

DISSENT BY ACOBA, J., WITH WHOM DUFFY, J., JOINS

I respectfully disagree that the application for writ of certiorari should be rejected. I believe a serious question exists as to the validity of the extended term sentencing procedure in this case. This issue was raised on resentencing after remand at trial and on appeal and apparently determined by the Intermediate Court of Appeals (ICA), but seemingly is not set forth in the application. See State v. Barona, No. 27702, SDO (App. Feb. 5, 2007) (citing, inter alia, State v. Rivera, 106 Hawai'i 146, 160-61, 102 P.3d 1044, 1058-59 (2004); State v. White, 110 Hawai'i 79, 81 n.4, 129 P.3d 1107, 1109 n.4 (2006)).

I believe the analysis set forth in Rivera and White governs. See Rivera, 106 Hawai'i at 171-72, 102 P.3d at 1069-70 (Acoba, J., dissenting, joined by Duffy, J.) (stating that "to determine that doubling the sentence was 'necessary for the protection of the public'" a proceeding is "subject to the right to jury trial under the Sixth Amendment" (citations omitted)); White, 110 Hawai'i at 91, 129 P.3d at 1119 (Acoba, J. dissenting, joined by Duffy, J.) (stating that "the availability of federal habeas proceedings and the resulting impact on the parties and both state and federal courts[, after Kaua v. Frank, 436 F.3d 1057 (9th Cir. 2006),] makes a reexamination of our [Hawai'i] extended-term sentencing decisions [rejecting a jury trial] even more imperative").

The constitutional violation here appears too fundamental and too obvious to ignore. Cf. State v. Iaukea, 56 Haw. 343, 355, 537 P.2d 724, 733 (1975) (stating that this court "ha[s] the power, sua sponte, to notice plain errors or defects in the record affecting substantial rights not properly brought to the attention of the trial judge or raised on appeal" (citing State v. Yoshino, 50 Haw. 287, 289, 439 P.2d 666, 668 (1968); State v. Cummings, 49 Haw. 522, 528, 423 P.2d 438, 442 (1967); State v. Ruiz, 49 Haw. 504, 507, 421 P.2d 305, 308 (1966))); see Maugaotega v. Hawaii, No. 05-7309, 2007 WL 505811, at \*1 (U.S. Feb. 20, 2007) (The United States Supreme Court granting certiorari from this court's judgment denying the right to a jury trial in an extended sentencing hearing and directing that "[t]he judgment is vacated and the case is remanded to the Supreme Court of Hawaii for further consideration[.]"); Cunningham v. California, 549 U.S. -- (2007).

Accordingly I would grant certiorari inasmuch as we are vested with the discretion to do so, and in my opinion justice requires no less. See State v. Bolosan, 78 Hawai'i 86, 89 n.5, 890 P.2d 673, 676 n.5 (1995) (The legislative history of HRS § 602-59 (1985) indicated that although "the application for writ of certiorari must state 'errors of law or fact' or 'inconsistencies in the decision of the ICA with that of the Supreme Court, Federal decisions or its own decisions, and the magnitude of such errors or inconsistencies dictating the need for further appeal' . . . [,] such requirement is directed only

to the application for the writ[,]'" and, hence, the application requirement "'is not descriptive of the scope of review determinative of the Supreme Court's decision to grant or deny certiorari'" and "'[t]he Supreme Court's power in that regard is intended to simply be discretionary.'" (Quoting Conf. Comm. Rep. No. 73, in 1979 Senate Journal, at 992.) (Emphases in original.) (Brackets omitted.)).



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