DISSENTING OPINION BY ACOBA, J.,
WITH WHOM DUFFY, J., JOINS

In light of Blakely v. Washington, -- U.S. --, 124 S.Ct. 2531 (2004), I believe our prior decisions in 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), must be reexamined. In my view, in Blakely, the United States Supreme Court further explicated the holding in Apprendi v. New Jersey, 530 U.S. 466 (2000), and emphatically reaffirmed that the United States Constitution's Sixth Amendment right to a jury trial mandates 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.'" Blakely, -- U.S. at --, 124 S. Ct. at 2536 (quoting Apprendi, 530 U.S. at 490).[1] The Sixth Amendment is applicable to the States through the Fourteenth Amendment and we are bound to apply the construction given it by the United States Supreme Court, to the extent it establishes a minimum standard of protection as against government action. See State v. Adrian, 51 Haw. 125, 131, 453 P.2d 221, 225 (1969) (holding that the confrontation clause of the Sixth Amendment is applicable to the states and therefore the

[1] Both the prosecution and Defendant cite to Blakely. In Defendant's case, the court filed its judgment of conviction and sentence on October 8, 2003. The Supreme Court decided Blakely on June 24, 2004. Thus, inasmuch as Defendant's case was pending on direct review when Blakely was decided, he is entitled to retroactive application of the Supreme Court opinion in Blakely. Cf. State v. Garcia, 96 Hawai‘i 200, 29 P.3d 919 (2001). In any event, the core premises in Blakely are derived from Apprendi, which was decided on June 26, 2000, and insofar as such premises are set forth in Blakely, references to Blakely would encompass Apprendi.

U.S. Supreme Court's interpretation of the provision is binding upon this court). Applying the plain import of Blakely and unless it is otherwise qualified, it would appear that "the State's sentencing procedure [in this case] did not comply with the Sixth Amendment," Blakely, -- U.S. at --, 124 S. Ct. at 2538, and, thus, the sentence imposed on Defendant-Appellant Larry Rivera (Defendant) "is invalid[,]" id., and the case should be remanded for resentencing.[2] I set forth the Blakely rule as it applies to this case first and discuss the majority's rationale, second.

I.

Following a jury trial, Defendant was convicted of Count I, Promoting a Dangerous Drug in the Third Degree, Hawai'i Revised Statutes (HRS) § 712-1243; Count II, Unlawful Use of Drug Paraphernalia, HRS § 329-43.5(a); and Count III, Promoting a Detrimental Drug in the Third Degree, HRS § 712-1249, all class C felonies except for Count III, which is a petty misdemeanor. Thus, under HRS § 706-660 (1993),[3] the "ordinary" and "maximum"

[2] The United States District Court for the District of Hawai'i, Judge Susan Oki Mollway, has arrived at a similar application of Apprendi in Kaua v. Frank, Civ. No. 03-00432 (D. Haw. Dec. 9, 2004). Subsequent to this court's decision in Kaua, on December 9, 2004, the district court granted Kaua's 28 U.S.C. § 2254 petition to vacate extended sentence upon a determination that Kaua's extended sentence was "contrary to, and involved an unreasonable application of Apprendi." Id. at 29.

[3] HRS § 706-660 states in pertinent part as follows:

> **Sentence of imprisonment for class . . . C felonies; ordinary terms.** A person who has been convicted of a . . . class C felony may be sentenced to an indeterminate term of imprisonment . . . . When ordering such a sentence, the court shall impose the maximum length of imprisonment which

(continued...)

sentence as to Count I is five years, as to Count II, five years, and as to Count III, thirty days. Pertinent here, Plaintiff-Appellee State of Hawai‘i moved to have Defendant sentenced to an extended term of imprisonment as a multiple offender and to an extended term of imprisonment as a persistent offender for each of the class C felonies in Counts I and II. The first circuit court (the court), exercising its discretion, granted the motions pursuant to HRS § 706-662 (Supp. 2002).[4] HRS § 706-662 provides in relevant part as follows:

> **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.
>
> . . . .
>
> (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[.]

(Emphases added.)

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[3](...continued)
shall be as follows:

. . . .

(2) For a class C felony -- 5 years.

The maximum length of imprisonment shall be determined by the Hawaii paroling authority in accordance with section 706-669.

(Emphases added.)

[4] In light of the fact that Kaua was binding on the court, the court was correct in following precedent.

In sentencing Defendant as a persistent offender, the court made the following "findings of fact":

> 1. The Court finds that [Defendant] is a "persistent offender" within the meaning of Section 706-662(1) of the [HRS] because of the following facts:
>
> a. [Defendant] 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, 1997, in Cr. No. 49175, [Defendant] 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] was represented by counsel, to wit, Ed Worth and/or Marie Milks.
>
> c. On June 27, 1996, in Cr. No. 95-2564, [Defendant] 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. At all relevant times during these proceedings, [Defendant] was represented by counsel, to wit, Deputy Public Defender Debra Loy.
>
> d. On October 15, 1996, in Cr. No. 96-1456, [Defendant] was convicted of the offense of Promoting a Dangerous Drug in the Second Degree, an offense which constitute a class B felony as defined by the Hawaii Penal Code. The offense was committed on October 12, 1995. At all relevant times during these proceedings, [Defendant] was represented by counsel, to wit, Deputy Public Defender Debra Loy.
>
> 2. The Court further finds that [Defendant] 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's] criminal history includes 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] 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'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] guilty of possession of methamphetamine, drug paraphernalia and marijuana. <u>It is evident that [Defendant's] prior involvement with the criminal justice system has not deterred him from further criminal activity</u>.
>
> d. <u>[Defendant] has failed to benefit from the criminal justice system</u>.
>
> e. <u>[Defendant] has demonstrated a total disregard for the rights of others and has a poor attitude toward the law</u>.
>
> f. <u>[Defendant] has demonstrated a pattern of criminality which indicates that he is likely to be a recidivist in that he cannot confirm his behavior to the</u>

requirement of the law.

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

3. Pursuant to consideration of the other sentencing factors under HRS Section 706-606, the Court 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], to provide [Defendant] with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

4. Based on the above, this Court further finds that [Defendant] 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.

(Emphases added.) In sentencing Defendant as a multiple offender, the court made the following "findings of fact":

1. The Court finds that [Defendant] 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], as mandated by HRS Section 796-606(1), this Court further finds that [Defendant] is a "multiple offender" whose commitment for extended terms is necessary for the protection of the public because of the following facts:

a. [Defendant's] criminal history includes 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] has an extensive criminal history, the characteristics of which have involved a felony conviction for Rape in the Second Degree and two (2) separate convictions for Promoting a Dangerous Drug in the Second Degree.

c. [Defendant'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] guilty of possession of methamphetamine, drug paraphernalia and marijuana. It is evident that [Defendant's] prior involvement with the criminal justice system has not deterred him from further criminal activity.

> d. [Defendant] has failed to benefit from the criminal justice system.
>
> e. [Defendant] has demonstrated a total disregard for the rights of other and has a poor attitude toward the law.
>
> f. [Defendant] has demonstrated a pattern of criminality which indicates that he is likely to be a recidivist in that he cannot confirm his behavior to the requirement of the law.
>
> g. Due to the quantity and seriousness of [Defendant's] past convictions and the seriousness of the instant offenses, [Defendant] poses a serious threat to the community and his long term incarceration is necessary for the protection of the public.
>
> 3. Pursuant to consideration of the other sentencing factors under HRS Section 706-606, the Court further finds that the 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], 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 Court further finds that [Defendant] 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.

(Emphases added.)

The majority attempts to distinguish Blakely from this case on the grounds that (1) Blakely addresses "determinate" sentencing, as opposed to an indeterminate sentencing scheme, majority opinion at 24, and (2) Blakely concerned a fact (a determination of "deliberate cruelty") which in our jurisdiction would be "intrinsic" to a charge under our sentencing paradigm distinguishing "intrinsic" and "extrinsic" facts and, hence, would be decided by our juries, id. With all due respect, and accepting the language of the majority in Blakely at face value, I do not believe that that decision can be parsed so narrowly.[5]

[5] I do not agree that Blakely is a mere "gloss" on Apprendi, as the majority contends. Majority opinion at 17. See Apprendi, 530 U.S. at 497 n.21 (before Blakely, "express[ing] no view on the subject" of "determinate sentencing schemes"); see also Blakely, -- U.S. at --, 124 S. Ct. at 2561 (continued...)

II.

In Blakely, "second-degree kidnaping [was] a class B felony" punishable by "a term of ten years" under a Washington statute. -- U.S. at --, 124 S. Ct. at 2535. Sentencing guidelines, however, established "a 'standard range' of 49 to 53 months" of imprisonment "for [the] . . . offense of second-degree kidnaping with a firearm." Id. "Pursuant to [a] plea agreement, the State [of Washington] recommended a sentence within the standard range of 49 to 53 months." Id. However, "the judge rejected the State's recommendation and imposed an exceptional sentence of 90 months -- 37 months beyond the standard maximum." Id. Under Washington law, "[a] judge may impose a sentence above the standard range if he finds substantial and compelling reasons justifying an exceptional sentence." Id. (internal quotation marks and citation omitted). The judge "justified the sentence on the ground that petitioner had acted with 'deliberate cruelty,' a statutorily enumerated ground for departure" from the standard range. Id. After a hearing, the judge "issued 32 findings of fact" in support of his sentence. Id.

The United States Supreme Court "reversed" the judgment. It noted that "[t]he facts supporting that finding" of

[5](...continued)
(Breyer, J., dissenting, joined by O'Connor, J.) ("I would have thought the Court might have limited *Apprendi* so that its underlying principle would not undo sentencing reform efforts. Today's case dispels that illusion.").

"'deliberate cruelty'" "were neither admitted by petitioner nor found by a jury." Id. at --, 124 S. Ct. at 2537. It rejected the State's contention "that there was no *Apprendi* violation because the relevant 'statutory maximum' is not 53 months, but the 10-year maximum for class B felonies[.]" Id. The Court made clear "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*." Id. (emphasis in original). Consequently,

> the . . . "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.

Id. (emphasis in original and emphasis added) (internal quotation marks and citation omitted). The Supreme Court indicated that "[t]he judge in this case [then] could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea[]" because "to justify an exceptional sentence . . . factors other than those which are used in computing the standard range sentence for the offense" must be "take[n] into account[.]" Id. (internal quotation marks and citation omitted). The fact that discretion is exercised in arriving at an enhanced sentence is not determinative inasmuch as the judge "cannot make that judgment without finding some facts to support it beyond the bare elements of the offense." Id.

Hence, "[w]hether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." Id. (emphases in original). Thus,

> labels do not afford an acceptable answer[] . . . as . . . to the constitutionally novel and elusive distinction between "elements" and "sentencing factors[]" [because] . . . the relevant inquiry is not of form, but of effect - does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?

Apprendi, 530 U.S. at 494 (emphasis added) (internal quotation marks and citations omitted) (brackets omitted).[6] The Supreme Court explained that "when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." Apprendi, 530 U.S. at 496 n.19 (emphasis added).

III.

In this case the "ordinary" "maximum" term for each of the offenses under Counts I and II is five years' imprisonment. HRS § 706-660(2); see supra note 3. Upon conviction, then, five years' imprisonment would be the "prescribed statutory maximum," Blakely, -- U.S. at --, 124 S. Ct. at 2536 (internal quotation marks and citation omitted), for the crime involved because five years is "the maximum [sentence] a [judge] may impose without any additional findings," id. at --, 124 S. Ct. at 2537 (emphasis in

[6] The distinction between "sentencing facts" and "elements of crimes" was the way by which "legislatures could indicate whether a judge or a jury must make the relevant factual determination." Blakely, -- U.S. at --, 124 S. Ct. at 2560 (Breyer, J. dissenting, joined by O'Connor, J.).

original). An extended sentence under HRS § 706-662 "describe[s] an increase beyond the maximum authorized statutory sentence," i.e., beyond one that can be imposed simply on the jury verdict, and thus "is the functional equivalent of an element of a greater offense" that was not "covered by the jury's guilty verdict." Apprendi, 530 U.S. at 496 n.19.

In extending the ordinary sentence, i.e., increasing the penalty from five years' imprisonment to ten years pursuant to HRS § 706-662 on each one of the counts, the court was required (after establishing threshold facts) to determine that doubling the sentence was "necessary for the protection of the public." HRS § 706-662. As in Blakely, the court "cannot make that judgment without finding some facts to support it beyond the bare elements of the offense." Blakely, -- U.S. at -- n.8, 124 S. Ct. at 2538 n.8 (emphasis added). Thus, the court made "findings of fact" to support its "judgment" that the sentence was necessary to protect the public based on facts beyond those established by the guilty verdict.

Similar to Blakely, "factors other than those which are used in computing the standard range sentence for the offense" were "considered." --- U.S. at ---, 124 S. Ct. at 2537. Tellingly, then, the court could not have imposed the extended sentence simply on the strength of the jury's verdict; rather, it was required to make supplemental findings justifying a sentence double that which could be authorized under the jury verdict.

Consequently, in the instant case, "the verdict alone [did] not authorize the sentence." Id. But "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment' . . . and the judge exceeds his proper authority," id., and the sentence must be vacated.

IV.

Although Blakely concerned a "determinate" sentencing scheme, the Supreme Court nowhere limited the Sixth Amendment's reach in Blakely to only such approaches.[7] Thus, that our sentencing structure may generally be denominated an "indeterminate" one is not a basis for distinguishing Blakely. Contrasting determinate sentencing from indeterminate sentencing in response to Justice O'Connor's dissent, the Blakely majority apparently posited as an indeterminate sentencing procedure, one in which the jury's guilty verdict would authorize the judge's sentence without the finding of any additional facts: "In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail." -- U.S. at --, 124 S. Ct. at 2540. Ordinarily, then, under an indeterminate scheme of sentencing such as our own, the ordinary indeterminate sentence imposed by the court is not the subject of

[7] As the Court's majority said, "[t]his case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." Blakely, -- U.S. at --, 124 S.Ct. at 2540.

further jury decision because the indeterminate sentence is authorized by the jury's verdict. That is not the case here, however. The extended sentences have been imposed pursuant to a separate non-jury extended term proceeding, tacking on an additional five years to the indeterminate sentence of five years on each of Count I and Count II.

Hence, in the case before us, it is the findings of the court, based on facts and factors not submitted to the jury, that resulted in a prison term beyond that simply attributable to the guilty verdict. In imposing the extended sentences, the court was not deciding a sentence within fixed statutory limits, (as in the example of indeterminate sentencing provided by the Blakely majority referred to supra), but whether to impose an additional term of imprisonment. By rough analogy, the presumptive standard range of forty-nine to fifty-three months for the offense in Blakely is akin to the five-year indeterminate sentence in the instant case, and the "sentence enhancement" by the Washington judge extending the sentence to ninety months based upon findings of "deliberate cruelty" is the equivalent of the extended term proceeding based on persistent and multiple offender findings in this case. The extended term proceeding under the logic of Blakely would be a proceeding subject to the right to jury trial under the Sixth Amendment.

Even outside that analogy, the manifest purpose of the extended term hearing conducted here was to enlarge the

indeterminate sentence of five years to ten years on each of Counts I and II. Insofar as an extended term is imposed in addition to the ordinary indeterminate sentence authorized by the jury's verdict, that extended term does not fall within the maximum sentence a judge may impose by virtue of a guilty verdict. Consequently, with respect to extended sentences under our "indeterminate" sentencing structure, "the required finding[s by the court] expose the defendant to a greater punishment than that authorized by the jury verdict[.]" Id. at 494.

V.

That in Blakely, the judge found the "petitioner had acted with 'deliberate cruelty,'" id. at --, 124 S. Ct. at 2535, was not dispositive in that case and does not afford a basis for distinguishing the instant case. As the Supreme Court pointed out, "[w]hether the judge's authority to impose an enhanced sentence depends on finding a specified fact . . . , one of several specified facts . . . , or . . . aggravating fact" does not alter the "case that the jury's verdict alone [did] not authorize the sentence." id. at --, 124 S. Ct. at 2538. "Labels . . . [such] as . . . 'elements' and 'sentencing factor,'" then, are not the "answer." Apprendi, 530 U.S. 466, 494. To reiterate, the "relevant inquiry is . . . [the] effect -- does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Id. (emphasis added). Therefore, whether the required finding of

"necessary for the protection of the public," HRS § 706-662, is viewed as an "elemental" fact or a "sentencing factor," 530 U.S. at 467, or that the supporting subsidiary facts found by the court constitute part of such facts or factors, "it remains the case" that the effect of the court's pronouncement under HRS § 706-606 subjects the defendant to greater punishment than that which could be imposed on the basis of the guilty verdict only.

VI.

It begs the question, then, to find Apprendi inapplicable on the basis that an extended sentence hearing is a two "step" procedure, the first requiring

> a finding beyond a reasonable doubt that the defendant is a multiple offender, which finding may not be made unless the defendant is being sentenced for two or more felonies or is under sentence for a felony and the maximum terms of imprisonment authorized for the defendant's crimes met certain requisites[] . . . [and the] second[,] . . . to determine whether the defendant's commitment for an extended term is necessary for the protection of the public[,] . . . [the latter] deal[ing] with the subject matter of ordinary sentencing[,]

Kaua, 102 Hawai'i at 9, 72 P.3d at 481 (internal quotation marks and citations omitted). The criteria for extended terms rest not only on the foundational facts as to prior felonies or pending or past felony sentences, see HRS § 706-662, supra, but also on such facts as would support the determination that an extended term in the particular case is necessary for the protection of the public. Because such subsidiary facts are required in addition to the prescribed foundational ones to arrive at the ultimate finding, see findings by the court, supra, these subsidiary facts

or "additional findings" are "essential to the punishment," Blakely, -- U.S. at --, 124 S.Ct. at 2537, and as a result, must be found by a jury beyond a reasonable doubt, id., and not merely treated as "the subject matter of ordinary sentencing[,]" Kaua, 102 Hawai'i at 12, 72 P.3d at 484 (quoting Carvalho, 101 Hawai'i at 111, 63 P.3d at 419) (quoting Huelsman, 60 Haw. at 79, 588 P.2d at 400).

It would appear inconsistent with Apprendi and Blakely, then, to hold, for example, that "the ultimate finding that [a defendant] was a 'multiple offender' whose extensive criminal actions warranted extended prison terms was [one] properly within the province of the sentencing court." Id. at 13, 72 P.3d at 485. Hence, Kaua's emphasis on the "extrinsic" nature of factors involved in such an "ultimate finding" as being "separable from the offense itself" because "involv[ing] consideration of collateral events or information" is incorrect. Id. at 11, 72 P.3d at 483 (quoting State v. Tafoya, 91 Hawai'i 261, 271, 982 P.2d 890, 900 (1999)). For such events or information constitute the basis for findings necessary for an extended sentence. Because they do, under Blakely, they are the very matters that must be considered by a jury. The ultimate finding, then, is not susceptible to an "ordinary sentence" procedure. Id. at 12, 72 P.3d at 484.

The "intrinsic-extrinsic" framework referred to in Kaua is an analogue of the "distinction between 'elements' and

'sentencing factors'," Apprendi, 530 U.S. at 494, eschewed by the Supreme Court majority in favor of a focus on "the effect" of the sentencing court's ultimate finding and the answer to the question of whether such a "finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict[.]" Id. On the record in this case, the answer would be in the affirmative. As indicated by the Supreme Court, it is the "effect" brought about by the court's action that is determinative rather than the "labels" attached to the sentencing procedures. Id. This case involves "a sentence greater than what state law authorized on the basis of the verdict alone." Blakely, -- U.S. at --, 124 S. Ct. at 2538. Inasmuch as it does, under Blakely, the extended sentences infringe on the "reservation of jury power[,]" id. at --, 124 S. Ct. at 2540, in the Sixth Amendment.

VII.

I cannot agree with the majority's rationale for distinguishing our "intrinsic-extrinsic" paradigm from the implications of Blakely. With all due respect, I believe the majority's position rests on at least two faulty premises. First, the majority maintains there exists an equation between consideration of the "protection of the public" factor as part of the general sentencing considerations under HRS § 706-606 and the "protection of the public" determination under HRS § 706-662 such that in extended term sentencing "the sole determining factor

remaining that increases the penalty" are "the prior conviction[s]" which are not subject to jury determination under Apprendi or Blakely. Majority opinion at 32. The fallacy, of course, is that the determinations are not the same.

On its face, HRS § 706-606 (1993) sets forth a multiple factor list to generally guide the court in sentencing.[8] It does not authorize any particular sentence. HRS § 706-606 does not direct a sentencing court to prefer one consideration over the other or to give more weight to one factor than the other. Among the options available in arriving at an appropriate sentence is probation, HRS § 706-620 (Supp. 2003),[9] a suspended sentence, HRS

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[8] HRS § 706-606 states as follows:

> **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.

(Emphasis added.)

[9] HRS § 706-620, entitled "Authority to withhold sentence of imprisonment," states as follows:

> A defendant who has been convicted of a crime may be sentenced to a term of probation unless:

(continued...)

§ 706-622 (1993),[10] and imprisonment, e.g., HRS § 706-660.[11] As applicable here, HRS § 706-660 authorizes, inter alia, an indeterminate "ordinary" prison term of five years for a class C felony. Applying HRS § 706-606, a sentencing court may consider any number of those factors in deciding whether a defendant should be imprisoned or be given an alternative sentence in a particular case. While pursuant to HRS § 706-606 the court must consider the protection of the public as one of other multiple factors, it is not required to find upon express facts that protection of the public mandates an indeterminate sentence, as is required by HRS § 706-662 for an extended sentence.

Thus, the commentary to HRS § 706-660 draws a distinction between an "ordinary" indeterminate sentence under

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[9](...continued)

> (1) The crime is first or second degree murder or attempted first or second degree murder;
> (2) The crime is a class A felony, except class A felonies defined in chapter 712, part IV, and by section 707-702;
> (3) The defendant is a repeat offender under section 706-606.5;
> (4) The defendant is a felony firearm offender as defined in section 706-660.1(2); or
> (5) The crime involved the death of or the infliction of serious or substantial bodily injury upon a child, an elder person, or a handicapped person under section 706-660.2

(Emphasis added.)

[10] HRS § 706-622 states as follows:

> **Requirement of probation; exception.** When a person who has been convicted of a felony is not sentenced to imprisonment, the court shall place the person on probation. Nothing in this part shall prohibit the court from suspending any sentence imposed upon persons convicted of a crime other than a felony.

(Emphasis added.)

[11] See supra note 3.

HRS § 706-660 and an enhanced sentence under a provision like HRS § 706-662:

> With the exception of special problems calling for extended terms of incarceration as provided in subsequent sections, it provides for only one possible maximum length of imprisonment for each class of felony. . . .
>
> 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.
>
> . . . .
>
> [T]his section embodies a policy of differentiating exceptional problems calling for extended terms of imprisonment from the problems which the vast majority of offenders present[.]

(Emphasis added.) (Footnotes omitted.) Quoting from an American Bar Association study, the commentary continues as follows:

> [M]any sentences authorized by statute in this country are, by comparison to other countries and in terms of the needs of the public, excessively long for the vast majority of cases. Their length is undoubtedly the product of concern for protection against the most exceptional cases, most notably the particularly dangerous offender and the professional criminal. It would be more desirable for the penal code to differentiate explicitly between most offenders and such exceptional cases, by providing lower, more realistic sentences for the former and authorizing a special term for the latter.
>
> The sentences provided in this section, when compared to the extended sentences authorized in subsequent sections seek to achieve the recommended explicit differentiation.

(Quoting ABA Standards § 2.5.) (Ellipsis points and brackets in original.) (Footnote omitted.) Hence, in the "subsequent sections" referred to, such as HRS § 706-661, an "extended term[]" for a class C felony is set at ten years, HRS § 706-661(4) (Supp. 2003).[12] That term would be applied on conviction

[12] HRS § 706-661(4) states as follows:

> **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

(continued...)

of a class C felony in those cases designated in HRS § 706-662 where, as here, the court finds a defendant a persistent offender, HRS § 706-662(1), or a multiple offender, HRS § 706-662(4).

An extended term, then, is intended to "explicit[ly] differentiat[e]," commentary to HRS § 706-660, "exceptional cases," id., from "ordinary" indeterminate terms that are set forth in HRS § 706-660, for "most offenses." Thus, in contrast with HRS § 706-606, which treats protection of the public as one consideration among others in generally guiding the sentencing court as to whether to impose an ordinary sentence of imprisonment under HRS § 706-660, or another sentencing alternative such as probation or a suspended sentence, HRS § 706-662(1) and (4) focus upon whether the protection of the public warrants a term beyond the ordinary sentence. Generally, then, the protection of the public factor in HRS § 706-606 is one among several considerations in deciding whether to sentence a defendant to an ordinary imprisonment term under HRS § 706-660 or probation or suspension of sentence, as contrasted to HRS § 766-662 in which the question is not whether the protection of the public warrants a prison term or not, but whether it requires the

[12](...continued)
imprisonment which shall be as follows:

. . . .

(4) For a class C felony -- indeterminate ten-year term of imprisonment.

The minimum length of imprisonment for [paragraph] . . . (4) shall be determined by the Hawaii paroling authority in accordance with section 706-669.

length of the term served to be beyond that which would be imposed in "the vast majority of case[s]." Commentary to HRS § 706-660.

Accordingly, "the determination that it is 'necessary for protection of the public[,]' HRS § 706-662[,]" is decidedly not "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[,]" as the majority contends. Majority opinion at 31. This contextual misapprehension of the standard leads to the fallacy in the majority's conclusion that "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, . . . expressly authorized . . . in Apprendi and again in Blakely[] . . . [and similarly t]he multiple offender determination, pursuant to HRS § 706-662(4)(a), mirrors the prior conviction exception in Apprendi[.]" Majority opinion at 31-32 (emphasis in original).

Under our penal code, then, there is a substantial difference between choosing between probation and the ordinary indeterminate sentence, and between an indeterminate sentence and an extended sentence. For purposes of Apprendi and Blakely, the distinction is even more apparent for inasmuch as in the former

category, both a sentence of probation or an indeterminate sentence are authorized by the jury verdict, in the latter category only the indeterminate sentence (and not the extended sentence) can legitimately be the product of a jury verdict.

VIII.

The second mistaken premise is the majority's proposition that "[h]ad 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[,]" and, thus, "[i]t defies logic that the circuit court could . . . 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[.]" Majority opinion at 34 (emphases in original).

Obviously, the court did not sentence Defendant to serve the ordinary five-year prison term in Count I, consecutive to the ordinary five-year prison term in Count II. And just as clearly it had the discretion to do so under HRS § 706-668.5. See also supra note 3. HRS § 706-668.5(1) directs that "[m]ultiple terms of imprisonment imposed at the same time run concurrently unless the court orders," and HRS § 706-668.5(2) states that "[t]he 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." That both the prosecution and the court believed imposition of consecutive prison terms under Counts I and II was not appropriate underscores the infirmity of the majority's argument.

The parties and the court apparently perceived what should be manifest -- that there is a substantial difference between two ordinary five-year terms served consecutively and two extended ten-year terms served concurrently. The fact that the two consecutive five-year terms amount to a ten-year indeterminate term and the two ten-year extended terms run concurrently, does not mean that the minimum terms to be actually served as set by the paroling authority would be the same in both cases. The defendant who must serve an extended sentence faces a greater HPA minimum sentence determination[13] than the defendant who must serve consecutive terms, even when both sentences are quantitatively equal.

When setting a defendant's minimum sentence, the HPA considers six "aggravating" factors that "may be accorded weight in favor of a longer minimum sentence of imprisonment[,]" including whether the "inmate is a persistent offender, professional criminal, dangerous person, multiple offender, or offender against the elderly, handicapped or minor, and sentenced

[13] HRS § 706-669 vests the HPA with authority to fix "the minimum term of imprisonment to be served before the prisoner shall become eligible for parole." HRS § 706-669(1) (1993).

to an extended period of imprisonment."[14] Hawaii Administrative Rules (HAR) § 23-700-25(f) (1992) (emphases added). Thus, unlike a sentence of two consecutive five-year terms, a sentence of two ten-year extended terms to run concurrently exposes the defendant to a higher minimum sentence. Moreover, because the HPA considers the "prisoner's criminal history and character" in determining the minimum term of imprisonment, HRS § 706-669(8) (1993), it is free to consider prior extended terms. See HAR § 23-700-23(a) (requiring the HPA to consider the "nature and circumstances of the offense and the history and characteristics of the inmate") and Guidelines for Establishing Minimum Terms of Imprisonment, Hawai'i Paroling Authority (July 1989) (establishing that one of the "three areas of focus" in the guidelines is "the offender's criminal history" (emphasis added)). Should a defendant who has served an extended term be convicted of another crime in the future, the HPA would consider the prior extended term as part of the defendant's "criminal history." The effect, then, is that the defendant with an extended term on his or her record faces greater consequences than the defendant who merely serves consecutive terms.

Therefore, such "ten year sentences" are in fact not "the same" as the majority maintains. The prosecution, the defense, and the court accurately perceived that they are not, as

[14] The HPA has the authority to "establish guidelines for the uniform determination of minimum sentences which shall take into account both the nature and degree of the offense of the prisoner and the prisoner's criminal history and character." HRS § 706-669(8) (1993) (emphasis added).

should this court. Because the court did impose extended terms and not hypothetical five-year consecutive terms, and such extended terms could only be imposed on findings beyond that covered by the jury verdict, Blakely would mandate a resentencing in this case.