*****NOT FOR PUBLICATION*****

NO. 24501

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee

vs.

APOLOSIO SUA, Defendant-Appellant

APPEAL FROM THE FIRST COURT
(CR. NO. 85-0873)

MEMORANDUM OPINION
(By: Levinson, Acoba, and Duffy, JJ.;
and Nakayama, J., Dissenting, With Whom Moon, C.J., Joins)

We remand for a hearing on the sentence imposed pursuant to Hawaiʻi Revised Statutes (HRS) § 706-660.1 (1976) on Defendant-Appellant Apolosio Sua (Defendant) but affirm the order of the first circuit court[1] (the court) denying Defendant's challenge of his murder conviction as an "illegal sentence" under Hawaiʻi Rules of Penal Procedure (HRPP) Rule 35,[2] see State v.

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[1] The Honorable Karen S.S. Ahn issued the order herein.

[2] The prior version of HRPP Rule 35, effective October 15, 1980, read as follows:

> The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 90 days after the sentence is imposed, or within 90 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 90 days after entry of any order or judgment of the Supreme Court of the United States denying review of, or having the effect of

(continued...)

Levi, 102 Hawai‘i 282, 289, 75 P.3d 1173, 1180 (2003), and affirm Defendant's conviction for possession of a firearm.

I.

The facts and procedural history involving Defendant's prior conviction are undisputed in the briefs submitted to this court. On July 12, 1985, Defendant was charged with murder in the first degree, HRS § 707-701 (1976),[3] for the killing of Glenn Clibourne on or about June 22, 1985. Defendant was also charged with carrying a firearm on person without permit or license, HRS § 134-9 (Supp. 1984). Defendant was found guilty on both counts.

On December 6, 1985, Plaintiff-Appellee State of Hawai‘i (the prosecution) moved, pursuant to HRS § 706-660.1 (1976), that Defendant receive a mandatory term of imprisonment of ten years. Defendant was sentenced on January 6, 1986, to

[2](...continued)
upholding a judgment of conviction. A motion to correct or reduce a sentence which is made within the time period aforementioned shall empower the court to act on such motion even though the time period has expired. The filing of a notice of appeal shall not deprive the court of jurisdiction to entertain a timely motion to reduce a sentence.

(Emphasis added.)

[3] As originally enacted in 1972, HRS § 707-701 stated as follows:

Murder. (1) Except as provided in section 707-702, a person commits the offense of murder if he intentionally or knowingly causes the death of another person.
(2) Murder is a class A felony for which the defendant shall be sentenced to imprisonment as provided in section [706]-606.

1972 Haw. Sess. L. Act 9, § 1 at 86 (emphasis added). On January 1, 1987, HRS § 707-701 was amended and all of the text reproduced above was repealed. See 1986 Haw. Sess. L. Act 314, § 49, at 615-17. As a result, murder was no longer defined as a class A felony.

life with the possibility of parole for the murder conviction and five years, consecutive to the life sentence, for the firearm conviction. In addition, Defendant received the mandatory minimum term of ten years. Defendant did not contest his conviction via direct appeal.

On June 20, 2001, Defendant filed a motion for correction of illegal sentence pursuant to HRPP Rule 35. Defendant noted that the offense of murder for which he was convicted and sentenced was defined by HRS § 707-701 as a class A felony. HRS 707-701 stated that sentencing was to be done according to HRS § 706-606 (1985).[4] See supra note 3. On January 1, 1987, subsequent to Defendant's sentencing, the text of HRS § 706-606 was repealed in its entirety and replaced with new language relating to factors to be considered in imposing a sentence. See 1986 Haw. Sess. L. Act 314, § 15, at 599-600.

[4] HRS § 706-606 stated, in relevant part, as follows:

> **Sentence for offense of murder.** The court shall sentence a 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:
>
> (a) Life imprisonment without possibility of parole in the murder of:
> (i) A peace officer while in the performance of his duties, or
> (ii) A person known by the defendant to be a witness in a murder prosecution, or
> (iii) A person by a hired killer, in which event both the person hired and the person responsible for hiring the killer shall be punished under this subsection, or
> (iv) A person while the defendant was imprisoned.
> . . . .
> (b) Life imprisonment with possibility of parole in all other cases.

(Emphasis added.)

Because of the repeal, Defendant contends that his sentence was illegal. Hence, Defendant maintained that his life sentence for murder was illegal and must be reduced to twenty years. Defendant thus maintains he should be sentenced under HRS § 706-659 (Supp. 2002)[5] which sets out a sentence of twenty years for a class A felony.

On July 24, 2001, the court entered an order denying Defendant's motion without a hearing.

II.

A.

In his opening brief, Defendant appears to allege four points on appeal: (1) Defendant's sentence of life imprisonment is illegal under current Hawai'i law; (2) the court abused its discretion in not affording counsel for Defendant's motion; (3) the court exhibited bias and prejudice against Defendant; and (4) the court disregarded laws and legislative acts in its decision.

In his reply brief, Defendant for the first time raises three additional matters: (1) that the sentence for the offense

[5] HRS § 706-659 provides, in pertinent part:

> **Sentence of imprisonment for class A felony.** Notwithstanding part II; sections 706-605, 706-606, 706-606.5, 706-660.1, 706-661, and 706-662; and any other law to the contrary, a person who has been convicted of a class A felony, except class A felonies defined in chapter 712, part IV, shall be sentenced to an indeterminate term of imprisonment of twenty years without the possibility of suspension of sentence or probation.

(Emphases added).

of murder, HRS § 706-606(b), constituted an enhanced sentence that violated Defendant's due process rights under the federal constitution's fourteenth amendment, fifth and sixth amendments and article I, §§ 2, 5, 10 and 14 of the Hawai'i Constitution, citing inter alia, Apprendi v. New Jersey, 530 U.S. 466 (2000); (2) that his conviction for carrying a pistol or revolver without a permit or license in violation of HRS § 134-9 was illegal under State v. Jumila, 87 Hawai'i 1, 950 P.2d 1201 (1998); and (3) that because the court did not reverse his conviction pursuant to Jumila, it was biased against him. Because these grounds were not raised below or in the opening brief, we are not required to consider them.[6] However, we do so in the interest of justice. See Levi, 102 Hawai'i at 286 n.12, 75 P.3d at 1177 n.12 (noting that this court "'will not consider an issue not raised below unless justice so requires'" (quoting Bitney v. Honolulu Police Dep't, 96 Hawai'i 243, 251, 30 P.3d 257, 265 (2001)).

B.

This court has previously held that "[a]n appellate court may freely review conclusions of law and the applicable standard of review is the right/wrong test. A conclusion of law that is supported by the trial court's findings of fact and that reflects an application of the correct rule of law will not be

[6] As noted by the prosecution in its answering brief, "Defendant [apparently did] not contest[] the legality of the sentence imposed for the firearm conviction as neither his motion, nor his opening brief, make any mention of it."

overturned." Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994) (citations and internal quotation marks omitted). As to statutory interpretation, it is "a question of law reviewable de novo." State v. Arceo, 84 Hawai'i 1, 10, 928 P.2d 843, 852 (1996) (quoting State v. Camara, 81 Hawai'i 324, 329, 916 P.2d 1225, 1230 (1996) (citation omitted)). In interpreting a statute,

> [a court's] foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And where the language of the statute is plain and unambiguous, [a court's] only duty is to give effect to [the statute's] plain and obvious meaning.

State v. Wells, 78 Hawai'i 373, 376, 894 P.2d 70, 73 (1995) (citations, brackets, and internal quotation marks omitted).

III.

In connection with his opening brief, Defendant appears to make the same argument with respect to issues (1) and (4). This and issues (2) and (3), raised in his opening brief, are considered in turn.

As to issues (1) and (4), Defendant contends that his January 6, 1986 sentence is now incorrect because (1) Act 314, Session Laws of Hawai'i 1986 (Act 314) permits him to "collaterally attack his sentence now in this day and age,"[7]

[7] Defendant cites to HRS §§ 701-100 and 701-101(2) (1993), which make explicit reference to Act 314. § 701-100 states:

> Title 37 shall be known as the Hawaii Penal Code. Amendments made to this Code by Act 314, Session Laws of Hawaii 1986, shall become effective on January 1, 1987.

(2) his present sentence which was imposed pursuant to HRS § 706-606 is illegal because that version of the statute was repealed by Act 314, and (3) "the only recourse" is to sentence Defendant to a twenty-year term as set forth in HRS § 706-659 (Supp. 2002), because this statute establishes the current sentence for a class A felony.

Act 314 took effect on January 1, 1987. Act 314 amended HRS § 701-101 to read as follows:

> **Applicability to offenses committed before the effective date of amendments.** (1) Except as provided in subsection (2), amendments made by Act 314, Session Laws of Hawaii 1986, to this Code do not apply to offenses committed before the effective date of Act 314 . . . . Prosecutions for offenses committed before the effective date of Act 314 . . . are governed by the prior law, which is continued in effect for that purpose, as if amendments made by Act 314 . . . to this Code were not in force. For purposes of this section, an offense is committed before the effective date of Act 314[] if any of the elements of the offense occurred before that date.
>
> (2) In any case pending on or commenced after the effective date of amendments made by Act 314, Session Laws of Hawaii 1986, to this Code, involving an offense committed before that date upon the request of the defendant, and subject to the approval of the court, the provisions of chapter 706 amended by Act 314 . . . may be applied in particular cases.

HRS § 701-101 (Supp. 1987) (emphases added). Defendant committed the offense in 1985, before the effective date of Act 314. Thus, under HRS § 701-101(1), Act 314 is inapplicable to Defendant's case "[e]xcept as provided in [HRS § 701-101](2)." Hence, Act 314 would not apply to Defendant's case unless the conditions set forth in HRS § 701-101(2) are satisfied. Defendant was sentenced on January 6, 1986. Plainly, therefore, his case was no longer "pending" on January 1, 1987, nor had his case commenced after

that date. Defendant, therefore, did not qualify for the dispensation, if any, extended under HRS § 701-101(2).

As indicated in HRS § 701-101, then, Defendant's case is "governed by the prior law . . . as if amendments made by Act 314 to [the] Code were not in force." Accordingly, we conclude that Defendant was correctly sentenced under the prior law set forth in HRS § 706-606 (Supp. 1984).[8] Moreover, as was said in Levi, the repeal of the language in HRS § 706-606 did not invalidate any sentence imposed prior to the repeal. Levi, 102 Hawai'i at 287, 75 P.3d at 1178.

IV.

As to issue (2), Defendant relies on the fourteenth and sixteenth amendments to the United States Constitution, article I, section 5 of the Hawai'i Constitution, and HRS § 802-1

[8] Assuming, arguendo, that Defendant were to be sentenced under current guidelines, HRS § 706-659 would not apply, inasmuch as murder is no longer defined as a class A felony. Defendant's sentence would be imposed in accordance with HRS § 706-656 (Supp. 2002), which states in relevant part:

> **Terms of imprisonment for first and second degree murder and attempted first and second degree murder.** (1) Persons convicted of first degree murder or first degree attempted murder shall be sentenced to life imprisonment without possibility of parole.
> . . . .
> (2) Except as provided in section 706-657, pertaining to enhanced sentence for second degree murder, persons convicted of second degree murder and attempted second degree murder shall be sentenced to life imprisonment with possibility of parole.
> . . . .

(Emphases added.) Thus, a murder conviction is still punishable by a sentence of life imprisonment, not a twenty-year sentence as Defendant argues.

(1993).[9] A similar argument made in Levi was rejected, and we reject the argument in this case for the same reasons. See Levi, 102 Hawai‘i at 288, 75 P.3d at 1179 (stating that "the United States Supreme Court [has] held that the federal constitutional right to counsel does not extend to post-conviction challenges" and that in Hawai‘i, "counsel may be appointed in post conviction proceedings at the discretion of the court" (footnote omitted)). The issues raised in the opening brief are not "'substantial issues' that would support the appointment of counsel for Defendant[,]" and, therefore, "we cannot say under these circumstances that the court abused its discretion in denying counsel." Id. at 288-89, 75 P.3d at 1179-80.

V.

As to issue (3), in his opening brief Defendant argues that the court was "biased and prejudice[d]" against him because (a) it failed to appoint him counsel, (b) other appellants (presumably raising similar issues) were appointed counsel,

[9] HRS § 802-1 reads in pertinent part:

> **Right to representation by public defender of other appointed counsel.** Any indigent person who is (1) arrested for, charged with or convicted of an offense or offenses punishable by confinement in jail or prison or for which such person may be or is subject to the provisions of chapter 571; or (2) threatened by confinement, against the indigent person's will, in any psychiatric or other mental institution or facility; or (3) the subject of a petition for involuntary outpatient treatment under chapter 334 shall be entitled to be represented by a public defender. If, however, conflicting interests exist, or if the public defender for any other reason is unable to act, or if the interests of justice require, the court may appoint other counsel.

(c) it gave "more credible consideration" to the prosecution's position, and (d) it did not administer the laws fairly and impartially. Again, similar arguments raised in Levi were rejected and we reject the same arguments in this case for the same reasons. In Levi, this court said there was no error "[i]n light of our conclusion that the court was correct with regard to appointment of counsel, and in the absence of any specific allegation of personal bias or prejudice," and "Defendant's arguments involving matters (c) and (d) simply take issue with the court's substantive analysis, which we consider correct for the same reasons indicated above." Levi, 102 Hawai'i at 289, 75 P.3d at 1180.

VI.

As to his Apprendi claim raised in his reply brief, Defendant relies on State v. Tafoya, 91 Hawai'i 261, 269-70, 982 P.2d 890, 898-99 (1999), State v. Schroeder, 76 Hawai'i 517, 527, 880 P.2d 192, 202 (1994), State v. Apao, 59 Haw. 625, 586 P.2d 250 (1978), and Apprendi. He maintains that because notice of the sentence enhancement was not included in Defendant's indictment or complaint, Defendant's sentence of life with the possibility of parole should be reduced to the twenty-year sentence under the current version of HRS § 706-659. The sentence of life imprisonment is prescribed for the offense of murder. Hence, there was no enhancement of the sentence of

murder itself. Accordingly, the issue of whether Defendant should be sentenced to life imprisonment was not required to be submitted to the jury. See Apprendi, 530 U.S. at 490 (holding that any fact that increase the penalty for a crime beyond the prescribed statutory minimum must be submitted to a jury and proven beyond a reasonable doubt).

The enhanced sentence that is relevant for discussion, however, is the ten-year mandatory minimum term of imprisonment imposed under HRS § 706-660.1. HRS § 706-660.1(1) provides in relevant part as follows:

> (a) A person convicted of a felony, where the person had a firearm in the person's 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[.]

Defendant was charged in Count I of the Complaint with "intentionally or knowingly caus[ing] the death of Glenn Clibourne by shooting him" and in Count II with "carry[ing] on his person a pistol or revolver without a permit or license to carry a firearm on his person[.]" This court has concluded in connection with HRS § 706-660.1 that "'aggravating circumstances' at issue -- *i.e.*, the use or threat to use a firearm during the commission of a felony -- were so 'enmeshed' in the charged offenses that such circumstances should have been alleged in the charging instrument and determined by the trier of fact." State v. Kaua, 102 Hawai'i 1, 11, 72 P.3d 473, 483 (2003) (emphasis added) (describing Schroeder, 76 Hawai'i at 528, 880 P.2d at

203). "[T]he requirement that 'intrinsic' facts must be determined by the trier of fact for purposes of extended term sentencing 'rests upon the necessity of upholding a defendant's constitutional rights to trial by jury and procedural due process.'" Id. (quoting Tafoya, 91 Hawai'i at 271-72, 982 P.2d at 900-01. "[T]he *Apprendi* Court held that findings that implicated 'elemental' facts requisite to imposing an enhanced sentence must be charged in the indictment, submitted to the jury, and proved by the prosecution beyond a reasonable doubt." Id. at 12, 72 P.3d at 484 (citing Apprendi, 530 U.S. at 490). In this case, the circuit court denied Defendant's Rule 35 motion without a hearing. The record indicates that Defendant possesses a colorable claim with respect to the sentence imposed pursuant to HRS § 706-660.1 and that a hearing should be conducted. Also, we may notice plain error. See Hawai'i Rules of Appellate Procedure 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 plain error not presented"). The prosecution would have an opportunity to be heard at a hearing on remand. Inasmuch as the issue has yet to be resolved, there is no prejudice to the prosecution's position. Indeed, it was the prosecution that noted the matter, raising it as a potential issue.

VII.

Also, contrary to the dissent's position, although Defendant has served his ten-year mandatory minimum term for the enhanced sentence, this issue is not moot. The court's sentence enhancement pursuant to Count II is not a "[m]erely abstract or moot" question. See Castle v. Irwin, 25 Haw. 786, 792 (1921). This appeal is still justiciable in that Defendant may be exposed to collateral consequences flowing from such a sentence.

Recently, the California Court of Appeals for the First District determined that the propriety of a judge's sentencing order is not rendered moot by the fact that the appellant had served the prison term. People v. Ellison, 4 Cal. Rptr. 3d 713, 720 (Cal. Ct. App. 2003). The court set out the test for mootness as follows: "A criminal case should not be considered moot where a defendant has completed a sentence where[,] . . . the sentence may have disadvantageous collateral consequences." Id. Such consequences include the appellant's exposure to a possible future enhancement for a prior prison term. Id.

The United States Court of Appeals for the Third Circuit has also held that a challenge to the district court's application of a sentencing enhancement was not moot because the appellant may still suffer "collateral legal consequences from a sentence already served." United States v. Cottman, 142 F.3d 160, 164 (1998) (quoting Pennsylvania v. Mimms, 434 U.S. 106, 109 n.3 (1977)). The consequences of the enhancement would result in

a significant increase, under the federal sentencing guidelines, for any future conviction. Id. at 164-65. In Mimms, the United States Supreme Court held that collateral legal consequences, such as "setting bail[,] . . . length of sentence, and . . . the availability of probation" were not "unduly speculative" in light of the fact that the defendant had fully served his state sentence and was still incarcerated. 434 U.S. at 109 n.3. Here, similarly, Defendant 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. As such, the enhanced sentence issue is not moot.

As to the firearm conviction in Count II, a majority of this court has overruled Jumila. In State v. Brantley, 99 Hawai'i 463, 56 P.3d 1242 (2002), the plurality opinion stated that Jumila had held "that a defendant cannot be convicted of both HRS § 134-6(a) and the separate felony." Id. at 465, 56 P.3d at 1254. Additionally, the plurality opinion held that "a defendant can be convicted of both HRS § 134-6(a) and the separate felony." Id. Accordingly, the firearm conviction is valid. Because Defendant did not raise this issue below and ultimately the conviction was not incorrect, and there was no evidence of personal bias or prejudice, see supra, it cannot be said that the failure to reverse the firearm conviction under HRS § 134-6(a) based on Jumila was evidence of the court's bias or prejudice.

VIII.

For the foregoing reasons, Defendant has failed to demonstrate that his 1986 sentence for murder and for firearm possession in any way violated the law. Accordingly, we affirm the court's order denying Defendant's motion for correction of his murder sentence, affirm his firearm conviction, but remand for a hearing on whether Defendant was correctly sentenced to a mandatory minimum term of imprisonment pursuant to HRS § 706-660.1.

DATED: Honolulu, Hawai‘i, December 30, 2003.

On the briefs:

Apolosio Sua, defendant-appellant, pro se.

Daniel H. Shimizu, Deputy Prosecuting Attorney, City & County of Honolulu, for plaintiff-appellee.