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

I concur in the vacation of the sentences and judgments entered by the Circuit Court of the First Circuit (the court) on May 17, 2004 and May 18, 2004 against Defendant-Appellant Miti Maugaotega, Jr. (Appellant). My concurrence is based upon (1) the February 20, 2007 mandate of the United States Supreme Court, Maugoatega v. Hawaii, --- U.S. ---, 127 S.Ct. 1210 (2007) [hereinafter Maugoatega v. Hawaii], (in response to the October 27, 2005 petition for writ of certiorari filed with the Court by Appellant) requiring, in view of Cunningham v. California, 549 U.S. ---, 127 S.Ct. 856 (2007), that this court reconsider the validity of the Hawai'i extended term sentencing scheme as applied to Appellant by the majority in State v. Maugaotega, 107 Hawai'i 399, 114 P.3d 905 (2005) [hereinafter Maugaotega]; (2) the dissenting opinion's disagreement with the majority in Maugaotega to a similar effect; and (3) the separate opinions in other appeals brought before and after this case, stating that Hawaii's sentencing scheme violated the Sixth Amendment right to a jury trial as set forth in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004).

However, contrary to the majority's position, I would vacate the sentences and the judgments thereon and remand for a jury trial, unless waived by Appellant, on the motion for extended terms filed by Plaintiff-Appellee State of Hawai'i (the

prosecution). This disposition on remand is required because (1) Hawai'i Revised Statutes (HRS) §§ 706-661 and -662, the extended term sentencing statutes, are not rendered unconstitutional in their entirety under Cunningham,[1] (2) the legislature expressly intended to preserve extended term sentencing, (3) such a disposition is approved by Cunningham, and (4) the facts of this appeal warrant it.

I.

A.

In his opening brief Appellant specifically "challenge[d the court's] ruling granting all of [the prosecution's] motions for extended terms of imprisonment based on plain error and the ruling in [Apprendi]." Presciently, Appellant argued that "[the court] . . . could not have 'extended' [Appellant's] maximum terms of imprisonment solely on the basis of the facts that the jury found at trial in Cr. No. 03-1-1897, or solely on the basis of the facts on the record of his 'no contest' pleas in all the remaining cases." He maintained that "the judge had to make additional findings in order to impose the extended sentences under HRS § 706-662." Thus, according to Appellant, in imposing "maximum terms of imprisonment because it was 'necessary for protection of the public' under HRS § 706-662(4), the judge exceeded his authority

[1] For the sake of convenience, the analysis related to the amendments to HRS §§ 706-661 and -662 (Supp. 2006) that expired on June 30, 2007, would apply to the versions of HRS §§ 706-661 and -662 that existed at the time of Appellant's sentencing and were reenacted on June 30, 2007.

and violated the Apprendi rule, by 'inflict[ing] punishment that the jury's verdict alone does not allow.'" (Quoting Blakely, 542 U.S. at 304.)

Faced with this court's precedent in State v. Kaua, 102 Hawai'i 1, 72 P.3d 473 (2003), Appellant asserted that "[t]he Kaua court erroneously construed Apprendi as applying to 'elemental' or 'intrinsic' facts only, when the Apprendi rule clearly applies to 'any fact' that increases the penalty for a crime beyond the prescribed statutory maximum, which includes 'extrinsic' facts also." (Quoting Apprendi, 530 U.S. at 490.) (Emphasis supplied.) Appellant pointed out that "[t]he distinction between 'intrinsic' and 'extrinsic' facts which Hawai'i precedents rely upon to exempt HRS § 706-662 from the Apprendi rule, is a distintion that the U.S. Supreme Court specifically rejected." In sum, as Appellant stated, "[b]ecause the 'extrinsic' factual finding that [Appellant] was a 'multiple offender' whose imprisonment was 'necessary for the protection of the public' under HRS § 706-662(4), had the effect of enhancing [Appellant's] sentence, the Apprendi rule was violated because this fact was not submitted to a jury [and] proved beyond a reasonable doubt." (Emphasis supplied.) Appellant noted that, in Blakely, the U.S. Supreme Court "reaffirm[ed] its commitment to the Apprendi rule[.]"

Subsequently, this court issued its decision in State v. Rivera, 106 Hawai'i 146, 102 P.3d 1044 (2004). In his reply

brief, Appellant requested that the majority reconsider its decision in Rivera, because contrary to the majority's decision, 'nowhere in . . . Blakely . . . does the United States Supreme Court limit the Blakely/Apprendi rule to determinate sentencing schemes only[,]" and the "'intrinsic-extrinsic' analysis in Kaua . . . is not compatible with the Blakely/Apprendi rule." (Citing Rivera, 106 Hawai'i at 172, 102 P.3d at 1070.) (Acoba, J., dissenting, joined by Duffy, J.).

B.

In previously affirming the extended sentences in the instant case, the majority in Maugaotega stated that, based on Kaua and Rivera, "Hawaii's extended term sentencing scheme does not run afoul of Apprendi, [and] disposes of [Appellant's] point of error on appeal[,]" 107 Hawai'i at 402, 114 P.3d at 908, and concluded that these cases were "not at odds with" "United States v. Booker, 543 U.S. 220 (2005), . . . holding that federal sentencing guidelines are subject to the jury trial requirements . . . , and severing provisions making the guidelines mandatory[,]" 107 Hawai'i at 402, 114 P.3d at 908. In contrast, the dissent in Maugaotega stated in relevant part that, "[b]ased on the dissent in Rivera, . . . the extended terms of imprisonment [should be vacated] and [the case] remand[ed] for resentencing in conformance with Apprendi." Id. at 411, 114 P.3d at 917 (Acoba, J., dissenting, joined by Duffy, J.).

As noted before, subsequently, on January 22, 2007, the United States Supreme Court decided Cunningham. In its February 20, 2007 mandate, the Court ordered that "[t]he judgment [in Maugaotega] is vacated and [the] case [is] remanded to the Supreme Court of Hawaii, for further consideration in light of [Cunningham]." Maugaotega v. Hawaii, --- U.S. at ---, 127 S.Ct. at 1210.

II.

A.

The prior dissents in Rivera and State v. White, 110 Hawai'i 79, 129 P.3d 1107 (2006), and as referred to in related appeals, see infra, including Maugaotega, are consistent with Cunningham. The fundamental proposition emphasized in the separate opinions as derived from Apprendi and Blakely was 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,'" Rivera, 106 Hawai'i at 166, 102 P.3d at 1064 (Acoba, J., dissenting, joined by Duffy, J.) (quoting Blakely, 542 U.S. at 301 (quoting Apprendi, 530 U.S. at 490)) (internal quotation marks and brackets omitted), and that the determination of extended term sentences by a judge did indeed increase such a penalty in disregard of a defendant's right to a jury trial.

The United States Supreme Court reiterated this determination in Cunningham, 549 U.S. at --, 127 S.Ct. at 863-64, stating that "[t]his Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence [beyond the prescribed statutory maximum] must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by the preponderance of the evidence." Hence, "[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." Rivera, 106 Hawai'i at 170, 102 P.3d at 1068 (Acoba, J., dissenting, joined by Duffy, J.) (quoting Blakely, 542 U.S. at 303 (internal quotation marks and citation omitted)); accord Cunningham, 549 U.S. at --; 127 S.Ct. at 865. Consequently, the proposition repeated in Cunningham and stated in the Rivera dissent that the prescribed "'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[,]" applies. Id. (emphasis omitted) (quoting Blakely, 542 U.S. at 303). Thus, "the 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he [or she] may impose without additional findings." Id. (ellipses and emphasis omitted) (quoting Blakely, 542 U.S. at 303).

Similar to Rivera, in Appellant's case, "it is the findings of the court, based on facts and factors not submitted to the jury, that result[s] in a prison term beyond that simply attributable to the guilty verdict." Rivera, 106 Hawai'i at 172, 102 P.3d at 1070 (Acoba, J., dissenting, joined by Duffy, J.). Consequently, as related in the Rivera dissent, "Hawaii's extended term proceeding . . . would be a proceeding subject to the right to jury trial under the Sixth Amendment," id., and the absence of a jury trial or wavier thereof by Appellant requires vacation of the sentences imposed. Therefore, despite the majority's rationalization of the "extrinsic-intrinsic" test in Kaua and its embracement of the Cunningham dissents, the dispute has been put to rest by the majority opinion in Cunningham.

B.

Accordingly, Appellant's extended sentence must be vacated and the case remanded for resentencing in conformance with Cunningham and Apprendi, because Appellant's sentence was based on facts not submitted to a jury. See Rivera, 106 Hawai'i at 172, 102 P.3d at 1070 (Acoba, J., dissenting, joined by Duffy, J.) (stating that the extended sentence imposed on the defendant violated the Sixth Amendment where "[i]t [was] the findings of the court, based on the facts and factors not submitted to the jury, that resulted in a prison term beyond that simply attributable to the guilty verdict" (emphasis in original)); Maugaotega, 107 Hawai'i at 411, 144 P.3d at 917 (Acoba, J.,

dissenting, joined by Duffy, J.) (stating that the Appellant's "extended terms of imprisonment" should be "vacate[d] and remand[ed] for resentencing in conformance with [Apprendi], vacated, Maugoatega v. Hawai'i, --- U.S. at ---, 127 S.Ct. at 1210 ("The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case [is] remanded to the Supreme Court of Hawai'i for further consideration in light of [Cunningham.]).

These precepts were previously confirmed in this jurisdiction in the separate opinions in White, 110 Hawai'i at 97, 129 P.3d at 1125 (Acoba, J., dissenting, joined by Duffy, J.) (stating that "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"); see also State v. Laysa, No. 27735, 2007 Haw. LEXIS 21, at *1-2 (Haw. Jan. 19, 2007) (order denying application for certiorari) (Acoba, J., dissenting, joined by Duffy, J.) (stating that "there is more than sufficient 'compelling justification' . . . , State v. Garcia, 96 Hawai'i 200, 206, 29 P.3d 919, 925 (2001) (emphasis omitted), to overrule the holding in [Kaua][, 102 Hawai'i 1, 72 P.2d 473] (citing Rivera, [106 Hawai'i 146, 102 P.3d 1044], Maugaotega, [supra], and White, [supra], and that it is imperative to reexamine the extended-term sentencing decisions" (citations omitted) (emphasis

added)); State v Keck, No. 27311, 2006 Haw. LEXIS 660, at *1 (Haw. Oct. 4, 2006) (order denying application for certiorari) (Acoba, J., concurring and dissenting, joined by Duffy, J.) (concurring in part, but dissenting as to the "extended term sentences issue" where the defendant was sentenced to extended terms of imprisonment); State v. Johnson, No. 27027, 2006 WL 1166141, at *1 (Haw. May 3, 2006) (unpublished disposition) (Duffy, J., dissenting, joined by Acoba, J.) (stating that the extended term sentences should be vacated and the case remanded for resentencing based on the dissents in Rivera and White); State v. Lanosa, No. 25633, 2006 WL 574456, at *3 (Haw. Mar. 10, 2006 (unpublished disposition) (Duffy, J., dissenting, joined by Acoba, J.) (stating that the majority's opinion conflicted with the Ninth Circuit Court of Appeals decision in Kaua v. Frank, 436 F.3d 1057 (9th Cir. 2006), affirming Kaua v. Frank, 350 F. Supp. 2d 848 (2004) [hereinafter Kaua I], because the Sixth Amendment requires a jury to make a finding that would "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict" (citation omitted)); State v. Brown, No. 26911, 2005 WL 2338855, at *2 (Haw. Sept. 26, 2005) (unpublished disposition) (Acoba, J., concurring and dissenting, joined by Duffy, J.) (concurring with the order affirming the trial court's judgment "except with respect to the procedure employed as to the imposition of an extended term sentence" based on the dissent in Rivera); State v. Domingo, No. 26458, 2005 WL 1400395, at *2

(Haw. June 14, 2005) (unpublished disposition) (Duffy, J., concurring and dissenting, joined by Acoba, J.) (concurring with the majority except with regard to the sentence imposed, based on the dissent in Rivera); State v. D'Argibaud, No. 26087, 2005 Haw. LEXIS 205, at *1 (Haw. Apr. 18, 2005) (order denying application for certiorari (Acoba, J., dissenting, joined by Duffy, J.) (dissenting on the basis that defendant's extended term of imprisonment violated Apprendi and its progeny, as stated in the dissent in Rivera); State v. Akana, No. 25647, 2005 WL 504052, at *2 (Haw. Mar. 4, 2005) (unpublished disposition) (Acoba, J., concurring and dissenting, joined by Duffy, J.) (concurring in the order affirming the trial court's judgment "except with respect to the procedure employed as to the imposition of an extended term sentence[,]" based on the dissent in Rivera); State v. Gomes, 107 Hawai'i 308, 314, 113 P.3d 184, 190 (2005) (Acoba, J., concurring, joined by Duffy, J.) (concurring but "continu[ing] to adhere to the position taken . . . [by the] dissent in [Rivera]"); see Jeannie Choi, Comment, State v. Rivera: Extended Sentencing and the Sixth Amendment Right to Trial by Jury in Hawai'i, 28 U. Haw. L. Rev. 457, 457, 484 (2006) (arguing "that Hawaii's extended sentencing scheme fails constitutional muster and that a remedy is timely" because "the Hawai'i Supreme Court [majority] attempted to reconcile [Hawaii's] extended sentencing scheme with the Sixth Amendment right to trial by jury through linguistic manipulation of a fact

as 'intrinsic' or 'extrinsic' where no substantial distinction in effect upon the statutory maximum exists").

III.

Appellant requests that this court "vacate the sentences in all cases, Cr. No. 03-1-1897, Cr. No. 03-1-2727, Cr. No. 03-1-2726, Cr. No. 03-1-2725, [and] Cr. No. 03-1-2724, reverse the circuit court's orders granting the [prosecution's] motions for extended term sentencing, and remand the cases for resentencing." In Cunningham, the Court explained the ways that an extended term sentence could be imposed in an Apprendi compliant sentencing system:

> As to the adjustment of California's sentencing system in light of our decision, "[t]he ball . . . lies in [California's] court." Booker, 543 U.S., at 265, 125 S.Ct. 738[.] We note that several States have modified their systems in the wake of Apprendi and Blakely to retain determinate sentencing. They have done so by calling upon the jury-either at trial or in a separate sentencing proceeding-to find any fact necessary to the imposition of an elevated sentence. As earlier noted, California already employs juries in this manner to determine statutory sentencing enhancements. . . . Other States have chosen to permit judges genuinely "to exercise broad discretion . . . within a statutory range," which, "everyone agrees," encounters no Sixth Amendment shoal. Booker, 543 U.S[.] at 233, 125 S.Ct. 738.[9] California may follow the paths taken by its sister States or otherwise alter its system, so long as the State observes Sixth Amendment limitations declared in this Court's decisions.

Cunningham, 549 U.S. at ---, 127 S.Ct. at 871 (emphases added) (footnote omitted) (some brackets in original and some added and some ellipses in original and some added).

Thus, Cunningham essentially outlines two possibilities: (1) follow the present system but modify it to require that a jury find any aggravating factors or (2) allow judges to exercise broad discretion, by creating a system in

which there is no "fixed term" which would allow judges to impose sentences without a jury. See Smylie v. State, 823 N.E.2d 679, 685 (Ind. 2005) (explaining that "[a] constitutional scheme akin to ours could take one of two forms"). Fundamental to any method, is that "the State observes Sixth Amendment limitations declared in this Court's decisions." Cunningham, 549 U.S. at ---, 127 S.Ct. at 871.

However, on remand, the majority concludes that the entire extended term statute is unconstitutional and forecloses both of the Cunningham possibilities posed. As to Cunningham option (1), the majority states that, "in light of the expressly stated legislative intent underlying Act 230, we decline to exercise our inherent judicial power to order, on remand, that a jury be empaneled[,]" majority opinion at 33, and as to option (2), "[t]he second remedy sanctioned by the Cunningham majority," allowing judges to exercise broad discretion "would require us to rewrite HRS ch. 706 in such a way as to transform it from an indeterminate to a determinate sentencing scheme[,]" majority opinion at 39 n.21. Accordingly, in asserting that "the task of conforming the extended term sentencing statutes to Cunningham lies with the legislature[,]" majority opinion at 31 (some capitalization omitted), the majority precludes imposition of any extended sentence unless and until the legislature acts. Manifestly, such an outcome is not compelled by our own precedent or Cunningham.

IV.

HRS §§ 706-661 and -662 are not unconstitutional in their entirety based on this court's own jurisprudence, other jurisdictions applying Apprendi and its progeny, and Apprendi's bright-line rule, reiterated in Cunningham, regarding extended sentencing. Initially, the majority's holding that HRS § 706-662 is unconstitutional on its face, majority opinion at 29-30, is inconsistent with this court's determination that allowing "the court" to make findings for enhancing sentences such as that required by HRS § 706-657 (1993) was unconstitutional, but did not render the entire statute void because in such a statutory scheme a jury could be substituted for a judge. See State v. Peralto, 95 Hawai'i 1, 18 P.3d 203 (2001), State v. Young, 93 Hawai'i 224, 999 P.2d 230 (2000), and State v. Janto, 92 Hawai'i 19, 986 P.2d 306 (1999), and discussion, infra; cf. Janto, 92 Hawai'i at 34, 986 P.2d at 320 (finding the statute allowing "the court" to make findings unconstitutional "[b]ecause the requirement that the jury find the facts necessary for imposition of a particular punishment is rooted in the Hawai'i constitution's guarantee of right to jury trial").

In Janto, Young, and Peralto, this court concluded that in order to apply HRS § 706-657 constitutionally, a jury, instead of the court as the statute dictated, had to make the necessary findings for enhanced sentencing and so ordered. See infra. It is inconsistent with the foregoing cases for the majority to void

the entire extended sentencing regime, simply because the statute's prescription that "the court" make the findings is invalid, when the case may be readily remanded for a jury, instead, to render such a determination. The majority's contradictory position thus flies in the face of our own precedent.

Second, it is not necessary to nullify the entire statute where some portions of the extended term sentencing statute may be constitutionally applied. Other jurisdictions facing similar issues, in light of Apprendi, Blakely, and Cunningham, have also upheld the constitutional portions of their respective extended term sentencing regimes. See State v. Shattuck, 704 N.W.2d 131, 143 n.11 (Minn. 2005) (holding that portions of the sentencing scheme were unconstitutional as applied because "[t]he traditional rule is that a law is facially unconstitutional only if it is unconstitutional in all of its applications" (citing United States v. Salerno, 481 U.S. 739, 745 (1987) (to succeed in facial challenge, challenger "must establish that no set of circumstances exists under which the Act would be valid"))); State v. Dilts, 103 P.3d 95, 99-100 (Ore. 2004) ("This court has held that, when part or parts of a statute are held unconstitutional, the whole statute need not be invalidated if the part or parts that are constitutionally impermissible are severable from the remainder of the statute" and "the fact that the sentencing guidelines may be applied

unconstitutionally, as they were in this case, does not mean that we must reject the sentencing guidelines themselves as unconstitutional" (citation omitted)); Smylie, 823 N.E.2d at 685 ("The foregoing conclusion about the unconstitutionality of Indiana's present sentencing system hardly nullifies the entire arrangement. We have historically rescued constitutional portions of statutes, if possible, when other portions are held unconstitutional." (Citation omitted.)). As noted, this statute may be applied constitutionally if a jury makes the necessary findings for imposing extended term sentences. The majority, however, simply chooses to circumvent the application of Cunningham in this case.

Further, in declaring the statute unconstitutional in its entirety, the majority precludes application of portions of the statute obviously allowable by Cunningham. Apprendi dictated the bright line rule reiterated in Cunningham that "the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." Cunningham, 549 U.S. at ---, 127 S.Ct. at 860 (citing Apprendi 530 U.S. at 490) (emphasis added) (citations omitted).

The majority's holding would eliminate the sentencing court's ability to impose extended term sentencing, even in the Apprendi-approved situation of prior convictions. See HRS § 706-

662(1) (Supp. 2006) (allowing for extended term sentencing where "[t]he defendant is a persistent offender in that the defendant has previously been convicted of two felonies committed at different times when the defendant was eighteen years of age or older"); see also Shattuck, 704 N.W.2d at 143 n.10 (concluding that "Appellant has not demonstrated that Minn. Sent. Guidelines II.D is unconstitutional in all of its applications, because a section not before us today, which provides for imposition of an upward departure based on the fact of a prior conviction, could be determined to be constitutional"). Such a result is plainly contrary to Apprendi, Blakely, and Cunningham.

V.

Accordingly, I disagree with the majority that Cunningham option (1) is not possible or appropriate for we have, in similar instances, "call[ed] upon the jury -- either at trial or in a separate sentencing proceeding -- to find any fact necessary to the imposition of an elevated sentence." Cunningham, 549 U.S. at ---, 127 S.Ct. at 871.[2]

In eschewing option one, the majority states that "in Act 230, the legislature expressed its intent regarding how best to conform our extended term sentencing regime to the requirements of Apprendi and its progeny and, in so doing, did

[2] I do agree that the second option is foreclosed because we cannot do the job of the legislature and "transform [our sentencing system] from an indeterminate to a determinate sentencing scheme." Majority opinion at 39 n.21.

not vest in the jury the power to find the requisite aggravating facts but, rather, directed that the sentencing court should retain that responsibility." Majority opinion at 35 (citations omitted). Act 230 was the result of a review by the Committee to Conduct a Comprehensive Review of the Hawai'i Penal Code (the Committee) that specifically addressed Hawaii's extended sentencing provisions in an effort to avoid the Apprendi jury trial requirement.

Amendments to HRS §§ 706-661 and -662 were proposed by the Committee in response to Kaua I, 350 F. Supp. 2d at 860, which found that Hawaii's extended term sentencing scheme was unconstitutional. According to the Committee, the specific concern was that the decision created "a clear danger that sentences imposed pursuant to Hawaii's current extended term sentencing scheme will be subject to invalidation by the federal courts." Report of the Committee to Conduct a Comprehensive Review of the Hawai'i Penal Code at 27m (2005) [hereinafter Penal Code Review] (emphasis added). The Committee stated that "the proposed amendments remove[d] the need to protect the public as a finding the court must make before a defendant is eligible for an extended term sentence. Rather, a defendant who ha[d] been convicted of a felony and me[t] the criteria for any of the modified section 706-662 categories, [was] exposed, without more, to the maximum extended term sentence." Id. at 27n (emphasis added). Thus, "[t]he proposed amendments [were] aimed at

strengthening our extended term sentencing scheme against constitutional attack in this evolving area of law." Id. at 27m.

Consequently, while the majority posits that the legislature, in attempting to conform our extended term sentencing scheme to Apprendi, vested authority in the sentencing court to find the requisite aggravating facts, it ignores the legislature's overarching concern that led to the aborted amendment of the extended term sentencing structure: that extended term sentencing continue to be available. In light of Cunningham, the legislature's designation of the sentencing court as the fact finder for extended term sentencing is invalid. Nevertheless, the extended term sentencing procedure may still be enforced under the first option -- calling upon the jury to find necessary facts -- approved by the Supreme Court, and should be adopted in view of the legislature's desire to preserve extended term sentencing.

VI.

In that regard, article VI, section 1 of the Hawai'i Constitution vests the "judicial power of the State" in the courts. This court has stated that "the inherent power of the court is the power to protect itself; the power to administer justice whether any previous form of remedy has been granted or not; the power to promulgate rules for its practice; and the power to provide process where none exists." State v. Moriwake,

65 Haw. 47, 55, 647 P.2d 705, 712 (1982) (citations and internal quotation marks omitted).

Furthermore, the inherent power of the circuit courts is confirmed by HRS § 603-21.9(6) (1993), which states that "[t]he several circuit courts shall have the power . . . [to] do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to them by law or for the promotion of justice matters pending before them." Additionally, the circuit courts have included within this inherent power, the power to control the litigation process before them and to "create a remedy for a wrong even in the absence of specific statutory remedies[.]" State v. Harrison, 95 Hawai'i, 28, 32, 18 P.3d 890, 894 (2001) (citations omitted).

A.

Pertinent to this case, this court has established a circuit court's inherent power to empanel a jury, where constitutionally necessary. In Janto, the statute at issue, HRS § 706-657, provides that "[t]he court may sentence a person who has been convicted of murder in the second degree to life imprisonment without possibility of parole under section 706-656 if the court finds that the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity[.]" (Emphases added.) The trial court had concluded that after "[t]he jury found Janto guilty of murder in the second degree on

January 26, 1998 . . . [,] the prosecution filed a motion for enhanced sentence pursuant to [HRS] § 706-657" but "in this situation the court would have to submit this issue to the jury because it depends on something that is intrinsic within the case as opposed to extrinsic" or "[i]n other words, because the nature of the sentence involved [it] . . . would be something before the trier of fact. In this case I [(the court)] was not the trier of fact." 92 Hawai'i at 26, 986 P.2d at 313.

Janto recognized that "[i]f a potential penalty might rise from 15 years to life on a nonjury determination, the jury's role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gate keeping[.]" Id. at 34, 986 P.2d at 321. This court thus affirmed the trial court, holding that "a finding leading to an enhanced sentence pursuant to HRS § 706-657 must be made by the trier of fact[,]" id. at 32-33, 986 P.2d at 319-320, i.e., the jury.

Hence, although HRS § 706-657 instructed that "the court" make the findings necessary to impose an enhanced sentence, Janto explained that "the requirement that the jury find the facts necessary for imposition of a particular punishment is rooted in the Hawai'i constitution's guarantee of right to jury trial, [and] the prosecution's argument that adequate notice was given to Janto by the procedures explicated

in HRS § 706-657 [was] unpersuasive." Id. at 34, 982 P.2d at 321.

This court also noted the possible "procedural difficulties in requiring the jury simultaneously to determine guilt and make a finding that the murder was 'especially heinous, atrocious, or cruel,'" and, based on such concerns, adopted the solution of a bifurcated proceeding. Id. In such a proceeding, after a jury returns a guilty verdict, an evidentiary hearing must be held and the jury must make a determination as to whether the murder was "especially heinous, atrocious, or cruel" rather than a judge. Id. at 34-35, 986 P.2d at 321-22. Thus, a procedure similar to that deemed necessary in Janto manifestly applies to the imposition of extended term sentences in light of Cunningham's approval of "calling upon the jury" "to find any fact necessary to the imposition of an elevated sentence" "in a separate sentencing proceeding." 549 U.S. at ---, 127 S.Ct. at 859 (citation omitted).

Further, in Peralto, this court exercised its inherent power to order a jury empaneled on resentencing in a case involving an extended term sentencing appeal. Like Janto, Peralto also involved HRS § 706-657, which referred to "[t]he court" sentencing a person to life imprisonment without the possibility of parole if it found "the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity."

Peralto, 95 Hawai'i at 5, 18 P.3d at 207 (quoting HRS § 706-657) (emphasis added). Peralto retroactively applied Young.

Young required that "[t]he prosecution must prove and the jury must unanimously find, beyond a reasonable doubt, that the defendant intentionally or knowingly inflicted unnecessary torture on the victim and that the victim suffered unnecessary torture." Id. (citing Young, 93 Hawai'i at 236, 999 P.2d at 241). Because the jury had not been specifically instructed as to the Young test and, thus, had not made the necessary findings to impose an enhanced sentence, this court exercised its inherent power and remanded the case, instructing that a new jury be empaneled to make the necessary findings to determine whether enhanced sentencing was appropriate. Id. at 6, 18 P.3d at 208.

Again, it must be noted that this court required a jury finding in Janto, Young, and Peralto, despite the express language in HRS § 706-657 designating "the court" as authorized to enhance a defendant's sentence "if the court" makes the finding that the "the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity." Thus, in the foregoing cases, the fact that the legislature had explicitly directed that such determinations were to be made by the judge rather than the jury did not persuade or preclude this court from requiring that fact-finding that would have been done by the court was nevertheless to be assigned to the jury.

This court plainly held that where a jury did not make specific findings on the aggravated circumstances necessary for enhanced sentencing, a new jury must to be empaneled to make such decisions rather than a judge, and exercised its inherent judicial power in establishing such a procedure. Obviously, the same rationale applies here because in order to preserve the constitutionality of our extended sentencing scheme, the jury, rather then the court, must make the necessary findings regarding aggravated circumstances.

B.

Peralto also concluded that "[b]ecause the sufficiency of the jury instruction [was] a procedural error, remand for a HRS § 706-657 hearing [was] possible in [that] case" inasmuch as "where a defendant's enhanced sentence under HRS § 706-657 is vacated on appeal based on a procedural error, the prosecution may elect to conduct a new HRS § 706-657 hearing or may consent to resentencing without the enhancement. If the HRS § 706-657 issue was originally decided by a jury, a new jury shall be empaneled for the hearing on remand unless the parties agree to waive the jury and conduct the hearing before the court." 95 Hawai'i at 6 n.4, 18 P.3d at 208 n.4 (emphasis added).

Analogously, in the instant case the imposition of an extended term sentence based on unconstitutional judicial fact-finding would amount to a procedural error. Therefore, based on established precedent, the same procedure outlined by Peralto

applies in Appellant's situation. Indeed, the argument for use of the judiciary's inherent power is even stronger here where, without such a procedure, there will be no extended term sentencing until the legislature acts.

VII.

Other jurisdictions have exercised this inherent power emphasizing the overriding intent of the legislature to retain enhanced sentences in the appropriate cases.[3] For example, the

[3] In support of its decision to invalidate the extended term sentencing scheme, the majority relies on several cases. The Arizona Supreme Court, in State v. Brown, 99 P.3d 15, 18-19 (Ariz. 2004), did not, as the majority suggests, exercise restraint and choose not to act in the face of Apprendi. Instead, the court stated that "[g]iven the procedural posture in which this case arrived in this [c]ourt[,]" although there were many "additional issues [that] deserve serious consideration, almost none have been directly addressed by the trial judge and none were raised in or decided by the court of appeals" and, as such, it was "unwilling, even in this important area of the law, to consider these issues as an initial matter in the context of this special action." Id. at 18.

Similarly in Dilts, the Oregon Supreme Court did not take a position on the trial court's implementation of either of the Cunningham options, but left the door open for both. That court stated that "our holding simply requires Oregon courts to apply the guidelines in a way that respects the Sixth Amendment[,]" and concluded that "[o]ur discussion above makes clear that a sentence within the guidelines' presumptive range would be constitutional" but explained that it would "not speculate as to the specific positions that the parties may take before the trial court respecting that court's authority in the resentencing proceedings" because "[i]t is inappropriate to address statutory issues, as well as more fundamental state and federal constitutional issues, relating, inter alia, to indictment, notice and jury trial until they have been raised before and decided by the trial court." Dilts, 645 P.3d at 96, 101.

In Shattuck, 704 N.W.2d at 148 n.17, the Minnesota Supreme Court observed that "the legislature ha[d] recently enacted significant new requirements for aggravated sentencing departures, including sentencing juries and bifurcated trials, and that th[o]se changes appl[ied] both prospectively and to resentencing hearings" and, as such, it "express[ed] no opinion about these recent changes, and d[id] not foreclose the district court from considering any constitutionally applicable and/or available laws on remand." Further, subsequent to that decision, the Minnesota courts have found error where the trial court failed to exercise its inherent power to empanel a jury to avoid any Apprendi problem. See State v. Boehl, 726 N.W.2d 831, 842 (Minn. Ct. App. 2007) (holding that "[t]he district court possessed the inherent judicial authority to [e]mpanel a resentencing jury on remand from . . . reversal of [the] respondent's enhanced sentence" and "[b]ecause the district court erred by failing to recognize that it possessed this inherent judicial authority, [Boehl] reverse[d] and remand[ed] for the district court's discretionary determination of whether to exercise that authority").

(continued...)

Indiana Supreme Court, acknowledging the two possibilities later outlined in Cunningham, determined that the approach most "faithful to the large objectives of the General Assembly" would be to maintain the "present arrangement of fixed terms modified to require jury findings on facts in aggravation[.]" Smylie, 823 N.E.2d at 685, 686 (emphasis added). This reasoning is echoed by State v. Chauvin, 723 N.W.2d 20, 24 (Minn. 2006), which, as noted above, concluded that "[w]ithout a constitutional mechanism for imposing an upward sentencing departure and without legislative guidance on how to proceed, empaneling a sentencing jury was necessary (1) to carry out the legislative sentencing scheme to the extent that it contemplated that the district court would impose upward departures where such departures were more appropriate, reasonable, or equitable than the presumptive sentence" and "(2) to vindicate Chauvin's Sixth Amendment right to a jury determination of aggravating sentencing factors."

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[3](...continued)

In State v. Provost, 896 A.2d 55, 66-67 (Vt. 2005), the Vermont Supreme Court declined to "follow the example of those courts that have created their own sentencing procedures to replace legislative schemes held unconstitutional in the wake of Apprendi and Blakely[,]" because it was "not at all clear whether the [Vermont l]egislature would prefer an indeterminate sentencing scheme placing greater discretion in trial judges, or a scheme requiring juries to conduct whatever additional fact-finding is needed."

However, in the instant case the legislature has clearly expressed its intent that extended term sentencing exist even in light of Apprendi and Blakely. As noted above, allowing a jury to make findings necessary to impose an extended sentence would be consistent with this intent, and would not prevent the legislature from taking any future action. The same is true of State v. Hughes, 110 P.3d 192, 209 (Wash. 2005), abrogated on other grounds by Washington v. Recuenco, --- U.S. ---, ---, 126 S.Ct 2546, 2553 (2006), where the Washington Supreme Court concluded it would "not create a procedure to empanel juries on remand to find aggravating factors because the legislature did not provide such a procedure and, instead, explicitly assigned such findings to the trial court."

Chauvin explained that "[i]t could completely ignore the legislative scheme for departing from the presumptive guideline sentence" or "it could do the least amount of damage to the statutory scheme by retaining the departure mechanism while at the same time complying with *Blakely* by using a sentencing jury." Id. at 25 (emphasis added).

Chauvin reasoned that, "[f]aced with this conflict, we agree that it was practically necessary for the district court to improvise a jury fact finding mechanism to comply with the Sixth Amendment." Id. That court elaborated that "using a sentencing jury to make factual findings is a unique judicial function" because "the determination of court procedural matters is a judicial function that arises from the court's inherent judicial powers." Id. (emphasis added) (internal quotation marks, citations, and brackets omitted).

Hence, Chauvin concluded that empaneling a sentencing jury was also a procedural matter because it "did not change the punishment available for the underlying substantive offense" but "merely changed the steps that the court took in arriving at a sentence already authorized by the legislature." Id. (emphasis added). Thus, that court reiterated that "safeguarding the rights of criminal defendants is a historical and constitutional function of the judicial branch" and, as a result, "providing a jury trial where the statutory scheme is silent on the issue" was necessarily in line with this judicial function. Id. at 26-27.

Additionally, the Maine Supreme Court declared that "[a]lthough requiring a jury to determine [an aggravating fact] may be less efficient that the [l]egislature conceived, tradition and judicial efficiency do not trump the Sixth Amendment." State v. Schofield, 895 A.2d 927, 935 (Me. 2005). Further, in fashioning a proper remedy upon concluding that the defendant was given an enhanced sentence in violation of Blakely, the Maine Supreme Court decided that although there was "presently no procedure for empaneling a jury to decide sentencing facts," it was "well within [that court's] inherent judicial power to 'safeguard and protect within the borders of this State the fundamental principles of government vouchsafed to us by the State and Federal Constitutions.'" Id. at 937 (quoting Morris v. Goss, 83 A.2d 556, 565 (Me. 1951)). As is also true in the instant case, Schofield held that empaneling a jury on resentencing "best preserves the [l]egislature's intent to provide greater punishment for those who commit the most heinous offenses." Id.

Finally, in Aragon v. Wilkinson ex rel. County of Maricopa, 97 P.3d 886, 891 (Ariz. App. Ct. 2004), the Arizona Court of Appeals reiterated that "Blakely does not impede the imposition of an aggravated sentence because the court can convene a jury to find facts that may support imposition of an aggravated sentence." In a situation similar to the instant case, that court concluded that "although the statutory

sentencing scheme does not currently provide for convening a jury trial during the sentencing phase of a non-capital case, nothing in our rules or statutes prohibits the court from doing so." Id. Furthermore, in order to assist the trial court in sentencing on remand, Aragon stated that "the court may utilize its inherent authority to convene a jury trial on the existence of facts that may support imposition of an aggravated sentence." Id. (citations omitted).

VIII.

Against this precedent, the majority maintains that it chooses not to exercise that inherent power based on "prudential rules of self government" and in the name of "self-restraint."[4] Majority opinion at 37. But as stated before, the majority's position here is diametrically opposed to its position in Janto, Young, and Peralto, where the majority asserted the appropriateness of remanding cases for determination by a jury of enhanced sentences even though the statutes designated the judge as being charged with that task. Moreover, in opposition to the legislature's express intent to "strengthen[] our extended term sentencing scheme against constitutional attack in this evolving area of law[,]" Penal Code Review at 27m, the majority's opinion

[4] Instead of adopting an interim solution to address the issue of extended term sentencing, the majority suggests to the legislature the future procedure it envisions by stating that, "[w]ithout deciding the issue, we foresee that, in a reformed extended term sentencing scheme in which the jury is vested with the responsibility of making the requisite findings, notice of the prosecution's intention to seek to seek an extended sentence and the facts requisite to that extended sentence . . . would be included in the indictment but withheld from the jury until the second phase of the trial." Majority opinion at 34 n.20.

concludes in effect that until there is a legislative amendment, there can never be any extended term sentencing.

To reiterate, in such cases, the majority wrongly forbids any extended term sentencing despite the expressed legislative intent to guard against "a clear danger that sentences imposed pursuant to Hawaii's current extended term sentencing scheme will be subject to invalidation by the federal courts." Penal Code Review at 27m. The legislature's fundamental concern was to "maintain" "extended term statutes," id. at 27n, and to protect them from "constitutional attack," id. at 27m. In order, then, to best conform our current extended term sentencing scheme with the expressed intent of the legislature, a jury should be empaneled on remand to decide on the findings necessary under a motion for extended term sentencing, unless Appellant waives his right to jury and such waiver is agreed to by the court.[5]

Accordingly, because the prosecution filed motions for extended terms and this matter was appealed on the ground that the procedure followed in light of Apprendi and Blakely was incorrect, this case should be remanded for disposition of the extended term motions based on the procedure confirmed in Blakely

[5] The majority states that subsequent action was taken in the form of House Bill No. 1152, H.B. 1152, 24th Leg., Reg. Sess (2007), by the legislature during its 2007 session in order to address the Cunningham mandate and "to assign to the jury the role of making the finding requisite for the imposition of an extended term of imprisonment." Majority opinion at 37 n.20. Plainly, the bifurcated proceeding proposed by the legislature in H.B. 1152 is consistent with the proceeding proposed here on remand. Accordingly the bill supports the disposition recommended in this separate opinion -- not the one proposed by the majority.

and Cunningham. See State v. Kahapea, 111 Hawai'i 267, 285, 141 P.3d 440, 455 (2006) (Acoba, J., dissenting, joined by Duffy, J.) (noting that "under the express language of the penal code, consecutive sentences are not meant or intended to displace or replace extended sentences[;] . . . [i]t 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" and that "[s]uch subterfuge would violate the provisions of the penal code and potentially raise serious due process considerations").

IX.

Based on the foregoing, I would vacate the sentences and the judgments thereon and remand for a jury trial on the prosecution's motion for extended terms.