I, section 7, which requires a case-specific inquiry into the totality of the circumstances to evaluate voluntariness. *See Schneckloth,* 412 U.S. at 227, 93 S.Ct. 2041; *State v. Russo,* 67 Haw. 126, 137, 681 P.2d 553, 562 (1984); *Ganal,* 81 Hawai'i at 368, 917 P.2d at 380. This case-specific analytical framework underlying consent means that mere compliance with the dictates of the implied consent statute does not necessarily, much less automatically, equate to a finding of actual, voluntary consent under HRS § 291E–11(b). *Williams,* 771 S.E.2d at 377. Beyond mere statutory compliance, it is clear that an approach that accounts for the totality of the circumstances is invariably required to determine the voluntariness and validity of consent. *Cf. State v. Wulff,* 337 P.3d at 581 (Idaho 2014) (concluding that "irrevocable implied consent operat[ing] as a per se

rule ... cannot fit under the consent exception because it does not always analyze the voluntariness of that consent").

**V. Conclusion**

In this case, Won sought to suppress evidence recovered in a warrantless search. The State has not contested that the search was warrantless, but argued, inter alia, that it was nonetheless consensual. However, the State has not met its burden to demonstrate that Won's consent to be searched and the waiver of his constitutional right to be free of warrantless searches was the product of his free and unconstrained choice.

Under article I, section 7 of the Hawai'i Constitution, where no "specifically established and well-delineated exception[ ]" is present, a warrantless search is per se unreasonable, and any results of that search must be excluded from evidence. *Ganal,* 81 Hawai'i at 368, 917 P.2d at 380. Here, because voluntary consent has not been demonstrated and no other exception to the warrant requirement is applicable, the result of Won's breath test, the product of the warrantless search, is not admissible into evidence.[48]

32 Based on the foregoing analysis, the district court erred in not suppressing the result of Won's breath test. The judgment on appeal of the ICA and the district court's amended judgment of conviction are vacated, and the case is remanded to the district court for further proceedings consistent with this opinion.[49]

Concurring Opinion by WILSON, J.

I join the majority opinion's conclusion that the search in the instant case violated article I, section 7 of the Hawai'i Constitution. Our decision does not, however, address the constitutionality of the statute, HRS § 291E–68, which criminalizes a licensed driver whenever he or she exercises the constitutional right to withhold consent to *356 **1091 a search of his or her breath, blood, or urine. I write separately to express my view that, on its face, the statute constitutes an unconstitutional abridgement of the right to be free from unreasonable searches and seizures under article I, section 7 of the Hawai'i Constitution and the fourth amendment to the United States Constitution.

A signature aspect of individual freedom guaranteed by our state and federal constitutions is the protection from unreasonable searches and seizures enjoyed by every citizen. *See* U.S. Const. amend. IV; Haw. Const. art. I, § 7; *Wolf v. Colorado,* 338 U.S. 25, 27, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society."), *overruled on other grounds by Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Territory v. Ho Me,* 26 Haw. 331, 335 (Haw.Terr.1922) (noting that fourth and fifth amendment "rights are indispensable to the full enjoyment of personal security, personal liberty and private property"). Under article I, section 7 of the Hawai'i Constitution, a search without a warrant is per se unreasonable, saving a "specifically established and well-delineated exception [ ]." *State v. Ganal,* 81 Hawai'i 358, 368, 917 P.2d 370, 380 (1996). Constitutional protections against unreasonable searches and seizures understandably apply to the search of the body, including its blood, breath, and urine. *See Missouri v. McNeely,* —— U.S. ——, 133 S.Ct. 1552, 1558, 185 L.Ed.2d 696 (2013); *Skinner v. Ry. Labor Execs.' Ass'n,* 489 U.S. 602, 616–17, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). Indeed, the purpose of the warrant requirement is to protect human dignity from unreasonable intrusion by the government. *See, e.g., McNeely,* 133 S.Ct. at 1558 (describing a compelled blood test as "an invasion of bodily integrity implicat[ing] an individual's most personal and deep-rooted expectations of privacy" (internal quotation marks omitted) (citations omitted)).

Recently, under the guise of protecting the public from intoxicated drivers, the constitutional rights of licensed drivers to be free from unreasonable searches and seizures have been eroded by laws that make criminal the exercise of those rights. By criminalizing an individual's decision to require a warrant before being subjected to a breath or blood alcohol search, such laws expose to prison those who obtain a driver's license and exercise the right to be free from unreasonable searches and seizures. Some courts have embraced this criminalization of the exercise of fourth amendment rights. *See, e.g.,* *State v. Brooks,* 838 N.W.2d 563, 570–73 (Minn.2013); *State v. Birchfield,* 858 N.W.2d 302, 306–10 (N.D.2015); *People v. Harris,* 225 Cal.App.4th Supp. 1, 170 Cal.Rptr.3d 729, 734–36 (2014).

Notwithstanding recent precedent endorsing the implied surrender of the warrant requirement, the fourth amendment to the United States Constitution may still stand as a guarantee of Won's right to request a warrant before his privacy interest in his breath was subjected to a governmental search. The United States Supreme Court has not directly addressed this issue. Nonetheless, under the Hawai‘i Constitution, Won did not impliedly surrender that right by joining the vast number of Hawai‘i citizens who obtain a driver's license. In Hawai‘i, the privacy interest due a citizen in breath, blood, or urine is protected by the warrant requirement of article I, section 7 of the Hawai‘i Constitution. Hawai‘i is not a state whose citizens fall prey to the proposition that, by obtaining a driver's license, they impliedly surrender their right to receive the protection of a warrant before enduring a blood or breath search. We have a rightfully proud tradition under our constitution of providing greater protections to our citizens than those afforded under the United States Constitution. *See, e.g.,* *State v. Mundon,* 121 Hawai‘i 339, 365, 219 P.3d 1126, 1152 (2009) (“[W]e are free to give broader protection under the Hawai‘i Constitution than that given by the federal [C]onstitution.” (second alteration in original) (citation omitted) (internal quotation mark omitted)); *State v. Heapy,* 113 Hawai‘i 283, 298, 151 P.3d 764, 779 (2007) (noting that article I, section 7 of the Hawai‘i Constitution provides “a more extensive right of privacy[ ]” than the fourth amendment (citation omitted) (internal quotation mark omitted)); *State v. Rogan,* 91 Hawai‘i 405, 423, 984 P.2d 1231, 1249 (1999) *357 **1092 (stating that greater protections are provided by the double jeopardy clause of the Hawai‘i Constitution than its federal counterpart); *State v. Hoey,* 77 Hawai‘i 17, 36, 881 P.2d 504, 523 (1994) (“On the issue before us, we choose to afford our citizens broader protection under article I, section 10 of the Hawai‘i Constitution than that recognized by the [United States Supreme Court] under the United States Constitution....”).

Here, because there was no voluntary consent and no other exception to the warrant requirement, Won's breath test, gained pursuant to HRS § 291E–68, was in violation of article I, section 7 of the Hawai‘i Constitution. Won was coerced to give his consent to the search of his breath by the threat of prosecution if he refused to give his consent. The constitutional infirmity of HRS § 291E–68 is more evident in its prosecution of a citizen who, unlike Won, does not consent and instead exercises his or her constitutionally endowed right to the protection of a warrant before the search of his or her blood, breath, or urine. In such a situation, an individual wholly innocent of driving under the influence may be culpable as a criminal misdemeanant merely by refusing to consent to a BAC test without a warrant.

The legislature recognized the problematic nature of the statute prior to its enactment. During discussions regarding the bill containing the criminal penalty for refusal, the Chair of the House Judiciary Committee stated: “Criminalizing the refusal to submit to a test infringes upon important personal rights that in the past, this Legislature has been mindful of protecting.” 2010 House Journal, at 838 (statement of Rep. Karamatsu). He further noted that the law would

"result[ ] in situations where the arrestee is convicted of refusal when the test result would have indicated that the arrestee was not guilty of [OVUII]." *Id.* This sentiment was memorialized in a House Standing Committee Report, which warned:

Your Committee understands that to criminalize refusal to submit to a breath, blood, or urine test infringes upon important personal rights that in the past the Legislature has protected. Your Committee is mindful that such a law can result in a situation where the arrestee is convicted of refusal when the test results would have indicated that the arrestee was not guilty of intoxicated driving.

H. Stand. Comm. Rep. No. 907–10, in 2010 House Journal, at 1343.

For the reasons discussed above, and because there is no instance in which the criminalization of the right to refuse a BAC test pursuant to the statutory scheme at issue would be rendered constitutionally permissible, HRS § 291E–68 is unconstitutional on its face. *See, e.g., State v. Maugaotega,* 115 Hawai'i 432, 446–47, 168 P.3d 562, 576–77 (2007) (holding sentencing statute "in all of its manifestations" was "unconstitutional on its face"); *see also Camara v. Mun. Court of City & Cnty. of San Francisco,* 387 U.S. 523, 540, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) (holding "appellant had a constitutional right to insist that the [health] inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection"). The fact that, notwithstanding the statute, a warrant may be obtained or an exigent circumstance might be present, does not change the intended consequence of this statute, which is to punish every exercise of the right to refuse a warrantless search by a driver's-licensed citizen whose blood, breath, or urine the government seeks to search.

In assessing the facial validity of "a statute authorizing warrantless searches" the United States Supreme Court has noted that "the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant." *City of Los Angeles v. Patel,* —— U.S. ——, 135 S.Ct. 2443, 2451, 192 L.Ed.2d 435 (2015). Thus, in declaring facially unconstitutional a Los Angeles Municipal Code provision requiring that hotels make guest records available for police inspection, the United States Supreme Court rejected the argument that the statute was saved by the fact a valid search could occur pursuant to a warrant or an exigent circumstance:

If exigency or a warrant justifies an officer's search, the subject of the search must permit it to proceed irrespective of whether it is authorized by statute. Statutes *358 **1093 authorizing warrantless searches also do no work where the subject of a search has consented. Accordingly, the constitutional "applications" that petitioner claims prevent facial relief here are irrelevant to our analysis because they do not involve actual applications of the statute.

*Id.* On this basis, the Court rejected the petitioner's contention that the facial challenge to the statute "must fail because such searches will never be unconstitutional in all applications." *Id.* at 2450.

In *Patel,* the Court also rejected the United States' argument "that a statute authorizing warrantless searches may still have independent force if it imposes a penalty for failing to cooperate in a search conducted under a warrant or in an exigency." *Id.* at 2451 n. 1. In this regard, the Court noted that the availability of prosecution for failure to consent to warrantless searches authorized by the constitution does not save the statute from its constitutional infirmity:

This argument gets things backwards. An otherwise facially unconstitutional statute cannot be saved from invalidation based solely on the existence of a penalty provision that applies when searches are not actually authorized by the statute. This argument is especially unconvincing where, as here, an independent obstruction of justice statute imposes a penalty for "willfully,

resist[ing], delay[ing], or obstruct[ing] any public officer ... in the discharge or attempt to discharge any duty of his or her office of employment." Cal.Penal Code Ann. § 148(a)(1) (West 2014).
*Id.*
Similarly, in the instant case, the effect of HRS § 291E–68 is to improperly authorize warrantless searches where there is no exception to the warrant requirement. Of course, if a warrant is obtained prior to an individual's submission to a BAC test or if an exigency is present, providing a valid exception to the warrant requirement, the individual has no constitutional right to refuse to submit to the test. In such cases, as noted by the Court in *Patel, id.,* prosecution for obstruction of public administration or another crime related to the obstruction of justice may be appropriate. *Cf. State v. Line,* 121 Hawai'i 74, 82, 214 P.3d 613, 621 (2009) (explaining that "purposeful obstruction of a law enforcement officer executing a search warrant is a crime even if the warrant is defective and the search consequently unlawful" (emphasis omitted) (citation omitted)). These cases would fall outside of the scope of HRS § 291E–68, which specifically authorizes criminal penalties for individuals who refuse to submit to warrantless BAC tests where there is no exigency or other exception to the warrant requirement at issue.[1]
Moreover, the ICA and the dissent's proposition that the threat to public safety from intoxicated drivers renders reasonable the criminalization of the exercise of a fourth amendment right is anathema to the purpose of the fourth amendment. It is the very purpose of the fourth amendment and article I, section 7 of the Hawai'i Constitution to elevate the individual liberties of citizens beyond calibration based on the degree of threat to public safety posed by a particular crime. Constitutional liberties do not depend on the seriousness of the crime involved. *See Ferguson v. City of Charleston,* 532 U.S. 67, 86, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001) (explaining that although urine tests provide evidence of drug abuse, which is a serious problem, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose" (citation omitted) (internal quotation marks omitted)); *United States v. United States Dist. Court,* 407 U.S. 297, 315–16, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972) (noting that the warrant clause of the fourth amendment *359 **1094 "is not an inconvenience to be somehow 'weighed' against the claims of police efficiency" and that "[i]t is, or should be, an important working part of our machinery of government, operating as a matter of course"). An individual does not lose his or her liberties because he or she is charged with a crime. To the contrary, it is beyond cavil that citizens are endowed with full constitutional protection particularly where the government chooses to prosecute for the most serious of crimes.
No matter the inducement of contemporary statistics, the constitution stands as a bulwark against the insidious balancing of individual liberty in proportion to the seriousness of the crime for which a citizen stands accused. To deem reasonable a law so manifestly antithetical to the continued vitality of the fourth amendment and article I, section 7 is to pave the analytical way for future statutes that permit government to prosecute citizens who insist on a warrant before being subjected to a search or seizure. Indeed, the balancing approach adopted by the ICA and the dissent affords the legislature the option to enhance the penalty for refusing to consent to a search—perhaps to a felony—if convincing statistics establish that the present sanction is not sufficiently reducing the number of intoxicated drivers. Such an approach runs afoul of the fourth amendment and article I, section 7 of our constitution. There are exigencies independent of the seriousness of a crime justifying the government's warrantless search of the realm of privacy enjoyed by citizens in their body as well as their homes. *See, e.g., State v. Clark,* 65

Haw. 488, 494, 654 P.2d 355, 360 (1982) (recognizing that an exigency exists when there is "an immediate danger to life or of serious injury or an immediate threatened removal or destruction of evidence"); *State v. Dorson,* 62 Haw. 377, 384, 615 P.2d 740, 746 (1980) (same). However, the nature of a crime, no matter how serious, does not expose citizens to a government unfettered by the right to be free from unreasonable searches and seizures.

HRS § 291E–68 elevates the danger of intoxicated driving to an importance beyond the signature significance of the warrant requirement of the United States and Hawai'i constitutions. The premise that the danger of intoxicated driving transcends the protection of the warrant requirement of the fourth amendment to the United States Constitution and article 1, section 7 of the Hawai'i Constitution is per se unreasonable and renders HRS § 291E–68 unconstitutional on its face.

Dissenting Opinion by NAKAYAMA, J., in which RECKTENWALD, C.J., joins.

The Majority holds that the criminal sanctions for refusing to submit to a breath or blood alcohol test provided by Hawai'i Revised Statutes (HRS) § 291E–68 (Supp.2012) are inherently coercive, thus rendering Defendant Yong Shik Won's (Won) otherwise voluntary consent invalid. As a result, the Majority has deemed a duly enacted statute unconstitutional in all but a very narrow set of circumstances. A number of state and federal courts have considered the constitutionality of statutes similar to that at issue here, and none of them have held that a driver's decision to agree to take a breath or blood test is coerced simply because the state has attached the penalty of making it a crime to refuse the test. While Hawaii's constitution can provide greater protections than those of other states, the statute at issue here fully complies with well-established principles of Hawai'i constitutional law.

I dissent. I would hold that the legislature properly exercised its constitutional authority when it criminalized the refusal to submit to breath or blood alcohol testing pursuant to Hawaii's implied consent statutes. In this case, Won's cooperation with lawful implied consent procedures constituted real and voluntary consent that excused the officers from obtaining a warrant. Accordingly, I would affirm Won's conviction and sentence.

**DISCUSSION**

I.

This court bears a heavy burden when it is tasked with declaring a law unconstitutional. As Chief Justice John Marshall has explained:

The question, whether a law be void for its repugnancy to the constitution, is, at all *360 **1095 times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

*Fletcher v. Peck,* 10 U.S. 87, 128, 6 Cranch 87, 3 L.Ed. 162 (1810) (Marshall, C.J.). A court of review cannot evade this solemn obligation by declaring that although a statute maintains some facial validity, it operates unconstitutionally in almost every case in which it might apply, and specifically, in those cases in which the legislature intended it to apply.

II.

A.

Implied consent laws have a long history of constitutional validity that dates back at least to the 1950s. In *Breithaupt v. Abram,* 352 U.S. 432, 435 & n. 2, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957), the Supreme Court was presented with the fact that Kansas had "by statute declared that any person who operates a motor vehicle ... shall be deemed to have given his consent to submit to a chemical test ... for the purpose of determining the alcoholic content of his blood." The Court described Kansas' implied consent law as a "sensible and civilized system protecting ... citizens not only from the hazards of the road due to drunken driving but also from some use of dubious lay testimony," and held that although a defendant "was unconscious when [his] blood was taken, ... the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right." *Id.* Accordingly, the Supreme Court acknowledged early on that implied consent can function as valid constitutional consent.[1]

Implied consent laws rely on the premise that "[d]riving is a privilege, not a right," and that it is therefore subject to regulation pursuant to the state's police powers. *See State v. Spillner,* 116 Hawai'i 351, 364, 173 P.3d 498, 511 (2007); *Illinois v. Batchelder,* 463 U.S. 1112, 1116–17, 103 S.Ct. 3513, 77 L.Ed.2d 1267 (1983). One such regulation is that any person who operates a vehicle upon a public road shall be deemed, as a matter of law, to have given consent to OVUII testing. *See* HRS § 291E–11 (2006).[2] That is, by choosing to utilize the state's highways, drivers voluntarily bring themselves under the regulation of the implied consent laws. *See State v. Hanson,* 97 Hawai'i 71, 75, 34 P.3d 1, 5 (2001) (stating that consent may be implied from an individual's conduct); *see also* Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 8.2(1) (3d ed. 1996) ("Often it is said that ... consent is 'implied' ... because of the person's conduct in engaging in a certain activity.").

Our legislature enacted an implied consent statute in 1967 as a principled "means of decreasing fatalities, injuries, damages and losses resulting from highway traffic accidents." *Rossell v. City & Cnty. of Honolulu,* 59 Haw. 173, 181, 579 P.2d 663, 669 (1978). Implied consent laws encourage drivers suspected of OVUII to provide breath, blood, or urine samples by imposing substantial administrative sanctions on those who refuse to submit to chemical testing. *See, e.g.,* HRS § 291E–41(c) (2004) (doubling the period of driver's license revocation for an individual who refuses a breath, blood, or urine test). *361 **1096 These administrative sanctions operate constitutionally, as the Supreme Court has explained: "Given ... that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no less legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice." *South Dakota v. Neville,* 459 U.S. 553, 563–64, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983). Although "the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make," that choice "is not an act that is coerced by the officer." *Id.*

The Supreme Court recently reaffirmed the constitutional validity of implied consent laws, and specifically acknowledged that these laws penalize refusal with significant administrative sanctions:

States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense.... Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.

*Missouri v. McNeely,* —— U.S. ——, 133 S.Ct. 1552, 1566, 185 L.Ed.2d 696 (2013) (Sotomayor, J., plurality opinion) (emphasis added). Thus, the Supreme Court has characterized chemical testing performed pursuant to implied consent statutes as a viable alternative to a nonconsensual blood draw.

Similarly, this court has recognized that the constitutional validity of Hawaii's implied consent regime "has long been established," *State v. Severino,* 56 Haw. 378, 380, 537 P.2d 1187, 1189 (1975), and this is in accord with the uniform view of our sister jurisdictions. *See, e.g., State v. Moore,* 354 Or. 493, 318 P.3d 1133, 1137 (2013) ("[A] police officer's accurate statement of the potential lawful adverse consequences resulting from a refusal ordinarily cannot be deemed to unlawfully coerce a defendant's consent to a search or seizure."); *State v. Padley,* 354 Wis.2d 545, 849 N.W.2d 867 (Wis.App.2014) ("[V]oluntary consent to a blood draw is not negated by the fact that consent was procured by informing a suspect that the alternative is a penalty for refusing to comply with the implied consent law.").

In sum, implied consent laws have a long history of constitutional validity that encompasses the significant administrative consequences that such laws impose on individuals who revoke consent. *See, e.g., Severino,* 56 Haw. at 380, 537 P.2d at 1189; *Breithaupt,* 352 U.S. at 435 & n. 2, 77 S.Ct. 408; *Moore,* 318 P.3d at 1137. Accordingly, appellate courts have uniformly held that a driver provides constitutionally effective consent by cooperating with chemical testing pursuant to the terms of a lawful implied consent regime.

B.

The key question in this case is whether the criminal sanctions that accompany the revocation of implied consent unconstitutionally coerce individuals to submit to OVUII testing. This question hinges on whether the constitution permits the legislature, in exchange for granting the privilege of operating a vehicle on the state's highways, to require that drivers condition their right to revoke implied consent on misdemeanor criminal sanctions. If so, a police officer's accurate statement of the potential lawful adverse consequences of a refusal could not be deemed inherently coercive. *See, e.g., Neville,* 459 U.S. at 563–64, 103 S.Ct. 916; *Moore,* 318 P.3d at 1137.

Prior to the Supreme Court's recent decision in *Missouri v. McNeely,* the constitutionality of criminal refusal sanctions appeared beyond dispute. In *Schmerber v. California,* 384 U.S. 757, 770–71, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the Supreme Court held that a warrantless blood draw taken from a non-consenting OVUII defendant did not violate his right against unreasonable *362 **1097 search and seizure. The Court explained:

The officer in the present case might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system.... [W]e conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.

*Id.* (internal citation and quotation marks omitted).

Following *Schmerber,* courts nationwide adhered to the view that no exigency beyond the natural evanescence of intoxicants in the blood stream—present in every OVUII case—would be required to establish an exception to the warrant requirement. Thus, in *Neville,* the Supreme Court explained that there was no constitutional right to refuse to submit to a blood test:

The simple blood-alcohol test is so safe, painless, and commonplace, *see* *Schmerber,* 384 U.S., at 771, 86 S.Ct., at 1836, that respondent concedes, as he must, that the state could legitimately compel the suspect, against his will, to accede to the test.
....
[Although] the right to silence underlying the Miranda warnings is one of constitutional dimension, ... [the] right to refuse [a] blood-alcohol test, by contrast, is simply a matter of grace bestowed by the [state] legislature.
459 U.S. at 563–64, 103 S.Ct. 916 (emphasis added). Other courts similarly ascribed to the view that the right to refuse was a matter of legislative grace that lacked a constitutional dimension. *See, e.g., People v. Sudduth,* 65 Cal.2d 543, 55 Cal.Rptr. 393, 421 P.2d 401, 403 (1966) (Traynor, C.J.) ("Suspects have no constitutional right to refuse a test designed to produce physical evidence in the form of a breath sample."). And this court, following the national trend, stated: "*Schmerber* permits the police to take a blood sample from a person lawfully arrested for driving while intoxicated despite his refusal to submit to the blood test." *Rossell,* 59 Haw. at 179, 579 P.2d at 667–68 (1978).
As a consequence of *Schmerber* and *Neville,* the Fourth Amendment appeared to accommodate criminal refusal sanctions under the theory that any chemical test taken cooperatively pursuant to the implied consent law would have also been constitutionally permissible as a forced test had the person refused to cooperate. For example, in *Burnett v. Municipality of Anchorage,* 806 F.2d 1447, 1450 (9th Cir.1986), the Ninth Circuit held that a breathalyzer test administered in accordance with Alaska's criminal implied consent regime "is an appropriate and reasonable search incident to arrest which appellants have no constitutional right to refuse." The court also rejected the argument "that by criminalizing refusal, the state has attached an unconstitutional condition to the privilege of using the state's highways ... because there is no Fourth Amendment right to refuse a breathalyzer examination." *Id.* This decision was in accord with other state appellate courts adjudicating Fourth Amendment challenges to criminal refusal schemes. *See, e.g., State v. Hoover,* 123 Ohio St.3d 418, 916 N.E.2d 1056, 1061–62 (2009) ("Asking a driver to comply with conduct he has no right to refuse and thereafter enhancing a later sentence upon conviction does not violate the constitution."); *cf. Quintana v. Mun. Court,* 192 Cal.App.3d 361, 237 Cal.Rptr. 397 (1987) (holding that although criminal refusal sanctions burden a fundamental right, such sanctions meet strict scrutiny).
Thus, prior to *McNeely,* implied consent tests obtained on pain of criminal sanction appeared to be absolutely justifiable as a subset of permissible *Schmerber* tests. Indeed, our legislature specifically considered this aspect of *Schmerber* when, in 2010, it criminalized refusal. *See* 2010 House Journal, at 838 (statement of Rep. Har) ("Essentially, because of this seminal case, this U.S. Supreme Court case, the power of police, they can forcibly extract a blood sample or any type of chemical sample from the defendant if they're suspected of DUI."). In other words, when the legislature adopted HRS § 291E–68, members were specifically aware *363 **1098 of the then-prevailing understanding of the Fourth Amendment that had been enunciated by this court, by the Supreme Court, and by notable jurists nationwide. *See, e.g., Rossell,* 59 Haw. at 179, 579 P.2d at 667–68; *Neville,* 459 U.S. at 563–64, 103 S.Ct. 916; *Sudduth,* 55 Cal.Rptr. 393, 421 P.2d at 403 (Traynor, C.J.).
The paradigm changed fundamentally in 2013, when the Supreme Court held that "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *McNeely,* 133 S.Ct. at 1568. Thus, when confronted with a "routine" OVUII case in which no "special

facts" beyond the natural dissipation of alcohol in the bloodstream were present, the Supreme Court affirmed the suppression of nonconsensual blood test evidence obtained without a warrant. *Id.* By endorsing the defendant's right to insist on a warrant, the Supreme Court repudiated the long-standing understanding of *Schmerber,* i.e. that a defendant's right to refuse a blood test lacked a constitutional dimension. *See, e.g., Rossell,* 59 Haw. at 179, 579 P.2d at 667–68; *Neville,* 459 U.S. at 563–64, 103 S.Ct. 916. As a result, implied consent regimes have been decoupled from *Schmerber,* and can no longer be justified solely on the ground that defendants lack a constitutional right to refuse to have blood taken or that the right to refuse is merely a matter of legislative grace.

Nonetheless, there are independent constitutional grounds that justify conditioning the privilege of driving on an agreement that the revocation of implied consent carries a misdemeanor criminal sanction.

C.

Hawai‘i is one of thirteen states to impose some form of criminal sanction on individuals who revoke their implied consent to OVUII testing.[3] With the exception of the Majority in this case, the uniform view of appellate courts is that implied consent regimes that impose criminal refusal sanctions do not violate the Fourth Amendment.

As previously explained, prior to *McNeely,* such laws appeared unassailable. *See, e.g., Rossell,* 59 Haw. at 179, 579 P.2d at 667–68; *Neville,* 459 U.S. at 563–64, 103 S.Ct. 916; *Burnett,* 806 F.2d at 1450; *Quintana,* 192 Cal.App.3d 361, 237 Cal.Rptr. 397; *Hoover,* 916 N.E.2d at 1061–62. After *McNeely,* this has remained the uniform view. For example, several appellate courts have held that imposing a criminal sanction on the right to refuse does not constitute an unconstitutional condition. *See, e.g., Beylund v. Levi,* 859 N.W.2d 403 (N.D.2015) (holding that a criminal refusal statute did not violate the Fourth Amendment under the doctrine of unconstitutional conditions); *State v. Chasingbear,* 2014 WL 3802616, at *3–8 (Minn.Ct.App. Aug.4, 2014); *State v. Janssen,* 2014 WL 6909682, at *12–13 (Kan.App. Dec. 5, 2014).

Similarly, several appellate courts have directly upheld the imposition of criminal refusal sanctions against defendants who revoked their implied consent. *See, e.g., State v. Bernard,* 859 N.W.2d 762, 764 (Minn.2015) ( "[Because] the breath test the police asked Bernard to take would have been constitutional as a search incident to a valid arrest, ... charging Bernard with criminal test refusal does not implicate a fundamental right."); *State v. Birchfield,* 858 N.W.2d 302 (N.D.2015) (affirming the defendant's conviction for criminal refusal against a Fourth Amendment challenge).

Finally, in circumstances like the present case, courts have uniformly held that cooperation *364 **1099 with a criminal implied consent regime yields real and voluntary consent that excuses officers from obtaining a warrant. *See State v. Smith,* 849 N.W.2d 599, 606 (N.D.2014) ("[A]n individual's consent is not coerced simply because a criminal penalty has been attached to refusing the test or that law enforcement advises the driver of that law."); *People v. Harris,* 225 Cal.App.4th Supp. 1, 170 Cal.Rptr.3d 729, 735 (Cal.App.Div.Super.Ct.2014) ("The fact that there are [criminal] penalties for refusal to cooperate with [OVUII] testing upon arrest does not render the consent illusory or coercive."), *aff'd,* 234 Cal.App.4th 671, 184 Cal.Rptr.3d 198 (2015); *Janssen,* 2014 WL 6909682, at *10 (rejecting defendant's argument that "the notification under the implied consent advisories that refusing testing could lead to criminal prosecution coerced his consent"); *State v. Nece,* 2014 WL 5313744, at *8 (Kan.App. Oct. 10, 2014) ("[T]he fact that Hornseth informed Nece about the potential for criminal prosecution of a test refusal under the implied consent advisories did not render Nece's consent involuntary."); *State v.*

*Brooks,* 838 N.W.2d 563, 570 (Minn.2013) ("[A] driver's decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test.").

Although some of these reported decisions rely on a view of *Schmerber* that *McNeely* repudiated—i.e. that the right to refuse lacks a constitutional dimension—because criminal refusal sanctions are not unconstitutional conditions, these decisions are fundamentally correct. *See Quintana,* 192 Cal.App.3d 361, 237 Cal.Rptr. 397 (holding that although criminal refusal sanctions burden a fundamental right, such sanctions meet strict scrutiny).[4]

III.

The fundamental question is whether the Hawai'i legislature had the constitutional authority to criminalize the withdrawal of implied consent, which, by comparison, has been upheld in jurisdictions like California, Minnesota, and North Dakota, among many others. *See, e.g., Harris,* 170 Cal.Rptr.3d at 735; *Birchfield,* 858 N.W.2d 302; *Bernard,* 859 N.W.2d 762. If so, the implied consent form accurately advised Won of the potential adverse consequences of refusal, and his cooperation with lawful implied consent procedures was not unlawfully coerced. This question is governed by the test for unconstitutional conditions articulated in *Nakamoto v. Fasi,* 64 Haw. 17, 22, 635 P.2d 946, 951 (1981).

A.

In *Nakamoto,* this court addressed "the critical question of whether the City [of Honolulu could] require submission to a search as a condition of entry into the Neal Blaisdell Center." As the court explained:

The City is free to adopt and enforce reasonable rules restricting the time and manner of use of its premises, for members of the public do not have the absolute and unfettered right to enter or to make use of a City-owned facility. But once having extended ... an invitation to the public to use its arena upon paying the price of admission, it could not further condition the exercise of this privilege upon compliance with an unconstitutional requirement.

*Id.* Accordingly, the court turned to the question of whether a mandatory search condition designed to mitigate the risk posed by contraband containers of alcohol (i.e. bottles and cans) was unconstitutional.

To adjudicate this question, the court articulated a heightened standard of constitutional scrutiny: "In the absence of a compelling circumstance, a citizen [may not be] required to relinquish his [or her] constitutional right to be free from unreasonable searches and seizures, in order to be allowed to exercise a privilege." *Id.* at 22–23, 635 P.2d at 952. *365 **1100 The court explained that "necessity in terms of possible harm to the public ... must be weighed against the Fourth Amendment interest of the individual," and determined that "[o]nly where the public interest clearly outweighs the privacy interest of the individual may he be required to surrender his Fourth Amendment protection." *Id.* at 23, 635 P.2d at 952 (emphasis added). The court also cautioned that "[t]he degree to which a citizen may be required to relinquish a constitutional right, in the interests of public safety, must be commensurate with the extent and nature of the threatened harm," and should "be limited to the very minimum necessary to accomplish the governmental objective." *Id.* at 24–25, 635 P.2d at 953.

Applying these standards, the court held that the mandatory search condition at issue was unconstitutional for two reasons. First, the court was unable to conclude that the asserted public safety interest—the risk posed by "a can or bottle which might be thrown with resulting injuries,"—clearly outweighed individual privacy interests: "[T]here has been no showing that

the threat to the public safety at rock concerts has been so pervasive and of such magnitude as to justify" the mandatory search condition. *Id.* at 23, 635 P.2d at 952.

The court distinguished the challenged search from the lawful imposition of mandatory searches at airports and courthouses, stating: "[I]t cannot be seriously argued that the threat to public safety in the present case is as grave as those which justified suspending the warrant requirement in airport and courthouse searches." *Id.* at 24–25, 635 P.2d at 953. In those circumstances, the court explained, the public interest would clearly outweigh individual privacy interests:

Airport and courtroom searches have received judicial sanction essentially because of the magnitude and pervasiveness of the danger to the public safety. The overriding concern in these areas has been the threat of death or serious bodily injury to members of the public posed by the introduction of inherently lethal weapons or bombs. Constitutional provisions, obviously, were never intended to restrict government from adopting reasonable measures to protect its citizenry.

....

"The courts have relaxed the strictures of the Fourth Amendment in light of the unprecedented violence experienced in these two public areas."

*Id.* (quoting *Collier v. Miller,* 414 F.Supp. 1357, 1362 (S.D.Tex.1976) (emphases added)). Thus, the court concluded that a mandatory search condition would be acceptable if the threat of death or serious bodily injury to members of the public was implicated and the terms of the search were appropriate. *Id.*

Turning to its second rationale, the court concluded that the mandatory search condition was not sufficiently tailored to limit the imposition on individual privacy. For example, the search at issue lacked "articulable facts to support a conclusion that the person searched may be in possession of [a] prohibited item." *Id.* at 23, 635 P.2d at 952. And in the absence of "clear guidelines ... too much was left to the discretion of the security guards." *Id.* Thus, the program was "fatally flawed by the great potential for arbitrary and random enforcement." *Id.* However, the court emphasized that minimally intrusive searches like "a brief stop and a cursory examination," or the use of "magnetometers" at airports help to "minimize[ ] citizen inconvenience, resentment and embarrassment," and thus are more likely to withstand constitutional scrutiny. *Id.* at 24–25, 635 P.2d at 953.

B.

Applying the standards enunciated in *Nakamoto* to this case, I conclude that the Hawai'i legislature did not exceed its constitutional authority when it conditioned the privilege of driving on cooperation with an implied consent regime that imposes criminal refusal sanctions.

1.

The first question is whether the state's interest in highway safety is "compelling," that is, whether it "clearly outweighs the privacy interest of the individual." *Nakamoto, *366 **1101* 64 Haw. at 23, 635 P.2d at 952. I would conclude that it does.

"The carnage caused by drunk drivers is well documented," *Neville,* 459 U.S. at 558, 103 S.Ct. 916, and, in fact, "exceeds the death toll of all our wars," *Perez v. Campbell,* 402 U.S. 637, 657, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971) (Blackmun, J., concurring). Given the magnitude and pervasiveness of the danger to the public, the Supreme Court has repeatedly recognized that states have a "compelling interest in highway safety." *Mackey v. Montrym,* 443 U.S. 1, 19, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979); *Dixon v. Love,* 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977). This interest is particularly acute in Hawai'i, where the annual percentage of traffic fatalities caused by drunk driving is among the highest in the nation.[5] In 2012 alone, 47 individuals were killed by drunk drivers in this state, and in 2013, 33 more were killed.

although "some progress has been made, drunk driving continues to exact a terrible toll on our society." *McNeely,* 133 S.Ct. at 1565.
Relatedly, in criminalizing the refusal to submit to breath or blood alcohol testing, the Hawai'i legislature noted, "[w]hile gains have been made in reducing both driving under the influence arrests and the total number of alcohol-related fatalities, today's offender is more likely to have a highly elevated alcohol concentration and, as a whole, Hawaii's rate of alcohol-related fatalities remains unacceptably high." Conf. Com. Rep. No. 88–10, in 2010 Senate Journal, at 751. In subsequently amending the criminalization law, the legislature stated,
[o]ver the past several years, Hawai'i has had a high incidence of alcohol-related traffic fatalities. While enforcement of existing laws governing the operation of a vehicle under the influence of an intoxicant has had an impact on alcohol-related traffic fatalities, the Legislature determined that more needed to be done to substantially reduce the number of fatalities.

Conf. Com. Rep. No. 56–12, in 2012 House Journal, at 1627. The legislature also noted there was an average of 5,500 arrests for OVUII in Hawai'i each year. Conf. Com. Rep. No. 56–12, in 2012 House Journal, at 1627.
Two leading indicators correlate with drunk-driving fatalities, (1) extreme OVUII and (2) recidivism. Extreme OVUII is typically defined as operating a vehicle with a BAC of 0.15 or higher, and is present in approximately sixty percent of fatal drunk-driving accidents.[7] With respect to recidivism, "research shows that drivers involved in fatal accidents with blood alcohol levels above the ... legal limit are eight times more likely to have had a prior conviction for impaired driving."[8] And there is a demonstrable link between extreme OVUII and recidivism.[9] Compounding these issues is the problem of breath test refusal, which occurs in approximately 10% of cases in Hawai'i,[10] and the fact that "repeat offenders refuse the test more frequently than first-time offenders."[11] *367 **1102 Because "the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test," *Neville,* 459 U.S. at 564, 103 S.Ct. 916, it is no surprise that refusals "increase[ ] the likelihood of a plea bargain, nolle, or reduced criminal penalty."[12] As a result, the State is unable to impose the kind of swift and certain sanctions that are critical to protect the public by discouraging recidivism. The threat of "administrative penalties [has simply] not [proven] severe enough to deter refusals by repeat offenders."[13] When the legislature included the addition of criminal penalties for refusal, it noted that, "[i]n 2006, Hawaii's alcohol-related traffic fatality rate of 52 percent was the highest in the nation. Sadly, this trend appears to be continuing despite efforts to curb this type of behavior since, in 2008, 43 percent of drivers involved in traffic fatalities tested positive for alcohol."[14] Accordingly, the legislature was justified in its passage of criminal refusal sanctions insofar as those sanctions further a compelling public safety interest by targeting the most deadly offenders.
In sum, the threat to public safety caused by drunk driving and the related problem of breath test refusal are "so pervasive and of such magnitude" that "the public interest clearly outweighs the privacy interest of the individual." *Nakamoto,* 64 Haw. at 23, 635 P.2d at 952. Indeed, the "carnage" caused by drunk driving greatly exceeds the "unprecedented violence" at airports and courthouses that this court has already described as sufficient to justify a mandatory warrantless search procedure. *Id.; Perez,* 402 U.S. at 657, 91 S.Ct. 1704 (Blackmun, J., concurring) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars.").
2.
The second question is whether the provisions of Hawaii's implied consent regime are "commensurate with the extent and nature of the threatened harm." *Nakamoto,* 64 Haw. at 25,

635 P.2d at 953. The presence of several procedural safeguards indicates that the intrusion on privacy occasioned by the criminal refusal scheme is "limited to the very minimum necessary to accomplish the governmental objective." *Id.* at 24, 635 P.2d at 953.

First, unlike the search in *Nakamoto* that lacked even articulable suspicion, here both probable cause and a lawful arrest are required before a law enforcement officer may initiate implied consent procedures. *See* HRS § 291E–11(b) (Supp.2006). In addition, once implied consent procedures are initiated, officers are required to follow an extensive set of guidelines that mitigate the potential for "arbitrary and random enforcement." *Nakamoto,* 64 Haw. at 24, 635 P.2d at 952. Thus, officer discretion has been almost completely removed by the terms of Hawaii's implied consent law.

Second, the implied consent statutes offer arrestees the choice between three minimally intrusive and medically standardized procedures, thus limiting "citizen inconvenience, resentment, and embarrassment." *Id.* at 25, 635 P.2d at 953. *Neville* stated that a "simple blood-alcohol test is so safe, painless and commonplace," that it is "clearly legitimate." 459 U.S. at 563, 459 U.S. 553; *see also Schmerber,* 384 U.S. at 771, 86 S.Ct. 1826 ("[T]he quantity of blood extracted is minimal, and ... for most people the procedure involves virtually no risk, trauma, or pain."). Urine tests are even less intrusive than blood tests because they do not require venipuncture. Least intrusive is the breath test. In any event, the suspect is given a choice between three well-accepted and minimally intrusive tests, and thus, the intrusion on privacy caused by the testing itself is very limited.

Third, the state has a compelling interest in avoiding violent encounters between police officers and its citizens. Although the state may undoubtedly compel an arrestee against his or her will to submit to a blood draw if it *368 **1103 obtains a warrant, Hawaii's implied consent regime removes that possibility by requiring officers to honor refusal. HRS § 291E–15 (Supp.2010) (mandating that if an arrestee refuses a test for OVUII, "none shall be given"). However, the right to refuse is conditioned on a penalty, so as " 'to equip [law enforcement] officers with an instrument of enforcement not involving physical compulsion.' " *Rossell,* 59 Haw. at 182, 579 P.2d at 669 (citation omitted). In other words, the penalty provisions of Hawaii's implied consent regime are tailored to reduce the imposition on individual autonomy by avoiding "the violence which would often attend forcible tests upon recalcitrant inebriates." *Id.*

Fourth, arrestees are offered a real choice to refuse to submit to testing, albeit a conditional one. *See* HRS § 291E–15 ("If a person under arrest refuses to submit to a breath, blood, or urine test, none shall be given."). That officers are statutorily required to honor a defendant's refusal gives "some intimation that [the defendant's] objection would be meaningful [and] that the search is subject to his [or her] consent." *Nakamoto,* 64 Haw. at 21, 635 P.2d at 951.

Fifth, criminal refusal sanctions are commensurate with the extent of the threat to public safety, because the threat of "administrative penalties [have] not [proven] severe enough to deter refusals by repeat offenders."[15] In other words, a less intrusive option has proven ineffective in deterring the most dangerous offenders.

Finally, the intrusiveness on privacy is minimized by the fact that OVUII arrestees are in custody, and thus, have a diminished expectation of privacy. *See, e.g., Maryland v. King,* —— U.S. ——, 133 S.Ct. 1958, 1978, 186 L.Ed.2d 1 (2013) ("The expectations of privacy of an individual taken into police custody necessarily are of a diminished scope. A search of the detainee's person ... may involve a relatively extensive exploration, including requiring at least some detainees to lift their genitals or cough in a squatting position." (internal quotation marks and citations omitted)).

In sum, the procedures of Hawaii's implied consent regime are "commensurate with the extent and nature of the threatened harm," and are sufficiently tailored to ensure that any intrusion on privacy is "limited to the very minimum necessary." *Nakamoto,* 64 Haw. at 24–25, 635 P.2d at 953. In addition, the state's interest in protecting the public from the pervasive threat of death or serious bodily injury clearly outweighs the intrusion on individual privacy. *Id.* Accordingly, the legislature constitutionally conditioned the right to revoke implied consent on misdemeanor criminal sanctions.

Because Won was accurately advised of the lawful adverse consequences of refusal, his consent to a breath test according to implied consent procedures was freely and voluntarily given. *See Moore,* 318 P.3d at 1137 ("[A] police officer's accurate statement of the potential lawful adverse consequences resulting from a refusal ordinarily cannot be deemed to unlawfully coerce a defendant's consent to a search or seizure."); *Smith,* 849 N.W.2d at 606 ("[A]n individual's consent is not coerced simply because a criminal penalty has been attached to refusing the test or that law enforcement advises the driver of that law."); *Harris,* 170 Cal.Rptr.3d at 735 ("The fact that there are [criminal] penalties for refusal to cooperate with [OVUII] testing upon arrest does not render the consent illusory or coercive.").

Conversely, the Majority did not conduct a constitutional conditions analysis to evaluate whether HRS § 291E–68 is lawful when applied in the manner that the legislature intended. Thus, "the legislature is to be pronounced to have transcended its powers ... in a doubtful case," *Fletcher v. Peck,* 10 U.S. at 128 (Marshall, C.J.), without full consideration of every argument that might be raised in favor of the statute's constitutional operation.[16]

*369 **1104 3.

Based on my determination that Won's breath test was obtained in a constitutional manner, I would resolve the remainder of his points on appeal as follows. First, it is well settled that "[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.*" *Neville,* 459 U.S. at 564 n. 15, 103 S.Ct. 916. Thus, Won's Fifth Amendment argument lacks merit.

Second, under my view of this case, Won was not misled about the possible sanctions accompanying refusal. Rather, he was accurately informed of the sanctions as follows: "[I]f you refuse to submit to a breath, blood, or urine test, you shall be subject to up to thirty days imprisonment and/or fine up to $1,000 or the sanctions of 291E–65, if applicable." (Emphases added). Thus, Won was not misled into believing that these sanctions would be immediately or automatically imposed in violation of his due process rights.

Finally, although our prior decisions have held that "a motorist is not entitled to consult with counsel before deciding to submit to the chemical test," *see State v. Severino,* 56 Haw. 378, 380–81, 537 P.2d 1187, 1189 (1975), if Won's statutory right to counsel was indeed violated, he failed to demonstrate an adequate nexus between the alleged violation and his breath test evidence that would require exclusion of the test results. *See State v. Edwards,* 96 Hawai'i 224, 237–39, 30 P.3d 238, 251–53 (2001) (requiring that "the defendant ... demonstrate, by a preponderance of the evidence, a connection between the statutory violation and the evidence to be suppressed."). This is particularly true where, as here, police officers relied in good faith on this court's prior precedent.[17]

IV.

The Majority does not hold that HRS § 291E–68 is unconstitutional on its face. Rather, it has held that HRS § 291E–68 operates unconstitutionally in almost every situation in which it might apply:

the position in which Won was placed, because of the criminal sanction for refusal, the forced selection between constitutional rights, and the potential significant punishment the sanction entailed, was inherently coercive.
....
For this reason, Won's election on the Implied Consent Form to submit to a BAC test is invalid as a waiver of his right not to be searched.
Majority at ——— – ———, 372 P.3d at 1085 (internal citations omitted). Thus, under the Majority opinion, consent to OVUII testing is involuntary *per se* if the defendant has been made aware of the criminal refusal sanctions provided by HRS § 291E–68. In other words, the Majority has declared that HRS § 291E–68 is unconstitutional when applied in the manner intended by the legislature and in the overwhelming majority of cases. Although the Majority has not declared the statute completely invalid, it has done so in effect.[18]
**1105 *370 **CONCLUSION**
For the foregoing reasons, I would affirm Won's conviction and sentence.[19]

# All Citations

137 Hawai'i 330, 372 P.3d 1065

# Footnotes

1
The relevant portions of the "Implied consent of operator of vehicle to submit to testing to determine alcohol concentration and drug content" section provides as follows:
(a) Any person who operates a vehicle upon a public way, street, road, or highway or on or in the waters of the State shall be deemed to have given consent, subject to this part, to a test or tests approved by the director of health of the person's breath, blood, or urine for the purpose of determining alcohol concentration or drug content of the person's breath, blood, or urine, as applicable.
(b) The test or tests shall be administered at the request of a law enforcement officer having probable cause to believe the person operating a vehicle ... is under the influence of an intoxicant ... only after:
(1) A lawful arrest; and
(2) The person has been informed by a law enforcement officer that the person may refuse to submit to testing under this chapter.
Hawai'i Revised Statutes § 291E–11 (Supp.2006).
2
HRS § 291E–15 provides:
If a person under arrest refuses to submit to a breath, blood, or urine test, none shall be given, except as provided in section 291E–21. Upon the law enforcement officer's determination that the person under arrest has refused to submit to a breath, blood, or urine test, if applicable, then a law enforcement officer shall:
(1) Inform the person under arrest of the sanctions under section 291E–41, 291E–65, or 291E–68; and

(2) Ask the person if the person still refuses to submit to a breath, blood, or urine test, thereby subjecting the person to the procedures and sanctions under part III or section 291E–65, as applicable;
provided that if the law enforcement officer fails to comply with paragraphs (1) and (2), the person shall not be subject to the refusal sanctions under part III or IV.
(Emphasis added).
3
HRS § 291E–65 provides, in relevant part:
If a person under arrest for operating a vehicle after consuming a measurable amount of alcohol, pursuant to section 291E–64, refuses to submit to a breath or blood test, none shall be given, except as provided in section 291E–21....
(Emphasis added).
4
HRS § 291E–21(a) provides:
Nothing in this part shall be construed to prevent a law enforcement officer from obtaining a sample of breath, blood, or urine, from the operator of any vehicle involved in a collision resulting in injury to or the death of any person, as evidence that the operator was under the influence of an intoxicant.
5
The two areas of sanctions provided for refusal to submit to a BAC test are separate from the criminal prosecution prescribed for the OVUII offense.
6
The criminal sanction became effective on January 1, 2011. 2010 Haw. Sess. Laws Act 166, § 26 at 415.
7
"A crime is a petty misdemeanor if it is so designated in this Code or in a statute other than this Code enacted subsequent thereto, or if it is defined by a statute other than this Code that provides that persons convicted thereof may be sentenced to imprisonment for a term not to exceed thirty days." HRS § 701–107(4) (Supp.2005).
8
HRS § 706–640(1)(e).
9
HRS § 706–605(1)(d), (6).
10
HRS § 291E–61(a)(3) (Supp.2010) provides:
(a) A person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle:
...
(3) With .08 or more grams of alcohol per two hundred ten liters of breath....
11
The police report apparently refers to the Implied Consent Form as the "ADLRO form," as the report notes, "I read Won the ADRLO form. He elected the breath test." The Implied Consent Form is identified as "HPD–396K (R–01/11)" at the bottom left of the form.
12

HRS § 291E–65 applies to a person under the age of twenty-one at the time of the offense. HRS Chapter 291E, Part III addresses the administrative revocation process which provides for suspension of the person's license and privilege to operate a vehicle.

13

Handwritten notes under the right to counsel section state, "said he does not agree with this one, and was not going to initial."

14

The original complaint charged Won with violation of HRS "§ 291E–61(a)(1) and or (a)(3)." Won filed a motion to dismiss the original complaint for failure to allege the requisite mens rea. Subsequent to Won's motion but prior to the district court's ruling on it, this court issued *State v. Nesmith,* 127 Hawai'i 48, 276 P.3d 617 (2012), which held that mens rea must be included in a complaint alleging violation of HRS § 291E–61(a)(1) but that it need not be alleged in a charge under HRS § 291E–61(a)(3).

The district court denied the motion to dismiss and granted the State's motion to amend the complaint. The amended complaint included the requisite mens rea for the HRS § 291E–61(a)(1) charge. At trial, Won orally moved the court to reconsider its decision denying the dismissal of the HRS § 291E–61(a)(1) charge. The State did not object to the dismissal of the HRS § 291E–61(a)(1) charge, and the court granted the motion.

15

In relevant part, the statutory right to an attorney provides:

It shall be unlawful in any case of arrest for examination:

(1) To deny to the person so arrested the right of seeing ... counsel ...;

(2) To unreasonably refuse or fail to make a reasonable effort ... to send a ... message ... to the counsel ...;

(3) To deny to counsel ... the right to see or otherwise communicate with the arrested person at the place of the arrested person's detention ....

HRS § 803–9 (1993).

16

The Honorable David W. Lo presided.

17

The judgment of conviction indicates that Won violated "HRS [§] 291E–61(a)(1)(3)(b)(1)." However, as noted *supra,* the (a)(1) portion of the charge was dismissed, and the State proceeded to trial only on the (a)(3) portion of the charge. An amended judgment of conviction was subsequently filed reflecting "HRS [§] 291E–61(a)(3)(b)(1)" presumably pursuant to a directive included in the Judgment on Appeal issued by the Intermediate Court of Appeals.

18

*See infra* note 37.

19

Additionally, the ICA held as follows: (a) *McNeely* did not render HRS § 291E–68 unconstitutional, *Won,* 134 Hawai'i at 80, 332 P.3d at 682; (b) the administration of the Implied Consent Form was not an interrogation and, thus, there was no requirement to advise Won of his constitutional rights, *id.* at 73, 332 P.3d at 675; (c) the administration of the Implied Consent Form does not confer a right to an attorney under HRS § 803–9, *id.* at 74, 332 P.3d at 676; and (d) the Implied Consent Form was not inaccurate or misleading, *id.* at 75–76, 332 P.3d at 677–78, thus rejecting Won's arguments.

20

Won's Application was supported by two briefs of amici curiae. The National College for DUI Defense, Inc. argued that the criminal sanctions of HRS § 291E–68 were an unconstitutional infringement on the Fourth Amendment, and assuming the criminal sanctions were constitutional, those sanctions entitled Won to be advised of his Fifth and Sixth Amendment rights before consenting. The Hawai‘i Association of Criminal Defense Lawyers argued that the administration of the Implied Consent Form implicated Won's right to counsel under both article I, section 5 of the Hawai‘i Constitution and HRS § 803–9, and the violation of Won's right to counsel required suppression of the results of the breath test.

21

The State's position was also supported by amicus curiae briefs from the Attorney General of the State of Hawai‘i (AG). The AG argued that the breath test does not implicate a requirement to inform arrestees of their constitutional rights. The AG further argued that the holding of *McNeely* applied only to blood tests and that Won's breath test was excepted from the requirements of a warrant by the exigency, search incident to arrest, and special law enforcement needs exceptions.

22

The Supreme Court eliminated any implication in its prior case law that warrantless BAC testing is permissible without regard to the circumstances. *McNeely,* 133 S.Ct. at 1560. *McNeely* revisited *Schmerber* to make it clear that the warrantless BAC search was permissible under the exigency exception to the warrant requirement.

Thus, our analysis in *Schmerber* fits comfortably within [Supreme Court] case law applying the exigent circumstances exception. In finding the warrantless blood test reasonable in *Schmerber,* we considered all of the facts and circumstances of the particular case and carefully based our holding on those specific facts.

*McNeely,* 133 S.Ct. at 1560. Thus, *McNeely* overruled any reading of *Schmerber* that may have indicated that an individual may be forced to submit to a warrantless BAC test when no exception to the warrant requirement is present.

Further, although the BAC test in *McNeely* was a blood test, *McNeely,* 133 S.Ct. at 1558, the Supreme Court has applied *McNeely* to a case involving other forms of BAC testing. *See Brooks v. Minnesota,* ––U.S. ––––, 133 S.Ct. 1996, –– L.Ed.2d –––– (2013) (reversing case regarding blood and urine BAC tests “for further consideration in light of [*McNeely* ]”).

23

No exception to the warrant requirement based on exigency can be gleaned from the facts and circumstances of this case. *See State v. Clark,* 65 Haw. 488, 494, 654 P.2d 355, 360 (1982) (generally defining an exigency as “when the demands of the occasion reasonably call for an immediate police response”). Nor has the State argued that an exigency is present. Further, an exigency is not sufficient to validate a warrantless search in this case because a legislature may not establish a per se exigency by statute. *McNeely,* 133 S.Ct. at 1560.

The AG has argued that the special law enforcement needs exception applies. However, where the purpose of the search is to generate evidence for law enforcement purposes, it does not fall within that exception as defined by the Supreme Court. *See City of Indianapolis v. Edmond,* 531 U.S. 32, 41–42, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) (where “the primary purpose of the ... program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment”); *Ferguson v. City of Charleston,* 532 U.S. 67, 84, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001) (“Such an approach is inconsistent with the Fourth Amendment.”); *see also* William E. Ringle, *Searches and Seizures, Arrests and Confessions* § 10:13 (2d. ed.) (“Under the special needs doctrine, exceptions to the warrant requirement are permitted .... when police are

engaged in activities unrelated to crime-solving."); Wayne R. LaFave, 3 *Search & Seizure: A Treatise on the Fourth Amendment* § 5.4(c) (5th ed.).

It is manifest that the purpose of the BAC test administered to Won was to gather evidence for criminal prosecution and, in fact, was so used. The State has not asserted that the purpose of the BAC test was for a purpose other than to gather evidence for a criminal prosecution.

This court has not been called upon to determine whether the Hawai‘i Constitution recognizes a "special law enforcement needs" exception to the warrant requirement. In light of the fact that the search in this case was for the purpose of collecting evidence for a criminal prosecution, we conclude that under the Supreme Court's definition, the special needs exception is not applicable to the circumstances of this case, and thus it is unnecessary to address whether a "special law enforcement needs" exception to the warrant requirement is in accordance with the Hawai‘i Constitution.

The search incident to arrest exception is also inapplicable as it is "limited in scope to a search of the arrestee's person and the area within his immediate control from which he could obtain a weapon or destroy evidence." *State v. Paahana,* 66 Haw. 499, 506, 666 P.2d 592, 597 (1983) (internal quotation mark omitted). "[T]he exception for searches incident to a lawful arrest 'implies the exigent circumstances of imminent danger to the arresting officer or others and of imminent concealment or destruction of evidence or the fruits of the crime from the circumstances of a lawful arrest.' " *Id.* (quoting *State v. Clark,* 65 Haw. 488, 496, 654 P.2d 355, 361 (1982)). As noted, *McNeely* held that the natural metabolization of alcohol does not qualify as a per se exigency, and the record indicates no other exigency that necessitated the breath test.

24

*Accord State v. Quino,* 74 Haw. 161, 174, 840 P.2d 358, 364 (1992); *Nakamoto,* 64 Haw. at 21, 635 P.2d at 951; *State v. Patterson,* 58 Haw. 462, 470, 571 P.2d 745, 750 (1977); *State v. Price,* 55 Haw. 442, 443, 521 P.2d 376, 377 (1974); *see also Trainor,* 83 Hawai‘i at 255, 925 P.2d at 823; *Ganal,* 81 Hawai‘i at 370, 917 P.2d at 382; *Bonnell,* 75 Haw. at 147–48, 856 P.2d at 1277; *State v. Russo,* 67 Haw. 126, 137, 681 P.2d 553, 562 (1984); *State v. Merjil,* 65 Haw. 601, 605, 655 P.2d 864, 868 (1982); *Kaluna,* 55 Haw. at 371 n. 7, 520 P.2d at 60 n. 7. The right to refuse consent to a search is, of course, superseded by a warrant or an exception to the warrant requirement.

25

*Accord Trainor,* 83 Hawai‘i at 261, 925 P.2d at 829; *Ganal,* 81 Hawai‘i at 368, 917 P.2d at 380; *Patterson,* 58 Haw. at 468, 571 P.2d at 749.

26

A warrantless BAC test may be required by police pursuant to HRS § 291E–21 from the operator of any vehicle involved in a collision resulting in injury to or the death of any person. Such a test does not offend the Hawai‘i Constitution "so long as (1) the police have probable cause to believe that the person has committed a DUI offense and that the blood sample will evidence that offense, (2) exigent circumstances are present, and (3) the sample is obtained in a reasonable manner." *State v. Entrekin,* 98 Hawai‘i 221, 232, 47 P.3d 336, 347 (2002). In *Entrekin,* "exigent circumstances were clearly present." *Id.* at 233, 47 P.3d at 348.

27

*See also State v. Garcia,* 96 Hawai‘i 200, 204, 29 P.3d 919, 923 (2001) (reaffirming *Wilson* and restating that a police officer cannot "give a driver arbitrary, false, or misleading information regarding a driver's rights under the implied consent law and still compel the admission of the results in the criminal context").

28
The language of HRS § 291E–15 requires police to inform a driver arrested for OVUII and who refuses to submit to a BAC test of the "sanctions under section 291E–41, 291E–65, or 291E–68" as a necessary condition for the sanction of the specified statute to be imposed. *See* HRS § 291E–15(1) (utilizing the disjunctive connector "or" in enumerating the penalties that a police officer must inform a driver); HRS § 291E–15(2) (a person's refusal of a BAC test will subject that "person to the procedures and sanctions under part III *or* section 291E–65, as applicable" (emphases added)). Further, the legislative history of HRS § 291E–15 indicates that police are obliged to inform an arrestee only of the sanctions that may be sought to be imposed. *See* H. Stand. Comm. Rep. 762–06, in 2006 House Journal, at 1391–92 (noting that the legislative intent for the notice requirement is to "inform an arrested driver of sanctions that may be imposed for refusing to take" a BAC test (emphasis added)). For instance, HRS § 291E–65 is only applicable to a person under twenty-one years of age; it is accordingly unnecessary to inform a person over twenty-one years of age of the sanctions provided by that section.
29
"It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions." *Bailey v. Alabama,* 219 U.S. 219, 239, 31 S.Ct. 145, 55 L.Ed. 191 (1911) (holding that under the Thirteenth Amendment, a state could not criminalize the failure to perform under a contract) (quoted approvingly in *Speiser v. Randall,* 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958) (holding that a tax exemption could not be based on a state's infringement of a veteran's First Amendment rights)). Here, if a person could not withdraw one's implied consent, the prohibition against warrantless searches would be transgressed by the creation of a statutory conclusive presumption.
30
The ICA characterized HRS § 291E–68 as a "threat" designed to increase submission: "the Hawaii Legislature has chosen to use the threat of ... criminal sanctions to encourage arrestees to submit to testing." *Won,* 134 Hawai'i at 65, 332 P.3d at 667. Notably, the legislature was cognizant of the fact that "to criminalize refusal to submit to a breath, blood, or urine test infringes upon important personal rights." H. Stand. Comm. Rep. No. 907–10, in 2010 House Journal, at 1343; *see also* 2010 House Journal, at 838 (statement of Rep. Karamatsu) (mentioning that criminal refusal sanctions "make criminals of people who exercise their right to refuse" and could "result[ ] in situations where the arrestee is convicted of refusal when the test result would have indicated that the arrestee was not guilty of [OVUII]"). It is noted that, according to the dissent, a significant majority of states have not adopted a statute providing for criminal sanctions for OVUII arrestees who refuse BAC testing. Dissent at —— n. 3, 372 P.3d at 1098 n. 3.
31
In concluding that the consent given in *Nakamoto* was involuntary and an "inherent product of coercion," this court emphasized the fact that it was "given in the belief that [she] would forfeit her right to attend the concert[ ] if she refused to be searched." *Nakamoto,* 64 Haw. at 22, 635 P.2d at 951 (citing *Gaioni v. Folmar,* 460 F.Supp. 10 (M.D.Ala.1978); *Wheaton v. Hagan,* 435 F.Supp. 1134 (M.D.N.C.1977)). Thus, the court held that Nakamoto's consent did not "validate an otherwise improper intrusion." *Id.*

If, in *Nakamoto,* this court found as inherently coercive the threat of being barred from entering a government-owned arena if a concertgoer refuses a warrantless search, the threat of being subjected to criminal sanctions if a suspected OVUII offender refuses a BAC test produces a significantly more severe level of coercion.

32

Section 5 of article I provides as follows:

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

Haw. Const. art. I, § 5. Article I, section 7 provides as follows:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

Haw. Const. art. I, § 7.

33

Similarly, a state "cannot abridge [the] constitutional rule [that police may not arrest a person except on probable cause] by making it a crime" to refuse to answer police requests for identification, "any more than it could abridge the protections of the Fifth and Sixth Amendments by making it a crime to refuse to answer police questions once a suspect has been taken into custody." *Kolender v. Lawson,* 461 U.S. 352, 366–67, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (Brennan, J., concurring).

34

It bears repeating here that this opinion does not concern the civil administrative penalties attendant to a driver's refusal of BAC testing. *See* HRS § 291E–41(d) (Supp.2010); *see generally* HRS Chapter 291E, Part III. Those types of sanctions are not affected in any way by our decision. Because we conclude only that the threat of being subjected to criminal sanctions inherently coerces a suspected OVUII offender into giving consent, if a police officer does not inform the offender of the criminal sanctions because they were omitted from the notice given by the officer, *see* HRS § 291E–15; *supra* note 28, then proving OVUII through evidence of a defendant's blood alcohol content, *see* HRS § 291E–61(a)(3)–(4), will remain a viable option for purposes of prosecution. Further, in cases where BAC evidence is inadmissible because it was obtained in the absence of valid consent, the State is free to rely upon "other relevant evidence of intoxication in order to prosecute" an accused OVUII offender pursuant to "the criminal offense of [OVUII], e.g., the manner in which [the accused] was observed to have driven his vehicle, his conduct in performing the requisite alcohol tests, his appearance, demeanor, and other valid police observations of signs of intoxication." *State v. Wilson,* 92 Hawai'i 45, 54 n. 14, 987 P.2d 268, 277 n. 14 (1999); *see* HRS § 291E–61(a)(1)–(2) (OVUII can be proven by evidence that a person is operating a vehicle "[w]hile under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty" or "[w]hile under the influence of any drug that impairs the person's ability to operate the vehicle in a careful and prudent manner").

35

Our decision is consistent with this court's recognition of our constitution's protection in article I, section 7 against the impairment of voluntary consent by coercion. *See, e.g., Trainor,* 83 Hawai'i

at 263, 925 P.2d at 831; *Nakamoto,* 64 Haw. at 22, 635 P.2d at 951. Thus, the decisions of other jurisdictions that have not found the threat of imprisonment for failing to submit to a BAC test to be inherently coercive, *see, e.g., State v. Smith,* 849 N.W.2d 599 (N.D.2014); *State v. Brooks,* 838 N.W.2d 563 (Minn.2013); *Burnett v. Municipality of Anchorage,* 806 F.2d 1447 (9th Cir.1986), are at odds with the preservation of voluntary choice and respect for human dignity embodied by Hawai‘i law. *See, e.g., Kaluna,* 55 Haw. at 366, 520 P.2d at 57.

36

The dissent takes issue with this opinion for not considering the facial constitutional validity of the criminal refusal sanctions under the implied consent statutory scheme. Dissent at —— – —— –, 372 P.3d at 1104–05. However, Won agreed to take a breath test and, therefore, was not subjected to any criminal sanctions attendant to a refusal of a BAC test. Thus, we resolve this case on the question of whether Won acceded to the breath test voluntarily and without coercion in accordance with the requirements of consent embodied by article I, section 7 of the Hawai‘i Constitution. This is consistent with the longstanding canon counseling "courts [to] avoid reaching constitutional questions in advance of the necessity of deciding them." *Hawaii Gov't Employees Ass'n v. Lingle,* 124 Hawai‘i 197, 208, 239 P.3d 1, 12 (2010) (quoting *City & Cnty. of Honolulu v. Sherman,* 110 Hawai‘i 39, 56 n. 7, 129 P.3d 542, 559 n. 7 (2006)).

37

The ruling in *In Interest of Doe,* 77 Hawai‘i 435, 444, 887 P.2d 645, 654 (1994), relied upon the ICA for its "reasonableness" analysis, was specifically confined to the particular circumstances presented in that case.

We emphasize that the exception to the warrant requirement of article I, section 7 of the Hawai‘i Constitution, and the relaxation of the probable cause standard to one of reasonable suspicion that we prescribe in the present case, are strictly limited to the school context and the unique balance of interests present therein.

*Id.* (emphasis added).

38

The ICA opinion also implies that counsel would be of no benefit to a person determining whether to sign the HPD–396K Consent Form because "counsel could not have directly advised Won to refuse to submit to testing." *Won,* 134 Hawai‘i at 74, 332 P.3d at 676. Even under the ICA premise that there is no right to refuse consent to a BAC test, an important function of counsel is to explain to a client the choices that may be presented and ramifications that may flow from the election of one course of action as opposed to another. We thus reject any implication by the ICA Opinion of narrowing the role and importance of counsel.

39

This doctrine "limits the government's ability to exact waivers of rights as a condition of benefits, even when those benefits are fully discretionary." *United States v. Scott,* 450 F.3d 863, 866 (9th Cir.2006). It also ensures that constitutional rights are not eroded "by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.,* —— U.S. ——, 133 S.Ct. 2586, 2594, 186 L.Ed.2d 697 (2013).

Analysis under this doctrine consists of two parts. First, the court must identify the condition imposed by the government in exchange for the benefit. *Nakamoto,* 64 Haw. at 23, 635 P.2d at 952. Second, a balancing test must be conducted to determine whether the governmental interest in imposing the condition is so compelling as to clearly outweigh the burdens that the condition levies upon constitutional guarantees. *Id.* at 23–24, 635 P.2d at 952.

40

This court has utilized or at least mentioned this doctrine only in civil cases. *See* Nakamoto v. Fasi, 64 Haw. 17, 22, 635 P.2d 946, 951 (1981); Perry v. Planning Comm'n of the Cnty. of Haw., 62 Haw. 666, 682, 619 P.2d 95, 106 (1980); The King v. Lau Kiu, 7 Haw. 489, 492 (Haw. Kingdom 1888). At least one state appellate court has explicitly rejected a balancing approach in the context of a case similar to ours, reasoning that the fundamental inquiry is whether the implied consent statute creates an impermissible per se exception to the warrant requirement, not whether the legislature is authorized to enact such a statute. *See* Weems v. State, 434 S.W.3d 655, 665 (Tex.App.2014), *pet. granted* (Aug. 20, 2014).

Further, this doctrine was not used in any of the other state appellate cases where criminal refusal sanctions were found not to be inherently coercive. *See, e.g.,* People v. Harris, 234 Cal.App.4th 671, 184 Cal.Rptr.3d 198, 213 (2015) (applying the totality of the circumstances test to determine whether the consent exception to the warrant requirement validated the warrantless blood test), *review denied* (June 10, 2015); State v. Brooks, 838 N.W.2d 563, 569 (Minn.2013), *cert. denied,* —— U.S. ——, 134 S.Ct. 1799, 188 L.Ed.2d 759 (2014) (same); State v. Modlin, 291 Neb. 660, 867 N.W.2d 609, 619 (2015) (same); State v. Smith, 849 N.W.2d 599, 606 (N.D.2014) (same, but defendant was subjected to a breath test).

41

The elimination of constitutional rights in the criminal arena, through the application of the unconstitutional conditions doctrine that the dissent endorses, would facilitate convictions, the attendant consequences of which include incarceration, criminal fines, and the stigma of being branded a criminal. These consequences are significantly more serious than those exacted in the civil arena, where this doctrine was designed to operate in. *See* Zap v. United States, 328 U.S. 624, 628, 66 S.Ct. 1277, 90 L.Ed. 1477 (1946) (holding that Fourth and Fifth Amendment rights could yield as a condition of a contractor's agreement with the government); Yin v. California, 95 F.3d 864, 872 (9th Cir.1996) (holding that a state employee's union "contract may under appropriate circumstances diminish (if not extinguish) legitimate expectations of privacy"); Wyman v. James, 400 U.S. 309, 317–18, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971) (conditioning receipt of welfare benefits upon home visits found valid).

42

Implicit in the dissent's argument is that by criminalizing the right to refuse to submit to a breath or blood test, OVUII arrestees will be coerced into taking such a test, increasing the conviction rate of arrestees, and in turn decreasing OVUII-related casualties. *See* Dissent at —— – ——, 372 P.3d at 1100–01. The same outcome could reasonably be anticipated by eliminating *Miranda* rights or the right to counsel of OVUII defendants.

43

The dissent also seems to be using the unconstitutional conditions doctrine to conclude that actual consent procured from a suspected OVUII offender under HRS § 291E–11(b) is always valid if the requirements of the implied consent statute is adhered to, but this doctrine applies only when "a government seeks to achieve its desired result by obtaining bargained-for consent of the party whose conduct is to be restricted." Richard A. Epstein, Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 4, 7 (1988) (emphasis added). The bargained-for consent here is a motorist's implied consent to warrantless BAC testing under HRS § 291E–11(a) in exchange for the privilege of driving on public roads. Hence, the unconstitutional conditions doctrine is meant to determine the validity of implied consent under HRS § 291E–11(a). The doctrine is not calibrated to measure the validity of actual, non-

bargained-for consent required by HRS § 291E–11(b) because, as already explained, consent is subject to an inquiry into the totality of the circumstances to determine voluntariness.
At the very outset, therefore, the dissent's analysis is flawed as is it inconsistent with the unconstitutional conditions framework that it purportedly follows.
44
*But see Villarreal,* 475 S.W.3d at 811 (concluding that "a DWI suspect's privacy interest outweighs the State's interest in preventing drunk driving through warrantless searches" and quoting the *McNeely* plurality in "stating that 'the general importance of the government's interest in this area does not justify departing from the warrant requirement without a showing' that some established exception ... applies").
45
The dissent concludes that the intrusion into privacy resulting from a warrantless BAC test is "minimized" by the fact that OVUII arrestees are already "in custody, and thus, have a diminished expectation of privacy." Dissent at ——, 372 P.3d at 1103. This justification is plainly contrary to our law as promulgated by *Kaluna* and its progeny. In *Kaluna,* this Court reiterated that the state constitutional right to be free from unreasonable searches and seizures "requires that governmental intrusions into the personal privacy of citizens of this State be no greater in intensity than absolutely necessary under the circumstances." *State v. Kaluna,* 55 Haw. 361, 369, 520 P.2d 51, 58–59 (1974). In effectuating this overarching principle, this Court refused to follow the Supreme Court's allowance "of a complete body search of an individual conducted as an incident to his lawful custodial arrest," *id.* at 367, 520 P.2d at 57, in order to avoid "lend[ing] unprecedented power to the police to subject individuals under custodial arrest for even the most trivial offenses to the indignities of an exhaustive body search when no articulable reason supports such an intrusion other than the bare fact that the arrestee is in custody." *Id.* at 369, 520 P.2d at 59. Simply, *Kaluna* refused to hold "that since a lawful custodial arrest is a significant intrusion into an individual's privacy, further, 'lesser' intrusions may be made without regard for their justifications." *Id.* at 370, 520 P.2d at 59. Accordingly, the statement by the dissent that intrusion into the privacy of OVUII arrestees from a warrantless BAC test is "minimized" because arrestees are already "in custody" and "have a diminished expectation of privacy" is contrary to our law.
46
Such treatment is incorrect especially because implied consent statutes do "not take into account the totality of the circumstances present in each case, but only consider certain facts." *Weems,* 434 S.W.3d at 665.
47
Cases from appellate courts in other jurisdictions holding that criminal sanctions do not necessarily render consent involuntary did not hold that mere compliance with an implied consent statute per se satisfies the requirements of actual consent. The inquiry in those cases still redounded to whether, based on the totality of the circumstances, actual consent was freely and voluntarily provided. *See, e.g., People v. Harris,* 234 Cal.App.4th 671, 184 Cal.Rptr.3d 198, 213 (2015), *review denied* (June 10, 2015) (holding that criminal penalties by themselves do not coerce consent, but determining "whether defendant's submission in this case was freely and voluntarily given under the normal totality of the circumstances analysis"); *State v. Brooks,* 838 N.W.2d 563, 569 (Minn.2013) (holding that the implied consent statute was complied with, but still analyzing the totality of the circumstances to determine whether consent was voluntarily procured), *cert. denied,* —— U.S. ——, 134 S.Ct. 1799, 188 L.Ed.2d 759 (2014); *State v. Modlin,*

291 Neb. 660, 867 N.W.2d 609, 619 (2015) (stating "that a court may not rely solely on the existence of an implied consent statute to conclude that consent to a blood test was given for Fourth Amendment purposes and that the determination of whether consent was voluntarily given requires a court to consider the totality of the circumstances"); *State v. Smith,* 849 N.W.2d 599, 606 (N.D.2014) (holding that consent is not coerced because refusing a chemical test is criminally punishable, but proceeding to an examination of "the totality of the circumstances" to determinate whether consent was voluntarily given).

To reiterate, searches contended by the State to be consensual under Hawai‘i law are subject to "the most careful scrutiny" because failure to adhere to this standard "would sanction the possibility of ... coercion." *Trainor,* 83 Hawai‘i at 262, 925 P.2d at 830. Hence, to the extent that the foregoing cases from other jurisdictions did not find criminal refusal sanctions inherently coercive, they are inconsistent with the right, under article I, section 7, to free, voluntary, and meaningful decision-making when waiver of constitutional rights is solicited, and they are in derogation of such values embodied by Hawai‘i law as respect for human dignity and the integrity of one's person. *See Kaluna,* 55 Haw. at 366, 371 & n. 7, 520 P.2d at 57, 60 & n. 7; *see also supra* note 35.

48

Won additionally argued to the ICA and later to this Court that he should have been informed of his rights under *Miranda* before the Implied Consent Form was read to him, that he was denied his right to an attorney in violation of HRS § 803–9 and that the Implied Consent Form misinformed him of the sanctions for refusing to consent to a breath, blood, or urine test. In light of our disposition in this case, we do not address these arguments or that portion of the decision of the ICA addressing these arguments.

49

"When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions." *Garcia,* 96 Hawai‘i at 211, 29 P.3d at 930. This is the first time that we announce the constitutional principle that the threat of criminal sanctions inherently precludes a finding of voluntariness in the context of the consent exception to the warrant requirement. As such, this decision applies only to this case and to all cases pending on direct appeal or not yet final at the time that this decision is rendered. By final, we mean those cases in which the judgment of conviction has been rendered and the availability of appeal and certiorari has elapsed. *Id.* at 214, 29 P.3d at 933.

1

It is clear that the purpose of HRS § 291E–68 and other criminal refusal statutes is to procure an individual's purported consent to a BAC test. *See State v. Won,* 134 Hawai‘i 59, 65, 332 P.3d 661, 667 (App.2014) ("Instead of authorizing the police to force persons arrested in the typical OVUII case to undergo chemical testing based on their implied consent, the Hawai‘i Legislature has chosen to use the threat of administrative and criminal sanctions to encourage arrestees to submit to testing.").

In cases where a police officer obtains a warrant, or where there is an exigency, a police officer need not obtain an individual's consent to conduct a BAC test.

1

The Hawai‘i legislature has similarly declared: "The consent of a person ... shall not be withdrawn by reason of the person's being dead, unconscious, or in any other condition that renders the person incapable of consenting to examination, and ... [i]n such event, a test of the person's blood or urine shall be administered." HRS § 291E–14 (2000).

2
"OVUII" stands for operating a vehicle under the influence of an intoxicant, and is the standard term used for drunk driving in Hawai'i. Throughout this dissent OVUII is used interchangeably with the acronyms "DUI" and "DWI," which other jurisdictions use to denote driving under the influence and driving while intoxicated, respectively.
3
*See* Alaska Stat. Ann. §§ 28.35.031, 28.35.032 (West, Westlaw through 2014 2nd Reg. Sess.); Cal. Veh.Code §§ 23538, 23577 (West, Westlaw through Ch. 2 of 2015 Reg. Sess.); Fla. Stat. Ann. §§ 316.1932, 316.1939 (West, Westlaw through 2015 1st Reg. Sess.); Iowa Code Ann. § 321J.2 (West, Westlaw through 2015 Reg. Sess.); La.Rev.Stat. Ann. §§ 14:98.2, 32:666 (West, Westlaw through 2014 Reg. Sess.); Me.Rev.Stat. tit. 29–A, § 2521 (West, Westlaw through Ch. 9 2015 Reg. Sess.); Neb.Rev.Stat. §§ 60–6,197, 60–6,197.03, 60–6,197.04 (West, Westlaw through 2014 Reg. Sess.); Ohio Rev.Code Ann. § 4511.19 (West, Westlaw through Files 1, 3 and 4 of 2015–16 Reg. Sess.); 75 Pa. Cons.Stat. Ann. § 3804 (West, Westlaw through 2014 Reg. Sess.); R.I. Gen. Laws Ann. § 31–27–2.1 (West, Westlaw through Ch. 555 2014 Legis. Sess.); Vt. Stat. Ann. tit. 23, § 1201 (West, Westlaw through 2014 Legis. Sess.); Va.Code Ann. § 18.2–268.3 (West, Westlaw through 2014 Legis. Sess.).
4
However, an OVUII arrestee cannot be said to have consented to a forcible blood draw in contravention of a later expressed wish to withdraw his or her implied consent. *See, e.g.,* *State v. Wulff,* 157 Idaho 416, 337 P.3d 575 (2014); *Byars v. State,* —— Nev. ——, 336 P.3d 939 (2014); *State v. Fierro,* 853 N.W.2d 235 (S.D.2014); *State v. Villarreal,* 475 S.W.3d 784 (Tex.Crim.App.2014); *Weems v. State,* 434 S.W.3d 655 (Tex.App.2014); *State v. Aviles,* 443 S.W.3d 291 (Tex.App.2014).
5
For example, in 2011, Hawai'i had the highest rate of traffic fatalities caused by drunk drivers in the nation. *See State Motor Vehicle Fatalities and State Alcohol–Impaired Motor Vehicle Fatalities, 2011,* Nat'l Highway Traffic Safety Admin. (Dec. 2012), www-nrd.nhtsa.dot.gov/Pubs/811699.pdf.
6
*See Traffic Safety Facts: Hawai'i 2009–2013,* Nat'l Highway Traffic Safety Admin. (Dec. 2014), www-nrd.nhtsa.dot.gov/departments/nrd30/ncsa/STSI/15-HI/2013/15-HI-2013.htm.
7
*See, Traffic Safety Facts, 2012 Data,* Nat'l Highway Traffic Safety Admin. (Dec. 2013), www-nrd.nhtsa.dot.gov/Pubs/811870.pdf.
8
*See* NHTSA, *New In–Vehicle Technology Targeted Toward Habitual Drunk Drivers,* Nat'l Highway Traffic Safety Admin. (Jan. 8, 2010), www. nhtsa. gov/PR/DOT-12-11.
9
*See* Leonard A. Marowitz, *Predicting DUI Recidivism: Blood Alcohol Concentration and Driver Record Factors,* State Cal. Dep't Motor Vehicles (May 1996), http://apps.dmv.ca.gov/about/profile/rd/r_d_report/Section_5/S5-162.pdf.
10
*See Breath Test Refusal Rates in the United States, 2011 Update,* Nat'l Highway Traffic Safety Admin. (Mar. 2014), www.nhtsa. gov/staticfiles/nti/pdf/Breath_Test_Refusal_Rates-811881.pdf.
11

*Breath Test Refusals in DWI Enforcement,* Nat'l Highway Traffic Safety Admin. (Aug. 2005), www.nhtsa.gov/staticfiles/nti/pdf/809876.pdf.

12

*See supra* note 11.

13

*Id.*

14

*See* S.B. 2897, 25th Leg., Reg. Sess. (2010), *available at* http://www.capitol.hawaii.gov/session2010/CommReports/SB2897_HD1_HSCR718-10_.PDF.

15

*See supra* note 11.

16

The Majority rests its determination on the fact that criminal refusal sanctions are "inherently coercive," in other words, coercive as a matter of law. My discussion has been limited to that issue. There have been no allegations in this case that Won's consent was otherwise involuntary under the totality of the circumstances.

Moreover, the Majority's cited cases do not support its far-reaching conclusion. The Majority cites to *State v. Villarreal,* 475 S.W.3d 784, 810–11 (Tex.Crim.App.2014), which suppressed Villarreal's blood results due to lack of consent. Villarreal, unlike Won, was forced to submit to a blood test over his objection, as was required by Texas Transportation Code, Section 724.012(b), an important distinction that the *Villarreal* court noted. *See id.* ("[I]n the context of nonconsensual, warrantless bodily search of a person suspected of criminal activity, a statute providing for irrevocable implied consent cannot supply the type of voluntary consent necessary to establish and exception to the Fourth Amendment warrant requirement.") (emphasis added). The Majority also cites to *Aviles v. State,* 443 S.W.3d 291, 294 (Tex.App.2014), and *State v. Fierro,* 853 N.W.2d 235, 243 (S.D.2014), to support the argument that implied consent statutes are not exceptions to the warrant requirement. Critically, however, neither case (nor any other) holds that consent to a blood or breath test is coerced and rendered involuntary merely because there are consequences for refusal, including criminal penalties.

17

I agree with the Majority that counsel may be of value in these circumstances, and that an attorney does not necessarily violate his or her ethical obligations by accurately advising a client of the potential consequences of submitting to or refusing a breath test.

18

Pursuant to the Majority opinion, if a police officer obtains a warrant or if exigent circumstances are present and the defendant then refuses to submit to OVUII testing, refusal sanctions may constitutionally be imposed. However, this is practically irrelevant because, in such circumstances, a police officer has no need to obtain the defendant's consent to obtain BAC evidence.

19

The posture of this case is unique in that Won did not challenge the voluntariness of his consent before trial. This argument was raised once the Supreme Court issued its decision in *McNeely.* Our use of a *de novo* standard of review in these circumstances does not obviate the usual standard of review for voluntariness of consent: "[T]he findings of a trier of fact regarding the validity of consent to search must be upheld unless clearly erroneous." *State v. Patterson,* 58 Haw. 462, 469, 571 P.2d 745, 749 (1977).