

**Electronically Filed  
Supreme Court  
SCWC-22-0000017  
10-AUG-2023  
02:10 PM  
Dkt. 13 ORDDS**

SCWC-22-0000017

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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TRONG T. NGUYEN,  
Petitioner/Petitioner-Appellant,

vs.

ADMINISTRATIVE DIRECTOR OF THE COURTS, STATE OF HAWAI‘I  
Respondent/Respondent-Appellee.

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CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CAAP-22-0000017; CASE NO. 1DAA-21-00003)

DISSENT TO THE ORDER REJECTING  
APPLICATION FOR WRIT OF CERTIORARI  
(By: McKenna, J.)

I dissent. Although not raised as an issue on certiorari, I would accept certiorari and order supplemental briefing based on the clear-cut violation of the defendant’s Hawai‘i constitutional right against self-incrimination based on the “custodial interrogation” that occurred.

With respect to “custody,” State v. Hewitt, 153 Hawai‘i 33, 526 P.3d 558 (2023), reiterated the bright-line rule of State v. Ketchum, 97 Hawai‘i 107, 34 P.3d 1006 (2001), that a person is

"in custody" for purposes of article I, section 10 of the Hawai'i constitution when probable cause to arrest has developed. When the officer pulled the defendant over for, among other things, speeding at 103 miles in a 45 mile per hour zone, probable cause had already developed for an arrest for the crime of excessive speeding. Therefore, the defendant was in "custody."

With respect to "interrogation," when an officer "should have known that [their] words and actions were reasonably likely to elicit an incriminating response from the defendant[,]" *State v. Kazanas*, 138 Hawai'i 23, 38, 375 P.3d 1261, 1276 (2016), interrogation has occurred. After pulling the defendant over, the officer asked the defendant if he had been drinking, to which he received an affirmative response. The question was clearly likely to elicit this incriminating response.

Finally, despite other indicia of OVUII, a violation of a defendant's right against self-incrimination is "structural error" under our constitutional jurisprudence, not subject to a "harmless error" analysis. *State v. Loher*, 140 Hawai'i 205, 225, 398 P.3d 794, 814 (2017).

Hence, although pursuant to Rule 28(B)(4)(D) of the Hawai'i Rules of Appellate Procedure, the parties would have the opportunity brief this plain-error issue, I would accept certiorari and order supplemental briefing for the seemingly

clear violation of defendant's constitutional right against self-incrimination.

DATED: Honolulu, Hawai'i, August 10, 2023.

/s/ Sabrina S. McKenna

