

DISSENT BY ACOBA, J.

I would accept the Application for Writ of Certiorari filed by Petitioner/Petitioner-Appellant William Benjamin Napeahi (Petitioner) to correct the reasoning in State v. Loher, 118 Hawai'i 522, 193 P.3d 438 (2008), inasmuch as contrary to the holding by the Intermediate Court of Appeals (the ICA), State v. Mauqaotega, 115 Hawai'i 432, 168 P.3d 562 (2007) [hereinafter Mauqaotega II], rather than Blakely v. Washington, 542 U.S. 296 (2004), or United States v. Booker, 543 U.S. 220 (2005), established a purported "new rule" governing the imposition of extended sentences in this jurisdiction. In Loher, the ICA recognized that Mauqaotega II "held that Hawaii's extended sentencing statute did not comply with Apprendi [v. New Jersey], 530 U.S. 466 (2000)], and its progeny, effectively overruling prior case law which upheld Hawaii's extended sentence statutory scheme." 118 Hawai'i at 535, 193 P.3d at 451. Additionally, the ICA stated that this court, in Mauqaotega II, "acknowledged that the United States Supreme Court, in Cunningham v. California, 549 U.S. 270 (2007), left no doubt that a majority of the United States Supreme Court had rejected the intrinsic/extrinsic distinction underlying the Hawai'i decisions that had upheld Hawaii's extended sentencing system under Apprendi and its progeny." Loher, 115 Hawai'i at 536, 193 P.3d 452.

Inexplicably, however, the ICA went on to determine that the issue was not that Mauqaotega II, via Cunningham,

announced a "new rule," but whether Blakely and Booker established a "new rule." Id. at 538, 193 P.3d at 454. According to the ICA, "the legal landscape only became clear after Apprendi (2000), Blakely (2004), and Booker (2005), taken together, established that a sentencing scheme in which the maximum possible sentence is set based on facts found by a judge is not consistent with the Sixth Amendment." Id. at 538, 193 P.3d at 454. The ICA held that "under any construction of the post-Apprendi cases, [the defendant] is not entitled to retroactive application of Blakely and Booker on collateral review." Id.

Contrary to the ICA's holding, however, Blakely and Booker had no effect on a majority of this court's continued adherence to the belief that Hawaii's extended sentencing scheme did not violate Apprendi. It was not until Maugaotega II had been decided that this court finally acknowledged that Hawaii's extended sentencing scheme was unconstitutional. Therefore, the ICA's determination that Blakely and Booker established "new rules" is irrelevant to the question of whether the defendant's sentence in that case violated Apprendi. According to this jurisdiction, at the time his sentence was imposed, it did not. Moreover, the plain pronouncements of the United States Supreme Court did not evince at all that Blakely and Booker established a rule divorced from Apprendi.

