CONCURRING OPINION BY ACOBA, J.

I concur in the result but additionally believe that the Intermediate Court of Appeals (ICA) did gravely err (1) in applying the holding of State v. Sinagoga, 81 Hawai'i 421, 918 P.2d 228 (App. 1996), to this case because Petitioner/Defendant-Appellee Gregory Heggland (Petitioner) challenged the validity of his alleged prior conviction, State v. Heggland, 116 Hawai'i 376, 382, 173 P.3d 523, 529 (App. 2007), and Sinagoga has been limited to uncounseled conviction or identity challenges, see State v. Veikoso, 102 Hawai'i 219, 227 n.8, 74 P.3d 575, 523 n.8 (2003); (2) in holding that the mandatory parole portion of Petitioner's Colorado conviction is part of the "maximum term of imprisonment possible" for purposes of HRS § 706-606.5(2)(f) (1993 & Supp. 2005); and (3) in holding that the Circuit Court of the Third Circuit (the court) abused its discretion in refusing to credit all of the evidence proffered by Respondent/Plaintiff-Appellant State of Hawai'i (Respondent) to establish Petitioner's prior conviction.

I.

As to the first point, the ICA stated that "[u]nder [State v.]Afong, [61 Haw. 281, 602 P.2d 927 (1979),] and Sinagoga, [Petitioner] had conceded the validity of the prior Colorado conviction by failing to raise a good-faith challenge that it was uncounseled or did not pertain to him." Heggland,

116 Hawai'i at 386, 173 P.3d at 533 (emphasis added). According to the ICA, as a result of Petitioner's failure to raise a good faith challenge, "there was no need for [Respondent] to prove by evidence beyond [Petitioner's] presentence report or stipulations that [Petitioner's] prior conviction was valid." Id. Agreeing with the ICA's opinion, and relying on the burden shifting analysis in Sinagoga, the majority states that "[Petitioner] did not raise a good faith challenge to the validity of his prior Colorado conviction[,]" when in fact "he affirmatively stipulated" to it. Majority opinion at 30.

In my view, following this court's decision in Veikoso, Sinagoga does not apply, and the court was required to apply the standard in State v. Freitas, 61 Haw. 262, 278, 602 P.2d 914, 925 (1979), that "[p]roof of prior conviction may consist of 'any evidence, . . . that reasonably satisfies the (sentencing) court that the defendant was convicted,'" (quoting HRS § 706-666(2)(1993))[1] as it apparently did in determining whether Petitioner's prior Colorado conviction was sufficiently proven.

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[1] HRS § 706-666 provides:

> **Definition of proof of conviction.** (1) An adjudication by a court of competent jurisdiction that the defendant committed a crime constitutes a conviction for purposes of sections 706-606.5, 706-662, and 706-665, although sentence or the execution thereof was suspended, provided that the defendant was not pardoned on the ground of innocence.
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> (2) Prior conviction may be proved by any evidence, including fingerprint records made in connection with arrest, conviction, or imprisonment, that reasonably satisfies the court that the defendant was convicted.

(Boldfaced font in original.)

Veikoso was decided subsequent to Sinagoga. That case limited Sinagoga's application to a defendant's "challenge [of] a prior conviction on the grounds that it was (1) uncounseled and/or (2) not against the defendant." Majority opinion at 30 n.7 (quoting Heggland, 116 Hawai'i at 384, 173 P.3d at 531). In Veikoso, the majority and the concurrence held that a collateral attack on a prior conviction was prohibited where the prior conviction was an element required to be proven. See Veikoso, 102 Hawai'i at 224, 74 P.3d at 580 (holding that "[t]he right to collaterally attack prior attack convictions in the context of proceedings on a subsequent offense does not extend to convictions based on allegedly invalid guilty pleas" (boldfaced font omitted)); id. at 227, 74 P.3d at 583 (Acoba, J. concurring) (stating that "for the sake of the orderly administration and disposition of cases . . . a collateral attack on a prior conviction should not be allowed in trial proceedings in which the prior conviction is an element to be proven").

The Veikoso court recognized "the tension between [its] holding and dictum in Sinagoga" because Sinagoga "outline[d] a procedure whereby defendants could challenge convictions appearing in a presentence report on the basis that they were '(1) uncounseled, (2) otherwise invalidly entered, and/or (3) not against the defendant.'" Id. at 227 n.8, 74 P.3d at 523 n.8 (quoting Sinagoga, 81 Hawai'i at 446, 918 P.2d at 253 (emphasis

added)).[2] Veikoso held that the phrase "otherwise invalidly entered" used in Sinagoga "should be disregarded" because it "may be misconstrued as permitting collateral attacks whenever the validity of a conviction is challenged[.]" Id. Accordingly, the import of Veikoso is that the Sinagoga five-step analysis does not apply in situations where the defendant does not raise a good faith challenge based on an uncounseled prior conviction and/or a prior conviction that was not rendered against the defendant.[3]

The majority agrees that Veikoso limits the Sinagoga procedure. Majority opinion at 30 n.7 (citation omitted). In the instant case, since Petitioner did not raise an uncounseled conviction or a mistaken identity challenge, Sinagoga does not apply at all.[4] Hence, Respondent does not benefit from the presumption of validity accorded an alleged prior conviction, as

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[2] I adhere to my position in Sinagoga that the prosecution or movant submitting prior convictions as a basis for augmenting the sentence "should come forward with proof of the validity of the relevant prior convictions" including proof that the prior conviction was not uncounseled. Sinagoga, 81 Hawai'i at 436, 918 P.2d at 243 (Acoba, J., dissenting) (footnote omitted).

[3] As has been noted before, in an article published in the University of Hawai'i Law Review, Shirley M. Cheung critiqued Sinagoga with respect to adopting the five-step analysis. State v. Sinagoga: The Collateral Use of Uncounseled Misdemeanor Convictions in Hawai'i, 19 U. Haw. L. Rev. 813 (Fall 1997). Cheung states that the five-step analysis is a "contradiction to the spirit of the Sixth Amendment" because it "places the burden of identifying past convictions on the defendant," and the defendant's failure to raise a good faith challenge would permit the State to use a prior conviction in sentencing even if it was uncounseled. Id. at 840, 841 (footnotes omitted).

[4] The majority asserts that this opinion "intimate[s] that Sinagoga is irrelevant" but that Sinagoga is relevant because it "provides the appropriate framework for analyzing whether [the court] erred." Majority opinion at 32 n.11. The point of course, as stated herein, is that Sinagoga does "not apply," i.e., govern, Petitioner's case. See discussion supra. If "relevant" refers to the underlying facts that give rise to the issues on appeal, that is common in every case and says nothing about the point that Sinagoga is not pertinent to Petitioner's case.

provided under step three[5] of the Sinagoga analysis. Rather, the sufficiency of the evidence establishing Petitioner's prior conviction must be assessed by the sentencing court under the standard established in Freitas. In sum, Petitioner did not raise the issue of whether the prior Colorado conviction was uncounseled or mistakenly applied against him, therefore, the Sinagoga procedure is not germane to his sentencing. Rather, where a mandatory minimum term of imprisonment is sought under the Hawai'i repeat offender statute, Respondent must provide evidence that "reasonably satisfies the court" of the prior conviction, as stated by Freitas, 61 Haw. at 278, 602 P.2d at 925 (citation omitted).

II.

As to the second point, I concur that the phrase "maximum term of imprisonment possible" in HRS § 706-606.5(2)(f) "does not include the mandatory parole portion of a Colorado convicted defendant's sentence." Majority opinion at 21-22. Thus, as the majority holds, the ICA erred by "misread[ing] the phrase to include any possible imprisonment that may arise from a

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[5] Step three provides that

> prior to imposing the sentence, the court shall inform the defendant that (a) each reported criminal conviction that is not validly challenged by the defendant is defendant's prior, counseled, validly entered criminal conviction, and (b) a challenge to any reported prior criminal conviction not made by defendant before sentence is imposed may not thereafter, absent good cause, be raised to attack the court's sentence.

Sinagoga, 81 Hawai'i at 447, 918 P.2d at 254.

sentence, even if not part of the original 'term of imprisonment.'" Id. at 20-21 (emphasis in original).

Under Colorado's sentencing scheme, the term of imprisonment and the term of mandatory parole are distinct. Craig v. People, 986 P.2d 951, 963 (Colo. 1999). More recently, in denying time-served credit against prison time for a defendant's violation of mandatory parole, the Colorado Court of Appeals did so on the ground that the term of mandatory parole must be distinguished from the term of imprisonment. People v. Edwards, 165 P.3d 904, 906 (Colo Ct. App. 2007). I note additionally that, if the courts of Colorado were to characterize mandatory parole as part of a term of imprisonment as the ICA seemingly did, a prison sentence that is said to include mandatory parole would violate Apprendi v. New Jersey, 530 U.S. 466 (2000) and Blakely v. Washington, 542 U.S. 296 (2004).

In People v. Kendrick, 143 P.3d 1175, 1176 (Colo. Ct. App. 2006), the defendant had pled guilty to aggravated robbery and was sentenced to fifteen years' imprisonment and five years' mandatory parole. Under Colorado law, as a class three felony, aggravated robbery ordinarily carried a sentence of imprisonment ranging from four to twelve years plus mandatory parole. Id. (citing Colo. Rev. Stat. § 18-1.3-401(1)(a)(V)(A) (2005)). However, aggravated robbery was considered an "extraordinary risk crime" and therefore subject to Colorado Revised Statutes § 18-1.3-401(10) (2005), which added four years to the

aforementioned sentence, thus increasing the presumptive range of imprisonment from four to sixteen years. Id.

The defendant there argued that his fifteen-year sentence plus the five years of mandatory parole amounted to a twenty-year sentence that thus exceeded the "statutory maximum available for his conviction" in violation of Apprendi and Blakely. Id. The Colorado appellate court noted that the maximum sentence imposable under statute "for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, unless the defendant has stipulated to judicial fact finding for sentencing purposes." Id. (citing Blakely, 542 U.S. 296; Lopez v. People, 113 P.3d 713 (Colo. 2005)). However, Kendrick explained that the defendant's sentence did not violate either Apprendi or Blakely because "the use of the term 'maximum sentence' [under Colorado law] is intended to refer only to the length of imprisonment, separate from any period of parole." Id. at 1177 (emphases added). Because the Colorado "'General Assembly' [(legislature)] had separated mandatory parole periods from the concept of 'maximum sentence,' . . . it therefore[] did not intend that the period of mandatory parole be part of the 'maximum sentence.'" Id.

Accepting that Petitioner's prior conviction was on November 14, 1997, as stated in the presentence report, see discussion infra, and Petitioner apparently does not dispute

Respondent's statement that "if the Court[considers] the maximum term of imprisonment [as] six years from [Petitioner's] sentence on November 14, 1997[,]" the maximum term of imprisonment would range from November 14, 1997 to November 13, 2003, Petitioner's alleged crime was committed on August 28, 2003, and this was within the "maximum term of imprisonment possible" under HRS § 706-606.5(2)(f) without respect to the mandatory parole term.[6]

III.

As to the third point, I do not believe the court abused its discretion in rejecting the ICON document and the testimony of Officer Reginald Une (Officer Une). "An abuse of discretion occurs when the court clearly exceeds the bounds of reason or disregards rules or principles of law to the substantial detriment of a party litigant." State v. Fetelee, 117 Hawai'i 53, 63, 175 P.3d 709, 719 (2008) (citation omitted). The majority agrees that this standard requires the court to make a "judgment call" that on appeal, should be reviewed only for abuse of discretion. Majority opinion at 43 (citation omitted).

A.

With respect to the ICON document, the court opined that it "looks like a Colorado rap sheet[,]" the defense stated

[6] The presentence report stated that "[o]n November 14, 1997, [Petitioner] was sent to five years prison" for aggravated robbery in Colorado. However, Petitioner does not argue that a mandatory minimum sentence is inapplicable under HRS § 706-606.5 because his repeat offense was outside of the five year prison term imposed by the Colorado court but instead only takes issue with the sufficiency of the proof of the prior conviction.

that it "appears to be the minutes" from a proceeding, and the prosecutor contended that it was an "abstract showing the arrest and the conviction in Colorado." Heggland, 116 Hawai'i at 379, 173 P.3d at 526. The court expressed its confusion, noting that it "[didn't] know what it is." Id. In addition, the court questioned whether the document could properly be used to prove Petitioner's prior conviction, stating that it instead "would expect . . . some kind of a certified court document from Colorado" containing "evidence of [the] conviction if the dates are in question." Id.

The majority acknowledges that under Freitas, "certified copies of both the indictment and the judgment" are sufficient for proving the existence of a defendant's prior conviction for purposes of HRS § 706-666(2). Majority opinion at 41 (quoting Freitas, 61 Haw. at 278, 602 P.2d at 926) (emphasis added). See also State v. Buffalo, 4 Haw. App. 646, 649, 674 P.2d 1014, 1017 (1983) (stating that "the best evidence to prove a conviction is the judgment of conviction itself or a properly authenticated copy thereof" (citations omitted)). Unlike Freitas, however, Respondent in this case did not submit a certified copy of the judgment of conviction.

The majority also cites State v. Drozdowski, 9 Haw. App. 583, 854 P.2d 238 (1993), for the proposition that "evidence other than a certified copy of an indictment and judgment" may constitute sufficient evidence to establish a prior conviction in

a foreign jurisdiction. Majority opinion at 42. The majority posits that this proposition in conjunction with the fact that "the court misinterpreted [Respondent's] burden of proof" and that Petitioner "stipulated to the existence of his prior conviction," rendered the ICON document competent evidence that the court should have considered. Id.

However, the evidence considered by the trial court in Drozdowski and held by the ICA to be sufficient in establishing a prior conviction consisted of a document entitled "Criminal Minutes - Sentence" obtained in the following manner:

> The probation officer . . . testified that he utilized the National Crime Information System communication network and provided the Santa Cruz Probation Department with the following information: Drozdowski's full name, FBI number, California number, height, weight, birth date, and social security number. In response, he received a copy of a document titled 'CRIMINAL MINUTES-SENTENCE' that was certified by the Deputy Clerk of the Superior Court of California, County of Santa Cruz on December 6, 1990. That document, in evidence, notes that on February 21, 1990 [the defendant] was represented by counsel named 'S. Wright' and, for violating § '2:11378 H & S Health and Safety Code, felony,' was sentenced, inter alia, to 180 days in the county jail (with credit for time served) and five years' probation during which he was required to totally abstain from the use of intoxicants/drugs and to submit to testing for the use of controlled substances.

9 Haw. App. at 589, 854 P.2d 241 (emphases added) (brackets omitted). The trial court there credited the evidence as proof of the defendant's prior conviction. See id.

The ICON document here also may have been minutes of Petitioner's prior arrest and conviction in Colorado and was also certified by the Colorado court. Heggland, 116 Hawai'i at 379, 173 P.3d at 526. However, unlike in Drozdowski, Respondent did not present a witness such as a police officer to verify in

detail as to how the information in the document was obtained. Whereas the officer in Drozdowski testified to providing numerous details, including the defendant's "name, FBI number, California number, height, weight, birth date, and social security number," 9 Haw. App. at 589, 854 P.2d 241, which would reasonably ensure that the document pertained to that defendant, here, there was no indication that similar information was provided in order to obtain the ICON document. In fact, the court cited the fact that "[t]here's nobody here to testify what" was meant by abbreviations in the ICON document as a basis for its understandable refusal to "speculate" about whether certain abbreviations stood for "public defender." Heggland, 116 Hawai'i at 380, 173 P.3d at 527. Moreover, unlike the ICON document, the Drozdowski document was plainly labeled as minutes, and clearly identified the defendant's counsel, the specific violation, and the length and terms of the sentence under the prior conviction. 9 Haw. App. at 589, 854 P.2d at 241. Unlike the ICON document, the Drozdowski document contained complete information understandable to all the parties.

Under analogous circumstances in Buffalo, the defendant was charged with robbery in the first degree, assault in the second degree, and of being a felon in possession of a firearm under HRS § 134-7. 4 Haw. App. at 647, 674 P.2d at 1016. The prosecution sought to establish the fact of defendant's prior felony conviction in California by evidence consisting of:

> (1) a cover sheet which purports to be an attestation and certification of the attached documents by the clerk of the Superior Court of the State of California in and for the County of Orange; (2) a copy of the second amended information charging [the defendant] with the wilful, unlawful and felonious killing of a human being in violation of § 187 of the California Penal Code; (3) a copy of the clerk's minutes of the arraignment hearing; (4) a copy of the clerk's minutes of the sentencing hearing; and (5) an Abstract of Judgment.

Id. at 647-48, 674 P.2d at 1016.

The ICA held the aforementioned documents insufficient to prove the defendant's prior felony conviction for purposes of HRS § 134-7, which prohibits possession of a firearm by one convicted of a felony. Id. at 650, 674 P.2d at 1018 (footnotes omitted). Regarding the abstract of judgment, the ICA explained that this "is a document used in California to inform its prison officials of a conviction and provides the authority for carrying the judgment and sentence into effect" and is "merely a device by which the execution of the order of probation or judgment is carried out." Id. at 649-50, 674 P.2d at 1017 (footnote omitted).

With respect to the information charging the defendant and the minutes, the ICA stated that

> [a]ll they indicate is that person named Joseph William Buffalo was charged on an information and that the court clerk's minutes indicate that he was found guilty of second degree murder. Proof of an information is not proof of conviction and the clerk's minutes are not the best evidence of conviction.

Id. at 650 n.4, 674 P.2d at 1018 n.4. Although the ICA noted that it was considering the sufficiency of the evidence for purposes of HRS § 134-7, where a prior felony conviction was an element of the offense, rather than HRS § 706-666 and

HRS § 706-606.5, id. at 650 n.5, 674 P.2d at 1018 n.15, Buffalo is instructive in that it demonstrates the historical rejection by the courts of this state of evidence other than a certified judgment of conviction to prove a prior conviction. In this case there is no indication of why a certified copy of the judgment of conviction was not obtained, after the issue was raised.

HRS § 706-666(2) plainly states that in order for evidence to be considered as establishing a prior conviction, such evidence must "reasonably satisf[y] the court that the defendant was convicted." Unlike the trial court in Drozdowski, the court here did not find that the ICON document should be credited with establishing a prior conviction. In my view, the court has not "clearly exceeded" any "bounds of reason" in refusing to credit a document where there was no information as to the circumstances under which the document was obtained, it was not entirely clear what the document purported to be, and entries in the document were not understandable. Such refusal was within the court's discretion and neither Respondent nor the majority point to any "rules or principles of law" which the refusal violates.

B.

In connection with Officer Une, his testimony consisted of the circumstances surrounding his supervision of Petitioner's mandatory parole for the Colorado conviction. Officer Une testified that the maximum supervision term for Petitioner's

mandatory parole terminated on November 21, 2004, and that revocation of Petitioner's parole prior to this date meant that Petitioner "'could have been sent back' to prison." Heggland, 116 Hawai'i at 379, 173 P.3d at 526. Officer Une also testified that based on his review of documents contained in an "interstate compact packet" (the packet) sent by the state of Colorado, he believed Petitioner was convicted on November 14, 1997 in Colorado. Id.

The court stated that "having considered the . . . testimony of [Officer Une], the [c]ourt is still of the mind and concludes that the fact of [Petitioner's] prior conviction, which is the basis for [Respondent's HRS § 706-606.5] motion, has not been established by satisfactory evidence." Id. at 380-81, 173 P.3d at 527-28. The majority holds that the "court abused its discretion in failing to accord the evidence[,]" which includes Officer Une's testimony, "proper weight" in establishing Petitioner's prior conviction. Majority opinion at 46 (citation omitted).

As the majority acknowledges, Officer Une's testimony regarding the alleged November 14, 1997 date of Petitioner's Colorado conviction was based on the packet. Id. at 37 (footnote omitted). However, there was no plain indication from the record of what type of document the "packet" was or what information it purported to contain. The majority states that Officer Une's reference to the packet is "likely a reference to the Interstate

Compact for the Supervision of Adult Offenders, codified in HRS Chapter 353B," and likely contains "materials regarding [Petitioner's] criminal record sent from Colorado pursuant to the interstate compact." Id. at 37 n.15. Plainly, the packet is an insufficient basis for establishing a prior conviction where it can only be speculated as to what the packet was and what information it provided.

Furthermore, Officer Une admitted that neither "a copy [nor a] certified copy of the judgment in [Petitioner's] Colorado case was included" in the packet. Heggland, 116 Hawai'i at 379, 173 P.3d at 526. Officer Une also testified to being unfamiliar with Colorado sentencing law.

In my view, then, the court did not abuse its discretion in refusing to credit Officer Une's testimony as establishing facts regarding Petitioner's prior conviction. Because the contents of the packet, let alone its credibility, were not clearly established in the record, and Officer Une lacked knowledge of any certified judgment of conviction and of the Colorado sentencing laws, the court's rejection of Officer Une's testimony regarding the prior conviction could not be an abuse of discretion.

C.

With respect to the presentence report, the court did not credit it with establishing Petitioner's prior conviction. As the majority notes, under HRS § 706-601 (Supp. 2003), a

presentence report must be prepared for all felony cases after conviction and before sentencing unless the report requirement is waived. Majority opinion at 37 n.16. Thus, the court is bound by statute to "accord due consideration" to a presentence report "before imposing sentence" where, inter alia, "the defendant has been convicted of a prior felony." HRS § 706-601(a). In addition, as the majority explains, HRS § 706-604 (1993) provides that "[t]he court shall furnish to the defendant or the defendant's counsel and to the prosecuting attorney a copy of the report of any pre-sentence diagnosis . . . and afford fair opportunity, if the defendant or the prosecuting attorney so requests, to controvert or supplement them." Majority opinion at 44-45 (quoting HRS § 706-604(2)) (ellipsis in original).

Arguably, Petitioner did "contest[] whether [his] prior conviction qualified him" for mandatory minimum sentencing. But Petitioner stipulated that "[a]t the time [he] committed the offenses in the instant case, he had [a] prior felony conviction in Colorado . . . for Conspiracy to Commit Aggravated Robbery." Petitioner however, failed to indicate the basis for his objection. Thus, Petitioner's objection was insufficient to raise a material issue regarding the prior conviction. Consequently, I agree that under these specific circumstances, the court abused its discretion in failing to credit the pre-sentence report.