

DISSENTING OPINION BY ACOBA, J.

I respectfully dissent.

As indicated in the dissent in State v. Reis, No. 27171, 2007 WL 2372580, at *16 (Haw. Aug. 21, 2007) (Acoba, J., dissenting), I believe "the majority in this case incorrectly applies the terms 'proceedings' and 'penalty incurred' in the generic savings clause in Section 29 of Act 44, 2004 Haw. Sess. L. Act 44 [hereinafter Act 44], § 29 [hereinafter Section 29], to [erroneously] preclude the application of Section 11 of Act 44 [hereinafter, Section 11] to" Defendant-Appellee Russell Kela Cruz (Cruz). For "[i]n light of its ameliorative and remedial purpose of allowing [non-violent] drug offenders to be sentenced to probation, Section 11 should be applied to" Cruz. Id.

Thus, for the reasons stated in the Reis dissent,

(1) under a plain reading of Section 29, [Cruz's] sentencing "proceeding" took place after the effective date of Act 44, (2) alternatively, and assuming, arguendo, the term "proceedings" is ambiguous, the fact that prosecution of the case was initiated prior to the effective date of the Act does not preclude application of Section 11 under State v. Avilla, 69 Haw. 509, 750 P.2d 78 (1988), and also (3) [Cruz's] sentence may be treated as "a penalty incurred," after the effective date of the Act.

Id. I reiterate that, as the Honorable Steven Alm was correct in Reis, I believe the Honorable Virginia Lea Crandall correctly ruled in this case as follows:

[T]he court adopts the arguments set forth by the defense in its memorandum filed January 21, 2005, and the court finds and concludes that it has the discretion with respect to this case to sentence the defendant to probation.

Accordingly, the court sentences Mr. Cruz to a term of probation of five years subject to the following mandatory and special terms and conditions.

(Emphasis added.) Unfortunately, Cruz's opportunity for

rehabilitation is forfeited by the Reis decision, as are the opportunities of others similarly situated and "[t]he consequences will invariably have an adverse effect for [them], for those around them, and for our community as a whole." Reis, 2007 WL 2372580, at *16 (Acoba, J., dissenting).

I adhere to the conclusion that "[u]ltimately, the majority's [decision] is unsound because 'nothing is to be gained by imposing the more severe penalty,' Wayne LaFave, 1 Substantive Criminal Law, § 2.5 (2007) . . . , that existed before the most recent legislative policy embodied in Section 11, -- especially when our case law permits this court to confirm application of Section 11." Id. Accordingly, Judge Crandall's ruling was "legally correct and judicially appropriate[,]" id., and, thus, I would affirm the decision applying Section 11 and sentencing Cruz to probation.

A handwritten signature in black ink, appearing to read "Crandall", is written in a cursive style.