DISSENTING OPINION OF ACOBA, J.

Because, in my view, this case raises serious questions concerning, among other things, 1) the proper statutory construction of Hawai‘i Revised Statutes (HRS) § 602-4 (1993), 2) conflicting case law applying HRS § 602-4, 3) superintendence of the lower courts under HRS § 602-4, and 4) the principle that all persons similarly situated must be treated the same, I strongly believe that our decision in this case should count for the future. I am constrained, therefore, to explain why that is so.

I.

HRS § 602-4 grants this court "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." HRS § 602-4 does not contain any limiting or qualifying language with respect to the exercise of the supreme court's supervisory power. Any limitation on such supervisory power, then, is self-imposed.

Our case law evinces a search for an appropriate standard governing exercise of that power. In State, ex rel. Marsland v. Shintaku, 64 Haw. 307, 640 P.2d 289 (1982), this court stated that its supervisory power is used only "in rare and exigent circumstances." Id. at 313, 640 P.2d at 294 (citing Gannett Pac. Corp. v. Richardson, 59 Haw. 224, 227, 580 P.2d 49,

53 (1978)). In my view, the rare and exigent standard is an erroneous adaptation from a statement in Gannett that concerned an application for a writ of prohibition against a district court judge. Speaking of the writ, this court in Gannett said, "[T]he writ of prohibition is an extraordinary remedy, and we have repeatedly said that prohibition will not be utilized as a substitute for appeal. . . . We have deviated from this rule only in rare and exigent circumstances." 59 Haw. at 227, 580 P.2d at 53 (citations omitted) (emphasis added).

In State v. Moniz, 69 Haw. 370, 742 P.2d 373, reconsideration denied, 69 Haw. 370, 742 P.2d 373 (1987), this court employed its supervisory power upon a showing of "compelling circumstances." Id. at 373, 742 P.2d at 376 (citations omitted). One of two reasons for employing supervisory power was the circuit court's failure to follow a statute requiring court approval before a mental patient was eligible for unescorted leave from the hospital. See id. at 375, 742 P.2d at 377. Similarly, the trial court here failed to comply with a governing statute. Thus, arguably, the facts in this case may also constitute compelling circumstances for exercising supervisory power because the constitutional right to a trial of Defendant-Appellant David Hauanio, Jr. (Defendant) is implicated.

Erroneously citing again to the statement in Gannett, this court in State v. Fields, 67 Haw. 268, 686 P.2d 1379 (1984), said that "prudential rules of . . . self-governance" apply in the exercise of the power granted under HRS § 602-4. Id. at 274, 686 P.2d at 1385 (internal quotation marks and citation omitted) Admitting that "though the prudential rules may counsel against the consideration of [the] appeal," id. at 277, 686 P.2d at 1387, supervisory jurisdiction was nevertheless asserted in Fields. This court remanded the case to the circuit court, holding that warrantless searches could not be imposed as a condition of probation unless based on reasonable suspicion. See id. at 283, 686 P.2d at 1390.

Supervisory power was also exercised without a showing of "rare and exigent circumstances" or "compelling circumstances" in In re Carvelo, 44 Haw. 31, 352 P.2d 616 (1959). In that case, supervisory power was invoked to take jurisdiction of a case in which a court-appointed attorney for an indigent defendant did not timely file a notice of appeal because of a change in "statutory provisions governing appellate review of convictions and appeals in forma pauperis." Id. at 35, 352 P.2d at 621.

Considering the development of the law in this area, I believe that to effectuate the responsibility delegated under HRS § 602-4 for "general superintendence" of the lower courts, we must exercise discretionary power tailored to the circumstances

presented by the case under review, as this court did in Carvelo. Any other standard is unnecessarily restrictive, unsupported by the plain language of HRS § 602-4, and abdicates our obligation of "general superintendence" of the lower courts.

II.

Thus, in this case, if HRS § 602-4 means anything, it must, at a minimum, apply where a statute is apparently disregarded by a trial court and where such error impacts upon a substantial right, such as the constitutional right to a trial. See State v. Vaitogi, 59 Haw. 592, 597, 585 P.2d 1259, 1262-63 (1978) and People v. Morreale, 107 N.E.2d 721, 723 (Ill. 1952). The violation of HRS § 853-4(11) (Supp. 1997) here was called to the trial court's attention by the probation department, acknowledged by the prosecution, and moved on by the defense.[1]

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1 The court was not authorized to grant Defendant's motion for deferred acceptance of a guilty (DAG) plea in the instant case because Defendant had been allowed a DAG plea in a prior criminal case in 1981. HRS § 853-4(11) (Supp. 1997) disqualifies defendants who had previously received a deferral order for a prior offense from receiving a second deferral. Chapter 853 does "not apply when[t]he defendant has been charged with a felony offense and has been previously granted [DAG] plea status for a prior offense, regardless of whether the period of deferral has already expired[.]" HRS § 853-4(11). (Emphasis added.)

Granting Defendant a second deferral period would conflict with the express mandate of HRS § 853-4(11) and the purpose of HRS chapter 853, that a "'first time, accidental, or situational offender[] . . . [should] be given the opportunity to keep his or her record free of a criminal conviction.'" State v. Putnam, 93 Hawai'i 362, 367, 3 P.3d 1239, 1244 (2000) (quoting 1976 Haw. Sess. L. Act 154 § 2, at 279 (emphasis and brackets omitted)). As Defendant had been previously granted a deferral, he is not a first time offender as contemplated by HRS chapter 853. Accordingly, Defendant was not eligible for a second deferral period at the time the court granted it.

The trial court proceeded to grant the motion for a DAG plea although Defendant was ineligible for such disposition under HRS § 853-4(11).[2] The error committed (1) contravenes the express language as well as the purpose and policy of the DAG plea statute, (2) undermines the respect we owe to the legislature, a co-equal branch of government, (3) imposes an obligation on the probation department to administer and enforce a court order in contravention of the statute, (4) arbitrarily excludes all other defendants similarly situated from the same dispensation granted Defendant,[3] and (5) entangles this court in a circumvention of the statute.

Moreover, under the majority's rationale, the only remedy available to Defendant to obtain review of the court's DAG plea order is to disobey it and, thus, incur a conviction and sentence that can be appealed. With all due respect, I consider that option an unconscionable one to place before Defendant when HRS § 602-4 affords a remedy "where no other remedy is expressly provided by law." Additionally, were that option followed by Defendant, it would result in a future proceeding before this court on the same issue -- a duplicative waste of this court's

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2 I believe the court's departure from the plain command of HRS § 853-4(11) was the result of its conscientious belief that it was acting in the best interest of everyone.

3 See State v. Garcia, No. 23513, slip op. at 35 (Haw. Aug. 10, 2001) (stating that "when this court announces a new rule that benefits a defendant and applies the rule to the defendant in the case in which the rule is announced, it must be applied to all similarly situated defendants") (internal quotation marks and citations omitted).

resources and allied judiciary services and of the defense's and prosecution's efforts and time. Finally, whether the DAG plea disposition rather than a trial would be in the best interest of Defendant is a decision committed to Defendant and not one that should influence our disposition of this case.

I would exercise supervisory jurisdiction under HRS § 602-4.