CONCURRING AND DISSENTING OPINION BY NAKAYAMA, J.

I concur in part IX of the majority opinion affirming the Director's revocation of Castro's license under HRS § 286-258(d)(2). However for the reasons expressed in my dissent in State v. Garcia, 96 Hawai'i 200, 214, 29 P.3d 919, 933 (1999) (Nakayama, J., with whom Ramil J., joins, dissenting), and infra, I believe that State v. Wilson, 92 Hawai'i 45, 987 P.2d 268 (1999), was wrongly decided and should be overruled. Therefore, I would affirm the Director's findings of fact, conclusions of law and decision revoking Castro's license.

Because of the majority's continuing expansion of the supervisory powers doctrine, I am compelled to once again voice my concerns.[1] Supervisory powers should be invoked sparingly and only in great necessity.[2] Thus, the evolution of this court's

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[1] See In re Doe, 96 Hawai'i 217, 224, 30 P.3d 231, 238 (2001) (Nakayama J., with whom Ramil J., joins, dissenting), Garcia, 96 Hawai'i at 914, 29 P.3d at 933 (Nakayama J., with whom Ramil J., joins, dissenting), and Wilson, 92 Hawai'i at 54, 987 P.2d at 277 (Nakayama J., with whom Ramil J., joins, dissenting) for each of my dissents in response to this line of cases.

[2] Supervisory powers are derived from HRS § 602-4 (1993) which states "[t]he supreme court shall have the general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law." Inherent powers, on the other hand are derived from the Constitution. In State v. Harrison, 95 Hawai'i 28, 32, 18 P.3d 890, 894 (2001) this court stated:

> courts have inherent equity, supervisory, and administrative powers as well as inherent power to control the litigation process before them. Inherent powers of the court are derived from the state Constitution and are not confined by or dependent on statute. Among courts' inherent powers are the powers to create a remedy for a wrong even in the absence of specific statutory remedies, and to prevent unfair results. The courts also have inherent power to curb abuses and promote a fair process which extends to the preclusion of evidence and may include dismissal in severe circumstances.

(continued...)

implementation of the supervisory powers doctrine warrants examination. In State v. Pattioay, 78 Hawai'i 455, 468 n.28, 896 P.2d 911, 924-25 n.28 (1995) this court expressly stated that "the court's inherent powers 'must be exercised with restraint and discretion' and only in exceptional circumstances." (quoting Kukui Nuts of Hawaii, Inc. v. R. Baird & Co., Inc., 6 Haw. App. 431, 436, 726 P.2d 268, 272 (1986)). Necessity, according to the Pattioay court, is indispensable to the "legitimate exercise" of these powers. Id. at 468 n.28, 896 P.2d at 925 n.28.

In Pattioay, necessity was found after a lengthy discussion of the Posse Comitatus Act (PCA)[3] and the conclusion that federal law had been unequivocally violated. The PCA is a federal statute prohibiting "direct participation by a member of the [armed services] in a search, seizure, arrest or other similar activity unless participation in such activity is otherwise authorized by law." Pattioay, 78 Hawai'i at 460, 896 P.2d at 916 (quoting 10 U.S.C. § 375 (1988)). Violation of this statute results in a fine or imprisonment. The Pattioay court stated that although it was exercising supervisory power "in this

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[2](...continued)

In Pattioay, this court stated that "the courts of this State have the inherent supervisory power over criminal prosecutions to ensure that evidence illegally obtained by government officials or their agents is not utilized in the administration of criminal justice through the courts." Pattioay, 78 Hawai'i at 468, 896 P.2d at 924. The court combined the two sources of power into a single phrase. In Wilson, this court further combined the concepts such that the court now refers to its "supervisory powers."

[3] 18 United States Code (U.S.C.) § 1385 (1988).

case" and "in this instance," it was by no means setting forth a rule that was to be broadly interpreted.

Two Justices[4] concurred in that decision, presenting salient reasons behind the exercise of supervisory powers in that instance. Most notably, Justice Ramil recalled this country's "antipathy toward the use of the military in civilian law enforcement" and placed it in the context of Hawai'i's history under martial law. Id. at 471-72, 896 P.2d at 927-28 (Ramil, J., with whom Moon, C.J., joins, concurring). Given the combined force of the unlawful conduct and Hawai'i's unique history, this court properly exercised its supervisory power in suppressing illegally obtained evidence.

Wilson, contrary to the cautionary language of Pattioay, contains no explanation of this court's exercise of its supervisory powers. The majority in Wilson, expanded the narrow application of Pattioay in but two sentences of a footnote. The majority suggested that Pattioay stood for the broad principle that "[t]his court has previously indicated that the exclusion of evidence based on a statutory violation is proper under appropriate circumstances." Wilson, 92 Hawai'i at 52 n.10, 987 P.2d at 275 n.10. Without any analysis, this court quickly concluded that the exercise of its power was appropriate.

The statute at issue in Wilson, HRS § 286-151, is also

[4] Pattioay, 78 Hawai'i at 470, 896 P.2d at 926 (Ramil, J., with whom Moon, C.J., joins, concurring).

the statute at issue in the case sub judice. HRS § 286-151[5] sets forth the implied consent law under Hawai‘i law. The law provides that by operating a motor vehicle the driver is "deemed to have given consent" to the test (or tests) for measuring BAC. HRS § 286-151. The arrestee may "refuse"[6] to physically comply with the testing procedure. HRS § 286-151.5. Finally, the police officer is merely required to inform the arrestee of the sanctions for refusal.[7] Failure to perform this duty is not unlawful, nor does the statute provide for fines or imprisonment.

Comparing the circumstances under which we exercised supervisory powers in Pattioay with Wilson, the absence of necessity in Wilson is glaring. In Pattioay, a federal law prohibited military participation in civilian law enforcement,

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[5] HRS § 286-151 provides in relevant part:

> (a) Any person who operates a motor vehicle or moped on the public highways 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.
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> . . . .
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> (2) The person has been informed by a police officer of the sanctions under part XIV and sections 286-151.5 and 286-157.3.

[6] Blacks Law Dictionary provides that "refusal implies the positive denial of an application or command, or at least a mental determination not to comply." Blacks Law Dictionary (6th ed.) at 887.

[7] The statutory language enacting Hawai‘i's highway safety program neither expressly nor impliedly provides that an arrestee may withdraw his or her consent. The driver may, however, physically refuse to be tested, the result of which is a sanction. Despite undergoing many amendments since its enactment in 1967, the legislature never added language giving the driver the option to withdraw consent.

the violation of which resulted in specific consequences, fine or imprisonment. In Wilson, the state statute at issue required a police officer to inform the arrestee of the sanctions if the arrestee physically refused to take a breath or blood test for the presence of alcohol. Wilson, 92 Hawai'i at 49, 987 P.2d at 272. The failure to provide the arrestee with a catalogue of the legal consequences of his decision is not illegal conduct.[8] Nor does the statute provide for imprisonment, much less a fine.

In my dissent in Wilson, I questioned the propriety of exercising our supervisory powers and noted the majority's failure to "address the analysis of the Pattioay decision, or explain why the supposed statutory violation in this case falls within the exception to the general rule limiting the suppression remedy to constitutional violations." Wilson, 92 Hawai'i at 59 n.5, 987 P.2d at 282 n.5.

Rectifying its failure to adequately apply the principles of Pattioay in Wilson, the majority of this court used Garcia as its vehicle for a post facto discussion of its Wilson reasoning. The majority concluded that its decision in Wilson was "based at least in part in maintaining the integrity of the

[8] It's worth pointing out that even a Miranda warning, a right of constitutional dimensions, does not require that the arrestee be educated regarding the consequence of his or her decision to remain silent. See Oregon v. Elstad, 470 U.S. 298, 317 (1985) (stating "we have not held that the sine qua non for a knowing and voluntary waiver of the right to remain silent is a full and complete appreciation of all of the consequences flowing from the nature and quality of the evidence in the case.").

judicial system." Garcia, 96 Hawai'i at 206, 29 P.3d at 925. Rather than apply that concern to the facts, the majority simply provided a string cite of cases discussing judicial integrity.[9] In no way did the majority explain how this court's integrity was at stake in Wilson or why conduct that is not unlawful necessitates application of the exclusionary rule.

In Wilson, I cautioned against an over broad interpretation of this court's supervisory powers. I recommended a case by case analysis so that both fairness and due process concerns could be adequately evaluated to determine whether exceptional circumstances existed warranting the use of our supervisory powers. My concerns centered on the fact that failure to complete such an analysis would lead to the development of inconsistent law based in part upon this court's

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[9] In Garcia, the majority cited to three Hawai'i cases in support of its statement that the exclusionary rule may be employed to ensure the maintenance of judicial integrity. Although it is true that the cases cited by the Garcia majority do discuss judicial integrity, the majority failed to acknowledge that each of these cases also stand for the proposition that our supervisory powers should not be invoked unless and until illegal conduct that threatens the very fairness of the judicial proceedings is evident. See State v. Bridges, 83 Hawai'i 187, 196, 896 P.2d 357, 366 (1996) (stating that the issue was whether evidence obtained by non-constitutional violation in another jurisdiction should be admitted in a criminal proceeding in the forum jurisdiction. In defining the primary purpose of the exclusionary rule, the Bridges court stated that "[o]f course, when evidence is not obtained illegally, "no loss of judicial integrity is implicated in a decision to admit the evidence."); State v. Bowe, 77 Hawai'i 51, 60, 881 P.2d 538, 547 (1994) (holding "that official police coercion is not a necessary predicate to finding that a confession is involuntary under article I, sections 5 and 10 of the Hawai'i Constitution."); and State v. Augafa, 92 Hawai'i 454, 470, 992 P.2d 723, 739 (App. 1999) (concluding that "the police did not act illegally in arresting Defendant and in seizing the drugs. Since there was no illegal conduct by the officers . . ., there was no threat of unfair process that would require suppression of the evidence.").

judgment of what the law should be rather than what the law is.

My concerns were validated in State v. Edwards, 96 Hawai‘i 224, 232, 30 P.3d 238, 246 (2001). This court departed from the long held rule that the proponent of a motion to suppress evidence has the burden of proving that (1) evidence was unlawfully secured and (2) that a constitutional right was violated. Pattioay, 78 Hawai‘i at 466, 896 P.2d at 922. At issue in Edwards was HRS § 803-9(2) (1993)[10] which requires the police to make a reasonable effort to contact an arrestee's counsel when requested. The language of HRS § 803-9 is important because, like Pattioay and unlike Wilson and Garcia, the statute at issue states that the police act unlawfully if they fail to make a reasonable effort to contact the requested counsel. We held the police did not make a reasonable effort to contact Edward's counsel. Despite this, this court did not exercise its supervisory powers. The defendant argued this court should exercise its supervisory powers and suppress her statements made without the aid of counsel. We declined, stating that in the absence of misconduct of constitutional dimensions, evidence is not "per se inadmissible." Edwards, 96 Hawai‘i 237-38, 30 P.3d

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[10] HRS § 803-9(2) provides:

> To unreasonably refuse or fail to make a reasonable effort, where the arrested person so requests and prepays the cost of the message, to send a telephone, cable, or wireless message through a police officer or another than the arrested person to the counsel or member of the arrested person's family[.]

at 251-51. We then determined that Edwards failed to make a connection between the evidence to be suppressed and the statutory violation. I agreed that this court should not exercise its supervisory powers because the violation was statutory and no constitutional right was in danger of being trammeled.

Where Edwards becomes problematic is that in explaining the application of the exclusionary rule, this court stated that, "[t]he proponent of a motion to suppress has the burden of establishing not only that the evidence sought to be excluded was unlawfully secured, but also, that his or her own . . . rights were violated." Edwards, 96 Hawai'i at 232, 30 P.3d at 246 (quoting State v. Augafa, 92 Hawai'i 454, 464, 992 P.2d 723, 733 (App. 1999) (quoting State v. Balberdi, 90 Hawai'i 16, 21, 975 P.2d 773, 778 (App. 1999) (quoting State v. Anderson, 84 Hawai'i 462, 467, 935 P.2d 1007, 1012 (1997)))). The Anderson opinion, expressly stated that the proponent must prove that his own "Fourth Amendment" rights were violated. Anderson, 84 Hawai'i at 467, 935 P.2d at 1012. Balberdi also retains the words "Fourth Amendment." Balberdi, 90 Hawai'i at 21, 975 P.2d at 778. Augafa appears to be the first case deleting the vital words conveying the rule that a right of constitutional dimensions must be

violated.[11] No other case in this court's history put forth the incredible proposition that one need only prove that a right, as opposed to a constitutional right, has been violated in order to warrant suppression.

In this case, the majority perpetuates this inconsistent line of reasoning. Here, the defendant pushed the form 396B away and interrupted the officer's recital of its content. The defendant stated that he refused to take the intoxilyzer test. The officer persisted and completed reading the form aloud to the defendant. The defendant never asked the officer what the phrase "prior alcohol contacts" meant. The defendant had two prior convictions for violating HRS § 291-4 and was undoubtedly aware that sanctions existed if he refused to take the test. It is not statutorily required that he appreciate, much less know, all the possible consequences emanating from his decision. Moreover, the officer engaged in no unlawful conduct. Invoking our supervisory powers because a defendant was not informed of every potential consequence for physical refusal of the BAC test strays far indeed from the exceptional circumstances envisioned in Pattioay.

Wilson, Garcia, Edwards, and now this case, demonstrate the dangers associated with not adhering closely to the

[11] It is interesting that Justice Acoba chose to quote that particular phrase from Augafa with the constitutional violation omitted. Augafa and Balberdi were authored by Justice Acoba when he was a member of the Intermediate Court of Appeals.

cautionary language of Pattioay. The majority inconsistently applies the exercise of our supervisory powers. Accordingly, I dissent from sections III-VII of the majority's opinion in which it exercises this court's supervisory power in suppressing evidence obtained in the absence of a constitutional violation.