

DISSENT BY ACOBA, J.

I respectfully dissent and would grant the application for writ of certiorari filed by Petitioner/Defendant-Appellant Walter Lee Cutsinger (Petitioner). In my view, Petitioner is correct in that (1) the Intermediate Court of Appeals (ICA) should not have reached the question of the constitutionality of H.B. 2, 24th Leg., Second Spec. Sess. (2007) (enacted as Act 1) because it was not properly before the ICA in Petitioner's case, see State v. Jess, No. 28483, slip op. at 19-20 (Mar. 31, 2008) (Acoba, J., dissenting) (stating that "[a]ny constitutional questions that could arise with respect to the application of Act 1 to [Petitioner] . . . may be foreclosed by events that occur on remand for resentencing" (emphasis omitted)); (2) the new charging rule requiring all aggravating factors to be alleged in the charging document in order for a defendant to be eligible for an extended term sentence adopted by the majority should apply to Petitioner inasmuch as he, like the petitioner in Jess, "stands before this court today with a sentence that has been vacated . . . and therefore, is in the same shoes as a defendant who has yet to be sentenced or a defendant on direct appeal of his sentence[,] " id. at 41, and "as a matter of fundamental fairness we must apply any new rule benefitting defendants to those who are similarly situated," id. at 3-4; and (3) the failure of Respondent/Plaintiff-Appellee State of Hawai'i to comply with such a charging rule precludes it from seeking an extended term sentence.

