

RE: **Proposal to Amend Rules 5, 10, and 11 of the Hawai'i Rules of Penal Procedure and Adopt Form K (Change of Plea)**

NEW FORM K - CHANGE OF PLEA

The Supreme Court of Hawai'i seeks public comment regarding proposals to amend Rules 5, 10, and 11 of the Hawai'i Rules of Penal Procedure and to add Form K - Change of Plea. The proposed amendments and addition of Form K will comply with the 2013 statutory changes of HRS Section 802E-2. The proposed rule amendments and new form are attached hereto.

Comments about the proposed rule should be submitted, in writing, **no later than Tuesday, January 7, 2014**, to the Judiciary Communications & Community Relations Office by mail to 417 South King Street, Honolulu, HI 96813, by facsimile to 539-4801, or via the Judiciary's website at www.courts.state.hi.us.

Attachment

PROPOSED TEMPORARY NEW RULE TO HAWAII RULES OF PENAL PROCEDURE

Rule 5. PROCEEDINGS FOLLOWING ARREST.

(a) In general.

(1) UPON ARREST. An officer making an arrest under a warrant shall take the arrested person without unnecessary delay before the court having jurisdiction, or, for the purpose of admission to bail, before any judge or officer authorized by law to admit the accused person to bail.

(2) PROBABLE CAUSE DETERMINATION UPON ARREST WITHOUT A WARRANT. As soon as practicable, and, Rule 45 notwithstanding, not later than 48 hours after the warrantless arrest of a person held in custody, a district judge shall determine whether there was probable cause for the arrest. No judicial determination of probable cause shall be made unless there is before the judge, at the minimum, an affidavit or declaration of the arresting officer or other person making the arrest, setting forth the specific facts to find probable cause to believe that an offense has been committed and that the arrested person has committed it. If probable cause is found as aforesaid, an appropriate order shall be filed with the court as soon as practicable. If probable cause is not found, or a proceeding to determine probable cause is not held within the time period provided by this subsection, the arrested person shall be ordered released and discharged from custody.

(3) CONSOLIDATION WITH OTHER PROCEEDINGS. The probable cause determination may, in the discretion of the judge, be combined with a bail hearing under subsection (a)(1) of this rule, an arraignment, a preliminary hearing or any other preliminary proceeding in the criminal case so long as the probable cause determination takes place in the time period provided under subsection (a)(2) of this rule. A probable cause determination shall not constitute an initial appearance unless it is combined with another preliminary proceeding in the same case.

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Rule 10. ARRAIGNMENT IN CIRCUIT COURT.

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(e) Upon the initial appearance of the defendant before the court, the court shall:

- (1) be satisfied that the defendant is informed of the charge;
- (2) inform the defendant that there is no requirement to make a statement and that any statement made may be used against the defendant;
- (3) advise the defendant of the right to counsel;
- (4) inform the defendant of the potential for immigration consequences by reading the advisement in §802E-2, Hawai'i Revised

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Statutes, at the commencement of the arraignment and plea hearing to all defendants present;

~~[(4)]~~ (5) allow the defendant reasonable time and opportunity to consult counsel; and

~~[(5)]~~ (6) admit the defendant to bail as provided by law or in these rules.

Rule 11. PLEAS.

* * *

(c) **Advice to defendant.** The court shall not accept a plea of guilty or nolo contendere without first addressing the defendant personally in open court and determining that the defendant understands the following:

- (1) the nature of the charge to which the plea is offered; and
- (2) the maximum penalty provided by law, and the maximum sentence of extended term of imprisonment, which may be imposed for the offense to which the plea is offered; and
- (3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made; and
- (4) that if the defendant pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the right to a trial is waived~~[-and]~~.

~~[(5)] that if the defendant is not a citizen of the United States, entry of a plea to an offense for which the defendant has been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.]~~

(d) **Advisement Concerning Alien Status.** Prior to entry of a plea of guilty or nolo contendere, or admission of guilt or sufficient facts to any offense punishable as a crime under state law, except those offenses designated as infractions, the court shall read the advisement in §802E-2, Hawai'i Revised Statutes, on the record to the defendant.

~~[(d)]~~ (e) **Insuring that the plea is voluntary.** The court shall not accept a plea of guilty or nolo contendere without first addressing the defendant personally in open court and determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from any plea agreement.

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~~[(e)]~~ **(f) Plea agreement.**

(1) IN GENERAL. The prosecutor and counsel for the defendant, or the defendant when acting pro se, may enter into plea agreements that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to an included or related offense, the prosecutor will take certain actions or adopt certain positions, including the dismissal of other charges and the recommending or not opposing of specific sentences or dispositions on the charge to which a plea was entered. The court may participate in discussions leading to such plea agreements and may agree to be bound thereby.

(2) NOTICE OF PLEA AGREEMENT. Any plea agreement shall be disclosed by the parties to the court at the time the defendant tenders the defendant's plea. Failure by the prosecutor to comply with such agreement shall be grounds for withdrawal of the plea.

(3) WARNING TO DEFENDANT. Upon disclosure of any plea agreement, the court shall not accept the tendered plea unless the defendant is informed that the court is not bound by such agreement, unless the court agreed otherwise.

(4) INADMISSIBILITY OF PLEA DISCUSSIONS. Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or of a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the offense charged or any other offense, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or penal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the offense charged or any other offense is admissible in a penal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

~~[(f)]~~ **(g) Determining accuracy of plea.** Notwithstanding the acceptance of a plea of guilty, the court shall not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

Form K

STATE OF HAWAI'I CIRCUIT COURT OF THE _____ CIRCUIT	<input type="checkbox"/> GUILTY PLEA <input type="checkbox"/> NO CONTEST PLEA <input type="checkbox"/> MOTION TO DEFER	CASE NUMBER:
STATE OF HAWAI'I vs. (Defendant)		
Date of Birth:	Defendant's Age:	Education (Last Grade Completed):
CHARGE(S)/HRS:	MAXIMUM IMPRISONMENT/FINE:	REPORT NUMBER(S):
Extended Term of Imprisonment: Mandatory Minimum Term of Imprisonment:		
<ol style="list-style-type: none"> 1. My mind is clear. I have not taken any medication, alcohol, or illegal drugs within the last 48 hours. I am not sick. I speak, read, write, and understand the English language or this document has been read to me or has been interpreted for me. 2. I have received a written copy of the original charge(s) in this case. The charge(s) has/have been explained to me. I understand the original charge(s) against me. I told my lawyer all of the facts I know about the case. My lawyer explained the government's evidence against me, my possible defense(s), and the facts which the government must prove in order to convict me. 3. I understand the reduced charge(s) with which the government has agreed to charge me, instead of the original charge(s). (Applicable only if original charge has been reduced.) 4. I plead of my own free will. No one is pressuring me or threatening me or any other person to force me to plead. I am not taking the blame or pleading to protect another person from prosecution. 5. I know I have the right to plead not guilty and have a speedy and public trial by jury or by the court. I know in a trial the government is required to prove my guilt beyond a reasonable doubt. I know I can see, hear, and question witnesses who testify against me, and that I may call my own witnesses to testify for me at trial. I understand I have the right to take the stand to testify and I have the right not to testify at trial. I know by pleading I give up the right to file any pre-trial motions, and I give up the right to a trial and may be found guilty and sentenced without a trial of any kind. I also give up the right to appeal anything that has happened in this case to date. 6. I understand that the court may impose any of the following penalties for the offense(s) to which I now plead: the maximum term of imprisonment, any extended term of imprisonment, and any mandatory minimum term of imprisonment specified above; consecutive terms of imprisonment (if more than one charge); restitution; a fine; a fee and/or assessment; community service; probation up to 2 years of imprisonment and other terms and conditions. 		
<input type="checkbox"/> Prosecutor <input type="checkbox"/> Defendant <input type="checkbox"/> Defense Counsel <input type="checkbox"/> Adult Probation Division		

GUILTY/NO CONTEST PLEA (Continued)	CASE NUMBER:	
<p>7. <input type="checkbox"/> I plead no contest because, after discussing all the evidence and receiving advice on the law from my lawyer, I do not want to contest the charge(s) against me.</p> <p> <input type="checkbox"/> I plead guilty because, after discussing all the evidence and receiving advice on the law from my lawyer, I believe that I am guilty. (Give a brief statement of the facts that establish the defendant's guilt as to each offense to which the defendant is entering a plea pursuant to the requirements of HRS §§ 701-114, 701-115, 702-205, and 702-206, as amended.)</p> <p> <input type="checkbox"/> I move to defer acceptance of my plea. I understand that if the Court denies my motion, the Court will then find and adjudge me guilty upon this plea, and impose sentence.</p> <p>8. I have not been promised any kind of deal or favor or leniency by anyone for my plea, except that I have been told that the government has agreed as follows (if none, write "None"):</p> <p> <input type="checkbox"/> I know that the court is not required to follow any deal or agreement between the Government and me. I know that the court has not promised me leniency.</p> <p> <input type="checkbox"/> The court has agreed to follow the plea agreement pursuant to Rule 11, Hawai'i Rules of Penal Procedure.</p> <p>9. I further state that (if none, write "None"):</p> <p>10. I understand that:</p> <p> <input type="checkbox"/> If I am not a citizen of the United States, whether or not I have lawful immigration status, I have the right to receive advice from my lawyer about the specific impact that this case will have, if any, on my immigration status.</p> <p> <input type="checkbox"/> The entry of a guilty or nolo contendere plea, admission of guilt or sufficient facts, or conviction, deferred judgment, or deferred sentence may have the consequence of my immediate detention, deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.</p> <p> <input type="checkbox"/> In some cases, detention and deportation from the United States will be required.</p> <p> <input type="checkbox"/> My lawyer must investigate and advise me about the aforementioned issues prior to the commencement of trial, entry of a guilty or nolo contendere plea, or admission of guilt or sufficient facts to any offense punishable as a crime under state law, other than those offenses designated as infractions, and I acknowledge that I have been so advised.</p> <p> <input type="checkbox"/> I am not required to disclose my immigration status or citizenship status to the court.</p> <p>11. I am signing this Guilty/No Contest Plea form after I have gone over all of it with my lawyer. I know I will not be permitted to withdraw my plea. I am signing this form in the presence of my lawyer. I have no complaints about my lawyer and I am satisfied with what he/she has done for me.</p>		
DATE	DEFENDANT'S SIGNATURE	
<p style="text-align: center;">CERTIFICATE OF COUNSEL</p> <p>I certify that I have read and explained fully this Guilty/No Contest Plea document to the defendant and believe he/she understands this document in its entirety. The statements contained in this document conform with my understanding of the defendant's position. I believe the defendant's plea is made voluntarily and with an intelligent understanding of the nature of the charge(s) and possible consequences. The defendant signed this Guilty/No Contest Plea form in my presence. I further certify that I have complied with Rules 1.2a and 1.4 of the Hawaii Rules of Professional Conduct.</p>		
DATE	ATTORNEY FOR DEFENDANT	SIGNATURE
<p>I acknowledge that the Judge questioned me personally in open court to make sure that I knew what I was doing in pleading guilty or no contest and understood this form before I signed it.</p>		
DATE	SIGNATURE OF DEFENDANT (signed in open court after questioning)	
NAME OF JUDGE		