*** NOT FOR PUBLICATION ***

DISSENTING OPINION BY NAKAYAMA, J.,
WITH WHOM, MOON, C.J., JOINS

I respectfully dissent from section VI of the majority's opinion that suggests Apprendi v. New Jersey, 530 U.S. 466 (2000), should be retroactively applied to Sua's Hawai'i Rules of Penal Procedure (HRPP) Rule 35 motion to correct an illegal sentence based on the circuit court's imposition of a ten-year mandatory minimum pursuant to Hawai'i Revised Statutes (HRS) § 706-660.1 (1985).[1] Majority Opinion (MO) at 10-12. The majority remands this case for a hearing on whether Sua was correctly sentenced to a mandatory minimum term of imprisonment. MO at 15. As discussed infra, I would affirm the circuit court's denial of Sua's HRPP Rule 35 motion because: (1) Sua did not raise the issue that the ten-year mandatory minimum violated his right to due process; and (2) even if this court construed Sua's reply brief as raising this issue, the issue is moot.

**A. Sua has not asserted that the ten-year mandatory minimum violated his right to due process.**

In his reply brief, Sua argues that his life sentence with the possibility of parole pursuant to HRS § 706-606(b)(1985)[2] is an illegal sentence stating: "WHERE THERE IS NO

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[1] HRS § 706.660.1 (1985) provided in relevant part:

> Sentence of imprisonment for use of a firearm in a felony. (a) A person convicted of a felony, where the person had a firearm in his possession and threatened its use or used the firearm while engaged in the commission of the felony, may be sentenced to a mandatory term of imprisonment the length of which shall be as follows:
> (1) For a class A felony - up to 10 years[.]

[2] HRS § 706-606(b) (1985) provided in relevant part:

> Sentence for offense of murder. The court shall sentence a

(continued...)

JURY DETERMINATION THAT THE SENTENCE FOR THE OFFENSE OF MURDER HRS § 706-606(b) WHICH CONSTITUTED AN ENHANCED SENTENCE THAT VIOLATED SUA'S DUE PROCESS RIGHTS UNDER THE FEDERAL CONSTITUTIONS FOURTEENTH AMENDMENT, FIFTH AND SIXTH AMENDMENT AND ARTICLE I, § 2,5 [sic], 10 AND 14 OF THE HAWAIʻI CONSTITUTION[.]" Sua's arguments in which he cites to Apprendi and State v. Tafoya, 91 Hawaiʻi 261, 982 P.2d 890 (1999), involve only his sentence for the offense of murder pursuant to HRS § 706-606, not his ten-year mandatory minimum pursuant to HRS § 706-660.1. Regarding his ten-year mandatory minimum sentence, which the majority tackles, Sua merely states that "[t]he State then moved for mandatory term sentence under HRS § 706-660.1" when describing his case history. Nowhere else in his reply brief does Sua discuss his ten-year mandatory minimum, much less make an argument that the ten-year mandatory minimum violated his right to due process.

Accordingly, because this claim was neither raised nor argued, it should not be considered.[3] See Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 28(b)(4)(D) (stating in relevant part that "[p]oints not presented . . . will be disregarded, except that the appellate court, at its option, may notice a

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[2](...continued)

> person who has been convicted of murder to an indeterminate term of imprisonment. In such cases the court shall impose the maximum length of imprisonment as follows:
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> . . . .
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> (b) Life imprisonment with possibility of parole in all other cases. The minimum length of imprisonment shall be determined by the Hawaii paroling authority in accordance with section 706-669.

[3] The majority admits as much by stating that "[a]lso, we may notice plain error." MO at 12.

plain error not presented"); HRAP Rule 28(b)(7) ("Points not argued may be deemed waived."). Furthermore, it appears to be patently unfair to construe Sua's vague statement as having raised an issue in the reply brief and to not allow the prosecution to be heard on the matter at the appellate level.

**B. Even if this court were to construe Sua's reply brief as raising the issue that the ten-year mandatory minimum term of imprisonment violated his right to due process, the issue is moot.**

> In Hawai'i,
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> [i]t is well-settled that the mootness doctrine encompasses the circumstances that destroy the justiciability of a case previously suitable for determination. A case is moot where the question to be determined is abstract and does not rest on existing facts or rights. Thus, the mootness doctrine is properly invoked where events have so affected relations between the parties that the two conditions for justiciability . . . relevant on appeal--adverse interest and effective remedy--have been compromised.

State v. Fukusaku, 85 Hawai'i 462, 474-75, 946 P.2d 32, 44-45 (1997) (citations omitted). In the instant case, on January 6, 1986, Sua was sentenced to life imprisonment with the possibility of parole for the murder conviction and five years, consecutive to the life sentence, for the firearm conviction. In addition, Sua received a ten-year mandatory minimum term of imprisonment. On June 20, 2001, more than fourteen years later, Sua filed his HRPP Rule 35 motion. On appeal from the circuit court's denial of his HRPP Rule 35 motion, Sua filed a reply brief on January 11, 2002. Assuming, arguendo, that Sua raised the issue of whether the mandatory minimum violated his right to due process in his reply brief, the mandatory minimum has already been served, and, thus, no effective remedy exists. Accordingly, the

issue is moot and should not be addressed.

The majority claims that this issue is not moot because Sua may be exposed to collateral consequences flowing from the ten-year mandatory minimum. The majority first relies on Castle v. Irwin, 25 Haw. 786, 792 (1921), for the proposition that "[t]he court's sentence enhancement pursuant to Count II is not a '[m]erely abstract or moot' question." MO at 13. In Castle, various parties attempted to settle their interests in the estate of James B. Castle. Castle, 25 Haw. at 787. This court noted that "[m]erely abstract or moot questions will not be determined on appeal and feigned or fictitious appeals ought not to be tolerated." Id. at 792. Because Castle was a civil suit and had nothing to do with sentence enhancements, Castle is inapposite to the instant case and does not stand for the proposition that a sentence enhancement is not a merely abstract or moot question as suggested by the majority.

The majority also relies on People v. Ellison, 4 Cal. Rptr. 3d 713 (Cal. Ct. App. 2003), for the proposition that "'A criminal case should not be considered moot where a defendant has completed a sentence where, . . . the sentence may have disadvantageous collateral consequences.'" MO at 13 (quoting Ellison, 4 Cal. Rptr. 3d at 720). In Ellison, the California Court of Appeals for the First District put forth concrete collateral consequences of the defendant's completed sentence. Ellison, 4 Cal. Rptr. 3d at 720. The court stated that,

> [a]ppellant, who received a determinate prison term, was sentenced to a term of imprisonment under section 1170. Therefore, under subdivision (b)(1) of section 3000, appellant was "released on parole for a period not exceeding

> three years," a period which would extend beyond expiration of the period of probation appellant was previously serving. If, during those three years, appellant violated the terms of his parole, he would again be exposed to a state prison sentence. Furthermore, as appellant also points out, if the sentence imposed by Judge Cissna was valid, appellant will now be exposed to a possible future enhancement for a prior prison term. (§ 667.5, subd.(b).) If the sentence was not valid, the prior prison term, though actually served, would not justify an enhancement.

Id.

In the instant case, the majority fails to show how Sua's ten-year mandatory minimum will have concrete disadvantageous collateral consequences in light of his life imprisonment sentence. The majority also fails to show how Sua's ten-year mandatory minimum will expose him to possible future sentence enhancements. The majority merely speculates that Sua "may suffer significant consequences because of the sentence enhancement, such as the length of the sentence, the availability of parole, and the setting of bail in a future case." MO at 14. Thus, without a showing, beyond mere speculation, of adverse collateral consequences, this issue is moot.

Finally, the majority relies on United States v. Cottman, 142 F.3d 160 (3d Cir. 1998), for the proposition that "a sentencing enhancement was not moot because the appellant may still suffer 'collateral legal consequences from the sentence already served.'" MO at 13 (quoting Cottman, 142 F.3d at 164). In Cottman, the United States Court of Appeals for the Third Circuit "conclude[d] that a finding of mootness [was] forestalled here because Cottman may still suffer collateral legal consequences from a sentence already served." Cottman, 142 F.3d at 164 (citation and internal quotation marks omitted). The

court explained its decision:

> Two considerations, both of which are products of Federal Sentencing Guidelines, lead us to this determination. First, the § 2B1.1(b)(4)(B) "in the business" sentencing enhancement increases Cottman's Criminal History Category from I to II for any future convictions. The district court's application of the enhancement increased Cottman's total offense level from ten to twelve, pushing him from Zone B to Zone C on the Sentencing Table which determines his guideline range. Because his sentence placed him in Zone C, Cottman no longer qualified for a sentence of probation in lieu of imprisonment. Cottman, as a result, acquired two, rather than one, criminal history points. The net outcome is that a sentence for any future conviction which may be imposed upon Cottman under the Guidelines will be significantly increased.
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> Second, if we were to find an error in the application of the "in business" enhancement, the appropriate sentencing range would be reduced from 10-16 months to 6-12 months. This reduction would likely merit a credit against Cottman's period of supervised release for the excess period of imprisonment to which Cottman was subjected.

Id. at 164-65.

Similar to Ellison, the court in Cottman delineated specific and concrete collateral consequences of the served sentence. Unlike Ellison and Cottman, the majority in the instant case fails to show any concrete collateral consequences of Sua's served ten-year mandatory minimum. Therefore, assuming arguendo, that Sua did raise this issue, the issue is moot and should not be addressed.