***** FOR PUBLICATION *****

NO. 26199

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

STATE OF HAWAI‘I, Plaintiff-Appellee,

vs.

LARRY RIVERA, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CR. NO. 02-1-2128)

DECEMBER 22, 2004

MOON, C.J., LEVINSON, AND NAKAYAMA, JJ.; AND ACOBA, J.,
DISSENTING WITH WHOM DUFFY, J. JOINS

OPINION OF THE COURT BY LEVINSON, J.

The defendant-appellant Larry Rivera appeals from the judgment of the circuit court of the first circuit, the Honorable Derrick H.M. Chan presiding, filed on October 8, 2003, convicting him of and sentencing him for the following offenses: (1) promoting a dangerous drug in the third degree, in violation of Hawai‘i Revised Statute (HRS) § 712-1243 (1993 & Supp. 2003);[1] (2)

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[1] HRS § 712-1243 provides:

> (1) A person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount.
>
> (2) Promoting a dangerous drug in the third degree is a class C felony.
>
> (3) Notwithstanding any law to the contrary, except for first-time offenders sentenced under section 706-622.5, if the commission of the offense of promoting a dangerous drug in the third degree under this section involved the possession or distribution of methamphetamine, the person convicted shall be sentenced to an indeterminate term of imprisonment of five years with a mandatory minimum term of imprisonment, the length of which shall be not less than thirty days and not greater than two-and-a-half years, at the discretion of the sentencing court. The person convicted shall not be eligible for parole during the mandatory period of imprisonment.

unlawful use of drug paraphernalia, in violation of HRS § 329-43.5(a) (1993);[2] and (3) promoting a detrimental drug in the third degree, in violation of HRS § 712-1249 (1993).[3] On appeal, Rivera contends that the circuit court erred as follows: (1) in granting the motions of the State of Hawai‘i [hereinafter, "the prosecution"] for (a) an extended term of imprisonment as a "persistent offender," pursuant to HRS § 706-662(1) (1993 & Supp. 2003),[4] and

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[2] HRS § 329-43.5(a) provides:

> It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter. Any person who violates this section is guilty of a class C felony and upon conviction may be imprisoned pursuant to section 706-660 and, if appropriate as provided in section 706-641, fined pursuant to section 706-640.

[3] HRS § 712-1249 provides:

> (1) A person commits the offense of promoting a detrimental drug in the third degree if the person knowingly possesses any marijuana or any Schedule V substance in any amount.
> (2) Promoting a detrimental drug in the third degree is a petty misdemeanor.

[4] HRS § 706-662 provides in relevant part:

> **Criteria for extended terms of imprisonment.** A convicted defendant may be subject to an extended term of imprisonment under section 706-661, if the convicted defendant satisfies one or more of the following criteria:
> (1) The defendant is a persistent offender whose imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless the defendant has previously been convicted of two felonies committed at different times when the defendant was eighteen years of age or older.
> . . . .
> (3) The defendant is a dangerous person whose imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless the defendant has been subjected to a psychiatric or psychological evaluation that documents a significant history of
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> (continued...)

[4](...continued)

dangerousness to others resulting in criminally violent conduct, and this history makes the defendant a serious danger to others. Nothing in this section precludes the introduction of victim-related data in order to establish dangerousness in accord with the Hawaii rules of evidence.

(4) The defendant is a multiple offender whose criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless:

(a) The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for felony; or

(b) The maximum terms of imprisonment authorized for each of the defendant's crimes, if made to run consecutively, would equal or exceed in length the maximum of the extended term imposed or would equal or exceed forty years if the extended term imposed is for a class A felony.

(5) The defendant is an offender against the elderly, handicapped, or a minor under the age of eight, whose imprisonment for an extended term is necessary for the protection of the public. The court shall not make this finding unless:

(a) The defendant attempts or commits any of the following crimes: murder, manslaughter, a sexual offense that constitutes a felony under chapter 707, robbery, felonious assault, burglary, or kidnapping; and

(b) The defendant, in the course of committing or attempting to commit the crime, inflicts serious or substantial bodily injury upon a person who is:

(i) Sixty years of age or older;

(ii) Blind, a paraplegic, or a quadriplegic; or

(iii) Eight years of age or younger; and

(c) Such disability is known or reasonably should be known to the defendant.

(6) The defendant is a hate crime offender whose imprisonment for an extended term is necessary for the protection of the public. The court shall not make this finding unless:

(a) The defendant is convicted of a crime under chapter 707, 708, or 711; and

(b) The defendant intentionally selected a victim, or in the case of a property crime, the property that was the object of a crime, because of hostility toward the actual or perceived race, religion, disability, ethnicity, national origin, gender identity or expression, or sexual orientation of any person. For purposes of this subsection, "gender identity or expression" includes a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression; regardless of whether that gender identity, gender-related self-image, gender-related appearance, or gender-related

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(b) extended terms of imprisonment as a "multiple offender," pursuant to HRS § 706-662(4)(a) (1993 & Supp. 2003), see supra note 4, inasmuch as the jury did not decide that such extended terms of imprisonment were necessary for the protection of the public, and, therefore, the extended term sentences imposed by the circuit court ran afoul of the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), compelling this court to "strike down Hawaii's extended term sentencing scheme and to overrule State v. Kaua, 102 Hawai'i 1, 72 P.3d 473 (2003)[,] and State v. Hauge, 103 Hawai'i 38, 79 P.3d 131 (2003)";[5] and (2) in sentencing him to a mandatory minimum term of imprisonment of three years and four months for his conviction of unlawful use of drug paraphernalia, pursuant to HRS § 329-43.5(a), inasmuch as unlawful use of drug paraphernalia is not one of the enumerated class C felonies in HRS § 706-606.5 (1993 & Supp. 2003).[6]

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[4](...continued)

expression is different from that traditionally associated with the person's sex at birth.

[5] We decline Rivera's invitation to overrule Kaua and Hauge for the reasons discussed infra in Section III.A.

[6] HRS § 706-606.5 provides in relevant part:

> **Sentencing of repeat offenders.** (1) Notwithstanding section 706-669 and any other law to the contrary, any person convicted of murder in the second degree, any class A felony, any class B felony, or any of the following class C felonies: section 188-23 relating to possession or use of explosives, electrofishing devices, and poisonous substances in state waters; section 707-703 relating to negligent homicide in the first degree; 707-711 relating to assault in the second degree; 707-713 relating to reckless endangering in the first degree; 707-716 relating to terroristic threatening in the first degree; 707-721 relating to unlawful imprisonment in the first degree; 707-732 relating to sexual assault or rape in the third degree; 707-735 relating to sodomy in the third degree; 707-736 relating to sexual abuse in the first degree; 707-751 relating to promoting child abuse in the

(continued...)

The prosecution counters, inter alia, that (1) Rivera was properly sentenced to extended terms of imprisonment because (a) HRS §§ 706-662(1) and (4) pass constitutional muster under Apprendi and Kaua, and (b) the United States Supreme Court's decision in Blakely v. Washington, 124 S.Ct. 2531 (2004), does

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[6](...continued)
second degree; 707-766 relating to extortion in the second degree; 708-811 relating to burglary in the second degree; 708-821 relating to criminal property damage in the second degree; 708-831 relating to theft in the first degree as amended by Act 68, Session Laws of Hawaii 1981; 708-831 relating to theft in the second degree; 708-835.5 relating to theft of livestock; 708-836 relating to unauthorized control of propelled vehicle; 708-852 relating to forgery in the second degree; 708-854 relating to criminal possession of a forgery device; 708-875 relating to trademark counterfeiting; 710-1071 relating to intimidating a witness; 711-1103 relating to riot; 712-1203 relating to promoting prostitution in the second degree; 712-1221 relating to gambling in the first degree; 712-1224 relating to possession of gambling records in the first degree; 712-1243 relating to promoting a dangerous drug in the third degree; 712-1247 relating to promoting a detrimental drug in the first degree; 134-7 relating to ownership or possession of firearms or ammunition by persons convicted of certain crimes; 134-8 relating to ownership, etc., of prohibited weapons; 134-9 relating to permits to carry, or who is convicted of attempting to commit murder in the second degree, any class A felony, any class B felony, or any of the class C felony offenses enumerated above and who has a prior conviction or prior convictions for the following felonies, including an attempt to commit the same: murder, murder in the first or second degree, a class A felony, a class B felony, any of the class C felony offenses enumerated above, or any felony conviction of another jurisdiction shall be sentenced to a mandatory minimum period of imprisonment without possibility of parole during such period as follows:

> . . . .
> (b) Two prior felony convictions:
> . . . .
> (iv) Where the instant conviction is for a class C felony offense enumerated above -- three years, four months;
> . . . .
> (2) Except as in subsection (3), a person shall not be sentenced to a mandatory minimum period of imprisonment under this section unless the instant felony offense was committed during such period as follows:
> . . . .
> (d) Within ten years after a prior felony conviction where the prior felony conviction was for a class B felony[.]

(Emphasis added.)

not alter this court's holding in Kaua, and (2) the record demonstrates that Rivera was properly sentenced as a repeat offender.

Rivera responds that "pursuant to the United States Supreme Court's recent decision in Blakely v. Washington, the Hawai'i extended term sentencing scheme, which allows a judge to find enhancement facts, denied [him] of his right to a jury trial."

We note that this court's analysis and decision in Kaua dispose of Rivera's first point of error on appeal. Accordingly, we would not address Rivera's argument that Kaua is unconstitutional in another published opinion were it not for Blakely, which was handed down on June 24, 2004 and cited by the prosecution in its answering brief and which affirms Apprendi and focuses on the defects of determinate sentencing guidelines. Thus, the present matter addresses the question whether Blakely calls the continuing viability of our analysis in Kaua into question.[7]

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[7] We further note that on December 9, 2004, the United States District Court for the District of Hawai'i, the Honorable Susan Oki Mollway presiding, filed an order in Kaua v. Frank, Civ. No. 03-00432 SOM/BMK (D. Haw. Dec. 9, 2004), granting Kaua's petition, pursuant to 28 United States Code (U.S.C.) § 2254(d)(1) (2003), to vacate his extended sentence. 28 U.S.C. § 2254(d)(1) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

The district court held that this court's conclusion in Kaua, 102 Hawai'i 1, 72 P.3d 473, "that Kaua's extended sentence did not violate Apprendi was contrary to, and involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court." Kaua v. Frank, slip op. at 26. The district court also noted that "[w]hile circuit

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We hold that Hawai‘i's extended term sentencing scheme is not incompatible with Blakely v. Washington, inasmuch as (1) Blakely addresses only statutory "determinate" sentencing "guideline" schemes, and (2) this court's "intrinsic-extrinsic" analysis culminating in Kaua is compatible with both Blakely and Apprendi. Additionally, we hold that the circuit court properly sentenced Rivera as a repeat offender.

I. BACKGROUND

On September 27, 2002, the prosecution charged Rivera by complaint with the following offenses: (1) promoting a dangerous drug (Count I), in violation of HRS § 712-1243, see supra note 1; (2) unlawful use of drug paraphernalia (Count II), in violation of HRS § 329-43.5(a), see supra note 2; and (3) promoting a detrimental drug in the third degree (Count III), in violation of HRS § 712-1249, see supra note 3. The following facts were adduced at Rivera's jury trial, which commenced on July 10, 2003 and ended on July 11, 2003.

On September 19, 2002, at approximately 8:55 a.m., Recardo Basuil, a security guard posted at the Island Colony Hotel (the Hotel), responded to a report from the Hotel's front desk that there was someone sleeping on the twenty-sixth floor. Basuil proceeded to the twenty-sixth floor where he found Rivera sleeping in the hallway. Basuil approached Rivera and, within

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[7](...continued)
law may be 'persuasive authority' for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law, only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied." Kaua v. Frank, slip op. at 15 n.6 (quoting Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir.), cert. denied, 540 U.S. 968 (2003). Accordingly, we decline to follow the district court's analysis, which substantially mirrors Justice Acoba's.

two feet of him, observed a small plastic bag and an "ice pipe" on the floor two inches from Rivera. Upon recognizing the two items as drug paraphernalia, Basuil directed the Hotel's front desk to notify the Honolulu Police Department (HPD). HPD Officers Choy, Nakasone, and Hoʻokano thereafter arrived at the Hotel. Officer Choy approached Rivera, who was still sleeping in the hallway, and observed a glass pipe with a bulbous end and a clear plastic "baggy" with a marijuana leaf design printed on it on the floor beside him. Officer Choy took photographs of Rivera and the glass pipe and plastic baggy where they lay. Based on his training and experience, Officer Choy identified the glass pipe as being of the type used to heat crystal methamphetamine and inhale its vapors. Officer Choy also observed that the bulbous portion of the pipe contained a black and white residue, which he judged to be crystal methamphetamine after it has been heated.

Officer Hoʻokano placed Rivera under arrest for the promotion of dangerous drugs in the third degree, and Officer Choy proceeded to conduct a search incident to Rivera's arrest. Officer Choy recovered a small plastic bag containing a leafy vegetable matter and a second small plastic bag containing a crystal-like substance from Rivera's front pocket. HPD criminalist Stacy Riede testified that, through testing, she determined that the leafy vegetable matter was marijuana and that the crystal-like substance was crystal methamphetamine.

On July 11, 2003, the jury returned a verdict of guilty as charged on all three counts.

On August 6, 2003, the prosecution filed the following motions: (1) a motion for extended terms of imprisonment as a multiple offender, pursuant to HRS § 706-662(4)(a), see supra note 4; (2) a motion for extended term of imprisonment as a persistent offender, pursuant to HRS § 706-662(1), see supra note 4; and (3) a motion for sentencing as a repeat offender, pursuant to HRS § 706-606.5, see supra note 6.

The circuit court conducted a sentencing hearing on October 8, 2003, during which it considered the prosecution's two motions for extended terms of imprisonment and the motion for sentencing as a repeat offender. Rivera opposed the prosecution's motions, but expressly stated that he understood that "the repeat offender statute applies here and that this [c]ourt has an obligation to impose a mandatory minimum[.]" The circuit court granted all three of the prosecution's motions and orally sentenced Rivera as follows:

> THE COURT: . . . [A]lthough you come today and say that you [are] making good efforts, and I do commend you for that, I believe, in this particular instance, the [prosecution's] motion for extended term is warranted. So, therefore, the [prosecution's] motions for extended term[s] [are] granted. I will not order the terms to be consecutive, but I think there has to be a point in your life for you to take a step forward [rather] than just applying to programs after your trial, and you take a step further. The extensive criminal history, I think it has to be checked and double checked, not by the system, but by yourself to make sure you try, and this is really what you want to do.
>
> So, in Count 1, I'll sentence you to 10 years; in Count 2, 10 years; in Count 3, 30 days. In Counts 1 and 2, mandatory minimum sentence of three years and four months.

On October 13, 2003, the circuit court filed a written order granting the prosecution's motion for sentencing as a repeat offender, which stated the following:

> [T]he [c]ourt having found that [Rivera] is a repeat offender, pursuant to Section 706-606.5 of the Hawai[']i Revised Statutes [(HRS)], based on [Rivera's prior]

> conviction for the offense of Promoting a Dangerous Drug in the Second Degree, pursuant to Section 712-1242 of the [HRS], under Criminal No. 95-2564, and [Rivera's prior] conviction for the offense of Promoting a Dangerous Drug in the Second Degree, pursuant to Section 712-1242 of the [HRS], under Criminal No. 96-1456, and being fully advised in the premises and having orally granted said Motion for Sentencing of Repeat Offender,
>
> IT IS HEREBY ORDERED that the aforesaid motion be[,] and the same is[,] hereby granted, and [Rivera] is sentenced to a mandatory minimum term of imprisonment of three (3) years and four (4) months without the possibility of parole.

On November 3, 2003, the circuit court filed its written findings of fact (FOFs), conclusions of law (COLs), and order granting the prosecution's motion for extended term of imprisonment as a persistent offender, wherein the circuit court entered the following relevant FOFs, COLS, and order:

> 1. The [c]ourt finds that Defendant Rivera is a "persistent offender" within the meaning of Section 706-662(1) of the [HRS] because of the following facts:
>
> a. Defendant Rivera was born on March 8, 1952 and was eighteen (18) years of age or older at the time of the commission of the offenses listed below.
>
> b. On January 20, 1977, in Cr. No. 49175, Defendant Rivera was convicted of the offense of Rape in the Second Degree, an offense which constitutes a class B felony as defined by Act 9, S.L.H. 1972. The offense was committed on March 5, 1976. At all relevant times during these proceedings, Defendant Rivera was represented by counsel . . . .
>
> c. On June 27, 1996, in Cr. No. 95-2564, Defendant Rivera was convicted of the offense of Promoting a Dangerous Drug in the Second Degree, an offense which constitutes a class B felony as defined by the Hawaii Penal Code. The offense was committed on February 1, 1995. . . .
>
> d. On October 15, 1996, in Cr. No. 96-1456, Defendant Rivera was convicted of the offense of Promoting a Dangerous Drug in the Second Degree, an offense which constitutes a class B felony as defined by the Hawaii Penal Code. The offense was committed on October 12, 1995. . . .
>
> 2. The [c]ourt further finds that Defendant Rivera is a "persistent offender" whose commitment for an extended term is necessary for the protection of the public because of the following facts:
>
> a. Defendant Rivera's criminal history included eighty-two (82) arrests resulting in three (3) prior felony convictions in addition to convictions for twenty-seven (27) misdemeanor, petty misdemeanor and violations.
>
> b. Defendant Rivera has an extensive criminal history, the characteristics of which have involved a felony conviction for the violent act of Rape in the Second Degree and two (2) separate convictions for Promoting a Dangerous Drug in the Second Degree.

c. Defendant Rivera's criminality has continued despite being sentenced to periods of both probation and incarceration in his prior convictions. In the instant case, a jury found Defendant Rivera guilty of possession of methamphetamine, drug paraphernalia and marijuana. It is evident that Defendant Rivera's prior involvement with the criminal justice system has not deterred him from further criminal activity.

d. Defendant Rivera has failed to benefit from the criminal justice system.

e. Defendant Rivera has demonstrated a total disregard for the rights of others and has a poor attitude towards the law.

f. Defendant Rivera has demonstrated a pattern of criminality which indicates that he is likely to be a recidivist in that he cannot conform his behavior to the requirement of the law.

g. Due to the quantity and seriousness of Defendant Rivera's past convictions and the seriousness of the instant offenses, Defendant Rivera poses a serious threat to the community[,] and his long term incarceration is necessary for the protection of the public.

3. Pursuant to the consideration of the other sentencing factors under HRS Section 706-606 [(1993)],[8] the [c]ourt further finds that extended term sentences need to be imposed to reflect the seriousness of the offenses, to promote respect for law, to provide just punishment for the offenses, to afford adequate deterrence to criminal conduct, to protect the public from further crimes of Defendant Rivera, to provide Defendant Rivera with needed educational or vocational training, medical care, or other correctional

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[8] HRS § 706-606 provides:

Factors to be considered in imposing a sentence. 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:

(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.

(Emphases added).

> treatment in the most effective manner.
>
> 4. Based on the above, this [c]ourt further finds that Defendant Rivera is a "persistent offender", eligible for extended terms of imprisonment of ten (10) years for each of the class C felony offenses in Counts I and II.
>
> ORDER
>
> ACCORDINGLY, IT IS HEREBY ORDERED that the [prosecution]'s Motion For Extended Term Of Imprisonment Of A Persistent Offender be[,] and the same is, hereby granted.
>
> IT IS FURTHER ORDERED that Defendant Rivera be sentenced to the extended terms of imprisonment of ten (10) years for each of the class C felony offenses in Counts I and II.
>
> IT IS FURTHER ORDERED that said terms are to run concurrently.

(Emphases added).

Also on November 3, 2003, the circuit court filed its written FOFs, COLs, and order granting the prosecution's motion for extended terms of imprisonment as a multiple offender, wherein the circuit court entered the following relevant FOFs, COLS, and order:

> 1. The [c]ourt finds that Defendant Rivera is a "multiple offender" within the meaning of HRS Section 706-662(4)(a) because he has been sentenced for two (2) felonies, to wit:
>
> Cr. No. 02-1-2128
> Count I:
> Promoting a Dangerous Drug in the Third Degree (HRS Section 712-1243; a class C felony)
> Count II:
> Unlawful Use of Drug Paraphernalia (HRS Section 329-43.5(a); a class C felony)
>
> 2. Upon consideration of the nature and circumstances of the offenses and the history and characteristics of Defendant Rivera, as mandated by HRS Section 706-606(1), [see supra note 8,] this [c]ourt further finds that Defendant Rivera is a "multiple offender" whose commitment for extended terms is necessary for the protection of the public because of the following facts:
>
> a. Defendant Rivera's criminal history included eighty-two (82) arrests resulting in three (3) prior felony convictions in addition to convictions for twenty-seven (27) misdemeanor, petty misdemeanor and violations.
>
> b. Defendant Rivera has an extensive criminal history, the characteristics of which have involved a felony conviction for the violent act of Rape in the Second Degree and two (2) separate convictions for Promoting a Dangerous Drug in the Second Degree.

> c. Defendant Rivera's criminality has continued despite being sentenced to periods of both probation and incarceration in his prior convictions. In the instant case, a jury found Defendant Rivera guilty of possession of methamphetamine, drug paraphernalia and marijuana. It is evident that Defendant Rivera's prior involvement with the criminal justice system has not deterred him from further criminal activity.
>
> d. Defendant Rivera has failed to benefit from the criminal justice system.
>
> e. Defendant Rivera has demonstrated a total disregard for the rights of others and has a poor attitude towards the law.
>
> f. Defendant Rivera has demonstrated a pattern of criminality which indicates that he is likely to be a recidivist in that he cannot conform his behavior to the requirement of the law.
>
> g. Due to the quantity and seriousness of Defendant Rivera's past convictions and the seriousness of the instant offenses, Defendant Rivera poses a serious threat to the community[,] and his long term incarceration is necessary for the protection of the public.
>
> 3. Pursuant to the consideration of the other sentencing factors under HRS Section 706-606[, see supra note 8], the [c]ourt further finds that extended term sentences need to be imposed to reflect the seriousness of the offenses, to promote respect for law, to provide just punishment for the offenses, to afford adequate deterrence to criminal conduct, to protect the public from further crimes of Defendant Rivera, to provide Defendant Rivera with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.
>
> 4. Based on the above, this [c]ourt further finds that Defendant Rivera is a "multiple offender," eligible for extended terms of imprisonment of ten (10) years for each of the class C felony offenses in Counts I and II.
>
> ORDER
>
> ACCORDINGLY, IT IS HEREBY ORDERED that the [prosecution]'s Motion For Extended Terms Of Imprisonment Of A Multiple Offender be[,] and the same is, hereby granted.
>
> IT IS FURTHER ORDERED that Defendant Rivera be sentenced to the extended terms of imprisonment of ten (10) years for each of the class C felony offenses in Counts I and II.
>
> IT IS FURTHER ORDERED that said terms are to run concurrently.

(Emphases added).

On November 4, 2003, Rivera timely filed a notice of appeal.

II. STANDARDS OF REVIEW

A. Sentencing

> [A] sentencing judge generally has broad discretion in imposing a sentence. State v. Gaylord, 78 Hawai'i 127, 143-44, 890 P.2d 1167, 1183-84 (1995); State v. Valera, 74 Haw. 424, 435, 848 P.2d 376, 381 . . . (1993). The applicable standard of review for sentencing or resentencing matters is whether the court committed plain and manifest abuse of discretion in its decision. Gaylord, 78 Hawai'i at 144, 890 P.2d at 1184; State v. Kumukau, 71 Haw. 218, 227-28, 787 P.2d 682, 687-88 (1990); State v. Murray[,] 63 Haw. 12, 25, 621 P.2d 334, 342-43 (1980); State v. Fry, 61 Haw. 226, 231, 602 P.2d 13, 16 (1979).
>
> Keawe v. State, 79 Hawai'i 281, 284, 901 P.2d 481, 484 (1995). "[F]actors which indicate a plain and manifest abuse of discretion are arbitrary or capricious action by the judge and a rigid refusal to consider the defendant's contentions." Fry, 61 Haw. at 231, 602 P.2d at 17. And, "'[g]enerally, to constitute an abuse it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.'" Keawe, 79 Hawai'i at 284, 901 P.2d at 484 (quoting Gaylord, 78 Hawai'i at 144, 890 P.2d at 1184 (quoting Kumukau, 71 Haw. at 227-28, 787 P.2d at 688)).

State v. Kaua, 102 Hawai'i 1, 7, 72 P.3d 473, 479 (2003) (quoting State v. Rauch, 94 Hawai'i 315, 322, 13 P.3d 324, 331 (2000)) (brackets and ellipsis points in original).

B. Questions Of Constitutional Law

> "We answer questions of constitutional law 'by exercising our own independent judgment based on the facts of the case,'" and, thus, questions of constitutional law are reviewed on appeal "under the 'right/wrong' standard." State v. Jenkins, 93 Hawai'i 87, 100, 997 P.2d 13, 26 (2000) (citations omitted).

Kaua, 102 Hawai'i at 7, 72 P.3d at 479 (quoting State v. Aplaca, 96 Hawai'i 17, 22, 25 P.3d 792, 797 (2001)).

C. Statutory Interpretation

> "[T]he interpretation of a statute . . . 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) (citations omitted)). See also State v. Toyomura, 80 Hawai'i 8, 18, 904 P.2d 893, 903 (1995); State v. Higa, 79 Hawai'i 1, 3, 897 P.2d 928, 930 (1995); State v. Nakata, 76 Hawai'i 360, 365,

> 878 P.2d 699, 704 (1994). . . .
> Gray v. Administrative Director of the Court, 84 Hawai‘i 138, 144, 931 P.2d 580, 586 (1997) (some brackets added and some in original). See also State v. Soto, 84 Hawai‘i 229, 236, 933 P.2d 66, 73 (1997). Furthermore, our statutory construction is guided by established rules:
>
> > When construing a statute, our 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 we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.
> >
> > When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. . . .
> >
> > In construing an ambiguous statute, "[t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1-15(1) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool.
>
> Gray, 84 Hawai‘i at 148, 931 P.2d at 590 (quoting State v. Toyomura, 80 Hawai‘i 8, 18-19, 904 P.2d 893, 903-04 (1995)) (brackets and ellipsis points in original) (footnote omitted). This court may also consider "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it . . . to discover its true meaning." HRS § 1-15(2)(1993). "Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another." HRS § 1-16 (1993).

Kaua, 102 Hawai‘i at 7-8, 72 P.3d at 479-480 (quoting Rauch, 94 Hawai‘i at 322-23, 13 P.3d at 331-32(quoting State v. Kotis, 91 Hawai‘i 319, 327, 984 P.2d 78, 86 (1999) (quoting State v. Dudoit, 90 Hawai‘i 262, 266, 978 P.2d 700, 704 (1999) (quoting State v. Stocker, 90 Hawai‘i 85, 90-91, 976 P.2d 399, 404-05 (1999) (quoting Ho v. Leftwich, 88 Hawai‘i 251, 256-57, 965 P.2d 793, 798-99 (1998) (quoting Korean Buddhist Dae Won Sa Temple v. Sullivan, 87 Hawai‘i 217, 229-30, 953 P.2d 1315, 1327-28 (1998))))))).

D. Plain Error

> "'We may recognize plain error when the error committed affects substantial rights of the defendant.'" State v. Cordeiro, 99 Hawai'i 390, 405, 56 P.3d 692, 707, reconsideration denied, 100 Hawai'i 14, 58 P.3d 72 (2002) (quoting State v. Jenkins, 93 Hawai'i 87, 101, 997 P.2d 13, 27 (2000) (quoting State v. Cullen, 86 Hawai'i 1, 8, 946 P.2d 955, 962 (1997))). See also [Hawai'i Rules of Penal Procedure] HRPP Rule 52(b) (1993) ("Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

Hauge, 103 Hawai'i at 48, 79 P.3d at 141 (quoting State v. Matias, 102 Hawai'i 300, 304, 75 P.3d 1191, 1195 (2003).

III. DISCUSSION

A. Hawaii's Extended Term Sentencing Scheme Is Not Incompatible With The United States Supreme Court's Decision In *Blakely v. Washington*.

Rivera argues that the United States Supreme Court's recent decision in Blakely v. Washington renders Hawaii's extended term sentencing scheme unconstitutional insofar as it denied him his right to a jury trial by imposing an extended term sentence based upon facts found by the sentencing court but not by the jury. Rivera submits that the circuit court could not have extended his terms of imprisonment based solely on the facts that the jury found beyond a reasonable doubt at his trial, because it was the circuit court that made the posttrial finding that extended term sentences were "necessary for the protection of the public." Rivera propounds that, inasmuch as "this 'public protection' finding was 'essential to the punishment' [he] received, it had to be made by a jury under Apprendi" and Blakely. We disagree.

Blakely focused on the perceived defects of Washington state's determinate sentencing scheme, applying the rule the Court had previously crafted in Apprendi, i.e., that "[o]ther

than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. Thus, the Blakely majority held that a Washington court's sentencing of a defendant to more than three years above the 53-month statutory maximum of the prescribed "standard range" for his offense, on the basis of the sentencing judge's finding that the defendant had acted with deliberate cruelty, violated his sixth amendment right to trial by jury. In our view, the Blakely analysis vis-a-vis Apprendi is confined to the meaning of the construct "statutory maximum" within the context of determinate or "guideline" sentencing schemes. Inasmuch as Hawaii's extended term sentencing structure is indeterminate, we believe that Blakely does not affect the "intrinsic-extrinsic" analysis that this court articulated in Kaua.

The Blakely majority explained that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 124 S.Ct. at 2537 (emphasis in original). "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional facts." Id. (emphasis in original). Accordingly, the essential mandate of Apprendi -- i.e., that any fact other than a prior conviction must be submitted to a jury and proved beyond a reasonable doubt -- is unaffected by the Court's decision in Blakely. Blakely can reasonably be construed, then, as a gloss on Apprendi, clarifying (1) that the upward limit of

any given presumptive sentencing range prescribed in a statutory scheme utilizing a "determinate" sentencing "guideline" system constitutes the "statutory maximum" and (2) that a defendant upon whom a sentence exceeding this "statutory maximum" is imposed is entitled to all of the procedural protections that Apprendi articulates.

In connection with the foregoing, the Blakely majority reasoned as follows:

> Justice O'CONNOR argues that, because determinate sentencing schemes involving judicial factfinding entail less judicial discretion than indeterminate schemes, the constitutionality of the latter implies the constitutionality of the former. Post, at 2543-2548. This argument is flawed on a number of levels. First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal right to a lesser sentence -- and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.

124 S.Ct at 2540 (emphasis added). Thus, the Blakely majority's declaration that indeterminate sentencing does not abrogate the jury's traditional factfinding function effectively excises indeterminate sentencing schemes such as Hawaii's from the decision's sixth amendment analysis. See People v. Claypool, 684 N.W.2d 278, 286 (Mich. 2004) ("[T]he majority in [Blakely] made clear that the decision did not affect indeterminate sentencing systems."). As such, this court's Kaua analysis retains its vitality with respect to Rivera's present challenge of HRS §§ 706-662(1) and (4)(a) and disposes of his claim that the

circuit court erred in imposing extended term sentences.

> Kaua reaffirmed the "intrinsic-extrinsic" analysis first articulated by this court in State v. Schroeder, 76 Hawai'i 517, 880 P.2d 192 (1994), and reaffirmed in State v. Tafoya, 91 Hawai'i 261, 982 P.2d 890 (1999), and rejected the defendant's argument that Apprendi mandated that a "multiple offender" determination, for purposes of HRS § 706-662(4)(a), must be made by the trier of fact, holding (1) that HRS § 706-662 passed constitutional muster under the Hawai'i and United States Constitutions and (2) that "[t]he facts foundational to . . . extended terms of imprisonment . . ., pursuant to HRS § 706-662(4)(a), fell outside the Apprendi rule, and, thus, the ultimate finding that [a defendant] was a 'multiple offender' whose extensive criminal actions warranted extended prison terms was properly within the province of the sentencing court." Kaua, 102 Hawai'i at 13, 72 P.3d at 485. In so holding, this court noted
>
> > the fundamental distinction between the nature of the predicate facts described in HRS §§ 706-662(1), (3), and (4), . . . on the one hand, and those described in HRS §§ 706-662(5) and (6), . . . on the other. Specifically, the facts at issue in rendering an extended term sentencing determination under HRS §§ 706-662(1), (3), and (4) implicate considerations completely "extrinsic" to the elements of the offense with which the defendant was charged and of which he was convicted; accordingly, they should be found by the sentencing judge in accordance with [State v.] Huelsman[, 60 Haw. 71, 588 P.2d 394 (1979),] and its progeny. The facts at issue for purposes of HRS §§ 706-662(5) and (6), however, are, by their very nature, "intrinsic" to the offense with which the defendant was charged and of which he has been convicted; accordingly, they must be found beyond a reasonable doubt by the trier of fact in order to afford the defendant his constitutional rights to procedural due process and a trial by jury. Tafoya, 91 Hawai'i at 271-72, 982 P.2d at 900-01; Schroeder, 76 Hawai'i at 528, 880 P.2d at 203.
>
> Id. at 12-13, 72 P.3d at 484-85 (emphases added).

Hauge, 103 Hawai'i at 59-60, 79 P.3d at 152-53 (emphases deleted) (brackets in original).

Based on Kaua, we held in Hauge that HRS § 706-662(1), see supra note 4, is not unconstitutional. HRS § 706-662(1) allows for extended term sentencing if the "defendant is a persistent offender whose imprisonment for an extended term is necessary for protection of the public" and the defendant has "previously been convicted of two felonies committed at different

times when the defendant was eighteen years of age or older." In Hauge, the defendant-appellant argued, as Rivera does now, that "under Apprendi, the finding that an extended term of imprisonment is 'necessary for protection of the public' is 'separate and apart from [the court's] findings as to the predicate facts' and, therefore, 'should have been submitted to a jury and proven beyond a reasonable doubt.'" Hauge, 103 Hawai'i at 59-60, 79 P.3d at 152-53. Nevertheless, we concluded that, in light of Kaua, Hauge's argument that HRS § 706-662(1) is unconstitutional was without merit.

The bottom line is that Blakely's gloss on Apprendi, which addresses only statutory "determinate" sentencing "guideline" schemes, does not undermine the ongoing viability of this court's decision in Kaua.

1. Hawaii's indeterminate extended term sentencing scheme

"Under our system of government, the power to determine appropriate punishment for criminal acts lies in the legislative branch." State v. Bernades, 71 Haw. 485, 490, 795 P.2d 842, 845 (1990) (quoting State v. Freitas, 61 Haw. 262, 274, 602 P.2d 914, 923 (1979)). Hawai'i utilizes a mandatory indeterminate sentencing scheme. See Bernades, 71 Haw. at 488, 795 P.2d at 844. An indeterminate sentence is "[a] sentence to imprisonment for the maximum period defined by law, subject to termination by the parol board or other [authorized] agency at any time after service of the minimum period" ordinarily set by the paroling authority. Black's Law Dictionary 911 (4th ed. 1968). In this jurisdiction, a convicted defendant's individual characteristics and culpability are considered by the Hawai'i Paroling Authority,

which sets the minimum term of imprisonment, pursuant to HRS § 706-669 (1993). Bernades, 71 Haw. at 488, 795 P.2d at 844.

In State v. Kido, 3 Haw. App. 516, 654 P.2d 1351 (1982), the Intermediate Court of Appeals (ICA) explained the history of the legislature's allocation of the power to sentence:

> Prior to 1965, the paroling authority recommended and the judiciary set the minimum sentence which the convicted defendant was required to serve before becoming eligible for parole and discharge. [Revised Laws of Hawai'i (RLH)] § 258-52 (1955). In 1965, RLH § 258-52[] was amended by Act 102 to take away from the judiciary and instead give to the paroling authority the sole authority to determine minimum terms of imprisonment. Section 258-52, as amended, was recodified in 1968 as HRS § 711-76, pursuant to Act 16 (1968). In 1972, HRS § 711-76 was repealed by Act 9 which enacted the Hawaii Penal Code.
>
> As part of the Hawaii Penal Code, HRS § 706-669 [(1993)] now provides, inter alia:
>
> > § 706-669 Procedure for determining minimum term of imprisonment. (1) When a person has been sentenced to an indeterminate or an extended term of imprisonment, the Hawaii paroling authority shall, as soon as practicable but no later than six months after commitment to the custody of the director of the department of social services and housing hold a hearing, and on the basis of the hearing make an order fixing the minimum term of imprisonment to be served before the prisoner shall become eligible for parole.
>
> As the commentary on HRS § 706-669 states, "This section continues the policy of the previous law of vesting in the Board of Paroles & Pardons the exclusive authority to determine the minimum time which must be served before the prisoner will be eligible for parole."
>
> The legislature has also restricted the judiciary's authority with respect to the kinds of sentences which it may impose.
>
> Section 706-660, HRS (1976) provided:
>
> > § 706-660 Sentence of imprisonment for felony; ordinary terms. A person who has been convicted of a felony may be sentenced to an indeterminate term of imprisonment except as provided for in section 706-660.1 relating to the use of firearms in certain felony offenses. When ordering such a sentence, the court shall impose the maximum length of imprisonment which shall be as follows:
> >
> > (1) For a class A felony -- 20 years;
> >
> > (2) For a class B felony -- 10 years; and

> (3) For a class C felony -- 5 years.[9]
>
> The minimum length of imprisonment shall be determined by the Hawaii paroling authority in accordance with section 706-669.

Apparently referring to the amendments made by Act 102 (1965), the commentary to HRS § 706-660 (1976) states, inter alia:

> In 1965, the Legislature enacted a law designed to end judicially imposed inconsistent sentences of imprisonment. This policy -- known as true indeterminate sentencing -- is continued. The court's discretion is limited to choosing between imprisonment and other modes of sentencing. Once the court has decided to sentence a felon to imprisonment, the actual time of release is determined by parole authorities. Having decided on imprisonment, the court must then impose the maximum term authorized. . . . [Footnotes omitted.]

Id. at 524-25, 654 P.2d at 1357-59. Moreover, the commentary to HRS § 706-660 contains a footnote, which states that "[i]t must, however, be remembered that the Code grants the court the power to impose an extended term of imprisonment" pursuant to HRS § 706-661 (1993 & Supp. 2003).[10]

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[9] HRS § 706-660 (1993) now provides:

> **Sentence of imprisonment for class B and C felonies; ordinary terms.** A person who has been convicted of a class B or class C felony may be sentenced to an indeterminate term of imprisonment except as provided for in section 706-660.1 relating to the use of firearms in certain felony offenses and section 706-606.5 relating to repeat offenders. When ordering such a sentence, the court shall impose the maximum length of imprisonment which shall be as follows:
>
> (1) For a class B felony -- 10 years; and
>
> (2) For a class C felony -- 5 years.
>
> The minimum length of imprisonment shall be determined by the Hawaii paroling authority in accordance with section 706-669.

(Emphasis added).

[10] HRS § 706-661 provides:

> **Sentence of imprisonment for felony; extended terms.** In the cases designated in section 706-662, a person who has been convicted of a felony may be sentenced to an extended indeterminate term of imprisonment. When ordering such a sentence, the court shall impose the maximum length of imprisonment which shall be as follows:
>
> (1) For murder in the second degree -- life without the

(continued...)

In contrast to Hawaii's indeterminate sentencing scheme, at issue in Blakely was Washington's determinate sentencing structure and, particularly, the sentencing court's imposition of a sentence thirty-seven months in excess of the fifty-three-month upward limit of the statutorily enumerated "standard range." Blakely, 124 S.Ct. at 2537. Washington codified a ten-year (or 120-month) maximum sentence for class B felonies in Revised Code of Washington (RCW) § 9A.20.021(1)(b). Id. Nevertheless, the "presumptive guideline range" for a class B felony was set between forty-nine and fifty-three months. Id. at 2535. As noted supra in Section III.A, Blakely construed the upward limit of the presumptive guideline range, and not the ten-year maximum sentence for a class B felony, as the "statutory maximum." The Blakely majority explained, consistent with Apprendi, that any fact permitting sentencing in excess of the upward limit of the presumptive guideline range must be found by the trier of fact at trial beyond a reasonable doubt. Id. at 2537. At issue in Blakely was the fact that the sentencing court's finding of an aggravating fact -- i.e., that the defendant had acted with deliberate cruelty -- subjected the defendant to an enhanced sentence under Washington's determinate

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[10](...continued)

> possibility of parole;
> (2) For a class A felony -- indeterminate life term of imprisonment;
> (3) For a class B felony -- indeterminate twenty-year term of imprisonment; and
> (4) For a class C felony -- indeterminate ten-year term of imprisonment.
>
> The minimum length of imprisonment for [paragraphs] (2), (3), and (4) shall be determined by the Hawaii paroling authority in accordance with section 706-669.

(Emphases added.)

sentencing guideline scheme, notwithstanding that the defendant had not admitted the fact in a guilty plea, nor had a jury found it at trial beyond a reasonable doubt. Therein lies the distinction between Hawaii's enhanced sentencing structure, set forth in HRS § 706-662, and Washington's determinate sentencing guideline scheme: (1) In Hawai‘i, the sentencing scheme is indeterminate, and there is no presumptive guideline range; and (2) the sentencing court could not have subjected the defendant to an extended term of imprisonment based on the same facts in Blakely without submitting those facts to the trier of fact, because the aggravating factor of "deliberate cruelty" entailed an "intrinsic" fact so "inextricably enmeshed in the defendant's actions in committing the offense charged . . . that the Hawai‘i Constitution requires that these findings be made by the trier of fact[.]" Kaua, 102 Hawai‘i at 11, 72 P.3d at 483 (quoting Tafoya, 91 Hawai‘i at 271-72, 982 P.2d at 900-01).

2. The circuit court did not err by sentencing Rivera to extended terms of imprisonment as a persistent and multiple offender.

"It is settled that an extended term sentencing hearing is 'a separate criminal proceeding apart from the trial of the underlying substantive offense,' wherein 'all relevant issues should be established by the state beyond a reasonable doubt.'" Kaua, 102 Hawai‘i at 9, 72 P.3d at 481 (quoting State v. Kamae, 56 Haw. 628, 635, 548 P.2d 632, 637 (1976)).

A convicted defendant may be subject to an extended term of imprisonment if "[t]he defendant is a multiple offender whose criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for protection of

the public[,]" and "[t]he defendant is being sentenced for two or more felonies. . . ." HRS § 706-662(4)(a). A convicted defendant may also be subject to an extended term of imprisonment if "[t]he defendant is a persistent offender whose imprisonment for an extended term is necessary for protection of the public[,]" and "the defendant has previously been convicted of two felonies committed at different times when the defendant was eighteen years of age or older." HRS § 706-662(1). Thus, what subjected Rivera to an extended term of imprisonment as a multiple offender under HRS § 706-662(4)(a) was the fact of his current convictions of and sentencing for two or more felonies, the elements of each of which the jury had found that the prosecution had proved beyond a reasonable doubt. Similarly, Rivera was subject to an extended term of imprisonment as a persistent offender under HRS § 706-662(1) based upon two prior felony convictions committed at different times at the age of eighteen years or older, facts extrinsic to the offenses of which he has presently been convicted and, therefore, outside the purview of the jury's factfinding function.

In Huelsman, this court set out a two-step process in which a sentencing court must engage in order to impose an extended term sentence. 60 Haw. at 76, 588 P.2d at 398. The first step requires a finding beyond a reasonable doubt that the defendant is within the class of offenders to which the particular subsection of HRS § 706-662 applies. Id. In the event that the sentencing court finds that the defendant is a persistent offender under subsection (1) or a multiple offender under subsection (4), the second step requires the sentencing court to determine whether "the defendant's commitment for an

extended term is necessary for protection of the public." Id.

In the course of the October 8, 2003 sentencing hearing, the circuit court orally ruled that Rivera was both a persistent and multiple offender whose extended term sentences were necessary for the protection of the public, see supra Section I, based in pertinent part on Rivera's extensive criminal history. The circuit court then reaffirmed, in its November 3, 2003 written FOFs, COLs, and orders granting the prosecution's motions for extended term sentencing as a persistent and multiple offender, that Rivera's "long term incarceration [was] necessary for the protection of the public" due to the "quantity and seriousness of . . . Rivera's past convictions and the seriousness of the instant offenses." Accordingly, the circuit court adhered to the mandate set forth in Huelsman that the sentencing court "shall enter into the record all findings of fact which are necessary to its decision." 60 Haw. at 92, 588 P.2d at 407. Moreover, the circuit court complied with the Huelsman two-step process, finding that (1) Rivera was a persistent and multiple offender and (2) that his commitment for an extended term was necessary for the protection of the public. Id. at 77, 588 P.2d at 398. We cannot say that the circuit court acted in an "arbitrary or capricious" manner, such that it "clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to [Rivera's] substantial detriment[.]" See Kaua, 102 Hawai‘i at 7, 479 P.3d at 479. Thus, inasmuch as the circuit court's imposition of extended term sentences passed muster under both the United States and Hawai‘i Constitutions, the circuit court did not err in granting the prosecution's motions for extended term sentences.

3. Comparison of the judicial determination "to protect the public" at ordinary sentencing and extended term sentencing

Justice Acoba, in his dissent, contends that the crucial factors in determining whether Blakely applies to HRS § 706-662 in the present matter were (1) the circuit court's determination that sentencing Rivera to extended terms of imprisonment was "necessary for protection of the public" and (2) the fact that such a pronouncement subjected Rivera to "greater punishment than that which could be imposed on the basis of the guilty verdict only." Dissenting opinion at 13.

It could be said that the analogue of Blakely's statutory "standard range" prescribed by Hawaii's indeterminate sentencing scheme for a class C felony is the statutory alternative between a sentence of probation and a five-year term of imprisonment, pursuant to HRS §§ 706-605 (1993 & Supp. 2003)[11]

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[11] HRS § 706-605 provides in relevant part:

> **Authorized disposition of convicted defendants.** (1) Except as provided in parts II and IV of this chapter or in section 706-647 and subsections (2) and (6) of this section and subject to the applicable provisions of this Code, the court may sentence a convicted defendant to one or more of the following dispositions:
>
> (a) To be placed on probation as authorized by part II of this chapter;
>
> (b) To pay a fine as authorized by part III and section 706-624 of this chapter;
>
> (c) To be imprisoned for a term as authorized by part IV of this chapter;
>
> (d) To make restitution in an amount the defendant can afford to pay; provided that the court may order any restitution to be paid to victims pursuant to section 706-646 or to the crime victim compensation special fund in the event that the victim has been given an award for compensation under chapter 351 and, if the court orders, in addition to restitution, payment of fine in accordance with paragraph (b), the payment of restitution and a compensation fee shall have priority over the payment of the fine; payment of restitution shall have priority over payment of a compensation fee; or

(continued...)

and 706-660, see supra note 9. As noted supra in Section III.A.1, the commentary to HRS § 706-660 explains that "[t]he court's discretion is limited to choosing between imprisonment and other modes of sentencing" and, "[h]aving decided on imprisonment, the court must then impose the maximum term authorized." See Kido, 3 Haw. App. at 525, 654 P.2d at 1358.

Thus, had the circuit court imposed upon Rivera a sentence falling within the "standard range" for a class C felony in Counts I and II, it would have chosen either probation or a five-year term of imprisonment, pursuant to HRS § 706-660. For mandatory guidance in determining whether to impose a sentence of probation or imprisonment, the circuit court would then have looked to the "traditional" factors considered in imposing a sentence, pursuant to HRS § 706-606, see supra note 8.

> As a general matter, when exercising its broad discretion to impose any particular sentence so as to fit the punishment to the offense as well as to the needs of the individual defendant and the community, the sentencing court bec[omes] obligated to consider the HRS § 706-606 "factors" as part of its decision making process.
>
> . . . .
>
> . . . HRS § 706-606(2) [(1993)] mandates consideration of the four classic penal objectives -- retribution/just punishment, deterrence, incapacitation, and rehabilitation[.]

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[11](...continued)

> (e) To perform services for the community under the supervision of a governmental agency or benevolent or charitable organization or other community service group or appropriate supervisor; provided that the convicted person who performs such services shall not be deemed to be an employee of the governmental agency or assigned work site for any purpose. All persons sentenced to perform community service shall be screened and assessed for appropriate placement by a governmental agency coordinating public service work placement as a condition of sentence.
>
> (2) The court shall not sentence a defendant to probation and imprisonment except as authorized by part II of this chapter.

(Emphases added).

Gaylord, 78 Hawai‘i at 149-50, 890 P.2d at 1189-90 (footnotes and citations omitted). Specifically, HRS § 706-606(2)(c) provides that the sentencing court shall consider the need for the sentence imposed to "protect the public from further crimes of the defendant[.]"

> HRS § 706-606(2)(c) reflects the penal objective of "incapacitation."
>
> > Incapacitation is the idea of simple restraint: rendering the convicted offender incapable, for a period of time, of offending again. Whereas rehabilitation involves changing the person's habits or attitudes so he or she becomes less criminally inclined, incapacitation presupposes no such change. Instead, obstacles are interposed to impede the person's carrying out whatever criminal inclinations he or she may have. Usually, the obstacle is the walls of a prison, but other incapacitative techniques are possible -- such as exile or house arrest.
>
> [A. von Hirsch and A. Ashworth,] Principled Sentencing at 101 [(1992)]. For the latest and probably most definitive empirical study of the relationship between incapacitation and crime reduction, see F. Zimring and G. Hawkins, Incapacitation (1995).

Gaylord, 78 Hawai‘i at 148 n.35, 890 P.2d at 1188 n.35. Therefore, as this court explained in Gaylord, sentencing courts are required to consider the four classic penal objectives embedded in HRS § 706-606(2) when imposing any sentence, whether for ordinary or extended terms. Most relevant to our present analysis, sentencing courts must evaluate the "need for the sentence imposed . . . [t]o protect the public from further crimes of the defendant[.]" HRS § 706-606(2)(c) (emphasis added). Consequently, in the case of sentencing a defendant to our statutory scheme's "standard range" for a class C felony, the jury's verdict alone authorizes a sentence of either probation or a five-year indeterminate maximum term of imprisonment under HRS

§ 706-660, and that authorization by the jury's verdict includes the requirement that the sentencing court consider all the factors set forth in HRS § 706-606 when determining the particular sentence to be imposed.

In the present matter, the circuit court was required first to consider the factors set forth in HRS § 706-606 in imposing a sentence; in doing so, the circuit court obviously determined that the indeterminate maximum term of imprisonment for each of Rivera's class C felonies, rather than probation, was the appropriate sentence. See supra Section I. Furthermore, the circuit court expressly noted in its written FOFs, COLs, and orders granting the prosecution's motions for extended terms of imprisonment as a persistent and multiple offender that it had considered the sentencing factors enumerated in HRS § 706-606 and had determined that extended term sentences were appropriate in order "to protect the public from further crimes" committed by Rivera. Id. Thus, the circuit court determined under HRS § 706-606 that the classic penal objective of "incapacitation" took primacy in the sentencing of Rivera in order to accomplish the goal of rendering him incapable of offending again for the indeterminate maximum period of time. As the circuit court demonstrated in its findings, such an analysis under HRS § 706-606 was the basis for its determination that prison for an indeterminate maximum term, rather than probation, was the appropriate sentence for Rivera.

Admittedly, a sentencing court's imposition of an extended term sentence requires the determination that it is "necessary for protection of the public." HRS § 706-662. Nevertheless, such a determination is effectively the same one that the sentencing court has made upon concluding that a defendant should be sentenced to an indeterminate maximum term of imprisonment rather than probation under "ordinary" sentencing principles. The factor that justifies the enhancement of the sentence to extended prison terms, therefore, is the fact of prior or multiple felony convictions. See Almendarez-Torres v. United States, 523 U.S. 224, 243 (1998) (noting that "recidivism . . . is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence"). Thus, the sentencing judge acquires the authority to impose an extended term sentence under HRS § 706-662(1) only upon finding the Apprendi-approved "additional fact" of a prior conviction. Moreover, HRS §§ 706-662(1) and 706-662(4) expressly mandate that the sentencing court "shall not make such a finding" that an extended term sentence is "necessary for protection of the public" unless the defendant has prior or multiple felony convictions. Hence, the "necessary for protection of the public" determination alone is insufficient to subject a defendant to extended terms of imprisonment. In contrast, the sentencing court's finding in Blakely that the defendant acted with deliberate cruelty, was the sole aggravating factor that extended the defendant's sentence to ninety months from the fifty-three-month statutory maximum of the standard range.

To recapitulate, inasmuch as both HRS §§ 706-606 and 706-662 require the determination of whether the sentence imposed

is needed to protect the public, the sole determining factor remaining that increases the penalty under Hawaii's extended term sentencing in HRS § 706-662(1) is the fact of a prior conviction, a fact that the Supreme Court expressly authorized the sentencing court to find in Apprendi and again in Blakely. Similarly, the sole factor, beyond those already enumerated in HRS § 706-606 and already considered by the sentencing court, which extends an indeterminate prison term pursuant to HRS § 706-662(4)(a), is the fact that a defendant is a multiple offender. The multiple offender determination, pursuant to HRS § 706-662(4)(a), mirrors the prior conviction exception in Apprendi because the defendant has either already pleaded guilty, and thereby admitted guilt, or the trier of fact has found beyond a reasonable doubt that the defendant has committed two or more felonies for which he is currently being sentenced. See Apprendi, 530 U.S. at 488 (reasoning that both the "certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that [the defendant] did not challenge . . . that 'fact[,]' . . . mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range").

To underscore our point, we note that, within the range of discretion that the Hawai'i Penal Code affords courts in imposing sentences, HRS § 706-668.5 (1993)[12] authorizes

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[12] HRS § 706-668.5 provides:

Multiple sentence of imprisonment. (1) If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an unexpired term of imprisonment, the terms may run concurrently or consecutively. Multiple terms of imprisonment

(continued...)

sentencing courts to impose sentences consecutively under certain circumstances.

> HRS § 706-668.5 (1993) permits consecutive sentencing if multiple terms of imprisonment are imposed on a criminal defendant at the same time. The legislative purpose of the statute is to give the sentencing court discretion to sentence a defendant to a term of imprisonment to run either concurrently or consecutively. Discretionary use of consecutive sentences is properly imposed in order to deter future criminal behavior of the defendant, to insure public safety, and to assure just punishment for the crimes committed. Absent clear evidence to the contrary, it is presumed that a sentencing court will have considered all factors before imposing concurrent or consecutive terms of imprisonment under HRS § 706-606 (1993).

State v. Tauilili, 96 Hawai‘i 195, 199-200, 29 P.3d 914, 918-19 (2001) (footnotes and citations omitted).

In the present matter, the circuit court had the discretion under HRS § 706-668.5 to sentence Rivera to serve two consecutive five-year indeterminate maximum terms of imprisonment for his convictions of class C felonies in Counts I and II because "multiple terms of imprisonment [were] imposed on [him] at the same time[.]" Again, the circuit court would have been required to consider the factors set forth in HRS § 706-606 -- including the need to "protect the public" contained in HRS § 706-606(2)(c) -- when determining whether to impose consecutive or concurrent terms of imprisonment.

> [B]y the plain language of HRS § 706-668.5(2) -- although subject, pursuant to HRS § 706-668.5(1), to presumptively concurrent sentencing in connection with multiple prison terms "imposed at the same time" --, the sentencing court [is] obligated to "consider the factors set forth in [HRS §]

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[12](...continued)
imposed at the same time run concurrently unless the court orders or the statute mandates that the terms run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms run concurrently.

(2) The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider the factors set forth in section 706-606.

> 706-606" when determining whether multiple indeterminate prison terms were to run concurrently or consecutively.
> . . . .
> . . . [T]he fact that HRS § 706-606 is incorporated by reference into HRS § 706-668.5 has profound significance. Bearing in mind that all indeterminate (including consecutive) prison terms are inherently incapacitative, the legislative sentencing philosophy permeating HRS ch. 706 in general and HRS § 706-606 in particular dictates that discretionary consecutive prison sentences, pursuant to HRS § 706-668.5, may properly be imposed only if the penal objectives sought to be achieved include retribution (i.e., "just deserts") and deterrence.

Gaylord, 78 Hawai'i at 150, 890 P.2d at 1190 (footnotes omitted). Had the circuit court sentenced Rivera to consecutive terms of imprisonment in Counts I and II, the effect would have been a ten-year indeterminate maximum term of imprisonment, a term equal to the two concurrent ten-year extended terms of imprisonment that the circuit court actually imposed in this case. See supra Section I. It defies logic that the circuit court could, consistent with Blakely, legitimately impose the same ten-year sentence, comprised of two consecutive five-year indeterminate maximum terms, under ordinary sentencing principles, but run afoul of Blakely by imposing concurrent ten-year extended terms of imprisonment based on the finding of prior or multiple concurrent convictions.

B. The Circuit Court Properly Sentenced Rivera As A Repeat Offender.

Rivera argues that the circuit court erred in sentencing him as a repeat offender, pursuant to HRS § 706-606.5, see supra note 6, for his conviction in Count II, unlawful use of drug paraphernalia, in violation of HRS § 329-43.5(a), inasmuch as unlawful use of drug paraphernalia is not a class C felony enumerated under HRS § 706-606.5 and therefore cannot trigger the operation of the statute. On that basis, Rivera contends that

his sentence must be vacated and remanded for further proceedings. We disagree.

The prosecution moved in the present matter for Rivera to be sentenced as a repeat offender, under HRS § 706-606.5(1)(b)(iv), to a mandatory minimum term of imprisonment of three years and four months based upon his conviction of the offense charged in Count I, promoting a dangerous drug in the third degree, "an enumerated class C felony under HRS § 706-606.5(1)[.]" It was Rivera's conviction of promoting a dangerous drug in the third degree that triggered his eligibility for sentencing as a repeat offender under HRS § 706-606.5(1).

HRS § 706-606.5 provides in relevant part that "any person convicted of . . . any of the following class C felonies," including HRS § "712-1243[,] relating to promoting a dangerous drug in the third degree[,] . . . shall be sentenced to a mandatory minimum period of imprisonment without possibility of parole during such period . . . ." (Emphasis added.) In its order granting the prosecution's motion for repeat offender sentencing, the circuit court found that Rivera was a repeat offender based upon his prior convictions in Criminal Nos. 95-2564 and 96-1456, both involving the offense of promoting a dangerous drug in the second degree, in violation of HRS § 712-1242, a class B felony. Thus, Rivera's mandatory minimum sentence under HRS § 706-660.5(1)(b)(iv) for two prior felony convictions, "[w]here the instant conviction is for a class C felony offense enumerated above[, is] three years, four months." The circuit court therefore ordered that Rivera be sentenced to "a mandatory minimum term of imprisonment of three (3) years and four (4) months without the possibility of parole."

Rivera presumably grounds his assertion that the circuit court sentenced him as a repeat offender based upon his conviction of the offense charged in Count II, unlawful use of drug paraphernalia, on the circuit court's oral ruling, which granted the prosecution's motion for sentencing of a repeat offender. At the hearing on the prosecution's motion, the circuit court granted the prosecution's motions for extended terms of imprisonment and stated that "in Count 1, I'll sentence you to 10 years; in Count 2, 10 years; in Count 3, 30 days. In Counts 1 and 2, mandatory minimum sentence of three years and four months." (Emphasis added). However, in its October 13, 2003 written order granting the prosecution's motion for repeat offender sentencing, the circuit court did not specify the count to which the mandatory minimum term of imprisonment applied. Rivera correctly notes that the offense of unlawful use of drug paraphernalia is not among those class C felonies enumerated in HRS § 706-606.5(1), the conviction of which would possibly subject him to repeat offender sentencing. See HRS § 706-606.5(1), supra note 6. Nevertheless, assuming arguendo that the circuit court orally erred in sentencing Rivera as a repeat offender in connection with Count II, in addition to its oral imposition of a repeat offender sentence in connection with Count I, any error was harmless.

As a preliminary matter, we note that Rivera is judicially estopped from challenging his sentence as a repeat offender.

> Pursuant to the doctrine of judicial estoppel, [a] party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed

> by him, at least where he had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by his action.

Roxas v. Marcos, 89 Hawai‘i 91, 124, 969 P.2d 1209, 1242 (1998) (citation omitted). At the October 8, 2003 hearing on the prosecution's motions for extended term sentencing, Rivera expressly conceded that "the repeat offender statute applies here and that this [c]ourt has an obligation to impose a mandatory minimum[.]" (Emphasis added). Moreover, Rivera filed a motion for reconsideration of his sentence on January 6, 2004, which stated in relevant part:

> 2. The defendant appeared before this [c]ourt on October 8, 2003 for sentencing in the above-entitled case. At that time, this [c]ourt imposed the following sentence upon the defendant:
>
> In Count one - 10 years (as a persistent and multiple offender) concurrent, with a mandatory minimum sentence of three years and four months.
>
> In Count two - 10 years (as a persistent and multiple offender) concurrent.
>
> In Count three - 30 days with credit for time served.

(Emphases added). That being so, Rivera cannot comply with Hawai‘i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) (2004), which requires that he show "where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court[.]" Rivera cannot now "take a position in regard to [his sentence as a repeat offender that] is directly contrary to" what he asserted at sentencing, nor may he raise as error a point on appeal to which he did not object at sentencing. Roxas, 89 Hawai‘i at 124, 969 P.2d at 1242; HRAP Rule 28(b)(4). For reasons that we discuss infra, we decline to recognize plain error, inasmuch as any error committed by the circuit court in orally sentencing Rivera did not affect his "substantial rights." Hauge, 103 Hawai‘i at 48, 79 P.3d at 141.

Even if the circuit court's oral grant of the prosecution's motion for repeat offender sentencing misstated that Rivera's mandatory minimum prison term applied to both Counts I and II, "[e]rror is not to be viewed in isolation [or] considered purely in the abstract." Aplaca, 96 Hawai'i at 25, 25 P.3d at 800 (citations omitted). "Consistent with the harmless error doctrine, we have frequently stated that error 'must be examined in light of the entire proceedings and given the effect to which the whole record shows it is entitled.'" Id.

> The fact that the error, in this case, implicates [Rivera]'s sentence and not his conviction does not render the harmless error doctrine inapplicable. To the contrary, HRS § 641-16 (1993) expressly states that "[n]o order, judgment, or sentence shall be reversed or modified unless the court is of the opinion that error was committed which injuriously affected the substantial rights of the appellant." (Emphasis added). In addition, [Hawai'i Rules of Penal Procedure (HRPP)] Rule 52, which provides that "[a]ny error, defect, irregularity[,] or variance which does not affect substantial rights shall be disregarded[,]" is applicable to all penal proceedings, including sentencing. (Emphasis added.) See HRPP Rule 54(a) (2000) ("These rules shall apply to all penal proceedings in all courts of the State of Hawai'i except as provided in subsection (b) of this rule."). Moreover, the United States Supreme Court has stated that most constitutional errors, including those at sentencing, can be harmless. See, e.g., Arizona v. Fulminante, 499 U.S. 279, 306, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

Id. (brackets in original).

In its October 13, 2003 written order granting the prosecution's motion for repeat offender sentencing, the circuit court imposed only one mandatory minimum prison term of three years and four months. In addition, the circuit court imposed extended term sentences of ten years in Counts I and II to run concurrently. Accordingly, any error that the circuit court committed by orally stating that the mandatory minimum term of imprisonment applied both to Counts I and II was harmless,

because Rivera is, in fact, serving only one mandatory minimum term of imprisonment of three years and four months. Moreover, by his own express admission, Rivera clearly understood that the circuit court (1) had "an obligation to impose a mandatory minimum" term of imprisonment under HRS § 706-606.5 as a result of his conviction of promoting a dangerous drug, as charged in Count I, and (2) had in fact imposed that very mandatory minimum in connection with Count I. As such, we hold (1) that there is no reasonable possibility that the circuit court's oral slip of the tongue contributed to Rivera's sentence and (2) that any resulting error was harmless beyond a reasonable doubt.

IV. CONCLUSION

Based on the foregoing analysis, we affirm the circuit court's judgment of conviction, extended term sentences, and repeat offender sentence.

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