

DISSENTING OPINION BY DUFFY, J.,
IN WHICH ACOBA, J., JOINS

I respectfully dissent. The majority opinion not only runs afoul of binding United States Supreme Court precedent for the reasons stated by the dissent in State v. Rivera, 106 Hawai'i 146, 166-77, 102 P.3d 1044, 1064-75 (2004) (Acoba, J., dissenting), but it also directly conflicts with the recent decision of the Ninth Circuit Court of Appeals in Kaua v. Frank, 436 F.3d 1057 (9th Cir. 2006).

Concededly, this court is not obligated to follow a decision of the Ninth Circuit even on a federal constitutional question. State v. Simeona, 10 Haw. App. 220, 237, 864 P.2d 1109, 1117 (1993), overruled on other grounds by State v. Ford, 84 Hawai'i 65, 70, 929 P.2d 78, 83 (1996). See also Strong v. Omaha Construction Industry Pension Plan, 701 N.W.2d 320, 328 (Neb. 2005) ("[W]hile Nebraska courts must treat U.S. Supreme Court decisions as binding authority, lower federal court decisions are only persuasive authority."); People v. Bradley, 460 P.2d 129, 132 (Cal. 1969) ("[A]lthough [California courts] are bound by decisions of the United States Supreme Court in interpreting the federal Constitution, we are not bound by the decisions of lower federal courts even on federal questions." (Citations omitted.)). But here, the federal district court effectively has the power to review our decisions via the writ of habeas corpus. The Ninth Circuit's Kaua decision has in large

part undercut the Rivera "intrinsic-extrinsic fact" distinction and the two-step sentencing process of State v. Okumura, 78 Hawai'i 383, 894 P.2d 80 (1995), and State v. Schroeder, 76 Hawai'i 517, 880 P.2d 192 (1994). Thus, the availability of federal habeas proceedings, and the resulting impact on the parties and both state and federal courts, makes a reexamination of our extended-term sentencing decisions even more imperative.

The circuit court in the instant case stated during sentencing that "the primary issue in this case has to do with the necessity to protect the public, not just the individuals who[] according to the jury . . . had been assaulted, but all people in the community from Lanosa." In so doing, the circuit court was attempting to comply with the statutory requirement of a finding that "an extended term is necessary for protection of the public." HRS § 706-662(4); see also Rivera, 106 Hawai'i at 162, 102 P.2d at 1060 ("Admittedly, a sentencing court's imposition of an extended term sentence requires the determination that it is 'necessary for protection of the public.'"). The majority, following Rivera, nevertheless characterizes the circuit court's extended term sentence under HRS § 706-662(4) as having been made on the basis of Lanosa's "simultaneous and multiple convictions by the jury," and concludes that it therefore does not violate his right to a jury trial guaranteed by the sixth amendment to the federal

constitution. See also Rivera, 106 Hawai'i at 163, 102 P.2d at 1061 (holding that there is no difference between the "protection of the public" determination in ordinary sentencing and that made in extended terms sentencing, such that the "sole determining factor remaining that increases the [sentence] is the fact of the prior conviction") (emphasis in original).

Like the dissent in Rivera, the Ninth Circuit in Kaua disagreed with this analysis, holding:

The second step [of the extended term sentencing process under HRS § 706-662(4)] requires a sentencing judge to determine if extending the defendant's sentence is necessary for the protection of the public. This inquiry requires the court to find facts outside of those found by the jury that expose the defendant to an increased sentence. Because Apprendi v. New Jersey, 530 U.S. 466 (2000) held that any fact other than the fact of a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt, we agree with Kaua that a jury must find the facts required to satisfy step two.

Kaua, 436 F.3d at 1060 (footnotes omitted). The Ninth Circuit reasoned that the intrinsic-extrinsic distinction employed by this court to narrow the holding in Apprendi elevates form over substance:

With respect to the Hawai'i Supreme Court's decision, we disagree with its reasoning that the "extrinsic" nature of the factual findings required for step two exempt them from Apprendi's reach. Apprendi made irrelevant any distinction between facts based on their "intrinsic" or "elemental" quality for purposes of ascertaining whether the Sixth Amendment requires a jury to find them. Apprendi announced a new rule that focused on the effect of a court's finding of fact, not on the label the statute or the court applied to that fact. The United States Supreme Court plainly set forth this new rule, stating that "the relevant inquiry is one 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?" If so, the Sixth Amendment requires a jury, not a judge, to make the finding.

Id. at 1061-62 (footnotes omitted). I agree that, as in Rivera

and as in Kaua, the circuit court's public protection finding had the effect of exposing the defendant in the instant case to a greater sentence than otherwise authorized, and thus should have been found by a jury under Apprendi.

For the reasons set forth above, I continue to adhere to the position set forth in the dissent in Rivera. Based on that dissent and on the Ninth Circuit's views as recently expressed in Kaua, I would therefore vacate the extended terms of imprisonment and remand for resentencing in conformance with Apprendi.



James E. Duggan, Jr.