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

I respectfully dissent.

The majority notes that both the United States District Court for the District of Hawai'i (the district court) in Kaua v. Frank, 350 F. Supp. 2d 848 (D. Haw. 2004), and the United States Ninth Circuit Court of Appeals in Kaua v. Frank, 436 F.3d 1057 (9th Cir. 2006), have ruled that State v. Kaua, 102 Hawai'i 1, 72 P.3d 473 (2003), upon which the majority's opinion is premised, violated Apprendi v. New Jersey, 530 U.S. 466 (2000). Majority opinion at 4-5 n.4. Inasmuch as the decisions of the district court and the Ninth Circuit are in consonance with the dissent in State v. Rivera, 106 Hawai'i 146, 102 P.3d 1044 (2004), I agree with the reasoning in those decisions.

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 Constr. Indus. 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). As Defendant-Appellant Wayde K. White (White) indicates, he "principally seeks to preserve this issue for later federal habeas review, in the event such remedy becomes necessary." 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.

I.

In Kaua, the defendant, Wayman Kaua, had been convicted of class A felonies, subjecting him to an indeterminate term of imprisonment of twenty years, and of class B and C felonies, subjecting him to indeterminate terms of imprisonment of ten and five years, respectively. 350 F. Supp. 2d at 850-51. The prosecution filed a motion for extended terms of imprisonment pursuant to Hawai'i Revised Statutes (HRS) § 706-662(4) (Supp. 1999). Id. at 851. The sentencing judge granted the prosecution's motion. Id. The judge found that Kaua was a multiple offender and decided that an extended term of

imprisonment for Kaua was necessary for the protection of the public. Id. at 851-52. Kaua then appealed to this court.

After Apprendi and Ring v. Arizona, 536 U.S. 584 (2002) were decided, this court decided Kaua, upholding the extended sentence. 102 Hawai'i at 13, 72 P.3d at 485. Kaua subsequently filed a petition for writ of habeas corpus with the district court, challenging the extended sentence. The district court held that this court's decision violated Apprendi. As the district court said in Kaua, "[t]his case involves a statute that exposed [the defendant] to an enhanced punishment based on judge-determined facts." 350 F. Supp. 2d at 861. "His extended sentence, which was based on these findings, violated Apprendi and represented "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Id. Later, the Ninth Circuit would state succinctly:

> The sentencing court's public protection finding, coupled with the finding of multiple felonies, exposed Kaua to a sentence greater than the jury's guilty verdict authorized. Although it was proper for the court to make the multiple felony finding, under Apprendi, a jury should have made the public protection finding. The Hawaii Supreme Court's opposite conclusion, therefore, was contrary to Apprendi.

Kaua, 436 F.3d at 1062.

II.

After the district court issued its decision, our decision in Rivera was issued thirteen days later. In the dissent in that case, in which Justice Duffy joined, it was noted that this court's decision in Kaua appeared incorrect.

> In light of Blakely v. Washington, [542] U.S. [296] (2004), 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.'" . . . 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, [542] U.S. at [305], 124 S. Ct. at 2538, and, thus, the sentence imposed on [Larry Rivera] "is invalid[,]" id., and the case should be remanded for resentencing.

Rivera, 106 Hawai'i at 166-67, 102 P.3d at 1064-65 (Acoba, J., dissenting). Further, the dissent indicated that "the core premises in Blakely are derived from Apprendi, . . . and insofar as such premises are set forth in Blakely, references to Blakely would encompass Apprendi." Id. at 167 n.1, 102 P.3d at 1065 n.1.

In Rivera, Rivera was sentenced to an extended term as both a persistent and multiple offender under the same HRS provision as Kaua. As was said in the Rivera dissent, the sentencing court's finding that Rivera's actions warranted an extended term for the protection of the public under HRS § 706-662(4) was an additional fact not embodied in the jury's verdict and thus was required to be found by a jury.

> 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).
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> . . . As in Blakely, the court "cannot make that judgment without finding some facts to support it beyond the bare elements of the offense." Blakely, [541] U.S. at [305] 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.
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> . . . 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.

106 Hawai'i at 171, 102 P.3d at 1069 (emphasis added).

After Rivera was issued, and before the issuance of the decision herein, the Ninth Circuit sustained the district court's ruling in Kaua, reiterating that the necessity of public protection to justify an enhanced sentence was a finding that must be made by the jury and not the judge.

> The Hawaii sentencing court found that an extended sentence was necessary to protect the public in Kaua's case. Because the effect of this finding was to increase Kaua's sentence above that authorized by the jury's guilty verdict, we hold that [Apprendi] required a jury to make the finding. In reaching the opposite conclusion, the Hawaii Supreme Court applied a rule -- the "intrinsicextrinsic" analysis -- contrary to the rule that Apprendi announced.

436 F.3d at 1058 (footnote omitted).

III.

The facts here are like those in Kaua and Rivera. In the instant case, Plaintiff-Appellee State of Hawai'i, (the prosecution) sought to have White sentenced as a repeat offender to a mandatory minimum term of imprisonment of one year and eight months pursuant to HRS § 706-606.5(1)(a)(iv) (1993), as a multiple offender to extended terms of imprisonment of ten years, pursuant to HRS § 706-662(4)(a) (Supp. 2003) for each of the three class C felonies of which he was convicted, and to

consecutive terms of imprisonment pursuant to HRS § 706-668.5 (1993). The court denied the motion for consecutive term sentencing but granted the other motions.

As White argues, an extended term increased his imprisonment beyond that that would otherwise be authorized under the jury verdict.

> [T]he "ordinary term" of imprisonment (i.e., prescribed statutory maximum) for Forgery in the Second Degree is five years because HRS § 706-852(2) specifies that it is a class C felony. Since HRS § 708-831(12) specifies that Theft in the Second Degree is also a class C felony, then the "ordinary term" of imprisonment under HRS § 706-660 is likewise five years. An extended term sentence of ten years for a class C felony pursuant to HRS § 706-661(4) clearly constitutes an increase over the "ordinary term" maximum penalty of five years for both Forgery in the Second Degree and Theft in the Second Degree offenses. As in Apprendi's case, imposing an extended term sentence for class C felony effectively transforms the offense into a class B felony for which the ordinary term of imprisonment is ten years.

(Emphasis added.) Before imposing an extended term, the court made findings with respect to the protection of the public.

> You know, Mr. White, I would agree with your attorney that his instant offense does not in itself involve violence. But based upon the records and files that I have in this particular case, there's substantial evidence that would contradict the arguments of your attorney. You basically have had no means of employment since your first lengthy incarceration, which was for a violent offense. You share with me today that incarceration is not the way. You pulled an open term. Yet, you come back a few years later only to be convicted of another felony offense
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> You know, Mr. White, maybe in the last few months, you have done very well, and I commend you for that. But nevertheless, the court makes a finding that you are persistent offender, [sic] and it is necessary for the protection of the public to impose a prison sentence on you for an extended period of time. So I will grant the State's motion for sentencing defendant to an extended term of incarceration, and I will grant defendant's [sic] motioning [sic] for sentencing of repeat offender.

(Emphasis added.)

IV.

In response to White's appeal, the majority attempts to

distinguish our sentencing scheme from that in Blakely. The majority maintains that "Washington's system codified a standard range -- in Blakely that range was 49 to 53 months within the 120-month total maximum sentence statutorily prescribed[,]" majority opinion at 17 (emphasis omitted), and "Blakely instructs that any finding increasing the defendant's sentence beyond that standard range was required to be submitted to a jury[,]" id. According to the majority, however, "Hawai'i does not employ a standard range for any of its felonies [because t]he circuit court['s] . . . 'discretion is limited to choosing between imprisonment and other modes of sentencing [and o]nce the court has decided to sentence a felon to imprisonment, the actual time of release is determined by parole authorities[,]'" id. (quoting Rivera, 106 Hawai'i at 159, 102 P.3d at 1057 (other citation omitted)).

But, the dispute on whether our sentencing system is more or less determinate or indeterminate than the state of Washington's is or was, is not dispositive of whether the jury must render findings necessary for extended imprisonment. Under Blakely the Sixth Amendment right to jury applies because an extended sentence exceeds that sentence that is derived from the jury's verdict.

> [T]hat our sentencing structure may generally be denominated an "indeterminate" one is not a basis for distinguishing Blakely. . . . 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 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.

Rivera, 106 Hawai'i at 171, 102 P.3d at 1069 (Acoba, J., dissenting) (emphasis added). Thus,

> 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, . . . but whether to impose an additional term of imprisonment. . . . The extended term proceeding under the logic of Blakely would be a proceeding subject to the right to jury trial under the Sixth Amendment.

Id. (emphasis added). The fact that the paroling authority may determine the minimum sentence is not a dispositive factor, for the extended term is an additional sentence based on facts that are not determined by a jury. Under Apprendi,

> "[l]abels . . . [such] as . . . 'elements' and 'sentencing factor,'" then, are not the "answer." 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.

Id. (emphasis added) (citation omitted). Plainly, the "required finding" regarding the "protection of the public" by the sentencing court "expose[d]" White to "greater punishment." The Ninth Circuit decided likewise.

> With respect to the Hawaii 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 require 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.

Kaua, 436 F.3d at 1061 (footnotes omitted) (emphasis in original).

V.

The majority maintains that without the finding that the defendant committed a previous felony a judge would not be authorized to impose extended prison terms under HRS § 706-662(4)(a). Majority opinion at 19. Reiterating the argument above, the majority contends that "rather than the sentencing judge setting the specific term that a defendant is to serve, the minimum time served is set by the parole board." Id. at 18. It concludes, then, that "'[t]he factor that justifies the enhancement of the sentence to extended prison terms, therefore, is the fact of prior or multiple felony convictions.'" Id. at 19 (quoting Rivera, 106 Hawai'i at 162, 102 P.3d at 1060).

The majority made a similar argument in Kaua. In its habeas decision, the district court noted this court had indicated that "the finding that Kaua was a multiple offender fell outside the scope of Apprendi, like any finding based solely on a prior conviction[,]" Kaua, 350 F. Supp. 2d at 859, and "that it was only Kaua's multiple offender status that had exposed him to the extended sentence range . . . [;] the sentencing court's determination that Kaua's incarceration was necessary for the protection of the public was a mere offshoot of [that] finding[,]" id. In response, the district court said

> The Hawaii Supreme Court's conclusion that Kaua's extended sentence did not violate Apprendi was contrary to, and involved an unreasonable application of, clearly established federal law, as determined by the United State[s] Supreme Court. . . . The Kaua decision simply ignored the language in Apprendi stating:
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> > When the term "sentencing 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. . . .
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> Apprendi, 530 U.S, at 494 n.19.
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> . . . The Hawaii Supreme Court ignored the effect of the "protection of the public" determination on Kaua's sentence. Both in the hearing before this court and in its papers, the State of Hawaii admitted that the sentencing judge had to make that "protection of the public" determination before imposing the extended sentence. . . . [W]hat the Hawai'i Supreme Court failed to recognize was that the effect of that determination was to remove the functional equivalent of an element from the jury's province.

350 F. Supp. 2d at 860-61 (brackets omitted) (emphasis added).

Multiple convictions do not constitute the conclusive fact the majority indicates is determinative of whether an extended term is necessary. As HRS § 706-662(4) instructs, an extended sentence cannot be entered unless White's "criminal actions were so extensive" so as to warrant a term "necessary for the protection of the public." Thus in addressing White at the time of sentencing, the court ruled, "[T]he court makes a finding that you are a [multiple] offender, and it is necessary for the protection of the public to impose a prison sentence on you for an extended period of time." (Emphasis added.)

VI.

With all due respect, the failure to acknowledge what appears patent leads the majority to reject the conclusion that "the 'necessary for protection of the public' consideration is qualitatively different as between ordinary and extended-term

sentencing[.]" Majority opinion at 20-21. Contrary to the majority's assertion that "[i]t is erroneous to think that the 'necessary for protection of the public' requirement has any greater effect at extended term sentencing than it does at ordinary sentencing[,]" majority opinion at 19-20, the language of HRS § 706-662(4)(a), a pari materia reading of that statute and HRS § 706-606, and the commentary to HRS § 706-660 demonstrate that such a requirement "is [indeed] qualitatively different" for purposes of ordinary and extended term sentencing. The same argument was made by the majority in Rivera and is refutable again.

HRS § 706-606 is not determinative in the calculus of whether White should be sentenced to an extended term as the majority suggests. Majority opinion at 20-21. Unlike HRS § 706-606, HRS § 706-662 specifically and expressly sets forth, as stated in the title, the necessary "criteria for extended terms of imprisonment" (emphasis added), and mandates that "the convicted defendant [must] satisf[y] one or more of the following criteria: . . . (4) [t]he 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." HRS § 706-662(4). The distinction between HRS § 706-606 and HRS § 706-662 was elucidated in the Rivera dissent in response to a similar argument by the majority made in Rivera.

> [T]he 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. The fallacy, of course, is that the determinations are not the same.
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> On its face, HRS § 706-606 (1993) sets forth a multiple factor list to generally guide the court in sentencing. It does not authorize any particular sentence. . . . 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.

Rivera, 106 Hawai'i at 173-74, 102 P.3d at 1071-71 (Acoba, J., dissenting).

Contradicting the proposition advanced by the majority, the penal code expressly states that the policy underlying "ordinary" indeterminate sentencing under 706-606 is to be distinguished from that warranting extended term sentencing under 706-662.

> Thus, the commentary to HRS § 706-660 draws a distinction between an "ordinary" indeterminate sentence under HRS § 706-660 and an enhanced sentence under a provision like HRS § 706-662:
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> > 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. . . .
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> > 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.
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> > . . . .
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> > [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[.]
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> (Emphasis added.) (Footnotes omitted.) . . .
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> The sentences provided in this section, when compared to the extended sentences authorized in subsequent sections seek to achieve the recommended explicit differentiation.

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). That term would be applied on conviction 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).

106 Hawai'i at 174-75, 102 P.3d at 1072-73 (Acoba, J., dissenting) (emphasis in original and emphasis added).

It must be concluded, then, that the sentencing determination as to the protection of the public under HRS § 706-662 is indeed "qualitatively different" from that of HRS § 706-606.

> 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 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.
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> 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. 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[.]"

Rivera, 106 Hawai'i at 175, 102 P.3d at 1073 (Acoba, J.,

dissenting) (brackets, footnotes, and citations omitted) (some emphases in original and some added). Therefore, a determination that the defendant's "criminal actions were so extensive" that an extended sentence for the protection of the public is warranted is a fact that must be determined by a jury.

The Ninth Circuit has ruled similarly.

> Kaua challenges the Hawaii Supreme Court's conclusion that Apprendi permits a judge, rather than a jury, to find the facts required to satisfy step two of section 706-662(4)'s sentencing process. The second step 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 held that any act other than the fact of a prior conviction that increase 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).

VII.

In light of the foregoing, the sentencing procedure did not comply with the Sixth Amendment.[1] Accordingly, White's

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[1] In State v. Tafoya, 91 Hawai'i 261, 273, 982 P.2d 890, 902 (1999), this court said:

> [W]hen a fact susceptible to jury determination is a predicate to the imposition of an enhanced sentence, the Hawai'i Constitution requires that such factual determinations be made by the trier of fact. The legislature may not dilute the historical province of the jury by relegating facts necessary to the imposition of a certain penalty for criminal behavior to the sentencing court.

(Emphasis added.) The public protection requirement in HRS § 706-662(4) is "a predicate to the imposition of an enhanced sentence." Id. Consequently its existence must be determined by the jury, the trier of fact in criminal cases, unless a jury is waived by the defendant. See State v. Young, 93 Hawai'i 224, 237, 999 P.2d 230, 243 (2000) (concluding that "a jury may infer that the victim suffered unnecessary torture based upon circumstantial evidence, if the circumstantial evidence is sufficient to convince the jury, beyond a reasonable doubt, that the murder was 'especially heinous, atrocious, or

(continued...)

extended term sentences must be vacated and the case remanded for resentencing.

James E. Duffy, Jr.

[1](...continued)
cruel'"); State v. Janto, 92 Hawai'i 19, 26, 33, 986 P.2d 306, 313, 320 (1999) (concluding that findings leading to an enhanced sentence must be made by the trier of fact to protect a defendant's constitutional rights to due process and a jury trial where enhanced sentence following conviction of second degree murder hinged on whether the murder was committed in a particularly heinous, atrocious, or cruel manner).

A defendant's right to a jury determination of that requirement, then, is grounded in the right to jury trial provision in article I, section 14 of the Hawai'i Constitution, separate and independent from the provisions of the Sixth Amendment of the United States Constitution. See e.g., State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988) (stating that "as the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawai'i Constitution, [the Hawai'i Supreme Court is] free to give broader privacy protection than that given by the federal constitution").