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IN THE SUPREME COURT OF THE STATE OF HAWAII

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STATE OF HAWAII,
Respondent/Plaintiff-Appellee,

vs.

RONALD MELVIN BARNES,
Petitioner/Defendant-Appellant.

SCWC-15-0000909

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-15-0000909; FC-CR. NO. 12-1-0057)

JUNE 6, 2019

DISSENTING OPINION BY RECKTENWALD, C.J., IN WHICH
NAKAYAMA, J., JOINS, AS TO PART IV.B OF THE MAJORITY OPINION

I. INTRODUCTION

A court "may never cross the line into attempting to compel an admission of guilt or punish the defendant for maintaining [a claim of] innocence." State v. Nakamitsu, 140 Hawai'i 157, 166, 398 P.3d 746, 755 (2017) (internal quotation

marks omitted) (quoting State v. Kamana'o, 103 Hawai'i 315, 321, 82 P.3d 401, 407 (2003)). Accordingly, "a sentencing court may not impose an enhanced sentence based on a defendant's refusal to admit guilt" when the defendant intends to appeal. Kamana'o, 103 Hawai'i at 316, 82 P.3d at 402 (emphasis added). This limitation on the discretion of sentencing courts protects defendants' right to remain silent and right against self-incrimination in criminal proceedings, pursuant to the Fifth Amendment to the United States Constitution and article I, section 10 of the Hawai'i Constitution. Id. at 320, 82 P.3d at 406.

As demonstrated in Barrios, to determine whether a sentencing court has improperly imposed an enhanced sentence based on a defendant's refusal to admit guilt, we analyze whether the three factors set forth in Kamana'o, as a whole, weigh in favor of vacating the defendant's sentence. State v. Barrios, 139 Hawai'i 321, 338, 389 P.3d 916, 933 (2016) (holding that "application of the three-part Kamana'o analysis weigh[ed] in favor of vacating Barrios's sentence," where the first factor "weigh[ed] in favor of vacating the sentence," there was no indication of the second factor, and the third factor "provide[d] further support as to why Barrios's sentence should be vacated"). Here, when the circuit court's statements at sentencing are viewed in context of the entire proceeding, it is apparent that

the circuit court's decision to impose consecutive sentences was not "improperly influenced" by Barnes's maintenance of his innocence. Kamana'o, 103 Hawai'i at 323, 82 P.3d at 409. Rather, in imposing Barnes's sentence, the circuit court carefully considered relevant sentencing factors - most notably, the fact that Barnes sexually abused two young children over a long period of time, causing lasting trauma to both of them.

In reaching a contrary result, the Majority reformulates the Kamana'o analysis into a rigid "if-then" test, which is satisfied if there is an "indication" of the factors. The Majority's reformulation misconstrues the purpose of the Kamana'o analysis, which is to assist the court in determining the ultimate question: whether the sentencing court's decision to impose an enhanced sentence was "improperly influenced" by the defendant's maintenance of a claim of innocence. Accordingly, I respectfully dissent.

II. BACKGROUND

Barnes was charged with nine counts of sexual assault in the first degree and six counts of sexual assault in the third degree. Barnes's indictment alleged that he sexually abused Child 1 and Child 2, both of whom were his minor stepdaughters, between July 2001 and February 2005.

Child 1 and Child 2's mother (Mother) testified that

Child 1 was three years old and Child 2 was one year old when they were first introduced to Barnes. Barnes moved in with Mother, Child 1, and Child 2 shortly thereafter. Barnes and Mother got married and they moved to Hawai'i with Child 1 and Child 2 in June 2001.

Mother stated that while the family lived in Hawai'i, her work hours varied and she sometimes had "night shift[s], 12-hour shifts, or weekend shifts." Barnes was the primary caretaker of Child 1 and Child 2 while Mother was at work. Mother explained that Barnes was Child 1 and Child 2's only father figure and they referred to him as "Dad." Mother testified that in February 2005, the family moved to Tacoma, Washington. Mother and Barnes divorced roughly two years later. Child 1 and Child 2 had no relationship with Barnes following the divorce.

A. Child 1's Testimony

Child 1 was four to eight years old when the family lived in Hawai'i. Child 1 testified that throughout this time, when Mother was at work, Barnes would ask her to go into his bedroom and take off her clothes. Barnes would then put his finger into her vagina. Child 1 stated that this first occurred soon after the family moved to Hawai'i, when she was in kindergarten, and by the time the family left Hawai'i, this was

occurring "like every weekend." Child 1 testified that Barnes told her "not to tell anyone [about his conduct] . . . or something bad would happen."

Child 1 testified that throughout the same time period, Barnes licked her vagina "quite a few times." Child 1 also stated that, starting when she was about six or seven years old, Barnes put his penis in her mouth on several occasions. Child 1 further testified that when she was in the third grade, Barnes put his penis in her vagina. She stated that this was painful and scary. Child 1 also testified that Barnes showed her "that if I held [a shower head] towards my vagina, I could make myself feel good." Out of fear, Child 1 did not mention any of these incidents until after Mother divorced Barnes years later.

B. Child 2's Testimony

Child 2 was three to six years old when the family lived in Hawai'i. Child 2 testified that on one occasion, when she was between four and six years old, Barnes got in the bathtub with her, made her put his penis in her mouth, and later licked in and around her vagina. Child 2 stated that this terrified and confused her. She further testified that, because she was afraid and embarrassed, she did not tell anyone what Barnes did to her until Mother asked her about her interactions with Barnes years later.

Barnes did not testify.

C. Jury Verdict and Presentence Investigation Report

The jury found Barnes guilty of four counts of sexual assault in the first degree as to Child 1 and one count of sexual assault in the first degree as to Child 2. Accordingly, the circuit court adjudged Barnes guilty of five counts of sexual assault in the first degree. The circuit court then requested that Barnes "[p]lease help probation in the preparation of a presentence [investigation] report."¹

¹ Pursuant to Hawai'i Revised Statutes (HRS) § 706-601(1)(a) (2014), "the court shall order a pre-sentence correctional diagnosis of the defendant and accord due consideration to a written report of the diagnosis before imposing sentence where . . . [t]he defendant has been convicted of a felony." Here, Barnes was convicted of five felonies.

HRS § 706-602(1) (2014), which sets forth the requisite components of pre-sentence investigation reports, provides:

The pre-sentence diagnosis and report shall be made by personnel assigned to the court or other agency designated by the court and shall include:

- (a) An analysis of the circumstances attending the commission of the crime;
 - (b) The defendant's history of delinquency or criminality, physical and mental condition, family situation and background, economic status and capacity to make restitution or to make reparation to the victim or victims of the defendant's crimes for loss or damage caused thereby, education, occupation, and personal habits;
 - (c) Information made available by the victim or other source concerning the effect that the crime committed by the defendant has had upon said victim, including but not limited to, any physical or psychological harm or financial loss suffered;
 - (d) Information concerning defendant's compliance or
- (continued...)

A probation officer met with Barnes in order to complete the presentence investigation (PSI). As set forth in the PSI report:

[Barnes] reported that he received the PSI questionnaire that was sent to him but related that he would not be participating in the PSI. He further stated that if [I] wanted information on him, [I] should contact the state of Washington as he said he would not be signing any documents.

[Barnes] was given the opportunity to make a verbal statement/comment about the present matters, in which he replied that he is planning to file an appeal in the instant matters

Furthermore, [Barnes] reported that he is "innocent" of all the sexual assault charges against him. He said that one of the victims had a sexually transmitted disease that [he] never had, so he explained that it meant that she got the disease from someone else. He also indicated that the victim(s) may have been sexually assaulted, but that he was not the perpetrator, and said that it was someone else that was either dating the[ir] mother or living with them at that time. Due to [Barnes's] unwillingness to participate in the presentence investigation interview, only [partial] information is being provided to the court[.]

Because Barnes did not participate in the preparation of the PSI report, it lacked information set forth in HRS § 706-602(1)(b), including Barnes's "physical and mental condition, family situation and background, . . . education, occupation, and personal habits." Child 1 and Child 2 participated in the preparation of the PSI report by submitting victim statements.

(...continued)

non-compliance with any order issued under section 806-11; and

- (e) Any other matters that the reporting person or agency deems relevant or the court directs to be included.

Child 1 stated, "I now suffer from PTSD and [depression]. I am now also very shy and don't trust most people." She reported that although she saw a psychologist for three years and attended counseling for five years, "I lost my first job as a waitress because I was too shy to talk to customers. Before I was abused by [Barnes,] I wasn't shy. He made me fear people."

Child 2 stated that despite the fact that she was given counseling in connection with her experiences with Barnes, "I can no longer trust people entirely, especially if they are an older male. I also have trouble thinking about any degree of intimacy."

D. Sentencing

The State moved for consecutive sentencing, such that the sentencing in the four counts pertaining to Child 1 would run consecutively to the sentencing in the count pertaining to Child 2. The State explained:

Counts 1, 3, 5, and 6 that the defendant was convicted of pertains to his sexual penetration of a child witness in this case, [Child 1], over a[n] extended period of time while they lived here in Hawai'i, and it was numerous forms of penetration. . . . Count 13 pertains to sexual penetration of [Child 2], the younger of the two girls, while they lived here in Hawai'i.

It's [the] State's position that imposition of consecutive term sentencing is appropriate and reasonable, [and] reflects the seriousness of the crimes that this defendant committed against two separate witnesses.

Defense counsel argued that "there is no justification

for consecutive over concurrent sentencing in this particular case." He further stated that Barnes would "not be making a statement on the advice of counsel. He intends to appeal the case." The circuit court then stated, "Mr. Barnes, I just need it from your mouth. You have every right to say what you wish before sentencing. Do you wish to say anything?" Barnes replied, "Not in this court, your Honor."

The circuit court took judicial notice of the files and records in the case, including the PSI report, as well as the testimony given at trial. The circuit court sentenced Barnes to twenty years of imprisonment for each count. The circuit court determined that the terms of imprisonment for each count as to Child 1 would run concurrently with one another and granted the State's motion for consecutive sentencing for the remaining count as to Child 2. Thus, for the five felony counts of sexual assault in the first degree, Barnes was sentenced to a total of forty years of incarceration.

In reaching its sentencing determination, the circuit court considered the factors set forth in HRS § 706-606 (2014).²

² The court, in determining the particular sentence to be imposed, shall consider:

- (1) The nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) The need for the sentence imposed:

(continued...)

It explained:

[T]he nature and circumstances of the offense . . . are most serious as they involved the sexual molestation of two young children as to whom the defendant was in a position of trust as the husband of the children's natural mother. The conduct involved a variety of acts to the two children, both of whom were under the age of 14 years. The victim impact statements and some of what the court observed during trial showed that these two children apparently suffered harm from the sexual assaults, and that harm apparently remains with the children notwithstanding counseling.

. . . .

[T]hese sexual acts spanned a substantial period of time and involved acts of deception both as to the children and to adults.

In addition, while the defendant certainly has a right to appeal all matters that are appealable, he has been uncooperative in the preparation of any aspect of the presentence report and does not appear to have expressed any sadness that the two children suffered harm of any kind.

In addition, the sentence is required to reflect the

²(...continued)

- (a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
 - (b) To afford adequate deterrence to criminal conduct;
 - (c) To protect the public from further crimes of the defendant; and
 - (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) The kinds of sentences available; and
 - (4) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

seriousness of these offenses to not one but two small children and to promote respect for the laws of our state and to provide just punishment under the totality of the relevant circumstances.

. . . .

Based upon the factors which the court has just discussed under [HRS §] 706-606, the sentence is necessary to provide adequate deterrence to criminal conduct and to protect the public from further crimes of the defendant, especially against children.

III. DISCUSSION

A. We Consider the Kamana'o Factors as a Whole to Determine if a Sentence Was Improperly Influenced by the Defendant's Maintenance of a Claim of Innocence

1. State v. Kamana'o

The defendant in Kamana'o was convicted of, inter alia, two counts of sexual assault in the first degree. Kamana'o, 103 Hawai'i at 316, 82 P.3d at 402. He wrote a letter to the circuit court in which he expressed his continued claim of innocence. Id. at 318, 82 P.3d at 404. At sentencing, the circuit court asked Kamana'o to confirm his persistence in maintaining this claim by asking him, "Your position essentially remains unchanged? The position that you expressed in your letter?" Id. at 323-24, 82 P.3d at 409-10. Then, in imposing an extended sentence, the circuit court expressly emphasized the defendant's refusal to admit guilt. It stated:

The problem that the Court faces and addresses is whether or not . . . Mr. Kamanao's criminality is so extensive as to require an extended term of imprisonment from 20 years to life. . . . [N]otwithstanding the seriousness of the offenses with which [Kamana'o] has been charged and for which he has

been convicted, there appears to be no so-called aggravating circumstances[.]

. . . .

In addition to the nature and multiplicity of the offenses committed by [Kamana'o], the seriousness, the flagrancy of his conduct is aggravated by what has been pointed out by [the DPA]: That he refuses to acknowledge his culpability for these offenses. . . . [A] jury has convicted [Kamana'o] of the offenses, and, on that basis, the Court finds that he is guilty of these offenses and is culpable. That being the case, his refusal to acknowledge this very serious behavioral problem, which caused him to terrorize and victimize and assault his victims, negates any reasonable expectation of his rehabilitation, whether in 20 years or for the duration of his life.

Id. at 317-18, 82 P.3d at 403-04 (original emphases altered).

In determining whether the circuit court's statements amounted to reversible error, this court analyzed three factors applied by the Michigan Supreme Court: "(1) the defendant's maintenance of innocence after conviction, (2) the judge's attempt to get the defendant to admit guilt, and (3) the appearance that, had the defendant affirmatively admitted guilt, [the] sentence would not have been so severe." Id. at 323, 82 P.3d at 409 (original brackets omitted) (quoting People v. Wesley, 411 N.W.2d 159, 162 (Mich. 1987)).

We determined that the first factor weighed in favor of vacating Kamana'o's sentence, as he clearly maintained his innocence after conviction through his remarks to the sentencing court. Id. With regard to the second factor, we noted that the circuit court asked Kamana'o to confirm that he was maintaining his claim of innocence, but did not coerce him into admitting

guilt.³ Id. at 323-24, 82 P.3d at 409-10.

Finally, we concluded that the third factor "weigh[ed] heavily in favor of vacating Kamanao's sentence and remanding the matter for resentencing." Id. at 324, 82 P.3d 410. We reasoned that because the circuit court imposed an extended term sentence despite the absence of any aggravating factors, it was "apparent" that the court "inferred a poor prognosis for rehabilitation on the sole basis of Kamanao's refusal to admit guilt." Id. (emphasis added). The circuit court's sentencing remarks left "no doubt that it granted the prosecution's motion for an extended term of imprisonment simply because Kamana'o refused to surrender his privilege against self-incrimination." Id. (emphasis added). As such, "the clear implication of the circuit court's remarks [was] that, had Kamana'o waived his privilege against self-incrimination and admitted his guilt, the circuit court would have denied the prosecution's motion for extended term sentencing." Id.

Although we quoted the Michigan Supreme Court's pronouncement that "if there is an indication of the three factors, then the sentence was likely to have been improperly

³ The Majority cites Kamana'o for the proposition that there is an indication of the second Kamana'o factor "when a sentencing court confirms the defendant is maintaining a claim of innocence." Majority at 16. To the contrary, in Kamana'o, this court did not make a determination as to whether there was any indication of the second factor, or whether the factor weighed in favor of vacatur. Kamana'o, 103 Hawai'i at 323-24, 82 P.3d at 409-10.

influenced by the defendant's persistence in [maintaining a claim of] innocence," we did not adopt this as the "manner in which the three factors are examined."⁴ Compare id. (quoting Wesley, 411 N.W.2d at 162 and "applying the Wesley factors"), with Majority at 15. Rather than determining whether there was an indication of the three factors, we analyzed each of the factors separately and then considered them as a whole to determine whether it appeared that the trial court's decision to impose the sentence was "improperly influenced" by the defendant's maintenance of his innocence, warranting vacatur of Kamana'o's sentence. Kamana'o, 103 Hawai'i 315, 82 P.3d 401 (vacating the defendant's sentence despite the fact that the judge did not attempt to get the defendant to admit guilt, where the first and third factors weighed in favor of vacatur).

Based upon our weighing of the three factors, we

⁴ The Majority states that under Kamana'o, "if there is an indication of the three factors, then the sentence was likely to have been improperly influenced by the defendant's persistence in [maintaining a claim of] innocence." Majority at 21 (internal quotation marks and citation omitted). However, Kamana'o does not apply this test, and instead weighs the three factors as a whole.

Similarly, in Nakamitsu, this court stated, "if there is an indication of the three factors, then the sentence was likely to have been improperly influenced by the defendant's persistence in his innocence." 140 Hawai'i at 166, 398 P.3d at 755 (quoting Wesley, 411 N.W.2d at 162). This court did not, however, apply the Majority's "indication" test. Instead, we determined that it was "not necessary for us to resolve the question of improper influence," and remanded the case on other grounds. Id. at 167, 398 P.3d at 756. Thus, the Majority fails to cite any case in which this court has applied its "indication" test, rather than weighing the three Kamana'o factors, in order to determine whether a defendant's sentence should be vacated.

vacated Kamana'o's sentence and remanded the matter to the circuit court for resentencing. Id.

2. State v. Barrios

The defendant in Barrios was also convicted of multiple counts of sexual assault on a minor. Barrios, 139 Hawai'i at 324, 389 P.3d at 919. In explaining its imposition of multiple consecutive sentences, the circuit court referenced many of the factors provided by HRS § 706-606, including the history and circumstances of the crime, protection of the public, and the need to consider deterrence. Id. at 326-27, 389 P.3d at 921-22. However, the circuit court also specifically emphasized Barrios's failure to show remorse at sentencing, stating:

You have never exhibited any kind of remorse or responsibility for any of your actions.

. . . .

You showed no remorse. You showed no remorse then, and you show no remorse now, and I know [defense counsel] has suggested that you not say anything. I respect that. That is your right. But your behavior is that of a twisted, sick person. As sick as I can think back in all my years that I've been on the bench that I have ever seen. That I have ever seen. The trauma that you've inflicted will have long-lasting effects.

Id. at 327, 389 P.3d at 922 (emphases added).

This court applied the three-factor Kamana'o analysis to determine whether it appeared that the circuit court's decision to impose the sentence was "improperly influenced" by Barrios's maintenance of his innocence. Because Barrios

maintained his innocence throughout trial, he chose to remain silent during sentencing, and his counsel "indicated to the court in sentencing that [Barrios] had not submitted a letter of apology because he was intending to appeal his convictions," we determined that the first factor weighed in favor of vacating Barrios's sentence. Id. at 338, 389 P.3d at 933. With regard to the second factor, we noted that, like in Kamana'o, "the circuit court did not ask Barrios to admit his guilt at sentencing." Id. Unlike in Kamana'o, however, the circuit court did not even ask Barrios to confirm that he continued to maintain his innocence. Id.

Finally, we concluded that the third factor weighed in favor of vacating Barrios's sentence, as the circuit court "implied that [Barrios's lack of remorse at sentencing] was an aggravating factor that it considered in imposing the extended sentence." Id. at 338-39, 389 P.3d 933-34 (internal quotation marks omitted). Because the first and third factors weighed in favor of vacatur, we vacated Barrios's sentence and remanded the matter to the circuit court for resentencing before a different judge. Id. at 339, 389 P.3d 934.

B. The Majority's "Indication" Test is Overbroad

The Majority construes the three-part Kamana'o analysis as an "if-then" test, under which any indication of the Kamana'o

factors warrants vacatur of a sentence. Majority at 21. This overbroad interpretation of Kamana'o could result in the vacatur of sentences imposed pursuant to proper trial court practices, when the record as a whole does not indicate that the court's sentencing determination was improperly influenced by the defendant's maintenance of a claim of innocence.

1. Right to Allocution

Under its "indication" test, the Majority interprets the circuit court's protection of Barnes's constitutional right to allocution as a request for Barnes to confirm his maintenance of innocence, warranting vacatur of his sentence. Majority at 18. By stating, "You have every right to say what you wish before sentencing. Do you wish to say anything?," the circuit court provided Barnes with an opportunity for allocution - the defendant's right to speak before sentence is imposed. State v. Carvalho, 90 Hawai'i 280, 285, 978 P.2d 718, 724 (1999).

HRS § 706-604 (1993) provides that, "[b]efore imposing [a] sentence, the court shall afford a fair opportunity to the defendant to be heard on the issue of the defendant's disposition." (Emphasis added.) Similarly, Hawai'i Rules of Penal Procedure (HRPP) Rule 32(a) provides that, "[b]efore suspending or imposing a sentence, the court shall address the defendant personally and afford a fair opportunity to the defendant . . . to make a statement and present any information in mitigation of punishment." (Emphasis added.)

Id. at 285-86, 978 P.2d 723-24.

"[P]re-sentence allocution has been recognized as a due

process right under the Hawai'i Constitution." Id. at 286, 978 P.2d 724 (internal quotation marks and citation omitted).

Because the protection of criminal defendants' constitutional right to allocution provides grounds for vacatur under the Majority's "indication" test, the test is overbroad.

2. Failure to Express Sadness

Barnes served as Child 1 and Child 2's father figure when they were very young; indeed, they called him "Dad." According to the PSI report, Barnes acknowledged that Child 1 and Child 2 "may have been sexually assaulted," and asserted that one of the girls "had a sexually transmitted disease . . . that she got . . . from someone else." Yet, Barnes expressed no sympathy or sadness for the children.

The Majority contends that the circuit court "faulted Barnes's persistence in his innocence" by noting that Barnes "does not appear to have expressed any sadness that the two children suffered harm." Majority at 19-20. However, Barnes could have expressed sadness that the children may have been sexually assaulted without admitting his own guilt.⁵ Thus,

⁵ Unlike an expression of remorse, to which acknowledgment or admission of wrongdoing is foundational, one can convey sadness that others have suffered harm without any admission of wrongdoing. Kamana'o, 103 Hawai'i at 321, 82 P.3d at 407 ("Remorse . . . is defined as deep and painful regret for wrongdoing.") (internal quotation marks and citation omitted) (emphasis in original); cf. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1094 (11th ed. 2003) (defining "sad" as "affected with or expressive of grief or unhappiness").

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contrary to the Majority's contention, the circuit court's statement does not indicate that it punished Barnes for refusing to admit guilt. Cf. Barrios, 139 Hawai'i at 327, 338, 389 P.3d 922, 933. Rather, the circuit court considered Barnes's statements acknowledging that his ex-stepchildren suffered trauma, as well as his seeming indifference to their trauma. As discussed infra, it was proper for the circuit court to consider Barnes's statements, which were contained in the PSI report, as well as Barnes's characteristics, in imposing his sentence. Because this proper consideration provides grounds for vacatur under the Majority's "indication" test, the test is overbroad.

3. Cooperation in the PSI

Third, the Majority's "indication" test improperly prohibits a sentencing court from considering a defendant's refusal to cooperate in the preparation of a PSI report in imposing sentence. With regard to the PSI report, the circuit court stated, "while [Barnes] certainly has a right to appeal all matters that are appealable, he has been uncooperative in the preparation of any aspect of the presentence report." The

⁵(...continued)

Although not relevant in the instant case, we note that this court has repeatedly held that a defendant's "lack of remorse legitimately may be considered as a factor in sentencing." Nakamitsu, 140 Hawai'i at 166, 398 P.3d at 755. There is a "meaningful[] distinction between imposing a harsher sentence upon a defendant based on his or her lack of remorse . . . and punishing a defendant for [the] refusal to admit guilt, . . . the latter being a violation, inter alia, of a criminal defendant's rights to due process, to remain silent, and to appeal." Kamana'o, 103 Hawai'i at 321, 82 P.3d at 407.

circuit court made no mention of the probation officer's observation that Barnes "reported that he is innocent of all the sexual assault charges against him." Yet, the Majority contends that Barnes's refusal to cooperate in the preparation of the PSI report is "inextricably linked" to his maintenance of innocence and thus, the circuit court impermissibly "faulted Barnes's persistence in his innocence." Majority at 19. I respectfully disagree with this interpretation.

We have held that "it is entirely appropriate, indeed required, that judges utilize information from the PSI [report] in determining the appropriate sentence, and such use of the PSI [report] by the court in the context of sentencing is expressly allowed by the statutes." State v. Hussein, 122 Hawai'i 495, 527, 229 P.3d 313, 345 (2010) (emphasis in original). Further, a defendant's "failure to participate in the PSI is relevant to the defendant's potential for rehabilitation, which is an appropriate sentencing consideration." New Hampshire v. Burgess, 943 A.2d 727, 733 (N.H. 2008); see also Lee v. State, 36 P.3d 1133, 1141 (Wyo. 2001) ("A defendant's failure to cooperate in the PSI is certainly a valid factor for a trial court to consider in contemplating the appropriate sentence.").

The circuit court commented on Barnes's refusal to cooperate in the preparation of the PSI report, not his refusal

to admit guilt.⁶ In so doing, the circuit court properly recognized and respected Barnes's right to appeal, while acknowledging that, due to Barnes's lack of cooperation in the PSI, the circuit court was unable to utilize information regarding Barnes's background or other relevant information that would assist it in determining an appropriate sentence. "[A] trial court is in essence forced to consider the lack of information in a PSI [report] when the defendant chooses to exercise [the right to remain silent] as it relates to mitigating information." German v. State, 27 So.3d 130, 133 (Fla. Dist. Ct. App. 2010). Thus, the circuit court's mere mention of Barnes's refusal to cooperate in the PSI does not present an appearance that had Barnes admitted guilt, his sentence would not have been so severe.

C. The Kamana'o Analysis Weighs Against Vacating Barnes's Sentence

Turning to the instant case, I conclude that the three-part Kamana'o analysis - as applied by this court in prior cases - weighs against vacating Barnes's sentence.

As in Kamana'o and Barrios, the first factor weighs in

⁶ I note that because the requisite components of a PSI report do not all bear upon the defendant's guilt or innocence, Barnes could have participated in the PSI without commenting on his culpability. HRS § 706-602(1); Burgess, 943 A.2d at 733 ("[A] PSI may contain information bearing no relation whatever to the crime with which the defendant is charged. Therefore, participation in the PSI did not require the defendant to incriminate himself.") (internal quotation marks and citations omitted).

favor of vacatur, as Barnes maintained his post-conviction innocence by asserting that he was innocent of the sexual assault charges for which he was convicted, stating that he planned to file an appeal, and choosing to remain silent during sentencing.⁷

With respect to the second factor, the circuit court did not ask Barnes to admit guilt or even confirm that Barnes continued to maintain his claim of innocence. Barrios, 139 Hawai'i at 338, 389 P.3d at 933; Kamana'o, 103 Hawai'i at 323-24, 82 P.3d at 409-10. Rather, as discussed above, by asking Barnes if he wished to say anything, the circuit court upheld Barnes's due process right to allocution, which is protected under the Hawai'i Constitution. Thus, the second Kamana'o factor weighs against the vacatur of Barnes's sentence.⁸

⁷ Barnes's counsel explained that Barnes would not make a statement at the sentencing hearing because he intended to appeal. Further, when the circuit court asked Barnes directly whether he wished to say anything, Barnes responded, "Not in this court, Your Honor."

⁸ The Majority summarily states that all three Kamana'o factors "are satisfied" and asserts that the circuit court confirmed that Barnes was maintaining his claim of innocence. Majority at 16-17, 22. However, it fails to cite to any evidence in the record that the circuit court attempted to induce Barnes into admitting guilt. Instead, the Majority asserts that a sentencing court's confirmation that a defendant is maintaining a claim of innocence "may come from the PSI [report], statements of defense counsel, or the defendant." Majority at 16-17.

I respectfully disagree. Hawai'i case law does not support the proposition that the second factor "is satisfied," or weighs in favor of vacating a sentence, in such circumstances. The second Kamana'o factor - whether the sentencing court attempted to get the defendant to admit guilt - pertains to the actions of the sentencing court, not the evidence contained in the record.

Barrios cited to Kamana'o for the proposition that vacatur of a sentence may be warranted even where the sentencing court does not seek to induce the

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The third Kamana'o factor also weighs against vacatur of Barnes's sentence. In imposing Barnes's consecutive sentence, the circuit court stated, "while [Barnes] certainly has a right to appeal all matters that are appealable, he has been uncooperative in the preparation of any aspect of the presentence report and does not appear to have expressed any sadness that the two children suffered harm of any kind." Rather than basing the imposition of Barnes's consecutive sentence on his refusal to admit guilt at sentencing, the circuit court properly considered the entire record, including the testimony elicited at trial and the PSI report, and based its sentencing decision on the factors set forth in HRS § 706-606.

Pursuant to HRS § 706-606(1), the circuit court specifically found the nature and circumstances of the offenses to be "most serious, as they involved the sexual molestation of two young children as to whom [Barnes] was in a position of trust" as their stepfather. Based on their victim impact statements "and some of what the court observed during trial," the circuit court concluded that Child 1 and Child 2 had suffered

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defendant to admit culpability for his actions if the first and third factors weigh heavily in favor of vacatur. See Barrios, 139 Hawai'i at 338, 389 P.3d at 933 (citing Kamana'o, 103 Hawai'i at 323-24, 82 P.3d at 409-10). Thus, a sentencing court's attempt to induce the defendant into admitting guilt is strong evidence that the sentence was "improperly influenced" by the defendant's maintenance of a claim of innocence. However, such an attempt is not necessary for a finding of improper influence.

harm from the sexual assaults "that apparently remains with [them] notwithstanding counseling." As such, the circuit court explained that the consecutive sentence was required to "reflect the seriousness of these offenses to not one but two small children[.]" See HRS § 706-606(2)(a).

The circuit court also properly considered Barnes's characteristics under HRS § 706-606(1). It highlighted the fact that the "sexual acts spanned a substantial period of time and involved acts of deception both as to the children and to adults." As discussed above, it noted that Barnes had not cooperated in the preparation of the PSI report and had not expressed sadness that his stepchildren suffered harm. See HRS § 706-606(1). The circuit court concluded, based on these factors, that the sentence was necessary to provide deterrence and "to protect the public from further crimes of the defendant, especially against children." See HRS § 706-606(2)(b)-(c).

In sum, the statements with which the Majority takes issue do not indicate that the circuit court's imposition of the consecutive sentence was based, even in part, on Barnes's refusal to admit guilt during sentencing. Further, as the Majority acknowledges, "the primary justification [for the consecutive sentence] raised by the State's Motion was that there were two, not one, child victims in this matter, and the circuit court

repeatedly emphasized that two children, not one, were harmed[.]” Majority at 20. Based upon its consideration of proper sentencing factors set forth by statute, the circuit court determined that the consecutive sentence was necessary to further the purposes of protection and deterrence. Therefore, there is no appearance that, had Barnes affirmatively admitted guilt, his sentence would not have been so severe. Kamana‘o, 103 Hawai‘i at 323, 82 P.3d at 409. As such, the third Kamana‘o factor weighs against vacating Barnes’s sentence.

IV. CONCLUSION

In conclusion, the three-part Kamana‘o analysis weighs heavily against the vacatur of Barnes’s sentence. The circuit court’s comments do not suggest that its decision to impose Barnes’s consecutive sentence was “improperly influenced” by his refusal to admit guilt. Thus, the sentence did not implicate Barnes’s constitutional rights and the circuit court did not err. I therefore respectfully dissent.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

