

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

I concur, except insofar as the majority suggests that our sentencing scheme conforms to Apprendi v. New Jersey, 530 U.S. 466 (2000), because in a particular case a consecutive sentence may be equated to an extended sentence. See Kaua v. Frank, 436 F.3d 1057, 1062 (9th Cir. 2006) (holding that, based on its "'intrinsic[-]extrinsic' analysis," "[t]he Hawaii Supreme Court's affirmance of [the defendant's] extended sentence [under Hawaii Revised Statutes (HRS) § 706-662] was contrary to the U.S. Supreme Court's decision in Apprendi["]).

As the circuit court of the first circuit determined, "Apprendi . . . does not apply . . . since . . . [Defendant-Appellant Michael Kahapea] was not sentenced to an extended term or enhanced sentence." The United States Supreme Court said in Apprendi, that "labels do not afford an acceptable answer[] . . . as . . . to the constitutionally novel and elusive distinction between elements and sentencing factors[] . . . [because] the relevant inquiry is 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?" 530 U.S. at 494 (emphasis added) (internal quotation marks and citations omitted) (brackets omitted). Thus, "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." Id. at 496 n.19 (emphasis added).

In this case the ordinary maximum term for each of the relevant offenses is ten years' imprisonment. HRS § 706-660(2) (1993). Upon conviction, then, ten years' imprisonment would be the prescribed statutory maximum for each offense involved because ten years is the maximum sentence a judge may impose without any additional findings by a jury. However, HRS § 706-668.5 (1993) provides in relevant part that "[m]ultiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms run consecutively." The imposition of prison terms in consecutive sequence, then, does not result in "an increase beyond the maximum authorized statutory sentence," Apprendi, 530 U.S. at 496 n.19, i.e., beyond one that can be imposed simply on the jury verdict and, thus, does not implicate Apprendi and its progeny.

However, the court's discretion in imposing a consecutive sentence is still circumscribed. See, e.g., State v. Vellina, 106 Hawai'i 441, 450, 106 P.3d 364, 373 (2005) (holding that it was plain error for the circuit court to sentence the defendant to consecutive prison terms based upon uncharged alleged misconduct); State v. Gaylord, 78 Hawai'i 127, 150, 890 P.2d 1167, 1190 (1995) (stating that "the imposition of consecutive prison terms solely for extraneous reasons, and to a defendant's substantial detriment, constitutes a plain and manifest abuse of discretion" (emphasis in original)); State v.

Kumukau, 71 Haw. 218, 227, 787 P.2d 682, 688 (1990) (determining that the sentencing court abused its discretion when it imposed excessive, consecutive maximum terms for each and every count for which the defendant was convicted). The judge's decision to impose a consecutive sentence must still adhere to the criteria set forth in HRS § 706-606 (1993). That is, "[t]he court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider the factors set forth in section 706-606." HRS § 706-668.5 (1993).

In a particular case the total indeterminate sentence imposed by way of consecutive sentencing under HRS § 706-668.5(2) may potentially equal an extended sentence imposed under HRS § 706-662. This, however, does not support the conclusion that, in the absence of a jury finding, an extended sentence given under HRS § 706-662¹ conforms to the precepts of Apprendi and

¹ Hawai'i Revised Statutes § 706-662 (Supp. 2005) states in pertinent part as follows:

Criteria for extended terms of imprisonment. A convicted defendant may be subject to an extended term of imprisonment under section 706-661, if the convicted defendant satisfies one or more of the following criteria:

- (1) The defendant is a persistent offender whose imprisonment for an extended term is necessary for protection of the public. . . .
- (2) The defendant is a professional criminal whose imprisonment for an extended term is necessary for protection of the public. . . .
- (3) The defendant is a dangerous person whose imprisonment for an extended term is necessary for protection of the public. . . .
- (4) The 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. . . .
- (5) The defendant is an offender against the elderly, handicapped, or a minor under the age of eight, whose imprisonment for an extended

(continued...)

Blakely v. Washington, 542 U.S. 296 (2004), as the majority has suggested in State v. Rivera, 106 Hawai'i 146, 156, 102 P.3d 1044, 1054 (2004), and in State v. White, 110 Hawai'i 79, 84-90, 129 P.3d 1107, 1112-18 (2006), and reiterated here. Majority opinion at 23-24.

For an "ordinary" prison term imposed under HRS § 706-660 (1993) is subject to the factors set forth in HRS § 706-606.

As applicable here, HRS § 706-660 authorizes, inter alia, an indeterminate "ordinary" prison term Applying HRS § 706-606, a sentencing court may consider any number of [the] factors [enumerated thereon] in deciding whether a defendant should be imprisoned While pursuant to HRS § 706-606 the court must consider . . . multiple factors, . . . [HRS § 706-606 does] not require[] . . . [that] express facts [be found] . . . as is required by HRS § 706-662 for an extended sentence.

Rivera, 106 Hawai'i at 174, 102 P.3d at 1072 (Acoba, J., dissenting) (emphasis in original) (some brackets in original and some added). See also White, 110 Hawai'i at 95, 129 P.3d at 1123 (Acoba, J., dissenting).

An ordinary prison term resting on consideration of HRS § 706-606 factors is to be distinguished from the imposition of extended terms under HRS § 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:

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. . . .

¹(...continued)

term is necessary for the protection of the public. . . .
(6) The defendant is a hate crime offender whose imprisonment for an extended term is necessary for the protection of the public. . . .

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.

[This section embodies a policy of differentiating exceptional problems calling for extended terms of imprisonment from the problems which the vast majority of offenders present.]

Rivera, 106 Hawai'i at 174, 102 P.3d at 1072 (Acoba, J., dissenting) (emphasis in original) (footnotes omitted) (quoting Commentary on HRS § 706-660 (1993). See also White, 110 Hawai'i at 96, 129 P.3d at 1124 (Acoba, J., dissenting). Hence, the penal code declares that "[t]he sentences provided in this section, [(HRS § 706-660),] when compared to the extended sentences authorized in subsequent sections[, i.e., HRS § 706-662,] seek to achieve the recommended explicit differentiation." Rivera, 106 Hawai'i at 175, 102 P.2d at 1073 (Acoba, J., dissenting) (quoting ABA Standards § 2.5). See White, 110 Hawai'i at 96, 129 P.3d at 1124 (Acoba, J., dissenting).

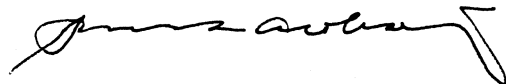
As noted in the Rivera dissent, an indeterminate consecutive sentence is qualitatively different from an extended sentence of ostensibly the same length.

The fact that the two consecutive five-year terms amount to a ten-year indeterminate term . . . does not mean that the minimum terms to be actually served as set by the paroling authority would be the same in both cases. The defendant who must serve an extended sentence faces a greater [Hawai'i Paroling Authority (HPA)] minimum sentence determination than the defendant who must serve consecutive terms, even when both sentences are [factually] quantitatively equal.

When setting a defendant's minimum sentence, the HPA considers six "aggravating" factors that "may be accorded weight in favor of a longer minimum sentence of imprisonment," including whether the "inmate is a persistent offender, professional criminal, dangerous person, multiple offender, or offender against the elderly, handicapped or minor, and sentenced to an extended period of imprisonment." Hawaii Administrative Rules (HAR) § 23-700-25(f) (1992) (emphases added). Thus, unlike a sentence of

two consecutive five-year terms, a sentence of two ten-year extended terms to run concurrently exposes the defendant to a higher minimum sentence. Moreover, because the HPA considers the "prisoner's criminal history and character" in determining the minimum term of imprisonment, HRS § 706-669(8) (1993), it is free to consider prior extended terms. See HAR § 23-700-23(a) (requiring the HPA to consider the "nature and circumstances of the offense and the history and characteristics of the inmate") and Guidelines for Establishing Minimum Terms of Imprisonment, Hawai'i Paroling Authority (July 1989) (establishing that one of the "three areas of focus" in the guidelines is "the offender's criminal history" (emphasis added)). Should a defendant who has served an extended term be convicted of another crime in the future, the HPA would consider the prior extended term as part of the defendant's "criminal history." The effect, then, is that the defendant with an extended term on his or her record faces greater consequences than the defendant who merely serves consecutive terms.

Rivera, 106 Hawai'i at 176, 102 P.3d at 1074 (Acoba, J., dissenting) (emphases in original) (footnotes omitted). The "differentiation" between indeterminate "ordinary" sentences under HRS § 706-660 which may be imposed concurrently or consecutively as authorized under HRS § 706-668.5(2), and extended sentences under HRS § 706-662, inheres in the penal code's sentencing structure. Thus, under the express language of the penal code, consecutive sentences are not meant or intended to displace or replace extended sentences. It would appear plain, then, that our sentencing law does not sanction the circumvention by a judge of the extended term sentencing procedure by resort to the consecutive term provision. Such subterfuge would violate the provisions of the penal code and potentially raise serious due process considerations.



Kana E. O'Leary, Jr.