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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I,
Respondent/Plaintiff-Appellee,

vs.

PIERRE HERNANDEZ,
Petitioner/Defendant-Appellant.

SCWC-15-0000067

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-15-0000067; CASE NO. 1DCW-14-0005133)

DECEMBER 21, 2018

CONCURRING AND DISSENTING OPINION BY NAKAYAMA, J.,
IN WHICH RECKTENWALD, C.J., JOINS

I agree with the Majority's holding that Hernandez's no contest plea did not preclude his challenge to his sentence. However, I write separately because I cannot join the Majority's holdings (1) that the District Court of the First Circuit's (district court) acceptance of Hernandez's Hawai'i Rules of Penal Procedure (HRPP) Rule 43 plea without conducting an on-the-record

colloquy justifies plain error review; and (2) that the district court erred in denying Hernandez the right of allocution. I continue to believe "this court's power to deal with plain error is one to be exercised sparingly and with caution." State v. Miller, 122 Hawai'i 92, 146, 223 P.3d 157, 211 (2010) (Nakayama, J., dissenting). In my view, the facts of this case do not justify plain error review. Moreover, Hernandez waived his right to engage personally with the court, including the right to engage in a colloquy and the right of pre-sentence allocution, when he initiated a proceeding by which he chose to plead remotely and remain absent from that point forward. Therefore, I respectfully concur in part and dissent in part.

I. BACKGROUND

On November 6, 2014, the State charged Hernandez with one count of harassment by stalking in violation of Hawai'i Revised Statutes (HRS) § 711-1106.5. Thereafter, Hernandez relocated from Hawai'i to the mainland and represented to defense counsel that he did not intend to return to Hawai'i.

No longer living in Hawai'i, Hernandez availed himself of HRPP Rule 43,¹ which allows a criminal defendant charged with a

¹ HRPP Rule 43(d)(2) (2012) provides:

(d) Presence may be waived for non-felony offenses. In prosecutions for offenses other than a felony, the court may:

. . . .

(continued...)

non-felony offense to waive the defendant's right to be present at court proceedings when the defendant resides off island, and filed his HRPP Rule 43 plea with the district court.² Hernandez verified that he understood the implications of the plea and that he wished to make use of the HRPP Rule 43 plea by mail procedure by signing the document and providing his fingerprint.

Attached to the HRPP Rule 43 plea by mail document was defense counsel's signed declaration. In his declaration, defense counsel stated that: (1) defense counsel "explained the defendant's right to be present"; (2) Hernandez represented to defense counsel that he "does not wish to be present" and that he "wishes the proceedings to be conducted in [his] absence"; (3) defense counsel "read and explained" the HRPP Rule 43 plea to Hernandez; (4) the statements in defense counsel's declaration "conform with [his] understanding of [Hernandez's] position"; (5)

¹(...continued)

- (2) conduct an arraignment in the defendant's absence, if the defendant's residence is out-of-state or on another island, the defendant consents in writing, and a plea of guilty or no contest is
 - (A) accepted and sentence is imposed; or
 - (B) offered and acceptance is deferred. Except for the requirement of addressing the defendant personally in open court, the court shall otherwise comply with the requirements of Rule 11 and Rule 32 of these Rules.

² I believe HRPP Rule 43 was enacted for the benefit of visitors and military personnel charged with low-level offenses. Its purpose is to spare those who reside off island the substantial cost and time required to travel from the mainland or neighbor islands to enter a guilty plea for a misdemeanor.

defense counsel believed that Hernandez understood the HRPP Rule 43 plea in its entirety; (6) Hernandez's "plea is voluntary"; and (7) Hernandez "understands the nature of the charge and the possible consequences."

The district court ruled that Hernandez's plea was "knowing, voluntary, and intelligent" in light of Hernandez's representations in the HRPP Rule 43 plea by mail document. Consequently, the district court accepted Hernandez's no contest plea and found him guilty as charged.

The district court sentenced Hernandez to one and one-half years of probation, with the condition that he spend thirty days in jail, serve 200 hours of community service, pay a \$55 criminal injuries fee, receive a mental health assessment and obtain treatment if required, and have no further contact with the complaining witness. As Hernandez was not present, he did not address the court before being sentenced. Hernandez appealed.

In the ICA, Hernandez argued, inter alia, that the district court plainly erred in accepting his no contest plea. He asserted that the district court failed to comply with HRPP Rule 11(d)³ because it did not read the deportation advisement contained in HRS § 802E-2 on the record to Hernandez prior to

³ HRPP Rule 11(d) (2014) provides: "Prior to entry of a plea of guilty or no contest . . . the court shall read the advisement in § 802E-2, Hawai'i Revised Statutes, on the record to the defendant."

accepting his plea. Hernandez also argued that the district court deprived him of his right of allocution by failing to afford him an opportunity to personally address the court before sentencing. The State countered that the district court did not err in accepting Hernandez's plea because "Hernandez's no contest plea complied with HRPP Rules 11 and 32 as required by HRPP Rule 43(d)(2)." The ICA affirmed the district court's judgment.

On certiorari, Hernandez now contends the trial court erred in accepting his no contest plea because, among other things, the court's failure to conduct an on-the-record colloquy with Hernandez forecloses the possibility that Hernandez's plea was made knowingly, voluntarily, and intelligently. Hernandez also argues that he was denied his constitutional right of allocution, which he did not waive.

II. DISCUSSION

The Majority holds that the district court's acceptance of Hernandez's plea without an on-the-record colloquy was plain error, and that Hernandez's right of allocution was violated. Majority at 2. I respectfully disagree. Because Hernandez did not contest the district court's acceptance of his plea at the district court stage, and in fact affirmatively availed himself of

the convenience afforded to him by HRPP Rule 43,⁴ I would not exercise plain error review to vacate the district court's acceptance of the plea now. I would further hold that by knowingly availing himself of the HRPP Rule 43 plea by mail procedure, Hernandez waived his right both to engage in a colloquy before the court accepted his plea, and to allocute before sentencing.

A. This court should not exercise plain error review to analyze the district court's acceptance of Hernandez's no contest plea.

The Majority holds plain error review is appropriate whenever substantial rights are affected. Majority at 24. Accordingly, it notices plain error by the district court in accepting Hernandez's plea without conducting a colloquy, an omission which it holds affected Hernandez's substantial rights. Majority at 34-36. I respectfully disagree. Because it is clear to me that Hernandez's plea was voluntary, and that he benefitted from the use of the HRPP Rule 43 plea by mail procedure, I believe that the district court's acceptance of his plea without conducting a colloquy did not affect Hernandez's substantial rights. As such, the facts of this case do not justify our sparing use of plain error review. Moreover, I believe

⁴ Nowhere does Hernandez contend that, had he been fully advised he would have eschewed the convenience afforded him by HRPP Rule 43 and returned to Hawai'i for plea and sentencing.

Hernandez's decision to avail himself of the HRPP Rule 43 plea by mail procedure was "invited error" that should not be reversed.

My views on the expansiveness of plain error review continue to diverge from those of the Majority. Plain error review should be exercised sparingly, and the facts of this case do not warrant plain error review. It is well established that issues raised for the first time on appeal are waived absent plain error. Miller, 122 Hawai'i at 133-34, 223 P.3d at 198-99 (Nakayama, J., dissenting) (quoting Kawamata Farms, Inc. v. United Agri Prods., 86 Hawai'i 214, 248, 948 P.2d 1055, 1089 (1997)). I have repeatedly stated that the power to correct plain error is one to be used sparingly, and with caution. Miller, 122 Hawai'i at 146, 223 P.3d at 211 (Nakayama, J., dissenting); "[T]he decision to take notice of plain error must turn on the facts of the particular case to correct errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings." Id. at 143, 223 P.3d at 208 (Nakayama, J., dissenting) (quotations omitted) (emphasis in original). This is so because "the plain error rule 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 costs of counsel's mistakes." State v. Ui, 142 Hawai'i 287, 302, 418 P.3d 628, 643 (2018) (Nakayama, J., dissenting) (quoting State v. Kelekolio, 74

Haw. 479, 515, 849 P.2d 58, 74-75 (1993)).

I believe, as I contended in Ui, that when the record clearly shows that a defendant initiated a procedural maneuver for his benefit, a trial court's acquiescence does not necessarily affect the defendant's substantial rights such that any "error" in that procedure requires correction. I noted in Ui that a district court's "error" in failing to conduct a colloquy with defendant Ui regarding stipulation to certain facts necessary for the prosecution to prove its case did not affect Ui's substantial rights when Ui "wanted to stipulate, initiated the stipulation, discussed the stipulation and its effects with her attorney, and ultimately agreed to it." 142 Hawai'i at 303, 418 P.3d at 644 (Nakayama, J., dissenting).

Similarly, applying plain error review to the facts of this case takes a step toward limiting the discretion inherent in plain error analysis. As noted previously, this court's discretion to correct plain error represents a departure from the rule that parties bear the costs of their counsel's mistakes. See Ui, 142 Hawai'i at 302, 418 P.3d at 643 (Nakayama, J., dissenting) (quotation and citation omitted). This "mistake," to the extent that defense counsel's compliance with Hernandez's wish to take advantage of an established pleading procedure can be considered a mistake, was not so prejudicial to Hernandez that we should

exercise our discretion to correct it.

The Majority holds the district court's failure to conduct an in-person colloquy with Hernandez led to an involuntary no contest plea and therefore affected Hernandez's substantial rights. Majority at 34-36. However, because Hernandez chose to avail himself of the benefits of the HRPP Rule 43 plea by mail procedure,⁵ I cannot agree that Hernandez's substantial rights were affected. Hernandez filed the HRPP Rule 43 plea by mail document asserting his voluntary waiver of his right to be present at various proceedings including arraignment, the entry of plea, and sentencing, and the right to be questioned in open court. He verified his desire to avail himself of the HRPP Rule 43 plea by

⁵ Numerous other states have adopted "plea in absentia" rules like HRPP Rule 43(d)(2). See Mich. Ct. R. § 6.610(E)(7); N.Y. Ct. R. § 200.25; Tex. Crim. Pro. Art. 42.14; Colo. R. Crim. P. 11(c); Ala. R. Crim. P. 14.4. As discussed in part I, supra, HRPP Rule 43(d) affords substantial benefits to those who cannot, or do not wish to appear in person to plead guilty to a misdemeanor.

The Majority effectively holds that if a misdemeanor defendant does not wish to appear in person, he must appear by video conference. Majority at 34 n.24. Indeed, HRPP Rule 43(e) provides for such a video appearance. The Majority contends that the video conference alternative to an in-person colloquy "has not presented a significant enough obstacle to prevent courts from utilizing the technique in a variety of contexts in a criminal case." Majority at 35 n.24.

However, while appearing by video conference may be viable when a defendant is in an institutional setting like a prison, the Majority does not address how video conferencing will be possible when the defendant is, like Hernandez, not in an institutional setting. Video conferences are not routinely conducted at arraignment when the defendant resides out of state and is not in an institutional setting. The authentication, identification, and confidentiality issues that will arise when attorneys use "smartphones and other common consumer devices" to enable out of state, non-institutionalized parties to appear virtually will make it difficult to create an accurate record and render this alternative impracticable. Contra Majority at 34 n.24.

Notwithstanding the possibility of conducting a colloquy through video communication, I believe the effect of the Majority's decision will be that Hawai'i judges will no longer accept HRPP Rule 43 pleas.

mail procedure by signing the document and providing his fingerprint. Hernandez also represented to counsel that he did not wish to return to Hawai'i to be present at the aforementioned proceedings, and affirmed that counsel read and explained the plea by mail document to him. Accordingly, Hernandez did not object to the court's acceptance of his plea at trial. Although the court did not conduct an in-person colloquy with Hernandez, his substantial rights were not affected because he achieved his desired outcome when the court accepted his plea. Thus, we should not apply plain error review to correct the "error."⁶

Moreover, I believe we should not exercise our discretion to notice and correct the district court's "error" because Hernandez never asserted on appeal or on certiorari that his substantial rights were affected to his detriment. "[W]here plain error has been committed and substantial rights have been affected thereby, the error may be noticed even though it was not

⁶ The Majority correctly states that "it is the duty of the trial court to perform a colloquy" Majority at 32 n.22. But this duty does not absolve parties of the requirement to object to trial court error to preserve those arguments for appeal. Our discretion to employ plain error review does not nullify the rule that parties waive arguments they fail to preserve. See *Kernan v. Tanaka*, 75 Haw. 1, 35, 856 P.2d 1207, 1224 (1993). However, our ever-expanding use of plain error review undermines the concept of waiver and continues to chip away at the principles of the adversary system. See *Ui*, 142 Hawai'i at 303, 418 P.3d at 644 (Nakayama, J., dissenting) (concluding the court's use of plain error review "further erodes the relationship between an attorney and her client, imposes unreasonable duties upon the court, and intrudes upon the adversarial nature of the trial process[.]"); See also *Miller*, 122 Hawai'i at 139, 223 P.3d at 204 (Nakayama, J., dissenting) ("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.").

brought to the attention of the trial court." Miller, 122 Hawai'i at 100, 223 P.3d at 165 (citation omitted). However, this court's principles of waiver remain the rule, to which plain error review is the exception. Hernandez asserts that, as a general matter, a colloquy between the court and a defendant is required, but does not allege that his substantial rights were affected, or how they were affected.⁷ Hernandez never alleged that his substantial rights were affected, so we should not exercise plain error review based on the inference that they were affected.

Finally, I believe that the "error" in this case, the district court's acceptance of Hernandez's plea without conducting a colloquy, was invited. "[G]enerally, invited errors are not reversible." State v. Jones, 96 Hawai'i 161, 166, 29 P.3d 351, 365 (2001). I believe Hernandez invited this error, and it is therefore not reversible. This court qualified the invited error doctrine in State v. Nichols, holding that the general rule is inapplicable "where an invited error is so prejudicial as to be plain error or to constitute ineffective assistance of counsel." 111 Hawai'i 327, 339 n.7, 141 P.3d 974, 986 n.7 (2006) (citations omitted). However, as I believe this "error" was not prejudicial

⁷ Hernandez communicated to the court through counsel and directly through the HRPP Rule 43 plea by mail document that he wished to waive the right to be present at arraignment, plea entry, and sentencing so he could avoid traveling back to Hawai'i. In light of these facts, Hernandez cannot reasonably assert that the district court's acceptance of his HRPP Rule 43 plea affected his substantial rights to his detriment.

and does not warrant plain error review (see supra), the general invited error rule should apply and the district court's "error" should not be reversed.

The Majority's holding is problematic because it enables a defendant who avails himself of a procedural maneuver at trial and benefits from that procedure to successfully challenge that procedure on appeal. Consistent with the longstanding invited error doctrine and Hernandez's failure to allege the error affected his substantial rights, we should not exercise our discretion to correct plain error when that "error" is a choice the defendant made for his own benefit. If it is clear from the record that the defendant wished to avail himself of a procedure, this court should not exercise plain error review when the defendant later changes his mind. Here, Hernandez clearly wished to avail himself of the HRPP Rule 43 plea by mail procedure. Thus, we should not exercise plain error review under these circumstances.

B. Hernandez waived his right to engage in an on-the-record colloquy and his right of allocution.

I believe that when Hernandez filed his HRPP Rule 43 plea by mail paperwork, he waived both his right to an on-the-record colloquy and his right of allocution. As such, neither right was violated when the district court did not engage him in a

colloquy or allow him the opportunity to speak before sentencing. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Reponte v. State, 57 Haw. 354, 361, 556 P.2d 577, 583 (1976) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). The Majority holds that Hernandez did not waive his right of allocution because he was not specifically informed of that right. Majority at 19 n.13.

However, I believe the record shows Hernandez knew he was entitled to personally address the court, and that by choosing to be absent at all proceedings, he waived that right. The text of HRPP Rule 43 states "[e]xcept for the requirement of addressing the defendant personally in open court, the court shall otherwise comply with the requirements of Rule 11 and Rule 32" HRPP Rule 43(d)(2)(B) (emphasis added). Furthermore, Hernandez's HRPP Rule 43 plea states "I understand that I have the right to be present at the arraignment, at pretrial proceedings, at the time I enter my plea and at my sentencing. I voluntarily waive (give up) my right to be present at all of these proceedings . . . I also give up my right to be questioned in open court." (emphasis added). Finally, defense counsel attached a declaration to the HRPP Rule 43 plea, stating, among other things, defense counsel "explained the defendant's right to be present," and "read and explained" the HRPP Rule 43 plea to Hernandez. The record

demonstrates Hernandez was aware of his right to engage with the court in person and knew he was waiving his right to be present at sentencing and at plea-entry, so he knowingly waived his right to engage with the court in person at both sentencing and plea-entry.

The record also supports that Hernandez knowingly, intelligently, and voluntarily entered the plea which waived his right to engage with the court in person. The HRPP Rule 43 plea indicates that Hernandez completed twelve years of education, was fluent in the English language, and understood the nature of the charge against him, the maximum penalty, that he had the right to plead not guilty, and the rights he was giving up by foregoing trial. The HRPP Rule 43 plea further supports that Hernandez pled of his own free will, that he was not coerced into pleading no contest, and that he was not promised any leniency or other benefit in exchange for his plea. Additionally, defense counsel's declaration indicates Hernandez understood the HRPP Rule 43 plea in its entirety, and that Hernandez "does not wish to be present" and "wishes the proceedings to be conducted in [his] absence." The district court did not err in not personally engaging with Hernandez, because Hernandez waived both his right to engage in an on-the-record colloquy with the court and his right of allocution.

III. CONCLUSION

I agree with the Majority's holding that Hernandez is

not precluded from challenging his sentence by entry of his no contest plea. However, I do not believe the facts of this case justify the court's use of plain error review to vacate the district court's acceptance of Hernandez's plea. I further disagree with the Majority's holding that Hernandez's right of allocution was violated, because I believe Hernandez waived his right to address the court in person, both to engage in an on-the-record colloquy before entry of his plea, and to allocute before sentencing, when he chose to plead remotely pursuant to HRPP Rule 43.

For these reasons, I would affirm the ICA's May 20, 2017 Judgment on Appeal. I respectfully concur in part and dissent in part.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

