*** FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER ***

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellant,

vs.

BRIAN JESS, Defendant-Appellee.

NO. 28483

RESERVED QUESTION FROM THE FIRST CIRCUIT COURT
(CR. NO. 00-1-0422)

MARCH 31, 2008

MOON, C.J., LEVINSON, AND DUFFY, JJ., NAKAYAMA, J., CONCURRING AND DISSENTING SEPARATELY, AND ACOBA, J., DISSENTING SEPARATELY

OPINION OF THE COURT BY LEVINSON, J.

On October 6, 2004, the defendant-appellee Brian Jess filed a 28 U.S.C. § 2254 (1996)[1] petition for a writ of habeas corpus in the United States District Court for the District of Hawai'i. In his petition, Jess alleged that the extended term sentence that the circuit court of the first circuit, the Honorable Victoria S. Marks presiding, imposed upon him on May 7, 2001,[2] pursuant to Hawai'i Revised Statutes (HRS) §§ 706-661

[1] 28 U.S.C. § 2254 provides in relevant part that "a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

[2] The sentence was imposed in Criminal No. 00-01-0422.

(Supp. 1999),[3] 706-662(1), 706-662(4)(a) (Supp. 1996),[4]

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[3] In 2000, HRS § 706-661 provided:

> In the cases designated in [HRS §] 706-662 [see infra note 4], a person who has been convicted of a felony may be sentenced to an extended indeterminate term of imprisonment. When ordering such a sentence, the court shall impose the maximum length of imprisonment which shall be as follows:
> (1) For murder in the second degree -- life without the possibility of parole;
> (2) For a class A felony -- indeterminate life term of imprisonment;
> (3) For a class B felony -- indeterminate twenty-year term of imprisonment; and
> (4) For a class C felony -- indeterminate ten-year term of imprisonment.
> The minimum length of imprisonment for sections 2, 3, and 4 shall be determined by the Hawai[']i paroling authority in accordance with [HRS §] 706-669.

Effective June 22, 2006, the legislature amended HRS §§ 706-661 and -662, see 2006 Haw. Sess. L. Act 230, §§ 23, 24, and 54 at 1012-13, 1025, to address concerns raised by the Hawai'i Judicial Council that Hawaii's extended term sentencing scheme faced challenges in federal court that it violated a defendant's right to a jury trial, protected under the sixth amendment to the United States Constitution, as articulated in Apprendi v. New Jersey, 530 U.S. 466 (2000), and its progeny. See Report of the Committee to Conduct a Comprehensive Review of the Hawai'i Penal Code at 271-27q (2005); Sen. Stand. Comm. Rep. No. 3215, in 2006 Senate Journal, at 1557; Hse. Stand. Comm. Rep. No. 665-06, in 2006 House Journal, at 1359. The amended version of HRS § 706-661 provided in relevant part:

> The court may sentence a person who satisfies the criteria for any of the categories set forth in [HRS §] 706-662 to an extended term of imprisonment, which shall have a maximum length as follows:
> (1) For murder in the second degree -- life without the possibility of parole;
> (2) For a class A felony -- indeterminate life term of imprisonment;
> (3) For a class B felony -- indeterminate twenty-year term of imprisonment; and
> (4) For a class C felony -- indeterminate ten-year term of imprisonment.
> In exercising its discretion on whether to impose the extended term of imprisonment or to use other available sentencing options, the court shall consider whether the extended term is necessary for the protection of the public and whether the extended term is necessary in light of the other factors set forth in [HRS §] 706-606.
> When ordering an extended term sentence, the court shall impose the maximum length of imprisonment. . . .

(continued...)

[3](...continued)
(Emphasis added.) Effective June 30, 2007, the amended version of HRS § 706-661 expired and the Supp. 2003 version, supra this note, was reenacted. See 2006 Haw. Sess. L. Act 230, § 54 at 1025.

Finally, effective October 31, 2007, the legislature amended HRS §706-661 as part of its reform of the state's extended term sentencing laws to bring them into compliance with the requirements of Apprendi and its progeny. HRS § 606-661 was amended to read:

> **Extended terms of imprisonment.** The court may sentence a person who satisfies the criteria for any of the categories set forth in [HRS §] 706-662[, infra note 4,] to an extended term of imprisonment, which shall have the maximum length as follows:
>
> (1) For murder in the second degree -- life without the possibility of parole;
>
> (2) For a class A felony -- indeterminate life term of imprisonment;
>
> (3) For a class B felony -- indeterminate twenty-year term of imprisonment; and
>
> (4) For a class C felony -- indeterminate ten-year term of imprisonment.
>
> When ordering an extended term sentence, the court shall impose the maximum length of imprisonment. The minimum length of imprisonment for an extended term sentence under paragraphs (2), (3), and (4) shall be determined by the Hawai[']i paroling authority in accordance with [HRS §] 706-669.

H.B. 2, 24th Leg., Second Spec. Sess. (2007), available at http://capitol.hawaii.gov/splsession2007b/bills/HB2_.htm (enacted as Act 1 on October 31, 2007), see http://capitol.hawaii.gov/site1/archives/2007b/getstatus2.asp?billno=HB2.

[4] In 2000, HRS § 706-662 provided in relevant part:

> A convicted defendant may be subject to an extended term of imprisonment under [HRS §] 706-661[, see supra note 3], if the convicted defendant satisfies one or more of the following criteria:
>
> (1) The defendant is a persistent offender whose imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless the defendant has previously been convicted of two felonies committed at different times when the defendant was eighteen years of age or older.
>
> . . . .
>
> (4) The defendant is a multiple offender whose criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for the protection of the public. The court shall not make this finding unless:
>
> (a) The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for felony[.]
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> . . . .

(continued...)

[4](...continued)
(Emphases added.) Effective June 13, 2001 and April 23, 2003, the legislature amended HRS § 706-662 in ways immaterial to the present matter. See 2003 Haw. Sess. L. Act 33, §§ 2 and 6 at 44-46; 2001 Haw. Sess. L. Act 240, §§ 3 and 6 at 630-31.

In section 24 of Act 230, effective June 22, 2006, the legislature amended HRS § 706-662 to address the same alleged constitutional infirmities discussed supra in note 1. Act 230 amended HRS § 706-662 to provide in relevant part:

> A defendant who has been convicted of a felony qualifies for an extended term of imprisonment under [HRS §] 706-661 if the convicted defendant satisfies one or more of the following criteria:
> (1) The defendant is a persistent offender in that the defendant has previously been convicted of two felonies committed at different times when the defendant was eighteen years of age or older;
> . . . .
> (4) The defendant is a multiple offender in that:
> (a) The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for felony; or
> (b) The maximum terms of imprisonment authorized for each of the defendant's crimes, if made to run consecutively, would equal or exceed in length the maximum of the extended term imposed or would equal or exceed forty years if the extended term imposed is for a class A felony[.]
> . . . .

Effective June 30, 2007, the amended version of HRS § 706-662 expired and the Supp. 2003 version, supra this note, was reenacted. See 2006 Haw. Sess. L. Act 230, § 54 at 1025.

Effective October 31, 2007, the legislature again amended HRS § 706-662 as part of its reform of the state's extended sentencing scheme to bring it into compliance with Apprendi and Cunningham v. California, 549 U.S. ___, 127 S. Ct. 856 (2007). The amended version of HRS § 706-662 provides in relevant part:

> **Criteria for extended terms of imprisonment:** A defendant who has been convicted of a felony may be subject to an extended term of imprisonment under [HRS §] 706-661[, see supra note 3,] if it is proven beyond a reasonable doubt that an extended term of imprisonment is necessary for the protection of the public and that the convicted defendant satisfies one or more of the following criteria:
> (1) The defendant is a persistent offender in that the defendant has previously been convicted of two or more felonies committed at different times when the defendant was eighteen years of age or older;
> . . . .
> (4) The defendant is a multiple offender in that:

(continued...)

and 706-664 (1993)[5] was, in light of Apprendi v. New Jersey, 530

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[4](...continued)

(a) The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for any felony; or

(b) The maximum term of imprisonment authorized for each of the defendant's crimes, if made to run consecutively, would equal or exceed in length the maximum of the extended term imposed or would equal or exceed forty years if the extended term imposed is for a class A felony[.]

H.B. 2, 24th Leg., Second Spec. Sess. (2007), available at http://capitol.hawaii.gov/splsession2007b/bills/HB2_.htm (enacted as Act 1 on October 31, 2007), see http://capitol.hawaii.gov/site1/archives/2007b/getstatus2.asp?billno=HB2.

[5] In 2000, HRS § 706-664, entitled "Procedure for imposing extended terms of imprisonment" provided:

> Hearings to determine the grounds for imposing extended terms of imprisonment may be initiated by the prosecutor or by the court on its own motion. The court shall not impose an extended term unless the ground therefor has been established at a hearing after the conviction of the defendant and on written notice to the defendant of the ground proposed. Subject to the provisions of [HRS §] 706-604, the defendant shall have the right to hear and controvert the evidence against the defendant and to offer evidence upon the issue.

Effective October 31, 2007, the legislature amended HRS § 706-664 as part of the overhaul of the extended sentencing scheme, in order to bring it into compliance with Apprendi and Cunningham. The amended version of HRS § 706-664 provides:

> (1) Hearings to determine the grounds for imposing extended terms of imprisonment may be initiated by the prosecutor or by the court on its own motion. The court shall not impose an extended term unless the ground therefor has been established at a hearing after the conviction of the defendant and written notice of the ground proposed was given to the defendant pursuant to subsection (2). Subject to the provisions of [HRS §] 706-604, the defendant shall have the right to hear and controvert the evidence against the defendant and to offer evidence upon the issue before a jury; provided that the defendant may waive the right to a jury determination under this subsection, in which case the determination shall be made by the court.
>
> (2) Notice of intention to seek an extended term of imprisonment under [HRS §] 706-662[, see supra note 4,] shall be given to the defendant within thirty days of the defendant's arraignment. However, the thirty-day period may be waived by the defendant, modified by stipulation of the parties, or extended upon a showing of good cause by the prosecutor. A defendant

(continued...)

U.S. 466 (2000), and its progeny, in violation of his right to a jury trial as provided by the sixth amendment to the United States Constitution. See Jess v. Peyton, No. Civ. 04-00601JMS/BMK, 2007 WL 1041737, at *1-*2 (D. Haw. April 18, 2006) (Jess II). On April 18, 2006, the United States District Court granted Jess's petition, concluding that the finding made by the circuit court, i.e., that an extended term was necessary for the protection of the public [hereinafter, "the necessity finding"], violated his sixth amendment right to a trial by jury as articulated in Apprendi. Id. at *4. The district court ordered the circuit court to resentence Jess in a manner consistent with that conclusion. Id. at *6. The reserved question before this court stems, ultimately, from that order, and reads as follows:

> May the trial court, as part of a sentencing proceeding brought pursuant to Section 706-662(1) & (4), H.R.S., empanel a jury to make a factual finding to determine whether the prosecution has proven beyond a reasonable doubt that the defendant's commitment for an extended term of incarceration is necessary for the protection of the public?

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[5](...continued)

> previously sentenced to an extended term under a prior version of this chapter shall be deemed to have received notice of an intention to seek an extended term of imprisonment.
>
> (3) If the jury, or the court if the defendant has waived the right to a jury determination, finds that the facts necessary for the imposition of an extended term of imprisonment under [HRS §] 706-662 have been proven beyond a reasonable doubt, the court may impose an indeterminate term of imprisonment as provided in [HRS §] 706-661[, see supra note 3].

H.B. 2, 24th Leg., Second Spec. Sess. (2007), available at http://capitol.hawaii.gov/splsession2007b/bills/HB2_.htm (enacted as Act 1 on October 31, 2007), see http://capitol.hawaii.gov/site1/archives/2007b/getstatus2.asp?billno=HB2.

The issue raised by the reserved question was addressed in part in our recent decision in State v. Maugaotega, 115 Hawai'i 432, 168 P.3d 562 (2007), [hereinafter, "Maugaotega II"]. Based upon Maugaotega II and the analysis infra, we answer the reserved question as follows:

> Although the two-count complaint filed by the prosecution on March 2, 2000 against the defendant-appellee Brian Jess did not charge the "aggravated crimes" described in HRS § 706-662, see Cunningham v. California, 549 U.S. ___, 127 S. Ct. 856, 864 (2007), the circuit court nevertheless has authority to impose extended terms of imprisonment upon Jess pursuant to the provisions of HRS § 706-662, because our decision to require the allegation of aggravating extrinsic facts in a charging instrument applies prospectively only. Furthermore, insofar as the circuit court possesses the inherent judicial authority "to provide process where none exists," State v. Moriwake, 65 Haw. 47, 55, 647 P.2d 705, 711-12 (1982), and the legislature, by amending Hawaii's extended term sentencing laws to include jury fact-finding, has clearly expressed its approval of a jury system for making the required findings in order to bring the extended sentencing procedures into compliance with Cunningham,[6] the circuit court would act within its

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[6] As noted supra in notes 3-5, effective October 31, 2007, Act 1 of the 2007 Second Special Session amended Hawaii's extended term sentencing laws to provide for jury fact-finding in the imposition of extended term sentences. The measure, moreover, provided important statements of legislative intent and provisions for the retroactive application of the new sentencing laws:

> SECTION 1. The purpose of this Act is to amend Hawaii's extended term sentencing law to address issues raised in recent federal court opinions and rulings on the right to a jury trial. These opinions, Apprendi v. New Jersey, 530 U.S. 466 (2000), Blakely v. Washington, 542 U.S. 296 (2004), United States v. Booker, 543 U.S. 220 (2005), and Cunningham v. California, 549 U.S. ___, 127 S.[]Ct. 856 (2007), have held that any fact, other than prior or concurrent convictions, that increases the penalty for a crime beyond the ordinary statutory maximum must be submitted to a jury and proven beyond a reasonable doubt.
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> . . . .
>
> The purpose of this Act is to amend Hawaii's extended term sentencing statutes to ensure that the procedures used to impose extended terms of imprisonment comply with the requirements set forth by the United States Supreme Court and Hawai[']i supreme court. The legislature intends that these amendments apply to any case that requires resentencing because of the decisions in the

(continued...)

> discretion if, pursuant to HRS §§ 706-662(1) and 706-662(4) (Supp. 1996), it empaneled a jury to make a factual finding as to whether the prosecution has proved beyond a reasonable doubt that a defendant's commitment for an extended term or terms of imprisonment is necessary for the protection of the public. Finally, in light of the plain language of Act 1, see supra notes 3-6, and the remedial nature of its amendments, the circuit court can also empanel a jury to make the same factual finding with respect to a defendant pursuant to HRS §§ 706-662, as amended by Act 1.

I. BACKGROUND

A. Initial Proceedings In The Circuit Court And This Court

On March 2, 2000, the plaintiff-appellant State of Hawai'i [hereinafter, "the prosecution"] charged Jess by complaint with robbery in the first degree, in violation of HRS § 708-840(1)(b)(ii) (Supp. 1998) (Count I), and unauthorized control of a propelled vehicle, in violation of HRS § 708-836 (Supp. 1999) [hereinafter, "UCPV"] (Count II), both charges arising out of an incident wherein Jess robbed a taxi driver at

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[6](...continued)

> Apprendi, Blakely, Booker, Cunningham, and Maugaotega cases. . . . To the extent that this Act applies retroactively, the legislature finds that it does not subject any offender to additional punishments or other disadvantage.
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> . . . .
>
> SECTION 5. This Act shall apply to all sentencing or resentencing proceedings pending on or commenced after the effective date of this Act, whether the offense was committed prior to, on, or after the effective date of this Act. A defendant whose extended term of imprisonment is set aside or invalidated shall be resentenced pursuant to this Act upon request of the prosecutor. . . .
>
> . . . .
>
> SECTION 8. This Act shall take effect upon its approval.

H.B.2, 24th Leg., Second Spec. Sess. (2007), available at http://capitol.hawaii.gov/splsession2007b/bills/HB2_.htm (enacted as Act 1 on October 31, 2007), see http://capitol.hawaii.gov/site1/archives/2007b/getstatus2.asp?billno=HB2. (Some internal citations omitted.)

knifepoint and took the vehicle. The complaint specifically alleged:

> COUNT I: On or about the 23rd day of February, 2000, in the City and County of Honolulu, State of Hawai[']i, BRIAN JESS, while in the course of committing a theft and while armed with a dangerous instrument, to wit, a knife, did threaten the imminent use of force against Canh Tran, a person who was present with intent to compel acquiescence to the taking of or escaping with the property, thereby committing the offense of Robbery in the First Degree, in violation of Section 708-840(1)(b)(ii) of the Hawai[']i Revised Statutes.
>
> COUNT II: On or about the 24th day of February, 2000, in the City and County of Honolulu, State of Hawai[']i, BRIAN JESS, did intentionally or knowingly exert unauthorized control over a propelled vehicle, by operating the vehicle without the consent of Canh Tran, owner of said vehicle, thereby committing the offense of Unauthorized Control of Propelled Vehicle, in violation of Section 708-836 of the Hawai[']i Revised Statutes.

On December 4, 2000, a jury found Jess guilty of both counts. On January 10, 2001, the prosecution filed motions (1) to sentence Jess as a repeat offender, pursuant to HRS § 706-606.5 (Supp. 1999), to a mandatory minimum sentence of six years and eight months imprisonment, (2) for an extended term of imprisonment of life with the possibility of parole as to Count I, pursuant to HRS §§ 706-661, 706-662(1), and 706-662(4)(a) (Supp. 1996), and (3) for the sentences on the two counts to be served consecutively, pursuant to HRS § 706-668.5 (1993). On May 7, 2001, the circuit court, the Honorable Victoria S. Marks presiding, entered a judgment of conviction and sentenced Jess to an extended term of life imprisonment with a mandatory minimum term of one year and eight months as to Count I and an extended term of ten years with a mandatory minimum term

of one year and eight months as to Count II, the two sentences to run concurrently.[7]

On July 9, 2001, Jess filed a motion for reconsideration of sentence, which the circuit court denied on July 31, 2001. Jess had previously filed a notice of appeal to this court on June 6, 2001, and, on September 26, 2003, this court filed a summary disposition order affirming the circuit court's judgment and sentence, concluding, inter alia, that Jess's extended term sentences were not unconstitutional under Apprendi (citing State v. Kaua, 102 Hawai'i 1, 12-13, 72 P.3d 473, 484-85 (2003)). See State v. Jess, No. 24339 (Haw. Sept. 26, 2003) (Jess I).

B. Habeas Corpus Proceedings In Federal Court

On October 6, 2004, Jess filed the petition for a writ of habeas corpus in the United States District Court, seeking to vacate the extended term sentences. Jess II, 2007 WL 1041737, at *2. In granting the petition, the United States District Court concluded that it was bound by the holding of the United States Court of Appeals for the Ninth Circuit in Kaua v. Frank, 436 F.3d 1057 (9th. Cir. 2006), that Hawaii's extended term sentencing scheme violated Apprendi and that, in the instant matter, the violation did not constitute harmless error. Jess II, 2007 WL 1041737, at *1.

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[7] In its June 5, 2001 findings of fact, conclusions of law, and order granting the prosecution's motion for extended term sentencing, the circuit court found that Jess had four previous felony convictions, qualifying him for an extended term pursuant to HRS § 706-662(1), and was being presently sentenced for two felony counts, qualifying him for an extended term pursuant to HRS § 706-662(4)(a), and further found that Jess's extended incarceration was necessary for the protection of the public.

C. Proceedings On Remand From Federal Court

On July 31, 2006, the prosecution filed its second motion in the first circuit court to resentence Jess to an extended term of imprisonment on Count I in a manner consistent with the order of the United States District Court by empaneling a jury to make the necessity findings required by HRS §§ 706-662(1) and 706-662(4)(a). In the declaration of counsel submitted in support of the motion for an extended term of imprisonment, after reciting Jess's prior convictions, counsel averred:

> 30. [Jess] is a "persistent offender" and a "multiple offender" whose commitment for an extended term is necessary for the protection of the public because of the following facts:
>
> a. [Jess] was on probation in [another criminal matter] when he committed the instant offenses.
>
> b. [Jess] has an extensive criminal history.
>
> c. [Jess]'s criminality has continued despite his prior contacts with the criminal justice system.
>
> d. [Jess] has failed to benefit from the criminal justice system.
>
> e. [Jess] has demonstrated a total disregard for the rights of others and a poor attitude toward the law.
>
> f. [Jess] has demonstrated a pattern of criminality which indicates that he is likely to be a recidivist in that he cannot conform his behavior to the requirements of the law.
>
> g. Due to the quantity and seriousness of [Jess]'s past convictions and the seriousness of the instant offenses, [Jess] poses a serious threat to the community and his long term incarceration is necessary for the protection of the public.

On October 5, 2006, Jess filed an amended motion to preclude empaneling a jury, arguing, inter alia, that extended term sentencing was "wholly a statutory creature in Hawai'i" and that HRS § 706-662 "expressly entrusts the requisite fact-finding

to 'the court,' not a jury." A hearing on the motion was scheduled for November 10, 2006, but, on November 6, 2006, the prosecution filed an alternative motion to reserve consideration of the jury-empanelment question to this court. Jess filed a memorandum in opposition on December 26, 2006. On February 21, 2007, the circuit court, the Honorable Virginia Lea Crandall presiding, determined that empaneling a jury for the purpose of making the necessity finding raised a novel question of law and, therefore, reserved the question, see supra, to this court, pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 15.[8] The prosecuting attorney for the County of Kaua'i filed an amicus brief on July 11, 2007, and the attorney general filed an amicus brief on September 18, 2007.

On April 26, 2007, this court entered an order accepting the reserved question, and, on November 26, 2007, this court requested supplemental briefing addressing the following question:

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[8] The dissent asserts that this opinion is "advisory" to the extent that we construe Act 1, see supra notes 4-5, as it pertains to Jess. Dissenting opinion at 28-29. HRAP Rule 15 provides in relevant part that "[a] circuit court . . . may reserve for the consideration of the supreme court a question of law arising in any proceedings before it." The plain language of this rule authorized the circuit court to seek advice from us as to a question of law. In order adequately to give the circuit court that advice, we must address all relevant issues. In the present matter, the prosecution has moved for extended term sentencing and has represented that it intends to pursue that course of action on remand. Act 1 speaks directly to extended term sentencing procedures. Accordingly, an assessment of whether Act 1 can be applied to Jess's resentencing does not constitute an advisory opinion on an abstract proposition that cannot affect the matter at issue in the present case. See State v. Matavale, 115 Hawai'i 149, 169 n.15, 166 P.3d 322, 342 n.14; State v. Cutsinger, No. 28203, 2008 WL 257175, at *6 (Haw. Ct. App. Jan. 30, 2008) (holding that the ICA's decision to address whether Act 1 could be applied retroactively to the defendant was not an advisory opinion on an abstract issue, because the case had to be remanded for resentencing and the prosecution had stated with certainty that it would seek an extended term of imprisonment pursuant to the procedures set forth in Act 1 on remand).

> In light of Cunningham v. California, 127 S. Ct. 856, 864 (2007), and State v. Merino, 81 Hawai'i 198, 212, 915 P.2d 672, 686 (1996), what is the significance, if any, of the fact that the March 2, 2000 complaint fails to allege that Jess, in committing the offenses of robbery in the first degree and unauthorized control of a propelled vehicle, was a persistent and/or multiple offender such that imposing upon him an extended term of imprisonment, pursuant to HRS §§ 706-661 and 706-662, was necessary for the protection of the public?

Jess filed his supplement brief on December 26, 2007, the prosecution filed its supplemental brief on December 31, 2007, and the attorney general filed an amicus brief December 31, 2007.

II. STANDARDS OF REVIEW

A. Empaneling A Jury

The issue presented by the reserved question -- whether a circuit court may empanel a jury for the purpose of considering the requisite necessity finding -- is a question of law. "'Questions of law are reviewable de novo under the right/wrong standard of review.'" Roes v. FHP, Inc., 91 Hawai'i 470, 473, 985 P.2d 661, 664 (1999) (quoting Francis v. Lee Enters., Inc., 89 Hawai'i 234, 236, 971 P.2d 707, 709 (1999)).

B. Sufficiency Of A Charge

> "'Whether an indictment [or complaint] sets forth all the essential elements of [a charged] offense . . . is a question of law,' which we review under the de novo, or 'right/wrong,' standard." . . . Merino, 81 Hawai'i [at] 212, 915 P.2d [at] 686 . . . (quoting State v. Wells, 78 Hawai'i 373, 379, 894 P.2d 70, 76 (1995) (citations omitted)).

State v. Cordeiro, 99 Hawai'i 390, 403, 56 P.3d 692, 705 (2002) (brackets and ellipsis points in original).

III. DISCUSSION

A. Although The Prosecution Did Not Allege In The Complaint That Jess Was A Persistent And/Or Multiple Offender Whose Imprisonment For An Extended Term Was Necessary For The Protection Of The Public, Jess Is Nevertheless Subject To Extended Term Sentencing Pursuant To HRS §§ 706-661 and 706-662.

1. Introduction

The prosecution and the attorney general concede that, under the fifth amendment's grand jury clause[9] and the sixth amendment's notice clause,[10] except for a past conviction, any fact that increases the maximum penalty for an offense must be alleged in a federal indictment, because such facts are elemental to the offense for constitutional purposes. See Jones v. United States, 526 U.S. 227, 243 n.6 (1999) ("[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (Emphasis added.)); id. at 232 ("[A] fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." (Emphasis added.)). They correctly

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[9] See U.S. Const. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .").

[10] See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . .").

observe, however, that the indictment rule has not been held to apply beyond federal prosecutions, because it is grounded in the fifth amendment's grand jury clause, which has not been applied to the states through the fourteenth amendment. See United States v. Cotton, 535 U.S. 625, 627 (2002) (explaining that, "[i]n federal prosecutions," other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum "must be charged in the indictment" (citing Apprendi, 530 U.S. at 490 (quoting Jones, 526 U.S. at 243 n.6))); Williams v. Haviland, 467 F.3d 527, 533 (6th Cir. 2006) ("By explicitly referring to federal prosecutions and distinguishing state prosecutions, Cotton makes clear that Apprendi did not revisit the well-established rule that the states are not bound by the Fifth Amendment grand jury right." (Emphasis in original.)); United States v. Harris, 536 U.S. 545, 549 (2002) (plurality opinion) ("In federal prosecutions, 'no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury' alleging all the elements of the crime." (Quoting U.S. Const. amend. V.)); Apprendi, 530 U.S. at 477 n.3 (declining to address the question whether a defendant in a state prosecution could challenge, under the federal constitution, the absence of aggravating factors in his indictment and noting that "the 'due process of law' that the Fourteenth Amendment requires the States to provide to persons accused of crime . . . has not . . . been construed to include" the fifth amendment's grand jury clause); Ring v. Arizona, 536 U.S. 584, 597 n.4 (2002) (citing Apprendi,

530 U.S. at 477 n.3); Alexander v. Louisiana, 405 U.S. 625, 633 (1972) ("Although the Due Process Clause guarantees petitioner a fair trial, it does not require the States to observe the Fifth Amendment's provision for presentment or indictment by a grand jury."). Accordingly, in this case, the federal indictment rule does not govern the sufficiency of the allegations in the complaint against Jess. We therefore turn our attention to Hawai'i law.

Pursuant to the due process and "grand jury" clauses of the Hawai'i Constitution, which reside respectively in article I, sections 5[11] and 10,[12] the prosecution must allege all essential elements of an offense in the charging instrument. See State v. Israel, 78 Hawai'i 66, 73, 890 P.2d 303, 310 (1995) (explaining that "the requirement that an accusation must sufficiently allege all of the essential elements of the offense charged derived" from the grand jury clause and the due process clause).[13] In

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[11] See Haw. Const. art. I, § 5 ("No person shall be deprived of life, liberty or property without due process of law . . . .").

[12] See Haw. Const. art. I, § 10 ("No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury or upon a finding of probable cause after a preliminary hearing held as provided by law or upon information in writing signed by a legal prosecuting officer under conditions and in accordance with procedures that the legislature may provide . . . .").

[13] The attorney general argues that extended term sentencing facts need not be alleged in the charging instrument under the notice clause of article I, section 14. See Haw. Const. art. I, § 14 ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ."). Under our precedents, however, the right to notice of all of the essential elements of the offense in the charging instrument is not grounded in the notice clause but, rather, the due process and grand jury clauses. See Israel, 78 Hawai'i at 73, 890 P.2d at 310; State v. Elliott, 77 Hawai'i 309, 311, 884 P.2d 372, 374 (1994) ("'[The] requirement obtains whether an accusation is in the nature of an oral charge, information, indictment, or complaint, and the omission of an essential element of the

(continued...)

contrast to the federal indictment rule, see Jones, 526 U.S. at 243 n.6, this court has held that not all facts that increase the maximum penalty for a crime must be pled in the charging instrument. See State v. Tafoya, 91 Hawai'i 261, 270, 982 P.2d 890, 899 (1999). We have adhered to the view that sentencing factors involving facts that are extrinsic to the offense need not be alleged in the charging instrument, but that sentencing factors concerning facts that are intrinsic to the offense must be alleged. Id. Thus, our cases suggest that the procedural safeguards guaranteed by sections 5 and 10 of article I attach to intrinsic, but not extrinsic, facts relating to enhanced sentencing considerations. See id. The issue is whether this intrinsic/extrinsic distinction, a distinction that we were compelled to abandon in Maugaotega II insofar as it applied to sentencing procedure, see 115 Hawai'i at 442-43, 445, 168 P.3d at 572-73, 575, remains viable insofar as it governs charging procedure, cf. id. at 449 n.19, 168 P.3d at 579 n.19.

2. *Apao, Estrada*, and the intrinsic/extrinsic distinction

In State v. Apao, 59 Haw. 625, 634, 586 P.2d 250, 257 (1978), this court observed that "due process requires that an indictment contain all of the essential elements of the offense

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[13](...continued)
crime charged is a defect in substance rather than of form. A charge defective in this regard amounts to a failure to state an offense, and a conviction based upon it cannot be sustained, for that would constitute a denial of due process.'" (Quoting State v. Jendruch, 58 Haw. 279, 281, 567 P.2d 1242, 1244 (1977).) (Emphasis added.)).

charged."[14] Consistent with this requirement, we held that the "better rule is to include in the indictment the allegations, which if proved, would result in application of a statute enhancing the penalty for the crime committed." Id. at 636, 586 P.2d at 258 (footnote and emphasis omitted); see also id. ("The common law required that 'every wrongful act which [was] to be taken into account in determining the punishment be alleged in the indictment.'" (Quoting State v. Blacker, 280 P.2d 789, 791 (Or. 1963).)); Apprendi, 530 U.S. at 510 (Thomas, J., concurring) ("'The indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted.'" (Quoting 1 J. Bishop, Law of Criminal Procedure § 81, at 51 (2d ed. 1872).)). It follows that, because such allegations must be alleged in the indictment, they comprise "essential elements" of the offense. See Apao, 59 Haw. at 634, 586 P.2d at 257. In State v. Estrada, 69 Haw. 204, 230, 738 P.2d 812, 829 (1987), we "transformed 'the better rule' as articulated in Apao into . . . [an] 'unequivocal' rule," State v. Schroeder, 76 Haw. 517, 527, 880 P.2d 192, 202 (1994) (citation omitted), that "[t]he aggravating circumstances must be alleged in the indictment and found by the jury," Estrada, 69 Haw. at 230, 738 P.2d at 829 (emphasis omitted) (citing Apao, 59 Haw. at 635-36, 586 P.2d at 258).

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[14] The Apao proposition was implicitly grounded in article I, section 10 of the Hawai'i Constitution, insofar as we relied on a federal decision interpreting the fifth amendment's grand jury clause. Apao, 59 Haw. at 635 & n.5, 257 & n.5 (quoting United States v. Radetsky, 535 F.2d 556, 562 (10th Cir. 1976), overruled on other grounds by United States v. Daily, 921 F.2d 994, 1004 & n.11 (10th Cir. 1990)).

We have, however, qualified the rule of Apao and Estrada, holding that "'historical facts,' the proof of which exposes the defendant to punishment by extended term sentence," State v. Huelsman, 60 Haw. 71, 79, 588 P.2d 394, 400 (1978), need not be alleged in the indictment or submitted to the jury, see Schroeder, 76 Hawai'i at 528, 880 P.2d at 203 (1994), because such facts "are wholly extrinsic to the specific circumstances of the defendant's offenses and therefore have no bearing on the issue of guilt per se," id. at 528, 880 P.2d at 203 (emphasis in original). For example, the former version of HRS § 706-662 provided, inter alia, that the court was to determine whether the defendant was a dangerous person whose imprisonment for an extended term was necessary for the protection of the public. See supra note 4. We have interpreted this determination to implicate an extrinsic fact, because it does not directly relate to the specific elements of the underlying offense giving rise to extended term sentencing under the statute. See Tafoya, 91 Hawai'i at 270-71, 982 P.2d at 899-900. We have also explained that extrinsic facts should not be submitted to the jury, because having the jury find such facts "would require the admission of potentially irrelevant and prejudicial evidence and contaminate the jury's required focus of the elements of the offense charged." See id. Beyond extrinsic facts, however, we have held that the Estrada rule remained applicable to "'aggravating circumstances' justifying the imposition of an enhanced sentence" if they involved factual questions that were "'enmeshed in'" or "intrinsic to 'the commission of the crime charged,'" Schroeder,

76 Hawai'i at 528, 880 P.2d at 203 (quoting Apao, 59 Haw. at 634, 586 P.2d at 257) (emphasis in original), such as whether the defendant possessed a shotgun or used a semiautomatic weapon during the commission of the offense, see Tafoya, 91 Hawai'i at 270, 982 P.2d at 899, or whether the defendant was convicted of attempted murder of a police officer who was "acting in the line of duty," see Estrada, 69 Haw. at 212-13, 738 P.2d at 819. The intrinsic/extrinsic distinction has been part of our case law since 1978, see Huelsman, 60 Haw. 71, 588 P.2d 394, and, as the attorney general observes, we indeed reiterated its principles as recently as July 2007, see State v. Kekuewa, 114 Hawai'i 411, 421-22, 163 P.3d 1148, 1158-59 (2007).

3. In the wake of *Cunningham*, the intrinsic/extrinsic distinction is no longer viable.

a. Sentencing procedure

Everything changed three months later. As Jess observes, in Maugaotega II, pursuant to the United States Supreme Court's mandate and judgment vacating our prior decision in State v. Maugaotega, 107 Hawai'i 399, 114 P.3d 905 (2005) (Maugaotega I), we reconsidered the defendant's appeal in light of Cunningham. Maugaotega II, 115 Hawai'i at 433, 168 P.3d at 563. We explained that, because the Cunningham majority flatly rejected the bifurcated approach proposed by Justice Kennedy in his dissenting opinion for sixth amendment purposes, Cunningham, 549 U.S. at ___, 127 S. Ct. at 869 n.14; id. at 872-73 (Kennedy, J., dissenting), it would likewise reject the intrinsic/extrinsic distinction that we have long followed. See Maugaotega II, 115 Hawai'i at 442-43, 445, 168 P.3d at 572-73,

575; see also id. at 453, 168 P.3d at 583 (Acoba, J., dissenting). We thus acknowledged that, in light of Cunningham, except for prior convictions, multiple convictions, and admissions, "any fact, however labeled, that serves as a basis for an extended term sentence must be proved beyond a reasonable doubt to the trier of fact." Maugaotega II, 115 Hawai'i at 447 & n.15, 168 P.3d at 577 & n.15 (majority opinion) (emphasis added).

Before Maugaotega II, we viewed aggravating intrinsic, but not extrinsic, facts as "elemental" to the offense for constitutional purposes. See State v. Kaua, 102 Hawai'i 1, 11-12, 72 P.3d 473, 483-84 (2003); see also Tafoya, 91 Hawai'i at 271-72, 982 P.2d at 900-01; cf. Apao, 59 Haw. at 634, 586 P.2d at 257. The elimination of the intrinsic/extrinsic distinction dictates that aggravating extrinsic facts are now likewise elemental. To illustrate this paradigm, extrinsic facts that give rise to enhanced sentencing comprise an element of what amounts to the "enhanced" version of the offense. Indeed, in explicating the Apprendi rule, the six-member Cunningham majority quoted with approval the observation, expressed in Harris, 536 U.S. at 557 (plurality opinion), that "'Apprendi said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime -- and thus the domain of the jury -- by those who framed the Bill of Rights.'"[15] 549 U.S. at

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[15] Given the Cunningham analysis, extrinsic enhancers effectively become, for constitutional purposes, attendant circumstances of the "aggravated" offense. Cf. HRS § 702-205 (1993) ("The elements of an offense are such (1) conduct, (2) attendant circumstances, and (3) results of conduct, as . . . (continued...)

___, 127 S. Ct. at 864 (emphases added); see also Harris, 536 U.S. at 557-58 (plurality opinion) ("Congress may not manipulate the definition of a crime in a way that relieves the Government of its constitutional obligations to charge each element in the indictment, submit each element to the jury, and prove each element beyond a reasonable doubt. McMillan[v. Pennsylvania, 477 U.S. 79 (1986),] and Apprendi asked whether certain types of facts, though labeled sentencing factors by the legislature, were nevertheless 'traditional elements' to which these constitutional safeguards were intended to apply." (Quoting Patterson v. New York, 432 U.S. 197, 211 n. 12. (1977).) (Citations omitted.)); Harris, 536 U.S. at 567 ("Read together, McMillan and Apprendi mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis." (Emphases added.)); Apprendi, 530 U.S. at 478 ("Any possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." (Footnote omitted.)).

Correlatively, and by virtue of Cunningham, the offenses of first degree robbery and unauthorized control of a propelled vehicle, with which the complaint charged Jess in the

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[15](...continued)
[a]re specified by the definition of the offense . . . ."); State v. Aiwohi, 109 Hawai'i 115, 127, 123 P.3d 1210, 1222 (2005) ("'[A]ny circumstances defined in an offense that are neither conduct nor the results of conduct would, by default, constitute attendant circumstances elements of the offense.'" (Quoting State v. Moser, 107 Hawai'i 159, 172, 111 P.3d 54, 67 (App. 2005).)).

present matter, are transformed into lesser included offenses of "aggravated crimes" because, in the words of the Hawai'i Penal Code, the "simple" offense will always be "established by proof of the same or less than all the facts required to establish the commission of the [enhanced or 'aggravated'] offense." See HRS § 701-109(4)(a) (1993) ("A defendant may be convicted of an offense included in an offense charged in the indictment or the information. An offense is so included when . . . [i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged."); State v. Jumila, 87 Hawai'i 1, 3, 950 P.2d 1201, 1203 (1998) (holding that second degree murder was, as a matter of law, an included offense of carrying or use of a firearm in the commission of a separate felony, because the felony underlying the firearm statute "will always be 'established by proof of the same or less than all the facts required to establish the commission of the' [firearm] offense" (quoting HRS § 701-109(4)(a))), overruled on other grounds by State v. Brantley, 99 Hawai'i 463, 469, 56 P.3d 1252, 1258 (2002); State v. Van den Berg, 101 Hawai'i 187, 191, 65 P.3d 134, 138 (2003) ("[T]he core legal analysis in . . . Jumila is still good law . . . ."); Apprendi, 530 U.S. at 506 (Thomas, J., concurring) (observing that, "if a statute increased the punishment of a common-law crime, whether felony or misdemeanor, based on some fact," then that "fact was an element of a new, aggravated grade of the common-law crime simply because it increased the punishment of the common-law crime" and that "the common-law

crime was, in relation to the statutory one, essentially just like any other lesser included offense"). The "aggravated crimes" at issue in this case, to wit, robbery in the first degree and UCPV committed by a persistent and/or multiple offender as to whom "an extended term of imprisonment is necessary for the protection of the public," Act 1, section 3, are "aggravated" versions of "simple" first degree robbery and "simple" UCPV, because the necessity finding is the additional "element of [the] aggravated crime." See Cunningham, 549 U.S. at ___, 127 S. Ct. at 864. Conversely, "simple" robbery and "simple" UCPV are lesser included offenses of their "aggravated" versions. See id.; HRS § 701-109(4)(a); Apprendi, 530 U.S. at 506 (Thomas, J., concurring).

b. Charging procedure

The prosecution and the attorney general argue that, although this court has abandoned the intrinsic/extrinsic distinction with respect to sentencing procedure, we should retain the distinction with respect to charging procedure. They urge, in substance, that extrinsic enhancers need not, for purposes of article I, sections 5 and 10 of the Hawai'i Constitution, be viewed as elements of an aggravated crime. The attorney general contends that this court need not fully abandon its intrinsic/extrinsic distinction, especially because the distinction does not require extrinsic facts to be alleged in the charging instrument, precisely because those facts "are wholly extrinsic to the specific circumstances of the defendant's offenses and therefore have no bearing on the issue of guilt per

se." Schroeder, 76 Hawai'i at 528, 880 P.2d at 203 (emphasis omitted). It is clear, however, that Cunningham is unwavering in its insistence that the determinative issue in deciding whether a given fact is elemental is not whether the fact is enmeshed in, or intrinsic to, the elements of the underlying offense, see 549 U.S. at ___ n.14, 127 S. Ct. at 869 n.14, but, rather, whether it simply increases the standard maximum punishment for the offense, see id. at ___, 127 S. Ct. at 860.

The intrinsic/extrinsic distinction is also rooted in the belief that having the jury find extrinsic facts "would require admission of potentially irrelevant and prejudicial evidence and contaminate the jury's required focus on the specific elements of the offense charged." Tafoya, 91 Hawai'i at 271, 982 P.2d at 900; see also id. at 273 n.15, 274 & n.17, 902 n.15, 903 & n.17. After Cunningham and Maugaotega II, however, the jury is constitutionally required to be the fact-finder with respect to extrinsic enhancers, because such facts are indeed elements of the offense for sentencing purposes. Nevertheless, the prosecution contends that, while this court's concern in Tafoya was directed at preventing the contamination of a trial "jury's required focus," see 91 Hawai'i at 271, 982 P.2d at 900, the same concern would arise if a grand jury were faced with extrinsically aggravating factual allegations. The prosecution concedes that a grand jury proceeding could potentially be bifurcated to prevent such contamination but, nonetheless, asserts that such a procedure would unnecessarily complicate the proceeding and be at odds with its purposes, which

is not "'an adversary hearing in which guilt or innocence of the accused is adjudicated'" but, rather, "'an ex parte investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person.'" State v. Bell, 60 Haw. 241, 243-44, 589 P.2d 517, 519 (1978) (quoting United States v. Calandra, 414 U.S. 338, 343-44 (1974)).

We observe, as a preliminary matter, that the jury contamination issues that the prosecution identifies would not arise in instances, such as the present case, where the defendant is charged by complaint or upon information, both of which are permitted by article I, section 10 of the Hawai'i Constitution. See supra note 12. When the prosecution does opt to charge by indictment, article I, section 10 requires that the grand jury find probable cause as to every element of the offense of which the defendant may later be convicted at trial. See Israel, 78 Hawai'i at 73, 890 P.2d at 310 ("[J]ust as the State must prove beyond a reasonable doubt all of the essential elements of the offense charged, the State is also required to sufficiently allege them . . . ." (Quoting State v. Tuua, 3 Haw. App. 287, 293, 649 P.2d 1180, 1184-85 (1982).)); State v. Stan's Contr., Inc., 111 Hawai'i 17, 32, 137 P.3d 331, 346 (2006) ("An indictment must enable a grand jury to determine that probable cause exists that the accused committed a violation of the charged offense . . . as to the elements of the offense . . . ."); Apao, 59 Haw. at 635 & n.5, 586 P.2d at 257 & n.5 (observing that the fifth amendment's grand jury clause requires that an indictment "'make clear the charges so as . . .

to avoid [the defendant's] conviction on facts not found, or perhaps not even presented to, the grand jury that indicted him'" (quoting Radetsky, 535 F.2d at 562)). Because the petit jury must find certain extrinsic elemental facts as a prerequisite to convicting a defendant of the enhanced (i.e., "aggravated") version of an offense, see Maugaotega II, 115 Hawai'i at 447, 168 P.3d at 577, it necessarily follows that, during the grand jury proceeding, the jury should likewise be required to find probable cause with respect to such elemental facts. See Stirone v. United States, 361 U.S. 212, 217 (1960) (observing that the defendant has a "substantial right to be tried only on charges presented in an indictment returned by a grand jury"). By ensuring that every element of an offense is supported by a finding of probable cause, the grand jury performs its "historical role of being a safeguard to protect citizens against unfounded criminal prosecutions." See State v. O'Daniel, 62 Haw. 518, 520, 616 P.2d 1383, 1386 (1980); see also Bell, 60 Haw. at 243, 589 P.2d at 519 ("[T]he grand jury's responsibilities include both the determination of whether there is probable cause to believe that a crime has been committed and the protection of citizens against unfounded criminal prosecutions."). To carry out its function, we believe that the grand jury must review the evidence supporting all elements of an offense, including extrinsic enhancers, logistically problematic as the process may be.[16] United States v. Italiano, 837 F.2d 1480, 1482 (11th Cir.

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[16] Of course, as we have noted, consistent with article I, section 10 of the Hawai'i Constitution, the prosecution is free, as in the present matter, (continued...)

1988) ("'[A] grand jury can perform its function of determining probable cause and returning a true bill only if all elements of the offense are contained in the indictment.'" (Quoting United States v. Outler, 659 F.2d 1306, 1310 (11th Cir. 1981), overruled on other grounds by United States v. Steele, 147 F.3d 1316, 1317 (11th Cir. 1998).)).

In this connection, we note that the United States Supreme Court declared in Jones that "'any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'" Tafoya, 91 Hawai'i at 273 n.15, 982 P.2d at 902 n.15 (quoting Jones, 526 U.S. at 243 n.6). Although the indictment rule in Jones is grounded in the fifth amendment's grand jury clause, see Haviland, 467 F.3d at 533, which has not been applied to state prosecutions, see Alexander, 405 U.S. at 633, article I, section 10 of the Hawai'i Constitution was patterned after its federal counterpart, see 1 Constitutional Convention of Hawaii 164, 243, 420 (1960) (explaining that article I, section 9, which was ultimately codified as section 8 (the predecessor to article I, section 10), "incorporates the first three clauses of the 5th Amendment of the Federal Constitution"). To be sure, article I, section 10 of the Hawai'i Constitution affords the prosecution more charging mechanisms than its federal analogue, insofar as article I, section 10

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[16](...continued)
to circumvent the grand jury altogether by charging a defendant via complaint. In addition, when the prosecution decides to go forward by way of indictment, a bifurcated grand jury proceeding is possible.

permits the prosecution to charge by indictment, complaint, or information, see supra note 12, whereas the fifth amendment only allows charging by indictment, see supra note 9. Nevertheless, we do not (and very likely may not, cf. State v. Texeira, 50 Haw. 138, 142 n.2, 433 P.2d 593, 597 n.2 (1967) (recognizing that the courts of this state must "afford defendants the minimum protection required by federal interpretations of the Fourteenth Amendment to the Federal Constitution")) interpret the plain language of article I, section 10 to require the inclusion of any less notice in a charging instrument than that which is guaranteed by the fifth amendment. Consequently, the fact that the federal courts do not recognize any distinction between intrinsic and extrinsic enhancers under the federal grand jury clause, see Cotton, 535 U.S. at 627 (citing Apprendi, 530 U.S. at 490) (quoting Jones, 526 U.S. at 243 n.6)); cf. Cunningham, 549 U.S. at ___ n.14, 127 S. Ct. at 869 n.14, is "highly persuasive" in shaping our interpretation of article I, section 10 of the Hawai'i Constitution. See Harada v. Burns, 50 Haw. 528, 532, 445 P.2d 376, 380 (1968) (holding that, although the seventh amendment's civil jury trial right does not apply to the states, the Hawai'i counterpart in article I, section 10 of the Hawai'i Constitution was patterned after the federal provision and, therefore, "the interpretation of [that] provision[] by the federal courts are deemed to be highly persuasive in the reasoning of this court").

Given the Cunningham imperative regarding the elemental character of Apprendi enhancers, the intrinsic/extrinsic distinction has lost its viability to the extent that it governs charging procedure and, therefore, we decline to follow it any further. Because the intrinsic/extrinsic distinction no longer serves to qualify the rule of Apao and Estrada, it follows that the rule now applies across the board both to intrinsic and extrinsic enhancers. In short, it is now clear that extrinsic enhancers, like intrinsic enhancers, are "essential elements" of the "aggravated" version of the offense. See Apao, 59 Haw. at 634, 586 P.2d at 257; Cunningham, 549 U.S. at ___ n.14, 127 S. Ct. at 864 (quoting Harris, 536 U.S. at 556-57 (plurality opinion)); Maugaotega II, 115 Hawai'i at 450, 168 P.3d at 580 (explaining that Cunningham, "by rejecting the intrinsic/extrinsic distinction, essentially reinstates the rule asserted in Estrada for both intrinsic and extrinsic facts" (emphasis in original) (citation omitted)). Accordingly, we hold that a charging instrument, be it an indictment, complaint, or information, must include all "allegations, which if proved, would result in the application of a statute enhancing the penalty of the crime committed." Apao, 59 Haw. at 636, 586 P.2d at 258 (footnote and emphasis omitted); accord Estrada, 69 Haw. at 230, 738 P.2d at 829.[17]

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[17] The prosecution and the attorney general do not challenge the validity of the rule of Apao and Estrada but, instead, cite cases from jurisdictions that have interpreted their respective "grand jury" provisions as not requiring the inclusion of facts giving rise to enhanced sentencing in the charging instrument. These courts reason that the disclosure requirements under their rules of criminal procedure supply sufficient notice to the

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4. Our decision today does not call the constitutionality of HRS § 706-664(2) or HRPP Rule 7(d) into question.

The attorney general argues that a holding that extrinsic facts foundational to enhanced sentencing must be alleged in the indictment would require us to rule HRS § 706-664, as amended by Act 1, to be unconstitutional. Although we are

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[17](...continued)
defendant of the prosecution's intention to rely on those facts. See, e.g., McKaney v. Foreman, 100 P.3d 18, 22 (Ariz. 2004) ("It thus becomes irrelevant that aggravators are not specified in the indictment or information based on evidence of probable cause presented to a grand jury or magistrate because the defendant will have been given ample notice under the Arizona Rules of Criminal Procedure . . . ."); Evans v. State, 886 A.2d 562, 575 (Md. 2005) (holding that aggravating factors are not required to be alleged in the indictment under the indictment provision of the Maryland Declaration of Rights, because "[t]he point of that provision is to give fair and adequate notice, and . . . that notice may come from statutory [n]otice," which is required thirty days before trial); State v. Berry, 141 S.W.3d 549, 561-62 (Tenn. 2004) (holding that the defendant is not entitled to notice in the indictment, under the Tennessee indictment clause, because the notice requirements are satisfied by the state's rules of criminal procedure). These courts acknowledge that aggravating factors may be the elemental to an offense for purposes of sentencing, but explain that their case law does not require that sentence-enhancing facts be alleged in the indictment, and they consequently decline to impose such a requirement. See McKaney, 100 P.3d at 21; Evans, 886 A.2d at 575, 575-76; Joubert v. State, 235 S.W.3d 729, 733 & n.21 (Tex. Crim. App. 2007). Unlike the foregoing illustrative jurisdictions, we have interpreted the Hawai'i Constitution as requiring that the charging instrument include all "allegations, which if proved, would result in the application of a statute enhancing the penalty of the crime committed." Apao, 59 Haw. at 636, 586 P.2d at 258 (footnote and emphasis omitted); accord Estrada, 69 Haw. at 230, 738 P.2d at 829. Accordingly, the cases cited by the prosecution and the attorney general are inconsistent with our precedents, and we therefore decline to follow them.

In an HRAP 28(j) citation of supplemental authority, the attorney general cites the Intermediate Court of Appeals' recent decision in Cutsinger, 2008 WL 257175, at *1, *17-*18, in which the ICA concluded, inter alia, that enhancing facts need not be alleged in the charging instrument. The ICA reasoned that, "[a]lthough Apprendi and its progeny require that sentencing-enhancing facts be treated as the functional equivalent of elements of an offense for purposes of the Sixth Amendment jury-trial right, . . . such facts are not elements for purposes of what must be pled in an indictment or complaint." Id. at *16; see also id. at *17-*18 (suggesting that extrinsic enhancers are not elemental). As we have explained supra, however, extrinsic enhancers must be alleged in the charging instrument, because they are indeed elemental for charging purposes under article I, sections 5 and 10 of the Hawai'i Constitution. We therefore overrule Cutsinger to the extent that its analysis is inconsistent with our own.

unable to discern from the attorney general's brief the specific language of HRS § 706-664 to which he is referring, see Hawaii Ventures, LLC v. Otaka, Inc., 114 Hawai'i 438, 478, 164 P.3d 696, 736 (2007) ("[A]n appellate court is not obliged to address matters for which the appellant has failed to present discernible arguments."), we presume that he is alluding to paragraph (2), which provides in relevant part that "[n]otice of intention to seek an extended term of imprisonment under section 706-662 shall be given to the defendant within thirty days of the defendant's arraignment." See supra note 5. This provision is not incompatible with our decision today because there is no mutual exclusivity between the necessity of alleging extrinsic elemental enhancers in the charging instrument and the subsequent statutory notice provision set forth in HRS § 706-664(2). Merely charging the "aggravated" offense does not obligate the prosecution to prove it; to the contrary, the prosecution can always opt to prove the lesser included, unenhanced version of the offense. Cf. Whiting v. State, 88 Hawai'i 356, 362, 966 P.2d 1082, 1088 (1998) ("Since recklessness will be satisfied by proof that the defendant acted intentionally or knowingly, a charge of manslaughter could be employed where a prosecutor, in the prosecutor's discretion, did not wish to push for a murder conviction." (Quoting commentary to HRS § 707-702.) (Emphasis omitted.)); State v. Holbron, 80 Hawai'i 27, 44, 904 P.2d 912, 929 (1995) ("Within constitutional limits, it is always the prosecution's prerogative to undercharge any offense for whatever reason it deems appropriate . . . ." (Emphasis added.)).

Moreover, the plain language of HRS § 706-664(2) simply does not say that notice of intention to seek an extended term of imprisonment under HRS § 706-662 "shall not be included in the charging instrument." Indeed, this provision is directed exclusively to sentencing procedure; it is completely silent with respect to charging procedure.

In the next section of the attorney general's brief, he asserts that a rule requiring that extrinsic enhancers be alleged in the charging instrument would render HRS § 706-664(2), as amended, unconstitutional to the extent that it provides that "[a] defendant previously sentenced to an extended term under a prior version of this chapter shall be deemed to have received notice of an intention to seek an extended term of imprisonment." See supra note 5. That provision also requires that the defendant receive notice within thirty days of his arraignment. See id. However, notice, constructive or otherwise, of the prosecution's intention to seek an extended term of imprisonment within thirty days of his arraignment is not a substitute for the constitutional requirement that an indictment, complaint, or information allege the elements of the "aggravated crime" justifying the imposition of an extended term of imprisonment. The latter derives from article I, sections 5 and 10; the former simply satisfies the statute. Thus, we do not read the statute's constructive notice provision as undertaking to cure the (as of then unknown) constitutional defects in the charging instruments of defendants who were previously sentenced to extended terms but

not charged with the "aggravated crimes" to which the extended terms pertain.

In any event, such a reading would contravene the doctrine of "constitutional doubt," which dictates that, "'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is adopt the latter,'" In the Interest of Doe, 96 Hawai'i 73, 81, 26 P.3d 562, 570 (2001) (quoting Jones, 529 U.S. at 857). Pursuant to article I, sections 5 and 10, all of the elements of an offense must be alleged in the charging instrument, and the prosecution's failure to do so is not cured or otherwise excused by the fact that the accused was actually or constructively aware of the circumstances that might give rise to an omitted element. See Israel, 78 Hawai'i at 73, 890 P.3d at 310 (observing that the requirement that the instrument must allege all of the essential elements of the offense "'is not satisfied by the fact that the accused actually knew them and was not misled by the failure to sufficiently allege all of them'" (quoting Tuua, 3 Haw. App. at 293, 649 P.2d at 1184-85)). Interpreting HRS § 706-664(2) as purporting to charge an element of an "aggravated crime" by constructive notice would cause the statute to run afoul of the guarantee, embedded in article I, sections 5 and 10, of actual notice in the charging instrument. We therefore decline to read HRS § 706-664(2) as attempting to charge defendants by constructive notice.

Finally, the attorney general maintains that the elimination of the intrinsic/extrinsic distinction would render HRPP Rule 7(d), entitled "[n]ature and contents [of an indictment, information or complaint]," invalid in many cases because, according to the attorney general, the rule does not require allegations that support an extended term to be pled in the charging instrument. HRPP Rule 7(d) provides in relevant part that "[t]he charge shall be a plain, concise and definite written statement of the essential facts constituting the offense charged," but "need not contain a formal conclusion or any other matter not necessary to such statement." Like HRS § 706-664(2), as amended, the rule is perfectly compatible with the proposition that enhancing elements of an "aggravated crime," giving rise to an extended prison term, must be pled in the charging instrument. Precisely because Cunningham decrees that factual enhancers that support an extended term of imprisonment are elements of an "aggravated crime," see supra section III.A.3, we construe HRPP Rule 7(d) to require the allegation of such elements if the prosecution decides to seek a conviction of that offense.

In short, we disagree with the attorney general that our decision calls the constitutionality of HRS § 706-662(2) or HRPP Rule 7(b) into question.

5. Our holding with respect to charging instruments alleging "aggravated crimes" is strictly prospective, and, therefore, does not apply to Jess.

The attorney general argues that any decision mandating that all Apprendi/Cunningham enhancers -- whether intrinsic or extrinsic -- be alleged in all charging instruments seeking an

extended prison term pursuant to HRS § 706-662, as amended, see supra section III.A.3.b, should be limited to purely prospective application.

The question of prospective application arises when this court announces a new rule. See State v. Ketchum, 97 Hawai'i 107, 123 n.26, 34 P.3d 1006, 1022 n.26 (2001) ("If . . . a judicial decision announces a 'new rule,' then this court may, in its discretion, determine that the interests of fairness preclude retroactive application of the new rule."); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 534 (1991) ("It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the paradigm case arising when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct."). In the present matter, the rule of Apao and Estrada was previously qualified by the intrinsic/extrinsic distinction, which did not require, and indeed counseled against, the inclusion of extrinsic facts in the charging instrument. See Tafoya, 91 Hawai'i at 271, 982 P.2d at 900; see also supra section III.A.3.b. In light of Cunningham, however, we have recognized today that the intrinsic/extrinsic distinction is no longer viable for charging purposes. See supra section III.A.3.b. Aside from footnote 19 of our Maugaotega II opinion, see 115 Hawai'i at 449 n.19, 168 P.3d at 579 n.19, this case represents the first instance in which we have questioned the ongoing viability of the intrinsic/extrinsic distinction in the context of charging

procedure. See supra section III.A.3.a. Indeed, even the dissenting opinions that previously challenged the validity of the intrinsic/extrinsic distinction attacked the distinction from the standpoint of the sixth amendment right to a jury trial regarding extended term sentencing and not from the standpoint of proper charging procedure sufficient to satisfy article I, sections 5 and 10 of the Hawai'i Constitution. See State v. Rivera, 106 Hawai'i 146, 167, 102 P.3d 1044, 1065 (2004) (Acoba, J., dissenting) (asserting that "'the State's sentencing procedure [in this case] did not comply with the Sixth Amendment,' and, thus, the sentence imposed on [the defendant] 'is invalid'" (quoting Blakely v. Washington, 542 U.S. 296, 305 (2004)) (brackets in original)); Maugaotega I, 107 Hawai'i at 410-11, 114 P.3d at 916-17 (Acoba, J., dissenting); State v. White, 110 Hawai'i 79, 97, 129 P.3d 1107, 1125 (2006) (Acoba, J., dissenting). Accordingly, the rule we announce today, which liberates the rule of Apao and Estrada from the gloss imposed by Huelsman, Schroeder, and Tafoya, constitutes a new rule.[18]

Because we are announcing a new rule, we must decide whether the rule should be given retroactive effect. "Although judicial decisions are assumed to apply retroactively, such application is not automatic," because "'the Constitution neither prohibits nor requires retrospective effect.'" State v. Peralto,

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[18] The dissent asserts that "it would be inaccurate to characterize the new rule announced here as being grounded solely in our state law," because the rule was previously articulated in Jones. Dissenting opinion at 34 n.25; cf. id. at 44-45. As we explained supra in section III.A.1, however, the rule in Jones is limited to federal prosecutions. Therefore, the new rule we announce today is based solely in article I, sections 5 and 10 of the Hawai'i Constitution.

95 Hawai'i 1, 6, 18 P.3d 203, 208 (2001) (quoting State v. Santiago, 53 Haw. 254, 268, 492 P.2d 657, 665 (1971)). We are therefore "[f]ree to apply decisions with or without retroactivity," Santiago, 53 Haw. at 268, 492 P.2d at 665, and may give a new rule (1) purely prospective effect, which means that the "'rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision,'" State v. Garcia, 96 Hawai'i 200, 208, 29 P.3d 919, 927 (2001) (quoting James B. Beam Distilling, 501 U.S. at 536); (2) limited or "pipeline" retroactive effect, under which the rule applies to the parties in the decision and all cases that are on direct review or not yet final as of the date of the decision, see State v. Colbert, 918 A.2d 14, 20 (N.J. 2007); State v. Fortin, 843 A.2d 974, 1036 n.18, motion for clarification granted by 843 A.2d 974 (N.J. 2004); cf. Garcia, 96 Hawai'i at 214, 29 P.3d at 933 (giving a rule limited prospective application, because the rule had previously been applied in the decision that originally announced the rule); State v. Hanaoka, 97 Haw. 17, 20, 32 P.3d 663, 666 (2001); or (3) full retroactive effect, under which the rule applies "'both to the parties before the court and to all others by and against whom claims may be pressed,'" Garcia, 96 Hawai'i at 208, 29 P.3d at 927 (quoting James B. Beam Distilling, 501 U.S. at 535).[19] In deciding which

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[19] A fourth alternative is to accord a new rule selective retroactive effect, which means that the court may apply the "rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement." Garcia, 96 Hawai'i at 208, 29 P.3d (continued...)

option is appropriate, we "'weigh[] the merits and demerits of retroactive application of the particular rule,'" Peralto, 95 Hawai'i at 6, 18 P.3d at 208 (quoting Santiago, 53 Haw. at 268, 492 P.2d at 665, in light of "'(a) the purpose of the newly announced rule, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards,'"[20] id. at 7, 18 P.3d at 209 (quoting Santiago, 53 Haw. at 268-67, 492 P.2d at 665-66).

"Primary consideration is given to the purpose for which the new standards are adopted." Santiago, 53 Haw. at 269, 492 P.2d at 666. Retrospective application is generally provided to "[r]ules designed to protect 'the very integrity of the fact-

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[19](...continued)
at 927 (quoting James B. Beam Distilling, 501 U.S. at 537). We have, however, declined to follow this approach, because "'selective application of new rules violates the principles of treating similarly situated defendants the same.'" Id. at 214, 29 P.3d at 933 (quoting State v. Jackson, 81 Hawai'i 39, 51, 912 P.2d 71, 83 (1996)).

[20] In a HRAP 28(j) citation of supplemental authority, Jess refers us to Danforth v. Minnesota, No. 06-8273, 2008 U.S. LEXIS 2012, at *5, *33 (U.S. Feb. 20, 2008), in which the United States Supreme Court held that, when a federal court announces a new rule of criminal procedure, although the retroactive effect of that new rule is limited to those cases that are not yet final in the federal courts, see Teague v. Lane, 489 U.S. 288, 304-05 (1989), state courts are nonetheless free to give the new federal rule broader retroactive effect. We do not believe that either Danforth or Teague is particularly germane to our analysis regarding whether the new charging rule that we announce today should apply retroactively, because the rule is grounded not in the United States Constitution but, rather, in article I, sections 5 and 10 of the Hawai'i Constitution. See supra section III.A. Therefore, we are guided by our own independent state law jurisprudence in determining whether the rule applies retroactively. See State v. Nakata, 76 Hawai'i 360, 378, 878 P.2d 699, 717 (1994) (acknowledging that the doctrinal basis of this court's retroactivity jurisprudence, Linkletter v. Walker, 381 U.S. 618 (1965), has been overruled by the United States Supreme Court but, nevertheless, continuing to follow Linkletter's "more flexible test . . . when determining whether to retroactively apply decisions of state law made by this court"); see also Garcia, 96 Hawai'i at 212, 29 P.3d at 931.

finding process,'" id. (quoting Linkletter v. Walker, 381 U.S. 618, 639 (1965), overruled by Griffith v. Kentucky, 479 U.S. 314 (1987)), as where the "major purpose" of the rule "is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials," Williams v. United States, 401 U.S. 646, 653 (1971), cited in Santiago, 53 Haw. at 665-66, 492 P.2d at 268-29. For present purposes, the intrinsic/extrinsic dichotomy, which was the law in this jurisdiction until Maugaotega II, did not require the inclusion of extrinsic enhancing facts in the charging instrument. See Tafoya, 91 Hawai'i at 271, 982 P.2d at 900. The defendant was, however, provided by statute with written notice and the right to hear and controvert the evidence against him and to offer evidence on his behalf with respect to the imposition of extended prison terms. See HRS § 706-664 (1993), supra note 5. The extrinsic enhancers were found by the court, see id., and were subject to the "procedural standards . . . applicable to ordinary sentencing," see Huelsman, 60 Haw. at 80, 588 P.2d at 400. In light of these provisions, we do not believe that the intrinsic/extrinsic distinction substantially impaired the criminal trial's truth-finding function, so as to raise serious questions about the accuracy of findings made by judges with respect to extrinsic enhancers. See Williams, 401 U.S. at 653; cf. Schriro v. Summerlin, 542 U.S. 348, 356 (2004) (concluding that the holding in Ring, 536 U.S. 584, that the statutory aggravators were effectively elements for federal constitutional

purposes and thus had to be submitted to the jury as the trier of fact and proved beyond a reasonable doubt, did not apply retroactively, because Ring did not announce one of the "'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding,'" such that the Schriro Court could not "confidently say that judicial factfinding seriously diminishes accuracy" (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)) (emphasis omitted)). Thus, the purpose of the "new rule" announced today is not to remediate an aspect of the criminal process that substantially impairs its truth-finding function. Consequently, the purpose of the new rule does not counsel that we should accord our decision retrospective effect.

Furthermore, the prosecution has long relied on the intrinsic/extrinsic distinction in charging defendants. In this case, for example, the prosecution's failure to allege extrinsic enhancers in its complaint against Jess fully comported with Tafoya, which counseled that such facts should not be included in the complaint, see 91 Hawai'i at 271, 982 P.2d at 900; see also supra section III.A.3.b. Obviously, the same holds true in countless other cases. E.g., Maugaotega II, 115 Hawai'i at 435 n.3, 168 P.3d at 565 n.3 (observing that the indictments against the defendant did not allege "that, if convicted, [the defendant] could be subject to extended sentencing as a multiple offender for whom extended terms of imprisonment were necessary for the protection of the public"). Accordingly, the extent of law enforcement's reliance on the intrinsic/extrinsic distinction

counsels in favor of limiting our decision to purely prospective application. See Fortin, 843 A.2d at 1037 (concluding that the court's holding, which required that aggravating facts in capital cases be alleged in the indictment, was limited to purely prospective application, in light of the prosecution's reliance on the court's previous ruling that such facts did not have to be alleged).

Finally, the burden on the administration of justice would be significant if our "new rule" applied retrospectively, because our courts would be inundated with HRPP Rule 40 (2006)[21] petitions filed by defendants who were sentenced to extended terms from as long ago as 1978, see Huelsman, 60 Haw. 71, 588 P.2d 394, alleging that, because the extrinsic enhancers foundational to their extended term sentences were not alleged in their charging instrument, their extended sentences are therefore invalid. See State v. Cummings, 101 Hawai'i 139, 143, 63 P.3d 1109, 1244 (2003) (holding that, aside from technical errors, the omission of an essential element in the charging instrument is a defect that is not one of mere form but is instead one of substantive subject matter jurisdiction, which renders any subsequent trial, judgment of conviction, or sentence a nullity, and which is per se prejudicial); Russell v. Blackwell, 53 Haw. 274, 277-79, 492 P.2d 953, 956-57 (1972) (holding that a rule

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[21] See HRPP Rule 40(a)(1) (2006) ("At any time but not prior to final judgment, any person may seek relief under the procedure set forth in this rule from the judgment of conviction, on the following grounds: (i) that the judgment was obtained or sentence imposed in violation of the constitution of the United States or of the State of Hawai'i; [or] (ii) that the court which rendered the judgment was without jurisdiction over the person or the subject matter . . . ." (Spacing altered.)).

requiring the court to follow certain procedures in accepting a defendant's guilty plea did not apply retroactively, because such application "would impose an awesome burden on the administration of justice," insofar as it would require that all guilty pleas that were previously accepted in a manner that did not comply with the new procedure be set aside).

In light of these considerations, we believe that the prosecution and the courts would be substantially prejudiced by the retrospective application of the new rule we announce today, and, therefore, we accord it purely prospective application. See Garcia, 96 Hawai'i at 211, 29 P.3d at 930 ("'[W]here substantial prejudice results from the retrospective application of new legal principles to a given set of facts, the inequity may be avoided by giving the guiding principles prospective application only.'" (Quoting State v. Ikezawa, 75 Haw. 210, 220-21, 857 P.2d 593, 598 (1993).)); State v. Tachibana, 79 Hawai'i 226, 238, 900 P.2d 1293, 1305 (1995) (holding that the new rule, which required that the court conduct a colloquy with a defendant to determine if the defendant is freely and voluntarily waiving his right to testify, only applied "prospectively to cases in which trial is not completed until after the date of [the] decision"); Fortin, 843 A.2d at 1037; see also State v. Haanio, 94 Hawai'i 405, 407, 16 P.3d 246, 248 (2001) (partially overruling State v. Kupau, 76 Hawai'i 387, 879 P.2d 492 (1994), and holding that, "in jury trials beginning after the filing date of this opinion, the trial courts shall instruct juries as to any included offenses having a rational basis in the evidence without regard to whether the

prosecution requests, or the defense objects to, such an instruction"); State v. Stanley, 60 Haw. 527, 533, 592 P.2d 422, 426 (1979) (holding that the new rule, which required that "a family court order waiving jurisdiction must be appealed from prior to the commencement of the criminal trial on the offenses charged," would apply "only prospectively," in light of the "absence of clear direction in [this court's] previous cases regarding the proper time for challenging a waiver order"); State v. Warner, 58 Haw. 492, 501, 573 P.2d 959, 965 (1977) (holding that a new jury instruction rule was "for prospective application only"), overruled on other grounds by State v. Sawyer, 88 Hawai'i 325, 327, 966 P.2d 637, 639 (1998). Accordingly, all charging instruments filed after the date of this decision, in which the prosecution seeks enhanced sentencing, must include "allegations, which if proved, would result in the application of a statute enhancing the penalty of the crime committed." Apao, 59 Haw. at 636, 586 P.2d at 258 (footnote and emphasis omitted); accord Estrada, 69 Haw. at 230, 738 P.2d at 829.

Because the new rule that we announce today is purely prospective, it does not apply in this case. See Garcia, 96 Hawai'i at 208, 29 P.3d at 927. Therefore, the remaining question is whether the complaint against Jess is defective under the construction of the intrinsic/extrinsic dichotomy that was the prevailing law when Jess was charged on March 2, 2000.

Jess challenges Count I of the complaint, which charged him with first degree robbery as follows:

> On or about the 23rd day of February, 2000, in the City and County of Honolulu, State of Hawaii, BRIAN JESS, while in the course of committing a theft and

> while armed with a dangerous instrument, to wit, a knife, did threaten the imminent use of force against Canh Tran, a person who was present with the intent to compel acquiescence to the taking of or escaping with the property, thereby committing the offense of Robbery in the First Degree, in violation of [HRS §] 708-840(1)(b)(ii) . . . .

Jess asserts that the prosecution omitted certain intrinsic facts from the complaint that the circuit court found in imposing an extended term prison sentence. That sentence was, however, vacated by the federal district court in the habeas proceeding. See Jess II, 2007 WL 1041737. Nevertheless, the prosecution filed a second motion for extended term sentencing on remand. Giving Jess the benefit of the doubt, we construe his argument as attacking the allegations set forth in the declaration of counsel filed in support of the second motion, to the extent that those allegations are identical to the findings that Jess references in his brief.[22]

In the declaration, the prosecution alleged in relevant part:

> 30. [Jess] is a "persistent offender" and a "multiple offender" whose commitment for an extended

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[22] Jess takes issue with the circuit court's finding that his "behavior has escalated as evidenced by his possession and threat to use a knife during the commission of the instant robbery." Jess asserts that this is an intrinsic allegation that was required to be pled in the complaint. The prosecution did not, however, rely on this allegation in its second motion for extended term sentencing. Furthermore, even assuming that the prosecution did rely on Jess's possession of and threat to use a knife, we believe that the complaint, when read in a commonsensical fashion, sufficiently alleged that fact, because it asserted that Jess, "while in the course of committing a theft and while armed with a dangerous instrument, to wit, a knife, did threaten the imminent use of force against Canh Tran." See Garringer v. State, 80 Hawai'i 327, 330, 909 P.2d 1142, 1145 (1996) (explaining that the charging instrument "'must be read in a common-sensical fashion in order to ascertain whether the material aggravating circumstance has been sufficiently alleged therein to support the imposition of enhanced sentencing'" (quoting Schroeder, 76 Haw. at 530, 880 P.2d at 205)).

> term is necessary for the protection of the public because of the following facts:
>
> . . . .
>
> d. [Jess] has failed to benefit from the criminal justice system.
>
> e. [Jess] has demonstrated a total disregard for the rights of others and a poor attitude toward the law.
>
> f. [Jess] has demonstrated a pattern of criminality which indicates that he is likely to be a recidivist in that he cannot conform his behavior to the requirements of the law.
>
> g. Due to the quantity and seriousness of [Jess]'s past convictions and the seriousness of the instant offenses, [Jess] poses a serious threat to the community and his long term incarceration is necessary for the protection of the public.

(Formatting altered.) The allegations of paragraphs (d) through (g) were not "'enmeshed in'" the underlying elements of Jess's first degree robbery and unauthorized control of a propelled vehicle convictions, see Tafoya, 91 Hawai'i at 270, 982 P.2d at 899 (quoting Schroeder, 76 Hawai'i at 528, 880 P.2d at 203); to the contrary, they spoke to whether Jess's commitment for an extended term is necessary for the protection of the public based upon Jess's behavior exhibited over time -- a subject that this court had (until Maugaotega II) held to be extrinsic to the charged offenses and therefore extraneous to the allegations necessary to the charging instrument, see Rivera, 106 Hawai'i at 152-54, 160, 102 P.3d at 1050-52, 1058 (holding that the circuit court properly found, as an extrinsic fact, that the defendant's "commitment for an extended term was necessary for the protection of the public"); Tafoya, 91 Hawai'i at 275 n.19, 982 P.2d at 904 n.19 ("The finding whether an extended term of imprisonment is necessary for the protection of the public, also necessary for imposition of an extended term of imprisonment

pursuant to HRS § 706-662(5), is not a factual finding susceptible to jury determination." (Emphasis in original.)). Accordingly, Jess's argument is without merit.

Jess next claims that his enhanced sentence was sought by the prosecution, and imposed by circuit court, in retaliation for Jess's exercise of his constitutional right to a jury trial. He asks us to adopt a rule imposing a presumption of vindictiveness on the part of the prosecution and the circuit court by analogizing to a number of United States Supreme Court decisions that mandate a presumption of prejudice and vindictiveness when a harsher sentence is imposed following appellate remand or a defendant's exercise of his right to a trial de novo. See North Carolina v. Pearce, 395 U.S. 711 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 794 (1989)); Texas v. McCullough, 475 U.S. 134 (1986); Blackledge v. Perry, 417 U.S. 21 (1974).

The Pearce Court explained that "'[d]ue process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.'" Smith, 490 U.S. at 798 (quoting Pearce, 395 U.S. at 725); see also McCullogh, 475 U.S. at 137-38. "'In order to assure the absence of such a motivation,'" the Pearce Court held that, "'whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for him doing so must affirmatively appear.'" Smith, 490 U.S. at 798 (quoting Pearce, 395 U.S. at 726). "'Otherwise, a presumption arises that a greater sentence has

been imposed for a vindictive purpose . . . .'" Id. at 798-99 (quoting McCullough, 475 U.S. at 142 (quoting United States v. Goodwin, 457 U.S. 368, 374 (1982))). The United States Supreme Court adopted a similar rule in Blackledge "to guard against vindictiveness by the prosecutor at the postconviction stage," Smith, 490 U.S. at 800 n.3, where an inmate who, after being convicted of a misdemeanor charge of assault with a deadly weapon in state district court and exercising his statutory right to a trial de novo in the superior court, was charged in the superior court with felony assault with a deadly weapon. Blackledge, 417 U.S. at 22-23.

Nevertheless, the United States Supreme Court has observed that, under the foregoing line of cases, "a mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule." Goodwin, 457 U.S. at 384. "'[T]he Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of "vindictiveness."'" Smith, 490 U.S. at 800 n.3 (quoting Blackledge, 417 U.S. at 27); see also id. at 799 (quoting Goodwin, 457 U.S. at 373). The Goodwin Court held that "[t]he possibility that a prosecutor would respond to a defendant's pretrial demand for a jury trial by bringing charges not in the public interest that could be explained only as a penalty imposed on the defendant is so unlikely that a presumption of vindictiveness certainly is not warranted." 457 U.S. at 384 (emphasis in original). We believe it is equally unlikely, as a universal matter, that a prosecutor

would respond to a defendant's exercise of his right to a jury trial by filing a posttrial motion for extended term sentencing that was both contrary to the public interest and explainable only as an exercise in vindictiveness. We therefore decline to create a prophylactic presumption that the prosecution and the circuit court are retaliating against a defendant for exercising his right to a jury trial whenever the prosecution seeks, and the circuit court imposes, an extended term sentence.

B. The Parties' Arguments Regarding Inherent Power And *Ex Post Facto* Issues

1. The prosecution

The prosecution argues that empaneling a jury in the present matter would be a proper exercise of the circuit court's inherent power because the state has an interest in deterring crime and the legislature, by enacting the original extended term scheme, evinced its intent to protect the public from particularly dangerous individuals. (Citing, inter alia, Commentary to HRS §§ 706-661 and 706-662; State v. Alvey, 67 Haw. 49, 57, 678 P.2d 5, 10 (1984).) It asserts that concluding that the trier of fact may, under HRS § 706-662, be a jury rather than the sentencing judge comports with this court's precedent in Tafoya, 91 Hawai'i at 271, 982 P.2d at 900, and that this court has, in the past, concluded -- despite the plain language of the statute assigning fact-finding responsibility to the court -- that a circuit court possesses the inherent power to conduct a bifurcated trial in order to afford a jury the opportunity to find facts necessary for the imposition of an extended term sentence, citing State v. Janto, 92 Hawai'i 19, 34-35, 986 P.2d

306, 321-22 (1999). Indeed, the prosecution urges, this court went further in Peralto when it concluded that, upon remand, the trial court could empanel a new jury to make extended sentencing findings pursuant to new procedural safeguards announced in State v. Young, 93 Hawai'i 224, 999 P.2d 230 (2000). (Citing Peralto, 95 Hawai'i at 7-8, 18 P.3d at 209-10.) Similarly, the prosecution maintains, the failure at Jess's first trial to assign to the jury the task of considering the necessity finding was a procedural error, correctable under Peralto by the trial court's empanelment of a new jury upon remand.

2. Jess

Jess argues that this court should not rewrite the plain language of HRS §§ 706-661 and 706-662 to construe "the court" to mean "the trier of fact" absent "compelling and conclusive justification" which, he contends, is absent in the present matter. He insists that consecutive term sentencing, available pursuant to HRS § 706-668.5 (1993), provides an adequate remedy for particularly dangerous defendants and is free from constitutional infirmities.

Jess also asserts that precedent weighs against assigning the prerogative of making the necessity finding to a jury. He notes that this court has concluded in the past that "extrinsic" facts -- such as the necessity finding -- must be found by the sentencing judge, not the jury, because extrinsic facts are not, by their nature, part of the elements of the charged offense and, hence, assigning their determination to the jury would contaminate a jury's proper focus. (Citing, inter

alia, White, 110 Hawai'i at 84-85, 129 P.3d at 1112-13; Maugaotega I, 107 Hawai'i at 402, 114 P.3d at 908; Kaua, 102 Hawai'i at 12-13, 72 P.3d at 484-48; Tafoya, 91 Hawai'i at 271, 275 n.19, 982 P.2d at 900, 904 n.19.) He argues that rewriting the statute to assign the necessity finding to the jury (1) could "create due process and evidentiary problems for the defendant that only a considered and integrated legislative statutory overhaul may anticipate and solve" and (2) would conflict with the legislative intent expressed through Act 230, see supra notes 3 and 4, and the analysis of the Judicial Council upon which Act 230 was grounded -- analysis that did not touch upon the jury solution at all. (Citing Report of the Committee to Conduct a Comprehensive Review of the Hawai'i Penal Code at 271-27q (2005); 2006 Haw. Sess. L. Act 230, passim at 1012-13.) Rather, he urges, this court should exercise restraint and await action by the legislature.

Finally, Jess asserts that this court cannot announce a judicial reformation of the extended sentencing laws and then apply that judicial decision to his case without violating his rights to due process and protections against ex post facto measures.[23] (Citing, inter alia, Haw. Const. art. I, §§ 5 and

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[23] Article I, section 10 of the United States Constitution provides in relevant part that "[n]o State shall . . . pass any . . . ex post facto Law . . . ." (Underscoring added.) This court has previously noted that the Hawai'i Constitution does not contain a similar section, see State v. Guidry, 105 Hawai'i 222, 239, 96 P.3d 242, 256 (2004) (noting that HRS § 1-3, which provides that legislation is presumed to have a prospective effect only, extends similar protection), although article III, section 1 of the Hawai'i Constitution would also arguably bar ex post facto measures by virtue of its limitation of "[t]he legislative power of the State . . . to all rightful subjects of legislation not inconsistent with . . . the Constitution of the United States."

14; Bouie v. City of Columbia, 378 U.S. 347 (1964); Hicks v. Oklahoma, 447 U.S. 343, 346 (1980); United States v. Newman, 203 F.3d 700 (9th Cir. 2000); United States v. Morehead, 959 F.2d 1489, 1511-12 (10th Cir. 1992); Rubino v. Lynaugh, 845 F.2d 1266, 1274 (5th Cir. 1988).)

C. The Circuit Court Possesses The Inherent Judicial Authority To Empanel A Jury For Consideration Of The Necessity Finding Pursuant To HRS §§ 706-661 (Supp. 1999), 706-662 (Supp. 1996), and 706-664 (1993) Without Offending The Right To Due Process Or The Separation Of Powers Doctrine.

1. Reform by the circuit court of HRS § 706-662 (Supp. 1996) and immediate application of the reformed statute would not offend a defendant's right to due process.

We begin as a threshold matter with Jess's last argument, to wit, that judicial reformation of HRS § 706-662 (Supp. 1996) to allow jury consideration of the necessity finding at his resentencing hearing would violate his right to due process and prohibitions against ex post facto measures. Jess's argument is meritless.

a. Application of a judicially-reformed statute to a defendant is constrained by the requirements of due process, grounded in *ex post facto* concerns.

The United States Supreme Court has made it clear that the constitutional prohibition against ex post facto measures applies only to legislative enactments. Rogers v. Tennessee, 532 U.S. 451, 456 (2001) ("As the text of the Clause makes clear, it 'is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government.'"

(Quoting Marks v. United States, 430 U.S. 188, 191 (1977))). The Rogers Court, nonetheless, observed "that limitations on ex post facto judicial decisionmaking are inherent in the notion of due process," id. at 457, citing Bouie as an instructive example. In Bouie, the Court held that a judicial interpretation of a criminal trespassing statute, when applied retroactively to the defendants -- African-Americans wishing to patronize a department store restaurant -- to expand criminal liability violated "'the basic principle that a criminal statute must give fair warning of the conduct that it makes a crime,'" id. (quoting Bouie, 378 U.S. at 350). The Rogers Court made it equally clear, however, that, "[t]o the extent that [a] petitioner argues that the Due Process Clause incorporates the specific prohibitions of the Ex Post Facto Clause as identified in Calder[v. Bull, 3 U.S. 386 (1798)[24]], [a] petitioner misreads Bouie." Id. at 458-59 (characterizing any language implying that due process analysis must wholly incorporate ex post facto precedent as "dicta"). Rather, the Rogers Court clarified that the appropriate test for analyzing whether a newly announced judicial doctrine can apply

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[24] In Calder, the Court set forth four types of laws to which the ex post facto prohibition extends:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

3 U.S. at 390-91, quoted in Rogers, 532 U.S. at 455.

to the instant defendant is grounded in "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct." Id. at 459 (citing Bouie, 378 U.S. at 351, 352, 354-55; United States v. Lanier, 520 U.S. 256, 266 (1997); Marks, 430 U.S. at 191-92 ; Rose v. Locke, 423 U.S. 48, 53 (1975); Douglas v. Buder, 412 U.S. 430, 432 (1973); Rabe v. Washington, 405 U.S. 313, 316 (1972)) (emphasis added). The Rogers Court refused to import ex post facto protections wholesale into judicial decision-making because (1) "[a] court's 'opportunity for discrimination . . . is more limited than [a] legislature's, in that [it] can only act in construing laws in actual litigation,'" id. at 460-61 (quoting James v. United States, 366 U.S. 213, 247 n.3 (1961) (Harlan, J., concurring in part and dissenting in part)) (some brackets added and some in original), and (2) "incorporation of the Calder categories[, see supra note 24,] into due process limitations on judicial decisionmaking would place an unworkable and unacceptable restraint on normal judicial processes and would be incompatible with the resolution of uncertainty that marks any evolving legal system," id. Instead, the Rogers Court concluded that judicial reformation of the law "violates the principle of fair warning, and hence must not be given retroactive effect, only where it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,'" id. at 462 (quoting Bouie, 378 U.S. at 354), circumstances that would

generate "unfair and arbitrary judicial action against which the Due Process Clause aims to protect," id. at 467.

b. For a judicial decision to implicate due process concerns, the change wrought upon the defendant's interests must be substantive, as opposed to procedural, and detrimental, as opposed to remedial.

In practice, when considering whether application of a judicial decision to a particular defendant is "unexpected and indefensible," Bouie, 378 U.S. at 354, courts have focused on two intertwined distinctions: (1) whether the change wrought by the judicial decision is detrimental or remedial to the defendant's interests; and (2) whether the change is substantive or procedural in nature. Without question, substantive changes to the legal landscape that increase a defendant's criminal liability for acts committed prior to the judicial decision violate the right to due process of law. See Bouie, 378 U.S. at 350, 353-55 ("[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law such as Art[icle] I, s[ection] 10, of the Constitution forbids," an action which "violate[s] the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits"); Rubino, 845 F.2d at 1274 (relying on Miller v. Florida, 482 U.S. 423 (1987), to conclude that due process concerns are implicated in the context of judicial statutory reformation only when the judicial modification operates "to the detriment of a criminal defendant" and holding, after analyzing the judicial elimination of a Texas doctrine governing the manner in which crimes composed

of overlapping elements were charged, that, "[i]f the . . . doctrine would have barred [the defendant]'s second prosecution and conviction, the State deprived him of due process in affirming his conviction in reliance on the abandonment of a protective rule in force at the time of his offenses").

On the other hand, procedural changes, i.e., those that alter the process by which guilt is adjudicated or sentence imposed, without modifying the degree of criminal liability or the length of the sentence imposed, do not implicate due process concerns. See, e.g., Collins v. Youngblood, 497 U.S. 37, 45 (1990) (defining procedural changes as "changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes" and further defining matters of substance as those that "depriv[e] a defendant of 'substantial protections with which the existing law surrounds the person accused of crime' or arbitrarily infring[e] upon 'substantial personal rights'") (quoting Malloy v. South Carolina, 237 U.S. 180, 183 (1915); Duncan v. Missouri, 152 U.S. 377, 382-83 (1894)).

Hankerson v. State, 723 N.W.2d 232 (Minn. 2006), is an apt illustration of the foregoing principle. In Hankerson, the Minnesota Supreme Court -- albeit in the context of analyzing whether ex post facto principles were violated by retroactive application of a legislative reform of the state's extended sentencing statutes instigated by Apprendi, 530 U.S. 466, and Blakely v. Washington, 542 U.S. 296 (2004) -- relied on Collins, 497 U.S. at 51 and Dobbert v. Florida, 432 U.S. 282, 287-88,

292-94 (1977), to conclude that "a change affecting the identity of the fact finder is procedural and thus is not burdened by ex post facto restrictions." Hankerson, 723 N.W.2d at 242 (underscoring added). The court distinguished substantive from procedural changes by concisely defining procedural modifications as those that "d[o] not add aggravating factors, eliminate elements of aggravating factors, or increase the duration of the sentence authorized by a finding of aggravating factors." Id.

Equally clear is the proposition that, if a judicial reformation of a statute works to the defendant's advantage, due process is not offended. See Morehead, 959 F.2d at 1511-12 (noting that United States Supreme Court and Tenth Circuit precedent distinguished allowable retroactive application where judicially-wrought changes expanded the rights of criminal defendants (citing Batson v. Kentucky, 476 U.S. 79 (1986)) from judicial decision-making that constricted the rights of criminal defendants, which, to be applied retroactively, had to pass additional due process muster as articulated in Bouie (citing Marks, 430 U.S. 188; Bouie, 378 U.S. 347)); State v. Sandoval, 161 P.3d 1146, 1167 (Cal. 2007) (noting that federal courts have unanimously concluded that the "remedial interpretation" of federal sentencing guidelines in Booker, 543 U.S. at 268, instigated by the requirements of Apprendi, comports with due process).

c. The circuit court would not offend the right to due process by reforming HRS § 706-662 (Supp. 1996) so as to allow for jury consideration of the necessity finding and applying that reformation to the case at hand.

In the present matter, invocation of a court's inherent power "to provide process where none exists," Moriwake, 65 Haw. at 55, 647 P.2d at 711-12, by reforming HRS § 706-662 (Supp. 1996) to allow for jury fact-finding would not violate Jess's right to due process of law. Assigning the fact-finding role to the jury would be a procedural, as opposed to a substantive, change that would not expand the scope of criminal liability, increase punishment, or alter any evidentiary burdens to Jess's detriment, see Rubino, 845 F.2d at 1274, but, rather, would "simply chang[e] the course to a result," id. See Washington v. Recuenco, ___ U.S. ___, 126 S. Ct. 2546, 2549, 2553 (2006) (wherein the United States Supreme Court ruled that Apprendi errors were procedural and subject to harmless error analysis) (abrogating State v. Hughes, 110 P.3d 192, 196 (Wash. 2005) (holding that an error under Blakely, 542 U.S. 296, was structural and could never be harmless); Collins, 497 U.S. at 51 ("The right to jury trial provided by the Sixth Amendment is obviously a 'substantial' one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the Ex Post Facto Clause."); Jess II, 2007 WL 1041737, at *4 (applying harmless error analysis to Jess's habeas petition); Hankerson, 723 N.W.2d at 242 (construing Collins, 497 U.S. at 51, and Dobbert, 432 U.S. at

287-88, 292-94, to "make clear that a change affecting the identity of the fact[-]finder is procedural").

Moreover, the judicial reformation of the statute to allow for the empanelment of a jury, by being more protective of Jess's constitutional right to a jury, would work to his advantage and not to his detriment. See Hankerson, 723 N.W.2d at 241-43 (the amendments to Minnesota's sentencing scheme, by requiring a higher quantum of proof upon resentencing, "vindicate, not violate, Hankerson's constitutional rights").

2. In light of recent legislative action, the circuit court would not offend the separation of powers doctrine by invoking its inherent judicial authority to empanel a jury to consider the necessity finding under HRS § 706-662 (Supp. 1996).

In Maugaotega II, this court held that HRS § 706-662 (Supp. 1996) was, in light of Cunningham v. California, 549 U.S. ___, 127 S. Ct. 856 (2007), unconstitutional on its face, insofar as every subsection "authorize[d] the sentencing court to extend a defendant's sentence beyond the 'standard term' authorized solely by the jury's verdict . . . by requiring the sentencing court, rather than the trier of fact, to make an additional necessity finding that . . . does not fall under Apprendi's prior-or-concurrent-convictions exception . . . ." Maugaotega II, 115 Hawai'i at 446, 168 P.3d at 576 (footnote omitted).

We recognized that our courts possess the inherent authority to reform the law to preserve its constitutionality by ordering the empanelment of juries to consider the factual findings requisite to the imposition of an extended term sentence

pursuant to HRS §§ 706-661 and 706-662 as they existed at the time. Maugaotega II, 115 Hawai'i at 448-49, 168 P.3d at 578-79 (citing, inter alia, Peralto, 95 Hawai'i at 6, 18 P.3d at 208; Aragon v. Wilkinson ex rel. County of Maricopa, 97 P.3d 886, 891 (Ariz. Ct. App. 2004); Galindez v. State, 955 So. 2d 517, 527 (Fla. 2007); State v. Schofield, 895 A.2d 927, 937 (Me. 2005)); see also Maugaotega II, 115 Hawai'i at 458, 168 P.3d at 588 (Acoba, J., concurring and dissenting, joined by Duffy, J.). Nevertheless, in light of the legislature's expressed intent in Act 230 of the 2006 legislative session, see supra notes 3 and 4, and the legislature's then-current failure to reach agreement on the creation of a jury-based system,[25] we concluded that it would

> not . . . be appropriate for this court to assert its inherent authority to empanel a jury on remand because, as a rule,
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> > [p]rudential rules of judicial self-governance properly limit the role of the courts in a democratic society. Cf. Trustees of OHA v. Yamasaki, 69 Haw. 154, 171, 737 P.2d 446, 456 (1987); Life of the Land v. Land Use Commission, 63 Haw. 166, 172, 623 P.2d 431, 438 (1981) (citing Warth v. Seldin, 422 U.S. 490, 498 . . . (1975)). . . . [One] such rule is that, "even in the absence of constitutional restrictions, [courts] must still carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of government." Id. (emphasis added) (citation omitted). . . .

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[25] As noted in Maugaotega II, 115 Hawai'i at 450 n.20, 168 P.3d at 580 n.20, House Bill No. 1152 was introduced on January 24, 2007 and sought to amend HRS §§ 706-662 and 706-664 to assign to the jury the fact-finding role with respect to extended term sentences. See H.B. No. 1152, 24th Leg., Reg. Sess. (2007), available at http://capitol.hawaii.gov/session2007/bills/HB1152_SD2_.htm. The Senate and the House of Representatives were unable to reach agreement on a final draft of the bill, however, and the measure was put over.

> . . . Although judicial review serves as a check on the unconstitutional exercise of power by the executive and legislative branches of government, "the only check upon [the judicial branch's] exercise of power is [its] own sense of self-restraint." U.S. v. Butler, 297 U.S. 1, 78-79 . . . (1936) (Stone, J., dissenting).
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> In re Attorney's Fees of Mohr, 97 Hawai'i 1, 9-10, 32 P.3d 647, 655-56 (2001) (some brackets added and some in original) (some ellipses added and some in original) (emphasis in original). See also Ross v. Stouffer Hotel Co., 76 Hawai'i 454, 467, 879 P.2d 1037, 1050 (1994) (Klein, J., concurring and dissenting) ("'[T]he [c]ourt's function in the application and interpretation of . . . laws must be carefully limited to avoid encroaching on the power of [the legislature] to determine policies and make laws to carry them out.'") (quoting Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 256-57 (1970) (Black, J., dissenting)); Bremner v. City & County of Honolulu, 96 Hawai'i 134, 139, 28 P.3d 350, 355 (App. 2001) (quoting Life of the Land, 63 Haw. at 171-72, 623 P.2d at 438).

Maugaotega II, 115 Hawai'i at 450, 168 P.3d at 580 (some ellipses added and some in original).

Although Maugaotega II focused on the inherent power of this court to order, on remand, the empanelment of a jury to consider the requisite findings, such inherent judicial authority resides equally in a circuit court, be it in an original proceeding or in a sentencing proceeding on remand. See HRS § 603-21.9 (1993);[26] Richardson v. Sports Shinko (Waikiki Corp.),

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[26] HRS § 603-21.9 provides in relevant part:

> The several circuit courts shall have power:
> . . . .
> (6) To make . . . such . . . orders, . . . 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 to them by law or for the promotion of justice in matters pending before them.

76 Hawai'i 494, 507, 880 P.2d 169, 182 (1994) ("[C]ourts have inherent equity, supervisory, and administrative powers as well as inherent power to control the litigation process before them[,] . . . powers . . . derived from the state Constitution and . . . not confined by or dependent on statute," and "[a]mong courts' inherent powers are the powers to 'create a remedy for a wrong even in the absence of specific statutory remedies'" and the "inherent power to . . . promote a fair process." (Quoting Peat, Marwick, Mitchell v. Superior Court, 245 Cal Rptr. 873, 883 (Cal. Ct. App. 1988) (citing, inter alia, Moriwake, 65 Haw. at 55, 647 P.2d at 711-12).) (Citing State v. Alvey, 67 Haw. 49, 57, 678 P.2d 5, 10 (1984) (noting that a trial court, in invoking its inherent powers, must "'balanc[e] the interests of the [s]tate against fundamental fairness to a defendant with the added ingredient of the orderly functioning of the court system'" (quoting Moriwake, 65 Haw. at 56, 647 P.2d at 712).); Moriwake, 65 Haw. at 55, 647 P.2d at 711-12 (defining the inherent power of all courts, including the trial court, as "the power to protect itself; the power to administer justice whether any previous form of remedy has been granted or not; . . . and the power to provide process where none exists"), quoted in Farmer v. Admin. Dir. of the Courts, 94 Hawai'i 232, 241, 11 P.3d 457, 466 (2000).

This court has concluded that the extended term sentencing scheme "should be construed in harmony with the requirements of due process," State v. Kamae, 56 Haw. 628, 635, 548 P.2d 632, 637 (1976) (speaking specifically of HRS § 706-664 but addressing as a whole the due process requirements of the

extended sentencing scheme), which includes the need, in light of Cunningham, to address shortcomings in the fact-finding structure of HRS § 706-662. Moreover, the matter of extended term sentencing is of sufficient public concern to justify invocation of a circuit court's inherent power to reform the statute so as to preserve its constitutionality provided that, by invoking that authority, the circuit court could "conclude with confidence that (i) it [was] possible to [do so] in a manner that closely effectuate[d] policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred such a reformed version of the statute to invalidation of the statute." Sandoval, 161 P.3d at 1159 (some brackets added and some in original). And, as noted in Maugaotega II, jury consideration of the necessity finding could be structured so as to avoid "contamination" of the impartiality of the jury by postponing introduction of evidence pertaining to extended term sentencing until after the guilt phase of the trial has concluded. 115 Hawai'i at 449-50 n.19, 168 P.3d at 579-80 n.19 (citing Janto, 92 Hawai'i at 34-35, 986 P.2d at 321-22). Nor is a properly timed determination of the necessity finding any less suited to a jury than the finding that a murder was carried out in a manner "especially heinous, atrocious, or cruel," as required by HRS § 706-657 and assigned to the jury in Peralto, 95 Hawai'i at 7, 18 P.3d at 209, and Janto, 92 Hawai'i at 33, 986 P.2d at 320. The United States District Court for the District of Hawai'i, in fact, implicitly concluded that the necessity finding was suitable for jury determination. See Jess II, 2007

WL 1041737, at *6 (in articulating its harmless error analysis comparing the likelihood that jury and judge findings would agree on the necessity finding in any given case).

To be sure, the circuit court, in exercising its discretion to invoke its inherent authority "to provide process where none exists," Moriwake, 65 Haw. at 55, 647 P.2d at 712, must be similarly aware of the necessity of tempering the exercise of that power in light of the expressed intent of the legislature on the subject under consideration. See Maugaotega II, 115 Hawai'i at 450, 168 P.3d at 580 (citing, inter alia, Mohr, 97 Hawai'i at 9-10, 32 P.3d at 655-56, for the proposition that "'the only check upon [the judicial branch's] exercise of power is [its] own sense of self restraint'" (quoting Butler, 297 U.S. at 78-79)). The Wisconsin Supreme Court, in Barland v. Eau Claire County, 575 N.W.2d 691 (Wis. 1998), in describing the separation of powers amongst the three branches of government, noted that "'[t]he separation of powers doctrine states the principle of shared, rather than completely separated powers,'" which "'envisions a government of separate branches sharing certain powers.'" Id. at 696 (quoting State v. Holmes, 315 N.W.2d 703, 709 (Wis. 1982)). The Barland court concluded that, "'[i]n these areas of "shared power," one branch of government may exercise power conferred on another only to an extent that does not unduly burden or substantially interfere with the other branch's exercise of its power.'" Id. (quoting In re Complaint Against Grady, 348 N.W.2d 559, 566 (Wis. 1984)). Similarly, the highest court in Maryland, in Wynn v. State, 879

A.2d 1097 (Md. 2005), recently commented that "[c]ourts across the country . . . have maintained that inherent authority should be recognized and yet employed rarely," id. at 1104, noting that "the need for a narrow application of inherent authority is greater when the power claimed as deriving from inherent authority overlaps and conflicts with a power of the legislative or executive branch," id. at 1105. Therefore, "'[i]n exercising its power to do what is reasonably necessary for the proper administration of justice . . . [,] a court must proceed with a cautious and cooperative spirit into those areas where its constitutional powers overlap with those of other branches.'" Id. (quoting In re Alamance County Court Facilities, 405 S.E.2d 125, 133 (N.C. 1991)). Concerns such as these led us, in Maugaotega II, to decline to exercise this court's inherent authority to empanel a jury, in light of, at that time, the most recent and most explicit expressions of legislative intent pertaining to the wisdom of a jury-based necessity finding. 115 Hawai'i at 449-50, 168 P.3d at 579-80.

There has, however, been a recent seachange in the legislature's clearly expressed intent regarding the wisdom of employing juries in the context of extended term sentencing. The enactment of H.B. No. 2, see supra notes 3-6, during the recent special session provides this court with a fresh, conclusive expression of legislative support for the use of juries as the trier of fact with respect to extended term sentencing fact-finding and allows us to "conclude with confidence," Sandoval, 161 P.3d at 1159, that empaneling a jury would "closely

effectuate[] policy judgments clearly articulated by the [legislature]," id., and that the legislature "would . . . prefer[] such a reformed version of the statute to invalidation of the statute," id.;[27] see also State v. Cutsinger, No. 28203, 2008 WL 257175, at *1, *14 (Haw. Ct. App. Jan. 30, 2008) ("The Legislature's enactment of Act 1 . . . eliminates any doubt about the Legislature's intent with respect to extended term sentencing. The Legislature has plainly expressed its desire for a sentencing scheme in which extended terms of imprisonment may continue to be imposed."). In light of the recent legislation, invocation of the court's inherent authority in the instant matter would "'not unduly burden or substantially interfere with the other branch's exercise of its power.'" Barland, 575 N.W.2d at 696 (quoting Grady, 348 N.W.2d at 566).

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[27] The dissent argues that, "[b]y answering the [r]eserved [q]uestion in the affirmative, and allowing for the application of [Hawaii's extended term sentencing] statute,[HRS § 706-662 (Supp. 1996),] the majority violates precedent," namely Maugaotega II. Dissenting opinion at 13. The dissent overlooks the obvious, namely, that the legislature enacted Act 1 after we decided Maugaotega II. As we have said, our decision in Maugaotega II was guided by the latest expression of legislative intent, specifically Act 230, which vested the power to make the necessity finding not with the jury, but with the court. See 115 Hawai'i at 449-50, 168 P.3d at 579-80. Act 1 provides the evidence of conclusive legislative support for the circuit court to empanel a jury pursuant to its inherent authority that was previously lacking, directing that the jury, and not the sentencing court, make the necessity finding. See supra notes 4-5. Accordingly, our conclusion that the circuit court may empanel a jury to make the necessity finding under HRS § 706-662 is consistent with principles of stare decisis.

D. The Circuit Court May, With Respect To A Properly Charged Defendant, Empanel A Jury For Determination Of The Necessary Findings Pursuant To The Newly Amended Versions Of HRS §§ 706-661, 706-662, and 706-664.

1. The plain language of the amended statute allows for retroactive application upon resentencing.

In the interests of judicial economy, we construe Jess's constitutional arguments broadly to include the question whether the prohibition against ex post facto measures prevents the circuit court from applying Act 1 of the 2007 Second Special Session, see supra notes 3-6, to his resentencing. The measure provides in relevant part that "[t]his Act shall apply to all sentencing or resentencing proceedings pending on or commenced after the effective date of this Act, whether the offense was committed prior to, on, or after the effective date of this Act." See supra note 6. It specifically addresses defendants in Jess's position by providing that "[a] defendant whose extended term of imprisonment is set aside or invalidated shall be resentenced pursuant to this Act upon request of the prosecutor." Id.

2. Application of Act 1 to Jess's case would not violate the constitutional prohibition against *ex post facto* measures.

Ex post facto protections are not implicated unless, without notice, they effect a substantive change to the defendant's interests that operates to his or her detriment. See Cutsinger, 2008 WL 257175, at *8 ("Under the Supreme Court's test for determining whether a criminal law falls within the ex post facto prohibition, two critical elements must be present: 'first, the law must be retrospective, that is, it must apply to

events occurring before its enactment; and second, it must disadvantage the offender affected by it.'" (Quoting Miller, 482 U.S. at 430.)); Landgraf v. USI Film Prods., 511 U.S. 244, 269-70, 275 n.28 (1994) (noting that "[w]hile we have strictly construed the Ex Post Facto Clause to prohibit application of new statutes creating or increasing punishments after the fact, we have upheld intervening procedural changes even if application of the new rule operated to a defendant's disadvantage in the particular case," and concluding that "[a] statute does not operate 'retrospectively merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based on prior law[; r]ather the court must ask whether the new provision attaches new legal consequences to events completed before its enactment"); Sandoval, 161 P.3d at 1159 ("A retroactive law does not violate the ex post facto clause if it does not alter 'substantial personal rights' but merely changes 'modes of procedure which do not affect matters of substance.'" (Quoting Miller, 482 U.S. at 430.) (Underscoring added.)); Hankerson, 723 N.W.2d at 241-42 (concluding (1) that, in order "'[t]o fall within the ex post facto prohibition, a law must be [a] retrospective -- that is, "it must apply to events occurring before its enactment" -- and [b] it "must disadvantage the offender affected by it"'" (quoting Lynce v. Mathis, 519 U.S. 433, 441 (1997) (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981))), (2) that Apprendi-mandated amendments introducing jury fact-finding "are not prohibited as ex post facto laws because they do not work to [the defendant]'s disadvantage" but, rather,

"vindicate, not violate, [her] constitutional rights," and (3) that "a change affecting the identity of the fact[-]finder is procedural and thus is not burdened by ex post facto restrictions"); State v. Upton, 125 P.3d 713, 719-20 (Or. 2005) (analyzing Oregon's reformed extended term sentencing statute, instigated in response to Apprendi and Blakely, wherein the fact-finding function was assigned to the jury and concluding: (1) that assigning facts to the jury "changes only the method for determining the available punishment; it does not . . . increase that punishment"; (2) that, to the extent that the new jury fact-finding responsibilities "change[] the quantum of proof required under the sentencing guidelines, it inures to the defendant's advantage to require the state to prove any enhancing factors beyond a reasonable doubt," a procedural change which "does not prejudice defendant; indeed, it vindicates his constitutional rights"; and (3) that the prohibition against ex post facto measures was not, therefore, violated because "[f]or a statute to violate state or federal ex post facto clauses, the statute must at least effect some kind of disadvantageous change upon the defendant" (emphasis added) (citing State v. McNab, 51 P.3d 1249, 1252 (Or. 2002)); Washington v. Pillatos, 150 P.3d 1130, 1135, 1137-38 (Wash. 2007) (reasoning that "if the changes to the statute do not alter the consequences of the crime[,] then there is likely no relevant lack of notice" and concluding that retroactive application of amendments to Washington's penal code driven by Blakely did not violate ex post facto prohibitions because "the[] defendants had warning of the risk of an

exceptional sentence" and "at the time . . . the[] defendants committed the crimes . . . , [the state] had a seemingly valid exceptional sentencing system which gave fair notice of the risk of receiving such a sentence").

As noted supra in section III.C.1.c, the United States Supreme Court, in Recuenco, ruled that Apprendi errors are procedural in nature, 126 S. Ct. at 2553; see also Cutsinger, 2008 WL 257175, at *8 ("The pivotal change made by Act 1 -- providing the defendant with the right to have a jury determine the facts necessary to impose an extended term -- is a procedural change to Hawai'i's extended term sentencing statutes. It therefore falls within the procedural-change exception to the ex post facto prohibition."). Moreover, prescribing a jury as the trier of fact during the extended term sentencing phase, pursuant to Act 1, is remedial in nature and "does not prejudice [the] defendant; indeed it vindicates his constitutional rights," Upton, 125 P.3d at 719; see also Cutsinger, 2008 WL 257175, at *8 ("Act 1 provides [the defendant] with additional benefits not contained in the prior law. Act 1 gives [the defendant] the right and option to have a jury (instead of only the sentencing court) determine the facts necessary to impose an extended term of imprisonment. It also requires that such facts be proven beyond a reasonable doubt." (Citation and footnote omitted.)). Applying the Calder test, see supra note 24, it is clear that the new jury provisions do not (1) increase criminal liability for conduct previously innocent, (2) aggravate the degree of Jess's crimes, (3) increase the punishment available at the time Jess

committed his crimes, or (4) alter evidentiary standards to Jess's detriment. See Calder, 3 U.S. at 390-91, quoted in Rogers, 532 U.S. at 455; see also Cutsinger, 2008 WL 257175, at *8 (concluding that "the retroactive application of Act 1 does not disadvantage [the defendant] because it does not subject him to 'increase[d] punishment beyond what was prescribed' when his burglary offense was committed" (quoting Miller, 482 U.S. at 430) (brackets in original)).

We therefore hold that the constitutional prohibition against ex post facto measures is not offended by the plain language of the new law. See Cutsinger, 2008 WL 257175, at *8 (holding that "Act 1's retroactive application to [the defendant] does not violate the Ex Post Facto Clause of Article I, § 10").[28]

IV. CONCLUSION

For the foregoing reasons, we remand this matter to the circuit court for further proceedings consistent with this opinion.

[28] Although the dissent asserts that Act 1 should not be construed or applied with respect to Jess, see dissenting opinion at 1-3, 9-29, it does not take issue with the actual substance of our due process or ex post facto analysis.

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