

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

I concur in the result. As to the question of whether the mandatory minimum sentence in this case runs afoul of Apprendi v. New Jersey, 530 U.S. 466 (2000) or Blakely v. Washington, 542 U.S. 296 (2004), I believe it does not, based on the reasoning in the dissent in State v. Rivera, 106 Hawai'i 146, 102 P.3d 1044 (2004).

Under Hawai'i Revised Statutes (HRS) § 706-606.5, as quoted by the majority, the mandatory minimum sentence herein is premised on a two-fold requirement -- "one prior felony conviction" and an "instant conviction" of "a class B felony." The Rivera dissent noted that,

in Blakely, the United States Supreme Court further explicated the holding in [Apprendi], and emphatically reaffirmed that the United States Constitution's Sixth Amendment right to a jury trial mandates that "other 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, [542] U.S. at [--], . . . (quoting Apprendi, 530 U.S. at 490, . . .).

Rivera, 106 Hawai'i at 166, 102 P.3d at 1064 (Acoba, J., dissenting) (emphasis added) (brackets omitted). Pursuant to the express qualification by the United States Supreme Court, a "prior conviction" prerequisite does not implicate Apprendi or Blakely. The same is true of the "instant conviction" condition, for, as observed in the dissent,

[t]he 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." [Blakely, 542 U.S. at --] (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).

Id. at 170, 102 P.3d at 1068. Hence, because the "instant conviction" prong is satisfied by the jury verdict, the mandatory minimum sentence did not require the sentencing judge to find any fact beyond that already inhering in Defendant-Appellant Richard Gonsalves's conviction. This is a case, then, where the "prior conviction" requirement was removed from jury adjudication and the "instant conviction" requirement did not necessitate findings beyond the jury verdict itself. Therefore, fact finding by a jury, as expounded in Apprendi and Blakely, was not required in imposing the mandatory minimum sentence against Defendant.


James E. Duggan, Jr.