DISSENTING OPINION BY NAKAYAMA, J.

I respectfully dissent. Pursuant to the following discussion, I believe that the plain language of Hawai'i Revised Statutes (HRS) § 853-1(b) (1993 & Supp. 2007) as it applies to HRS § 706-624(3) (1993 & Supp. 2007) is ambiguous, and would hold that actual notice of the terms and conditions of a deferred acceptance of guilty plea ("DAG plea") is sufficient to satisfy considerations of fairness to the defendant in this case, Eric Kanoa Shannon ("Shannon").

I. DISCUSSION

A. In My View, the Plain Language Of HRS § 853-1(b) As It Applies To HRS § 706-624(3) Is Ambiguous.

In its writ of certiorari, the prosecution requests that this court interpret the plain language of HRS § 706-624(3) in such a way as to hold that actual notice is sufficient to satisfy the statute's written notice requirement. To this end, the prosecution largely relies on the dissent's reasoning in the Intermediate Court of Appeals' opinion of the instant case.

Rather than strictly construe the plain language of HRS § 706-624(3), the dissent would hold that "a defendant who has actual notice or knowledge of the condition of a DAG plea should not be allowed to avoid punishment for violating those conditions simply because the defendant was not provided with written notice." State v. Shannon, 116 Hawai'i 38, 41, 169 P.3d 990, 993 (2007) (Nakamura, J., dissenting). The dissent relied on federal court decisions that have been confronted with the issue of "whether the failure to provide the defendant with written notice of the conditions of supervised release, as required by statute,

automatically invalidates the trial court's revocation of the defendant's supervised release." Id. The dissent observed that "every other [federal circuit] to address this issue" have held that "the 'government's failure to provide the [written] notice required by the [federal] statutes does not limit the [trial] court's authority to revoke supervised release where the defendant had actual notice of the release terms.'" Id. (quoting United States v. Arbizu, 431 F.3d 469 (5th Cir. 2005)) (alterations added and in original). As the dissent noted, "[f]ederal law requires that defendants sentenced to a term of supervised release be provided with written notice of the conditions of release." Id. Section 3583(f) of Title 18 of the United States Code provides, in its entirety:

> **Written statement of conditions.** The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

The Fifth Circuit observed that

> [t]he purpose of [18 U.S.C.] §§ 3583(f) and 3603(1)[1] is to ensure that the defendant is notified of the conditions of his supervised release. Congress decided that requiring the probation officer to provide the defendant with written notice of the conditions is the best way to ensure the defendant knows what is expected of him during the supervised release period. It would be patently unfair to revoke a defendant's supervised release and send him back to prison for violating conditions of the release that he had no way of knowing existed.
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> Congress, however, did not decide that a defendant who

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[1] 18 U.S.C. § 3603(1) provides, in its entirety:

> A probation officer shall--
>
> (1) instruct a probationer or a person on supervised release, who is under his supervision, as to the conditions specified by the sentencing court, and provide him with a written statement clearly setting forth all such conditions[.]

> does not receive the proper written notice should be immune from revocation of supervised release. A defendant who knows that his supervised release terms bar certain conduct should not be allowed to engage in that conduct and then hide behind the government's failure to follow statutory notice procedures during sentencing.

Id. at 41-42, 169 P.3d at 993-94 (quoting Arbizu, 431 F.3d at 471).

Hawaii's DAG plea statutory framework is subsumed under HRS chapter 853. HRS § 853-1(b) provides, in its entirety:

> **Deferred acceptance of guilty plea or nolo contendere plea; discharge and dismissal, expungement of records.**
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> . . . .
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> (b) The proceedings may be deferred upon any of the conditions specified by section 706-624. As a further condition, the court shall impose a compensation fee pursuant to section 351-62.6 upon every defendant who has entered a plea of guilty or nolo contendere to a petty misdemeanor, misdemeanor, or felony; provided that the court shall waive the imposition of a compensation fee, if it finds that the defendant is unable to pay the compensation fee. The court may defer the proceedings for a period of time as the court shall direct but in no case to exceed the maximum sentence allowable; provided that, if the defendant has entered a plea of guilty or nolo contendere to a petty misdemeanor, the court may defer the proceedings for a period not to exceed one year. The defendant may be subject to bail or recognizance at the court's discretion during the period during which the proceedings are deferred.

(Emphasis added.)

HRS § 706-624 is organized in the following manner:

> **Conditions of probation.**
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> (1) Mandatory conditions. The court shall provide, as an explicit condition of a sentence of probation:
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> . . . .
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> (2) Discretionary conditions. The court may provide, as further conditions of a sentence of probation, to the extent that the conditions are reasonably related to the factors set forth in section 706-606 and to the extent that the conditions involve only deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 706-606(2), that the defendant:
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> . . . .
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> (3) Written statement of conditions. The court shall order the defendant at the time of sentencing to sign a written acknowledgment of receipt of conditions of probation. The defendant shall be given a written copy of any requirements imposed pursuant to this section, stated

> with sufficient specificity to enable the defendant to comply with the conditions accordingly.

HRS § 706-624(1) specifies seven "[m]andatory conditions," see HRS § 706-624(1)(a)-(g), which includes "[t]hat the defendant not commit another federal or state crime or engage in criminal conduct in any foreign jurisdiction or under military jurisdiction that would constitute a crime under Hawaii law during the term of probation." HRS § 706-624(1)(a). HRS § 706-624(2), meanwhile, specifies seventeen "[d]iscretionary conditions." See HRS § 706-624(2)(a)-(q).

Reading HRS § 706-624(3) together with the plain language of HRS § 853-1(b), which incorporates by reference "the conditions specified by [HRS §] 706-624," it appears reasonable to conclude that HRS § 706-624(3) is not a "condition" per se by which further proceedings may be deferred. Indeed, HRS § 853-3 (1993) mandates that "[u]pon violation of a term or condition set by the court for a deferred acceptance of guilty plea or deferred acceptance of nolo contendere plea, the court may enter an adjudication of guilt and proceed as otherwise provided." Nothing within HRS chapter 853 provides consequences for a court's non-compliance with HRS § 706-624(3). See HRS §§ 853-1 to -4. As such, complying with the plain language of both HRS § 853-1(b) and HRS § 853-3 would create a confusing incoherence should a trial court defer proceedings on the "condition[]" of HRS § 706-624(3). See State v. Putnam, 93 Hawai'i 362, 368-69, 3 P.3d 1239, 1245-46 (2000) ("We conclude that, because a court's course of action following revocation is expressly set forth in HRS § 853-3, no need or justification arises for resort to any

other statute, such as HRS § 706-625(5), for guidance in the situation presented by Defendant's case."); see also Gray v. Admin. Dir. of the Court, 84 Hawai'i 138, 148, 931 P.2d 580, 590 (1997) ("[T]he legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality."). Because of this incoherence, I would hold that the plain language of HRS § 853-1(b) is ambiguous, and accordingly look to its legislative history for guidance. See State v. White, 110 Hawai'i 79, 83, 129 P.3d 1107, 1111 (2006).

B. The Legislative History Of HRS §§ 853-1(b) and 706-624(3).

1. HRS § 853-1(b)

Enacted in 1976,[2] HRS chapter 853 was intended "to establish a means whereby a court in its discretion may defer acceptance of a guilty plea . . . for a certain period on certain conditions with respect to certain defendants." Hse. Conf. Comm. Rep. No. 31, in 1976 House Journal, at 1140. In so establishing, a "defendant [has] the opportunity to keep his record free of criminal conviction, if he can comply with those terms and conditions during the period designated by court order." Id.

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[2] The language of HRS § 853-1(b) as enacted in 1976 provided as follows:

> The proceedings may be deferred upon any of the conditions specified by section -624, Hawaii Penal Code. The court may defer the proceedings for such period of time as the court shall direct but in no case to exceed the maximum sentence allowable. The defendant may be subject to bail or recognizance at the court's discretion during the period which the proceedings are deferred.

1976 Haw. Sess. L. Act 154, § 2 at 280.

"The completion of such period in compliance with such conditions may then result in the discharge of the defendant and expungement of the matter from his record." 1976 Haw. Sess. L. Act 154, § 1 at 279. Hawaii's legislature concluded that "[i]t is in the best interest of the State that in certain criminal cases, particularly those involving first time, accidental, or situational offenders, the offender not be burdened with the stigma of having a criminal record for the rest of his life." Id. Indeed, a DAG plea was intended as a "sentencing alternative" for those "cases wherein the facts and circumstances clearly indicate that the defendants are one-time, situational or accidental offenders who will not engage in further criminal activity and do not pose a threat to the safety of the community." Sen. Stand. Comm. Rep. No. 616-76, in 1976 Senate Journal, at 1152. "For these offenders, the humiliation and inconvenience of arrest and prosecution satisfy the need for punishment; and a trial and conviction would serve no purpose other than to impair the offenders' educational, employment, and professional opportunities and ability to function as a responsible and productive member of the community." Id. Additionally, "the [DAG plea] procedure . . . has the . . . benefit of saving time and money for the criminal justice system without adversely affecting the public interest." Also, "[i]t will further relieve the congestion in the courts and enable the criminal justice system to direct its limited resources where they can be most beneficial to the community." Id.

Accordingly, HRS chapter 853 was enacted to

> [s]et out specifically and in detail: (a) how the court shall discharge the defendant and dismiss the charge against him; (b) that the defendant may apply for expungement of all recordation relating to his arrest, arraignment, indictment, information, plea of guilty, or dismissal and discharge and the exceptions thereto; (c) proceedings for commencing a "DAG" plea; (d) the legal consequences of violation of terms and conditions during deferment; and (e) when the "DAG" plea chapter would not be applicable.

1976 House Journal, at 1140.

In 1988, HRS § 853-1(b) was amended to include the following words: "(b) . . . unless the defendant has entered a plea of guilty or nolo contendere to a petty misdemeanor, in which case the court may defer the proceedings for a period not to exceed one year." 1988 Haw. Sess. L. Act 184, § 1 at 314. Inclusion of this amendment was intended to provide a trial court with "the discretion to impose a period of time which the court finds to be necessary to effectively assess the success of the [DAG plea]." Sen. Stand. Comm. Rep. No. 2148, in 1988 Senate Journal, at 924.

In 2000, HRS § 853-1(b) was amended to include the following words:

> (b) . . . As a further condition, the court shall impose a compensation fee pursuant to section 351-62.6 upon every defendant who has entered a plea of guilty or nolo contendere to a petty misdemeanor, misdemeanor, or felony; provided that the court shall waive the imposition of a compensation fee, if it finds that the defendant is unable to pay the compensation fee.

2000 Haw. Sess. L. Act 115, § 3 at 232-33. In imposing this fee, Hawaii's legislature recognized the "substantial benefit" that a DAG plea under HRS § 853-1 confers upon a defendant ("assuming the defendant meets all the conditions and terms" imposed by the trial court), inasmuch as "the charges are dismissed without adjudication of guilt and the defendant is discharged and may

apply for expungement." Sen. Stand. Comm. Rep. No. 2481, in 2000 Senate Journal, at 1026; Hse. Stand. Comm. Rep. No. 980-00, in 2000 House Journal, at 1365.

Pursuant to the foregoing, this court has determined that "the granting of a DAG plea is an act of legislative grace, within the discretion of the trial court; it is not a matter of right for the defendant." State v. Kaufman, 92 Hawai'i 322, 329, 991 P.2d 832, 839.[3] In Kaufman, the defendant pled guilty to twenty-six counts of theft in the first degree and moved for a DAG plea, which the circuit court granted. Id. at 323-24, 991 P.2d at 833-34. The defendant's DAG plea was conditioned on the defendant being "free from further conviction for a period of five years[,]" and to "reimburse all monies received . . . ." Id. at 324, 991 P.2d at 834. The trial court deferred acceptance of the defendant's DAG plea for five years, but the deferment period was extended for an additional five years, bringing the total deferment period to ten years. Id. at 327, 991 P.2d at 837. On appeal, the defendant asserted, inter alia, that "the tolling provision applicable to probation, HRS § 706-627, should not apply."[4] Id. at 328, 991 P.2d at 838. Pursuant to the

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[3] I note that even though Kaufman did not address the same issue, its reasoning is persuasive.

[4] HRS § 706-627 (1993) provides, as follows:

> (1) Upon the filing of a motion to revoke a probation or a motion to enlarge the conditions imposed thereby, the period of probation shall be tolled pending the hearing upon the motion and the decision of the court. The period of tolling shall be computed from the filing date of the motion through and including the filing date of the written decision of the court concerning the motion for purposes of computation of the remaining period of probation, if any.

legislative history of Hawaii's DAG plea statutes and HRS § 706-627, this court held that the public policy behind HRS § 706-627 supported its applicability to a DAG plea, inasmuch as "[w]ithout tolling, a person subject to a deferral period pursuant to a DAG plea would effectively escape the sanction of revocation simply because his untolled deferral period had expired before the trial court ruled on the revocation." Id. at 329, 991 P.2d at 839 (emphasis added). Accordingly, this court determined that "we cannot construe the law in such a way that would preclude the trial court's setting aside of [a defendant's] DAG plea merely because the hearing was postponed beyond the deferral period, especially when [the defendant] contributed and agreed to the delay of the circuit court's decision on [the] motion to set aside [the] DAG plea." Id.

2. HRS § 706-624(3)

In light of the foregoing, I will now review the legislative history of HRS § 706-624(3) for additional guidance. Enacted in 1972, HRS § 706-624(4), as it was known then, provided the following language: "The defendant shall be given a written copy of any requirements imposed pursuant to this section, stated

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> In the event the court fails to file a written decision upon the motion, the period shall be computed by reference to the date the court makes a decision upon the motion in open court. During the period of tolling of the probation, the defendant shall remain subject to all terms and conditions of the probation except as otherwise provided by this chapter.
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> (2) In the event the court, following hearing, refuses to revoke the probation or grant the requested enlargement of conditions thereof because the defendant's failure to comply therewith was excusable, the defendant may be granted the period of tolling of the probation for purposes of computation of the remaining probation, if any.

with sufficient specificity to enable him to guide himself accordingly." 1972 Haw. Sess. L. Act 9, § 1 at 75-76. This statute was enacted as part of a reformation of the Hawai'i Penal Code ("HPC"), which is based on the Model Penal Code ("MPC"). Hse. Conf. Comm. Rep. No. 1, in 1972 House Journal, at 1035.

In 1986, HRS § 706-624(4) became HRS § 706-627(3), which provided in its entirety: "(3) Written statement of conditions. The defendant shall be given a written copy of any requirements imposed pursuant to this section, stated with sufficient specificity to enable the defendant to guide the defendant's self accordingly." 1986 Haw. Sess. L. Act 314, § 25 at 606. This amendment was included among many "comprehensive amendments that would refine the penal code rather than propose widesweeping reform." Hse. Conf. Comm. Rep. No. 51-86, in 1986 House Journal, at 937. The legislature generally intended that "[t]he amendments to section 706 . . . demonstrate a shift from the present approach of sentencing which emphasizes rehabilitation toward achieving the goal of just punishment." Id. at 938. The legislature was silent as to their intent of the amendment to HRS § 706-624 specifically.

In 2006, Hawaii's legislature again made numerous "substantive and technical amendments to" the HPC, Hse. Conf. Comm. Rep. No. 94-06, in 2006 House Journal, at 1813, which included revising HRS § 706-624(3) to its present form, as follows:

> (3) Written statement of conditions. The court shall order the defendant at the time of sentencing to sign a written acknowledgement [sic] of receipt of conditions of probation. The defendant shall be given a written copy of any requirements imposed pursuant to this section, stated

> with sufficient specificity to enable the defendant to comply with the conditions accordingly.

2006 Haw. Sess. L. Act 230, § 20 at 1010. Again, there is no indication of legislative intent outside of the changes made to the plain language of HRS § 706-624(3).

The Commentary to HRS § 706-624, however, states that what was then known as "[s]ubsection (4) is an addition to the law suggested by the Model Penal Code and accepted in other states. The intent is to provide the defendant with notice of what is expected of the defendant in a form which will not escape the defendant's memory." (Citing M.P.C. § 301.1, Tentative Draft No. 2, comments at 145-46 (1954).)

C. In My View, the ICA Gravely Erred When It Held That HRS § 706-624(3) Was Incorporated By Reference Into Hawaii's DAG Plea Statutory Framework Through HRS § 853-1(b).

Most closely analogous to the instant case is this court's opinion in State v. Huggett, 55 Haw. 632, 636-37, 525 P.2d 1119, 1122-23 (1974), where this court gleaned guidance from several federal court decisions to conclude that even though the defendant "neither saw nor signed the written conditions of probation applicable to him[,]" oral notice of a condition is sufficient to revoke his probation for failing to comply with that condition. In State v. Lee, 10 Haw. App. 192, 197, 862 P.2d 295, 297 (1993), however, the ICA noted that "Huggett . . . involved an offense committed in 1971, prior to the effective date (January 1, 1973) of the Hawaii Penal Code."

The ICA in the instant case relied solely on its opinion in Lee to reject the prosecution's argument that "Shannon's receipt of actual, oral notice at the February 11,

2005 hearing was sufficient." Shannon, 116 Hawai'i at 40, 169 P.3d at 992. In Lee, the defendant pled no contest to the offense of sexual assault in the third degree, and was sentenced to a term of five years of probation and twelve months in jail. 10 Haw. App. at 193, 862 P.2d at 296. The defendant's jail term was suspended, however, on certain conditions. Id. Because the defendant violated one of these conditions, the prosecution moved to revoke his probation, which was granted by the trial court. Id. at 194-95, 862 P.2d at 296-97. On appeal, the ICA reversed the trial court's decision on the ground that the defendant was not provided with written notice of the terms and conditions of his probation pursuant to the plain language of HRS § 706-624(3). Id. at 197-98, 862 P.2d at 297-98. Notwithstanding the ICA's holding in Lee, I believe that Lee is distinguishable because construing the plain language of HRS § 853-1(b) was not before the ICA in that case, and the plain language of HRS § 706-624(3), independent of HRS § 853-1(b), appears unambiguous.

Particularly persuasive in that connection is this court's discussion in State v. Sylva, 61 Haw. 385, 605 P.2d 496 (1980). In Sylva, the defendant pled guilty to the offense of burglary in the second degree, but was denied his request for a DAG plea pursuant to HRS § 853-4(7).[5] 61 Haw. at 386, 605 P.2d

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[5] HRS § 853-4(6) to (8) provides:

> This chapter shall not apply when:
> . . . .
> (6) The defendant has been convicted of any offense defined as a felony by the Hawaii Penal Code or has been convicted for any conduct which if perpetrated in this state would be punishable as a felony;
> (7) The defendant is found to be a law violator or

at 497. The defendant in Sylva was thirty-one years old and without a felony conviction as an adult. Id. However, as a juvenile, the defendant was adjudicated for thirty-six malicious conversion offenses, three attempted malicious conversion offenses, and three burglary offenses. Id. The trial court determined that because of the defendant's prior juvenile record, he was statutorily disqualified to a DAG plea. Id.

On appeal, this court determined that "when read independently of the other subsections," HRS § 853-4(7) "appears to be clear and unambiguous[.]" Id. at 387-88, 605 P.2d at 498. However, reading the statutory language "in the context of the entire statute and construed in a manner consistent with the purposes of the statutes[,]" this court held that HRS § 853-4(7) was ambiguous "when read in context of subsections (6) and (8) and the purposes of Chapter 853." Id. at 388, 605 P.2d at 498. This court opined that "[i]f, as argued by the State, we were to follow the language of subsection (7) literally, it would mean that every defendant with a juvenile record for offenses which would have been felonies if committed by an adult would be automatically disqualified from the benefits of [a] DAG plea[.]" Id. at 389, 605 P.2d at 498-99. In that regard, this court further opined, "it would simply make no difference if the defendant happens to have a juvenile record of a single offense

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delinquent child for the commission of any offense defined as a felony by the Hawaii Penal Code or for any conduct which if perpetrated in this state would constitute a felony;

(8) The defendant has a prior conviction for a felony committed in any state, federal, or foreign jurisdiction.

incurred at age twelve, and he is before the court with an unblemished adult record as a 'one-time, accidental or situational offender.'" Id. at 389, 605 P.2d at 499. Accordingly, and notwithstanding the plain language of HRS § 853-4(7), this court limited application of HRS § 853-4(7) "to only those cases involving minors over whom the family courts had exclusive original jurisdiction under HRS § 571-11(1) but were waived from the family courts to the criminal courts to be tried as adults pursuant to HRS § 571-22." Id. For those defendants "with juvenile records who are not before the court on such waivers, and who are not disqualified by any of the other subsections," this court held that "the trial court is vested with discretionary authority to either deny or accept DAG pleas." Id.

Similarly, as discussed supra, I would hold that the plain language of HRS § 853-1(b), as it applies to HRS § 706-624(3), is ambiguous. Moreover, based on the legislative history of HRS § 853-1(b), Hawaii's legislature intended that our trial courts be given discretion to provide "certain defendants" with a "substantial benefit"; namely, should a defendant comply with the terms and conditions of his DAG plea, "the charges are dismissed without adjudication of guilt and the defendant is discharged and may apply for expungement." 2000 Senate Journal, at 1026. As enunciated by our legislature when it enacted HRS chapter 853 in 1976, a DAG plea may be granted by the trial court in its discretion for those "cases wherein the facts and circumstances clearly indicate that the defendants are one-time, situational or

accidental offenders who will not engage in further criminal activity and do not pose a threat to the safety of the community." 1976 Senate Journal, at 1152. This is due to the legislature's observation that "[f]or these offenders, the humiliation and inconvenience of arrest and prosecution satisfy the need for punishment; and a trial and conviction would serve no purpose other than to impair the offenders' educational, employment, and professional opportunities and ability to function as a responsible and productive member of the community." Id. In light of the foregoing, it seems unlikely that our legislature intended that a defendant, who has actual notice of the terms and conditions of his DAG plea, may violate those terms and conditions yet be shielded from the consequences arising therefrom. See HRS § 1-15(2) (1993) ("The reason and spirit of the law, and the cause which induced the legislature to enact it, may be considered to discover its true meaning."); Kaufman, 92 Hawai'i at 329, 991 P.2d at 839 (holding, based on public policy and the facts and circumstances of that case, that "[w]ithout tolling, a person subject to a deferral period pursuant to a DAG plea would effectively escape the sanction of revocation simply because his untolled deferral period had expired before the trial court ruled on the revocation."); Gray, 84 Hawai'i at 148, 931 P.2d at 590 ("[T]he legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality."); id. ("[W]e must read statutory language in the context of the entire statute and construe it in a manner

consistent with its purpose." (Block format and citation omitted.)); Sylva, 61 Haw. at 389, 605 P.2d at 499 ("In order to give [HRS § 853-4(7)] a fair and reasonable construction consistent with the purposes of Chapter 853, [HRS § 853-4(7)] must be given a limited application.").

Accordingly, pursuant to the legislative history of HRS § 853-1(b) and in light of the foregoing discussion, I would hold that the ICA gravely erred when it held that HRS § 706-624(3) is incorporated by reference into Hawaii's DAG plea statutory framework through the plain language of HRS § 853-1(b).

D. Federal Case Law Interpreting Similar Federal Statutes Uniformly Hold That Evidence Of Actual Notice Is Sufficient To Satisfy the Federal Statutes' Written Notice Requirement.

Because I would conclude that HRS § 706-624(3) is not included as a "condition" pursuant to HRS § 853-1(b), HRS chapter 853 is silent as to whether it requires any notice of a trial court's terms and conditions of a DAG plea. "In ruling on state law, this Court may look for guidance to federal case law interpreting similar provisions." Crosby v. State Dep't of Budget & Fin., 76 Hawai'i 332, 339 n.9, 876 P.2d 1300, 1307 n.9 (1994).

As quoted above, section 3583(f) of Title 18 of the United States Code provides, in its entirety:

> **Written statement of conditions.** The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

Additionally, section 3603(1) of Title 18 of the United States

Code provides:

> A probation officer shall--
> (1) instruct a probationer or a person on supervised release, who is under his supervision, as to the conditions specified by the sentencing court, and provide him with a written statement clearly setting forth all such conditions[.]

As discussed supra, a federal court has held that "[i]t would be patently unfair to revoke a defendant's supervised release and send him back to prison for violating conditions of the release that he had no way of knowing existed." Arbizu, 431 F.3d at 471. At the same time, however, "Congress . . . did not decide that a defendant who does not receive the proper written notice should be immune from revocation of supervised release." Id.; United States v. Ortega-Brito, 311 F.3d 1136, 1138 (9th Cir. 2002) ("[T]he statutes detail the obligations of the [federal] district court and the probation officer, [but] they are silent with respect to remedies for noncompliance."). Rather, "[t]he purpose behind the requirement that the court order a written statement of the conditions of supervised release be furnished to the defendant is to provide 'a guide for the defendant's conduct and for such supervision as is required.'" United States v. Felix, 994 F.2d 550, 551 (8th Cir. 1993); Arbizu, 431 F.3d at 471 ("Congress decided that requiring the probation officer to provide the defendant with written notice of the conditions is the best way to ensure the defendant knows what is expected of him during the supervised release period."). Accordingly, "[b]ecause the ultimate goal" of the written notice requirement "is notice and guidance for the defendant," the federal courts "decline[d] to impose a rule that failure to order or to provide

a written statement automatically results in the inability of the sentencing court to revoke supervised release based on a violation of one of the conditions." Felix, 994 F.2d at 551; see Ortega-Brito, 311 F.3d at 1138 (agreeing with the reasoning of Felix).

Instead, federal courts have held that actual notice is sufficient to satisfy the purpose of the federal statutes quoted above. Felix, 994 F.2d at 551; see Arbizu, 431 F.3d at 471 ("We conclude, therefore, that failure to provide written notice of the conditions of supervised release does not automatically invalidate a revocation of such release if the defendant received actual notice of the conditions imposed."); United States v. Tapia-Marquez, 361 F.3d 535, 538 (9th Cir. 2004) (affirming its holding in Ortega-Brito); Ortega-Brito, 311 F.3d at 1138 ("[W]e must determine whether [the defendant] received actual notice of the conditions, the violations of which formed the basis for the revocation of his supervised release."); United States v. Ramos-Santiago, 925 F.2d 15, 17 (1st Cir. 1991) (holding that even though the defendant never received a "written statement of conditions," the "essentials of the notice required" by the federal statutes were met when the defendant and his counsel "received copies of the sentence, to which were attached, inter alia, the conditions of his supervised release.").

I believe that the foregoing reasoning is persuasive, insofar as it gives HRS § 853-1(b) "a fair and reasonable construction consistent with the purposes of Chapter 853[.]" See Sylva, 61 Haw. at 389, 605 P.2d at 499. Accordingly, because it

would be "patently unfair" to set aside a defendant's DAG plea for violating conditions he never knew existed, I would hold that a trial court may set aside a defendant's DAG plea if the defendant has actual notice of the terms and conditions thereof. See Arbizu, 431 F.3d at 471.

The issue presented therefore becomes whether the evidence is sufficient to support a finding that Shannon was given adequate actual notice of the conditions of his DAG plea. In the instant case, the record reflects that Shannon satisfied one of these conditions; namely, he paid the twenty-five dollar "CICF" fine on March 14, 2005. The record also reflects, and Shannon admits, that he requested that the trial court convert his outstanding forty-hours of community service work into a fine. In light of the foregoing, I would hold that the evidence is sufficient to show that Shannon had actual notice of the terms and conditions of his DAG plea.

E. In My View, Shannon's Remaining Points Of Error On Appeal Are Without Merit.

1. In my view, HRS § 706-627(1) (1993) does not require that a written motion to set aside a DAG plea be filed to toll the deferral period.

In his opening brief before the ICA, Shannon asserts that the plain language of HRS § 706-627(1) requires that the prosecution file a written motion to set aside Shannon's DAG plea in order to toll the deferral period. HRS § 706-627(1) provides, in its entirety:

> (1) Upon the filing of a motion to revoke a probation or a motion to enlarge the conditions imposed thereby, the period of probation shall be tolled pending the hearing upon the motion and the decision of the court. The period of

> tolling shall be computed from the filing date of the motion through and including the filing date of the written decision of the court concerning the motion for purposes of computation of the remaining period of probation, if any. In the event the court fails to file a written decision upon the motion, the period shall be computed by reference to the date the court makes a decision upon the motion in open court. During the period of tolling of the probation, the defendant shall remain subject to all terms and conditions of the probation except as otherwise provided by this chapter.

This court has long adhered to the following rule of statutory construction: "When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself." White, 110 Hawai'i at 83, 129 P.3d at 1111 (quoting Gray, 84 Hawai'i at 148, 931 P.2d at 590).

Contrary to Shannon's assertion, the plain language of HRS § 706-627(1) does not require the prosecution to file a written motion. Instead, the plain language of HRS § 706-627(1) requires only that the "decision of the court concerning the motion" be in writing. Because the plain language of HRS § 706-627(1) makes a distinction between "the filing date of the motion" and "the filing date of the written decision of the court," id. (emphasis added), I would hold that the legislature intended that, for purposes of tolling a deferral period, a motion to set aside a DAG plea may be made either orally or in writing. See White, 110 Hawai'i at 83, 129 P.3d at 1111.

In the instant case, Shannon's DAG plea was requested by oral motion and granted by the trial court on February 11, 2005. The proof of compliance hearing had been held on January 27, 2006. It was at this hearing that the prosecution made its

oral motion to set aside Shannon's DAG plea.[6] For reasons not included in the record on appeal, the hearing was continued to a later date. In light of the foregoing discussion, I would hold that the prosecution's oral motion on January 27, 2006 effectively tolled the deferral period "pending the hearing upon the motion and the decision of the court." HRS § 706-627(1).

2. In my view, Shannon's assertion that the trial court lacked statutory authority to impose, as a condition of his DAG plea, that he remain arrest free is disregarded pursuant to Hawai'i Rules of Appellate Procedure ("HRAP") Rule 28(b)(4) (2006).

Shannon asserts that the trial court lacked statutory authority to impose, as a condition of his DAG plea, that he remain arrest free during the period of his deferral. Shannon's sole argument as to this point of error is that the plain language of HRS § 706-624(1)(a) does not authorize a trial court's imposition of the condition that Shannon remain arrest free. HRS § 706-624(1)(a) provides, in relevant part, that "[t]he court shall provide, as an explicit condition of a

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[6] The District Court Rules of Civil Procedure ("DCRCP") Rule 7(b)(1) (2006) requires, as follows:

> (b) Motions and other papers.
>
> (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(Emphasis added.)

Moreover, the Rules of the District Courts of the State of Hawai'i ("RDCSH") Rule 7(a) (2006) states, in pertinent part: "All motions, except when made during a hearing or trial, shall be in writing, shall state the grounds therefor, shall set forth the relief or order sought, and if involving a question of law shall be accompanied by a memorandum in support of the motion." (Emphasis added.)

sentence of probation: . . . (a) [t]hat the defendant not commit another federal or state crime . . . ."

The prosecution contends that this point of error should be disregarded, inasmuch as Shannon failed to object to this condition. The prosecution further contends that the trial court had the authority to impose such a condition pursuant to HRS § 706-624(2)(q), which states that "[t]he court may provide . . . that the defendant[] . . . (q) [s]atisfy other reasonable conditions as the court may impose."

HRAP Rule 28(b)(4) requires that each point of error shall state:

> (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency.

Shannon fails to satisfy the requirements of (ii) and (iii) in his opening brief, and does not assert that his substantial rights were adversely affected by the trial court's imposition of this condition. Moreover, even if the trial court erred in imposing this condition, the error did not affect Shannon's substantial rights inasmuch as Shannon admitted to not satisfying the condition of completing forty-hours of community service work. See HRS § 853-3 ("Upon violation of a term or condition set by the court for a deferred acceptance of guilty plea . . . , the court may enter an adjudication of guilt and proceed as otherwise provided."); see also State v. Rivera, 106 Hawai'i 146, 166, 102 P.3d 1044, 1064 (2004) ("HRS § 641-16 (1993) expressly states that '[n]o order, judgment, or sentence shall be reversed

or modified unless the court is of the opinion that error was committed which injuriously affected the substantial rights of the appellant.'" (Emphasis, block format, and citation omitted.)). "Consistent with the harmless error doctrine, we have frequently stated that error must be examined in light of the entire proceedings and given effect to which the whole record shows it is entitled." Rivera, 106 Hawai'i at 165-66, 102 P.3d at 1063-64 (citation and quotation marks omitted).

Assuming, arguendo, that the trial court erred in imposing the condition of remaining arrest-free, the error is harmless in light of the circumstances of this case. See Rivera, 106 Hawai'i at 165-66, 102 P.3d at 1063-64. Accordingly, I would disregard this point of error. "Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented." HRAP Rule 28(b)(4).

3. In my view, Shannon's assertion that the trial court violated his right to confrontation is without merit.

Shannon asserts that the trial court violated his constitutional right to confrontation when it admitted the Adult Client Services report into evidence inasmuch as it constituted hearsay and he was not given an opportunity to cross-examine the probation officer that filled out the report. The prosecution contends that the trial court did not err when it admitted the report into evidence, and points out that the trial court took judicial notice "of the fact that [Shannon] has been charged with [a] crime subsequent . . . to the date that he was sentenced . .

. ." The prosecution further contends that even if the trial court erred in admitting the report into evidence, the error did not affect Shannon's substantial rights inasmuch as Shannon admitted to not satisfying the condition of completing forty-hours of community service work.

As discussed above and notwithstanding whether the trial court erred in either taking judicial notice of his arrest or admitting the report as evidence of his arrest record, the error complained of by Shannon does not affect his substantial rights inasmuch as Shannon admitted to not satisfying the condition of completing forty-hours of community service work. See HRS § 853-3; see also Rivera, 106 Hawai'i at 165-66, 102 P.3d at 1063-64. Accordingly, I do not believe that this court needs to express an opinion on this issue.

4. In my view, Shannon's assertion that the trial court abused its discretion when it refused to convert his forty hours of community service work into a fine is deemed waived pursuant to HRAP Rule 28(b)(7).

Shannon asserts that because "the usual practice of the trial court is to permit a probationer the opportunity to convert his or her community service [work] into a fine[,]" the trial court abused its discretion when it denied Shannon's request for the court to do the same for him. However, Shannon fails to include "citations to the authorities, statutes and parts of the record relied on" to support his assertion that this is a "usual practice of the trial court . . . ." HRAP Rule 28(b)(7). Accordingly, I would deem Shannon's point of error as waived. See id. ("Points not argued may be deemed waived.").

5. In my view, the trial court did not abuse its discretion when it refused to grant Shannon's motion for continuance.

Shannon asserts that the trial court abused its discretion when it refused to grant his motion to continue the April 6, 2006 hearing so that he could have more time to obtain a transcript of his change-of-plea hearing. Shannon contends that this transcript would have clarified whether additional grounds exist for his DAG plea to be withdrawn. He also contends that his request for a continuance was reasonable because he was retained as counsel shortly before the April 6, 2006 hearing.

The trial court ruled on Shannon's motion for a continuance, as follows:

> THE COURT: . . . I'm going to deny the . . . motion . . . . It's been a year since defendant was . . . sentenced. And . . . there's been more than adequate time for this motion to have been made previously.
>
> And I'll also note that the general practice of the [c]ourts is that subsequent to . . . the imposition of sentence, the courts are reluctant to grant withdrawal of plea. So I'm going to deny the motion at this time without prejudice to you to raise that later.
>
> [SHANNON'S COUNSEL]: Well, . . . is the [c]ourt considering that I just got on the case?
>
> THE COURT: Yes. And I don't think that this is a motion of such magnitude that really requires that . . . it be continued for a hearing at this time.

"We review a trial court's decision to grant or deny a motion to continue for an abuse of discretion." Onaka v. Onaka, 112 Hawai'i 374, 378, 146 P.3d 89, 93 (2006). "[A]n abuse of discretion occurs if the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Klie, 116 Hawai'i at 522, 174 P.3d at 361.

Even though Shannon's present counsel was retained

close to the April 6, 2006 hearing, I cannot conclude that the trial court abused its discretion because (1) it took Shannon over a year to decide that he wanted to withdraw his guilty plea, and (2) Shannon acquiesced to the terms and conditions of his DAG plea when he satisfied the condition of payment of a fine on March 14, 2005. The conditions of his DAG plea were given on February 11, 2005, which is the same day that Shannon changed his plea to guilty and was granted a DAG plea by the trial court. Accordingly, Shannon had more than a month to inform the court that he wanted to withdraw his guilty plea prior to his payment of the fine. In light of the foregoing, it cannot be said that the trial court "clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of" Shannon when it refused to grant his motion for a continuance. Klie, 116 Hawai'i at 522, 174 P.3d at 361.

II. CONCLUSION

Based upon the foregoing analysis, I would reverse the ICA's October 17, 2007 judgment on appeal.

Pamela W. Nakayama