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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.

ASHLEY VINCENT GAETA,
Petitioner/Defendant-Appellant.

SCWC-23-0000359

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-23-0000359; CASE NO. 3CPC-22-0000237)

OCTOBER 22, 2026

DEVENS, C.J., McKENNA, EDDINS, AND GINOZA, JJ., AND CIRCUIT
JUDGE HOLMA, ASSIGNED BY REASON OF VACANCY, CONCURRING IN THE
RESULT ONLY

OPINION OF THE COURT BY McKENNA, J.

I. Introduction

This appeal arises from the Circuit Court of the Third
Circuit's ("circuit court") denial of Ashley Vincent Gaeta's
("Gaeta") motion to defer acceptance of a no contest ("DANC")
plea, filed pursuant to Hawai'i Revised Statutes ("HRS") § 853-

1(a) (2014).¹ Gaeta pled no contest to a new charge of sexual assault in the fourth degree based on a plea agreement. The original charges of sexual assault and attempted sexual assault in the second degree were dismissed. The circuit court denied Gaeta's DANC motion and sentenced him to probation.

On certiorari, Gaeta alleges that the circuit court considered improper factors in denying his DANC motion. We disagree. We hold that the circuit court did not consider sexual penetration or other improper factors, including Gaeta's alleged lack of remorse, and therefore did not abuse its discretion by denying the DANC motion.

In our order accepting certiorari, we also ordered supplemental briefing on two additional issues:

¹ HRS § 853-1(a), "Deferred acceptance of guilty plea or nolo contendere plea; discharge and dismissal, expungement of records," permits courts to defer accepting a guilty or no contest plea for certain crimes. HRS § 853-1(a) provides:

- (a) Upon proper motion as provided by this chapter:
 - (1) When a defendant voluntarily pleads guilty or nolo contendere, prior to commencement of trial, to a felony, misdemeanor, or petty misdemeanor;
 - (2) It appears to the court that the defendant is not likely again to engage in a criminal course of conduct; and
 - (3) The ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law,

the court, without accepting the plea of nolo contendere or entering a judgment of guilt and with the consent of the defendant and after considering the recommendations, if any, of the prosecutor, may defer further proceedings.

1. Can plea agreements that allow consideration of facts and circumstances of dismissed charges override judicial precedent that prohibits consideration of dismissed charges?
2. Can courts consider a defendant's lack of remorse when a defendant pleads no contest?

On the first question, we hold that a plea agreement provision that attempts to override judicial precedent prohibiting consideration of dismissed charges in sentencing seeks imposition of an illegal sentence. This violates a defendant's rights under Article I, Sections 5 and 14 of the Hawai'i Constitution.² Therefore, such provisions must not be included in plea agreements.

On the second question, we hold that even after a no contest plea, a defendant continues to hold a limited right

² Article I, Section 5 of the Hawai'i Constitution provides:

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

Article I, Section 14 of the Hawai'i Constitution provides, in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the district wherein the crime shall have been committed[;] . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against the accused[;] . . . to have compulsory process for obtaining witnesses in the accused's favor; and to have the assistance of counsel for the accused's defense. Juries, where the crime charged is serious, shall consist of twelve persons. The State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment.

against self-incrimination based on Article I, Section 10 of the Hawai'i Constitution against the making of statements that might impact sentencing or the grant or denial of a DANC motion.³ We further prospectively hold that, based on this limited waiver of the right against self-incrimination for a no contest plea, a defendant's failure to express remorse cannot be used against the defendant. As this is a new rule of constitutional interpretation, it applies to events occurring after the date of this opinion.

But as the circuit court did not consider improper factors in denying Gaeta's DANC motion, we affirm the circuit court's August 7, 2023 first amended judgment of conviction and probation sentence as well as the Intermediate Court of Appeals' ("ICA") September 23, 2025 judgment on appeal.

³ Article I, Section 10 of the Hawai'i Constitution provides:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury or upon a finding of probable cause after a preliminary hearing held as provided by law or upon information in writing signed by a legal prosecuting officer under conditions and in accordance with procedures that the legislature may provide, except in cases arising in the armed forces when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy; nor shall any person be compelled in any criminal case to be a witness against oneself.

II. Background

A. Factual Background

The complaining witness ("CW") was around nineteen years old on May 15, 2021. She had met Gaeta in Kona about a month earlier when he had given her a ride to soccer practice. She described Gaeta, who was fifteen years older, as being like an "uncle" to her.

On May 15, 2021, the CW, her friends, and Gaeta went out in the evening, and then into the early morning, to various locations for volleyball, karaoke, and drinks. The CW was not able to remember all the evening's events after a certain point. But early in the morning of May 16, 2021, the CW and Gaeta ended up alone together in a friend's house.

The CW woke up in the living room of her friend's house around 4:00 a.m., lying in a twin-size bed with Gaeta. She later reported that Gaeta engaged in acts that would constitute actual and attempted sexual assault in the second degree, with penetration.⁴ The CW indicated she feigned sleep and kept moving

⁴ An individual commits sexual assault in the second degree if the person, "[k]nowingly subjects another person to an act of sexual penetration by compulsion[.]" HRS § 707-731(a) (Supp. 2016).

Hawai'i's criminal attempt statute provides:

(1) A person is guilty of an attempt to commit a crime if the person:

(a) Intentionally engages in conduct which would constitute the crime if the attendant

to prevent the sexual assault. She had been sexually assaulted in the ninth grade. The CW tried to fight back during the prior assault, but believed resisting had hurt her. Because of that, her response with Gaeta was to freeze.

At some point, the CW got up and contacted her friend to pick her up. Later that day, the CW contacted her friends to request emotional support. One friend reported to the police that the CW "was an absolute wreck, crying, and couldn't hold a conversation."

Initially, the CW said she "wasn't going to call the police, and wasn't going to do anything." One of the CW's friends called his own mother, who said the police should

circumstances were as the person believes them to be; or

- (b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.
- (2) When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, the person intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.
- (3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

HRS § 705-500 (2014).

definitely be involved. The CW eventually agreed. She went to Kona Community Hospital for a sex assault forensic examination, and police were called. No blood test was conducted to test for date rape drugs. DNA from an evidence specimen from the CW's clothing matched Gaeta's.

Gaeta later did not deny sexual contact with the CW, but maintained that their sexual encounter was consensual.

B. Circuit Court Proceedings

1. Indictment to Initial Plea and DANC Motion

On March 14, 2022, a grand jury indicted Gaeta on three counts. Counts 1 and 2 alleged sexual assault in the second degree through acts of sexual penetration by compulsion, which are class B felonies. Count 3 alleged attempted sexual assault in the second degree, a class B felony.

Circuit court minutes of November 30, 2022 indicated there was a plea deal being discussed. On December 13, 2022, the March 14, 2022 indictment was superseded by a complaint that added a Count 4. Count 4 alleged that Gaeta committed sexual assault in the fourth degree under HRS § 707-733(1)(b) (Supp. 2016) by knowingly exposing his genitals in a manner likely to alarm or cause the CW fear of bodily injury. This is a misdemeanor offense.

HRS § 853-4(a)(13)(O) and (P) (2014 & Supp. 2020) expressly disallow deferred acceptance of guilty pleas ("DAGs") and DANCs

for sexual assault in the second and third degrees, but sexual assault in the fourth degree is a DAG/DANC eligible offense.

Under the initial plea deal, Gaeta agreed to plead no contest to sexual assault in the fourth degree in Count 4 in exchange for dismissal of Counts 1 through 3. The State agreed not to oppose Gaeta's DANC motion but reserved the right to request substance abuse and mental health treatment as well as fifty hours of community service.

Pursuant to this plea agreement, on January 9, 2023, Gaeta entered a no contest plea to sexual assault in the fourth degree in Count 4. The circuit court found Gaeta's no contest plea had been entered knowingly, voluntarily, and intelligently with an understanding of the nature of the charge and the consequences of his plea.

The CW then addressed the court. She recounted at length significant negative effects from acts of sexual penetration by Gaeta. She alleged she was drugged by him and contracted a sexually transmitted disease ("STD"). She also said that the sexual assault had required her to seek mental health treatment and that her personality had changed. She further indicated that although the State had discussed the plea agreement with her, she strongly opposed a deferral that would allow Gaeta to evade a criminal conviction.

The circuit court then declined to rule on the DANC plea or to accept Gaeta's no contest plea. The circuit court instead continued the case. On January 17, 2023, at a hearing to withdraw his no contest plea, Gaeta asked to move forward with trial.

2. Second Plea and DANC Motion

Instead of going to trial, on May 17, 2023, Gaeta pled no contest based on a second plea agreement nearly identical to the first, except that, this time, the State reserved the right to oppose Gaeta's DANC motion.

The second plea agreement also included a specific provision stating that "[f]acts and circumstances of dismissed charges may be considered at sentencing."

At the hearing on Gaeta's DANC motion and sentencing, the State argued that the nature of the charge as well as the interests of justice weighed in favor of a conviction and not a deferral. The CW again gave an oral victim statement, stating that Gaeta had drugged and raped her and had transmitted an STD to her. She also discussed the major impact the evening had on her and her belief that Gaeta had done this before and would do it again if a DANC was granted.

Gaeta's counsel argued that justice would be satisfied if Gaeta received a deferral because "he is a law-abiding citizen

and that this was a situational one-time event for him that will not happen again[.]”

The circuit court denied Gaeta's DANC motion and sentenced him to one year of probation. The circuit court initially indicated it was considering lack of remorse, but then stated it was not considering lack of remorse or allegations of penetration, but was rather ruling based on the impact to the CW:

[THE COURT]: The Court is not considering the statement of sexual penetration . . . but what the Court is considering is the nature of the charge and the impact on the victim.

I mean he doesn't have to register. He doesn't have to go to jail, but I think, you know, look at her. You, look at her. You know, I'm looking at her, and she . . . is devastated by what happened, the incident.

You're only pleading to Sex 4. I get that. But I have to take into consideration the nature of the harm. Right?

.

No question he's . . . qualified to get the deferral. It's up to me as to whether or not you will get it, and, you know, although you pled no contest I don't really get any remorse over what has happened in this case.

.

[DEFENSE COUNSEL]: Your Honor. Just in State v. [Satoafaiga] --

[THE COURT]: Yeah.

[DEFENSE COUNSEL]: -- the court did say while a court can generally consider a defendant's lack of remorse in the sentencing context in this case the court was explicitly excluded from considering penetration. I know the Court's not considering penetration.

[THE COURT]: Right.

[DEFENSE COUNSEL]: But it could not obviate this limitation by penalizing Satoafaiga's failure to express remorse. So if he pleads no contest --

[THE COURT]: Yeah.

[DEFENSE COUNSEL]: -- the Court can't consider or say he's not remorseful when he's entitled to plead no contest, and that's all I'll say on that. I understand the Court's position.

[THE COURT]: Yeah. I mean, you know, it's a number of factors in determining, but the Court can consider the impact upon the victim.

. . . .

And clearly the victim in this case all along through the entire process has watched and participated. Right?

And so I agree that remorse shouldn't be considered. I'm not gonna consider it. Penetration is not to be considered. He didn't plead to that. However, the Court is going to find that the impact upon the victim requires that I'm not gonna grant the deferral[.]

(Emphases added.)

On May 25, 2023, Gaeta timely appealed the circuit court's judgment of conviction and probation sentence.

C. ICA Proceedings

Relevant to this certiorari proceeding, on appeal, Gaeta argued the circuit court misapplied HRS § 853-1, exceeded the bounds of the no contest plea, and improperly considered sexual penetration.

Gaeta argued that this court's opinion in State v. Satoafaiga, 150 Hawai'i 406, 504 P.3d 324 (2022), prohibited the circuit court from considering sexual penetration because the criminal counts alleging penetration had been dismissed. He argued that the impact on the CW relied on by the circuit court to deny his DANC motion did not arise solely from her exposure

to his genitals but instead arose from her allegations of sexual penetration; therefore, the circuit court improperly considered sexual penetration. Gaeta also asserted that the circuit court improperly considered lack of remorse.

The State disagreed with Gaeta's assertions and argued the record showed the circuit court appropriately weighed the HRS § 853-1 factors. The State argued the ends of justice included considering the impact on the CW.

The ICA affirmed the circuit court. State v. Gaeta, No. CAAP-23-0000359, 2025 WL 2466115, at *4 (Haw. App. Aug. 27, 2025) (SDO). Regarding the circuit court's alleged improper consideration of remorse, it ruled that a court can generally consider a defendant's lack of remorse in the sentencing context, citing Satoafaiga, 150 Hawai'i at 421, 504 P.3d at 339, and HRS § 706-606(1) (2014) (requiring the sentencing court to consider the "characteristics of the defendant"). Gaeta, 2025 WL 2466115, at *3.

The ICA then addressed Gaeta's argument that the circuit court improperly considered sexual penetration because the impact on the victim, upon which the circuit court based its DANC denial, was due to sexual penetration. Id. The ICA acknowledged that Satoafaiga, 150 Hawai'i at 421, 504 P.3d at 339, prohibits a court from penalizing a defendant for conduct

to which the defendant did not plead, such as the dismissed sexual penetration charges. Gaeta, 2025 WL 2466115, at *3.

The ICA then quoted this court's opinion in Satoafaiga:

We do not mean to imply that any time a defendant pleads to a lesser-included offense in exchange for the dismissal of a greater one, the court may not consider the circumstances leading to the greater charge. For example, if the heinous or aggravated nature of the acts committed points to a sentence on the upper end of the permitted sentencing range, the judge may consider it.

Gaeta, 2025 WL 2466115, at *3 (emphasis added) (quoting Satoafaiga, 150 Hawai'i at 421, 504 P.3d at 339). The ICA then indicated that the sexual assault in the fourth degree charge (exposing his genitals) to which Gaeta pled was a lesser-included charge of the dismissed attempted sexual assault in the second degree charge in Count 3 (attempted vaginal intercourse by compulsion).⁵ Id. Therefore, according to the ICA, the

⁵ Sexual assault in the fourth degree in Count 4, knowing exposure of genitals in a manner likely to alarm or cause the CW fear of bodily injury, is not a lesser-included offense of the dismissed attempted sexual assault in the second degree charge in Count 3, an attempt to subject the CW to an act of sexual penetration.

Under HRS § 701-109(4) (Supp. 2018), clauses (a)-(c), a lesser-included offense is one that (1) is established by proof of the same or less than all the facts required to establish the commission of the offense charged; (2) consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or (3) differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a different state of mind indicating lesser degree of culpability suffices to establish its commission.

Sexual assault in the fourth degree as charged in Count 4 does not meet any of these criteria in relation to the attempted sexual assault in the second degree charge in Count 3.

"impact on the victim" could be considered based on the quoted passage from Satoaifaiga. Gaeta, 2025 WL 2466115, at *3-4.

The ICA ultimately held the circuit court acted within its discretion by denying the DANC motion and affirmed Gaeta's conviction and probation sentence. Gaeta, 2025 WL 2466115, at *4.

D. Certiorari Application

On certiorari, Gaeta presents the following questions:

Did the Intermediate Court of Appeals gravely err when it ruled the circuit court did not abuse its discretion in denying Petitioner's motion for a DANC when it considered: (1) conduct excluded by the offense to which Gaeta pleaded; (2) Gaeta's purported failure to take responsibility or demonstrate remorse despite his no contest plea; and (3) CW's purported trauma, which included allegations of conduct to which Gaeta did not plead and other extraneous allegations about Gaeta's character.

The first and third points are interrelated and will be addressed together.

Also, in our order accepting certiorari, we ordered supplemental briefing on the following questions:

1. Can plea agreements that allow consideration of facts and circumstances of dismissed charges override judicial precedent that prohibits consideration of dismissed charges?
2. Can courts consider a defendant's lack of remorse when a defendant pleads no contest?

We address these additional issues in this opinion.

III. Standard of Review

Grant or Denial of DANC Motions

The grant or denial of a motion for a DANC plea is within the discretion of the [trial] court and will not be disturbed unless there has been manifest abuse of

discretion. State v. Tom, 69 Haw. 602, 603, 752 P.2d 597, 597 (1988). "An abuse of discretion occurs if the trial court has clearly exceeded the bounds of reason or has disregarded rules or principles of law or practice to the substantial detriment of a party litigant." State v. Davia, 87 Hawai'i 249, 253, 953 P.2d 1347, 1351 (1998) (internal quotation marks and citation omitted).

Satoafaiga, 150 Hawai'i at 415, 504 P.3d at 333.

IV. Discussion

A. The circuit court did not consider sexual penetration or other improper factors, including the alleged lack of remorse, and therefore did not abuse its discretion by denying the DANC motion.

1. HRS Chapter 853 Deferrals

HRS chapter 853, which allows for and governs DAGs and DANCs, serves important policy goals:

[I]n certain criminal cases, particularly those involving first time, accidental, or situational offenders, it is in the best interest of the State and the defendant that the defendant be given the opportunity to keep [the defendant's] record free of a criminal conviction if [the defendant] can comply with certain terms and conditions during a period designated by court order. Especially where youth is involved, a record free of a felony conviction, which would foreclose certain educational, professional, and job opportunities may, in a proper case, be more conducive to offender rehabilitation and crime prevention than the deterrent effects of a conviction and sentence.

1976 Haw. Sess. Laws Act 154, § 1 at 279.

For eligible defendants and offenses, a trial court may defer acceptance of a defendant's guilty or no contest plea and impose conditions of deferral, provided that:

- (1) [The] defendant voluntarily pleads guilty or nolo contendere, prior to commencement of trial, to a felony, misdemeanor, or petty misdemeanor;
- (2) It appears to the court that the defendant is not likely again to engage in a criminal course of conduct; and

- (3) The ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law,

the court, without accepting the plea of nolo contendere or entering a judgment of guilt and with the consent of the defendant and after considering the recommendations, if any, of the prosecutor, may defer further proceedings.

HRS § 853-1(a).

If a trial court decides to grant a deferral, it has discretion within parameters to determine the period of time for which proceedings should be deferred and what conditions to impose. Then, if a defendant satisfies the specified conditions for the deferral period, the defendant avoids a criminal conviction, the charge(s) are dismissed, and the defendant's corresponding arrest record can be expunged:

- (b) The proceedings may be deferred upon any of the conditions specified by section 706-624 . . . The court may defer the proceedings for a period of time as the court shall direct but in no case to exceed the maximum sentence allowable; provided that, if the defendant has entered a plea of guilty or nolo contendere to a petty misdemeanor, the court may defer the proceedings for a period not to exceed one year[.]
- (c) Upon the defendant's completion of the period designated by the court and in compliance with the terms and conditions established, the court shall discharge the defendant and dismiss the charge against the defendant.
- (d) Discharge of the defendant and dismissal of the charge against the defendant under this section shall be without adjudication of guilt, shall eliminate any civil admission of guilt, and is not a conviction.
- (e) Upon discharge of the defendant and dismissal of the charge against the defendant under this section, the defendant may apply for expungement not less than one year following discharge, pursuant to section 831-3.2.

HRS § 853-1(b) - (e).

But HRS § 853-4 excludes some offenses from deferral eligibility. Relevant to this case, HRS § 853-4(a)(13)(O) and (P) expressly disallow DAGs and DANCs for sexual assault in the second and third degrees. But sexual assault in the fourth degree is DAG/DANC eligible. Therefore, Gaeta's original charges were not eligible for deferral, while Count 4, to which he pled, is a deferral eligible offense.

Also, generally, "sentencing cases are persuasive, though not controlling authority, in the [DANC] context." Satoafaiga, 150 Hawai'i at 418 n.17, 504 P.3d at 336 n.17. And under HRS § 706-606, sentencing courts are to consider "[t]he nature and circumstances of the offense and the history and characteristics of the defendant[.]" "[T]he nature and circumstances" factor applies not just to sentencing of convicted defendants, but also to DANC pleas under HRS § 853-1(a)(2)-(3). Satoafaiga, 150 Hawai'i at 421-22, 504 P.3d at 339-40. This court stated:

In the [DANC] context, a court cannot intelligently decide whether a defendant is likely to reoffend nor whether their crimes merit immediate punishment without understanding the nature of the offense and the defendant's character and circumstances. Thus, judges not only may but must consider the defendant's particular situation in DANC proceedings as well as in sentencing.

Id. (Emphases added.)

Further, judges have broad discretion in deciding whether to grant DANC motions. Satoafaiga, 150 Hawai'i at 421, 504 P.3d at 339. An abuse of discretion occurs only "if the trial court

has clearly exceeded the bounds of reason or has disregarded rules or principles of law or practice to the substantial detriment of a party litigant.” Davia, 87 Hawai‘i at 253, 953 P.2d at 1351 (cleaned up).

As noted, HRS § 853-1(a) requires satisfaction of subsections (1) through (3) for a deferral to be granted. As a preliminary matter, the State and Gaeta agree that Gaeta satisfied the first two. Gaeta voluntarily pled no contest before commencement of trial. The circuit court also did not believe Gaeta posed a danger of recidivism; possible recidivism was not a factor in the DANC denial. The circuit court stated, “No question he’s . . . qualified to get the deferral.”

Therefore, as the parties agree, the only issue is whether the circuit court abused its discretion in its determination of the final condition, whether “[t]he ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law[.]” HRS § 853-1(a)(3). Gaeta argues that the circuit court abused its discretion because its conclusion on the third factor was based on improper consideration of sexual penetration and remorse.

We disagree and hold that the circuit court considered neither sexual penetration, remorse, nor other improper factors.

2. The circuit court did not improperly consider sexual penetration.

In the sentencing context, we have explicitly held that the "impact on the victim" can be considered as part of the circumstances of the offense. See State v. Hussein, 122 Hawai'i 495, 510, 229 P.3d 313, 328 (2010) (ruling that in deciding whether to award concurrent or consecutive terms in sentencing, courts can determine "that the multiplicity of offenses and victims and the impact upon the victims' lives warrant imposition of a consecutive term" (emphasis added)). Trial courts can therefore consider the "impact on the victim" when ruling on a DANC motion.

Here, the circuit court said several times it was not considering sexual penetration. Gaeta argues that, despite this, the "impact on the victim" referred to by the circuit court is not based on the conduct underlying the charge to which he pled. In other words, he asserts that, by considering the "impact on the victim," the circuit court actually considered the dismissed charges of sexual penetration.

Gaeta's argument is based on Satoafaiga, in which this court held that a circuit court abused its discretion by considering sexual penetration, when sexual penetration charges had been dismissed as part of the defendant's no contest plea. 150 Hawai'i at 417, 504 P.3d at 335. In that case, at the DANC

motion hearing, the circuit court repeatedly referenced acts of penetration, stating "I think everything you did to her, besides the digital penetration . . . I mean, talk about a negative influence on a child" and "this was more than text messaging. It was penetration with a finger to a vagina." 150 Hawai'i at 420, 504 P.3d at 338. This court held the circuit court abused its discretion by considering sexual penetration. 150 Hawai'i at 421, 504 P.3d at 339.

Gaeta is correct that the CW's impact statement did refer to acts of sexual penetration, including needing treatment for an STD. But, in contrast to Satoafaiga, the circuit court did not refer to acts of sexual penetration in its DANC denial. It also did not refer to the alleged STD transmission. The circuit court specifically stated it was not considering penetration (or lack of remorse) and that it was relying on the impact to the CW.

In this regard, Gaeta pled to sexual assault in the fourth degree in Count 4, by knowingly exposing his genitals in a manner likely to alarm or cause the CW fear of bodily injury. Victims can and do suffer significant psychological impacts from being exposed to genitals in a manner likely to alarm or cause fear of bodily injury. Even without considering sexual penetration, the impact to this CW from that exposure alone was more than sufficient for the circuit court to conclude that

"[t]he ends of justice and the welfare of society" required Gaeta to suffer the penalty imposed by law.

We therefore hold that the circuit court did not improperly consider the impact to the CW from the dismissed sexual penetration charges or other extraneous allegations.

3. The circuit court also did not improperly consider Gaeta's lack of remorse.

Gaeta also argues the circuit court improperly considered lack of remorse. He focuses on the circuit court's earlier statement that "I don't really get any remorse over what has happened in this case." While the circuit court initially remarked that Gaeta appeared to lack remorse for his conduct, the circuit court withdrew this remark and stated it was not considering lack of remorse in denying the DANC motion. The circuit court clearly stated that it based its DANC denial on the "impact on the victim," which was properly considered, as discussed above.

Therefore, the circuit court did not improperly consider lack of remorse in denying the DANC motion.

We therefore reject Gaeta's issues on certiorari.

B. Additional Issues

We now address the two questions for which we ordered supplemental briefing.

1. A plea agreement provision that attempts to override judicial precedent prohibiting consideration of dismissed charges seeks imposition of an illegal sentence and violates a defendant's rights under Article I, Sections 5 and 14 of the Hawai'i Constitution and must not be included in plea agreements.

The first question for which we ordered supplemental briefing relates to a provision in Gaeta's second plea agreement that the "[f]acts and circumstances of dismissed charges may be considered at sentencing." The provision was apparently inserted by the State to allow the circuit court to consider the dismissed sexual penetration charges, in direct contravention of this court's precedent discussed below.

Here, the circuit court clearly said it was not considering the dismissed sexual penetration counts, and the State never argued this plea agreement provision as a basis for affirming the circuit court's decision. But we ordered supplemental briefing based on the State's apparent attempt to circumvent judicial precedent designed to protect a criminal defendant's constitutional rights.

Our case law has consistently held that a trial court's consideration of dismissed or acquitted charges in sentencing violates a defendant's constitutional rights. See Satoafaiga, 150 Hawai'i at 418, 504 P.3d at 336; State v. Vellina, 106 Hawai'i 441, 450, 106 P.3d 364, 373 (2005); State v. Nunes, 72 Haw. 521, 525, 824 P.2d 837, 840 (1992). Satoafaiga explained

that punishing a defendant's dismissed charges of sexual penetration was analogous to punishing uncharged crimes, "[raising] serious constitutional questions" and implicating a defendant's Hawai'i constitutional rights under Article I, Section 5 (due process) and 14 (to be informed of the nature and cause of the accusation). 150 Hawai'i at 418, 504 P.3d at 336 (citing Nunes, 72 Haw. at 525, 824 P.2d at 840).

We have also recognized that plea agreements implicate a defendant's Article I, Section 5 due process rights. State v. Adams, 76 Hawai'i 408, 412, 879 P.2d 513, 517 (1994).

In modern times, plea agreements abound. Criminal justice today is for the most part a system of pleas, not a system of trials. Lafler v. Cooper, 566 U.S. 156, 170 (2012). In Hawai'i, in the fiscal year ending June 30, 2025, less than 200 Hawai'i circuit court criminal cases were resolved through trial while almost 2,000 were resolved through pleas. The Judiciary State of Hawai'i, 2025 Annual Caseload Report 9 (2026), https://www.courts.state.hi.us/wp-content/uploads/2026/02/FY2025_annual_report_statistical_supplement_Final_Draft-2.pdf [<https://perma.cc/APA4-J9UH>]. Although precise statistics are not readily available, an overwhelming majority of these circuit court pleas probably involved plea agreements.

In Adams, this court said this regarding plea agreements:

A plea agreement is essentially a contract entered into between the State and the defendant, in which the defendant agrees to plead guilty or no contest to a charge and to forego certain constitutional rights (including the right to trial) in exchange for which the State promises some form of leniency or cooperation in prosecutions.

76 Hawai'i at 412, 879 P.2d at 517.

But plea agreements are not commercial contracts. They implicate the enforcement and waiver of critical constitutional rights. And even when analogizing commercial contract principles, plea agreements are in the nature of adhesion contracts, as the government has much greater bargaining power. Therefore, resorting to contract principles cannot determine rights and duties under a plea agreement. Id.

Granted, in a plea agreement, a defendant may waive important pretrial and trial constitutional rights, such as the right to a jury trial or right to testify. See, e.g., State v. Gomez-Lobato, 130 Hawai'i 465, 469, 312 P.3d 897, 901 (2013) (involving waiving the right to a jury trial); Tachibana v. State, 79 Hawai'i 226, 232, 900 P.2d 1293, 1299 (1995) (involving waiving the right to testify). But there are plea provisions that implicate the fairness of the plea. Adams, 76 Hawai'i at 412, 879 P.2d at 517.

And as a sentence is determined after a plea is accepted, absent an agreement regarding sentencing that the court has agreed to bind itself to under Hawai'i Rules of Penal Procedure ("HRPP") Rule 11(f)(1) (eff. 2014), a defendant does not know

what sentence will be imposed. Therefore, a plea of no contest or guilty does not constitute a waiver of an appeal of the sentence on the grounds that it is illegal. State v. Dudoit, 90 Hawai'i 262, 265 n.2, 978 P.2d 700, 703 n.2 (1999). In other words, plea agreements cannot seek a waiver of the imposition of an illegal sentence.

This non-waiver of an illegal sentence is also recognized in HRPP Rule 40(a)(1)(iii) (eff. 2006), which allows a defendant to seek relief from an illegal sentence even after an unsuccessful direct appeal.

Fundamentally, we interpret the Hawai'i Constitution on its own terms, and we provide greater protection of a criminal defendant's due process rights than the United States Supreme Court does under the federal Due Process Clause. Granillo v. State, No. SCWC-22-0000740, 2026 WL 2085397, at *27 (Hawai'i July 15, 2026). Hawai'i's Due Process Clause respects human dignity. State v. Tolentino, 158 Hawai'i 321, 334, 592 P.3d 209, 222 (2026).

Hence, we hold that a plea agreement provision that attempts to override judicial precedent prohibiting consideration of dismissed charges in sentencing seeks imposition of an illegal sentence and therefore violates a defendant's rights under Article I, Sections 5 and 14. Therefore, plea agreements must not include such provisions.

2. Courts cannot consider lack of remorse in the context of no contest pleas.

As we ruled earlier, the circuit court did not improperly consider remorse in denying Gaeta's DANC motion and sentencing him to probation. Yet, in the context of this case involving a no contest plea, the ICA explicitly stated that "a court generally can consider a defendant's lack of remorse in the sentencing context," citing Satoafaiga, 150 Hawai'i at 421, 504 P.3d at 339. Gaeta, 2025 WL 2466115, at *3. But our law on whether a lack of remorse can be considered in the context of a no contest plea is unclear. We therefore also ordered supplemental briefing on this issue.

Federal and state courts, including the ICA, have generally held that a lack of remorse can be considered. See, e.g., United States v. Harris, 751 F.3d 123, 127 (3d Cir. 2014); State v. Knight, 701 N.W.2d 83, 87-88 (Iowa 2005); see also State v. Kaluna, No. CAAP-23-0000096, 2024 WL 637400, at *4 (Haw. App. Feb. 15, 2024) (SDO) (holding that the defendant's lack of remorse for the psychological harm suffered by a victim of a kidnapping charge to which the defendant pled no contest was a characteristic of the defendant that could properly be considered).

And we have previously ruled that a trial court abused its discretion by failing to consider the defendant's expressed

remorse before rejecting his DANC motion after a no contest plea. State v. Medeiros, 146 Hawai'i 1, 11, 454 P.3d 1069, 1079 (2019). Therefore, a defendant can choose to express remorse after a no contest plea, although such expressions could be used adversely in a civil proceeding arising out of the acts constituting the crime.

But the issue here is whether a court can consider a defendant's failure to express remorse in the context of ruling on a DANC motion or sentencing.

In Satoafaiga, we explicitly declined to address the issue of whether lack of remorse can be considered in the context of no contest pleas. We stated:

[Defendant] appears to argue for a rule displacing the analysis in Kamana'o and categorically barring judges from considering a defendant's remorse in cases involving a no contest plea. Because we hold that the underlying conduct for which Satoafaiga was asked to apologize was improperly considered, we do not address whether Kamana'o properly applies in the context of a no contest plea.

150 Hawai'i at 421 n.23, 504 P.3d at 339 n.23.

State v. Kamana'o, 103 Hawai'i 315, 82 P.3d 401 (2003), cited in this passage from Satoafaiga, was not a plea case; it involved a defendant's refusal to admit guilt with respect to an offense for which a jury found him guilty. 103 Hawai'i at 316, 82 P.3d at 402. We held that, although a sentencing court may consider a defendant's lack of remorse in evaluating the likelihood of rehabilitation, it was prohibited from imposing an

enhanced sentence based on a defendant's refusal to admit guilt, even after the jury conviction. 103 Hawai'i at 324, 82 P.3d at 410.

This court has said that "[t]he principle difference between a plea of guilty and a plea of nolo contendere is that the latter may not be used against the defendant in a civil action based upon the same acts." State v. Nguyen, 81 Hawai'i 279, 281 n.1, 916 P.2d 689, 691 n.1 (1996). But there are two additional, salient differences between guilty and no contest pleas, which are reflected in HRPP Rules 11(b) and (g):

- (b) No contest. A defendant may plead no contest only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

. . . .

- (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.

As can be seen, under HRPP Rule 11(b), in contrast with guilty pleas, a defendant can only plead no contest when a judge consents. Also, under HRPP Rule 11(g), in contrast with guilty pleas, no factual basis is required for no contest pleas. If a court is not satisfied that a no contest plea serves "the interest of the public in the effective administration of justice," the court does not have to allow a no contest plea; it

can insist on a guilty plea for a plea agreement. The defendant can otherwise go to trial.

Therefore, no contest pleas are different from guilty pleas. If a trial court consents to allow a no contest plea, a criminal defendant has the right not to admit to a factual basis for the plea.

Relatedly, the Vermont Supreme Court in State v. Gleason, 576 A.2d 1246, 1250 (Vt. 1990), held that while a no contest plea effectuates a waiver of a defendant's privilege against self-incrimination, the waiver is limited, and only extends "to the determination of guilt or innocence of the crime for which the plea is entered," and, while "awaiting sentencing, a defendant who has pled [no contest] may invoke the privilege to prevent the possible enhancement of the sentence."

We agree with the Vermont Supreme Court. Our law already implicitly recognizes what was stated by that court. HRPP Rule 11(g) does not require a factual basis for a no contest plea. Nguyen recognizes that the purpose of a no contest plea is to allow defendants to avoid making statements that can be used against them in civil proceedings. Kamana'o stands for the proposition that a court cannot impose an enhanced sentence based on a defendant's refusal to admit guilt.

Hence, we hold that even after a no contest plea, a defendant continues to hold a limited right against self-

incrimination based on Article I, Section 10 of the Hawai'i Constitution against the making of statements that might impact sentencing or the grant or denial of a DANC motion. We further prospectively hold that, due to the limited waiver of the right against self-incrimination for a no contest plea, a defendant's failure to express remorse cannot be used against the defendant. As this is a new rule of constitutional interpretation, it applies to events occurring after the date of this opinion.

We are therefore establishing another bright-line rule that enforces a defendant's right against self-incrimination under Article I, Section 10. As we said in State v. Hewitt, 153 Hawai'i 33, 44, 526 P.3d 558, 569 (2023):

Bright-line rules foster uniformity and predictability. See Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1179 (1989). The most significant role of judges may be to protect the individual criminal defendant against the occasional excesses of popular will, and to preserve the checks and balances within our constitutional system that are designed to inhibit that popular will. 56 U. Chi. L. Rev. at 1180. In terms of constitutional rules of criminal procedure, in order to preserve checks and balances, bright-line rules are therefore preferable.

This new bright line eliminates the confusion that has existed in our case law regarding whether a court can consider a defendant's failure to express remorse after a no contest plea in determining whether to grant a DANC motion or what sentence to impose.

This ruling also allows us to avoid concerns regarding expressions of remorse that are discussed in the law review

article abstract below, at least in the context of no contest pleas:

[J]udges varied widely in their views about the assessment of remorse and its relevance in judicial decision-making. Although they generally agreed that remorse was a valid legal construct, they disagreed about for which types of crimes and at which stage of criminal proceedings remorse was most relevant. They further disagreed about the indicators of remorse; behaviors that suggested remorsefulness to some judges suggested remorselessness to others. Finally, judges differed in their opinions concerning the impact of mental illness on remorse and frequently lacked a nuanced understanding of psychiatric disorders. These findings shed light on the courts' current treatment of a complex phenomenon and suggest that judges should give remorse, and especially the absence of remorse, much less weight than they currently do.

Rocksheng Zhong, Judging Remorse, 39 N.Y.U. Rev. L. & Soc. Change 133 (2015) (emphasis added).

Under our new bright-line rule, a trial court's discretion is limited to allowing or not allowing a no contest plea in the first instance, pursuant to HRPP Rule 11(b). If a court believes expressions of remorse are important to the effective administration of justice, it should not consent to the plea.

V. Conclusion

For these reasons, but subject to the additional rulings in this opinion, we affirm the circuit court's August 7, 2023 first

amended judgment of conviction and probation sentence as well as the ICA's September 23, 2025 judgment on appeal.

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