DISSENTING OPINION OF ACOBA, J.,
WITH WHOM LEVINSON, J. JOINS

Because there is no dispute that Hawai‘i Revised Statutes (HRS) § 706-659 (Supp. 1999) is not ambiguous or "absurd" in its application, I believe the statute's plain and unambiguous vesting of discretion in the sentencing court to grant probation may not be restricted to cases involving "strong mitigating circumstances." The tenet that the legislative history of HRS § 706-659 requires "strong mitigating circumstances," majority opinion at 8, as a prerequisite to the imposition of probation creates a new and, in my view, unauthorized limitation on a judge's consideration of a probationary sentence under that statute. With all due respect, I believe this results from a misapplication of the fundamental rules of statutory construction.

I.

In pertinent part HRS § 706-659 provides that

> [a] person who has been convicted of a class A felony, except class A felonies defined in chapter 712, part IV [relating to drug offenses and intoxicating compounds] shall be sentenced to an indeterminate term of imprisonment of twenty years without the possibility of . . . probation. . . . A person who has been convicted of a class A felony defined in chapter 712, part IV, may be sentenced to an indeterminate term of imprisonment except as provided for in section 706-660.1 relating to the use of firearms in certain felony offenses and section 706-606.5 relating to repeat offenders.

(Emphasis added.) I agree that authorization to impose an indeterminate term of imprisonment under HRS § 706-659 gives a

sentencing court discretion to sentence a defendant to probation and that the broad terms of the statute do not limit such dispensation only to "drug users." The judicial guidelines for "determining whether to impose a term of probation" are set forth in HRS § 706-621 (1993).[1] I disagree, however, as to any further ad hoc restriction on the discretion of the court. In my view, HRS § 706-659 is plain and unambiguous on its face: a sentencing court may grant probation following the guidelines in HRS § 706-621, except to defendants who (1) have used firearms in the course of certain crimes under HRS § 660.1 or (2) are repeat offenders as outlined by HRS § 706-606.5. Defendant does not come within either one of these two exceptions and thus is otherwise eligible for probation.

Absent an absurd result, see State v. Villeza, 85 Hawai'i 258, 273, 942 P.2d 522, 537 (1997) ("[d]eparture from the literal construction of a statute is justified only when such construction would produce an absurd and unjust result and the literal construction is clearly inconsistent with the purposes and policies of the statute[]" (citations omitted)), we must, in construing a statute, "'give effect to [the] plain and obvious meaning[]'" of its language. Fragiao v. State, 95 Hawai'i 9, 18, 18 P.3d 871, 880 (2001) (quoting State v. Kalama, 94 Hawai'i 60, 64, 8 P.3d 1224, 1228 (2000)). The majority does not discern any

[1] See majority opinion at 9 n.3.

ambiguity in the terms of HRS § 706-659 or any "absurdity" in applying the statute as written. The prosecution does not contend that HRS § 706-659 is ambiguous or absurd in result. To the contrary, its primary argument is that the statute plainly gives courts the discretion to sentence a class A drug offender to prison. Defendant does not claim that the statute is ambiguous or results in an absurdity.

Under these circumstances, "'we do not resort to a legislative history to cloud a statutory text that is clear.'" Kalama, 94 Hawai'i at 64, 8 P.3d at 1228 (quoting Ratzlaf v. United States, 510 U.S. 135, 147-48, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) (citations omitted)). Indeed, this court has gone so far as to announce that "'[e]ven where the Court is convinced in its own mind that the Legislature really meant and intended something not expressed by the phraseology of the Act, it has no authority to depart from the plain meaning of the language used.'" Id. (quoting State v. Dudoit, 90 Hawai'i 262, 271, 978 P.2d 700, 709 (1999) (citing State v. Buch, 83 Hawai'i 308, 325-26, 926 P.2d 599, 616-17 (1996) (Levinson, J., concurring and dissenting)).

Thus, in the absence of any perceived ambiguity or absurdity, an examination of legislative history for clarification is not called for under basic canons of statutory construction. A contrary approach can only lead, as it does

here, to untoward consequences that clash with the legislature's espoused intent and a defendant's reliance on that expression. See State v. Riveira, 92 Hawai'i 546, 561, 993 P.2d 580, 595 (App. 1999) (Acoba, J., dissenting) ("When faced with interpreting statutes, the courts must be vigilant of the consequences statutes work, whether declared by the legislature or not. It is how the statute would be read by the layperson [that] guides our construction in criminal cases[.]"), dissenting opinion adopted by State v. Riveira, 92 Hawai'i 521, 524, 993 P.2d 555, 558 (2000).

II.

As recounted, the legislature expressly limited the court's power to grant probation to certain class A drug felons in the two circumstances set forth in HRS § 706-659. See supra at 1. It plainly did not intend to impose any other qualification on the court's consideration of probation. The maxim of expressio unius est exclusio alterius applies. The statute's inclusion of two exceptions to the allowance of probation necessarily means that the legislature purposefully omitted other potential limitations on the court's discretion. See Black's Law Dictionary 581 (6th ed. 1990) (defining "expressio unius est exclusio alterius" as "[w]hen certain . . . things are specified in a law, . . . an intention to exclude all

others from its operation may be inferred"); In re Water Use Permit Applications, 94 Hawai'i 97, 151, 9 P.3d 409, 463 (2000) (explaining that "where the legislature includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the legislature acts intentionally and purposely in the disparate inclusion or exclusion" (brackets and internal quotations omitted)); Roxas v. Marcos, 89 Hawai'i 91, 129, 969 P.2d 1209, 1247 (1998) (applying "*expressio unius est exclusio alterius* [which means] the express inclusion of a provision [in a statute] implies the exclusion of another" to determine head of state would have been subject to suit for non-official acts once leadership term ended); Fought & Co., Inc. v. Steel Eng'g and Erection, Inc., 87 Hawai'i 37, 55, 951 P.2d 487, 505 (1998) ("This court has consistently applied the rule of *expressio unius est exclusio alterius* -- the express inclusion of a provision of a statute implies the exclusion of another -- in interpreting statutes." (Citing Keliipuleole v. Wilson, 85 Hawai'i 217, 227, 941 P.2d 300, 310 (1997).); State v. Cornelio, 84 Hawai'i 476, 495 n.33, 935 P.2d 1031, 1040 n.33 (1997); State v., Arceo, 84 Hawai'i 1, 29 n.38, 928 P.2d 843, 871 n.38 (1996); International Sav. and Loan Ass'n v. Wiig, 82 Hawai'i 197, 200, 921 P.2d 117, 120 (1996)); State v. Kaakimaka, 84 Hawai'i 280, 291, 933 P.2d

617, 628 (1997) ("'When the legislature expresses things through a list, the court assumes that what is not listed is excluded.'" (Quoting 2A Sutherland Statutory Construction § 47.23, at 216-17 (5th ed. 1992).).

Obviously, the legislature could have included "strong mitigating circumstances" as a third limitation on the court's exercise of discretion. The fact that it did not do so manifests its intent that it chose not to do so. Because the legislature did not include such a requirement in the statute itself, we should not now create one. Defendant accordingly is entitled to be considered for probation without the "strong mitigating circumstances" qualification.

III.

It is said in part, that the court did not abuse its discretion because of "the absence of strong mitigating circumstances favoring probation," majority opinion at 2, and that Defendant's request for probation based on "his old age and poor health" "d[id] not mandate a probationary sentence." Id. at 10. But there is no indication that the court applied the "strong mitigating circumstance" standard, nor can it be assumed that it did, inasmuch as this decision had not been rendered. Nor can it be justly said that Defendant failed to satisfy the standard, in the absence of any evidence that he knew it existed.

I believe it is with good reason that neither the court nor the parties addressed the sufficiency or insufficiency of evidence relating to such a standard. Under the plain language of HRS § 706-659, the court was not bound by a "strong mitigating circumstances" standard when Defendant was sentenced. Defendant could not have reasonably anticipated from the face of HRS § 706-659 that his appeal from the court's sentence would be rejected for failure to present strong mitigating circumstance in order to qualify for probation at his sentencing hearing. To hold the Defendant to such a showing at his sentencing hearing under these circumstances is a violation of his due process right to fair notice. See State v. Navor, 82 Hawai'i 158, 161, 920 P.2d 372, 375 (App. 1996) ("The purpose of notice is to ensure that interested parties are apprised of the pendency of any proceeding which is to be accorded finality. Given notice, parties are able to determine how to respond and prepare for the issues involved in the hearing." (Citations and emphasis omitted.)); see also State v. Schroeder, 76 Hawai'i 517, 531, 880 P.2d 192, 207 (1994) (holding that due process requires that a defendant must be provided notice of the intended application of a mandatory minimum term of imprisonment prior to being sentenced to such a term).

IV.

I must also disagree that the trial court's statements at sentencing were a mere "overemphas[is of] the importance of drug treatment in qualifying for probation[.]" Majority opinion at 10. Given a plain examination, the court's language manifests its belief that it could not sentence Defendant to probation because drug treatment was not appropriate in his case, i.e., because he was not a drug user:

> And so one of them is a class A felony in which -- which, under the law, requires that the court impose a mandatory 20-year jail term. Probation is available for that offense in those situations where the court were -- and this is a new option that's available for Count II -- where it appears that probation, particularly drug treatment, will have some benefit for that person who is convicted of a class A felony involving drugs. And I looked at that, Mr. Savitz, and I looked at the facts and circumstances in this case, the Pre-Sentence Investigation Report, and unfortunately, you don't fall into that category, persons for whom the probation for the class A felony would be available, the concern I have being that this is a search warrant case.
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> . . . . So even if the option of probation were considered, what we're looking at is for that person who is hopelessly addicted to drugs to get treatment. That's not you either because you're not on drugs. You're just selling them.

(Emphases added.)

Probationary treatment under the statute is not limited to drug users. This court has decided that a misunderstanding of a statute evinced by a sentencing court's statements resulted in an improper sentence.[2] In State v. Valera, 74 Haw. 424, 848 P.2d 376 (1993), the question arose as to whether a sentencing judge

[2] Despite what I believe to be error, I have no doubt that the court acted conscientiously in this matter.

could consider suppressed statements as well as crimes for which a defendant was acquitted when determining the defendant's sentence. In that case, the defendant was charged with two counts of murder in the second degree but found guilty of two counts of manslaughter. See id. at 429 n.3 & 430, 848 P.2d at 378 n.3 & 379. The sentencing judge disclosed that "there are [sic] certain evidence, which the jury could not hear but which . . . I cannot dismiss from my mind" and labeled the defendant "an executioner." Id. at 430 & 439, 848 P.2d at 379 & 382.

Examining the judge's statements, this court ruled he had inappropriately considered suppressed statements and acquitted charges. See id. at 437, 848 P.2d at 382. Despite (1) the fact that the judge had imposed a sentence within the statutory guidelines and (2) the cases holding that a court's "authority . . . to select and determine the severity of a penalty is normally undisturbed on review in the absence of an apparent abuse of discretion," this court held that, inasmuch as the judge relied on inappropriate matters, this court "[could] not find the sentencing judge's statements . . . harmless beyond a reasonable doubt." Id. at 440, 848 P.2d at 383.

Similarly, I cannot conclude that the error here was harmless beyond a reasonable doubt. See State v. Balisbisana, 83 Hawai‘i 109, 114, 924 P.2d 1215 (1996) (explaining that the

"harmless beyond a reasonable doubt" standard requires a "determin[ation of] whether there is a reasonable possibility that the error complained of might have contributed" to the outcome of the case (citation omitted)). Had the court not believed that its only permissible option was to sentence Defendant to prison because he was not a drug user and, thus, drug treatment would not "benefit" him, it is impossible to determine what the outcome of the sentencing hearing would have been.

V.

For the foregoing reasons, I would vacate the sentence and remand the case for resentencing. See State v. Perry, 93 Hawai'i 189, 198 n.17, 998 P.2d 70, 79 n.17 (2000) (remanding case "[b]ecause the court believed it had no discretion in choosing the sentence to be imposed other than to sentence Defendant as it did"). I do not doubt the integrity of the judge who sentenced Defendant, but maintaining the appearance of fairness would require reassignment to a new sentencing court. See State v. Chow, 77 Hawai'i 241, 251 n.13, 883 P.2d 663, 673 n.13 (App. 1994) (remanding case to a different judge, not because the appellate court "question[ed] the impartiality of the district court judge who originally sentenced Defendant," but

because "the district court judge who originally sentenced Defendant ha[d] already made a sentencing determination" (citation omitted)).