

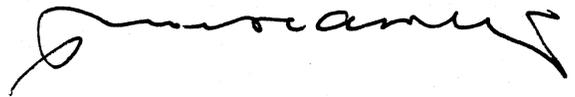
DISSENTING OPINION BY ACOBA, J.,
WITH WHOM DUFFY, J., JOINS

The parties cite and refer to Apprendi v. New Jersey, 530 U.S. 466 (2000), Blakely v. Washington, -- U.S. --, 124 S.Ct. 2531 (2004), and this court's recent decision in State v. Rivera, 106 Hawai'i 146, 102 P.3d 1044 (2004). None of the parties cite to United States v. Booker, -- U.S. --, 125 S.Ct. 738 (2005), in any post-briefing communication. See Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(j) (2005).¹ It would appear inapposite to use the instant case as a vehicle for expounding on matters in Booker inasmuch as this case does not raise the issues with which Booker was concerned, see Booker, -- U.S. at -- n.1, 125 S.Ct. at 747 n.1 ("The questions presented are: 1. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines . . . and 2. If the answer to the first question is 'yes,' . . . whether . . . the Sentencing Guidelines as a whole would be inapplicable[.]")

¹ HRAP Rule 28(j) states:

Citation of supplemental authorities. Parties may, by letter to the appellate clerk bring to the appellate court's attention pertinent and significant authorities published after a party's brief has been filed, but before a decision. A copy of the letter, setting forth the citations, shall be served at or before the time of filing as provided by Rule 25(b) of these rules. The letter shall provide references to either the page(s) of the brief or to a point argued orally to which the citations pertain. The letter shall, without argument, state the reasons for the supplemental citations. The parties shall provide the court with seven copies unless the case is assigned to the intermediate court of appeals in which case five copies shall be provided. Any response shall be made promptly and shall be similarly limited.

(emphases added) (internal quotation marks, citation, and block format omitted)), or share a commonality of fact and law with the situation in Booker. Until the parties before us argue the relevance and materiality of Booker in a specific case presented on appeal, I do not believe that the discussion the majority undertakes is germane. Based on the dissent in Rivera, I would vacate the extended terms of imprisonment and remand for resentencing in conformance with Apprendi.


James E. Duffin, Jr.