

DISSENTING OPINION BY LEVINSON, J.

I disagree with the majority's conclusion that the circuit court correctly ordered the defendant-appellant-petitioner Andrew Kamana'o to serve the indeterminate maximum terms of his first degree rape and sodomy sentences consecutively, because, in my view, Hawai'i Revised Statutes (HRS) § 706-668(1) (1976) (repealed 1986) required that the terms be served concurrently. See majority opinion at 2-3, 14-31. In interpreting the statute, this court's "foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself." State v. Reis, 115 Hawai'i 79, 84, 165 P.3d 980, 95 (2007) (quoting State v. Koch, 107 Hawai'i 215, 220, 112 P.3d 69, 74 (2005)). Therefore, I begin my analysis with the plain language of HRS § 706-668 as it was written at the time of the incidents giving rise to Kamana'o's convictions. See HRS § 701-101 (1985). The statute, entitled "Concurrent and consecutive terms of imprisonment," provided in relevant part that, "when multiple sentences of imprisonment are imposed on a person at the same time . . . , the sentence or sentences imposed by the court shall be served concurrently." HRS § 706-668(1). According to the commentary on HRS § 706-668, which this court may consult for guidance, see State v. Kaakimaka, 84 Hawai'i 280, 293, 933 P.2d 617, 630 (1997), the just-quoted provision "deprive[d] the [circuit] court of the power to mandate that the sentences imposed upon a defendant be served consecutively." Commentary on HRS § 706-668 (1976). In the present matter,

Kamana'o's three sentences each carried an indeterminate maximum term of twenty years' imprisonment and were imposed at the same time. See HRS §§ 706-659 (1985), 707-730(2) (1985), 707-733(2) (1985). Consequently, HRS § 706-668(1) mandated that his three sentences run concurrently.

The circuit court did not, however, run all of the sentences concurrently. Instead, it ordered that the two rape sentences run concurrently with each other, but consecutively with the sodomy sentence. The majority accepts the position advanced by the plaintiff-appellee-respondent State of Hawai'i [hereinafter, "the prosecution"] that the circuit court had the authority to impose indeterminate maximum sentences consecutively pursuant to the plain language of HRS § 706-606.5 (1985), see majority opinion at 14-21, which was entitled "Sentencing of repeat offenders" and provided in relevant part:

(1) Notwithstanding [HRS §] 706-669 and any other law to the contrary, any person convicted under . . . [HRS §] 707-730 relating to rape[or HRS §] 707-733 relating to sodomy in the first degree . . . , who has a prior conviction for any of the above enumerated offenses . . . , within the time of the maximum sentence of the prior conviction, shall be sentenced for each conviction after the first conviction to a mandatory minimum period of imprisonment without the possibility of parole during such period as follows:

(a) Second conviction - 5 years;

(3) The sentencing court may impose the above sentences consecutive to any other sentence then . . . imposed on the defendant

The majority essentially contends that the "sentences" referenced in paragraph (3) included the indeterminate maximum terms corresponding to each mandatory minimum. See majority

opinion at 14-21.¹ However, this court has construed the "above sentences" as those located textually above paragraph (3), including the sentence set forth in paragraph (1), which called for "a mandatory minimum period of imprisonment without the possibility of parole," as well as the sentence prescribed by HRS § 706-606.5(2), which likewise required "a mandatory minimum period of imprisonment." See State v. Cornelio, 84 Hawai'i 476, 491, 935 P.2d 1021, 1036 (1997) (quoting HRS § 706-606.5(3) and modifying it to read that "'the sentencing court may impose the [mandatory minimum prison] sentences [prescribed therein] consecutive to any other sentence then . . . imposed on the defendant'" (brackets and ellipsis in original)). Therefore, the language of HRS § 706-606.5(3) authorized the circuit court to impose consecutive mandatory minimum terms. It did not, by its terms, plainly permit the circuit court to order consecutive indeterminate maximum sentences, because the provisions found "above" that paragraph simply did not govern the imposition of indeterminate maximum terms. See Reis, 115 Hawai'i at 84, 165 P.3d at 985; see also State v. Plichta, 116 Hawai'i 200, 215, 172 P.3d 512, 527 (2007) (observing that a statute "should not be

¹ The majority claims that it does not construe "the above sentences" language in HRS § 706-606.5(3) and that its analysis does not rely upon that language. Majority opinion at 15 n.13. I find the majority's claim difficult to reconcile with its conclusion that HRS § 706-606.5 authorized the circuit court to impose indeterminate maximum sentences consecutively. See id. at 3-4, 20-26. The only reference to consecutive sentencing in HRS § 706-606.5 was in paragraph (3), which specifically provided that "[t]he sentencing court may impose the above sentences consecutive to any other sentence then . . . imposed on the defendant." The majority's conclusion that HRS § 706-606.5 empowered the circuit court to impose indeterminate maximum terms consecutively is therefore premised, at least implicitly, on the notion that "the above sentences" mentioned in paragraph (3) included indeterminate maximum terms of imprisonment.

stretched beyond its terms").

Nevertheless, the majority asserts that HRS § 706-606.5(3) authorized the circuit court to impose consecutive maximum terms by implication. See majority opinion at 14-21. The majority observes that Kamana'o's mandatory minimum terms prescribed by HRS § 706-606.5 were subsumed within the statutorily mandated indeterminate maximum terms of imprisonment for rape and sodomy, see HRS §§ 706-659, 707-730(2), 707-733(2). See also majority opinion at 20-21; State v. Feliciano, 107 Hawai'i 469, 503, 115 P.3d 648, 682 (2005) (Acoba, J., dissenting) (explaining that a mandatory minimum sentence indicates "how [the defendant] must serve the initial part of his sentence"). The majority thus believes that, because HRS § 706-606.5(3) authorized consecutive mandatory minimum terms and because mandatory minimums were subsumed within Kamana'o's indeterminate maximum sentences, the statute implicitly empowered the circuit court to impose his indeterminate maximum sentences consecutively. See majority opinion at 20-26.

The majority is correct that this court's three-and-a-half page decision in State v. Saufua, 67 Haw. 616, 699 P.2d 988 (1985), supports its interpretation of HRS § 706-606.5(3). Majority opinion at 29-31. In that case, the defendant was on probation for first degree robbery and burglary when he was convicted of second degree robbery. Saufua, 67 Haw. at 617, 699 P.2d at 989. Consequently, the prosecution moved for the revocation of the defendant's probation and the imposition of a mandatory minimum sentence under HRS § 706-606.5. Id. The

circuit court revoked probation and sentenced the defendant to concurrent terms of twenty and ten years for the prior first degree robbery and burglary offenses and to a ten-year consecutive sentence for the second degree robbery offense. Id. The circuit court also sentenced the defendant to a three-year mandatory minimum term for the second degree robbery offense, which it ordered was to run consecutively to the ten-year indeterminate maximum term for the same offense. Id. Accordingly, the defendant was sentenced to a total of thirty-three years of imprisonment. Id. at 617, 699 P.2d at 989-90. This court concluded that, although HRS § 706-606.5(3) did not authorize the circuit court to order that the defendant's mandatory minimum term for the second degree robbery offense run consecutively with the indeterminate maximum term for the same offense, id. at 617-19, 699 P.2d at 990-91, the statute did empower the circuit court to order that the indeterminate maximum term for the second degree robbery offense run consecutively with the indeterminate maximum term of the prior sentences for first degree robbery and burglary, id. at 619-20, 699 P.2d at 991. This court explained:

The mandatory minimum sentencing provisions are intended to apply to sentences imposed for the underlying subsequent conviction which triggered application of the statute. Logically, the required period of unparoled imprisonment is subsumed within the maximum sentence imposed for that offense. . . . The consecutive sentencing language of HRS § 706-606.5 necessarily must be read to allow the sentence on the underlying offense to be served consecutive to the sentence imposed for the prior offense or offenses.

Id. Accordingly, this court concluded that the circuit court had the authority, pursuant to HRS § 706-606.5(3), particularly the

statute's "consecutive sentencing language," to set the indeterminate maximum of the second degree robbery sentence (i.e., "the sentence on the underlying offense") to run consecutively with the indeterminate maximum of the first degree robbery and burglary sentence (i.e., "the sentence imposed for the prior offense or offenses"). See id. It would follow from the logic of Saufua, then, that, in the present matter, HRS § 706-606.5(3) likewise authorized the circuit court to set Kamana'o's indeterminate maximum sentence for his sodomy conviction to run consecutively with his indeterminate maximum sentences for rape.

I do not, however, agree with the Saufua court's conclusion that HRS § 706-606.5(3) "necessarily must" be read to authorize the circuit court to impose indeterminate maximum sentences consecutively. See id. at 619-20, 699 P.2d at 991. The fundamental premise underlying Saufua's conclusion is that, because the statute allowed the circuit court to impose consecutive mandatory minimum terms, it "necessarily must" have empowered the court to order that the indeterminate maximum terms run consecutively as well. See id.; see also majority opinion at 20-21, 29-31. Although I agree that a mandatory minimum prison term is subsumed within an indeterminate maximum prison term, see Saufua, 67 Haw. at 619-20, 699 P.2d at 991; Feliciano, 107 Hawai'i at 503, 115 P.3d at 682 (Acoba, J., dissenting), it does not necessarily follow from the plain language of HRS § 706-606.5(3), or any other provision of the Hawai'i Penal Code, see HRS title 37, that a sentence's minimum and maximum terms

must be served in the same fashion, whether concurrently or consecutively. No statutory provision imposes such a requirement, which is precisely why the circuit court had the discretion, conferred by HRS § 706-606.5(3), to order that the mandatory minimum terms of Kamana'o's two first degree rape convictions run consecutively, but was required by HRS § 706-668 to run the indeterminate maximum terms concurrently.² I therefore do not believe that this court is, or that the Saufua court was, at liberty to interpret HRS § 706-606.5(3) as implicitly authorizing the imposition of consecutive indeterminate maximum terms, because this court has an obligation to construe the plain meaning of the statute strictly. See State v. Aiwohi, 109 Hawai'i 115, 129, 123 P.3d 1210, 1224 (2005) ("[A] criminal statute 'must be strictly construed and . . . it cannot be extended beyond the plain meaning of the terms found therein.'" (Quoting State v. Johnson, 50 Haw. 525, 526, 445 P.2d 36, 37 (1968))). This court simply may not enlarge the breadth of HRS § 706-606.5(3) by implication. See Territory v. Shinohara, 42 Haw. 2, 35 (1957) ("A penal statute cannot be extended by implication or construction.'" (Quoting Territory v. Ah Goon, 22 Haw. 31, 33 (1914))).

² When I posed a hypothetical at oral argument, the deputy prosecuting attorney stated that HRS § 706-606.5 would not preclude the circuit court from running the mandatory minimum terms of two sentences for first degree sexual assault consecutively, while, at the same time, ordering the indeterminate maximum terms of the sentences to run concurrently. See MP3: Oral Argument, Hawai'i Supreme Court, at 48:20 to 48:53 (June 5, 2008), available at http://www.state.hi.us/jud/oa/08/SCOA_060508_28236.mp3/2-line.mp3. At that point, the author of the majority opinion astutely observed that, "[i]f you answer it that way, then haven't you conceded that your position is incorrect?" Id. at 48:54 to 49:01. Naturally, the prosecution did not think so. Id. at 49:01 to 49:03.

The plain and unambiguous language of HRS § 706-606.5(3) speaks only to the imposition of consecutive mandatory minimum terms. Compare HRS § 706-606.5(3) with HRS §§ 706-606.5(1) and (2). It goes no further than that. As such, I believe that the Saufua court erred by construing the statute expansively to govern the imposition of consecutive indeterminate maximum prison terms and, consequently, I believe that there is a compelling justification for this court to overrule Saufua on that particular issue, see State v. Kekuewa, 114 Hawai'i 411, 419, 163 P.3d 1148, 1156 (2007) ("'[A] court should not depart from the doctrine of stare decisis without some compelling justification.'" (Quoting State v. Garcia, 96 Hawai'i 200, 206, 29 P.3d 919, 925 (2001).)). Putting Saufua aside, I would hold that the plain language of HRS § 706-606.5(3) authorized the circuit court to impose consecutive mandatory minimum terms, but not consecutive indeterminate maximum terms on Kamana'o.³

³ Unlike the majority, I do not find it absurd to conclude that a statute that expressly authorizes the circuit court to impose consecutive mandatory minimum terms and that makes no mention of indeterminate maximum terms, see HRS § 706-606.5, does not permit the circuit court to impose consecutive indeterminate maximum terms by implication. See majority opinion at 21 n.17. With respect to the majority's example of a defendant whose consecutive five-year mandatory minimum terms for six class A felonies would be greater than his twenty-year indeterminate maximum terms if the indeterminate maximum were run concurrently, see majority opinion at 24, I believe that the example erroneously posits the possibility that a unified mandatory minimum might exceed the unified indeterminate maximum. In my view, the mandatory minimum must, by definition, be less than or equal to the maximum. See State v. Bernades, 71 Haw. 485, 488, 795 P.2d 842, 844 (1990) (explaining that the twenty-year indeterminate sentence set forth in HRS § 706-659 was the "maximum term" for Class A felonies); Webster's New International Dictionary 1517 (2d ed. 1960) (defining "maximum" as "[t]he greatest quantity or value attainable in a given case"); Black's Law Dictionary 1394 (8th ed. 2004) (defining a "maximum sentence" as "[t]he highest level of punishment provided by law for a particular crime"); cf. Williamson v. Hawai'i Paroling Auth., 97 Hawai'i 183, 191, 35 P.3d 210, 218 (2001) (holding that the Hawai'i Paroling Authority "has

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To be sure, as the majority observes, paragraph (a) of HRS § 706-606.5 provided that the statute applied "[n]otwithstanding [HRS §] 706-669 and any other law to the contrary." Majority opinion at 32-35. But, because HRS § 706-606.5, in my view, did not authorize consecutive indeterminate maximum terms, I do not believe that it was "contrary" to HRS § 706-668, which plainly required that the indeterminate maximum prison terms for Kamana'o's first degree rape and sodomy convictions run concurrently. Thus, the question in the present case stands in stark contrast to the issue in State v. Smith, 103 Hawai'i 228, 81 P.3d 408 (2003), on which the majority relies heavily, see majority opinion at 32-35. In that case, the defendant was convicted of promoting a dangerous drug in the third degree and unlawful use of drug paraphernalia. Id. at 229, 81 P.3d at 409. The defendant also had two prior convictions of second degree forgery and second degree theft. Id. at 231, 81 P.3d at 411. The prosecution moved for sentencing under the repeat offender statute, HRS § 706-606.5 (1993 & Supp. 2002), which the circuit court granted. Id. The court sentenced the defendant to two concurrent five-year indeterminate maximum terms of imprisonment, subject to one one-year mandatory minimum

³(...continued)

the authority to set a prisoner's minimum term at a period equal to his or her maximum sentence"). Consequently, a unified consecutive mandatory minimum sentence that might otherwise exceed a unified indeterminate maximum sentence would terminate at the end of the indeterminate maximum sentence. My interpretation of the HRS § 706-606.5 does not undermine legislative intent because the statute, which, by its express terms, only addressed consecutive mandatory minimum terms of imprisonment, does not govern the imposition of consecutive indeterminate maximum terms of imprisonment.

term of imprisonment. Id. at 231-32, 81 P.3d at 411-12. On a motion for reconsideration, the defendant asserted that the first-time drug offender sentencing statute, HRS § 706-622.5 (Supp. 2002), trumped the repeat offender statute, such that she should have been sentenced to a five-year term of probation. Id. The circuit court denied the motion. Id. On appeal, this court explained that the "[n]otwithstanding [HRS §] 706-669 and any other law to the contrary" clause in HRS § 706-606.5(1) was broader in scope than the "[n]otwithstanding any penalty or sentencing provision under part IV of [HRS ch.] 712" directive in HRS § 706-662.5. Id. at 235, 81 P.3d at 414. Consequently, this court held that, "in all cases in which HRS § 706-606.5 is applicable, including those in which a defendant would otherwise be eligible for probation under HRS § 706-622.5, the circuit courts must sentence defendants pursuant to the provisions of HRS § 706-606.5." Id. Accordingly, this court concluded that the circuit court did not err in sentencing the defendant as a repeat offender pursuant to HRS § 706-606.5 instead of sentencing her to probation pursuant to HRS § 706-662.5. Id.

Unlike Smith, the issue in this case is not whether the HRS § 706-606.5 (1985) authorized the circuit court to impose a mandatory minimum term of imprisonment as opposed to a sentence of probation, see id., but, rather, whether the statute permitted the court to run indeterminate maximum terms of imprisonment

consecutively.⁴ From my perspective, the statute simply does not speak to that issue. Therefore, HRS § 706-606.5 was not "contrary" to HRS § 706-668, which unequivocally directed the circuit court to run Kamana'o's indeterminate maximum terms for his first degree rape and sodomy convictions concurrently. Accordingly, I would vacate Kamana'o's sentence, insofar as it orders that the indeterminate maximum prison term for his sodomy conviction run consecutive to his indeterminate maximum prison term for the rape convictions, and remand this case for further proceedings consistent with this opinion.

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⁴ The same distinction can be drawn between this case and Reis and State v. Walker, 106 Hawai'i 1, 100 P.3d 595 (2004), both of which are cited by the majority, see majority opinion at 34. In those cases, this court held that HRS § 706-606.5, the repeat offender sentencing statute, took precedence over HRS § 706-622.5, the first-time drug offender sentencing statute. See Reis, 115 Hawai'i at 98, 165 P.3d at 999; Walker, 106 Hawai'i at 9-10, 100 P.3d at 603-04. Neither case addressed the question in this case, namely, whether HRS § 706-606.5 authorized the circuit court to impose consecutive indeterminate maximum sentences.

The "gist" of my criticism of the majority's reliance on Smith and its progeny is not simply that "Smith and its progeny did not address the precise question raised herein," majority opinion at 32 n.19, but also that Smith and its progeny stand for the self-evident proposition that a defendant cannot be sentenced to probation and a mandatory minimum term of imprisonment at the same time, see Reis, 115 Hawai'i at 98, 165 P.3d at 999; Walker, 106 Hawai'i at 9-10, 100 P.3d at 603-04; Smith, 103 Hawai'i at 235, 81 P.3d at 414. Accordingly, in no meaningful way are Smith and its progeny "analogous" to the case at hand. See majority opinion at 32 n.19.