

CONCURRENCE AND DISSENT BY ACOBA, J.;
WITH WHOM DUFFY, J., JOINS

In accordance with the concurring and dissenting opinion in State v. Maugaotega, No. 26657, slip op. at 1 (Haw. Oct. 1, 2007) (Acoba, J., concurring and dissenting, joined by Duffy, J.) [hereinafter Maugaotega], stating that based upon the February 20, 2007 mandate of the United States Supreme Court, Maugaotega v. Hawaii, --- U.S. ---, 127 S.Ct. 1210 (2007), (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 Hawaii extended term sentencing scheme as applied to the Appellant by the majority in State v. Maugaotega, 107 Hawaii 399, 114 P.3d 905 (2005), I would vacate Petitioner's sentence and the judgment thereon and remand for a jury trial, unless waived by Petitioner, on the motion for extended term filed by Respondent.

This disposition on remand is required because, as stated in the aforesaid concurring and dissenting opinion (Acoba, J., concurring and dissenting, joined by Duffy, J.), (1) Hawaii Revised Statutes (HRS) §§ 706-661 and -662, the extended term sentencing statutes, are not rendered unconstitutional in their entirety under Cunningham, (2) the legislature has expressed its intent to preserve extended term sentencing, (3) such a disposition is approved by Cunningham, (4) the majority's position in Maugaotega concluding that the entire extended term

statutes are unconstitutional is diametrically opposed and inconsistent with its position in State v. Janto, 92 Hawaii 19, 986 P.2d 306 (1999), State v. Young, 93 Hawaii 224, 999 P.2d 230 (2000), and State v. Peralto, 95 Hawaii 1, 18 P.3d 203 (2001), where the majority asserted the appropriateness of remanding cases for determination by a jury of proposed enhanced sentences even though the statute designated the judge rather than a jury as being charged with that task.

I concur in all other respects.