***** FOR PUBLICATION *****

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Plaintiff-Appellee,

vs.

WAYDE K. WHITE, Defendant-Appellant.

NO. 27201

APPEAL FROM THE FIRST CIRCUIT COURT
(Cr. No. 03-1-2198)

MARCH 10, 2006

MOON, C.J., LEVINSON AND NAKAYAMA, JJ.,
AND ACOBA, J., DISSENTING, WITH WHOM DUFFY, J., JOINS

OPINION OF THE COURT BY LEVINSON, J.

The defendant-appellant Wayde K. White appeals from the judgment of the circuit court of the first circuit, the Honorable Derrick Chan presiding, filed on March 1, 2005, convicting him of and sentencing him for the following offenses: (1) two counts of forgery in the second degree in violation of Hawai'i Revised Statutes (HRS) 708-852 (Supp. 1997)[1] and (2) one count of theft

[1] HRS § 708-852 provides:

> **Forgery in the second degree.** (1) A person commits the offense of forgery in the second degree if, with intent to defraud, the person falsely makes, completes, endorses, or alters a written instrument, or utters a forged instrument, or fraudulently encodes the magnetic ink character recognition numbers, which is or purports to be, or which is calculated to become or to represent if completed, a deed, will, codicil, contract, assignment, commercial instrument, or other instrument which does or may evidence, create, transfer, terminate, or

(continued...)

in the second degree in violation of HRS § 708-831(1)(b) (Supp. 1998).[2]

On appeal, White contends that the circuit court erred in sentencing him to extended terms of imprisonment as a "multiple offender" pursuant to HRS § 706-662(4)(a) (Supp. 2003),[3] inasmuch as the jury did not decide that such

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[1](...continued)
otherwise affect a legal right, interest, obligation, or status.
(2) Forgery in the second degree is a class C felony.

[2] HRS § 708-831 provides in relevant part:

Theft in the second degree. (1) A person commits the offense of theft in the second degree if the person commits theft:
. . . .
(b) Of property or services the value of which exceeds $300;
. . . .
(2) Theft in the second degree is a class C felony. . . .

[3] HRS § 706-662 provides in relevant part:

Criteria for extended terms of imprisonment. A convicted defendant may be subject to an extended term of imprisonment under section 706-661, if the convicted defendant satisfies one or more of the following criteria:
(1) The defendant is a persistent offender whose imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless the defendant has previously been convicted of two felonies committed at different times when the defendant was eighteen years of age or older.
. . . .
(3) The defendant is a dangerous person whose imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless the defendant has been subjected to a psychiatric or psychological evaluation that documents a significant history of dangerousness to others resulting in criminally violent conduct, and this history makes the defendant a serious danger to others. Nothing in this section precludes the introduction of victim-related data in order to establish dangerousness in accord with the Hawaii rules of evidence.
(4) The defendant is a multiple offender whose criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless:
(a) The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for felony; or
(b) The maximum terms of imprisonment authorized for
(continued...)

extended terms of imprisonment were necessary for the protection of the public, and, therefore, the extended term sentences imposed by the circuit court ran afoul of the sixth amendment to the United States Constitution as interpreted by the United States Supreme Court in Apprendi v. New Jersey, 530 U.S. 466 (2000), Blakely v. Washington, 542 U.S. 296 (2004), and United

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[3](...continued)

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

(5) The defendant is an offender against the elderly, handicapped, or a minor under the age of eight, whose imprisonment for an extended term is necessary for the protection of the public. The court shall not make this finding unless:
   (a) The defendant attempts or commits any of the following crimes: murder, manslaughter, a sexual offense that constitutes a felony under chapter 707, robbery, felonious assault, burglary, or kidnapping; and
   (b) The defendant, in the course of committing or attempting to commit the crime, inflicts serious or substantial bodily injury upon a person who is:
      (i) Sixty years of age or older;
      (ii) Blind, a paraplegic, or a quadriplegic; or
      (iii) Eight years of age or younger; and
   (c) Such disability is known or reasonably should be known to the defendant.

(6) The defendant is a hate crime offender whose imprisonment for an extended term is necessary for the protection of the public. The court shall not make this finding unless:
   (a) The defendant is convicted of a crime under chapter 707, 708, or 711; and
   (b) The defendant intentionally selected a victim, or in the case of a property crime, the property that was the object of a crime, because of hostility toward the actual or perceived race, religion, disability, ethnicity, national origin, gender identity or expression, or sexual orientation of any person. For purposes of this subsection, "gender identity or expression" includes a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression; regardless of whether that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth.

States v. Booker, 543 U.S. 220 (2005).

The State of Hawai'i [hereinafter, "the prosecution"] counters that the circuit court properly exercised its broad discretion to sentence White to extended terms of imprisonment as a multiple offender because HRS § 706-662(4)(a), see supra note 3, passes muster under Apprendi, Blakely, and Booker. (Citing State v. Maugaotega, 107 Hawai'i 399, 114 P.3d 905 (2005); State v. Rivera, 106 Hawai'i 146, 102 P.3d 1044 (2004), cert. denied, 126 S. Ct. 45 (2005); State v. Kaua, 102 Hawai'i 1, 72 P.3d 473 (2003).)

White responds that this court misconstrued Blakely's pronouncements in Rivera and incorrectly held that "Hawaii's extended term sentencing scheme is not incompatible with Blakely . . . , inasmuch as . . . Blakely addresses only statutory 'determinate' sentencing 'guideline' schemes." (Quoting Rivera, 106 Hawai'i at 150, 102 P.3d at 1048.)

We note that our recent decisions in Rivera and Maugaotega -- which reaffirmed our holding in Kaua that Hawaii's extended term sentencing scheme does not run afoul of Apprendi -- dispose of White's point of error. Nevertheless, inasmuch as White disputes our analysis of Blakely and mounts a new challenge to Rivera's interpretation of "indeterminate" sentencing schemes, we explain Rivera's consonance with the mandate of Blakely.[4]

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[4] On January 11, 2006, the United States Court of Appeals for the Ninth Circuit affirmed the United States District Court for the District of Hawaii's grant of Wayman Kaua's petition for a writ of habeas corpus in Kaua v. Frank, 350 F. Supp. 2d 848 (D. Haw. 2004), thereby vacating Kaua's extended sentence. See Kaua v. Frank, No. 05-15059 (9th Cir. Jan. 11, 2006). 28 U.S.C. § 2254(d) (2000) (concerning federal habeas relief) provides in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall

(continued...)

As we discuss more fully infra in section III, White's arguments are unavailing. Accordingly, we affirm the circuit court's judgment of conviction and sentence of White to extended terms of imprisonment.

I. BACKGROUND

On October 9, 2003, the prosecution charged White by complaint with the following offenses: (1) forgery in the second degree (Counts I & II) in violation of HRS § 708-852, see supra note 1, and (2) theft in the second degree (Count III) in violation of HRS § 708-831(1)(b), see supra note 2. On September 22, 2004, the circuit court commenced a jury trial that ended on September 24, 2004. On September 24, 2004, the jury returned a verdict of guilty as charged as to all three counts.

On November 26, 2004, the prosecution filed a motion to sentence White as a multiple offender to extended terms of

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[4](...continued)
not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

The district court held that our conclusion in State v. Kaua, 102 Hawai'i 1, 72 P.3d 473, "that Kaua's extended sentence did not violate Apprendi was contrary to, and involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court." Kaua v. Frank, 350 F. Supp. 2d at 860. The Ninth Circuit agreed that our affirmance of Kaua's extended term sentence contravened Apprendi and held that "[b]ecause the effect of the public protection finding was to increase Kaua's sentence above that authorized by the jury's guilty verdict, the Sixth Amendment required a jury to make that finding." Kaua v. Frank, No. 05-15059, slip op. at 10 (9th Cir. Jan. 11, 2006).

The district court noted in its opinion that "[w]hile circuit law may be 'persuasive authority' for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law, only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied." Kaua v. Frank, 350 F. Supp. 2d at 856 n.6 (quoting Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003)). Accordingly, we decline to follow the Ninth Circuit's holding.

imprisonment of ten years, pursuant to HRS § 706-662(4)(a), see supra note 3, for each of the three class C felonies of which he was simultaneously convicted. On that same day the prosecution also filed a motion for sentencing of a repeat offender to a mandatory minimum term of imprisonment of one year and eight months pursuant to HRS § 706-606.5(1)(a)(iv) (1993).[5] Finally, on November 26, 2004, the prosecution filed a motion for consecutive term sentencing pursuant to HRS § 706-668.5 (1993).[6]

The circuit court conducted a sentencing hearing on March 1, 2005, during which it sentenced White and considered the prosecution's motions for repeat offender, consecutive, and extended term sentencing. The circuit court concluded that White was a multiple offender under HRS § 706-662(4)(a), see supra note 3, and orally granted the prosecution's motion for extended terms

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[5] HRS § 706-606.5 provides in relevant part:

> (1) Notwithstanding section 706-669 and any other law to the contrary, any person convicted of murder in the second degree, any class A felony [or] any class B felony . . . and who has a prior conviction or prior convictions for the following felonies, including an attempt to commit the same: murder, murder in the first or second degree, a class A felony, a class B felony, or any felony conviction of another jurisdiction shall be sentenced to a mandatory minimum period of imprisonment without possibility of parole during such period as follows:
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> (a) One prior felony conviction:
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> . . . .
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> (iv) Where the instant conviction is for a class C felony -- one year, eight months[.]

[6] HRS § 706-668.5 provides:

> (1) If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an unexpired term of imprisonment, the terms may run concurrently or consecutively. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms run concurrently.
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> (2) The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider the factors set forth in section 706-606.

of imprisonment. The circuit court also granted the prosecution's motion for repeat offender sentencing. The circuit court denied the prosecution's motion for consecutive term sentencing. With respect to all three counts, the circuit court sentenced White to an extended ten-year indeterminate maximum term of imprisonment, subject to a mandatory minimum term of imprisonment of one year and eight months. The circuit court ordered all sentences to run concurrently with one another.

On March 23, 2005, the circuit court entered orders granting the prosecution's motions for repeat offender and extended term sentencing.

On March 30, 2005, White timely filed a notice of appeal to this court.

II. STANDARDS OF REVIEW

A. Sentencing

> [A] sentencing judge generally has broad discretion in imposing a sentence. State v. Gaylord, 78 Hawai'i 127, 143-44, 890 P.2d 1167, 1183-84 (1995); State v. Valera, 74 Haw. 424, 435, 848 P.2d 376, 381 . . . (1993). The applicable standard of review for sentencing or resentencing matters is whether the court committed plain and manifest abuse of discretion in its decision. Gaylord, 78 Hawai'i at 144, 890 P.2d at 1184; State v. Kumukau, 71 Haw. 218, 227-28, 787 P.2d 682, 687-88 (1990); State v. Murray[,] 63 Haw. 12, 25, 621 P.2d 334, 342-43 (1980); State v. Fry, 61 Haw. 226, 231, 602 P.2d 13, 16 (1979).
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> Keawe v. State, 79 Hawai'i 281, 284, 901 P.2d 481, 484 (1995). "[F]actors which indicate a plain and manifest abuse of discretion are arbitrary or capricious action by the judge and a rigid refusal to consider the defendant's contentions." Fry, 61 Haw. at 231, 602 P.2d at 17. And, "'[g]enerally, to constitute an abuse it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.'" Keawe, 79 Hawai'i at 284, 901 P.2d at 484 (quoting Gaylord, 78 Hawai'i at 144, 890 P.2d at 1184 (quoting Kumukau, 71 Haw. at 227-28, 787 P.2d at 688)).

State v. Rauch, 94 Hawai'i 315, 322, 13 P.3d 324, 331 (2000)

(brackets and ellipsis points in original).

B. Questions Of Constitutional Law

> "We answer questions of constitutional law 'by exercising our own independent judgment based on the facts of the case,'" and, thus, questions of constitutional law are reviewed on appeal "under the 'right/wrong' standard." State v. Jenkins, 93 Hawai'i 87, 100, 997 P.2d 13, 26 (2000) (citations omitted).

State v. Aplaca, 96 Hawai'i 17, 22, 25 P.3d 792, 797 (2001).

C. Statutory Interpretation

> "[T]he interpretation of a statute . . . is a question of law reviewable de novo." State v. Arceo, 84 Hawai'i 1, 10, 928 P.2d 843, 852 (1996) (quoting State v. Camara, 81 Hawai'i 324, 329, 916 P.2d 1225, 1230 (1996) (citations omitted)). See also State v. Toyomura, 80 Hawai'i 8, 18, 904 P.2d 893, 903 (1995); State v. Higa, 79 Hawai'i 1, 3, 897 P.2d 928, 930 (1995); State v. Nakata, 76 Hawai'i 360, 365, 878 P.2d 699, 704 (1994). . . .

Gray v. Admin[.] Dir[.] of the Court, 84 Hawai'i 138, 144, 931 P.2d 580, 586 (1997) (some brackets added and some in original)[; s]ee also State v. Soto, 84 Hawai'i 229, 236, 933 P.2d 66, 73 (1997). Furthermore, our statutory construction is guided by established rules:

> When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.
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> When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. . . .
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> In construing an ambiguous statute, "[t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1-15(1) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool.

Gray, 84 Hawai'i at 148, 931 P.2d at 590 (quoting State v. Toyomura, 80 Hawai'i 8, 18-19, 904 P.2d 893, 903-04 (1995)) (brackets and ellipsis points in original) (footnote omitted). This court may also consider "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it . . . to discover its true meaning." HRS § 1-15(2) . . . . "Laws in pari materia, or upon the same subject matter, shall be construed with reference to

> each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another." HRS § 1-16 (1993).

Rauch, 94 Hawai'i at 322-23, 13 P.3d at 331-32 (quoting State v. Kotis, 91 Hawai'i 319, 327, 984 P.2d 78, 86 (1999)).

III. DISCUSSION

White argues in his reply brief that, "[b]ased upon a careful review of Blakely," our decision in Rivera "misconstrued Blakely's pronouncements regarding the applicability of Apprendi" to Hawaii's extended term sentencing system. White urges us to reconsider Rivera, submitting that we erred in analyzing the "indeterminate" sentencing scheme discussed in Blakely because we presumed Washington's indeterminate sentencing scheme to be the same as Hawaii's. White posits that Blakely "used the terms 'determinate' and 'indeterminate' to distinguish between Washington's pre- and post-1981 sentencing schemes without explaining or defining what its use of those terms meant."

White claims that Justice O'Connor's dissent in Blakely, 542 U.S. at 314-17 (O'Connor, J., dissenting), reveals that "the 'indeterminate' sentencing scheme previously used in Washington . . . differed significantly from Hawaii's 'indeterminate' sentencing scheme in that Washington judges actually had 'unfettered discretion' in choosing an amount of prison time within the statutory range set for an offense." White quotes Justice O'Connor's dissent in an effort to illustrate how "Hawaii's sentencing scheme is more akin to the scheme that Blakely labeled 'determinate,'" thus undermining our

reasoning in Rivera. Citing HRS § 706-660 (1993),[7] White argues that, "[i]n contrast with Washington's former 'indeterminate' scheme, Hawaii's indeterminate sentencing scheme affords judges no discretion with regard to the number of years [of] imprisonment that a defendant must serve." (Emphasis in original.) White maintains that, in his case, "the judge was constrained to impose prison terms of exactly five years, whereas under Washington's 'indeterminate' scheme, a judge could have imposed anywhere between zero and five years," making Hawaii's sentencing scheme "more akin to the scheme that Blakely labeled 'determinate'" and that the Supreme Court struck down. White concludes that "the Blakely court's reasoning must be considered within the context of the Washington schemes," both pre-1981 and after the Washington state legislature passed the Sentencing Reform Act of 1981 (codified as Wash. Rev. Code chap. 9.94A). (Emphasis in original.) We believe that, notwithstanding Justice O'Connor's dissent in Blakely and Washington's pre- and post-1981 sentencing schemes, White's arguments are without merit.

The rule declared by the United States Supreme Court in Apprendi was that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the

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[7] HRS § 706-660 provides:

> A person who has been convicted of a class B or class C felony may be sentenced to an indeterminate term of imprisonment except as provided for in section 706-660.1 relating to the use of firearms in certain felony offenses and section 706-606.5 relating to repeat offenders. When ordering such a sentence, the court shall impose the maximum length of imprisonment which shall be as follows:
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> (1) For a class B felony -- 10 years; and
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> (2) For a class C felony -- 5 years.
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> The minimum length of imprisonment shall be determined by the Hawaii paroling authority in accordance with section 706-669.

(Emphasis added.)

prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The Blakely Court extended the Apprendi rule, explaining that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." 542 U.S. at 302 (emphasis in original).

In State v. Kaua, the first case to address the effects of Apprendi on Hawaii's extended term sentencing scheme, we

> reaffirmed the "intrinsic-extrinsic" analysis first articulated by this court in State v. Schroeder, 76 Hawai'i 517, 880 P.2d 192 (1994), and reaffirmed in State v. Tafoya, 91 Hawai'i 261, 982 P.2d 890 (1999), and rejected the defendant's argument that Apprendi mandated that a "multiple offender" determination, for purposes of HRS § 706-662(4)(a), [see supra note 3,] must be made by the trier of fact, holding (1) that HRS § 706-662[, see supra note 3,] passed constitutional muster under the Hawai'i and United States Constitutions and (2) that "[t]he facts foundational to . . . extended terms of imprisonment . . . , pursuant to HRS § 706-662(4)(a), fell outside the Apprendi rule, and, thus, the ultimate finding that [a defendant] was a 'multiple offender' whose extensive criminal actions warranted extended prison terms was properly within the province of the sentencing court." [State v.] Kaua, 102 Hawai'i at 13, 72 P.3d at 485. In so holding, this court noted
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> > the fundamental distinction between the nature of the predicate facts described in HRS §§ 706-662(1), (3), and (4), . . . on the one hand, and those described in HRS §§ 706-662(5) and (6), . . . on the other. Specifically, the facts at issue in rendering an extended term sentencing determination under HRS §§ 706-662(1), (3), and (4) implicate considerations completely "extrinsic" to the elements of the offense with which the defendant was charged and of which he was convicted; accordingly, they should be found by the sentencing judge in accordance with [State v.] Huelsman[, 60 Haw. 71, 588 P.2d 394 (1979),] and its progeny. The facts at issue for purposes of HRS §§ 706-662(5) and (6), however, are, by their very nature, "intrinsic" to the offense with which the defendant was charged and of which he has been convicted; accordingly, they must be found beyond a reasonable doubt by the trier of fact in order to afford the defendant his constitutional rights to procedural due process and a trial by jury. Tafoya,

> 91 Hawai'i at 271-72, 982 P.2d at 900-01; Schroeder, 76 Hawai'i at 528, 880 P.2d at 203.
>
> Id. at 12-13, 72 P.3d at 484-85 (emphases added).

Hauge, 103 Hawai'i at 59-60, 79 P.3d at 152-53 (emphases deleted) (brackets in original).

Subsequently, in Rivera, we analyzed the effect of Blakely on Hawaii's sentencing scheme:

> Blakely focused on the perceived defects of Washington state's determinate sentencing scheme, applying the rule the Court had previously crafted in Apprendi, i.e., that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. Thus, the Blakely majority held that a Washington court's sentencing of a defendant to more than three years above the 53-month statutory maximum of the prescribed "standard range" for his offense, on the basis of the sentencing judge's finding that the defendant had acted with deliberate cruelty, violated his sixth amendment right to trial by jury. In our view, the Blakely analysis vis-a-vis Apprendi is confined to the meaning of the construct "statutory maximum" within the context of determinate or "guideline" sentencing schemes. Inasmuch as Hawaii's extended term sentencing structure is indeterminate, we believe that Blakely does not affect the "intrinsic-extrinsic" analysis that this court articulated in [State v.]Kaua[, 102 Hawai'i 1, 72 P.3d 473 (2003)].
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> The Blakely majority explained that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." [542 U.S. at 303] (emphasis in original). "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional facts." Id. (emphasis in original). Accordingly, the essential mandate of Apprendi -- i.e., that any fact other than a prior conviction must be submitted to a jury and proved beyond a reasonable doubt -- is unaffected by the Court's decision in Blakely. Blakely can reasonably be construed, then, as a gloss on Apprendi, clarifying (1) that the upward limit of any given presumptive sentencing range prescribed in a statutory scheme utilizing a "determinate" sentencing "guideline" system constitutes the "statutory maximum" and (2) that a defendant upon whom a sentence exceeding this "statutory maximum" is imposed is entitled to all of the procedural protections that Apprendi articulates.

106 Hawai'i at 156, 102 P.3d at 1054 (emphases in original).

Recently, in Booker, the United States Supreme Court addressed the constitutionality of the statutory federal

sentencing guidelines in the context of Apprendi and Blakely. The majority held (1) that the federal sentencing guidelines are subject to Apprendi constraints and (2) that the provisions of the Federal Sentencing Act making the sentencing guidelines mandatory were incompatible with Apprendi, thereby requiring severance of those provisions and rendering the guidelines advisory only:

> If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.

543 U.S. at 226, 232, 246 (citations omitted) (emphases added). Further to the foregoing, the Court explained why it was necessary to excise the provisions of the Federal Sentencing Act that made the guidelines mandatory:

> As the Court today recognizes in its first opinion in these cases, the existence of § 3553(b)(1) is a necessary condition of the constitutional violation. That is to say, without this provision -- namely the provision that makes "the relevant sentencing rules . . . mandatory and impose[s] binding requirements on all sentencing judges" -- the statute falls outside the scope of Apprendi's requirement.
>
> The remainder of the Act "function[s] independently." Without the "mandatory" provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals. See 18 U.S.C.A. § 3553(a) (Supp. 2004). The Act nonetheless requires judges to consider the Guidelines "sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant," § 3553(a)(4), the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims, §§ 3553(a)(1), (3), (5)-(7) (main ed. and Supp. 2004). And the Act nonetheless requires judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care. § 3553(a)(2) (main ed. and Supp. 2004).

543 U.S. at 259-60 (some citations omitted) (emphases added).

We determined in Maugaotega that Booker did not alter the essential holdings of Apprendi and Blakely:

> [T]he declaration in Booker (1) that rendering the federal sentencing guidelines advisory rather than mandatory remedies their unconstitutionality and (2) that the Federal Sentencing Act continues to require judges to impose sentences that, among other things, "protect the public" essentially erases discretionary extended term sentencing schemes such as Hawaii's from the decision's purview.

107 Hawai'i at 408, 114 P.3d at 914.

Furthermore, in Harris v. United States, 536 U.S. 545, 565 (2002), the Supreme Court explained:

> Whether chosen by the judge or the legislature, the facts guiding judicial discretion below the statutory maximum need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. When a judge sentences the defendant to a mandatory minimum, no less than when the judge chooses a sentence within the range, the grand and petit juries already have found all the facts necessary to authorize the Government to impose the sentence. The judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from those juries--and without contradicting *Apprendi*.

(Emphases added.)

To respond to White's contention that "the 'indeterminate' sentencing scheme previously used in Washington . . . differed significantly from Hawaii's 'indeterminate' sentencing scheme in that Washington judges actually had 'unfettered discretion' in choosing an amount of prison time within the statutory range set for an offense," we must further distinguish Hawaii's sentencing scheme from the post-1981 Washington sentencing scheme at issue in Blakely.

> Hawai'i utilizes a mandatory indeterminate sentencing scheme. See [State v.]Bernades, 71 Haw. [485,] 488, 795 P.2d [842,] 844 [(1990)]. An indeterminate sentence is "[a] sentence to imprisonment for the maximum period defined by law, subject to termination by the parol board or other [authorized] agency at any time after service of the minimum period" ordinarily set by the paroling authority. Black's Law Dictionary 911 (4th ed. 1968). In this jurisdiction, a convicted defendant's individual characteristics and culpability are considered by the Hawai'i Paroling Authority, which sets the minimum term of imprisonment,

pursuant to HRS § 706-669 (1993). Bernades, 71 Haw. at 488, 795 P.2d at 844.

Rivera, 106 Hawai'i at 158, 102 P.3d at 1056. A "determinate sentence" is defined as "[a] sentence for a fixed length of time rather than for an unspecified duration." Black's Law Dictionary 1367 (7th ed. 1999). Nevertheless, rather than look specifically to the terms "determinate" and "indeterminate" in order to interpret the impact of Blakely, it is more appropriate to look at the effect of the system that the Court discusses.

"In contrast to Hawaii's indeterminate sentencing scheme, at issue in Blakely was Washington's determinate sentencing structure and, particularly, the sentencing court's imposition of a sentence thirty-seven months in excess of the fifty-three-month upward limit of the statutorily enumerated 'standard range.'" Rivera, 106 Hawai'i at 159, 102 P.3d at 1057 (quoting Blakely, 542 U.S. at 302) (emphases in original).

> In Washington, second-degree kidnaping is a class B felony. State law provides that "[n]o person convicted of a [class B] felony shall be punished by confinement . . . exceeding . . . a term of ten years." Other provisions of state law, however, further limit the range of sentences a judge may impose. Washington's Sentencing Reform Act specifies, for petitioner's offense of second-degree kidnaping with a firearm, a "standard range" of 49 to 53 months. A judge may impose a sentence above the standard range if he finds "substantial and compelling reasons justifying an exceptional sentence." The Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive. Nevertheless, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense." State v. Gore, 143 Wash.2d 288, 315-316, 21 P.3d 262, 277 (2001). When a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it. A reviewing court will reverse the sentence if it finds that "under a clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence." Gore, supra, at 315, 21 P.3d, at 277.
>
> Pursuant to the plea agreement, the State recommended a sentence within the standard range of 49 to 53 months.

> After hearing Yolanda's description of the kidnaping, however, the judge rejected the State's recommendation and imposed an exceptional sentence of 90 months -- 37 months beyond the standard maximum. He justified the sentence on the ground that petitioner had acted with "deliberate cruelty," a statutorily enumerated ground for departure in domestic-violence cases.

Blakely, 542 U.S. at 299-300 (footnotes and citations omitted).

> Therein lies the distinction between Hawaii's enhanced sentencing structure, set forth in HRS § 706-662, [see supra note 3,] and Washington's determinate sentencing guideline scheme: (1) In Hawai'i, the sentencing scheme is indeterminate, and there is no presumptive guideline range; and (2) the sentencing court could not have subjected the defendant to an extended term of imprisonment based on the same facts in Blakely without submitting those facts to the trier of fact, because the aggravating factor of "deliberate cruelty" entailed an "intrinsic" fact so "inextricably enmeshed in the defendant's actions in committing the offense charged . . . that the Hawai'i Constitution requires that these findings be made by the trier of fact[.]" [State v.]Kaua, 102 Hawai'i at 11, 72 P.3d at 483 (quoting [Tafoya], 91 Hawai'i at 271-72, 982 P.2d at 900-01).

Rivera, 106 Hawai'i at 159-60, 102 P.3d at 1057-58.

As the Supreme Court further explained in Blakely,

> [b]y reversing the judgment below, we are not, as the State would have it, "find[ing] determinate sentencing schemes unconstitutional." . . . This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment. Several policies prompted Washington's adoption of determinate sentencing, including proportionality to the gravity of the offense and parity among defendants. . . . Nothing we have said impugns those salutary objectives.
>
> Justice O'Connor argues that, because determinate sentencing schemes involving judicial factfinding entail less judicial discretion than indeterminate schemes, the constitutionality of the latter implies the constitutionality of the former. This argument is flawed on a number of levels. First, the Sixth Amendment by its terms is not a limitation of judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal right to a lesser sentence -- and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is

> concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10-year sentence -- and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

542 U.S. at 308-09 (emphases in original) (citations omitted).

Simply put, Washington's system codified a standard range -- in Blakely that range was 49 to 53 months within the 120-month total maximum sentence statutorily prescribed for class B felonies. Therefore, the statutory maximum of the standard range was 53 months, and Blakely instructs that any finding increasing the defendant's sentence beyond that standard range was required to be submitted to a jury and proved beyond a reasonable doubt, in accordance with Apprendi.

By contrast, Hawai'i does not employ a standard range for any of its felonies. The circuit court has no discretion to determine the length of a defendant's sentence. "The court's discretion is limited to choosing between imprisonment and other modes of sentencing. Once the court has decided to sentence a felon to imprisonment, the actual time of release is determined by parole authorities." Rivera, 106 Hawai'i at 159, 102 P.3d at 1057 (quoting the commentary to HRS § 706-660, see supra note 7).

White argues that

> the "indeterminate" sentencing scheme previously used in Washington state (i.e., before the "determinate" sentencing system under which defendant Blakely was sentenced) differed significantly from Hawaii's "indeterminate" sentencing scheme in that Washington judges actually had "unfettered discretion" in choosing an amount of prison time within the statutory range set for an offense.

White interprets Blakely's statement that "[i]n a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail" to describe

Washington's pre-1981 "indeterminate" sentencing scheme. (Quoting Blakely, 542 U.S. 308-09.) Conversely, White interprets the statement that

> [i]n a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10-year sentence -- and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury

to describe Washington's post-1981 "determinate" sentencing scheme at issue in Blakely. (Quoting Blakely, 542 U.S. 308-09.) We agree with White's interpretation that the Blakely Court's characterization of the first sentencing system described Washington's pre-1981 indeterminate sentencing scheme. Nevertheless, we disagree with White's contention that Hawaii's sentencing system does not resemble Washington's pre-1981 sentencing scheme.

White insists that Hawaii's sentencing scheme has no range and that, as such, it is "more akin to the scheme that Blakely labeled 'determinate'" and in violation of a defendant's sixth amendment rights. To the contrary, Hawaii's sentencing system most closely resembles the Washington sentencing system that was in place prior to the Sentencing Reform Act of 1981 and thus, as we stated in Rivera, is excised from Blakely's analysis. See Rivera, 106 Hawai'i at 156-57, 102 P.3d at 1054-55. The range inherent in Hawaii's indeterminate sentencing scheme lies between probation and the statutory maximum prison term, but, rather than the sentencing judge setting the specific term that a defendant is to serve, the minimum time served is set by the parole board. Therefore, Hawaii's system more closely resembles the pre-1981 Washington system that was not at issue in Blakely. As Justice O'Connor noted in her dissent in Blakely,

> [p]rior to 1981, Washington, like most other States and the Federal Government, employed an indeterminate sentencing scheme. Washington's criminal code separated all felonies into three broad categories: "class A," carrying a sentence of 20 years to life; "class B," carrying a sentence of 0 to 10 years; and "class C," carrying a sentence of 0 to 5 years. Sentencing judges, in conjunction with parole boards, had virtually unfettered discretion to sentence defendants to prison terms falling anywhere within the statutory range, including probation -- i.e., no jail sentence at all.

542 U.S. at 315 (O'Connor, J., dissenting) (emphasis added) (citations omitted). Similarly, sentencing judges in Hawai'i, in conjunction with parole boards, have "virtually unfettered discretion to sentence defendants to prison terms falling anywhere within the statutory range, including probation," id.

In Blakely, the judge was not authorized to impose the 90-month sentence based solely on the facts admitted in Blakely's plea. The aggravating fact in Blakely was that Blakely acted with what the sentencing judge deemed was "deliberate cruelty," whereas the fact that extended White's sentence was his concurrent conviction for two or more felonies. "The factor that justifies the enhancement of the sentence to extended prison terms, therefore, is the fact of prior or multiple felony convictions." Rivera, 106 Hawai'i at 162, 102 P.3d at 1060.

In the present matter, but for White's multiple convictions there would be no basis for extended prison terms. HRS § 706-662(4)(a), see supra note 3, authorizes a judge to impose an extended prison term upon finding that the defendant committed a previous felony; without the foregoing finding, notwithstanding that such a sentence may be considered "necessary for protection of the public," a judge would not be authorized to impose it. It is erroneous to think that the "necessary for protection of the public" requirement has any greater effect at

extended term sentencing than it does at ordinary sentencing. The circuit court was first required to consider the factors set forth in HRS § 706-606 (1993)[8] "in determining the particular sentence to be imposed." Among the traditional sentencing considerations set forth in HRS § 706-606, see supra note 8, is the "need for the sentence imposed . . . [t]o protect the public from further crimes of the defendant," HRS § 706-606(2)(c).

> [I]nasmuch as both HRS §§ 706-606[, see supra note 8,] and 706-662[, see supra note 3,] require the determination of whether the sentence imposed is needed to protect the public, the sole . . . factor, beyond those already enumerated in HRS § 706-606 and already considered by the sentencing court, which extends an indeterminate prison term pursuant to HRS § 706-662(4)(a), is the fact that a defendant is a multiple offender. The multiple offender determination, pursuant to HRS § 706-662(4)(a), mirrors the prior conviction exception in Apprendi because the defendant has either already pleaded guilty, and thereby admitted guilt, or the trier of fact has found beyond a reasonable doubt that the defendant has committed two or more felonies for which he is currently being sentenced. See Apprendi, 530 U.S. at 488 . . . (reasoning that both the "certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that [the defendant] did not

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[8] HRS § 706-606 provides:

> **Factors to be considered in imposing a sentence.** The court, in determining the particular sentence to be imposed, shall consider:
>
> (1) The nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) The need for the sentence imposed:
>
> (a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
>
> (b) To afford adequate deterrence to criminal conduct;
>
> (c) To protect the public from further crimes of the defendant; and
>
> (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) The kinds of sentences available; and
>
> (4) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

(Emphases added).

> challenge . . . that 'fact[,]' . . . mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range").

Rivera, 106 Hawai'i at 163, 102 P.3d at 1061.

Because we disagree with White that "[t]he Rivera court's acceptance of Blakely's labels (particularly the term 'indeterminate'), absent confirmation that Washington's definition of 'indeterminate' was the same or nearly the same as Hawaii's," was erroneous and that the "necessary for protection of the public" consideration is qualitatively different as between ordinary and extended-term sentencing, we affirm White's extended-term sentence.

IV. CONCLUSION

Based on the foregoing analysis, we affirm White's sentence to extended terms of imprisonment.

On the briefs:

Phyllis Hironaka,
Deputy Public Defender,
for the defendant-appellant
Wayde K. White

Daniel Shimizu,
Deputy Prosecuting Attorney,
for the plaintiff appellee
State of Hawai'i