

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

I respectfully disagree with the majority and would grant certiorari inasmuch as 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 State v. Kaua, 102 Hawai'i 1, 72 P.3d 473 (2003), State v. Rivera, 106 Hawai'i 146, 166, 102 P.3d 1044, 1064 (2004) (Acoba, J., dissenting, joined by Duffy, J.), State v. Maugaoteqa, 107 Hawai'i 399, 410, 114 P.3d 905, 916 (2005) (Acoba, J., dissenting, joined by Duffy, J.), and State v. White, 110 Hawai'i 79, 90, 129 P.3d 1107, 1118 (2006) (Acoba, J., dissenting, joined by Duffy, J.). As was stated in White,

both the United States District Court for the District of Hawai'i (the district court) in Kaua v. Frank, 350 F. Supp. 2d 848 (D. Haw. 2004) and the United States Ninth Circuit Court of Appeals in Kaua v. Frank, 436 F.3d 1057 (9th Cir. 2006), have ruled that State v. Kaua, 102 Hawai'i 1, 72 P.3d 473 (2003), upon which the majority's opinion is premised, violated Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

White, 110 Hawai'i at 90, 129 P.3d at 1118 (Acoba, J., dissenting, joined by Duffy, J.). Because "the federal district court effectively has the power to review our decisions via the writ of habeas corpus[, t]he Ninth Circuit's Kaua decision has in large part undercut the [majority view in] Rivera[" Id. at 91, 129 P.3d at 1119. Therefore, "the availability of federal habeas proceedings and the resulting impact on the parties and both state and federal courts make a reexamination of our extended-term sentencing decisions even more imperative." Id.; see also

J. Choi, Note, State v. Rivera: Extended Sentencing and the Sixth Amendment Right to Trial by Jury in Hawai'i, 28 U. Haw. L. Rev. 457, 476 (2006) (asserting that "the Hawai'i Supreme Court erred in upholding [Appellant Larry] Rivera's extended sentence," because "it misinterprete[ed] and incorrectly applie[d] Apprendi and Blakely[v. Washington, 542 U.S. 296 (2004)]").



James E. Sully, Jr.