CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I believe we have jurisdiction to consider the seventh point on appeal raised by Petitioner/Defendant-Appellant George Lacy, III (Petitioner) and must decide it along with the other issues. I do not view our jurisdiction on certiorari as narrowly as the majority.

The facts following are pertinent.

1. Petitioner was sentenced by the district court of the third circuit (the court) on March 8, 2006 to thirty days jail. Petitioner moved to stay execution of the sentence, and continued the case to April 12, 2006.

2. The filing of the appeal was noted by the court on April 12, 2006, whereupon execution of Petitioner's sentence was stayed by the court pending appeal.

3. On July 9, 2007, the Intermediate Court of Appeals (ICA) filed its judgment affirming the court's judgment.

4. On August 8, 2007, the court attempted to execute sentence, i.e., imprisonment, before the time for filing Petitioner's application for writ of certiorari had run.

5. The application for writ of certiorari filed by Petitioner on August 16, 2007, raised the court's attempted execution of sentence as an example of judicial bias (in addition to other claims of bias) and requested a different judge.

6. On August 20, 2007, this court issued an order staying execution of sentence.

7. Respondent/Plaintiff-Appellee State of Hawai'i filed nothing in response to the application, much less an objection to consideration of the judicial bias argument in point 7.

8. The claims of prejudice under point 7 are ancillary to the decision on the merits of the certiorari application.

I.

Hawai'i Revised Statutes (HRS) § 602-59 (Supp. 2006) provides for "review of the [ICA's] decision and judgment or dismissal order . . . by application to the supreme court for a writ of certiorari." Petitioner's seventh point is alleged as error of the court and not the ICA. However, this court's precedent and the statutes authorize us to consider the court's actions after the ICA's Summary Disposition Order was issued.

There is broad authority to consider matters arising on certiorari. 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 [s]upreme [c]ourt's decision to grant or

deny certiorari'" and "'[t]he [s]upreme [c]ourt's power in that regard is intended to be discretionary.'" State v. Bolosan, 78 Hawai'i 86, 89 n.5, 890 P.2d 673, 676 n.5 (1995) (quoting Conf. Comm. Rep. No. 73, in 1979 Senate Journal, at 992) (emphases in original) (brackets omitted). See also State v. Chong, 86 Hawai'i 282, 282-83, 949 P.2d 122, 122-23 (1997) (explaining that "[t]he legislative history of HRS § 602-59 makes clear we have the authority to consider any issues that arise in this case (citation omitted)).

Additionally, this court's precedent recognizes that the judicial power vested in the courts is broad and our powers are not susceptible to precise enumeration. Farmer v. Admin. Dir. of Court, 94 Hawai'i 232, 241, 11 P.3d 457, 466 (2000). Thus, this court has stated that under the Hawai'i Constitution, article VI, section 1, the judicial power includes "'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.'" Id. (quoting State v. Moriwake, 65 Haw. 47, 55, 647 P.2d 705, 711-12 (1982) (citations omitted)) (emphasis added).

The ICA had noted Petitioner's allegations of judicial bias, although it deemed the arguments waived, and the issue was raised again in Petitioner's application for certiorari. Since we properly exercised jurisdiction over other aspects of the

judicial bias argument raised in the certiorari application, this ancillary matter also should be decided. In addition to our discretion on certiorari referred to above, HRS § 602-5(7) (1993) further authorizes us to address the final episode of alleged bias, that is, the premature attempt to execute the mittimus, in order to promote justice in a matter pending before us. This court has the power to

> "make and award such judgments, decrees, orders and mandates, issue such executions and other processes, and 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 it by law or for the promotion of justice in matters pending before it."

Taomae v. Lingle, 108 Hawai'i 245, 251 n.12, 118 P.3d 1188, 1194 n.12 (2005) (quoting HRS § 602-5(7)) (emphases added) (holding that this court had jurisdiction to hear challenge to a constitutional amendment pursuant to HRS § 602-5(7)). In addition to the question of whether the court's attempted execution of mittimus was an indication of bias in the instant proceeding, the Hawai'i Rules of Penal Procedure Rule 40 proceeding left open in this case will likely be assigned to the same court. Hence, the determination of whether the court is impartial in the face of Petitioner's challenge is especially important. For "'people view fair procedures as a mechanism through which to obtain equitable outcomes . . . .'" K. Burke & S. Leben, "Procedural Fairness: A Key Ingredient in Public Satisfaction," American Judges Ass'n (September 26, 2007)

(quoting Tom R. Tyler, et al., Social Justice in a Diverse Society (1997)).

II.

Moreover, and significantly, due process requires that we decide this issue. Petitioner requests that if his case is remanded, it be tried by a different judge. Thus, Petitioner's due process right to an impartial judge is implicated under points 5, 6, and 7. "A state criminal defendant is entitled to an impartial judge as part of the fair trial guarantee in the due process clause of the fourteenth amendment of the United States Constitution." State v. Silva, 78 Hawai'i 115, 117, 890 P.2d 702, 704 (App. 1995), abrogated on other grounds by Tachibana v. State, 79 Hawai'i 226, 235 n.5, 900 P.2d 1293, 1302 n.5 (1995). Furthermore, "[s]ince the due process clause in section 5, article I of the Hawai'i Constitution is identical to the due process clause in the fourteenth amendment of the United States Constitution . . . the right to an impartial judge also inheres in section 5 of article I of the Hawai'i Constitution." Id. (citation omitted).

The issue of bias is not limited to what occurred during the trial. It extends to all of Petitioner's contacts with the court during the course of this litigation, including the attempted execution of mittimus by the court. Thus, the issue of the court's jurisdiction on August 8, 2007, does not dissipate the separate question of judicial bias.

When addressing due process concerns, this court has embraced an expansive view of its remedial power. In Farmer, 94 Hawai'i at 241, 11 P.3d at 466, this court unanimously agreed with the appellant that due process required an opportunity to adjust his license revocation period after one of the underlying DUI convictions was vacated. This court relied on its inherent powers under article VI, section 1 of the Hawai'i Constitution and the statutory authorization under HRS § 602-5(7) in holding that "justice require[d] that Farmer be given an opportunity to challenge the lifetime revocation of his driver's license because one of the three predicate convictions on which his revocation is based ha[d] been set aside[,]" even though the district court's rules specifically precluded such a remedy. Id.

Clearly, review of the court's conduct during the application period in light of Petitioner's due process right to an impartial court is consistent with our precedent and constitutionally mandated. Whether the judge ultimately had jurisdiction or not in the execution of mittimus, the issue of the judge's bias must be decided. Under the majority's approach, the question of the judge's bias remains undecided.

III.

Finally, the question raised in point 7 is not whether the court abused its discretion by refusing to grant a stay of Petitioner's sentence while Petitioner was appealing the ICA's judgment. Rather, the question is whether the court was or

appeared partial and thus abused its discretion in declining to recuse itself. The entire analysis of point 7 is directed at the question of judicial bias, over which we undoubtedly have jurisdiction, and not at the question of whether the court acted properly or improperly during the appeals period.

IV.

From only the bare facts stated above, I would conclude that Petitioner failed to demonstrate that the court's attempted premature execution of mittimus in this case exhibited partiality or an appearance of partiality. See Brown, 70 Haw. at 467 n.3, 776 P.2d at 1188 n.3 (a judge should not disqualify himself or herself where "the circumstances do not fairly give rise to an appearance of impropriety and do not reasonably cast suspicion on his impartiality"), or Ross, 89 Hawai'i at 380, 974 P.2d at 20 ("[B]ad appearances alone do not require disqualification. Reality controls over uninformed perception.").

V.

Based on the foregoing, I would hold that although the court acted on this case during the appellate phase, the premature execution of mittimus alleged in Petitioner's seventh point was not shown to have been based on bias on the part of the court so as to require disqualification.