NO. SCWC-12-0000858

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Appellee/Respondent, v. YONG SHIK WON, Appellant/Petitioner	Case No. 1DTA-11-01903; CAAP-12-0000858 ON WRIT OF CERTIORARI FROM OPINION FILED MARCH 28, 2014 IN INTERMEDIATE COURT OF APPEALS CASE No. CAAP-12-0000858 AFFIRMING JUDGMENT OF THE DISTRICT COURT BRIEF OF AMICUS CURIAE NATIONAL COLLEGE FOR DUI DEFENSE, INC.; APPENDIX; CERTIFICATE OF SERVICE

BRIEF OF AMICUS CURIAE NATIONAL COLLEGE FOR DUI DEFENSE, INC.

APPENDIX

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae the National College for DUI Defense is a nonprofit professional organization of lawyers, with over 1,000 members, focusing on issues related to the defense of persons charged with driving under the influence. Through its extensive educational programs, its website, and its email list, the College trains lawyers to more effectively represent persons accused of drunk driving.

Counsel for amicus states that no counsel for a party authored this brief in whole or in part and no person, other than amicus, its members, or its counsel made a monetary contribution to the preparation of this brief.

STATEMENT OF QUESTIONS PRESENTED FOR DECISION

1. Whether a statute that criminalizes the refusal to consent to a warrantless search of a person's breath or bodily substances is unconstitutional under the 4th Amendment to the United States Constitution?

2. Whether the criminalization of the implied consent laws of Hawaii mandates the protections found in the 5th and 6th Amendments to the United States Constitution?

STATEMENT OF PRIOR PROCEEDINGS AND MATERIAL FACTS

Amicus Curiae, National College for DUI Defense, adopts Petitioner Yong Shik Won's summary of the prior proceedings and material facts.

ARGUMENT

I. THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION GRANTS EVERY CITIZEN THE RIGHT TO BE FREE FROM A NONCONSENSUAL, WARRANTLESS SEARCH AND SEIZURE OF THEIR BODY AND ITS COMPONENTS. PUNISHING AND OR IMPRISONING CITIZENS FOR THEIR PEACEFUL ASSERTION OF THIS RIGHT RUNS AFOUL OF THE CONSTITUTION. FURTHER, THE THREAT OF INCARCERATION TO OBTAIN CONSENT IS CONTRARY TO THE FOURTH AMENDMENT AND IS AN INFIRM PROCEDURE.

In the instant case, the police, without a warrant, sought to obtain the consent of the defendant to submit to an invasion of his bodily integrity. In order to induce consent, the defendant was informed that - *without exception* - his failure to completely and totally cooperate with the search of his bodily fluids and/or breath would result in criminal charges being placed against him. He thereafter agreed to cooperate under that explicit

threat of incarceration. A mere submission to authority is presumed to be 'involuntary' consent as a matter of law.

In *Missouri v. McNeely* 133 S.Ct. 1552, 1558 (U.S. 2013) the Supreme Court of the United States held that nonconsensual, warrantless blood alcohol testing was presumptively unconstitutional. Hawaii has attempted to water down this holding with a set of statutes that compel consent under the threat of incarceration.

If a statute threatened jail unless someone consented to a warrantless search of their house, it would no doubt be considered unconstitutional on its face. Yet a person's body should be entitled to equal or greater protections than would a person's house under the Fourth Amendment. As stated in *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), "the Fourth Amendment protects people, not places." There, the Supreme Court found a violation of the Fourth Amendment simply by the attachment of an eavesdropping device to a public telephone booth. Later cases applied the analysis of Justice Harlan's concurrence in that case, which said that a violation occurs when government officers violate a person's "reasonable expectation of privacy," *id.*, at 360, 88 S.Ct. 507. See, e.g., *Bond v. United States*, 529 U.S. 334, 120 S.Ct. 1462, 146 L.Ed.2d 365 (2000); *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986); *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979).

a. A person has a reasonable expectation of privacy in their breath and bodily fluids.

In *Schmerber v. California* the Supreme Court wrote that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767, 86 S.Ct. 1826, 1834 (U.S.Cal. 1966)

A person has a reasonable expectation of privacy in the fluids contained in their body, and a breath test designed to determine just what is inside that body is just as violative of the person's bodily integrity as is a blood draw or a urinary catheterization. See *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). Government compulsion of a citizen to produce *any* sample from their body, whether it be breath, blood, urine, semen, feces, membrane or cells falls under the protections of the Fourth Amendment. The amount of information that can be discovered about a person from an analysis of even the smallest cells of their body is only

limited by the extent of scientific progress to date. It matters little whether the intrusion is painless or brief. As the Supreme Court stated in *Maryland v. King*, 133 S.Ct. 1958, 1968 -1969 (U.S. 2013):

> The Fourth Amendment, binding on the States by the Fourteenth Amendment, provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." It can be agreed that using a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search. Virtually any "intrusio[n] into the human body," *Schmerber v. California*, 384 U.S. 757, 770, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), will work an invasion of " 'cherished personal security' that is subject to constitutional scrutiny," *Cupp v. Murphy*, 412 U.S. 291, 295, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973) (quoting *Terry v. Ohio*, 392 U.S. 1, 24–25, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). The Court has applied the Fourth Amendment to police efforts to draw blood, see *Schmerber*, supra ; *Missouri v. McNeely*, 569 U.S. ——, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), scraping an arrestee's fingernails to obtain trace evidence, see *Cupp*, supra, and even to "a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis," *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)."

b. When a citizen has the right to insist on a search warrant, as he had here, he could not constitutionally be convicted of a crime for refusing to consent.

In *Missouri v. McNeely*, the police drew blood against the free will of the driver. The Court in *McNeely* reiterated that "the importance of requiring authorization by a neutral and detached magistrate before allowing a law enforcement officer to invade another's body in search of evidence of guilt is indisputable and great." *Missouri v. McNeely* 133 S.Ct. 1552, 1558 (U.S. 2013) quoting *Johnson v. United States*, 333 U.S. 10, 13–14, 68 S.Ct. 367, 92 L.Ed. 436 (1948)(quotation marks removed).

Laws criminalizing refusals to consent to warrantless searches are themselves unconstitutional. In *Camara*, the court concluded that a law that carried a criminal penalty for refusing to consent to a warrantless search was itself unlawful:

> "In this case, appellants has been charged with a crime for his refusal to permit housing inspectors to enter his leasehold without a warrant. There was no emergency demanding immediate access; in fact, the inspectors made three trips to the building in an attempt to obtain appellant's consent to search. Yet no warrant was obtained and thus appellant was unable to verify either the need for or the appropriate limits of the inspection. * * * * Assuming the facts to be as the parties have alleged, we therefore conclude that appellant had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection."

Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 540, 87 S.Ct. 1727, 1736 - 1737 (U.S.Cal. 1967).

Under the auspices of *Camara*, that portion of the implied consent law herein which criminalizes a refusal is violative of the United States Constitution and must be stricken.

c. A criminal statute cannot be employed to coerce a person to consent to a search that otherwise requires a search warrant.

In *Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523, 87 S.Ct. 1727 (1967), it was held that an ordinance that criminalized a person's refusal to consent to a warrantless search was unconstitutional on its face. That case involved a property owner faced with criminal charges for refusing to allow an inspection of his property without a search warrant. Under the challenged laws, refusal to permit an inspection was itself a crime, punishable by fine or even by jail sentence. The Supreme Court noted that these laws were then commonplace. *Id.* at 531.

The ordinance in *Camara* was hedged with various safeguards, including multiple prior notices, and a standard of reasonableness before an inspector could make a decision to enter. *Id.* at 531-533. The government claimed that those safeguards rendered the warrant requirement unnecessary. The Supreme Court held otherwise, stating:

> "In our opinion, these arguments unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment." *id.*

Continuing, the Court in *Camara* noted the pressures placed on an individual who dares to refuse a government's demand to search, and reaffirmed the need for the individualized review process that only a warrant process provides:

> "Yet, only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's decision to search. And even if the occupant possesses sufficient fortitude to take this risk, as appellant did here, he may never learn any more about the reason for the inspection than that the law generally allows housing inspectors to gain entry. The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search. We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty." *id.* (citations omitted).

Here, the implied consent statute has a real and substantial chilling effect on a person's ability to protect his 4th amendment rights, and its very existence places persons who are already in the vulnerable position of being held, in a police station, against their will, and without the ability to communicate to an attorney or any outside family or friends, in the difficult position of daring to say no to one or more uniformed policemen. The statute at hand essentially commands a police officer to use psychological pressure to obtain consent (by reading a mandatory threat-of-jail warning),and encourages the officer to disregard the obligation to obtain a search warrant (as enunciated under *McNeely v. Missouri*) by using the threat of jail instead. And in the meanwhile, the statute discourages a citizen from exercising his or her constitutional rights by telling him that a refusal is a criminal act. Since its very design is to shrink the constitutional protections of citizens, and to encourage constitutional violations by law enforcement, the law is invalid on its face as well as applied to defendant.

A search warrant is the constitutional method for obtaining bodily samples for police testing. The government does not have the power to waive or weaken the mandated search warrant process by fiat, edict, or statute. As written in *Schmerber v. California* 384 U.S. 757, 770, 86 S.Ct. 1826, 1835 (1966):

> "Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that inferences to support the search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson v. United States*, 333 U.S. 10, 13—14, 68 S.Ct. 367, 369, 92 L.Ed. 436; see also *Aguilar v. State of Texas*, 378 U.S. 108, 110—111, 84 S.Ct. 1509, 1511, 1512, 12 L.Ed.2d 723. The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great."

In summary, an implied consent statute or legislative scheme that criminalizes a citizen's refusal and thereby coerces consent, is not a suitable replacement for the Constitutional dictates of a search warrant application and review by a detached and neutral magistrate.

d. Consent given under threat of punishment is not consent which was 'freely and voluntarily given' as required by the Constitution.

Consent to search must be "freely and voluntarily given," *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968), and "not be coerced,

by explicit or implicit means, by implied threat or covert force." *Schneckloth v. Bustamonte,* (1973) 412 U.S. 218, 228, 93 S.Ct. 2041, 36 L.Ed.2d 854. In *Schneckloth* the Supreme Court stated, "Our decision today is a narrow one. We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 248; *United States v. Blakeney*, 942 F.2d 1001, 1015–16 (6th Cir.1991) ("*Schneckloth* involved a consent to search given by a person who was not in custody and specifically reserved judgment on the effect of custodial conditions upon a search authorized solely by an alleged consent."). " 'It is the Government's burden by a preponderance of the evidence, to show through clear and positive testimony that valid consent was obtained.' "*United States v. Hinojosa*, 606 F.3d 875, 881 (6th Cir.2010) (citations and internal quotation marks omitted).

The above generalized statements refer to the guidelines to establish legal consent when a person is <u>not</u> in custody. Even more proof must be established when, where as here, the person is already in custody when alleged consent is obtained.

Applying the principles of *Schneckloth* to persons <u>in custody</u>, the Supreme Court in *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976) considered the following additional factors in determining whether the consent was voluntary:

> (1) there was no overt act or threat of force committed against the defendant; (2) there were no promises made or subtle forms of coercion that might flaw the defendant's judgment; (3) the consent was given in public and not in the police station; (4) the defendant was not a "newcomer to the law"; (5) the defendant was not mentally deficient; (6) the record did not indicate that the defendant was unable, while arrested, to exercise a free choice regarding the consent; and (7) the arresting officers had administered Miranda warnings to the defendant prior to the consent.

The threat of additional charges and jail time if a person does not consent is the very type of 'overt act' that was likely referenced above.

e. Mere submission to a claim of lawful authority is not consent.

Valid consent cannot be established simply by a person submitting under the threat of a being thrown in jail if they refuse. Consent must be free and voluntary rather than a mere submission to a claim of lawful authority or the result of coercion or duress.

(*Florida v. Royer* (1983) 460 U.S. 491, 497; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 233-234; *People v. James* (1977) 19 Cal.3d 99, 106.)

> "[T]he State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." (*Florida v. Royer* (1983) 460 U.S. 491,497, citing, Lo-Ji *Sales, Inc. v. New York* (1979) 442 U.S. 319, 329; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 233–234; *Bumper v. North Carolina*,(1968) 391 U.S. 543, 548–549; *Johnson v. United States*,(1948) 333 U.S. 10, 13; *Amos v. United States*, (1921) 255 U.S. 313, 317.)

The burden is on the State to prove an exception to the warrant requirement. And the overarching concern of the Supreme Court is that the police obtain a search warrant wherever possible. The implied consent scheme of Hawaii, by criminalizing a citizen's demand for a search warrant before consenting (i.e. criminalizing a refusal to consent), attempts to circumvent the constitutional mandates of the Fourth Amendment. As stated by the Supreme Court in *U.S. v. Jeffers:*

> "The Fourth Amendment prohibits both unreasonable searches and unreasonable seizures, and its protection extends to both 'houses' and 'effects.' Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes. See *Weeks v. United States*, 1914, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652; *Agnello v. United States*, 1925, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145. Only where incident to a valid arrest, *United States v. Rabinowitz*, 1950, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653, or in 'exceptional circumstances,' *Johnson v. United States*, 1948, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436, may an exemption lie, and then the burden is on those seeking the exemption to show the need for it, *McDonald v. United States*, 1948, 335 U.S. 451, 456, 69 S.Ct. 191, 93 L.Ed. 153. In so doing the Amendment does not place an unduly oppressive weight on law enforcement officers but merely interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficent purposes intended. *Johnson v. United States*, supra."

U.S. v. Jeffers 342 U.S. 48, 51, 72 S.Ct. 93, 95 (U.S.1951).

II. ANY LAW THAT IS CONSIDERED CRIMINAL IN NATURE, WHETHER CHARACTERIZED IN FORM AS CIVIL OR CRIMINAL, CARRIES WITH IT THE GUARANTEES FOUND IN THE FIFTH AND SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

In its appellate briefs, the State of Hawaii concedes that the implied consent laws of Hawaii are criminal in nature. (See e.g., p.8 of the Intermediate Court of Appeals Answering Brief of the State of Hawaii). In point of fact, the implied consent law at issue carries with it a punishment of 30 days imprisonment and it threatens criminal

prosecution as a means to induce consent to a breath or blood test without a search warrant. HRS § 291E-68.

Noncriminal implied consent laws have been used to administratively sanction drivers in all 50 states who refuse to voluntarily consent to breath and blood testing following a lawful arrest. The National College for DUI Defense (NCDD) takes no position as to whether an administrative sanction (such as the loss of driving privileges) requires protections under the 5th or 6th amendments.

However, in 2011 Hawaii joined a handful of jurisdictions who have sought to criminalize a persons' refusal to voluntarily consent to a warrantless search of their breath or blood or bodily fluids for the presence of alcohol and or other drugs. Once the legislature of Hawaii crossed the line from a civil administrative sanction of a driver's license, to the imposition of criminal punishment, the NCDD posits that all of the constitutional protections attendant to criminal cases must be afforded to the driver, including those found under the 5th and 6th amendments to the United States Constitution.

Put another way, once a law is established to be criminal, certain provisions of the Bill of Rights are guaranteed to apply. The Supreme Court of the United States has held for 150-plus years that once an act is criminalized, the protections under the 5th and 6th amendments are mandatory and applicable. By criminalizing Hawaii's implied consent laws, drivers who fall under its purview must now be afforded all of the constitutional protections that are attached to such laws. As stated by the Supreme Court of the United States in *Ex parte Milligan*:

> "The rights guaranteed by the Fifth and Sixth Amendments are 'preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service.'

Ex parte Milligan 71 U.S. 2, 1866 WL 9434, 18 L.Ed. 281, 4 Wall. 2 (1866).

The 'War Against Drunk Driving' has joined federal, state, and local governments with such forces as Mothers Against Drunk Driving (MADD) and a host of many other organizations both public and private. The goals espoused by MADD and others are indisputably laudable. In fact, the appellate decision in this matter recounts Hawaii's long and sustained governmental efforts in that regard. But during campaigns as serious as a 'war on drunk driving' courts must fight evermore diligently to protect the constitutional

rights of its citizens from erosion, no matter how loud the hue and cry of the political masses. As the Supreme Court once wrote:

> "The imperative necessity for safeguarding [the] rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action."

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165, 83 S.Ct. 554, 565 - 566 (U.S. 1963).

Our Supreme Court has had to stem the tide against overzealous politicians many times in our history in order to preserve the rights of the individual. "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances", wrote the Court in *Ex parte Milligan*, 4 Wall, 2, 120—121, 18 L.Ed. 281.

Many consider the war (or campaign) against drunk driving to be of the highest magnitude. But the preservation of our constitutional rights has always been considered to be of the greatest importance of all: even during our great civil war it was necessary to safeguard those provisions found in our Bill of Rights. As the Supreme Court wrote in 1866:

> '(I)f society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.' *Ex parte Milligan*, *id.* at 124.

Almost one century later, the statements from *Ex parte Milligan* were reiterated by the Supreme Court of the United States in *Kennedy v. Mendoza-Martinez*. During the start of the Vietnam war the legislature, in an attempt to eradicate draft evasion, passed statutes that employed the sanction of deprivation of nationality as a punishment for the offense of leaving or remaining outside the country to evade military service. But these statutes did not afford the accused the procedural safeguards guaranteed by the Fifth and Sixth Amendments to the Constitution. The Supreme Court of the United States, in holding that such statutes were therefore unconstitutional, wrote:

> "We recognize that draft evasion, particularly in time of war, is a heinous offense, and should and can be properly punished. Dating back to Magna Carta, however, it has been an abiding principle governing the lives of civilized men that 'no

> freeman shall be taken or imprisoned or disseised or outlawed or exiled * * * without the judgment of his peers or by the law of the land * * *.' What we hold is only that, in keeping with this cherished tradition, punishment cannot be imposed 'without due process of law.' Any lesser holding would ignore the constitutional mandate upon which our essential liberties depend."

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 186, 83 S.Ct. 554, 577 (U.S.Cal. 1963)(footnote omitted).

One may argue that providing a possible drunk driver with his rights under the fourth, fifth or sixth amendments will make it more difficult to prosecute and punish drunk drivers; that guilty persons may go free; that it will be more difficult to eradicate drunk driving. That could all be true. But similar arguments have been made and rejected regarding conspirators in the Civil War, and of draft evaders during the Vietnam War. In responding to the arguments that the guilty might go free due to the protections of the 5th and 6th amendments, the Supreme Court wrote:

> "It is argued that our holding today will have the unfortunate result of immunizing the draft evader who has left the United States from having to suffer any sanction against his conduct, since he must return to this country before he can be apprehended and tried for his crime. The compelling answer to this is that the Bill of Rights which we guard so jealously and the procedures it guarantees are not to be abrogated merely because a guilty man may escape prosecution or for any other expedient reason."

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 184, 83 S.Ct. 554, 576 (1963)

It has previously been held that a person asked to submit to a breath or blood test is not entitled to *Miranda* warnings or to an attorney's advice. *South Dakota v. Neville*, 459 U.S. 553, 563-564 (1983). But the South Dakota law considered in *Neville* was not criminal in nature. Further, the Court in *Neville* was quick to point out that it considered the SD law to be a "true choice" statute: where the State had not "subtly coerced respondent into choosing the option it had no right to compel". *South Dakota v. Neville*, 459 U.S. 553, 563-564 (1983). Not only is *Neville* completely distinguishable; but the law under consideration here is the very exception described by the Court in *Neville* as not binding by its holding.

Unlike the law in *Neville*, here there *is* overt coercion to get the suspect to choose an option that (in the absence of a search warrant) the State in fact had "no right to compel". *Missouri v. McNeely* has made it clear that, in the absence of exigent

circumstances, the government has no right to compel a nonconsensual, warrantless alcohol test. *Missouri v. McNeely* 133 S.Ct. 1552, 1558 (U.S. 2013).

Additionally, the 'routine booking question' exception to *Miranda* as described in *Rhode Island v. Innis*, 446 U.S. 291 (1980) is not dispositive of the 5th and 6th amendment issues here. In the instant case, the actual words spoken by the defendant form the very essence of the crime – a "no" or its equivalent response carries a 30 day jail sentence and a $1,000 dollar fine. In the *Neville* and *Innis* cases, the questions as to whether one would (or would not) submit to a breath test were treated as no more consequential than being asked routine booking questions. If an answer to a question can be a crime *per se* (such as it is here), then it is anything but 'routine'.

In the instant case, the defendant was never given *Miranda* warnings, nor was he given an opportunity to consult with an attorney. Further, it appears that he never waived his right to remain silent or his right to consult with an attorney. Nor was the question about his submission as insignificant as a 'routine booking question' as contemplated under the law considered in *Neville*. Thus a question remains as to whether the breath test given to the driver in this matter was the fruit of the poisonous tree resulting from the violation of the driver's federal constitutional right to remain silent and right to an attorney.

CONCLUSION

It is urged by amicus curiae National College for DUI Defense, Inc. that this Honorable Court find that criminal refusal statute at issue herein is in violation of the Fourth Amendment to the United States Constitution because it improperly coerces a citizen to submit to a warrantless breath or blood analysis by threatening imprisonment should the citizen exercise his right to demand a Warrant. Further, because the eventual submission to the breath alcohol test was compulsed under the threat of incarceration and fines, then any consent obtained thereunder was not 'free and voluntary', and suppression of the test results is the appropriate remedy. See *Wong Sun v. United States,* 371 U.S. 471, 484–485, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (suppression as the fruit of the poisonous tree).

This Honorable Court is also urged to find that the statute, by making a refusal a crime, requires that a citizen be afforded the protections of the Fifth and Sixth

amendments to the United States Constitution, including *Miranda* warnings and the right to consult with an attorney. Because the defendant was not given *Miranda* warnings, and was improperly informed that he did not have a right to consult with an attorney, this court should remand this matter to the lower court with instructions to consider the evidence in light of the above and to make any additional findings as necessary, including whether suppression is an appropriate remedy if violation(s) did occur.

For all of the above reasons, the judgments of the Intermediate Court of Appeals and of the trial court should be reversed.

DATED: Wheaton Illinois; July 18, 2014.

Respectfully Submitted,

/s/ Donald J. Ramsell
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APPENDIX

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.

Haw. Rev. Stat. § 291E-68 (West)

NO. SCWC-12-0000858

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Appellee/Respondent, v. YONG SHIK WON, Appellant/Petitioner	Case No. 1DTA-11-01903; CAAP-12-0000858 ON WRIT OF CERTIORARI FROM OPINION FILED MARCH 28, 2014 IN INTERMEDIATE COURT OF APPEALS CASE No. CAAP-12-0000858 AFFIRMING JUDGMENT OF THE DISTRICT COURT CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on the date first written below, I duly served a true and exact copy of the foregoing document upon the following persons by operation of the Judiciary Electronic Filing and Service System upon:

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DATED: Honolulu, Hawaii, July 12, 2014.

BY:

s/Richard L. Holcomb
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Local Counsel for Amicus Curiae
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