DISSENTING OPINION BY NAKAYAMA, J.,
IN WHICH SUBSTITUTE JUSTICE HIRAI JOINS

I respectfully dissent. I agree with the ICA that Miller forfeited his claim for breached plea agreement when he failed to raise this issue before the trial court. Moreover, inasmuch as Miller does not point to any error committed by the trial court, and also failed to argue how the breached plea agreement affected his substantial rights, the Intermediate Court of Appeals (ICA) would have had to notice this claim under the plain error standard sua sponte. The ICA did not gravely err in affirming Miller s conviction and sentence when it declined to notice plain error sua sponte, and the circumstances of the case do not warrant such review on certiorari.

A. Failure to Preserve Breached Plea Agreement at Sentencing

First, I write to elaborate on the ICA s ruling that, because Miller did not raise the alleged breach at sentencing or in a Hawai i Rules of Penal Procedure Rule 35 motion, he cannot raise the issue for the first time on direct appeal. State v. Miller, No. 28849 (App. Sept. 15, 2008) (SDO) at 3. In his application for writ of certiorari (application), Miller claims that the ICA gravely erred by holding that he did not properly preserve the issue of the breach of the plea agreement for appeal, and, therefore, waived it. Yet, in Miller s opening brief, Miller correctly explained that the breached plea agreement was to be reviewed for plain error, inasmuch as

failure to raise the issue of an alleged breach of a plea agreement at a sentencing proceeding may constitute a waiver of the issue. Moreover, it is well established that challenges to

such papers raised for the first time on appeal are waived absent plain error. [1] Kawamata Farms, Inc. v. United Agri Prods., 86 Hawai i 214, 248, 948 P.2d 1055, 1089 (1997).

The United States Supreme Court has recently affirmed the position held by a majority of federal circuit courts on this issue[2] -- that a forfeited claim of a breached plea agreement

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[1] See Price v. AIG Ins. Co., Inc., 107 Hawai i 106, 111-12, 111 P.3d 1, 6-7 (2005) (explaining that [t]here are sound reasons for the rule. It is unfair to the trial court to reverse on a ground that no one even suggested might be error. It is unfair to the opposing party, who did not have the opportunity to address the argument below. Finally, it does not comport with the concept of an orderly and efficient method of administration of justice. (quoting Kawamata Farms, 86 Hawai i at 248, 948 P.2d at 1089)); see also United States v. Carr, 170 F.3d 572, 577 (6th Cir. 1999) (If the system is to work and if appellate review is to be meaningful, it is absolutely essential that a defendant raise all objections to the sentence before the sentencing judge in the first instance. For this reason, the law has developed that a failure to object results in a waiver. (Citation and internal quotation marks omitted.)).

[2] The majority of the federal circuit courts of appeal hold that a claim for a breached plea agreement is waived if not raised prior to appeal and may only be reviewed for plain error. See United States v. Cannel, 517 F.3d 1172, 1175-76 (9th Cir. 2008) (noting that the court would normally review [defendant s] claim that the government breached his plea agreement de novo, but that, because the defendant failed to assert this claim at the sentencing hearing, he failed to preserve this issue for appeal and forfeited this claim); United States v. Rivera-Rodriguez, 489 F.3d 48, 57 (1st Cir. 2007) (Ordinarily, whether the government has breached its plea agreement with a defendant is a question of law and our review is plenary. Where as here, however, the defendant . . . does not bring that breach to the attention of the sentencing court, we review only for plain error. (Citation and internal quotation marks omitted.)); United States v. Jensen, 423 F.3d 851, 854 (8th Cir. 2005) (Because Jensen failed to allege a breach at sentencing, we are limited to reviewing his now-raised challenge for plain error[.]); United States v. Swanberg, 370 F.3d 622, 627 (6th Cir. 2004) (Where, as here, a criminal defendant has failed to object below, he or she must demonstrate that the error was plain . . . before we may exercise our discretion to correct the error. (Citation and block format omitted.)); United States v. Brown, 328 F.3d 787, 790 (5th Cir. 2003) ([B]ecause [defendant] failed to object on this basis at sentencing, we review this issue only for plain error. (Emphasis and brackets added.)); United States v. Thayer, 204 F.3d 1352, 1356 (11th Cir. 2000) (holding that failure to object to breach of plea agreement at trial waived the issue on appeal, unless the deviation can overcome the plain error standard); United States v. Hicks, 129

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must satisfy the difficult requirements of the plain error standard. See Puckett v. United States (Puckett II), 129 S.Ct. 1423 (2009). In Puckett II, defendant James Puckett (Puckett) entered into a plea agreement with the government, agreeing to plead guilty to the charges against him. Id. at 1426-27. In exchange, the government agreed to stipulate that Puckett qualified for a reduction in his offense level. Id. At sentencing, the probation officer noted that Puckett had admitted that he committed subsequent criminal acts following the plea agreement and recommended that he receive no reduction in his offense level. Id. at 1427. Puckett s counsel objected to this report based on the Government s prior recommendation that the court reduce the offense. Id. The district court declined to grant the reduction in his offense level. Id.

On appeal to the United States Fifth Circuit Court of Appeals, Puckett argued for the first time that the government breached the plea agreement at sentencing. Id. The government conceded that it violated the plea agreement, but contended that Puckett forfeited this claim when he failed to raise it in the

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F.3d 376, 378 (7th Cir. 1997) (A defendant s failure to allege the breach of a plea agreement at sentencing waives the matter for appeal.); United States v. McQueen, 108 F.3d 64, 66-67 (4th Cir. 1997) (holding that, because the defendant raises the claim of a breached plea agreement for the first time on appeal, the court must affirm the sentence imposed . . . unless [it] find plain error). Even Miller cited to United States v. Flores-Payon, 942 F.2d 556 (9th Cir. 1991) in his opening brief to support the rule that failure to raise the issue of an alleged breach of a plea agreement at sentencing proceeding may constitute a waiver of the issue. (Emphasis added.) In Flores-Payon, the court of appeals explained that, in light of considerations of fairness and judicial efficiency, issues not presented to the trial court are generally waived. Id. at 558-60.

District Court and that the plain-error standard of review applied. Id. The Fifth Circuit Court of Appeals agreed and held that, although error (the breached plea agreement) had occurred and was obvious, Puckett did not show that the error affected his substantial rights. Id. at 1428 (citing Puckett v. United States (Puckett I), 505 F.3d 377, 388 (5th Cir. 2007)). Accordingly, the Court of Appeals affirmed the conviction and sentence. Id. On certiorari, the Supreme Court affirmed the Court of Appeals decision, holding that the plain-error four-pronged test does apply and in the usual fashion to a forfeited claim that the government breached its obligations under the plea agreement. Id. at 1428.

The Court observed the well-established rule that in order to properly preserve an error during a judicial proceeding, a litigant must bring the error to the attention of the tribunal. Id. Otherwise,

> [t]his claim for relief from the error is forfeited. No procedural principle is more familiar to this Court than that a . . . right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.

Id. (quoting Yakus v. United States, 321 U.S. 414, 444 (1944)). The Supreme Court warned that [f]ailure to abide by this contemporaneous-objection rule ordinarily precludes the raising on appeal of the unpreserved claim of trial error. Id.at 1429. (citation omitted). The Court explained why appellate-court authority to remedy the error . . . is strictly circumscribed, as follows:

> There is good reason for this; ÿÿanyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal.ÿÿ United States v. Padilla, 415 F.3d 211, 224 (1st Cir. 2005) (en banc) (Boudin, C.J., concurring).
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> This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them. That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute. In the case of an actual or invited procedural error, the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome. And of course the contemporaneous-objection rule prevents a litigant from ÿÿsandbagging the court-remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor. Cf. Wainwright v. Sykes, 433 U.S. 72, 89 (1977); see also United States v. Vonn, 535 U.S. 55, 72 (2002).

Id. at 1428 (some internal quotation marks omitted) (brackets omitted).

Based on federal case law and this jurisdiction s rulings on waiver, the ICA did not gravely err when it determined that Miller waived his claim of a breached plea agreement. The ICA was limited to reviewing the claim of a breached plea agreement under the plain error standard.

B. Extending Plain Error Review To Errors Committed By the Parties Rather Than By the Trial Court

Miller s opening brief did not conform with HRAP Rule 28(b)(4) inasmuch as it did not state the error committed by the court. More specifically, Miller s opening brief raised as a point of error that [t]he prosecutor violated the plea agreement, but it did not state the alleged error committed by the court or agency, as required by HRAP Rule 28(b)(4). (Emphasis added.)

Under the plain language of this rule, each point must

state the alleged error committed by the court. HRAP Rule 28(b)(4); see also O Conner v. Diocese of Honolulu, 77 Hawai i 383, 385, 885 P.2d 361, 363 (1994) (providing that HRAP Rule 28(b)(4) requires that [p]oints must refer to the alleged error committed by the court). However, Miller, at best, gave the prosecution notice that he needed to satisfy plain error requirements for appellate review of his breached plea agreement claim when he (1) set forth this standard in the standards of review section and (2) claimed that the ICA should consider this issue even though raised for the first time on appeal, under [Hawai i Rules of Penal Procedure (HRPP) Rule 52] and the plain error doctrine. Yet, mere notice to the prosecution does not satisfy the HRAP Rule 28(b) opening brief requirement that each point of error state the error committed by the court or agency.[3]

Rather than clearly explaining how Miller has satisfied HRAP Rule 28(b)(4), the majority attempts to obfuscate the points raised in the dissenting opinion by arguing at length that federal circuit courts recognized that the breach should be considered pursuant to plain error review. See majority at 35-39 & n.12 (citing Puckett II, 129 S.Ct. 1423; United States v.

[3] The majority notes that I fail[ ] to elaborate as to what is the legal significance of mere notice, why mere notice does not satisfy HRAP Rule 28(b), or why [Miller s] express discussion of plain error review served only to provide notice as opposed to actually raising the issue[.] Majority at 40. Quite simply, mere notice -- discussion of the plain error standard in the standards of error section -- does not satisfy HRAP Rule 28(b)(4), because the rule does not require notice, but, rather, a statement as to the alleged error committed by the court or agency. Providing notice through stating the standard of review, as required by HRAP Rule 28(b)(5), does not satisfy HRAP Rule 28(b)(4) s requirement that the point state the error.

Cannel, 517 F.3d 1172, 1176-77 (9th Cir. 2008); United States v. Rivera-Rodriguez, 489 F.3d 48, 57 (1st Cir. 2007); United States v. McQueen, 108 F.3d 64 (4th Cir. 2007);United States v. Salazar, 453 F.3d 911, 913, 915 (7th Cir. 2006); United States v. Jensen, 423 F.3d 851, 854-55 (8th Cir. 2005); United States v. Swanberg, 370 F.3d 622, 627 (6th Cir. 2004); United States v. Brown, 328 F.3d 787, 789, 791 (5th Cir. 2003); United States v. Barnes, 278 F.3d 644, 647 (6th Cir. 2002); United States v. Thayer, 204 F.3d 1352, 1356 (11th Cir. 2000)). However, the cited federal circuit cases are inapposite because, in contrast to Miller, the appellants in the cited federal cases were not required to follow HRAP Rule 28(b)(4).

Moreover, I am not saying that appellate courts are precluded from noticing plain error in reviewing a case that involves a breached plea agreement.[4] In fact, as I state infra on page 26 of my dissent, I agree that breaches of plea agreements may provide appropriate bases for appellate review under the plain error standard.

[4] The majority cites to cases that reviewed cases that involved allegations of breached plea agreements, but those cases do not quote to the appellants points of error or otherwise indicate that the appellants in those cases failed to cite to a court s error in compliance with HRAP Rule 28(b)(4). See State v. Chincio, 60 Haw. 104, 105, 588 P.2d 408, 409 (1978) (observing that the appellant moved to withdraw his guilty plea); State v. Waiau, 60 Haw. 93, 95, 588 P.2d 412, 414, (1978) (On this appeal, appellant presents only the question of the denial of his motion for specific performance of the plea bargain and for the change of the sentencing judge.); State v. Schaefer, 117 Hawai i 490, 496, 184 P.3d 805, 811 (App. 2008); State v. Abbott, 79 Hawai i 317, 318, 901 P.2d 1296, 1297 (App. 1995) (Defendant therefore urges us to reverse the November 17, 1992 Order of the Second Circuit Court which (1) denied his Motion for Specific Performance of Plea Agreement and for Sentencing Before a New Judge . . . .). These cases do not permit this court to disregard the requirements of HRAP Rule 28(b)(4).

However, the majority insists that Miller satisfied HRAP Rule 28(b)(4) because he succinctly stated in his points of error section fundamental errors that were committed, writing that . . . the prosecutor violated the plea agreement[.] Majority at 33-34 (emphasis added). Yet, it does not point out how or where in his points of error section Miller stated the error committed bythe court, as required by HRAP Rule 28(b)(4). (Emphasis added.) Stating an error that was committed in the court (i.e., the prosecutor violated the plea agreement,) is not the same as an error committed by the court, which is the requirement of HRAP Rule 28(b)(4). (Emphasis added.) HRAP Rule 28(b)(4) unequivocally requires that the appellant state the error committed by the court.

In my view, the majority ignores the requirement of HRAP Rule 28(b)(4), and instead rewrites this rule. Compliance with HRAP Rule 28(b)(4) does not turn on correctly naming who -- the court, or a particular party -- is at fault for the court s error. See majority at 37. Rather, the rule requires that, in allproceedings in the Hawai i appellate courts except as otherwise provided by statute, Rules of the Supreme Court, or Rules of the Intermediate Court of Appeals, see HRAP Rule 1(a) (emphases added), the appellant states the alleged error committed by the court. See, e.g., State v. Merino, 81 Hawai i 198, 201, 915 P.2d 672, 675 (1996) (reviewing the appellant s point of error that the circuit court . . . erred in allowing him to plead no contest in the first place because . . . the complaint charging him with criminal conspiracy was fatally

defective, giving rise to plain error, because it fail[ed] to sufficiently allege the elements of conspiracy).

In Merino, the defendant pointed out the circuit court s error in allowing him to plead no contest where the complaint charging him with criminal conspiracy was fatally defective. 81 Hawai i at 201, 915 P.2d at 75. Although the complaint s defect was technically the fault of the prosecution and was the reason for the court s error, the defendant complied with HRAP Rule 28(b)(4) by stating the court s error. Id. Similarly, here, where the prosecution s breach of the plea agreement may have been the root of the court s error, Miller was required to state the court s alleged error.

Under the majority s ruling, however, an opening brief will be reviewed where its point of error section states the alleged error committed by any party as long as fault may be attributed to that party. It is alarming that, under the majority s construction of HRAP Rule 28(b)(4), Hawai i appellate courts are now required to review an error committed by any party -- the prosecution or defendant in a criminal case, or the plaintiff, defendant, co-party in a civil case -- if that party is responsible for the error. Consequently, where the appellant states as a point of error any party s error (and by implication, the appellant s own error in failing to object to the alleged error), the appellate court must rule as to this point, regardless of whether it is the appellant s first objection to the error.

The majority s opinion, therefore, requires Hawaii s

appellate courts to review errors committed by parties in addition to the trial court. This results in the appellate court first determining whether the appellant s objection has merit, though that role is reserved for the trial court. As this court explained,

> [t]here are sound reasons for this rule. It is unfair to the trial court to reverse on a ground that no one even suggested might be error. It is unfair to the opposing party, who might have met the argument not made below. Finally, it does not comport with the concept of an orderly and efficient method of administration of justice.
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> Kawamata Farms, Inc. v. United Agri Prods., 86 Hawai i 214, 248, 948 P.2d 1055, 1089 (1997) (citation omitted).

Price, 107 Hawai i at 111, 111 P.3d at 6. Thus, I cannot agree with the majority s ruling that [n]o further detail was required than stating the prosecutor s error. See majority at 34. To reiterate, in my view, HRAP Rule 28(b)(4) requires stating the alleged error committed by the court or agency. (Emphasis added.)

C. Reviewing For Plain Error Sua Sponte

In his application, Miller seeks review of the ICA s ruling, apparently under a de novo standard, based on (1) past case law reviewing breached plea agreements, and (2) the prosecution s alleged breach of the plea agreement. Miller recited case law demonstrating that a breached plea agreement has affected other defendants substantial rights, but he did not show how he, specifically, suffered prejudice from the alleged breach of the plea agreement, i.e., evidence that the court would have granted the DANCP motion if not for the breach. He claims

generally that the breach affected [his] substantial rights by influencing whether he would be granted a DANCP, but he does not explain how the court s error had this effect. Miller thus seeks to inflate the plain error standard -- in his view, any time the prosecution breaches a plea agreement, the defendant is prejudiced and his or her fundamental rights [were] affected. Miller alleges that his claim should be reviewed under the plain error standard, but he actually argues for a de novo standard of review for forfeited claims of breached plea agreements. As such, in order to scrutinize Miller s claim under the plain error standard, the majority is required to inject its own analysis as to the effect of the prosecution s breach of the plea agreement. See majority at 30-31; HRAP Rule 40.1 (providing that, when an issue is not presented in accordance with the appellate rules, this court, at its option, may notice a plain error not presented).

Hawai i appellate courts may notice error not raised on appeal and at the trial court, pursuant to HRAP Rule 28(b)(4) and HRPP Rule 52(b), and they also have the inherent power to notice plain error sua sponte. State v. Fields, 115 Hawai i 503, 528-29, 168 P.3d 955, 980-81 (2007) (citations omitted). This court has not previously articulated a distinct standard for noticing plain error sua sponte. However, because this court may only notice a breached plea agreement affecting Miller s substantial rights sua sponte, I believe it is necessary to review this court s opinions finding plain error sua sponte. Upon review, it is apparent that we have exercised this power, and that it is

appropriate to do so, only in extraordinary circumstances.

At the outset, I observe that this court has stated that the appellate court s discretion to address plain error is always to be exercised sparingly. Okada Trucking Co., Ltd. v. Bd. of Water Supply, 97 Hawai i 450, 458, 40 P.3d 73, 81 (2002) (emphases added); see Honda v. Bd. of Trs. of the Employees Ret. Sys. of the State of Hawai i, 108 Hawai i 212, 239, 118 P.3d 1155, 1182 (2005) (Levinson, J., dissenting); Liftee v. Boyer, 108 Hawai i 89, 98, 117 P.3d 821, 830 (App. 2004). We have repeatedly stated that the power to exercise plain error is one to be used sparingly.[5] See Fox, 70 Haw. at 56, 760 P.2d at 676.

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[5] Miller s claim that Hawai i appellate courts have not hesitated to invoke the plain error doctrine is wrong. (Emphasis added.) (Citing to State v. Nichols, 111 Hawai i 327, 334, 141 P.3d 974, 981 (2006) and State v. Sanchez, 82 Hawai i 517, 524-25, 923 P.2d 934, 941-42 (App. 1996).) Simply because our courts are authorized to notice plain error, see HRPP Rule 52, and have decided to notice plain error, it does not follow that this standard is exercised without hesitation. The ICA and this court have stated many times that appellate power to deal with plain error is one to be exercised sparingly. See State v. Mars, 116 Hawai i 125, 132, 170 P.3d 861, 868 (2007); Fields, 115 Hawai i at 529, 168 P.3d at 981; State v. Frisbee, 114 Hawai i 76, 85, 156 P.3d 1182, 1191 (2007) (Nakayama, J., dissenting); State v. Rodrigues, 113 Hawai i 41, 47, 147 P.3d 825, 831 (2006); Nichols, 111 Hawai i at 335, 141 P.3d at 982; Honda, 108 Hawai i at 239, 118 P.3d at 1182 (Levinson, J., dissenting) (We have noted that the appellate court s discretion to address plain error is always to be exercised sparingly[.] (quoting Okada Trucking Co., 97 Hawai i at 458, 40 P.3d at 81); State v. Aplaca, 96 Hawai i 17, 22, 25 P.3d 792, 797 (2001); State v. Kotis, 91 Hawai i 319, 343, 984 P.2d 78, 102 (1999); State v. Lee, 83 Hawai i 267, 274, 925 P.2d 1091, 1098 (1996); State v. Nguyen, 81 Hawai i 279, 293, 916 P.2d 689, 703 (1996); State v. Kaiama, 81 Hawai i 15, 25, 911 P.2d 735, 745 (1996); State v. Baron, 80 Hawai i 107, 117, 905 P.2d 613, 623 (1995); State v. Puaoi, 78 Hawai i 185, 191, 891 P.2d 272, 278 (1995); State v. Kelekolio, 74 Hawai i 479, 515, 849 P.2d 58, 75 (1993); State v. Fox, 70 Haw. 46, 56, 760 P.2d 670, 676 (1988); State v. Kiaaina, No. 29034 (App. Nov. 14, 2008) (SDO); State v. Mitchell, No. 28079 (App. Oct. 17, 2008) (mem.); State v. Kaahui, No. 28487 (App. Aug. 29, 2008) (mem.); State v. Meyers, 112 Hawai i 278, 290, 145 P.3d 821, 833 (App. 2006); State v. Randles, 112 Hawai i 192, 194, 145 P.3d 735, 737 (App. 2006); State v. Chin, 112 Hawai i 142, 147 n.4, 144 P.3d 590, 595 n.4 (App. 2006); State v. Kiakona, 110 Hawai i 450, 458 n.4, 134 P.3d 616, 624

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According to the majority, Fox, and the cases that adopted its statement that the power to deal with error is one to be exercised sparingly and with caution, simply indicate that the term sparingly refers to the limitation already in place in HRPP Rule 52(b) that the error must be one affecting substantial rights. Majority at 54-58 (emphasis added). Yet, the Fox decision did not merely restate HRPP Rule 52(b) -- rather, it added a crucial element to this rule. Fox stated that under HRPP Rule 52(b), appellate courts have the power, sua sponte, to notice plain errors . . . though they were not properly brought to the attention of the trial judge or raised on appeal, 70 Haw. at 56, 760 P.2d at 676 (emphasis added), and subsequently limited this power, stating, this power to deal with error is one to be exercised sparingly and with caution because the rule represents a departure from the presupposition of the adversary system.

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n.4 (App. 2006); State v. Yoo, 110 Hawai i 145, 150, 129 P.3d 1173, 1178 (App. 2006); In re Doe Children, 108 Hawai i 134, 141, 117 P.3d 866, 873 (App. 2005); State v. Gray, 108 Hawai i 124, 134 n.9, 117 P.3d 856, 866 n.9 (App. 2005); Liftee v. Boyer, 108 Hawai i 89, 98, 117 P.3d 821, 830 (App. 2004); State v. Smith, 106 Hawai i 365, 375, 105 P.3d 242, 252 (App. 2004); State v. Lioen, 106 Hawai i 123, 128, 102 P.3d 367, 372 (App. 2004); State v. Carvalho, 106 Hawai i 13, 16 n.6, 100 P.3d 607, 610 n.6 (App. 2004); State v. Malivao, 105 Hawai i 414, 417, 98 P.3d 285, 288 (App. 2004); State v. Bermisa, 104 Hawai i 387, 392, 90 P.3d 1256, 1261 (App. 2004); State v. Coffee, 104 Hawai i 193, 197, 86 P.3d 1002, 1006 (App. 2004); State v. Aki, 102 Hawai i 457, 459, 77 P.3d 948, 950 (App. 2003); State v. Mara, 102 Hawai i 346, 352, 76 P.3d 589, 595 (App. 2003); State v. Martin, 102 Hawai i 273, 278, 75 P.3d 724, 729 (App. 2003); State v. Sugihara, 101 Hawai i 361, 364, 68 P.3d 635, 638 (App. 2003); State v. Gunson, 101 Hawai i 161, 162 n.4, 64 P.3d 290, 291 n.4 (App. 2003); State v. Kossman, 101 Hawai i 112, 122 n.10, 63 P.3d 420, 420 n.10 (App. 2003); State v. Lewis, 94 Hawai i 309, 313, 12 P.3d 1250 (App. 2000), aff d 94 Hawai i 292, 12 P.3d 1233.

Our court has used the word sparingly in order t limit appellate courts from noticing plain error. See The Random House College Dictionary 1260 (rev d ed. 1975) (defining sparing as 3. lenient or merciful. 4. frugally restricted. 5. scanty; limited -- [sparingly], adv.).

Id.; see Fields, 115 Hawai i at 529, 168 P.3d at 981 (explaining that the power to exercise plain error is to be exercised sparingly because it represents a departure from a presupposition of the adversary system - that a party must look to his or her counsel for protection and bear the cost of counsel s mistakes); see also United States v. Frady, 456 U.S. 152, 163 (1982) (stating that appellate courts may correct particularly egregious errors on appeal regardless of a defendant s trial default (emphasis added)). Although court rules may also reflect this concern, an appellate court s power is actually narrowed by case law.

Fields elaborated on this standard by quoting other courts highlighting the importance of the adversary system, as follows:

> See also Penson v. Ohio, 488 U.S. 75, 84[] (1988) (This system is premised on the well-tested principle that truth -- as well as fairness -- is best discovered by powerful statements on both sides of the question.);Hines v. United States, 971 F.2d 506, 509 (10th Cir. 1992) (The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.) (Citing United States v. Burke, 504 U.S. 229, 249[] (1992) (Scalia, J., concurring).); Ford v. United States, 533 A.2d 617, 624 (D.C. 1987) (The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.) (Citation omitted.); Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) (Failure to enforce this requirement will ultimately deprive us in substantial measure of that assistance of counsel which the system assumes - a deficiency that we can perhaps supply by other means, but not without altering the character of our institution.).

115 Hawai i at 529, 168 P.3d at 981.

When an appellate court notices plain error sua sponte, it depart[s] from the position usually presupposed by the adversary system that a party must look to his counsel to protect him and that he must bear the cost of the mistakes of his counsel twice: first, when the counsel failed to preserve the error at the lower court and, subsequently, when the counsel failed to argue the plain error on appeal. The appellate court must seek power to notice plain error sua sponte from both HRAP Rule 28(b)(4) and HRPP Rule 52(b). The power to deal with plain error sua sponte, therefore, should be exercised even more sparingly than the power to deal with plain error. As such, this court has stated that an appellate court should notice plain error sua sponte in exceptional circumstances. Fox, 70 Haw. at 56, 760 P.2d at 675-76 (In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings. (Emphases added and quoting United States v. Atkinson, 297 U.S. 157, 160 (1936).)). The circumstances should be exceptional for the court to overcome the fact that the error was not presented at the trial court or on appeal. See State v. Ruiz, 49 Haw. 504, 506, 421 P.2d 305, 308 (1966) (The power to notice error on the court s own motion will be exercised only in an exceptional case. (Emphasis added.)); see also State v. Schroeder, 76 Hawai i 517, 532, 880

P.2d 192, 207 (1994) ([P]oints of error not raised on appeal in accordance with Hawai i Rules of Appellate Procedure (HRAP) 28(b)(4) (1993) will ordinarily be disregarded. (Emphasis added.)).

This court has clearly sought to limit plain error review. Moreover, Hawaii s case law provides that plain error may be noticed to correct errors whichseriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights. Nichols, 111 Hawai i at 334, 141 P.3d at 981 (quoting State v. Sawyer, 88 Hawai i 325, 330, 966 P.2d 637, 642 (1998) (internal quotation marks omitted) (emphasis added) (formatting altered)). I do not believe that the majority has a reasonable basis to now question our long-held practice to consider the nature of the error or its impact when reviewing for plain error.

The majority also posits that the language of HRAP Rule 28(b)(4) and HRPP Rule 52(b) already encompass a preference for the adversarial system. Seemajority at 58 n.24. HRAP Rule 28(b)(4) does provide that [p]oints not presented in accordance with this section will be disregarded, (emphasis added), and that an appellate court may notice a plain error not presented. Yet, appellate review of plain error is confined and explained by case law. See Nichols, 111 Hawai i at 334, 141 P.3d at 981 (This court will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of

justice, and to prevent the denial of fundamental rights. (Quoting Sawyer, 88 Hawai i at 330, 966 P.2d at 642.)); see also majority at 14. In the same way, the mere recitation of the HRAP 28(b)(4) and HRPP Rule 52(b) requirements is insufficient; the constraints of appellate review of plain error must continue to be explained by appellate case law. Although an appellate court may notice a plain error not presented, this court s discretio to notice plain error sua sponte should be narrowed and explained by case law.

Dismissing the value of our court s explanations and discussions of these rules, and seeking to rely solely on HRPP Rule 52(b) and HRAP Rule 28(b)(4), see majority at 60, creates a vague and ambiguous standard. The mere acknowledgment that an error may be noticed despite counsel s failure to raise it see majority at 60, does not provide any explanation as to when it is appropriate for an appellate court to notice plain error. Consequently, this decision will result in confusion as to this court s application of the plain error rule.

The majority further disregards the dangers present when reviewing for plain error sua sponte, and plain error generally, claiming that a two-tiered standard for reviewing plain errors would invite not only due process, but equal protection objections because it would create two classes of defendants who could have suffered the same substantial right injury, granting one relief but denying it to the other on the circumstance that plain error was expressly raised in one instance but not in the other. Majority at 62 (emphasis added).

Nevertheless, Hawaii s appellate courts require parties to follow numerous procedural court rules, and have dismissed parties claims or appeals in accordance with rules and case law, when the rules were not followed, even where another appellant could have suffered the same substantial right injury. See, e.g. Bank of Hawai i v. Shinn, 120 Hawai i 1, 8, 200 P.3d 370, 377 (2008) (disregarding appellant s argument under HRAP Rule 28(b)(7) where appellant failed to make a discernable argument in support of his claim); In re Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), 116 Hawai i 481, 506, 174 P.3d 320, 506 (2007) (disregarding appellant s point of error under HRAP Rule 28(b)(4), because appellant failed to indicate where in the record the factual assertions are supported); Poe v. Hawai i Labor Relations Bd., 98 Hawai i 416, 419, 49 P.3d 382, 385 (2002) (dismissing appellant s appeal because it was untimely under HRAP Rule 4(a)(1)). An appellant who fails to comply with this rule should, like other rules, be subjected to the consequences that are provided by case and statutory laws.

A review of the small number of cases in which this court has noticed plain error sua sponte[6] indicates that it is

[6] In Justice Acoba s dissenting opinion in Fields, he stated, among other things, that even if Fields had failed to raise these issues in his certiorari application, the court has the inherent power to notice plain error sua sponte. 115 Hawaii at 536-37, 168 P.3d at 988-89 (Acoba, J., dissenting). He further stated that this court has many times employed this power, supporting this statement with the following cases:

> In re Doe, 102 Hawai i 75, 87, 73 P.3d 29, 41 (2003) [(Acoba, J., dissenting)]; State v. McGriff, 76 Hawai i 148, 155, 871 P.2d 782, 789 (1994 (citing State v. Grindles, 70 Haw. 528, 530, 777 P.2d 1187, 1189 (1989) (ÿÿthe power to sua sponte notice ÿÿplain errors

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only appropriate to do so in extraordinary circumstances.[7] See

(...continued)

> or defects affecting substantial rights clearly resides in this courtÿÿ (quotingState v. Hernandez, 61 Haw. 475, 482, 605 P.2d 75, 79 (1980))); State v. Iaukea, 56 Haw. 343, 355, 537 P.2d 724, 733 (1975) (This court ÿÿha[s] the power,sua sponte, to notice plain errors or defects in the record affecting substantial rights not properly brought to the attention of the trial judge or raised on appealÿÿ (citingState v. Yoshino, 50 Haw. 287, 289, 439 P.2d 666, 668 (1968); State v. Cummings, 49 Haw. 522, 528, 423 P.2d 438, 442 (1967); State v. Ruiz, 49 Haw. 504, 507, 421 P.2d 305, 308 (1966))).

Id.

Again, I do not dispute an appellate courts ability to notice plain error sua sponte. See supra at 12 (quoting Fields, 115 Hawai i at 528-29, 168 P.3d at 980-81 (stating that Hawai i appellate courts have the inherent power to notice plain error sua sponte)(citations omitted)). However, I note that many of these cited cases declined to notice plain error. See Doe, 102 Hawai i at 30, 73 P.3d at 77 (dismissing the appeal on the grounds that the appeal was moot); McGriff, 76 Hawai i at 155, 871 P.2d at 789 (examining the defendant s issue raised on appeal even though it did not conform with the HRAP Rule 28(b)(4) requirements, but finding that there was no plain error and affirming the defendant-appellant s conviction);Iaukea, 56 Haw. at 357, 537 P.2d at 734 (recognizing the court s power to review for plain error but ruling that the trial court did not err in giving a particular jury instruction); Cummings, 49 Haw. at 531, 423 P.2d at 444 (recognizing the power to notice plain error sua sponte, but ruling that there was no error in the admission of evidence). In Yoshino, this court reviewed defendant-appellant s allegation that the trial court prejudicial[ly] err[ed] in examining and discrediting the defendant s witnesses for plain error, but, inasmuch as the defendant alleged error for the first time on appeal, this court did not actually notice plain error sua sponte. See 50 Haw. at 290, 439 P.2d at 668.

[7] The cases that did notice plain error involved extraordinary errors. See State v. Staley, 91 Hawai i 275, 287, 982 P.2d 904, 916 (1999) (holding that the circuit court s failure to establish on the record that defendant s decision not to testify was made knowingly and voluntarily constituted plain error); State v. Mahoe, 89 Hawai i 284, 285, 972 P.2d 287, 288 (1998) (noticing plain error where the trial court failed to give a unanimity instruction, inasmuch as defendant s constitutional rights to due process and unanimous jury verdict were violated); State v. Richie, 88 Hawai i 19, 33-36, 960 P.2d 1227, 1241-43 (1998) (holding that the trial court plainly erred by convicting defendant on two counts under two different statutes that seek to redress the same conduct); State v. Loa, 83 Hawai i 335, 357-59, 926 P.2d 1258, 1280-82 (1996) (holding that circuit court plainly erred in allowing jury instruction for the nonexistent offense of attempted reckless manslaughter as a purported lesser included offense of attempted first degree murder, where appellant was convicted of the nonexistent offense); State v. Gaylord, 78 Hawai i 127, 150, 890 P.2d 1167, 1190 (1995) (noticing

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that the court plainly erred by sentencing defendant to consecutive indeterminate terms of imprisonment for the sole reason of ensuring payment of restitution in contravention of the philosophy that imprisonment may properly be imposed only if the penal objectives sought to be achieved include retribution (i.e., just deserts) and deterrence (emphasis added)); Schroeder, 76 Hawai i at 532, 880 P.2d at 207 (holding that the circuit court ssua sponte ordering of two concurrent mandatory terms of imprisonment - even though the prosecution explicitly sought onlyone mandatory minimum term of imprisonment and the defense counsel relied on the prosecution s explicit premise in fashioning his sentencing arguments - constituted plain error affecting the defendant s substantial rights because he was not given notice and an opportunity to be heard with regard to the second mandatory minimum term of imprisonment ordered sua sponte by the circuit court); State v. Lemalu, 72 Haw. 130, 136, 809 P.2d 442, 445 (1991) (emphasizing that the use of multiple verdict forms addressing both DUI counts does not, in and of itself, constitute reversible error, but recognizing plain error where DUI was the only offense presented to the jury, and the wording of the jury instructions in question, together with the multiple verdict forms, could probably mislead the jury into believing that the two methods of proving DUI constitute two separate offenses when, in that case, DUI is one offense); State v. Hirayasu, 71 Haw. 587, 589, 801 P.2d 25, 26 (1990) (observing that the statute charged only involves the use of signs and not the defendant s conduct at the time of the incident, but recognizing plain error because the trial court expressly found that the defendant s conduct supported his conviction); Grindles, 70 Haw. at 530-32, 777 P.2d 1189-90 (concluding that the trial court s action in compelling Appellant to put on his evidence prior to the conclusion of the State s evidence violated his due process right to a fair trial, even though defendant did not raise a due process claim on appeal); Hernandez, 61 Haw. at 481-82, 605 P.2d at 79 (noticing plain error sua sponte where the only evidence in support of defendant-appellant s conviction of sexual abuse of the victim s anus was the testimony from the complaining witness that the defendant might have engaged in anal contact); Ruiz, 49 Haw. at 506, 421 P.2d at 307-08 (noticing plain error sua sponte where the trial court s stated ground of the decision to find the defendant guilty was erroneous); see also State v. Calarruda, No. 28880 at 2-3 (App. Apr. 21, 2009) (SDO) (observing that Calarruda had been sentenced for the possession of both a firearm and the ammunition, but recognizing a plain error because there was no evidence that Calarruda had separately acquired or possessed the firearm and ammunition).

Moreover, I certainly recognize that the denial of constitutional rights may well be extraordinary. However, the majority places too much emphasis on the exact words used. Instead, it behooves the majority to place that language in context with the circumstances of the cases that even it relies on. For example, the majority s citation to State v. Heapy, 113 Hawaii 283, 305 n.26, 151 P.3d 764, 786 n.26 (2007) (plurality opinion), majority at 73, is unavailing for the following reasons: (1) unlike this case, the trial court actually considered arguments as to whether to admit certain evidence, id. at 304, 151 P.3d at 785; (2) without relying on the plain error doctrine, a plurality of this court believed that consideration of HRS §§ 291E-19 and -20, as well as The Use of Sobriety Checkpoints for Impaired Driving

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State v. Ruggiero, 114 Hawai i 227, 239, 160 P.3d 703, 715 (2007) (plurality opinion) (holding that the district court plainly erred in convicting defendant-appellant as a second time drinking under the influence offender, where the complaint against the defendant failed to allege the elemental attendant circumstance that the defendant had a prior conviction, and, therefore, substantially prejudiced him with regard to defending against a DUI charge as a second-time offender);State v. Yamada, 99 Hawai i 542, 550-52, 57 P.3d 467, 475-77 (2002) (noticing plain error sua sponte because the jury instruction, directing the jury to convict the defendant of manslaughter if a single juror believed that the prosecution had failed to negative the mitigating defense, deprived the defendant of his constitutional

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Enforcement, (Nov. 1990) of the National Highway Traffic Safety Administration (the Guide) was germane to resolving the reasonableness of the stop in that case, even though the defendant failed to raise on appeal both these statutes and the trial court's exclusion of the Guide into evidence, see id. at 303, 151 P.3d at 784 (It would be disingenuous in this case to perform an analysis of the reasonableness of the stop disengaged from consideration of HRS §§ 291E-19 and -20.),id. at 304, 151 P.3d at 785 ([A]lthough ultimately excluded [as evidence], the Guide was considered in the case. Also, consideration of the Guide on appeal, like HRS §§ 291E-19 and -20, is germane to the reasonableness of the stop in this case by virtue of the principles in [Delaware v. Prouse, 440 U.S. 648 (1979) and Michigan Dep t of State Police v. Sitz, 496 U.S. 444 (1990)].); and (3) the plurality merely noted in a footnote the possibility that plain error could be used as an alternative ground to simply refer to the statutes and the Guide when considering the reasonableness of the traffic stop in that case, see id. at 305 n.26, 151 P.3d at 786 n.26. Accordingly, the plurality's mere mention of the plain error doctrine was unnecessary to adjudicate the particular issue presented in that case, and is therefore dictum. See Robinson v. Ariyoshi, 65 Haw. 641, 654, 658 P.2d 287, 298 (1982) ([A]n inferior tribunal might not be bound under the doctrine of stare decisis if the pronouncement of a superior court is actually dictum.). In this regard, the majority s reliance oHeapy is wrong, inasmuch as it is clearly not an accurate reflection of the extraordinary circumstances under which this court has applied the plain error doctrine in the past.

right to a unanimous verdict). To illustrate, in Yamada, a special jury instruction directed the jury to return a guilty verdict for EMED manslaughter (manslaughter based upon extreme mental or emotional disturbance (EMED)) if one or more jurors believes or believe that the prosecution had failed to disprove the EMED defense to first degree murder. 99 Hawai i at 548, 57 P.3d at 473. This court ruled that this plainly erroneous instruction potentially allowed a single juror to highjack the proceedings and strong-arm the other eleven panel members into returning a verdict convicting Yamada of manslaughter, and, accordingly, vacated the defendant-appellant s manslaughter convictions. Id. at 551-52, 57 P.3d at 476-77. This court therefore noticed plain error sua sponte, correcting the particularly egregious nature of the error. Id. at 557-63, 57 P.3d at 482-88 (Acoba, J., concurring) (Most egregious, however, is that Court s Special Instruction No. 1 erroneously advised the jurors that they could return a verdict on manslaughter without unanimously agreeing to such a verdict.). Similarly, the plurality opinion of Ruggiero determined that the district court plainly erred in convicting appellant where the complaint failed to state an attendant circumstance of the statute. 114 Hawai i at 239, 160 P.3d at 715 (plurality opinion). In both Ruggiero and Yamada, this court decided to notice plain error sua sponte because of the particularly egregious and obviously harmful nature of the error. Frisbee, 114 Hawai i at 85, 156 P.3d at 1191 (Nakayama, J., dissenting).

As this court s case law has demonstrated, when an

appellant fails to identify or argue a court s error, an appellate court should only notice an extraordinary plain error sua sponte. Anytime this power is exercised, both parties are precluded from presenting arguments on the issue and our adversarial system is directly undermined.[8] As previously quoted and worth repeating here, This system is premised on the well-tested principle that truth - as well as fairness - is best discovered by powerful statements on both sides of the question. Fields, 115 Hawai i at 529, 168 P.3d at 981 (quoting Penson v. Ohio, 488 U.S. 75, 84 (1988)). In order to prevent the deterioration of our justice system, the power to notice plain error sua sponte should not be used in circumstances that are not extraordinary.

D. Noticing Plain Error Sua Sponte

This court may notice plain error to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights, -- and, arguably, in extraordinary circumstances. The majority correctly states that this court may review a breached plea agreement claim for plain error, but it (1) applies a de novo standard for a breached plea agreement claim raised for the first time on

[8] The majority finds this ironic, inasmuch as the prosecution argued against the ICA noticing plain error. Majority at 77 n.37. Although the prosecution noticed that Miller asked the ICA to notice plain error, mere notice does not satisfy HRAP Rule 28(b) requirements -- under HRAP Rule 28(b)(7), the appellant must also present arguments that satisfy the plain error standard. When the appellant fails to explain why the error that occurred in the lower court deprived him of his substantial rights, the prosecution cannot rebut the appellant s arguments.

appeal, and (2) determines that Miller s fundamental rights were violated based on the breached plea agreement itself. I disagree with the majority s application of the plain error standard.

1. A breached plea agreement does not in itself satisfy the plain error requirements.

[T]he decision to take notice of plain errormust turn on the facts of the particular case to correct errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings. Fox, 70 Haw. at 56, 760 P.2d at 676 (citation, brackets, and internal quotation marks omitted) (emphasis added); see Puckett II, 129 S.Ct. at 1433 (ruling that a per se approach to plain-error review is flawed (internal quotation marks and citation omitted)). To notice plain error, a Hawai i appellate court must also find that there is a reasonable possibility that the error contributed to the defendant s conviction, i.e, that the [breached plea agreement] was not harmless beyond a reasonable doubt. Nichols, 111 Hawai i at 337, 141 P.3d at 984 (brackets added).

Thus, in order to notice plain error, the majority must determine that, based on the record, Miller s substantial rights were affected from the breached plea agreement. The majority states that

> [Miller s] right to due process was violated based on the circumstances of this case, because (1) the promise of the prosecution to take no position on DANCP was central to the promise made by the prosecution as a condition of the plea, and thus, was clearly material to [Miller s] resulting decision to forego all of his constitutional rights and plead guilty,[] and (2) the court s rationale for rejecting [Miller s] DANCP, closely reflected the prosecution s position, which was offered for no other apparent reason than to influence the court s decision to grant or deny the

DANCP.

Majority at 78-79 (emphasis in original) (footnote omitted).

First, the majority s conclusion that Miller s due process rights were violated, in part, because of the court s rationale for rejecting Miller s DANCP, is contradicted by its conclusion that Miller was denied his due process rights[,] based solely on the alleged breach. See majority at 29. The majority made this conclusion prior to discussing the breach s impact on Miller and whether it affected Miller s substantial rights. See id.

The majority concludes that Miller s fundamental rights were violated based entirely on the fact of a breached plea agreement -- and without a discussion of how Miller s due process rights were affected in this case.[9] See majority at 29-30. It states that the prosecution breached the plea agreement, because, despite the prosecution s promise to take no position on the DANCP motion, the prosecution s comments parallel[ed] several important factors which a court considers in determining whether to grant a DANCP motion, -- whether the defendant is not likely again to engage in a criminal course of conduct, and the welfare of society [requires] that the defendant shall presently suffer the penalty. Id.at 26-27. The prosecution addressed

[9] The majority states that Miller s right to due process was violated, in part, because the court s rationale for rejecting [Miller s] DANCP, closely reflected the prosecution s position. Majority at 79. However, this analysis was conducted -- sua sponte -- following its conclusion that Miller was denied his due process rights. See majority at 28-30. The conclusion itself was based entirely on its de novo review of the breach. See id.

Miller s criminal record and his age, and the closeness of [Miller s] relationship with the victim. Majority at 26. The majority also refers to the fact that, in reference to Miller s offense, the prosecutor stated, you shouldn t be doing that to a significant loved one, which directly intimated that the charge was in effect that of Abuse of a Family or Household Member, and an offense that is excluded from DANCP eligibility. Id. at 27. Based on these observations alone and case law regarding plea agreements, generally, the majority concludes, as follows:

> Hence, in this case, the terms of the agreement were not fulfilled and [Miller] was denied his due process rights; thus, there was manifest injustice as a matter of law. See [State v.]Adams, 76 Hawai i [408,]414, 879 P.2d [513,]519[(1994)]. Accordingly, [Miller s] fundamental rights were indeed violated. See id. (noting that [t]he fundamental rights flouted by a prosecutor s breach of a plea agreement are those of the defendant, not of the State (quotingSantobello, 404 U.S. at 267 (Douglas, J., concurring))). Because contravention of the plea agreement violated Petitioner s fundamental rights and resulted in manifest injustice, it was incumbent upon the ICA to recognize the violation as plain error under HRPP Rule 52. See Santobello, 404 U.S. at 262 (concluding that the interests of justice require that the case be remanded for relief based on the breach, despite accepting the judge s assertion that the prosecutor s recommendation did not influence him).

Majority at 29-30 (emphases added). In my view, the majority s analysis is flawed because it contravenes the plain error standard of review.

I agree that breaches of plea agreements may provide appropriate bases for appellate review under the plain error standard[.] Majority at 17. Yet, this court has never provided that all breached plea agreements violate a defendant s

fundamental rights.[10] The appellate court must determine that the error in fact affected the defendant ssubstantial rights.[11]

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[10] The majority s cited cases, Adams, and Santobello v. New York, 404 U.S. 257 (1971), do not support the de novo standard set forth here. Although both Adams and Santobello vacated the plea agreement because of the breached plea agreement, the courts were not limited to reviewing the defendant s claim for plain error. Both defendants objected to the prosecution s breached plea agreement and gave the court the opportunity to review the alleged breach before appealing the court s error. Santobello, 404 U.S. at 497; Adams, 76 Hawai i at 410, 879 P.2d at 515.

In Adams, the defendant sought to withdraw his plea, arguing in a motion for reconsideration that the plea agreement was breached. Adams, 76 Hawai i at 410-11, 879 P.2d at 515-16. After concluding that the prosecution breached the plea agreement, this court reviewed the trial court s denial of the request for abuse of discretion. Id. at 412-414, 879 P.2d at 517-19. We ruled that the circuit court abused its discretion -- that it clearly exceeded the bounds of reason or disregarded rules of principles of law or practice to the substantial detriment of a party litigant -- and vacated the court s order denying the defendant s motion to withdraw his plea. Id. at 411, 879 P.2d at 516.

Hawai i precedent does not support the majority s claim that a breached plea agreement automatically denies a defendant of his due process rights and/or violates his fundamental rights. Because Adams was not subject to plain error review, the case does not dictate that a breach of a plea agreement requires the case to be remanded, even where the claim is forfeited.

I also note that the majority s quotation that a breach is undoubtedly a violation of the defendant s rights, majority at 89 (quoting Puckett II, 129 S.Ct. at 1429) (emphasis in original), is misleading, inasmuch as the Court recognized the defendant s rights, but notes the defendant s limited recourse when, as here, the defendant fails to object to the breach at the trial court:

> Such a breach is undoubtedly a violation of the defendant's rights, but the defendant has the opportunity to seek vindication of those rights in district court; if he fails to do so, Rule 52(b) as clearly sets forth the consequences for that forfeiture as it does for all others.

Puckett II, 129 S.Ct. at 1429 (citation omitted) (emphases added).

[11] The majority claims that I am [u]rging . . . that the denial of due process, i.e., the breach, does not in fact affect substantial rights, and that it is contrary to this court s plain error jurisprudence, and would greatly diminish due process protections under our constitution. Majority at 81. Again, this is an egregious distortion of my statements. Consequently, I must reiterate that the denial of due process affects substantial rights, but that a breached plea agreement, in itself, does not deny the defendant of his or her due process rights or affect the defendant s substantial rights. See Puckett II, 129 S.Ct. at 1429-33 (rejecting the claim that a breached plea

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Even assuming, arguendo, that the prosecution breached the plea agreement, it does not follow that Miller was denied his due process rights or that his fundamental rights were indeed violated. Seemajority at 29. Although we have recognized that breached plea agreements implicate constitutional rights, see majority at 29 (citing Adams, 76 Hawai i at 414, 879 P.2d at 519), thereby permitting this court to notice plain error, see majority at 15-17, a breached plea agreement -- even if it acts as inducement for pleading guilty -- does not automatically deny a defendant of his or her due process rights. Under the plain error standard of review, the error must be such that it seriously affect[ed]the fairness, integrity, or public reputation of judicial proceedings[.] Nichols, 111 Hawai i at 334, 141 P.3d at 981 (citation and block format omitted). By requiring an appellate court to notice a waived error if it involved a breached plea agreement that induced the defendant to plea, the majority lowers the plain error standard for breached plea agreements and creates a per se rule for noticing plain error in any breached plea agreement. Cf. Henderson v. Kibbe, 431 U.S. 145, 154 n.12 (1977) (characterizing appellate consideration of a forfeited trial court error which was not obviously prejudicial as extravagant protection (quoting Namet v. United States, 373 U.S. 179, 190 (1963)).

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agreement always impairs a defendant of his substantial rights). As it is well-established, in order to notice plain error, the appellate court must determine that (1) there was an error (2) which affected the defendant s substantial rights.

Although the majority states that the prosecution s promise to take no position on DANCP was clearly material to [Miller s] resulting decision to forego all of his constitutional rights and plead guilty, see majority at 78, I note that the prosecution also agree[d] to amend the charge of abuse of a family or household member to assault in the third degree, which may have reduced Miller s criminal liabilities. HRS § 709-906 (Supp. 2007) requires that, for the first offense of abuse of a family or household member, the convicted defendant serve a minimum jail sentence of forty-eight hours, and that, for the second offense that occurs within one year of the first conviction, the person shall be termed a repeat offender and serve a minimum jail sentence of thirty days. Further, as the majority recognizes, the original charge is so serious that, if it was the charged offense, it would have automatically precluded the court from deferring the defendant s no contest plea, whereas assault in the third degree would not have. See majority at 27-28 (citing HRS § 853-4 (Supp. 2008)). Thus, the plea agreement clearly involved advantages and incentives for the defendant other than the prosecution s promise to stand silent on the DANCP motion. See State v. Perry, 93 Hawai i 189, 198, 998 P.2d 70, 79 (App. 2000) (Under the facts, it is apparent that the bargain struck between Defendant and the State was, on one hand, to permit Defendant to plead to a reduced charge in order to avoid any aggravated penalties, and on the other hand, to allow the State to forego a trial and to obtain a certain conviction.). The breach of the plea agreement alone did not

deprive Miller of his due process rights.

In my view, the majority s position on breached plea agreements (1) is misleading, where it restates our long-held plain error standard, see majority at 13-15, but concludes that Miller s fundamental rights were violated without actually applying this standard, see majority at 18-30, (2) invites appellants to raise for the first time on appeal any error that a court has -- on a lower standard of review -- found that, under the circumstances, fundamental rights are denied,[12] and (3) contradicts the well-established limitation to the plain error standard that this court s power to deal with plain error is one to be exercised sparingly and with caution.

2. Federal case law

We have never employed the four-pronged plain error standard of review set forth in [U.S. v. Olano, 507 U.S. 725 (1993)]. Nichols, 111 Hawai i at 335, 141 P.3d at 982; see also Fox, 70 Haw. 46, 53, 760 P.2d at 676 (We have not endeavored to place a gloss on the rule, as other courts have, by further defining the kind of error for which we would reverse under [HRPP Rule 52(b)].) (internal quotation marks, brackets, and citation

[12] I strongly disagree with the majority s attempt to recharacterize a portion of my dissent, where it suggests that I seem to claim that cases wherein this court has concluded that fundamental rights were denied outside of the plain error context, cannot be used as support for the proposition that substantial rights were affected in the plain error context. Majority at 82. Cases that present similar factual patterns and analysis may, of course, be used to support cases that are to be reviewed under different standards of review. My disagreement with the majority rests on its holding that, because the plea agreement was breached, Miller s due process rights were violated, based on Adams discussion on the effect of a breached plea agreement generally.

omitted). Nevertheless, because Hawaii s plain error standard is substantially similar to the federal plain error test, it is useful to consider the federal treatment of a waived claim that the plea agreement was breached.

Each federal circuit court of appeals that reviewed a breach of a plea agreement for plain error required a showing that there was (1)error; (2) that was plain; (3) that affected substantial rights; and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings. Cannel, 517 F.3d at 1176 (emphases added); Rivera-Rodriguez, 489 F.3d at 57; Salazar, 453 F.3d at 913; Jensen, 423 F.3d at 854; Swanberg, 370 F.3d at 627; Brown, 328 F.3d at 789; Thayer, 204 F.3d at 1356; McQueen, 108 F.3d at 66. The conditions of the federal test, specifically, that there is an error that affected substantial rights and seriously affected the fairness, integrity, or public reputation of the judicial proceedings, are included within this court s rule that we will apply the plain error standard to review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights. Nichols, 111 Hawai i at 334, 141 P.3d at 981 (quoting Fox, 70 Haw. at 56, 760 P.2d at 676). Further, this court has stated that in order to notice plain error, there must be a reasonable possibility that error might have contributed to the defendant s conviction, i.e, that the [breached plea agreement] was not harmless beyond a reasonable doubt. Id.at 337, 141 P.3d at 984 (brackets added).

The federal cases reviewing breached plea agreements for plain error have determined that, even where the prosecution breaches the plea agreement, the defendant is not automatically prejudiced or deprived of his or her fundamental rights. See Cannel, 517 F.3d at 1179 (Clifton, J., concurring) (concluding that the government breached the plea agreement but agreeing with the majority that the sentence should be affirmed because the defendant did not show that the breach prejudiced him); U.S. v. De La Garza, 516 F.3d 1266, 1269-70 (11th Cir. 2008) (concluding that the government breached the plea agreement, but that defendant did not show that the breach prejudiced him and, therefore, failed to establish plain error); Salazar, 453 F.3d at 915 (holding that, even if the government had breached the agreement, the defendant could not have shown plain error, inasmuch as he could not have shown that the district court would have imposed a different sentence but for the government s argument. . . .);Jensen, 423 F.3d at 855 (holding that even if defendant was able to show a breach, he did not establish that it affected his substantial rights). When reviewing for plain error, the entire standard of review must be satisfied.

The majority s ruling is also at odds with the Supreme Court s clear ruling that a breached plea agreement does not satisfy the plain error requirement that the error must have affected the [defendant s] substantial rights. See Puckett II, 129 S.Ct. at 1429. In Puckett II, the defendant, like the majority here, see majority at 15-17, relied, in part, on Santobello, arguing that if the interests of justice required

a remand in Santobello even though the breach there was likely harmless, those same interests call for a remand whenever the Government reneges on a plea bargain, forfeiture or not. 129 S.Ct. at 1431. The Supreme Court rejected this claim, explaining that [w]hether an error can be found harmless is simply a different question from whether it can be subjected to plain-error review. Santobello (given that the error in that case was preserved) necessarily addressed only the former. Id. (emphasis added).

Furthermore, the Supreme Court rejected the claim that a breached plea agreement always impairs a defendant of his substantial rights. Id.It explained that a breached plea agreement does not necessarily prejudice the defendant where the defendant may have obtained the benefits of the plea agreement either because he obtained the benefits contemplated by the deal anyway (e.g., the sentence that the prosecutor promised to request) or because he likely would not have obtained those benefits in any event. Id.at 1432-33. According to the Supreme Court, the claim that a defendant asserting a breached plea agreement will always suffer an impairment of his substantial rights

> is simply an ipse dixit recasting the conceded error -- breach of the plea agreement -- as the effect on substantial rights. Any trial error can be said to impair substantial rights if the harm is defined as being convicted at a trial tainted with [fill-in-the-blank] error. Nor does the fact that there is a protected liberty interest at stake render this case different. That interest is always at stake in criminal cases.

Id. at 1433 (emphasis added).

The majority dismisses the Supreme Court s recent limitation of errors not objected to at the trial court, stating that Puckett II departed from federal precedent on breached plea agreements in significant respects, . . . all but overturning Santobello s holding that automatic reversal is warranted where a plea agreement is breached. Majority at 90. Yet, as the Supreme Court explained, Santobello was distinguishable from Puckett II because the defendant in that case preserved error. 129 S.Ct. at 1431. As such, I cannot agree that the Supreme Court departed from federal precedent.

Moreover, even though Puckett II is clear that an error that is not preserved is reviewed under a higher standard, the majority insists on clinging to the statements of Santobello and the Hawai i case law that followed it, even though the defendants preserved error and the appellate courts subsequently reviewed the trial court s rejection of the defendant s claim of a breached plea agreement. See majority at 15-16 (discussing Adams, 76 Hawai i 408, 879 P.2d 513), 83-84 (relying on State v. Yoon, 66 Haw. 342, 349, 662 P.2d 1112, 1116 (1983)).

Although stated differently from the federal four-prong standard, the Hawai i plain error standard also requires that the error affect the defendant s substantial rights. In light of Puckett II and the other federal decisions on this issue, I cannot agree with the majority s decision to erode Hawaii s plain error standard by determining that a breached plea agreement automatically denies a defendant of his substantial rights.

E. The Circumstances In This Case Do Not Require This Court To Correct The Alleged Error.

Although the majority decides that the breached plea agreement itself denied Miller of his due process rights, see majority at 28-30, it also concludes that the error was not harmless beyond a reasonable doubt. Majority at 30. In order to reach this conclusion, the majority is forced to inject its own analysis as to the effect of the prosecution s breach of the plea agreement because Miller does not attempt to explain this himself. As previously stated, the error should be extraordinary for an appellate court to notice plain error sua sponte, inasmuch as it precludes the prosecution from responding to the court s conclusions. In my view, such circumstances are absent here.

Assuming, arguendo, that the prosecution breached the plea agreement,[13] the majority also points to the court s

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[13] Although the plea agreement precluded the prosecution from taking a position as to the DANCP motion, the prosecution was permitted to make statements as to Miller s sentencing. The prosecution argues that its statements relating to Miller s offense was made in response to the court s prompt, Sentencing?, and for the purpose of influencing the court s ruling as to Miller s sentencing.

This case differs from the cases relied on by Miller, see majority at 19-20, which include United States v. Crusco, 536 F.2d 21, 23, 25 (3d Cir. 1976), where the prosecution had promised to take no position on sentencing but made statements in an effort to influence the severity of [the appellant s] sentence, and United States v. Moscahlaidis, 868 F.2d 1357, 1361-62 (3d Cir. 1989), where the government promised not to take a position related to the defendant s custodial sentence but presented a sentencing memorandum that was highly critical. In Crusco and Moscahlaidis, the prosecution s sentencing statements were made despite promising to stand silent on the issue, whereas, here, the prosecution s statements addressed the sentencing factors as permitted under the plea agreement.

In ruling on sentencing, the court is required to consider, among other things:

> (1) The nature and circumstances of the offense and the history and characteristics of the defendant;

(continued...)

statements that (1) Miller had no record for [fifty-one] years, (2) his offense was one too significant for the court to ignore, and (3) the welfare of society requires that he suffer the penalty. Majority at 30 (emphases omitted). It posits that

> [the court s] statement mirrors the prosecutor s comments regarding the severity of the crime and that [Miller] does not have a prior criminal record, but you know, at [fifty-one] years old, you shouldn t be doing that to a significant loved one. And this type of beating and brutality should not be accepted in our society.

Id. at 30.

Yet, the court s ruling indicates that it took into account the defense counsel s factual statements that

> [t]he [c]ourt has the discretion to grant the deferral. If the [c]ourt makes two findings, and one, it appears that the defendant s not likely, again to engage in a criminal course of conduct; and two, the ends of justice and the welfare of society have been properly served by the penalty as imposed by law.
> . . . . [H]e s 51 years old. He has no prior criminal record. . . . I ask that you use your discretion where [Miller] has not engaged at all in any criminal conduct. He s 51 years old.

(Emphases added.) It may seem implausible that the court considered Miller s counsel s statements because these facts were presented in support of the DANCP motion, and the court ruled

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(...continued)

> (2) The need for the sentence imposed:
> (a) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (b) To afford adequate deterrence to criminal conduct[.]

HRS § 706-606. The prosecution s statements that the complaining witness was a significant loved one, and that this type of beating and brutality should not be accepted in our society directly addresses [t]he nature and circumstances of the offense and [t]he need for the sentence imposed . . . to reflect the seriousness of the offense . . . and to provide just punishment for the offense. Because the prosecution s statements addressed the sentencing factors, I cannot agree that it breached its promise not to take a position as to the DANCP motion.

against the motion. However, the court stated, although [it could] find the defendant has had no record for [fifty-one] years, it could not make the required finding to grant the motion. The use of although to preface the fact that Miller had no record for fifty-one years, but then denying the DANCP motion, signals that the court recognized this fact as evidence to support the DANCP motion.

The remainder of the court s ruling denying the DANCP motion was based on whether the defendant is not likely again to engage in a criminal course of conduct, and [t]he ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, which are requirements that a defendant must satisfy prior to a court s grant of a DANCP motion. SeeHRS § 853-1(a)(2)-(3). The court stated that it could not make these findings based on Miller s offense. The court was aware of Miller s offense because of statements made by both Miller s counsel and the prosecution -- in its sentencing statements -- regarding Miller s offense.

In response to the court s Sentencing prompt, the prosecution described the nature of the offense, which is a factor of sentencing, see HRS § 706-606, as follows:

> [T]his case was borderline strangulation. The defendant actually elbows her, kneed her in the back, punched her, choked her, put his hand over her mouth, and told her to be quiet, and then also took a pillow after that because she wouldn t be quiet and put it over her face.
>
> At that time, your Honor, the witness in this case, the victim, actually feared for her life. And, you know, she s [fifty-one] years old. So is the defendant.

The prosecution also referred to the complaining witness (CW) as a significant loved one.

Miller s counsel next spoke as to the offense and the court s discretion to grant the DANCP motion. He further discussed Miller s relationship with CW and the resulting injuries to the complaining witness:

> [Miller] has had a [fourteen]-year relationship with [CW], and frankly, during the last four years of it, it has ended. And he has been ordered to attend Child and Family Services domestic violence classes. He has told me that he is actually learning a lot about it.
>
> . . . .
>
> He has agreed to pay whatever restitution to be determined, given the four-day later emergency check out to the office. . . .
>
> I just want the court to note, while we are not minimizing his plea and apology, when Officer Katayama appeared at the scene, there was no complaint of injuries. She showed the officer no injuries, and Officer Katayama would have testified that he s tried to look for injuries. Look for and found none.

(Emphases added.)

The prosecution, in response, informed the court as to the extent of the CW s injuries:

> We did have Dr. Nelson from the ER examine [CW], and did see -- well, diagnosis, she had a bruised neck; and also, in talking with Miss Moyco, she did have bruises to her leg area by basically getting into a fetal position to block the defendant.
>
> So Officer Katayama, even though he was on the scene first, bruises do show up later.

A fair review of the record does not show that the prosecution s statements to the court, even if they could be construed to be in violation of the plea agreement, affected Miller s substantial rights. The court decided that, based on the offense, as presented by both the prosecution and Miller s counsel, it could not find the necessary pre-requisites to grant

the DANCP motion. See HRS § 853-1. The court was also well aware as to the type of crime Miller committed because Miller was originally charged with Abuse of a Family or Household Member, under HRS § 709-906. Moreover, the court was further informed as to the offense when, pursuant to the plea agreement, it sentenced Miller to write a letter of apology to CW, participate in domestic violence intervention classes, and pay restitution to CW. Based on the ample evidence before the court regarding Miller s offense, I cannot agree that the prosecution s statements affected Miller s substantial rights, or that the error created such exceptional circumstances that this court must notice plain error sua sponte.

In light of the foregoing analysis, I would hold that (1) Miller waived the issue of breached plea agreement when he failed to raise it before the trial court, and (2) there was not an error which seriously affected the fairness, integrity, or public reputation of judicial proceedings, subverted the ends of justice, and prevented the denial of fundamental rights. Miller, SDO at 3 (quotations marks and citations omitted). As such, I would affirm the ICA s October 3, 2008 judgment, which affirms the family court of the second circuit s October 15, 2007 judgment.