

DISSENTING OPINION BY NAKAMURA, J.

I respectfully dissent.

A defendant's probation shall be revoked if the defendant "inexcusably failed" to comply with a substantial condition of probation. Hawaii Revised Statutes (HRS) § 706-625(3) (Supp. 2009). The probation of Defendant-Appellant Cornelius Wesley Durham (Durham) was revoked because he was terminated from the Catholic Charities' sex offender treatment program (Catholic Charities' program) and thereby failed to comply with the condition of his probation that required him to satisfactorily participate in the Hawai'i Sex Offender Treatment Program until clinically discharged. Whether Durham "inexcusably failed" to comply with a substantial condition of probation therefore turns on whether his termination from the Catholic Charities' program was justified.

The evidence presented at Durham's probation revocation hearing reflects that Catholic Charities terminated Durham basically because an attorney friend wrote a letter complaining about certain restrictions imposed on Durham as part of his treatment.<sup>1</sup> The complaint letter, which was addressed to Durham's therapist and probation officer, argued that the restrictions placed on Durham were unconstitutional and stated that the attorney friend would be filing a "motion with the Court to amend Mr. Durham's terms of probation" to remedy the violation of Durham's fundamental constitutional rights if the matter could not be resolved amicably. At the revocation hearing, Durham's probation officer testified that this complaint letter was "the trigger" for the Durham's termination from the Catholic Charities' program. Durham also introduced a letter written by the Director of the Catholic Charities' program indicting that Durham's termination was a direct result of the complaint letter.

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<sup>1</sup> Durham introduced evidence that after being terminated from the Catholic Charities' program, he was accepted into the Community Assistance Center's sex offender treatment program and was doing well in that program.

In my view, the mere submission of a letter by an attorney friend complaining about certain restrictions imposed on Durham as part of his treatment did not demonstrate that Durham's termination from the Catholic Charities' program was justified. Although the therapist provided a total of four reasons for terminating Durham from the Catholic Charities' program, all were related to the complaint letter. Significantly, the record does not show that Catholic Charities would have terminated Durham for reasons other than the submission of the complaint letter. No witness from the Catholic Charities program was called to testify at the revocation hearing. I do not believe that the submission of the complaint letter by Durham's friend demonstrated that Durham "inexcusably failed" to comply with a substantial condition of probation. Accordingly, I respectfully dissent from the majority's decision to affirm the circuit court's June 26, 2009, "Order Revoking Probation and Resentencing Defendant."