DISSENTING OPINION BY ACOBA, J.

I respectfully dissent.

First, this proceeding should be dismissed and the case remanded. The order of the United States District Court (district court) has already directed that the court must comply with Apprendi v. New Jersey, 530 U.S. 466 (2000),[1] that is, that if Plaintiff-Appellant State of Hawai'i (the prosecution) seeks an extended term, then Defendant-Appellee Brian Jess (Jess) must be afforded the option of a jury trial on the sentencing facts. Additionally, that he is entitled to one is already settled in this jurisdiction and need not be redecided, State v. Maugaotega, 115 Hawai'i 432, 447, 168 P.3d 562, 577 (2007) [hereinafter "Maugaotega II"], if as the majority holds, Jess is not entitled to non-extended term sentencing. Accordingly, with respect to Jess, whose case is before us, the majority decides nothing of consequence inasmuch as the jury requirement has already been imposed in his case irrespective of House Bill 2, Related to

[1] Jess brought a petition for writ of habeas corpus pursuant to 18 U.S.C. § 2254 "present[ing] the question of whether the Hawaii extended sentencing scheme violates the United States Constitution's Sixth Amendment trial-by-jury clause pursuant to the rationale of the United States Supreme Court [(the Supreme Court)] decision in [Apprendi] and its progeny." Jess v. Peyton, No. Civ. 04-00601 JMS/BMK, 2006 WL 1041737 at *1 (D.Haw. April 18, 2006). In granting Jess' petition for habeas corpus, the district court concluded that this court's "reasoning that the 'extrinsic' nature of the factual findings . . . exempt[ed] them from Apprendi's reach[,]" id. at *4 (quoting Kaua v. Frank, 436 F.3d 1037, 1060-61 (9th Cir. 2006) (Kaua II) (internal quotation marks omitted), "violate[d] the Sixth Amendment[]" to the United States Constitution as interpreted by Apprendi and its progeny, id. Thus, the district court ordered that Jess be resentenced in accordance with its opinion, id. at *6, i.e., that a jury make the requisite finding to impose an extended term sentence, id. at *4.

Sentencing, signed into law on October 31, 2007 as Act 1 [hereinafter, Act 1]. See 2007 Haw. Sess. L. (Second Special Session) Act 1 at ---. Nevertheless, the majority construes and applies Act 1, although it was not raised in this case.

The only consequential matter is the majority's new rule requiring extended sentencing factors to be alleged in charging documents. That is even further removed from Jess' case because under the majority's own holding, that rule does not apply to Jess, but is imposed generally to others whose cases have yet to be even initiated by the prosecution. This foray by the majority into the legislative area lays down a rule for general applicability that was not raised in the instant case and to which it will not apply. In light of the foregoing, the majority's claim of "judicial economy," majority opinion at 66, is, with all due respect, nothing more than judicial expediency -- Jess' case is merely the vehicle by which the majority proclaims propositions it seeks to advance that are not pertinent to or applied to his situation. Under these circumstances, no decision should be rendered on the Reserved Question.

Second, assuming arguendo that the Reserved Question must be answered, I believe that it must be answered in the negative and the case remanded for "non-extended" term sentencing because (1) the majority held in Maugaotega II, that Hawai'i Revised Statutes (HRS) § 706-662, the statute in the Reserved

Question, was facially unconstitutional, (2) this holding is applicable to Jess because Jess' case was pending on appellate review at the time Maugaotega II was decided, (3) Maugaotega II did not announce a new rule of criminal procedure, and (4) Maugaotega II is precedent binding on this court and therefore entirely dispositive on the Reserved Question in Jess' case.

Third, assuming arguendo Maugaotega II does not control, and the case is remanded in due course for resentencing under Act 1, the majority is wrong in deciding in this case that Act 1 may be retroactively applied to Jess and that the automatic notice provision in Act 1 does not conflict with the new rule adopted by the majority inasmuch as (a) the matter is not ripe for decision because on resentencing the questions decided by the majority may never arise in Jess' case, (b) the parties have not raised or briefed these issues, (c) there is no controversy, nor are there concrete facts raised with respect to these questions in this case, (d) the application of Act 1 to and its constitutionality in future unknown cases cannot be properly decided in a vacuum.

Fourth, assuming arguendo adoption of the new rule is necessary, the majority's holding that extended sentencing factors must be included in the charging document should be applied to Jess inasmuch as unlike a legislature, we do not promulgate broad rules outside of specific cases and as a matter of fundamental fairness we must apply any new rule benefitting

defendants to those who are similarly situated.[2]

I.

A.

With respect to the Reserved Question,[3] the prosecution and amici curiae[4] would answer the Reserved Question in the affirmative. The prosecution notes that on February 20, 2007, the Supreme Court vacated this court's judgment in State v. Maugaotega, 107 Hawai'i 399, 114 P.3d 905 (2005) [hereinafter Maugaotega I], vacated and remanded, Maugaotega v. Hawaii, __ U.S. __, 127 S.Ct. 1210 (2007) (memorandum opinion), the latest

---

[2] The majority's decision asserts that (1) under Cunningham v. California, --- U.S. ---, ---, 127 S. Ct. 856, 864 (2007), "extrinsic enhancers, like intrinsic enhancers, are 'essential elements' of the 'aggravated' version of the offense[,]" majority opinion at 30 (citations omitted), (2) therefore the majority adopts a new rule requiring that the charging instrument must include these enhancers, id. (citations omitted) (3) this holding applies purely prospectively to all criminal defendants, id. at 35, and (4) therefore this holding shall not apply retroactively to Jess, id. at 44, (5) rather, with respect to Jess, the court may empanel a jury for consideration of the necessity finding pursuant to HRS §§ 706-661, 706-662, and 706-664 under its inherent judicial authority and Act 1, id. at 65-66, (6) such practice, does not violate "the requirements of due process[] grounded in ex post facto concerns[,]" id. at 66, (7) also, the court may empanel a jury for consideration of the necessity finding under HRS §§ 706-661, 706-662, and 706-664 pursuant to Act 1, insofar as (8) Act 1's retroactive provisions do not violate ex post facto objections, and the notice requirements do not violate the majority's newly adopted rule, id. at 35, (9) thus this case is remanded to the court (presumably for application of Act 1), id. at 70.

[3] To reiterate, the question reserved stated:

> May the trial court, as part of a sentencing proceeding brought pursuant to [HRS §§ 706-662(1) & (4),] 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?

(Emphasis added.) On April 26, 2007, this court issued its "Order Accepting Reserved Question."

[4] Amici curiae are the Attorney General of the State of Hawai'i (Attorney General); Benjamin M. Acob, in his capacity as Prosecuting Attorney, County of Maui (Amicus Acob); and Craig A. De Costa, in his capacity as Prosecuting Attorney, County of Kauai (Amicus De Costa) [collectively, Amici].

in a series of cases in which the majority mistakenly reaffirmed this court's "extrinsic-intrinsic" dichotomy of sentencing factors and upheld the constitutionality of Hawaii's extended sentencing scheme. On remand, the Supreme Court instructed this court to reconsider Hawaii's extended sentencing scheme in light of its decision in Cunningham. Maugaotega v. Hawaii, 549 U.S. at ---, 127 S.Ct. at 1210.

The prosecution contended that if this court determined that the Supreme Court's ruling in Cunningham requires "that the trier of fact is to make the finding that the imposition of an extended term or [sic] imprisonment is necessary for the protection of the public[,]" that the court is authorized to empanel a jury to make that determination. The prosecution concluded that if this court holds "that the trier of fact is constitutionally required to make the 'necessary for the protection of the public' finding[,]" we should also hold that the court "has the inherent power to empanel a jury to make that determination as part of a sentencing proceeding on remand where a defendant's sentence has been vacated due to an Apprendi procedural error."

B.

On October 1, 2007, while the Reserved Question was pending, this court issued its decision in Maugaotega II, pursuant to the Supreme Court's mandate that we reconsider the validity of HRS §§ 706-661 and -662 in light of the Court's

decision in Cunningham.[5] In remanding the case, the majority of this court acknowledged that its position in Maugaotega I and prior cases was wrong under Apprendi.

> [T]he reasoning of the Cunningham majority leaves no doubt that . . . a majority of [the Supreme Court] would consider the necessity finding set forth in HRS § 706-662(4) as separate and distinct from traditional sentencing consideration and, instead, as a predicate to imposing an extended prison term on a defendant that, under Apprendi and its progeny, must either be admitted by the defendant or proved beyond a reasonable doubt to the trier of fact[.]

Maugaotega II, 115 Hawai'i at 446, 168 P.3d at 576 (citing Apprendi, 530 U.S. at 490).

Much of what is argued by the prosecution as to the Reserved Question was set forth in the dissent in Maugaotega II. The dissent opined that extended term sentences could be properly remanded for a jury trial because "(1) [HRS] §§ 706-661 and -662 . . . are not rendered unconstitutional in their entirety under Cunningham, (2) the legislature expressly intended to preserve extended term sentencing, [and] (3) such a disposition is approved by Cunningham[.]" Maugaotega II, 115 Hawai'i at 451, 168 P.3d at 582 (Acoba, J., concurring and dissenting, joined by Duffy, J.) (footnote omitted). The dissent in Maugaotega II noted that other separate opinions considering Hawaii's extended term sentencing statutes' compliance with Apprendi and its progeny had previously asserted that jury determinations were required to impose such sentences. Id. at 454, 168 P.3d at 584 (citing State v. White, 110 Hawai'i 79, 97, 129 P.3d 1107, 1125

[5] This section addresses the majority's fifth point. See supra at 4 n.2.

(2006) (Acoba, J., dissenting, joined by Duffy, J.) (stating that "a determination that the defendant's 'criminal actions were so extensive' that an extended sentence for the protection of the public is warranted is a fact that must be determined by a jury") (emphasis added)) (other citations omitted).

Second, the dissent posited that the majority's disposition in Maugaotega II was inconsistent with State v. Janto, 92 Hawai'i 19, 986 P.2d 306 (1999), State v. Young, 93 Hawai'i 224, 999 P.2d 230 (2000), and State v. Peralto, 95 Hawai'i 1, 18 P.3d 203 (2001), inasmuch as in those cases "this court concluded that in order to apply HRS § 706-657 constitutionally, a jury, instead of the court as the statute dictated, had to make the necessary findings for enhanced sentencing and so ordered." 115 Hawai'i at 456, 168 P.3d at 586.[6]

Third, the dissent declared that the majority position in Maugaotega II "ignore[d] the legislature's overarching concern that led to the aborted amendment of the extended term sentencing structure: that extended term sentencing continue to be available." Id. at 457, 168 P.3d at 587. Fourth, the dissent relied on the inherent power of the court as encompassed in (1) article VI, section 1 of the Hawai'i constitution, (2) HRS

[6] The dissent observed that other jurisdictions had already determined that their extended sentencing statutes could be applied constitutionally by allowing a jury to make the underlying findings. Maugaotega II, 115 Hawai'i at 456, 168 P.3d at 586 (citing Smylie v. State, 823 N.E.2d 679, 685 (Ind. 2005) (citation omitted); State v. Shattuck, 704 N.W.2d 131, 143 n.11 (Minn. 2005) (citing United States v. Salerno, 481 U.S. 739, 745 (1987))); State v. Dilts, 103 P.3d 95, 99-100 (Or. 2004)).

§ 603-21.9(6) (1993), and (3) this court's precedent[7] as an appropriate basis for authorizing juries to make findings pursuant to HRS §§ 706-661 and -662. Id. at 457, 168 P.3d at 587.[8] The dissent indicated that, as in Peralto, a new jury could be empaneled for sentencing purposes because the failure to comply with Apprendi and its progeny in the original sentencing proceeding amounted to a procedural error. Id. at 459, 168 P.3d at 589 (citing Peralto, 95 Hawai'i at 6 n.4, 18 P.3d at 208 n.4).[9]

Based on the foregoing, the dissent concluded that "to best conform our current extended term sentencing scheme with the expressed intent of the legislature, a jury should be empaneled

---

[7] See, e.g., State v. Harrison, 95 Hawai'i 28, 32, 18 P.3d 890, 894 (2001) (per curiam) (noting that the circuit courts have "inherent power to control the litigation process before them" and "to create a remedy for a wrong even in the absence of specific statutory remedies") (citations omitted); State v. Moriwake, 65 Haw. 47, 55, 647 P.2d 705, 712 (1982) (stating that "the inherent power of the court is the power to protect itself; the power to administer justice whether any previous form of remedy has been granted or not; the power to promulgate rules for its practice; and the power to provide process where none exists") (footnote, citation and internal quotation marks omitted).

[8] Similar to the prosecution, the dissent noted that (1) in Janto this court held that the trier of fact, i.e. the jury, must make findings necessary to impose an extended term sentence pursuant to HRS § 706-567, Maugaotega II, 115 Hawai'i at 458, 168 P.3d at 588 (Acoba, J., dissenting, joined by Duffy, J.) (citing Janto, 92 Hawai'i at 32-33, 986 P.2d at 319-20), and (2) in Peralto, "this court exercised its inherent power to order a jury empaneled on resentencing" pursuant to § 706-567 because the original jury had not been instructed according to Young, which required the prosecution to prove and the jury to unanimously find the requisite sentencing factor, id. (citing Peralto, 95 Hawai'i at 5, 18 P.3d at 207 (citing Young, 93 Hawai'i at 236, 999 P.2d at 241)).

[9] The dissent further noted that other jurisdictions had chosen to exercise the inherent power of the courts to empanel juries to preserve the legislative intent that certain criminal defendants would be subject to extended terms of incarceration. Id. at 459-61, 168 P.3d at 589-91 (citing Aragon v. Wilkinson ex rel County of Maricopa, 97 P.3d 886, 891 (Ariz. App. 2004); Smylie, 823 N.E.2d at 685-86; State v. Schofield, 895 A.2d 927, 935 (Me. 2005); State v. Chauvin, 723 N.W.2d 20, 24 (Minn. 2006)).

on remand to decide on the findings necessary under a motion for extended term sentencing unless [Maugaotega] waives his right to [a] jury and such waiver is agreed to by the court." Id. at 461, 168 P.3d at 591 (footnote omitted).

C.

Nevertheless, the majority held that "HRS § 706-662, in all of its manifestations, . . . is unconstitutional on its face[,]" Maugaotega II, 115 Hawai'i at 446-47, 168 P.3d at 576-77 (footnote omitted) (emphasis added), and therefore could not be applied to Maugaotega. Further, the majority declined to exercise the judiciary's inherent power to empanel juries for extended term fact finding because it claimed that, "in Act 230, the legislature expressed its intent . . . regarding how best to conform our extended term sentencing regime . . . and, in so doing, did not vest in the jury the power to find the requisite aggravating facts but, rather, directed that the sentencing court should retain that responsibility[,]" id. at 449, 168 P.3d at 579 (citing 2006 Haw. Sess. L. Act 230 §§ 23 & 24 at 1012-13) (other citations and footnote omitted), despite the fact that Act 230 was not involved in Maugaotega's case. Hence, the majority "vacate[d] Maugaotega's original extended term sentences and remand[ed] to the circuit court for non-extended term sentencing." Id. at 434, 168 P.3d at 564 (emphasis added).

II.

The Reserved Question concerns the same statute that

was applied to Maugaoatega. Consequently, the Reserved Question involves the same version of HRS § 706-662 held unconstitutional in Maugaotega II. Jess' case was pending before this court during the pendency and decision in Maugaotega II.[10] It follows that as a consequence of the foregoing proceedings, Maugaotega II is entirely dispositive on the Reserved Question. Based on (1) the majority's holding in Maugaotega II that Hawaii's extended sentencing scheme in HRS § 706-662 was unconstitutional on its face, and (2) the majority's perception of the supposed legislative intent in Act 230 (a statute not involved in Maugaotega II) that a jury could not be empaneled for the purpose of making the requisite findings to impose an extended sentence, the Reserved Question can only be answered in the negative as it applies to Jess' case. The majority in Maugaotega II established without question that under the statute involved in the Reserved Question, the circuit court could not empanel a jury to make the "necessary for the protection of the public" finding.[11] Hence,

---

[10] The version of HRS § 706-662 applicable to Maugaotega was an amended version of the statute that applied to Jess. However, the amendment dealt only with the definition of gender identity and thus was irrelevant to the issues raised in both cases.

[11] Jess advances essentially the same argument. He posits that we

> are bound by the doctrine of stare decisis to follow [our] recent decision in [Maugaotega II], by concluding that the answer to the Reserved Question is no. Two members of this [c]ourt, based upon the 'law of the case' doctrine, have already recognized that fact. Order Denying Motion For An Order Of Immediate Remand To The Circuit Court For Non-Extended Term Sentencing, entered November 8, 2007 (Dissent by Acoba, J., with whom Duffy, J., joins).

Jess is correct in noting that two members of this court concluded that under Maugaotega II, the reserved question must be answered in the negative. Order (continued...)

the same holding in Maugaotega II must, in principle, apply to Jess in the instant case.

This is because Maugaotega II is precedent. "Precedent is '[a]n adjudged case or decision of a court, considered as furnishing an example of authority for an identical or similar case afterwards arising or a similar question of law.'" State v. Garcia, 96 Hawai'i 200, 205, 29 P.3d 919, 924 (2001) (quoting Black's Law Dictionary 1176 (6th ed. 1990)) (emphasis added) (brackets in original). The purpose of precedent is to "furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; . . . eliminat[e] the need to relitigate every relevant proposition in every case; and . . . maintain[] public faith in the judiciary as a source of impersonal and reasoned judgments." Id. at 205-06, 29 P.3d at 924-25 (quoting Robinson v. Ariyoshi, 65 Haw. 641, 653 n.10, 658 P.2d 287, 297 n.10 (1982) (citation omitted)) (internal quotation marks and brackets omitted).

The practice of abiding by precedent, i.e., applying the same legal precepts to similar factual situations, is referred to as the doctrine of stare decisis. See State v.

---

[11](...continued)
Denying Motion For An Order Of Immediate Remand To The Circuit Court For Non-Extended Term Sentencing, entered November 8, 2007 (Dissent by Acoba, J., with whom Duffy, J., joins) (Dissent to the November 8, 2007 Order). However, the basis for that conclusion did not lie in the "law of the case" doctrine, but rather was necessitated by the majority holdings in Maugaotega II that Hawaii's extended term sentencing scheme was wholly unconstitutional and that the derivative legislative intent of Act 230 prohibited empanelment of a jury for the purpose of making the requisite findings for an extended sentence. Dissent to the November 8, 2007 Order.

Brantley, 99 Hawai'i 463, 479, 56 P.3d 1252, 1268 (2002) (Acoba, J., dissenting) ("[S]tare decisis ensures that the law will not merely change erratically and permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." (Quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) (citations and quotation marks omitted).)). The import of creating precedent is that we do not "'depart from the doctrine of stare decisis without some compelling justification.'" Id. at 480, 56 P.3d at 1269 (quoting Garcia, 96 Hawai'i at 206, 29 P.3d at 925 (citation omitted)). Once a decision of this court has become precedent, it establishes the "framework [in which subsequent cases] must be evaluated." Id. (arguing that Brantley should have been decided under the "framework" of State v. Jumila, 87 Hawai'i 1, 950 P.2d 1201 (1998)).

The proper application of the foregoing principles compels a negative answer to the Reserved Question. First, it is clear that Maugaotega II, a published opinion, constitutes precedent. Cf. Brantley, 99 Hawai'i at 479, 56 P.3d at 1268 (Acoba, J., dissenting) ("Upon its publication in 1998, Jumila became precedent.") Second, the majority does not purport to overrule Maugaotega II, much less present any "compelling justification" for doing so. See id. at 480, 56 P.3d at 1269 (citations omitted). Thus it follows that Maugaotega II must

provide the "framework" for analyzing the Reserved Question. See id.

In refusing to follow its own precedent, the majority ignores the "clear guide[,]" Garcia, 96 Hawai'i at 205, 29 P.3d at 924 (citation omitted), that existed with regard to the proper sentencing procedures in this jurisdiction following Maugaotega II. Maugaotega II established a clear rule -- Hawaii's extended sentencing statute involved in this case was "unconstitutional on its face." 115 Hawai'i at 446-47, 168 P.3d at 576-77 (footnote omitted). By answering the Reserved Question in the affirmative, and allowing for the application of that same statute, the majority violates precedent. The majority's reliance on "judicial economy," majority opinion at 66, will do nothing to inspire public confidence in the judiciary "as a source of impersonal and reasoned judgments." Garcia, 96 Hawai'i at 205-06, 29 P.3d at 924-25 (citations omitted). Inasmuch as Maugaotega II should apply, Jess' case must be remanded for "non-extended term sentencing." See Maugaotega II, 115 Hawai'i at 434, 168 P.3d at 564 (vacating appellant Maugaotega's "original extended term sentences and remand[ing] . . . for non-extended term sentencing").

III.

Even if Jess' case was considered final prior to its remand to the court by the district court, the general prohibition in Teague v. Lane, 489 U.S. 288 (1989), against

retroactive application of new rules to final cases is not applicable here. Teague articulated the rule that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310. Maugaotega II did not pronounce a new rule because its holding that Hawaii's extended term sentencing statutes were unconstitutional, 115 Hawai'i at 446-47, 168 P.3d at 576-77, was "dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301 (emphasis added).

Maugaotega II's conclusion regarding the unconstitutionality of the sentencing statutes was ultimately based upon the Supreme Court's decision in Apprendi which Cunningham merely reiterated. The Apprendi decision was issued in 2000, well before Jess' sentence was affirmed upon this court's issuance of its Summary Disposition Order in September 2003, as argued by the Attorney General. In determining that HRS § 706-662 was "unconstitutional on its face" and "violated [the defendant's] sixth amendment right to a jury trial," Maugaotega II, 115 Hawai'i at 446-47, 168 P.3d at 576-77, this court relied on Cunningham and Maugaotega v. Hawaii, 549 U.S. — , 127 S.Ct. 1210, see Maugaotega II, 115 Hawai'i at 447, 168 P.3d at 577.

The Maugaotega II majority acknowledged that "Cunningham rejected our long-held belief" that the method of

making the necessity finding under HRS § 706-662 "was not dissonant with Apprendi and its progeny." Id. at 445, 168 P.3d at 575 (citations omitted). In turn, Cunningham concluded that a court "engaging in fact-finding that increased the defendant's sentence beyond that authorized by the jury verdict" was "offending the Apprendi rule." Id. (citation omitted); see also id. at 453, 168 P.3d at 583 (Acoba, J., dissenting, joined by Duffy, J.) (explaining that "'Hawaii's extended term proceeding . . . would be a proceeding subject to the right to jury trial under the Sixth Amendment'" and noting that any dispute on this issue "has been put to rest by the majority opinion in Cunningham" (quoting State v. Rivera, 106 Hawai'i, 146, 172, 102 P.3d 1044, 1070 (2004) (Acoba, J., dissenting, joined by Duffy, J.) (ellipsis in original)).

Indeed, other cases preceding Jess held that Hawaii's extended term sentencing statutes were unconstitutional under Apprendi. Kaua v. Frank, 350 F.Supp.2d 848, 856 (D.Haw. 2004) [hereinafter Kaua I], agreed that the imposition of an extended sentence under HRS § 706-662 "was contrary to clearly established federal law, as determined by [the Supreme Court], and that it was an unreasonable application of clearly established federal law, as determined by [the Supreme Court]." The district court there held that this court's earlier decision upholding the application of the extended sentence to the defendant was based on a "reading of Apprendi [that] flies in the face of the actual

language of Apprendi, especially as that language has been construed in Ring v. Arizona, 536 U.S. 584 [(2002)]." Kaua I, 350 F.Supp.2d at 859.

Thus, Maugaotega II's holding was based upon precedent initially set forth by Apprendi in 2000 and therefore in existence well before Jess' sentence arguably became final in 2003. Therefore, even if Jess' conviction is viewed as final under Teague, Maugaotega II's holding is applicable to Jess insofar as its holding was supported and in fact required by the precedent set forth in Apprendi and its progeny. Hence, Maugaotega II's holding does not represent a new rule so much as it represents a correction of the Maugaotega I holding pursuant to the rules articulated in Apprendi and related cases that were established prior to this court's affirmance of Jess' conviction and sentence in 2003.

IV.

Assuming arguendo, however, that Maugaotega II does not apply, in the alternative, the Reserved Question proceeding should be deemed improvidently granted, as Jess argues, and the case simply remanded for resentencing. In that regard, while the disposition of the Reserved Question was pending, the legislature met in special session and passed Act 1. In oral argument the Attorney General indicated that on remand of Jess' case by this court, the prosecution would move for resentencing under the

newly enacted Act 1, if, assumably, this court did not apply the precedent of Maugaotega II.

However, the majority ignores its own holding on the Maugaotega II remand and contends that, based on Act 1, the Reserved Question can be answered in the affirmative because (1) "[the court] possesses the inherent judicial authority 'to provide process where none exists,' [Moriwake], 65 Haw. [at] 55, 647 P.2d [at] 711-12 . . .,[12] and [because] the legislature, by amending Hawaii's extended sentencing laws to include jury fact-finding [in Act 1], has clearly expressed its approval of a jury system for making the required [extended sentencing] findings", majority opinion at 7 (emphasis added) (formatting altered), and (2) the court may "empanel a jury for determination of the necessary findings pursuant to the newly amended versions of HRS §§ 706-661, 706-662, and 706-664[,]" that were amended by Act 1, id. at 66 (formatting altered).[13] As it did in Maugaotega II

[12] The dissent in Maugaotega II cited Moriwake to support the conclusion that the "extended term sentencing procedure [could] be enforced . . . [by] calling upon the jury to find necessary facts[.]" Maugaotega II, 115 Hawai'i at 457, 168 P.3d at 587 (citing Moriwake, 65 Haw. at 55, 647 P.2d at 712). Despite its insistence in the Maugaotega II majority opinion that a jury could not be empaneled to make these findings (based on the majority's perception of the legislature's purported intent of an act (Act 230) not involved in Maugaotega II), see Maugaotega II, 115 Hawai'i at 449, 168 P.3d at 579, today, the majority completely reverses its position, even citing Moriwake to argue that "allow[ing] for jury fact-finding would not violate Jess' right to due process of law." Majority opinion at 57.

[13] The majority maintains that because the "decision in Maugaotega II was guided by the latest expression of legislative intent, which vested the power to make the necessity finding not with the jury but with the court[,]" and since that time, the legislature has provided new evidence of its "conclusive . . . support for [the court] to empanel a jury pursuant to its inherent authority that was previously lacking," majority opinion at 65 n.27, Act 1 permits this court to answer the Reserved Question in the affirmative without violating stare decisis. However, inasmuch as the issue has not been (continued...)

with respect to Act 230, the majority relies on a statute -- Act 1 -- that has not been applied in the case before us. For the reasons delineated below, this approach is incorrect.[14]

A.

First, the Reserved Question asks only whether under the particular statute involved in the Reserved Question, HRS § 706-662 (1993 & Supp. 1996) can be constitutionally applied to resentence Jess to an extended term sentence by empaneling a jury, notwithstanding the express language of the statute. Unlike in Maugaotega II, this is not an appeal from an extended term sentence that has been imposed, but simply a request for

---

[13](...continued)
raised or briefed by the parties nor is ripe for decision in Jess' case, whether HRS § 706-662, as amended by Act 1, should be applied in Jess' case is not before us. Moreover, it is indisputable that HRS § 706-662 (Supp. 1996), the statute in the Reserved Question and declared unconstitutional in Maugaotega II, cannot be applied to Jess and the ruling as to nonextended term sentencing in Maugaotega II must be applied to conform with precedent.

Act 1 was enacted after Maugaotega II and after Jess' offense, conviction and original sentence and therefore the reference to jury empanelment therein and the application thereof cannot serve as precedent consistent with stare decisis as far as Jess is concerned. See Garcia, 96 Hawai'i at 205, 29 P.3d at 924 (defining precedent as "an adjudged case or decision of a court, considered as furnishing an example of authority for an identical or similar case afterwards arising or a similar question of law" (quoting Black's Law Dictionary 1176 (6th ed. 1990)) (brackets and internal quotation marks omitted)).

Similarly, Act 230 was enacted after Maugaotega's offense, conviction, and original sentence. Although in Maugaotega II the majority and the dissent, in response to the majority, referred to Act 230, see Maugaotega II, 115 Hawai'i at 449, 168 P.3d at 579 ("in Act 230, the legislature expressed its intent regarding how best to conform our extended term sentencing regime to the requirements of Apprendi and its progeny"); id. at 457, 168 P.3d at 587 (Acoba, J., dissenting, joined by Duffy, J.) (arguing that "the legislature's overarching concern . . . [was] that extended term sentencing continue to be available"), Act 230 could not apply to Maugaotega II inasmuch as the amendments contained in that Act expired on June 30, 2007, and were therefore inapplicable to that case. See id. at 436 n.1, 168 P.3d at 566 n.1 (majority opinion). The present case is markedly different in that the majority approves the application of Act 1, which was not in effect at any time relevant to Jess' case.

[14] This section pertains to the majority's points five through eight. See supra note 2.

legal advice as to the applicability of a specific statute before any sentence is imposed. In that connection, the issues pertaining to the construction of Act 1 were not raised or briefed by the parties. Accordingly, the question before the court does not pose as a matter of controversy any question of the construction of Act 1 to Jess so as to invoke our jurisdiction on the applicability of the Act to Jess.

The Reserved Question does not ask whether there are alternative avenues, such as through Act 1, for constitutionally imposing an extended term of imprisonment. As stated by Jess, "[the prosecution] . . . has not sought to amend the contents of the Reserved Question . . . to include any issue beyond empanelling [sic] a jury for sentencing purposes [under the statute noted. Further, t]he Reserved Question does not include any issue on the subject of the constitutional validity of [Act 1] . . . ."

B.

Second, the issue of whether Act 1 should be applied to Jess such that he may be subject to an extended sentence is not ripe on the present state of the record because the outcome of his case is yet to be decided on remand for resentencing. Whether Act 1 is constitutional as it would apply to Jess is not before this court. Any constitutional questions that could arise with respect to the application of Act 1 to him for the ultimate determination by this court may be foreclosed by events that

occur on remand for resentencing, even if the prosecution requests that Act 1 be applied.

Questions of construction concerning Act 1 as it affects this case could be foreclosed by Jess' entry into a plea agreement with the prosecution, by a stipulation as to an appropriate sentence, by Jess' waiver of a jury trial, by the jury's finding (if one is empaneled) that Jess does not meet the HRS § 706-662 criteria for extended sentencing, or by the jury's finding that an extended sentence is not necessary for the protection of the public. Indeed, Judge Seabright, who presided over Jess' federal habeas corpus petition that resulted in vacation of the previous court-imposed extended sentence, noted that he "ha[d] grave doubt as to whether the jury would have made the same public protection determination as the trial judge" and that "a jury could have just as easily found that an extended sentence was not necessary in this case." Jess, No. Civ. 04-00601 JMS/BMK, 2006 WL 1041737 at *6. In light of the foregoing, Act 1 should not be construed in this particular case.[15]

---

[15] With all due respect, the majority commits a similar error when it unilaterally overrules State v. Cutsinger, No. 28203, 2008 WL 257175 (Haw. App. Jan. 30, 2008) to the extent that the Intermediate Court of Appeals (ICA) held that sentence enhancing factors need not be included in charging documents. See majority opinion at 31 n.17 ("We therefore overrule Cutsinger to the extent that its analysis is inconsistent with our own.") Although Cutsinger was cited to this court in a Hawai'i Rule of Appellate Procedure (HRAP) Rule 28(j) citation to supplemental authority, it was not thoroughly briefed or argued before this court. This error is compounded by the fact that the ICA's decision is not yet final inasmuch as HRAP Rule 36(c) provides that

> [t]he [ICA's] judgment is effective upon the ninety-first day after entry, or, if an application for a writ of certiorari is filed, upon entry of [this] court's order

(continued...)

V.

Nevertheless, the majority contends that Act 1 "addresses defendants in [Jess'] position[,]" and unilaterally construes Jess' "constitutional arguments broadly to include" the constitutionality of Act 1 "[i]n the interests of judicial economy[.]" Majority opinion at 66. The majority goes on to decide that "the plain language of the amended statute allows for retroactive application upon resentencing[,]" id. (formatting altered), the "[a]pplication of Act 1 . . . would not violate the constitutional prohibition against ex post facto measures," id. (formatting altered),[16] and the automatic notice provision in Act

---

[15](...continued)
dismissing or rejecting the application or, upon entry of [this] court's order affirming in whole the judgment of the [ICA].

Accordingly, as the ICA's judgment in Cutsinger was filed on January 30, 2008, the judgment is not effective until May 1, 2008. Furthermore, the defendant in Cutsinger has indicated that he will file an application for writ of certiorari. In the event such application is filed, the ICA's judgment will be further stayed until this court decides to accept or reject said application. See HRAP Rule 41 ("The timely filing of an application for writ of certiorari stays finality of the [ICA's] judgment on appeal unless otherwise ordered by [this] court."). Thus, the appropriate time to address the correctness of the ICA's decision is when the issue is before us on certiorari, not in a preemptive strike in this case.

Because the decision in Custinger is not yet final, it is also inappropriate for the majority to cite to the ICA's opinion as controlling authority. See majority opinion at 65 (relating to the legislative intent behind Act 1), 66 (relating to the ex post facto clause), and 69-70 (same). Understandably, Westlaw's internet service warns users against reliance on the opinion, cautioning that "this opinion has not been released for publication in the permanent law reports. A petition for reconsideration in the court of appeals or a petition for certiorari in the [s]upreme [c]ourt may be pending."

[16] The majority states that inasmuch as this dissent "asserts that Act 1 should not be construed or applied with respect to Jess, it does not take issue with the actual substance of [the majority's] due process or ex post facto analysis." Majority opinion at 70 n.28. The point is that because Act 1 should not be considered or applied, it follows that we should not reach such questions. Rather we should wait until a case in which Act 1 is actually applied is before us. Hence, it is error for the majority to issue an opinion that is, for all intents and purposes, advisory and thus I do not address the (continued...)

1 does not conflict with the majority's requirement that extended term factors be pleaded in the charging document, id. at 35.

It would appear manifest that we should not construe Act 1 in the absence of any controversy presented in this appellate proceeding with respect to Act 1. The parties have not had the opportunity to raise and brief arguments related to Act 1 because obviously there is no reason at this point for doing so. The majority has made its declarations in a vacuum, without the benefit of specific facts on which to ground its holding. Therefore, the majority can only speculate in general on what challenges Jess and, other defendants could or would raise concerning Act 1 in the future.

With all due respect, it is folly to imagine that we can or should attempt to determine arguments that potentially could be raised against the applicability or legality of Act 1 in future unknown cases such that we can issue an unsolicited, blanket endorsement of the new extended term sentencing statute.[17] It is not reasonable to say that the application of Act 1 to particular defendants in cases not yet before this court will be constitutional without fail. Yet the majority proceeds to address questions that are not before this court under the

---

[16](...continued)
majority's position on the foregoing matters because any response would be similarly flawed.

[17] Additionally, Jess argues that in cases like his, "where the initial extended term was based on intrinsic/enmeshed factual allegations, a legislative attempt at a retroactive [sentencing reform] . . . [is] an issue not before this [c]ourt."

guise of serving "the interests of judicial economy" and at the expense of the doctrine of judicial review. Majority opinion at 66.

VI.

The extent to which the majority will go to decide questions not presented to us in an effort to uphold Act 1 without regard to the fact that the statute has yet to be raised in controversy in any case before us is exemplified in the majority's defense of the amended language in HRS § 706-664(2). In this case the Attorney General himself correctly argues that a holding such as the majority's requiring all aggravating factors relevant to enhanced sentencing be included in the indictment would render HRS § 706-664(2) as amended by Act 1 unconstitutional.[18] (Arguing that the new charging rule would render Act 1 "essentially unconstitutional[] to the extent that" it purports to allow resentencing of defendants who received extended sentences under the previous statute). The amended HRS § 706-664(2) provides in relevant part:

> (2) Notice of intention to seek an extended term of imprisonment under 706-662 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 previously sentenced to an extended term under a prior version of this chapter shall be deemed to have received

[18] Presumably the Attorney General has intimate knowledge of the intent behind Act 1. The Attorney General participated in the legislative enactment of Act 1, submitting testimony in support of the Act to the House Judiciary Committee and the Senate Committee on Judiciary and Labor. See Hse. Stand. Comm. Rep. No. 1, in 2007 House Journal (Second Special Session), at 71; Sen. Stand. Comm. Rep. No. 7, in 2007 Senate Journal (Second Special Session), at ---.

notice of an intention to seek an extended term of imprisonment.

(Emphasis added.)

The provision in HRS § 706-664, as amended by Act 1, that "[a] defendant previously sentenced to an extended term . . . shall be deemed to have received notice of an intention to seek an extended term of imprisonment[,]" is directly at odds with the new rule pronounced by the majority 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." Majority opinion at 30 (citations and internal quotation marks omitted).

The majority's new rule requiring all aggravating factors to be alleged in the charging document is based on the the requirement that "the prosecution must allege all essential elements of an offense in the charging instrument" which is in turn, derived from "the due process and 'grand jury' clauses of the Hawai'i Constitution, . . . resid[ing] respectively in article I, sections 5 and 10." Id. at 16 (footnotes and citation omitted). The provision in HRS § 706-664(2) stating that a defendant receives sufficient notice of being subject to an extended term sentence merely by virtue of being previously sentenced to an extended term conflicts with the majority's holding that due process requirements, including the provision of sufficient notice to a defendant, necessitate that the charging

document include all factors relevant to the determination of eligibility for an extended term sentence.

The majority attempts to circumvent the conflict between its holding and the express language of § 706-664 by contending that it "do[es] not read the statute's constructive notice provision as undertaking to cure the . . . constitutional defects in the charging instruments" lacking allegations of aggravating factors and "therefore decline[s] to read HRS § 706-662(2) [sic] as attempting to charge defendants by constructive notice." Id. at 33-34 (emphasis added). The majority rationalizes its avoidance of this obvious incongruity by resorting to the contention that "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 [to] adopt the latter.'" Id. at 34 (quoting In the Interest of Doe, 96 Hawai'i 73, 81, 26 P.3d 562, 570 (2001) (quoting Jones v. United States, 529 U.S. 848, 857 (2000))).

However, this is not a case in which this court is tasked with deciding between two valid interpretations of a statute. Rather, this is a case where in plain and unambiguous language the statute clearly directs that, in the context of extended term sentencing, the notice requirements of due process are automatically satisfied by a particular event while this

court's holding states that the notice requirements of due process are met only upon the fulfillment of a different event. See State v. Klie, 116 Hawai'i 519, 525, 174 P.3d 358, 364 (2007) (stating that "where the statute is clear and unambiguous" this court "cannot change the language of the statute, supply a want, or enlarge upon it in order to make it suit a certain state of facts" and "[e]ven when the court is convinced in its own mind that the legislature really meant and intended something not expressed by the phraseology of the act" this court "has no authority to depart from the plain meaning of the language used" (internal quotation marks and citation omitted) (original brackets omitted)); State v. Smith, 103 Hawai'i 228, 234, 81 P.3d 408, 414 (2003) (explaining that "it is a cardinal rule of statutory interpretation that, where the terms of a statute are plain, unambiguous and explicit, we are not at liberty to look beyond that language for a different meaning" (citation, internal quotation marks, brackets and emphasis omitted)); State v. Kalama, 94 Hawai'i 60, 64, 8 P.3d 1224, 1228 (2000) (stating "where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning" (citation and internal quotation marks omitted)).

It cannot be reasonably questioned that it was the legislative intent to deem a prior sentencing proceeding as a substitute for notice of a new extended term proceeding. The legislature explained that Act 1 "amend[s] Hawaii's extended

sentencing statutes" to conform them to "the requirements set forth by [the Supreme Court] and [this court]." Sen. Stand. Comm. Rep. No. 7, in 2007 Senate Journal (Second Special Session), at ---. Thus, the legislative intent behind Act 1 was to ensure the viability of Hawaii's extended sentencing statute. Given the legislature's expressly stated intent to maintain the validity of the extended sentencing statute, it reasonably follows that the legislature also sought to facilitate its application.

A provision like the one in HRS § 706-664(2) that provides notice to a defendant that an extended sentence will be sought is deemed satisfied where the defendant was previously sentenced to an extended term would facilitate the imposition of extended sentences by causing a requirement of due process to be fulfilled without any further action. Manifestly, and contrary to the majority's assertion, 706-664(2) does indeed enact a "constructive notice" provision, majority opinion at 34, that the majority simply chooses to ignore. Turning a blind eye to the express language of the statute, however, does not hide the fact that the legislature's expressed intent conflicts with the majority's holding today.

Thus, the statement in HRS § 706-664(2) that notice requirements are satisfied if the defendant has been sentenced to an extended term in the past directly contravenes the majority's holding that notice requirements are satisfied only upon the

inclusion of all aggravating factors in the charging document. At best, the majority's reliance on the doctrine of constitutional doubt is simply inapposite, but beyond this case, such rationalization adversely impacts the integrity of our decision making process.

VII.

In construing Act 1, the majority at bottom issues an advisory opinion,[19] an unwise practice in which this court should

---

[19] The majority's reliance on HRAP Rule 15 as justification for this court to construe Act 1 as it applies to Jess is incorrect. See majority opinion at 12 n.8 ("The plain language of [HRAP Rule 15] authorized [the court] to seek advice from us as to a question of law. In order adequately to give [the court] that advice, we must address all relevant issues."). The existence of such a procedure does not permit this court to decide questions in the abstract and on an insufficient record without regard to the specific facts of Jess' case.

First, and obviously, the Reserved Question did not ask for advice on the application of Act 1 in Jess' case. Faced with an order from the district court that Jess be resentenced in accordance with Apprendi, i.e., with a jury making the requisite findings, see supra at 1 n.1, and the conflicting precedent of this court upholding the constitutionality of judge-made findings, see supra at 5-6, the court inquired whether it could empanel a jury to make findings pursuant to HRS § 706-662 (Supp. 1996), see supra at 4 n.3 (quoting Reserved Question). Thus, the Reserved Question did not seek advice on the application of Act 1.

Second, this court should decline to provide advice on Act 1 because of the insufficient facts in Jess' case and the parties' lack of opportunity to address Act 1. See Territory of Hawai'i v. Comacho, 33 Haw. 628, 630, 1935 WL 3398 at *2 (1935) (returning the reserved question unanswered because in order to answer it, "it would be necessary for this court to . . . make its own findings of fact and then determine the questions of law applicable thereto which would be a clear invasion by this court of the province of the jury"). In order to resolve the issues related to Act 1, the majority determined on its own the applicable questions of law, which may not be relevant at all, see supra at 17 n.13, in the course of litigation in Jess' case.

Third, the Reserved Question rule upon which the majority relies provides for avoiding improvident or advisory opinions. HRAP Rule 15(c) provides that "[this] court may, in its discretion, return any reserved question for decision in the first instance by the court reserving it." (Emphasis added). This course of action should have been followed because it would allow the parties to develop a record upon which actual and not abstract questions would be determined.

Finally, I reiterate that the majority's reliance on Cutsinger is also misplaced inasmuch as the ICA's judgment has not been made final through (1) lapse of the period for filing an application for writ of certiorari, (2) rejection of such application, or (3) affirmance of the ICA by this court on

(continued...)

not engage. It is

> "one of the prudential rules of judicial self-governance" that "courts are to avoid advisory opinions on abstract propositions of law." Kona Old Hawaiian Trails Group v. Lyman, 69 Haw 81, 87, 734 P.2d 161, 165 (1987) (internal quotation marks, citation, and original brackets omitted). As this court has stated:
>
> > The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.
> >
> > Courts will not consume time deciding abstract propositions of law or moot cases, and have no jurisdiction to do so.
>
> Wong v. Bd. of Regents, Univ. of Haw., 62 Haw. 391, 394-95, 616 P.2d 201, 204 (1980) (citations omitted) (emphases added).

State v. Matavale, 115 Haw. 149, 169 n.15, 166 P.3d 322, 342 n.15 (2007) (first emphasis added) (some emphasis omitted). Not surprisingly, Jess maintains that we do not have "jurisdiction to issue an advisory opinion seeking to constitutionally apply Act [1] to this case in the future to excuse the prior and present constitutional defects in notice to [Jess] . . . where no case or controversy exists on that point of law." The majority's approach can only create legal harm and may unfairly affect future litigants.

VIII.

As noted before, supplemental briefing[20] was ordered to

---

[19](...continued)
certiorari. See supra at 20 n.15.

[20] To repeat, the parties were ordered to submit supplemental briefs to address the following question:

> In light of [Cunningham, 549 U.S. at ---, 127 S. Ct. at 864], and [Merino, 81 Hawai'i at 212, 915 P.2d at 686], what is the significance, if any, of the fact that the March
>
> (continued...)

consider the impact of Cunningham's supposed reaffirmation of the precept that "any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have to be considered an element of the aggravated crime[,]" --- U.S. at ---, 127 S.Ct. at 864 (citation omitted), thus requiring a jury determination on this particular issue.[21] In answering the question posed in the supplemental briefing order, the majority expressly states that its holding regarding a new charging procedure "constitutes a new rule." Majority opinion at 37 (footnote omitted). However, the majority is incorrect in its

---

[20](...continued)

> 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?

[21] In fact, of course, Cunningham merely reiterated Apprendi principles. As noted in the dissent in Rivera, 106 Hawai'i at 172, 102 P.3d at 1070 (Acoba J., dissenting, joined by Duffy, J.),

> "whether the judge's authority to impose an enhanced sentence depends on finding a specified fact . . ., one of several specified facts . . ., or . . . aggravating fact" does not alter the "case that the jury's verdict alone [did] not authorize the sentence." [Blakely v. Washington, 542 U.S. 296, 305 (2004)]. "Labels . . . [such] as . . . 'elements' and 'sentencing factor,'" then, are not the "answer." Apprendi, [530 U.S. at 494]. To reiterate, the "relevant inquiry is . . . [the] effect -- does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Id. . . . . Therefore, whether the required finding of "necessary for the protection of the public," HRS § 706-662, is viewed as an "elemental" fact or a "sentencing factor," [id. at 467], or that the supporting subsidiary facts found by the court constitute part of such facts or factors, "it remains the case" that the effect of the court's pronouncement subjects the defendant to greater punishment than that which could be imposed on the basis of the guilty verdict only.

(Emphases omitted) (some brackets and ellipses in original).

assertion that because this court is "[f]ree to apply decisions with or without retroactiv[ity,]" id. at 37-38 (quoting Peralto, 95 Hawai'i at 6, 18 P.3d at 208 (quoting State v. Santiago, 53 Haw. 254, 268, 492 P.2d 657, 665 (1971))) (internal quotation marks omitted) (first brackets in original), its "holding with respect to charging instruments alleging 'aggravated crimes' [should be] strictly prospective, and therefore, does not apply to Jess." Id. at 35 (formatting altered).[22] For the reasons following, the new charging rule must be applied to Jess.[23]

---

[22] This pertains to the majority's points one through four and nine. See supra 3-4 n.2.

[23] The majority misleadingly argues that the dissent has not previously raised the issue that aggravating factors must be included in the charging document. Majority opinion at 36-37. The inclusion of the enhanced sentencing factors in a charging document is not a new concept.

It should be noted that the majority recently reiterated that aggravating factors increasing punishments must be included in the charging document. See State v. Domingues, 106 Hawai'i 480, 487-88, 107 P.3d 409, 416-17 (2005) (reiterating the rule of State v. Estrada, 69 Haw. 204, 738 P.2d 812 (1987), that "if the 'aggravating circumstances' justifying the imposition of an enhanced sentence are 'enmeshed in,' or, put differently, intrinsic to the 'commission of the crime charged,'" then the aggravating circumstances must be included in the charging instrument "in order to give the defendant notice that they will be relied on to prove the defendant's guilt and support the sentence to be imposed" (emphasis omitted)). It is notable that the majority's adoption of the charging rule in Domingues was, like the charging ruling in this case, advisory. See Domingues, 106 Hawai'i at 498, 499, 107 P.3d at 427, 428 (Acoba, J., dissenting, joined by Nakayama, J.) (observing that the majority advanced a due process rule - "that a charge . . . under HRS § 291E-61 rests on aggravating circumstances that must be alleged in the charging instrument in order to give the defendant notice" even though "[t]here [was] no violation of due process" regarding the indictment as the defendant was "plainly informed of the specific statue . . . and the basis on which he is charged" and thus "[t]he majority's holding . . . constitute[d] an advisory opinion to one side on how future cases under the new [operating a vehicle under the influence of an intoxicant (OVUII)] statute may be saved from motions for dismissal") (internal quotation marks and citation omitted) (brackets omitted).

However, and with all due respect, the majority has not applied the charging proposition in a consistent manner. Although the majority reiterated in State v. Kekuewa, 114 Hawai'i 411, 163 P.3d 1148 (2007), that aggravating circumstances raising the punishment for the offense of OVUII must be included in the complaint, it held that "the prosecution's oral charge [of a "second offense"] sufficiently alleged a violation of HRS §§ 291E-61(a)(1)

(continued...)

[23](...continued)
and (b)(1)" for which the defendant was charged. Id. at 426, 163 P.3d at 1163. The Kekuewa dissent responded, however that the mere reference to a "second offense" committed by the defendant "fail[ed] under HRS § 291E-61 to designate . . . the essential element . . . that the offense occurred within five years of a prior conviction for [OVUII.]" Id. at 435, 163 P.3d at 1172 (Acoba, J., concurring and dissenting) (internal quotation marks, citations, and brackets omitted).

The dissent also contended that the majority was providing an "inconsistent response" by holding that "'prior convictions are generally a fact or circumstance extrinsic to the charged offense,' but 'prior convictions were intrinsic to, or enmeshed in, the habitual OVUII offenses.'" Id. at 433, 163 P.3d at 1170 (emphasis added) (brackets omitted) (quoting Kekuewa, 114 Hawai'i at 423, 163 P.3d at 1160 (majority opinion)). In light of the majority's holding, the Kekuewa dissent pointed out that "[t]he conflict between denominating a prior conviction as an 'extrinsic' factor in this court's precedents but on the other hand as an 'intrinsic' factor, in this case" demonstrates "the inherent limitations of an analysis based on an extrinsic/intrinsic formula." Id. at 434, 163 P.3d at 1171 (Acoba, J., concurring and dissenting) (emphasis added).

The plurality again stated in State v. Ruggiero, 114 Hawai'i 227, 160 P.3d 703 (2007), that "considerations of due process continue to require that the aggravating factors set forth in [the OVUII statute] all of which remain attendant circumstances that are intrinsic to . . . the . . . offenses . . . be alleged in the charging instrument and proven beyond a reasonable doubt at trial." Id. at 238, 160 P.3d at 714 (internal quotation marks, citations, and footnote omitted). However, the plurality held that the "the complaint [in Ruggiero] can reasonably be construed to charge the crime of [driving under the influence of intoxicating liquor (DUI)] as a first offense, in violation of HRS § 291E-61(a) and (b)(1)" and "given the unique nature of the element-- . . . that is, the absence of any prior convictions -- . . . the import of HRS § 291E-61[] is implicit in the charge." Id. at 240, 160 P.3d at 716 (emphasis added) (footnotes omitted).

In response, my concurring and dissenting opinion maintained that "[a]s in Kekuewa, because the complaint [against Ruggiero] 'failed to state a material element of a violation of HRS § 291E-61(b)(1) that the prosecution was required to prove, [i.e., that it was Ruggiero's "first offense"] it failed to state an offense and, therefore, was fatally defective.'" Id. at 258, 160 P.3d at 734 (Acoba, J., concurring in part and dissenting in part) (quoting State v. Cummings, 101 Hawai'i 139, 145, 63 P.3d 1109, 1115 (2003)) (brackets omitted). Furthermore, that concurring and dissenting opinion asserted, with respect to the plurality's argument that the import of HRS § 291E-61 was implicit in the charge, that "dispensing with an element on the purported ground that it is 'unique in nature' or 'implicit in the charge,' . . . is arbitrary because [it is] supported only by the desired result." Id. at 259, 160 P.3d at 735 (quoting Ruggiero, 114 Hawai'i at 240, 160 P.3d at 716 (plurality opinion)) (emphases added) (brackets omitted).

In Kekuewa and Ruggiero the majority and plurality, respectively, indicated that certain aggravating factors need not be pled. Understandably, and in view of the majority's different positions, the Attorney General maintains in the instant case in response to the supplemental question posed by this court that all aggravating circumstances need not be included in the complaint because "this Court[']s majority] just this past summer [in Kekuewa] repeated its earlier principles that '[e]xtrinsic' or 'historical' facts need not be alleged in the charging instrument.'" (Quoting Kekuewa, 114 Hawai'i at 411, 421-22, 163 P.3d at 1148, 1158-59) (ellipses omitted) (emphasis added). Similarly, the prosecution argued in its supplemental brief that under the

(continued...)

Assuming arguendo that Jess' conviction is viewed as final, this court has said that "[w]hen questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions." Garcia, 96 Hawai'i at 211, 29 P.3d at 930 (citations and internal quotation marks omitted) (brackets in original).[24] Garcia in fact recognized, as the Supreme Court reiterated this year, that

---

[23](...continued)
plurality opinion of Ruggiero, the fact of whether Jess was a persistent or multiple offender who required an extended term sentence for the protection of the public, "was not an elemental attendant circumstance intrinsic to the offenses" with which he was charged and "did not have to be alleged in the charging instrument[.]" (Emphasis added.) (Internal quotation marks, citation, and brackets omitted.)

In light of what the majority and plurality respectively have said in Dominques, Kekuewa, and Ruggiero, the Attorney General in the instant case predictably declared, "extrinsic factors need not be alleged in the charging instrument." Given the fluctuation in the majority's application of the intrinsic/extrinsic formula among other precedent, the drunk driving cases, and the extended term sentencing cases, it was not incumbent upon the dissent to address again in extended term sentence cases the question of whether aggravating factors were required to be set forth in a charging document, as had been done in the drunk driving cases. In the extended term sentencing cases the predicate question as framed by the majority was whether sentencing factors were to be decided by a jury, and the charging question raised in the drunk driving cases was thus subsumed in the predicate issue by the majority.

[24] Garcia is apposite to the instant case as it addressed the question of whether to apply the holding of State v. Wilson, 92 Hawai'i 45, 987 P.2d 268 (1999), which established a new evidence suppression rule based on a violation of HRS § 286-261(b), retroactively to Garcia because Garcia was awaiting trial when Wilson was decided. Garcia, 96 Hawai'i at 214, 29 P.3d at 933. In Wilson, this court held that the defendant, after being arrested for driving under the influence of intoxicating liquor, was not accurately informed of the consequences of taking a blood alcohol concentration (BAC) test because the officer informed the defendant that his driving privileges would be revoked for three months if he took the test and failed when in fact he would be subject to revocation of three months to one year if he failed the test. 92 Hawai'i at 46-47, 987 P.2d at 269-70.

This court therefore held that the defendant did not make a knowing and intelligent decision whether to exercise his statutory right of consent or refusal and the defendant's motion to suppress the BAC results was properly granted by the district court. Id. at 54, 987 P.2d at 277. Garcia held that Wilson must be given retroactive effect because "the newly announced rule was extended to Wilson, [and] we can perceive of no justification for withholding its application to those defendants who are similarly situated." Garcia, 96 Hawai'i at 214, 29 P.3d at 933.

states may "give broader retroactive effect to [the Supreme Court's] new rules of criminal procedure" and doing so does not "miscontru[e] the federal Teague standard." Danforth v. Minnesota, --- U.S. ---, ---, 128 S.Ct. 1029, 1046 (2008). The majority concludes that Danforth, which held that state courts may give new federal rules of criminal procedure broader retroactive effect than the federal courts do, is not "particularly germane" to Jess because Jess is decided on state constitutional grounds, not based on the federal constitution. See majority opinion at 39 n.20. Given this court's reference to federal precedent in this area and the majority's reliance on it in formulating the new rule, Danforth cannot be dismissed so hastily.[25] As indicated previously, in Garcia we noted that new

[25] It is noteworthy that although the majority maintains that the new rule announced in this case is grounded on article I, sections 5 and 10 of the Hawai'i Constitution, the majority declares the latter section is "patterned after its federal counterpart[.]" Majority opinion at 28 (citing 1 Constitutional Convention of Hawaii 164, 243, 420 (1960)) (emphasis added). For that reason, this court has relied on federal precedent in shaping this jurisdiction's retroactivity rules. See Garcia, 96 Hawai'i at 208, 29 P.3d at 927 (citing, inter alia, James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991), Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167 (1990), Daniel v. Louisiana, 420 U.S. 31 (1975), and Stovall v. Denno, 388 U.S. 293 (1967), in discussion of retroactivity principles). The majority itself utilizes federal cases in its retroactivity analysis. See, e.g., majority opinion at 36 (quoting James B. Beam Distilling Co., 501 U.S. at 534); id. at 39-40 (quoting Williams v. United States, 401 U.S. 646 (1971)); id. at 40 (citing Schriro v. Summerlin, 542 U.S. 348 (2004)).

Indeed, the "new" rule referred to by the majority that facts justifying the imposition of an extended term sentence must be pled in the indictment was previously announced in a federal case, namely Jones v. United States, 526 U.S. 227, 243 n.6 (1999) (declaring 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"). Thus, inasmuch as the rule announced here reflects the federal rule with the inclusion of prior convictions, it would be inaccurate to characterize the new rule announced here as being grounded solely in our state law.

It appears that the Supreme Court has not addressed the issue of retroactivity as it applies to the indictment rule expressed in Jones.

(continued...)

rules are applied retroactively only to cases which were "not yet final" when the new rule was announced. 96 Hawai'i at 214, 29 P.3d at 933 (quoting Griffith v. Kentucky, 479 U.S. 314, 328 (1987)). As the Supreme Court reiterated in Teague, "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310. The rationale behind Teague's rule against retroactive application of new rules to final cases, including those pending on collateral review, was that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." Id. at 309.

However, on the question of "whether Teague constrains the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion," the Supreme Court said it has "never suggested that it does" and in fact, "hold[s] that it does not." Danforth, -- U.S. at --, 128 S.Ct. at 1033. Hence, states may "give broader retroactive effect to [the Supreme Court's] new rules of criminal procedure" and doing so does not "miscontru[e] the federal Teague standard."

[25](...continued)
Therefore, inasmuch as the holding in Danforth clarifies that we are free to allow more extensive retroactive application than that which is allowed in the federal courts, Danforth buttresses the conclusion that we may follow Hawai'i precedent to determine the scope of retroactivity appropriate in this case.

Id. at --, 128 S.Ct. at 1046. Danforth noted that the rule announced in Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964), that prohibited admission of statements elicited by police during interrogations in certain circumstances, should not be given retroactive effect beyond Escobedo himself. Danforth, -- U.S. at --, 128 S. Ct. at 1038-39. However, Danforth held that it was proper for the Oregon Supreme Court in State v. Fair, 502 P.2d 1150 (Or. 1972), to "give retroactive effect to Escobedo despite [the Supreme Court's] holding" that Escobedo not apply retroactively. Id. at --, 128 S.Ct. at 1039.

In light of the fact that "[n]either Linkletter[ v. Walker, 381 U.S. 618 (1965)] nor Teague explicitly or implicitly constrained the authority of the States to provide remedies for a broader range of constitutional violations than are redressable on federal habeas[,]" id. at ---, 128 S.Ct. at 1038, this court is free to extend the retroactive application of the majority's new charging rule that is analogous to federal precedents to defendants whose cases are pending on direct review and those defendants like Jess whose extended term sentences have been vacated and who await resentencing at the time that the majority issues its opinion in this case.

IX.

In keeping with principles underlying our own precedent, the new charging rules should apply to Jess. The cases relied upon by the majority do not support its decision to

make the new rule announced in this case purely prospective.[26]

[26] Unlike in this case, the defendants in the cases cited by the majority that related to retroactive application of new rules were benefitted by the outcome of those cases. First, in State v. Ikezawa, 75 Haw. 210, 222, 857 P.2d 593, 598-99 (1993), upon which the majority principally relies, this court considered the prejudice to the defendant as well as the "effect . . . on the administration of justice in the instant case" if the pertinent new rule were applied retroactively. Ikezawa stated that the "effect . . . on the administration on justice" is grounded in the "concept of fairness[,]" id. at 220, 857 P.2d at 598, and is not merely a question of procedural efficiency or convenience. Ikezawa's analysis of the "administration of justice" factor indicates that it must be balanced against prejudice to the defendant. See id. at 222, 857 P.2d at 598 (weighing the defendant's reliance on the old rule and the prejudice to him that would result from retroactive application against the "burden [placed] on the judicial system" by prospective application). Additionally, Ikezawa's discussion of this factor equates it with "the integrity of the judicial process[,]" id. at 220, 857 P.2d at 598 (citation and internal quotation marks omitted), which is in turn commensurate with avoidance of inequitable results, id. at 220-21, 857 P.2d at 598 (footnote omitted). Here, the administration of justice factor is undermined by the unequal treatment visited on Jess.

Second, in some cases cited by the majority, prospective application of the new rule benefitted the defendant whereas retroactive application would have prejudiced the defendant. See, e.g., Ikezawa, 75 Haw. at 212, 857 P.2d at 594-95 (remanding with instructions to dismiss the charges against the defendant with or without prejudice); State v. Stanley, 60 Haw. 527, 592 P.2d 422 (1979) (prospective application of the new rule regarding timing of appeals from family court orders waiving jurisdiction benefitted the defendant because this court accepted and reviewed his appeal although he did not appeal the family court's waiver of jurisdiction until after he was convicted). It is manifest that prospective application of the new rule does not benefit Jess and that retroactive application of the rule would benefit him.

Third, in cases relied upon by the majority where the new rule was not applied to the defendant, the disposition of the case nevertheless benefitted the defendant. See, e.g., Tachibana, 79 Hawai'i 226, 240, 900 P.2d 1293, 1307 (1995) (announcing a new rule requiring courts to engage defendant in an on-record colloquy before accepting guilty pleas but granting Tachibana's petition for post-conviction relief on the ground that his right to testify was violated by counsel's refusal to call Tachibana as a witness); State v. Warner, 58 Haw. 492, 494-96, 573 P.2d 959, 961-62 (1977) (announcing a new rule for prospective application regarding when the jury instruction on manslaughter as a lesser included offense was mandated, but reversing defendant's conviction and remanding for a new trial because under the traditional approach, "there was sufficient evidence to require the giving of" the instruction in defendant's case); State v. Fortin, 843 A.2d 974, 997 (N.J. 2004) (announcing new rule for prospective application requiring aggravating factors to be submitted to grand jury and charged in indictment but vacating defendant's conviction and remanding for new trial because defendant was denied "his right to a fair trial" as a result of too-limited voir dire). Here, Jess is substantially prejudiced by the majority's refusal to apply its new rule retroactively.

Fourth, in other cases relied upon by the majority, the new rule was not applied to the defendant because the putative violation of that rule was harmless. See, e.g., State v. Haanio, 94 Hawai'i 405, 413, 16 P.3d 246, 254 (2001) (it was unnecessary for this court to apply the new rule mandating jury instruction on included offenses where there was a rational basis in the

(continued...)

As noted before, in Garcia the question posed was whether new rules articulated in Wilson should be applied retroactively to Garcia, who was awaiting trial at the time that the new rules were established. In explaining the rationale behind its holding in Garcia, this court observed that the retroactivity issue had been resolved in three ways: (1) by making a decision fully retroactive, "applying both to the parties before the court and to all others by and against whom claims may be pressed[,]" (2) by making a decision purely prospective where "a new 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[,]" or (3) by making a decision selectively prospective whereby "a court may apply a new 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." 96 Hawai'i at 208, 29 P.3d at 927 (citation and internal quotation marks omitted).

This court proceeded to explain that the rationale for applying a decision in a selectively prospective fashion cited by other courts was "to avoid disruptions of the administration of criminal law, while at the same time fostering review by applying the new rule to the case in which the rule was announced." Id.

[26](...continued)
evidence for such an instruction to the defendant because the court did in fact give an included offense instruction at defendant's trial). Plainly, exposing Jess to an extended sentence despite the supposed deficiency of the complaint against him cannot be deemed harmless error.

at 209, 29 P.3d at 928 (citation omitted). However, it was noted that selective prospective application "breaches the principle that litigants in similar situations should be treated the same, a fundamental component of stare decisis and the rule of law generally." Id. (citation and internal quotation marks omitted).

Garcia also observed that in Linkletter, 381 U.S. at 629, the Supreme Court cited three factors, later clarified by Stovall, considered at that time to apply in deciding whether a new court-determined rule applied retroactively or prospectively: (1) "the purpose to be served by the new standards," (2) "the extent of the reliance by law enforcement authorities on the old standards," and (3) "the effect on the administration of justice of a retroactive application of the new standards[.]" Garcia, 96 Hawai'i at 209-10, 29 P.3d at 928-29 (footnote, internal quotation marks and citation omitted). However, the Supreme Court concluded that the problem in relying on these factors in retroactivity analysis was that

> "where [a c]ourt . . . expressly declared a rule of criminal procedure to be a clear break with the past, it almost invariably went on to find such a newly minted principle nonretroactive" . . . because once "[a c]ourt . . . found that the new rule was unanticipated, the second and third Stovall favors - reliance by law enforcement authorities on the old standards and effect on the administration of justice of a retroactive application of the new rule - virtually compelled a finding of nonretroactivity."

Id. at 210, 29 P.3d at 929 (quoting Griffith, 479 U.S. at 324-25) (brackets omitted) (emphasis added).

In relying on the three Stovall factors, the majority argues that these factors weigh in favor of making the majority's new rule regarding the required elements of a charging document "purely prospective" in application. Majority opinion at 37-43. However, as the Supreme Court explained in Griffith, and as this court recognized in Garcia, the second and third Stovall factors have the natural tendency to automatically weigh against retroactive application and "virtually compell[] a finding of nonretroactivity." 96 Hawai'i at 210, 29 P.3d at 929 (citation and internal quotation marks omitted). Consequently the Stovall factors do not strike a true balance of interests. The factors render the decision of whether to apply a new rule prospectively or not, not only a foregone conclusion but a faulty one as well. In that light, the majority's arguments relying on the second and third Stovall factors, majority opinion at 41-43, are not a valid or cogent basis for opting for a prospective only approach.

Rather, in Garcia, this court chose to follow the approach adopted by the Court in Griffith. Relying on Griffith, we said that "selective application of new rules violates the principles of treating similarly situated defendants the same." Garcia, 96 Hawai'i at 214, 29 P.3d at 933 (citation and internal quotation marks omitted). Therefore, as Garcia noted, the fairer approach involved retroactive application of newly announced rules "to those defendants who are similarly situated." Id. Defendants "similarly situated" were described as "those

defendants in all cases . . . pending on direct review or not yet final" at the time that the case in question was decided. Id. (internal quotation marks, citation and emphasis omitted) (ellipses in original). However, under Danforth, the limits of retroactivity may be defined by the state court and are not constrained by federal court precedent.

A.

If ever there were compelling reasons for this court to exercise its right recognized in Danforth to retroactively apply a new rule without federal restriction, such reasons exist here. The court's original extended term sentence was vacated by the district court because the sentence violated Apprendi. Jess, No. Civ. 04-00601 JMS/BMK, 2006 WL 1041737 at *4, *6. Hence, there is no valid sentence binding upon Jess. If an extended term sentence is again sought by the prosecution, any sentence imposed against Jess by the court after the 2006 vacation of the sentence can still be appealed by Jess if not in keeping with the order of the district court to resentence Jess in light of Apprendi.

Jess stands before this court today with a sentence that has been vacated by the district court and therefore, is in the same shoes as a defendant who has yet to be sentenced or a defendant on direct appeal of his sentence. Cf. United States v. Martin, 363 F.3d 25, 46 n.35 (1st Cir. 2004) (explaining that if a "sentence is still subject to appeal, it is not 'final' for retroactivity purposes[]" (citation omitted)). In effect,

vacation by the district court in 2006, leaves Jess in the same position he was in prior to the court's initial imposition of an extended sentence.

B.

In these circumstances, the interest of fairness can only be served by retroactively applying the new charging rules announced by the majority. The direct review of Jess' case was arguably terminated by this court's issuance of a Summary Disposition Order (SDO) in 2003. However, Jess is in that position simply because the SDO was decided under a misapprehension of Apprendi. Indeed, other cases decided after that SDO held that Hawaii's extended term sentencing statutes were unconstitutional under Apprendi.

As noted previously, Kaua I declared that the imposition of an extended sentence under HRS § 706-662 "was contrary to clearly established federal law, as determined by [the Supreme Court], and that it was an unreasonable application of clearly established federal law, as determined by the Supreme Court[.]" 350 F.Supp.2d at 856. The district court there held that this court's earlier decision upholding the application of the extended sentence to Kaua was based on a "reading of Apprendi [that] flies in the face of the actual language of Apprendi, especially as that language has been construed in Ring v. Arizona, 536 U.S. 584 [(2002)]." Id. at 859.

On appeal from the district court, the Ninth Circuit Court of Appeals agreed that a jury was required to make the finding of whether an extended sentence was necessary for the protection of the public "[b]ecause Apprendi held that any fact other than the fact of a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt[.]" Kaua II, 436 F.3d at 1060 (footnote omitted). As the dissent in White noted, Kaua II "has in large part undercut the Rivera 'intrinsic-extrinsic fact' distinction and the two-step sentencing process of State v. Okumura, 78 Hawai'i 383, 894 P.2d 80 (1995), and State v. Schroeder, 76 Hawai'i 517, 880 P.2d 192 (1994)." 110 Hawai'i at 91, 129 P.3d at 1119 (Acoba, J., dissenting, joined by Duffy, J.).

Thus, that Jess' case, like Kaua's case and many others, see, e.g., Kaua II, 436 F.3d at 1058 (affirming the district court's grant of Kaua's petition for a writ of habeas corpus that vacated his extended term sentence); Rivera v. Propotnick, Civ. No. 06-00390 SOM-LEK, 2007 WL 1857474 at *1 (D.Haw. June 25, 2007) (finding that "Petitioner's extended term sentencing violated Apprendi and recommend[ing] that habeas corpus be granted and Petitioner resentenced) (formatting altered); Laysa v. White, No. CV 07-00088 JMS BMK, 2007 WL 1832028 at *1 (D.Haw. June 22, 2007) (granting Petitioner's habeas corpus petition and remanding for resentencing as the

extended term sentence violated Apprendi), traveled a circular route between the state courts and the federal district courts was due to a misconstruction of Apprendi, not error on the part of Jess. As noted in the White dissent, "the availability of federal habeas proceedings and the resulting impact on the parties and both state and federal courts makes a reexamination of our extended-term sentencing decisions even more imperative." White, 110 Hawai'i at 91, 129 P.3d at 1119 (Acoba, J., dissenting, joined by Duffy, J.).

C.

The holdings reached by the majority today regarding Jess are in a sense not "new" in that they are grounded upon principles set forth by Apprendi and its progeny while Jess' case was still on direct review. Hence, the majority's holdings represent a correction of prior holdings pursuant to the rules articulated in Apprendi and related cases that were established prior to this court's affirmance of Jess' conviction and sentence in 2003.

Furthermore, the procedural difficulties engendered by the misconstruction of Apprendi have not resulted in undue delay in the resolution of Jess' sentencing. The habeas corpus petition was submitted approximately nine months after the deadline for appealing this court's SDO expired. During that period of time between the issuance of the SDO in 2003 and the instant case, a stream of cases have issued, that interpreted

Apprendi and Ring as requiring all aggravating factors to be included in the charging instrument and rejecting the differentiation between extrinsic and intrinsic factors as a basis for excluding extrinsic factors from the charging instrument. See Cunningham, -- U.S. at --, 127 S. Ct. at 864 (explaining 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" (quoting Harris v. United States, 536 U.S. 545, 557-566 (2002) (plurality opinion)).

Thus, to deny Jess the benefit of the charging rule would be inequitable in light of the case law in place while Jess' case was on direct appeal and while Jess' case was under habeas review. Indeed, the arguments that were advanced by Jess on direct appeal to this court and rejected were ultimately vindicated by the Supreme Court. See State v. Jess, No. 24339, 2003 WL 22221386 at *1 (Hawai'i Sept. 26, 2003) (Summary Disposition Order) (reciting Jess' contention on appeal, including inter alia, that "HRS § 706-662 (Supp. 2000) . . . is unconstitutional in light of [the Supreme Court's] decision in [Apprendi]"). The charging document requirements should be applied to Jess in order to prevent further compounding of error and to prevent yet another defendant from being deprived of constitutional rights.

X.

Two important principles support extension of the new rule to Jess. To reiterate, the first is that "the nature of judicial review precludes us from simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new rules, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule." Garcia, 96 Hawai'i at 213, 29 P.3d at 932 (internal quotation marks, citation, and brackets omitted). The principle that precludes us from "fishing" for cases in this manner rests in the doctrine of separation of powers. It bears repeating that "[u]nlike a legislature, [and like the Supreme Court, we] do not promulgate new rules of constitutional criminal procedure on a broad basis. Rather the nature of judicial review requires that we adjudicate specific cases, and each case usually bcomes the vehicle for announcement of a new rule." Griffith, 479 U.S. at 322 (emphases added); see also Williams v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in part and dissenting in part) ("In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation").

The second principle is that "selective application of new rules violates the principle of treating similarly situated

defendants the same." Griffith, 479 U.S. at 322-23 (citation omitted). Garcia noted that we "cannot grant the benefit of the Wilson rule to Wilson and choose not to apply it to other similarly situated defendants because such selective application of new rules violates the principles of treating similarly situated defendants the same." Garcia, 96 Hawai'i at 214, 29 P.2d at 933 (citation and internal quotation marks omitted). As the U.S. Supreme Court said, "after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review." Griffith, 479 U.S. at 323. The majority's refusal to apply the new charging rules to Jess is even more egregious than if Garcia had refused to apply Wilson to the Garcia defendant. In this instance, the majority denies Jess the benefit of a rule announced in his own case.

XI.

Retroactive application of the new charging requirements to Jess is in keeping with the aforementioned principles we have adopted. Even if Jess' case is deemed to be on collateral review, the new charging rules should apply to those defendants like Jess insofar as the sentences of such defendants have been vacated by the district court and their cases are pending resentencing at the time this opinion is issued only because of the prior misapplication of the Apprendi precepts. As held in Danforth, "[n]either Linkletter nor Teague

explicitly or implicitly constrained the authority of States to provide remedies for a broader range of constitutional violations than are redressable on federal habeas." Danforth, -- U.S. at --, 128 S.Ct. at 1038.

Not only is this court at liberty to grant Jess relief by retroactively applying the new charging rules announced by the majority but, it is imperative that this court apply the rules retroactively to Jess in order to comport with the twin principles of Garcia referred to above. Failure to retroactively apply the majority's new rules in this manner would controvert the principles identified in Garcia as this court would be "using [Jess' case] as a vehicle for pronouncing new [rules], and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule" and would be "violat[ing] the principle of treating similarly situated defendants the same." Garcia, 96 Hawai'i at 213, 29 P.2d at 919 (citation and internal quotation marks omitted) (second brackets in original).

XII.

The prosecution argues that applying the new rule would have detrimental public policy effects. The prosecution contends that under such a retroactive application "[a]ny defendant who has ever been sentenced [to an extended term of imprisonment] could argue that his or her conviction was void because a material or essential element of the offense was not included in the [charging instrument]." (Quoting Poole v. State, 846 So.2d

370, 387 (Ala. Crim. App. 2002) (emphasis added) (internal quotation marks omitted) (brackets supplied in original).)[27] However, the prosecution's argument is incorrect. Retroactive application of the new charging rules, following the principles engendered by Garcia, would only allow those defendants whose cases are pending on direct review or, those who like Jess, are subject to resentencing as of the date of the decision in this case to benefit from the new rule. As in prior cases involving enhanced sentences, this court can afford the prosecution the option of proceeding on a non-extended term sentencing basis with such defendants or of initiating a new trial.

In Brantley, 84 Hawai'i at 114, 929 P.2d at 1364, the ICA held that the court erred "in sentencing Defendant to a mandatory minimum term of imprisonment under [HRS] § 706-660.1(3)(a) (1993) for use of a semi-automatic firearm in the commission of a felony, because there was no trial finding that Defendant actually or constructively possessed such a firearm at the time of the murder." The ICA explained that such a finding constituted "aggravating circumstances . . . intrinsic to the commission of the crime charged and therefore must be determined

[27] The prosecution's second argument asserts that "requiring the charging instrument to include the allegation . . . that an imposition of an extended term is necessary for the protection of the public 'would contaminate the [grand] jury's required focus on the factual circumstances surrounding the offense and potentially require the introduction of inadmissible bad act [sic] or overly prejudicial evidence to require the [grand jury] to make such [a probable cause determination].'" This argument is not germane to the question of whether the new rule should apply to Jess and therefore is not discussed here.

by the trier of fact." Id. at 125, 929 P.2d at 1375 (internal quotation marks, citation, and brackets omitted) (ellipsis in original).

Upon determining that the mandatory minimum sentence had been erroneously imposed upon the defendant the ICA followed the procedure adopted by the supreme court in Garringer v. State, 80 Hawai'i 327, 335, 909 P.2d 1142, 1150 (1996) opting to:

> withhold judgment on [Defendant's] conviction of [second degree murder] for thirty days. If the prosecution within that time consents to resentencing without a mandatory minimum under HRS § 706-660.1, we will affirm the conviction on that count and remand for resentencing. If on the other hand, the government does not consent, we will vacate [Defendant's] conviction on [the second degree murder count] and remand for a new trial.

Brantley, 84 Hawai'i at 125, 929 P.2d at 1375 (emphases added) (some brackets in original). Thus, if the prosecution seeks to impose a non-extended term sentence, Jess' conviction would be affirmed and the case could be remanded for such sentencing. Similarly, adjusting the defendant's sentence appears to be the preferred alternative in the federal courts when an indictment is ruled defective for failure to charge aggravating circumstances. See, e.g., United States v. Davis, 184 F.3d 366, 367 (4th Cir. 1999) (vacating defendant's sentence and remanding "for resentencing" because the indictment did not allege that the victim suffered "great bodily injury," which was an "offense element," not merely a sentencing factor); see also United States v. Hathaway, 318 F.3d 1001, 1009-10 (10th Cir. 2003) (ordering that defendant's criminal records be altered to reflect that he

was convicted of misdemeanor assault, not felony assault because "[t]he indictment . . . failed to allege a required and essential element of the felony crime for which [the defendant] was convicted"); cf. United States v. Wilkes, 130 F.Supp.2d 222, 226 (D.Mass. 2001) (concluding that because the indictment did not specify the amount of marijuana, "the indictment [was] deficient under Apprendi" such that defendant could not be subjected to an extended sentence based on the amount of drugs). If the prosecution seeks an extended sentence, Jess' conviction should be vacated and he would be entitled to a new trial based on a charging document filed within a specified period of time alleging the enhancement factors.[28]

XIII.

For the foregoing reasons, I must respectfully disagree with the majority opinion.

[28] Allowing the prosecution to refile charges against Jess in compliance with the new rule announced by the majority would not violate Jess' protection against double jeopardy inasmuch as "the double jeopardy guarantee 'imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside[.]'" United States v. DiFrancesco, 449 U.S. 117, 131 (1980) (quoting North Carolina v. Pearce, 395 U.S. 711, 720 (1969)) (emphasis omitted).