

DISSENTING OPINION BY ACOBA, J.

I respectfully disagree with the disposition herein for the reasons expressed in the dissenting opinion in State v. Jess, No. 28483 (Mar. 31, 2008). Accordingly, I would dispose of this case on the alternative grounds following.

First, the November 2, 2005 extended term sentence imposed on Petitioner/Defendant-Appellant Bob Emch (Petitioner) was plainly unconstitutional. See State v. Rivera, 106 Hawai'i 146, 166, 102 P.3d 1044, 1064 (2004) (Acoba, J., dissenting, joined by Duffy, J.) (arguing that under Blakely v. Washington, 542 U.S. 296 (2004), and Apprendi v. New Jersey, 530 U.S. 466 (2000), Hawaii's extended sentencing statute violated the right to a jury trial on "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" protected by the Sixth Amendment to the United States Constitution (citation, internal quotation marks, and footnote omitted)). Subsequently, upon remand by the United States Supreme Court in light of Cunningham v. California, 549 U.S. --, 127 S.Ct. 856 (2007), this court declared Hawaii's extended sentencing statute "unconstitutional on its face[,]" State v. Mauqaoteqa, 115 Hawai'i 432, 446-47, 168 P.3d 562, 576-77 (2007) [hereinafter, Mauqaoteqa II] (footnote omitted), and remanded the case for non-extended term sentencing,¹ id. at 434, 168 P.3d at 564.

¹ On January 11, 2008, Petitioner filed a timely writ of certiorari requesting review of the Intermediate Court of Appeals' September 27, 2007 summary disposition order.

Petitioner's appeal was apparently pending at the time. Because Petitioner's appeal was pending during the pendency of the Maugaotega II appeal, his case should be remanded for non-extended term sentencing, as was Maugaotega's case, under the doctrine of stare decisis. See Jess, No. 28483, slip op. at 11 (Acoba, J., dissenting) (stating that "the same holding in Maugaotega II must, in principle, apply to Jess").

Second, the so called "judicial reform[ation]" of the statute declared unconstitutional by Maugaotega II through resort to Act 1 was inappropriately applied in Jess because (a) "the Reserved Question [in Jess] ask[ed] only whether[,] under the particular statute involved in the Reserved Question, HRS § 706-662 (1993 & Supp. 1996) [could] be constitutionally applied to resentence Jess," Jess, No. 28483, slip op. at 18 (Acoba, J., dissenting), (b) "reform[ation]" conflicts with the majority holding in Maugaotega II, which had already declared that "HRS § 706-662, in all of its manifestations . . . is unconstitutional on its face[,]" 115 Hawai'i at 446-47, 168 P.3d at 576-77 (emphasis added), (c) Maugaotega II erroneously rejected the rationale in State v. Janto, 92 Hawai'i 19, 986 P.2d 306 (1999), State v. Young, 93 Hawai'i 224, 999 P.2d 230 (2000), and State v. Peralto, 95 Hawai'i 1, 18 P.3d 203 (2001), "inasmuch as in those cases 'this court concluded that in order to apply HRS § 706-657 constitutionally, a jury, instead of the court as the statute dictated, had to make the necessary findings for enhanced

sentencing and so ordered[,]" Jess, No. 28483, slip op. at 7 (Acoba, J., dissenting) (quoting Maugaotega II, 115 Hawai'i at 456, 168 P.3d at 586) (Acoba, J., dissenting, joined by Duffy, J.) (emphasis added)), and did not hold the statute unconstitutional on its face as in Maugaotega II, and (d) as in the instant case, "Act 1 . . . was not in effect at any time relevant to Jess' [or Petitioner's] case[,]" id. at 18 n.13.

Third, if this case is subjected to extended term sentencing on remand, the majority's determination of the constitutionality of Act 1, see 2007 Haw. Sess. L. (Second Special Session) Act 1 at ---, was incorrect inasmuch as Act 1 was not applied, raised, or briefed in Jess and, similarly, has yet to be applied, raised, or briefed in Petitioner's case and, consequently, was not in controversy in Jess, nor is in controversy in the instant case. Jess, No. 28483, slip op. at 19 (Acoba, J., dissenting) (arguing that the issues related to the application of Act 1 were not ripe for decision in Jess' case).

Fourth, any new rule requiring extended term factors to be alleged in the charging document should be applied to all similarly situated defendants, see id. at 40 (Acoba, J., dissenting) (arguing that "the fairer approach" is to apply new constitutional rules of criminal procedure retroactively "to those defendants who are similarly situated" (quoting State v. Garcia, 96 Hawai'i 200, 214, 29 P.3d 919, 933 (2001) (internal citation marks omitted))), such as Petitioner. Based on the twin

principles that (1) preclude us from "simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new rules, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule[,] "Garcia, 96 Hawai'i at 213, 29 P.3d at 932 (internal quotation marks, citation, and brackets omitted), and (2) require us to "treat[] similarly situated defendants the same[,] " id. (quoting State v. Kekona, 77 Hawai'i 403, 411 n.3, 886 P.2d 740, 748 n.3 (1994) (citing Powell v. Nevada, 511 U.S. 79, 84 (1994); see also Griffith v. Kentucky, 479 U.S. 314, 322-28 (1987)), the rule should apply not only prospectively, but also to Petitioner, inasmuch as his appeal was pending during the pendency of Jess' appeal.

A handwritten signature in cursive script, appearing to read "D. Rawns", is located in the lower right quadrant of the page.