

CONCURRING OPINION BY NAKAMURA, J.

I concur in the result reached by the majority. I do not join in the majority's opinion, however, because I believe it is unnecessary to reach the question of whether the Sixth Amendment right to counsel extends to a minimum-term parole hearing. Petitioner-Appellant Robert C. D'Ambrosio (D'Ambrosio) challenges the validity of his minimum-term parole hearing because his counsel failed to appear. Hawaii Revised Statutes (HRS) § 706-669(3) (1993) grants a prisoner a statutory right to counsel at the minimum-term parole hearing. In my view, the majority should have decided D'Ambrosio's claim based on his statutory right to counsel without addressing whether he had a right to counsel under the Sixth Amendment.

It is well settled that important questions regarding the interpretation of constitutional provisions should ordinarily be decided only when necessary to the resolution of a case. State v. Poaipuni, 98 Hawai'i 387, 401, 49 P.3d 353, 367 (2002) (Moon, C.J., concurring). "We should be reluctant to address constitutional questions when it is not necessary to do so." Id. at 402, 49 P.3d at 368. "[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, this court will decide only the latter." State v. Lo, 66 Haw. 653, 657, 675 P.2d 754, 757 (1983) (quoting Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring))

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(internal quotation marks, ellipses points, and brackets omitted).

Assuming that D'Ambrosio's allegation concerning the non-appearance of his counsel at the minimum-term hearing is true, D'Ambrosio either was denied his statutory right to counsel under HRS § 706-669(3) or waived his right to counsel. In either case, D'Ambrosio's statutory right to counsel, which the State of Hawai'i (the State) does not dispute, provides a sufficient basis for resolving his appeal. If D'Ambrosio was denied his statutory right to counsel, he is entitled to a new minimum-term hearing at which he shall "[b]e permitted to be represented and assisted by counsel[.]" HRS § 706-669(3)(b). If D'Ambrosio waived his right to counsel, he has no cause to complain. Accordingly, I would decline to reach the question of whether D'Ambrosio had a right to counsel at the minimum-term parole hearing under the Sixth Amendment.

My reluctance to reach the Sixth Amendment question finds support in cases casting doubt on whether the Sixth Amendment right to counsel extends to a parole release hearing. In Ganz v. Bensinger, 480 F.2d 88 (7th Cir. 1973), a prisoner claimed that because the Illinois Parole and Pardon Board determined the actual period of incarceration in most cases, the parole release hearing was a "critical stage" of the state's processing of criminal offenders to which the Sixth Amendment

right to counsel attached. Id. at 89. Writing for the three-judge circuit panel, then Circuit Judge (now Justice) John Paul Stevens rejected the prisoner's claim, holding as follows:

The Sixth Amendment entitles every person to counsel in a particular kind of proceeding -- a criminal trial. That Amendment is inapplicable to other types of proceedings, even though they may have a critical impact on the destiny of the individual. Thus, the Sixth Amendment issue turns not on the importance of the parole release hearing, but rather on whether it is a part of the criminal prosecution.

The prosecution is a judicial proceeding. It does not end until judgment has been entered and sentence imposed. Mempa v. Rhay, 389 U.S. 128, 134, 88 S.Ct. 254, 19 L.Ed.2d 336. Plaintiff argues that if the sentence is of indeterminate length, the sentencing process includes the proceedings before the Parole Board. Logically, that argument would support a conclusion that "the entire range of correctional process after sentencing is a part of the criminal proceeding" -- a conclusion we have already rejected. Gunsolus v. Gagnon, 454 F.2d 416, 422 (7th Cir. 1971), rev'd on other grounds sub nom. Gagnon v. Scarpelli, 411 U.S. 582, 93 S.Ct. 1736, 36 L.Ed.2d 503 (1973). In our opinion, the Sixth Amendment right to representation by counsel at the sentencing hearing applies only to the *judicial* hearing at which the sentence is fixed. The Amendment protects the accused during the adversary judicial trial; it does not broadly encompass every proceeding which may result in a deprivation of liberty or property. As the Supreme Court stated in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484[,], "Parole arises after the end of the criminal prosecution, including imposition of sentence." See Gagnon v. Scarpelli, 411 U.S. 778, 781, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). A parole release hearing is not part of the criminal prosecution; the Sixth Amendment is inapplicable.

Id. (footnotes omitted).

Utah has an indeterminate sentencing scheme similar to Hawai'i's. The Utah Supreme Court has held that the Sixth Amendment right to counsel does not apply to original parole grant hearings in which the prisoner's presumptive release date is set. Monson v. Carver, 928 P.2d 1017, 1029-30 (Utah 1996); Padilla v. Utah Bd. of Pardons and Parole, 947 P.2d 664, 670 (Utah 1997).

For the foregoing reasons, I do not join in the majority's Sixth Amendment analysis.

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