DISSENTING OPINION BY MOON, C.J.

I disagree with the majority's conclusion that, (1) under Hawai'i Revised Statutes (HRS) §§ 706-606.5 (1985) and 706-668(1) (1976), quoted infra, the Circuit Court of the First Circuit was authorized to impose consecutive indeterminate maximum terms of imprisonment and (2) the circuit court did not err in ordering petitioner/defendant-appellant Andrew K. Kamana'o to serve his indeterminate maximum terms for one count of rape in the first degree (count 9) and one count of sodomy in the first degree (count 11) consecutive to his indeterminate term for another count of rape in the first degree (count 6). I, therefore, join in Justice Levinson's dissent in part and write separately to underscore an additional point regarding indeterminate maximum sentencing and to clarify my position with respect to mandatory minimum sentencing and State v. Saufua, 67 Haw. 616, 699 P.2d 988 (1985).

Preliminarily, I note my agreement with Justice Levinson that, based on its plain language, "HRS § 706-668(1) mandated that [Kamanao's] three [indeterminate maximum twenty-year-imprisonment] sentences run concurrently." Dissenting Op. at 2. I also agree with his conclusion that HRS § 706-606.5(3) (relating to sentencing of repeat offenders) "did not, by its terms, plainly permit the circuit court to order **consecutive** indeterminate maximum sentences[.]" Id. at 3 (bold emphasis added) (underscored emphasis in original).

I believe this court's holding in State v. Tavares, 63 Haw. 509, 630 P.2d 633 (1981), underscores the correctness of Justice Levinson's position. In Tavares, this court was confronted with "whether a conviction on the second count of a two-count indictment constitute[d] a separate conviction" under HRS § 706-606.5 (Supp. 1980).[1] Id. at 509, 630 P.2d at 634. The court observed that:

> Although section 706-606.5(1) is explicit in delineating terms of imprisonment, the statute is ambiguous as to whether one conviction can be considered to have occurred "after" another conviction where both have been rendered simultaneously in the same trial. One possible interpretation is that the legislature intended that each felony offense be committed after conviction for the preceding felony to warrant increased criminal penalties. Under this interpretation, convictions on several counts of an indictment which occur during the same trial would not be totalled [sic] up, but treated as "one" prior conviction. Another possible interpretation of the language of the statute is that a conviction on each count of an indictment represents a separate conviction for the purposes of adding

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[1] The 1980 version of HRS § 706-606.5 contained the same language as the 1985 version of the statute, which is applicable to Kamanao's case. Section 706-606.5 (1985) provided in pertinent part that:

> (1) Notwithstanding . . . any other law to the contrary, any person convicted under section . . . 707-730 relating to rape in the first degree, 707-733 relating to sodomy in the first degree, . . . who has a prior **conviction** for any of the above enumerated offenses or of any one of those enumerated in subsection (2)[] in this or another jurisdiction, within the time of the maximum sentence of the prior conviction, shall be sentenced for each **conviction** after the first **conviction** to a mandatory minimum period of imprisonment without possibility of parole during such period as follows:
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> (a) Second **conviction** - 5 years;
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> (b) Third conviction - 10 years.
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> . . . .
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> (3) The sentencing court may impose the above sentences consecutive to any other sentence then or previously imposed on the defendant or may impose a lesser mandatory minimum sentence without possibility of parole than that mandated by this section where the court finds that strong mitigating circumstances warrant such action.

(Emphases added.)

> up the number of convictions for sentencing. Under this interpretation, each conviction on a separate count would result in an enhanced criminal sentence.

Id. at 511-12, 630 P.2d at 635. The Tavares court ultimately held that "convictions on several counts of an indictment are to be treated as only one conviction for the purposes of section 706-606.5(1)." Id. at 515, 630 P.2d at 637.

I am cognizant that this court subsequently criticized the Tavares court's reasoning in State v. Cornelio, 84 Hawai'i 476, 935 P.2d 1021 (1997). I emphasize, however, that it did not overrule Tavares. In Cornelio, this court pointed out that:

> Notwithstanding its attractiveness as a policy matter, the Tavares analysis disregarded the very rules of statutory construction that it purported to apply. In particular, the Tavares court was able to perceive ambiguity in the plain meaning of HRS § 706-606.5 only by pointedly ignoring the statute's proviso that "the sentencing court may impose the mandatory minimum prison sentences prescribed therein consecutive to any other sentence then imposed on the defendant." (Emphasis added.) In the face of the proviso, the only "possible interpretation" of the repeat offender statute was that "a conviction on each count of an indictment represents a separate conviction for the purposes of adding up the number of convictions for sentencing," such that "each conviction on a separate count could result in an enhanced criminal sentence." See Tavares, 63 Haw. at 512, 630 P.2d at 635. Had it therefore adhered to the "basic tenet of statutory interpretation" that "where the language of a statute is plain and unambiguous, construction by the court is inappropriate, and the court is bound to give effect to the law, according to its plain and obvious meaning," see id. at 511, 630 P.2d at 635, the Tavares court could not have "looked beyond the express language of the statute to the case law of other jurisdictions," as "extrinsic aids to its construction," for the purpose of holding that "convictions on several counts of an indictment are to be treated as only one conviction for the purposes of section 706-606.5(1)." See id. at 511-12, 515, 630 P.2d at 635-37.

84 Hawai'i at 491, 935 P.2d at 1036 (original brackets, ellipses, and footnotes omitted) (emphases in original). In not expressly overruling Tavares, the Cornelio court observed that the

legislature, in 1986, had amended HRS § 706-606.5 subsequent to Tavares in a manner essentially consistent with that decision's approach to the statute. See 1986 Haw. Sess. L. Act 314, § 17 at 600-02. The legislature amended HRS § 706-606.5 by defining a "conviction" under the statute as "two or more counts of an indictment or complaint[.]" HRS § 706-606.5(7) (Supp. 2007); see also 1986 Haw. Sess. L. Act. 314, § 17 at 602.[2] Thus, inasmuch as Cornelio declined to overrule Tavares, the holding therein as applied to the pre-amended HRS § 706-606.5, which is applicable to Kamana'o, controls.[3] See also State v. Dudoit, 90 Hawai'i 262,

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[2] Moreover, as previously quoted, subsection 706-606.5(3) provided in pertinent part that:

> The sentencing court may impose the above sentences consecutive to any other sentence then or previously imposed on the defendant or may impose a lesser mandatory minimum sentence without possibility of parole than that mandated by this section where the court finds that strong mitigating circumstances warrant such action.

The legislature, however, renumbered subsection (3) of HRS § 706-606.5 to subsection (5) in the current version of the statute and amended it to read in pertinent part:

> The sentencing court may impose the above sentences consecutive to any sentence imposed on the defendant for a prior conviction, but such sentence shall be imposed concurrent to the sentence imposed for the instant conviction.

HRS § 706-606.5(5).

[3] Cornelio involved, inter alia, the question "whether the sentencing court properly ran [the defendant's] mandatory minimum sentences imposed under HRS § 706-606.5 [(1993)] consecutively to each other[.]" 84 Hawai'i at 483, 935 P.2d at 1028 (internal quotation marks, ellipsis, and original brackets omitted). The Cornelio court held that the 1993 version of HRS § 706-606.5 "divests a sentencing court of the authority to impose consecutive mandatory minimum periods of imprisonment on a defendant convicted of multiple felony counts charged in the same indictment or complaint." Id. at 494, 935 P.2d at 1039. Such holding is consistent with Tavares' treatment of multiple counts in a single indictment.

273, 978 P.2d 700, 711 (1999) (observing that, due to the legislative amendment of HRS § 706-606.5, this court "perceived no need in Cornelio to expressly overrule Tavares").

In my view, the holding in Tavares that multiple counts in one indictment constitute a single conviction was consistent with HRS § 706-668(1)'s mandate that, "when multiple sentences of imprisonment are imposed on a person at the same time, . . . the sentence or sentences imposed shall be served concurrently." In other words, where the multiple sentences arise from multiple counts in one indictment, the multiple sentences imposed must be served concurrently. Accordingly, based on the plain language of HRS §§ 706-668(1) and 706-606.5, as well as the declaration in Tavares with respect to multiple counts/one conviction, Kamanao's three twenty-year indeterminate terms of imprisonment arising from three counts in a single indictment should have been ordered to be served concurrently.[4]

[4] The majority criticizes my conclusion that the holding in Tavares was consistent with HRS § 706-668(1)'s mandate regarding concurrent indeterminate maximum sentences. Majority Op. at 36-39. Specifically, the majority states:

> Initially, it must be noted that [Kamana'o] did not raise this issue to this court or to the ICA. Thus, it may only be considered under the doctrine of plain error.
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> However, the Chief Justice has not offered any basis for taking notice under the plain error rule. Moreover, because none of the parties raised plain error here or below[,] there is no discernible argument on this point for this court to review.

Majority Op. at 36-37 (citations and footnote omitted). The majority, however, misses the point. As stated previously, my discussion of Tavares is based upon my belief that its multiple counts/one conviction holding "underscores the correctness of Justice Levinson's position," Moon Dissenting Op. at 2, and provides analogous support of my view that Kamanao's three

(continued...)

In light of the holding in Tavares concerning multiple counts/one conviction, I depart from the majority's and Justice Levinson's apparent belief that Kamanao's five-year mandatory minimum term for each of the three counts could be run consecutively. The majority suggests that HRS § 706-606.5(3) authorized the circuit court "to run some mandatory minimum sentences consecutively and others concurrently[.]"[5] Majority at 27. Justice Levinson, likewise, maintains that subsection "706-606.5(3) authorized the circuit court to impose consecutive mandatory minimum terms." Dissenting Op. at 3 (emphasis in original). Indeed, HRS § 706-606.5(3) expressly conferred upon the circuit court the discretion to impose mandatory minimum terms of imprisonment "consecutive to any other sentences then or previously imposed on the defendant[.]" HRS § 706-606.5(3).

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[4](...continued)
indeterminate maximum twenty-year-imprisonment sentences should have been ordered to run concurrently. The question whether Kamanao's consecutive indeterminate maximum terms was lawful is the precise issue before this court and, therefore, resort to plain error is wholly unnecessary.

[5] To support its position that HRS §§ 706-668(1) and 706-606.5(3) "allow[ed] the imposition of consecutive indeterminate maximum sentences in conjunction with mandatory minimum sentences[,]" majority op. at 22-23, the majority hypothesizes -- based upon its belief that HRS § 706-606.5(3) permitted consecutive mandatory minimum sentences -- that,

> if a defendant were sentenced to consecutive five year mandatory minimum terms on six Class A felony counts, the combined mandatory minimum term would be thirty years. However, the indeterminate maximum term for each individual Class A felony would be twenty years. Thus, if the indeterminate maximums were served concurrently, they would be shorter than the combined mandatory minimum terms.

Majority Op. at 23. However, as discussed infra, the untenable result engendered by the above hypothetical would be avoided under the holding in Tavares and the plain reading of HRS § 706-606.5(3).

However, mandatory minimums for multiple counts in one indictment -- like indeterminate maximum terms -- must also be served concurrently under the holding in Tavares. Stated differently, the mandatory minimums under HRS § 706-606.5 can run consecutive to only the sentence for the prior offense under Tavares' definition of conviction. Thus, applying Tavares to the present case, counts 6, 9, and 11 constituted one conviction, thereby subjecting Kamana'o to a single five-year mandatory minimum term of imprisonment (as a second time offender under HRS § 706-606.5(1)(a), the first being his prior firearms conviction).

Lastly, I depart from Justice Levinson's dissent with regard to State v. Saufua, 67 Haw. 616, 699 P.2d 988 (1985), inasmuch as I believe it is inapplicable to the instant case. In Saufua, the circuit court, after revoking probation, sentenced the defendant to concurrent terms of twenty and ten years for the prior offenses and imposed the statutory maximum ten-year sentence for the subsequent underlying offense to be served consecutively. 67 Haw. at 617, 699 P.2d at 989. The circuit court also sentenced the defendant to a three year mandatory minimum term under the repeat offender statute to run consecutively with the subsequent offense sentence. Id. Thus, the sole inquiry before the Saufua court was "whether the mandatory minimum term may be tacked as a consecutive sentence to that imposed for the underlying subsequent offense." Id. at 617,

699 P.2d at 990. The court answered in the negative, reasoning that, to permit the mandatory minimum term to be tacked as a consecutive sentence, "[t]he court in effect extended the maximum sentence by three years without compliance with the extended term provisions." Id. at 619, 699 P.2d at 991. This court further reasoned that:

> The mandatory minimum sentencing provisions are intended to apply to sentences imposed for the underlying subsequent conviction which triggered application of the statute. Logically, the required period of unparoled imprisonment is subsumed within the maximum sentence imposed for that offense. This is in harmony with the statutory scheme. The consecutive sentence language of HRS § 706-606.5 necessarily must be read to allow the sentence on the **underlying** offense to be served consecutive to the sentence imposed for the **prior** offense or offenses.

Id. at 619-20, 699 P.2d at 991 (emphases added) (footnote omitted). Justice Levinson, however, believes, based upon the above statements -- particularly, the underscored sentence, -- that this court declared that:

> [T]he circuit court had the authority, pursuant to HRS § 706-606.5(3), particularly the statute's "consecutive sentencing language," to set the indeterminate maximum . . . sentence [for] the underlying offense[] to run consecutively with the indeterminate maximum . . . sentence . . . for the prior . . . offenses[]. It would follow from the logic of Saufua, then, that, in the present matter, HRS § 706-606.5(3) likewise authorized the circuit court to set Kamanao's indeterminate maximum sentence for his sodomy conviction to run consecutively with his indeterminate maximum sentences for rape[.]

Dissenting Op. at 6 (citation omitted). Likewise, the majority contends that, "in Saufua, this court has already determined that[,] where mandatory minimum sentences were involved, the maximum punishment available was the imposition of consecutive indeterminate maximum terms." Majority Op. at 30. I

respectfully disagree with the majority's and Justice Levinson's reading of Saufua. In my view, the above underscored statement made in Saufua clearly relates to sentences imposed for the underlying offense (that caused the probation to be revoked) and the prior offense. In other words, the Saufua court believed that HRS § 706-606.5 permitted the sentencing court to impose a sentence on the underlying offense to run consecutive to that of the prior offense.

In this case, Kamanao's sodomy and rape convictions were part of his underlying offenses; his prior offense concerned felony firearms violation, which -- according to defense counsel at oral argument -- was sentenced separate from and prior to the sentencing for the underlying offenses. Unlike Saufua, the issue in Kamanao's case involved solely the sentencing of the underlying offenses (not the sentencing of both the underlying and the prior offenses). I, therefore, believe that Saufua is distinguishable from, and inapplicable to, the instant case.

Based upon the foregoing, I join Justice Levinson's dissent to the extent that it concludes the circuit court erred in imposing consecutive indeterminate maximum terms of imprisonment. Further, to the extent that the majority and Justice Levinson appear to approve consecutive mandatory minimum sentencing for multiple counts arising from a single indictment, I disagree. Accordingly, I would vacate the ICA's January 3, 2008 judgment and the circuit court's October 16, 2006 amended

judgment and remand this case to the circuit court for re-sentencing.