IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

GLENN KEOHOKAPU, JR., Petitioner/Defendant-Appellant.

NO. SCWC-29937

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 29937; CR. NO. 08-1-0905)

MAY 15, 2012

CONCURRING AND DISSENTING OPINION BY
RECKTENWALD, C.J., IN WHICH NAKAYAMA, J., JOINS

This case requires us to consider how juries should be instructed under Hawaii's recently-amended extended sentencing law. That law now requires a jury to determine, inter alia, whether an extended term prison sentence is necessary for the protection of the public. See Hawaiʻi Revised Statutes (HRS) §§ 706-661 (Supp. 2008), 706-662 (Supp. 2008), and 706-664 (Supp. 2008). Previously, that was an issue for a judge to determine;

however, in the wake of a series of U.S. Supreme Court cases beginning with Apprendi v. New Jersey, 530 U.S. 466 (2000), the legislature in 2007 amended the statute to assign this task to a jury, unless waived by the defendant. See 2007 Haw. Sess. Laws, Second Special Sess., Act 1, §§ 1-4 at 1-4.

In the instant case, defendant Glenn Keohokapu, Jr. was convicted of manslaughter for stabbing Steven Wilcox to death outside a bar, and thus faced a possible twenty year indeterminate sentence. HRS §§ 707-702[1] and 706-659.[2] However, the State sought to extend his sentence to a term of life with the possibility of parole, and accordingly the jury was asked to consider whether Keohokapu was a persistent offender,[3] and whether an extended term sentence was needed to protect the public. HRS § 706-661(1). As set forth below, there was ample evidence establishing that Keohokapu was a persistent offender, and that Wilcox's death was one of a number of violent or otherwise criminal acts committed by Keohokapu during his adult life.

The circuit court accurately instructed the jury that

[1] HRS § 707-702(3) (Supp. 2008) provides, "Manslaughter is a class A felony."

[2] HRS § 706-659 (Supp. 2008) provides in pertinent part that "a person who has been convicted of a class A felony . . . shall be sentenced to an indeterminate term of imprisonment of twenty years without possibility of suspension of sentence or probation."

[3] HRS § 706-662(1) (Supp. 2008) defines "persistent offender" as a defendant who has "previously been convicted of two or more felonies committed at different times when the defendant was eighteen years of age or older."

the applicable sentencing options were a twenty year indeterminate term of imprisonment, or an extended term of life with the possibility of parole, and also gave the jury accurate definitions of "indeterminate term of imprisonment" and "parole." In my view, that information was required so that the jury could perform its role--as mandated by HRS § 706-662--to determine whether the extended term was necessary for the protection of the public.

The majority suggests that the jury should have instead been instructed that the applicable sentencing options were "maximums of twenty years and life[,]" e.g., without any reference to parole. Majority Opinion at 49. Respectfully, I disagree with that approach on several grounds. First, it is contrary to the statutory extended term sentencing scheme, which requires the jury to determine whether "an extended term of imprisonment is necessary for the protection of the public." See HRS §§ 706-662 and 706-664. Absent accurate information about the applicable sentencing options, the jury cannot fulfill its role under the statute. See HRS § 706-661.

Second, the majority's approach has the potential to confuse the jury about the applicable extended term. A jury could reasonably infer that a sentence of "life" means that the defendant will remain imprisoned for the remainder of his or her life. However, that inference would not necessarily be accurate, since a defendant such as Keohokapu would be eligible for parole.

Finally, the majority's approach does not account for the fact that in certain cases, the statute requires the jury to determine whether a defendant should be subjected to an extended sentence of life without parole, rather than a sentence of life with the possibility of parole. See HRS § 706-661(1) (providing that the maximum length of an extended term of imprisonment for murder in the second degree, which carries a sentence of life imprisonment with the possibility of parole, shall be "life without the possibility of parole"). There is no way that a jury could meaningfully make that decision without being informed of the difference between life with, and life without, the possibility of parole. Thus, the legislature clearly contemplated that juries would not be shielded from the fact that parole is available.

The circuit court here went further and included additional information about how the parole process works, including the setting of minimum terms. While I believe that this additional information was not required by the statute, any error in giving it was harmless in light of the overwhelming evidence in the record supporting the need for an extended term sentence to protect the public. Similarly, any error in the admission of evidence at the extended term sentencing hearing was harmless beyond a reasonable doubt.

Accordingly, I would affirm Keohokapu's conviction for

manslaughter[4] and the extended term sentence imposed by the circuit court.

I. Background

Keohokapu was charged with murder in the second degree, pursuant to HRS §§ 707-701.5 (1993) and 706-656 (Supp. 2008), in connection with an incident on the night of June 7, 2008, in which he fatally stabbed Wilcox during a fight outside of a nightclub.

A. Trial

In brief summary, the evidence a trial showed the following. On June 7, 2008, Wilcox and his friend Robin Gregory were at the nightclub Komo Mai. Keohokapu, Keohokapu's wife (Kauilani), and Keohokapu's brother were also at that nightclub. At some point in the evening, Keohokapu became upset after Wilcox's friend Gregory allegedly stared at Kauilani. Keohokapu left the club and Kauilani followed him outside, attempting to calm him down. Keohokapu's brother later joined the two of them outside. During their conversation, Keohokapu's brother "push[ed]" Kauilani away from the car. According to Kauilani, in response to seeing her being pushed, Wilcox, who had exited the club, said, "that's one female." Keohokapu's brother believed that Wilcox made that statement because Wilcox was trying to

[4] I concur with the majority's holding that the process by which the jury was selected did not result in substantial prejudice to Keohokapu, notwithstanding the pretrial publicity. Majority opinion at 1-2. Thus, that issue is not discussed further herein.

intervene in the situation. Thereafter, Keohokapu's brother told Wilcox that "it doesn't concern you[,]" and Keohokapu told Wilcox "that's my wife."

Several witnesses testified that Wilcox then began to fight with Keohokapu. Attempts were made to break up the fight between Wilcox and Keohokapu and calm the two men down. One witness recalled seeing a knife, held by Keohokapu, enter Wilcox's stomach. Keohokapu attempted to get into Kauilani's car, but she initially did not open the door because she was in shock and did not want to open the door until Keohokapu dropped the knife. Keohokapu left the scene with Kauilani. Wilcox was taken to the hospital where he died as a result of the stab wound.

Keohokapu testified in his own defense. He testified that, as the altercation began, Wilcox removed brass knuckles from his pocket, which caused Keohokapu to reach for a knife he had in his car because he was "worried." Keohokapu told Wilcox, "I going poke you[,]" but Wilcox continued to approach Keohokapu. Keohokapu testified that Wilcox eventually "walk[ed] into" the knife while Keohokapu was dodging Wilcox's punch. In closing argument, defense counsel argued that Keohokapu acted in self-defense.

The jury found Keohokapu guilty of the included offense of manslaughter, in violation of HRS § 707-702.

B. Sentencing Proceeding

Prior to Keohokapu's sentencing, the State notified Keohokapu that he was eligible to be sentenced to an extended term of imprisonment as a persistent offender pursuant to HRS §§ 706-661 (Supp. 2008) and 706-662(1) (Supp. 2008). The State also notified Keohokapu that it intended to introduce evidence of his past crimes. On May 27, 2009, the sentencing phase of Keohokapu's trial began before the same jury that had found him guilty of manslaughter. The court instructed the jury that the purpose of the hearing was to determine whether Keohokapu may be subject to an extended term of imprisonment for the manslaughter offense.

Pursuant to a subpoena, Kauilani testified for the State. The DPA asked Kauilani about an incident that occurred on April 3, 1996, which led Kauilani to file a police report. On that date, Kauilani returned to the apartment she was sharing with Keohokapu, who was her boyfriend at the time, to retrieve her belongings in order to move back with her mother. The next day, Kauilani reported to the police that Keohokapu hit her. When Kauilani could not remember further details of the encounter, the DPA showed her the relevant police report. When asked whether the report refreshed her recollection, Kauilani

answered in the affirmative.[5] The DPA then asked Kauilani whether Keohokapu grabbed her, to which Kauilani responded, "On the paper it says he slapped me." Kauilani then proceeded to testify in greater detail that Keohokapu slapped her in the face a few times, pushed her, grabbed her neck, said "I like kill you" and "you're going to die," and locked her in a room.

The DPA then asked Kauilani about an incident that occurred on July 13, 1996. Kauilani and Keohokapu were still dating, but were not living together. Keohokapu arranged to go to Kauilani's house to talk to her. Kauilani testified that Keohokapu came to see her because he missed her, thought she was seeing someone else, and had someone else's jacket. After Keohokapu arrived, Kauilani wanted to leave, but Keohokapu pulled her hair and ears, hit her, head butted her, scratched her chest, and bit her in the eye and on her shoulder. Kauilani reported the abuse as "[a]buse of family and household member[.]"

The DPA then asked Kauilani about another incident that occurred on October 20, 1994. Kauilani testified that on that day, Keohokapu grabbed her, causing her to hit her head against a brick wall, bit her, and pulled her stomach. Defense counsel then requested a bench conference and asked the DPA whether Kauilani was testifying with the police report in front of her.

[5] It is unclear whether the DPA retrieved the police report from Kauilani, but the record reflects that the DPA approached Kauilani before asking her whether the report refreshed her recollection.

The DPA responded that she did not know. The DPA then asked Kauilani about her testimony regarding the July 1996 and October 1994 incidents, and Kauilani stated, "I told you this is a part of my life that I tried to forget. And yes, I'm reading it from the paper."

The DPA then asked Kauilani about the police report for the July 13, 1996 incident. Kauilani testified that she signed the report, and wrote it the day following the incident. Kauilani testified that the report refreshed her recollection. However, when asked if she remembered her "hair being pulled" and being "head butted[,]" Kauilani responded "No[,]" "[t]his is back in '96." Over defense counsel's objection, the circuit court moved the report into evidence as a past recollection recorded. The report was then read to the jury, and its contents were consistent with Kauilani's prior testimony.

The DPA proceeded to examine Kauilani with respect to her report of the October 20, 1994 incident, but then withdrew her questions and did not attempt to move the report into evidence.

Kauilani further testified that she took out an order for protection against Keohokapu on March 11, 2008, because he was "run[ning] around with [other] girls" and smoking, and she wanted to get her car back. When asked whether Keohokapu physically abused her in January 2008, Kauilani responded, "Only because I wanted to grab my keys, and I didn't want him to take

the car. So I went for my keys. And he kept pushing me away." Kauilani testified that Keohokapu "ended up" cutting the middle of her eye with his teeth, choking her, and slapping her because she wouldn't move away from the door. She could not remember whether he forced her to have sex. Kauilani testified that she did not recall an incident of abuse on March 9, 2008. However, upon refreshing her recollection with the petition for an order for protection, Kauilani testified that, on March 9, 2008, Keohokapu grabbed her, pushed her, pulled her hair, choked her neck, and verbally abused her. However, she again testified that the purpose of the order for protection was to get her car back.

The DPA then asked Kauilani about a violation of the order for protection that occurred on April 23, 2008.[6] Kauilani explained that Keohokapu was "hurt" because she was going to the mainland to care for a cousin with Down Syndrome. Kauilani denied that she was leaving Hawaiʻi in order to get away from Keohokapu. The DPA then confronted Kauilani with her petition for an order for protection, in which Kauilani stated that she needed the order to protect herself until she could move out of state with her mother. Kauilani testified that she left for the mainland on April 24, 2008 and did not return until June 3, 2008, or four days before the incident at club Komo Mai.

The State then called Gregory Balga as a witness

[6] Kauilani testified over the course of two days. Kauilani gave the following testimony on the second day, March 28, 2009.

regarding an incident that occurred on October 23, 1993. Balga met Keohokapu in the early 1990's but could not recall what occurred on October 23, 1993. Specifically, Balga testified, "I have a drinking problem and I believe I was drinking." The DPA showed Balga his statement to the police concerning the incident. Balga testified that the statement was in his writing and bore his signature, but did not refresh his recollection regarding what occurred. Balga did not recall making a statement or talking to a police officer. The statement was admitted over objection as a past recollection recorded and was read to the jury. In the statement, Balga indicated that Keohokapu had accused him of "fooling around with his chick" and had kicked Balga in the face and hit Balga's sister. On cross-examination, Balga stated that he could not say whether the information he had written in his statement was accurate.

In addition, the following testimony was adduced from various witnesses. A Honolulu Police Department (HPD) officer testified that he arrested Keohokapu for robbery on December 18, 1994, and that Keohokapu had injured the complaining witness's mouth, jaw, and chin area, and had bitten the witness's arm. Another HPD officer testified that he arrested Keohokapu in connection with a homicide case on June 9, 2008,[7] and that, upon arriving at Keohokapu's home, he witnessed Keohokapu jump on a

[7] It appears that the HPD officer was testifying about the instant case and that the female inside the car was Kauilani.

woman's car, break off one of the windshield wipers, and attempt to break the windshield with his fist. During the testimony of a representative of the Hawaiʻi Criminal Justice Data Center, a criminal history record for Keohokapu was admitted into evidence, which showed twenty convictions. An HPD fingerprint examiner testified that Keohokapu's prints matched the prints taken for several police reports. Four of the police reports were associated with felony charges, i.e., burglary in the first degree, robbery in the second degree, promoting dangerous drugs in the third degree, and unlawful use of drug paraphernalia. Another HPD officer testified that he executed a search warrant at Keohokapu's home on December 6, 2002 and found a pipe and several bags of a substance resembling crystal methamphetamine.

After the State rested, the defense moved for judgment of acquittal, which was denied. Keohokapu presented testimony of his mother, sister, and father, which showed that Keohokapu was abused as a child. For example, Keohokapu's mother testified that from ages six to seventeen, Keohokapu's father would punch Keohokapu in the face or chest. When asked about whether she had spoken to Keohokapu since the homicide, his mother responded affirmatively and testified that Keohokapu had "expressed regret" for what happened. Keohokapu's father admitted being an "abusive father" and felt "responsible for what happened because of the way [he] raised him." Keohokapu did not testify.

During the settling of jury instructions, defense

counsel objected to the circuit court's proposed jury instructions numbers 2 and 4, concerning parole. Defense counsel explained that the instructions "might lead a jury to speculate that sentences imposed would result in shorter sentences that for whatever reason a jury might feel the need to over-compensate by extending -- by voting to extend a sentence." The State argued that the instructions were appropriate because the jury "need[s] to know what it is that they are -- that they are answering." The circuit court indicated that it would give the instructions over defense counsel's objection.

The jury was instructed that, for the offense of manslaughter, Keohokapu "may be subject to a maximum indeterminate term of imprisonment of twenty years."[8] The jury was further instructed that it would be required to answer two special interrogatories, contained in jury instruction number 1, in pertinent part:

> 1. Has the prosecution proven beyond a reasonable doubt that [Keohokapu] is a persistent offender in that he has previously been convicted of two or more felonies committed at different times when he was eighteen years of age or older?
>
> 2. Has the prosecution proven beyond a reasonable doubt that it is necessary for the protection of the public to subject [Keohokapu] to an extended term of imprisonment, which would extend the maximum length of his imprisonment for the offense of Manslaughter from twenty years of incarceration to life with the possibility of parole?

The jury was read the following instructions concerning parole:

[8] This instruction appeared in jury instruction number 7.

> **[Jury Instruction No. 6]** An "indeterminate term of imprisonment" is a sentence to imprisonment for the maximum period defined by law, subject to termination at any time after service of the minimum term of imprisonment determined by the Hawaii Paroling Authority.
>
> **[Jury Instruction No. 2]** When a person has been sentenced to a term of imprisonment, the Hawaii Paroling Authority shall, as soon as practicable but no later than six months after commitment to the custody of the Director of the Department of Public Safety hold a hearing, and on the basis of the hearing make an order fixing the minimum term of imprisonment to be served before the prisoner shall become eligible for parole.
>
> The Paroling Authority in its discretion may, in any particular case and at any time, impose a special condition that the prisoner will not be considered for parole unless and until the prisoner has a record of continuous exemplary behavior.
>
> After sixty days notice to the prosecuting attorney, the authority in its discretion may reduce the minimum term fixed by its order.
>
> **[Jury Instruction No. 3]** "Parole" means a conditional release of a prisoner who has served part of the term for which he was sentenced to prison.
>
> **[Jury Instruction No. 4]** The following provision of law relates to "parole", as defined in these instructions:
>
> No parole shall be granted unless it appears to the Hawaii Paroling Authority that there is a reasonable possibility that the prisoner concerned will live and remain at liberty without violating the law and that the prisoner's release is not incompatible with the welfare and safety of society.
>
> **[Jury Instruction No. 5]** You must not discuss or consider the subject of any action that the Hawaii Paroling Authority may or may not take in your deliberations of the facts at issue in this hearing.

During its closing argument, the State argued that in determining whether an extended term of imprisonment was necessary for the protection of the public, the jury should consider "the time frame of these incidents" and "the fact that there are no signs of rehabilitation." The State pointed out that the first incident occurred on October 23, 1993 and involved Balga, while the second incident was in 1996 and involved another felony, robbery in the second degree. The State further pointed

to multiple incidents in 1996 that involved Kauilani and highlighted violations and crimes that occurred when Keohokapu was not in prison. In conclusion, the State argued:

> [Keohokapu], even after the death of [] Wilcox is not concerned about his own safety, safety of others, safety of the person who's driving the car or anybody else that's on the road because he's angry.
>
> When he's angry and he gets violent and he cannot control himself.
>
> And when he gets angry and he gets violent and he cannot control himself, it results in injuries to other people, and now it has escalated into a death of a person.
>
> And because of that, the State is asking you to find that the extended term of imprisonment is necessary for the safety of the public.

In closing, defense counsel argued, inter alia:

> [T]he starting point is Manslaughter. Manslaughter is to be punished by 20 years. The life lost in a manslaughter case is to be repaid by 20 years. You cannot punish [Keohokapu] by unanimously saying yes to a life sentence and you cannot make [Keohokapu] repay the loss of [Wilcox's] life by exacting the price of a life sentence.
>
> You can only vote yes to a life sentence for [Keohokapu] if the State has proved to you beyond a reasonable doubt that it is necessary for the protection of the public that he be subjected to an extended term of imprisonment amounting to life.

In its rebuttal, the State argued that "from the first incident until the death of [] Wilcox in June, 2008, the time that [Keohokapu] spent in society [was] about five years[,]" even though the time period spanned over "16 or so years[.]" The State emphasized that in those "five years, [Keohokapu] managed to get three felony convictions, two of them which had injuries, a drug charge, methamphetamine charge, two abuse convictions, a restraining order conviction where the restraining order was based on two other physical abuse cases[,]" prior to causing

Wilcox's death.

The jury found that the State had met its burden of proving that Keohokapu was a persistent offender and that an extended term of imprisonment was necessary for the protection of the public. The circuit court sentenced Keohokapu to an extended term of imprisonment for life, with the possibility of parole.

II. Discussion

Given recent changes in the statutory framework for extended term sentencing, the circuit court properly instructed the jury that the applicable sentencing options were a twenty year indeterminate term of imprisonment, or an extended term of life with the possibility of parole, and also properly gave the jury accurate definitions of "indeterminate term of imprisonment" and "parole." Thus, I respectfully disagree with the majority's holdings that those instructions constituted reversible error. Although the circuit court gave the jury unnecessary additional information about the parole process in instructions 2 and 4, those instructions were harmless in light of the entire record, which included overwhelming competent evidence that supported the conclusion that an extended term sentence was necessary for the protection of the public. For the same reason, I believe that the alleged evidentiary errors were also harmless.

Prior to 2007, Hawaii's extended term sentencing statutes required, inter alia, that the sentencing judge--not the jury--determine that an extended term of imprisonment was

necessary for the protection of the public. See HRS §§ 706-661 (Supp. 2007) and 706-662 (Supp. 2007); see also State v. Maugaotega, 115 Hawaiʻi 432, 446-47, 168 P.3d 562, 576-77 (2007) (recognizing that HRS § 706-662 "in all of its manifestations, authorizes the sentencing court to extend a defendant's sentence beyond the 'standard term' authorized solely by the jury's verdict [] by requiring the sentencing court, rather than the trier of fact, to make an additional necessity finding") (emphasis added).

In 2000, in Apprendi, the United States Supreme Court ruled 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." 530 U.S. at 490. In light of Apprendi, several states amended their extended term sentencing procedures. Nevertheless, this court, relying on the distinction between intrinsic and extrinsic sentencing factors, initially maintained that Hawaii's extended term sentencing statute comported with Apprendi. See, e.g., State v. Kaua, 102 Hawaiʻi 1, 10-13, 72 P.3d 473, 482-85 (2003). However, in 2007, in Cunningham v. California, 549 U.S. 270, 291 n.14 (2007), the United States Supreme Court rejected the intrinsic/extrinsic distinction. Subsequently, in Maugaotega, this court expressly held that Hawaii's extended term sentencing statutes were unconstitutional. 115 Hawaiʻi at 477-48, 168 P.3d at 576-77. Thereafter, the

legislature amended Hawaii's extended term sentencing statutes, HRS §§ 706-661, 706-662, and 706-664, to comport with, inter alia, Apprendi, Cunningham, and Maugaotega. See 2007 Haw. Sess. Laws, Second Special Sess., Act 1, § 1 at 2 ("The purpose of this Act is to amend Hawaii's extended term sentencing statutes to ensure that the procedures used to impose extended terms of imprisonment comply with the requirements set forth by the United States Supreme Court and Hawaii supreme court."). Thus, the statute governing extended terms of imprisonment, HRS § 706-661, was amended to read as follows:

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

HRS § 706-661 (Supp. 2008).

The statute governing the criteria for extended terms of imprisonment, HRS § 706-662, was amended to require that the criteria for extended terms of imprisonment be "proven beyond a reasonable doubt":

> **Criteria for extended terms of imprisonment.** A defendant who has been convicted of a felony may be subject to an extended term of imprisonment under

> section 706-661 if it is proven beyond a reasonable doubt that an extended term of imprisonment is necessary for the protection of the public and that the convicted defendant satisfies one or more of the following criteria:
> (1) The defendant is a persistent offender in that the defendant has previously been convicted of two or more felonies committed at different times when the defendant was eighteen years of age or older[.]

HRS § 706-662 (Supp. 2008) (emphasis added).

Significantly, the procedure for imposing extended terms of imprisonment under HRS § 706-664 was amended to incorporate a jury in the process of determining whether the grounds for imposing an extended term of imprisonment have been established:

> **Procedure for imposing extended terms of imprisonment.** (1) Hearings to determine the grounds for imposing extended terms of imprisonment may be initiated by the prosecutor or by the court on its own motion. The court shall not impose an extended term unless the ground therefor has been established at a hearing after the conviction of the defendant and written notice of the ground proposed was given to the defendant pursuant to subsection (2). Subject to the provisions of section 706-604, the defendant shall have the right to hear and controvert the evidence against the defendant and to offer evidence upon the issue before a jury; provided that the defendant may waive the right to a jury determination under this subsection, in which case the determination shall be made by the court.
> . . . .
> (3) If the jury, or the court if the defendant has waived the right to a jury determination, finds that the facts necessary for the imposition of an extended term of imprisonment under section 706-662 have been proven beyond a reasonable doubt, the court may impose an indeterminate term of imprisonment provided in section 706-661.

HRS § 706-664 (Supp. 2008) (emphasis added).

Thus, absent a waiver by the defendant, the jury now determines whether "the facts necessary for the imposition of an extended term of imprisonment under section 706-662 have been

proven beyond a reasonable doubt[.]" Id. While the jury is not responsible for sentencing, the jury must now determine whether the prosecution has proven beyond a reasonable doubt that, inter alia, an "extended term of imprisonment is necessary for the protection of the public[.]"[9] HRS § 706-662.

In connection with that inquiry, the circuit court accurately instructed the jury that for the offense of manslaughter, Keohokapu "may be sentenced to a maximum indeterminate term of imprisonment of twenty years." See HRS §§ 707-702(3) and 706-659. Also in accordance with legislative directive, see HRS §§ 706-661, 706-662, 706-664, the circuit court instructed the jury that it must answer the following two interrogatories:

> 1. Has the prosecution proven beyond a reasonable doubt that [Keohokapu] is a persistent offender in that he has previously been convicted of two or more felonies committed at different times when he was eighteen years of age or older?

[9] I respectfully disagree with the majority that the Hawaiʻi cases it relies on, State v. Peralto, 95 Hawaiʻi 1, 18 P.3d 204 (2001), State v. Young, 93 Hawaiʻi 224, 999 P.2d 230 (2000), and State v. Janto, 92 Hawaiʻi 19, 986 P.2d 306 (1999), are relevant to the inquiry before this court. See Majority opinion at 41-42. Those cases address the framework for enhancing a defendant's sentence for second degree murder pursuant to HRS § 706-657 if "the murder was especially heinous, atrocious, or cruel[.]" See Peralto, 95 Hawaiʻi at 6, 18 P.3d at 208; Young, 93 Hawaiʻi at 234-36, 999 P.2d at 240-42; Janto, 92 Hawaiʻi at 34-35, 986 P.2d at 321-22. Asking a jury to consider whether a murder was "especially heinous, atrocious, or cruel" for the purposes of enhancing a defendant's sentence, see Janto, 92 Hawaiʻi at 35, 986 P.2d at 322, does not involve the same considerations as asking the jury to determine whether "an extended term of imprisonment is necessary for the protection of the public[.]" HRS § 706-662 (emphasis added). The latter requires reference to the statutory maximum in order for the jury to determine whether a longer term is necessary for the protection of the public. In contrast, the former is a narrow inquiry that does not require any reference to the maximum length of the defendant's sentence. Accordingly, Janto, Peralto, and Young are inapposite.

> 2. Has the prosecution proven beyond a reasonable doubt that it is necessary for the protection of the public to subject [Keohokapu] to an extended term of imprisonment, which would extend the maximum length of his imprisonment for the offense of Manslaughter from twenty years of incarceration to life with the possibility of parole?

In addition, the circuit court provided the jury with accurate definitions of "indeterminate term of imprisonment" and "parole." All of these instructions were necessary for the jury to meaningfully perform its role prescribed by the legislature, see HRS § 706-662, since they enabled the jury to consider the maximum lengths of the two potential terms so that it could determine whether an extended term was necessary for the protection of the public.

The majority, however, suggests that the jury should have instead been instructed only that the applicable sentencing options were "maximums of twenty years and life[,]" i.e., without any reference to parole. Majority opinion at 49. I respectfully disagree with that approach on several grounds. First, it is contrary to the extended term sentencing scheme in this jurisdiction. As amended, the extended term sentencing statutes explicitly require the jury to determine whether "an extended term of imprisonment is necessary for the protection of the public," see HRS §§ 706-662 and 706-664, and explicitly recognize that the applicable "extended term" for Keohokapu is "an indeterminate life term of imprisonment[.]" See HRS § 706-661(1). Based on the plain language of the statutes, it is clear

that the legislature intended that the jury determine whether a term of life with the possibility of parole was necessary for the protection of the public.

Second, the majority's approach has the potential to confuse the jury about the applicable extended term. Respectfully, I do not believe that excluding references to "parole," where parole is statutorily a part of the extended term, results in an accurate description of the maximum length of the extended term. Majority opinion at 49-50. An interrogatory phrased in the manner suggested by the majority could lead a jury to reasonably infer that a sentence of "life" means exactly what it says, e.g., that the defendant will remain imprisoned for the remainder of his or her life. However, that inference would not necessarily be accurate, because a defendant such as Keohokapu would be eligible for parole.

Finally, the majority's approach does not account for the fact that in certain cases, the statute requires the jury to determine whether a defendant should be subjected to a sentence of life without parole, rather than a sentence of life with the possibility of parole. For example, a defendant who is convicted of murder in the second degree, absent an enhanced sentence, "shall be sentenced to life imprisonment with possibility of parole." HRS 706-656(2). If that defendant is eligible for an extended term of imprisonment, pursuant to HRS § 706-661(1), the maximum length of the relevant extended term of imprisonment for

"murder in the second degree" is "life without the possibility of parole." In that situation, a jury could not meaningfully make the decision of whether an extended term of imprisonment is necessary for the protection of the public without being informed of the difference between life with, and life without, the possibility of parole.[10] The fact that the legislature explicitly requires the consideration of those two options confirms that in the present circumstances, it intended for the option of life with the possibility of parole to be explained to the jury.

The majority cites a number of cases that stand for the general proposition that juries should not be instructed about the possibility of parole. In particular, the majority relies on People v. Ramos, 689 P.2d 430 (Cal. 1984), in support of its position that instructions concerning the possible post-conviction actions of other government agencies should be avoided. See Majority opinion at 42-44. I agree that considerations regarding sentencing should not play a role in the jury's deliberations on the guilt or innocence of a defendant, where extended sentencing is not at issue. However, this is not

[10] The majority suggests that in that situation, i.e., one involving a motion for extended term for the offense of murder in the second degree, the court should "instruct the jury to consider whether the defendant's sentence should be extended from possible life imprisonment to a definite (or fixed) sentence of life imprisonment." Majority opinion at 50 n.33. Respectfully, this proposed language appears contrary to legislative intent, as the plain language of HRS § 706-661(1) states that the extended term of imprisonment for murder in the second degree is "life without the possibility of parole[,]" not "a definite (or fixed) sentence of life imprisonment." Majority opinion at 50 n.33.

such a situation. As discussed supra, in response to Apprendi and its progeny, the legislature amended the extended term sentencing statutes to require the jury's involvement in issues of extended term sentencing, and in particular, to determine whether a specific extended term sentence was necessary for the protection of the public. See 2007 Haw. Sess. Laws, Second Special Sess. Act 1, §§ 1-4 at 1-4. Pursuant to Hawaii's sentencing scheme, the jury should be advised of what the applicable sentences would be, and given definitions of the terms that appear in those sentences. Accordingly, I respectfully disagree with the majority that the circuit court erred by so instructing the jury in the instant case.

The circuit court here went further and included additional information about how the parole process works. More specifically, jury instructions 2 and 4,[11] to which Keohokapu

[11] Jury Instruction No. 2 stated:

> When a person has been sentenced to a term of imprisonment, the Hawaii Paroling Authority shall, as soon as practicable but no later than six months after commitment to the custody of the Director of the Department of Public Safety hold a hearing, and on the basis of the hearing make an order fixing the minimum term of imprisonment to be served before the prisoner shall become eligible for parole.
> . . . .

Jury Instruction No. 4 stated:

> The following provision of law relate [sic] to "parole", as defined in these instructions:
>
> No parole shall be granted unless it appears to the Hawaiii Paroling Authority that there is a reasonable probability that the prisoner concerned will live and remain at liberty without violating the law and that

(continued...)

objected, told the jury about how the Hawaiʻi Paroling Authority sets the minimum prison term, and that the Hawaiʻi Paroling Authority determines whether parole shall be granted. While I believe that this additional information was not required by statute, any error in giving it was harmless in light of the overwhelming evidence in the record supporting the need for an extended term sentence to protect the public. Similarly, any error in admitting Balga's report or Kauilani's testimony about her October 1994 statement to police was harmless beyond a reasonable doubt.

When jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, "when read and considered as a whole, the instructions given [were] prejudicially insufficient, erroneous, inconsistent, or misleading." State v. Nichols, 111 Hawaiʻi 327, 334, 141 P.3d 974, 981 (2006). The alleged errors are "not to be viewed in isolation and considered purely in the abstract[,]" but rather "examined in the light of the entire proceedings and given the effect which the whole record shows [them] to be entitled." Id. I do not believe that jury instructions 2 and 4, while arguably irrelevant, were "prejudicially insufficient, erroneous, inconsistent, or misleading." Id. In light of the circuit

[11](...continued)
the prisoner's release is not incompatible with the welfare and safety of society.

court's proper instruction to the jury on what it was required to determine, and the overwhelming evidence adduced in support of the extended term sentence, there is no reasonable possibility that the alleged errors might have contributed to the jury verdict on the extended term motion.

Although jury instructions 2 and 4 arguably contained irrelevant information, that information was nevertheless accurate. Moreover, the circuit court specifically told the jury, as contained in jury instruction 5, "You must not discuss or consider the subject of any action that the Hawaii Paroling Authority may or may not take in your deliberations of the facts at issue in this hearing." This instruction was given immediately after the contested instructions concerning the Hawaiʻi Paroling Authority, and juries are presumed to have followed the court's instructions. State v. Smith, 91 Hawaiʻi 450, 461, 984 P.2d 1276, 1287 (App. 1999). Thus, this instruction clarified to the jury that its function was not to deliberate over issues of parole. Rather, the jury's function was to determine whether the prosecution had proven beyond a reasonable doubt that, inter alia, an extended term of imprisonment was necessary for the protection of the public.

The record contains overwhelming competent evidence of Keohokapu's criminal history. This evidence included repeated acts of domestic violence against Kauilani, who reluctantly testified or indicated in police reports that Keohokapu, inter

alia, hit her, slapped her, bit her, choked her, and threatened to kill her. Keohokapu's actions caused Kauilani to suffer bite marks, scratches, bruises, and hearing impairment. Multiple incidents occurred in 1996, and the jury heard testimony that over a decade later in 2008, Kauilani continued to allege in police reports acts of abuse and filed several orders for protection. Moreover, based on the testimony presented at trial, the jury was aware that the altercation between Keohokapu and Wilcox arose when Wilcox attempted to intervene in an argument involving Kauilani and Keohokapu.

In addition, the jury heard testimony from a police officer that in 1994, Keohokapu was arrested for robbery in the second degree, and the officer observed injuries to the complaining witness's mouth and jaw area, chin area, and to his right tricep area. The jury was also aware that Keohokapu was involved in the following four felony offenses: burglary in the first degree, robbery in the second degree, promoting a dangerous drug in the third degree, and unlawful use of drug paraphernalia.

Moreover, an officer testified that on June 9, 2008, the day after the incident resulting in Wilcox's death, the officer went to Keohokapu's house to arrest him in connection with the homicide case. The officer observed a female exiting the house and a male, later identified as Keohokapu, jumping on the front hood of the car. The officer could see that Keohokapu was "trying to smash the window in and he was holding on to what

appeared to be the windshield wipers, which [he thought Keohokapu] broke off at a later point, and started hitting the car with it." The officer further testified that Keohokapu broke off the driver's side windshield wiper and "started banging the window and the car with it." Based on what he observed, the officer's impression was that Keohokapu was attempting to get into the car.

Finally, Keohokapu's history of criminal conduct was particularly of concern since, although it spanned a period of sixteen years, Keohokapu had been out of custody for only five of those years. Moreover, although he had been incarcerated for a substantial period in the middle of those sixteen years, he resumed his prior criminal behavior when he was released.

Based on the overwhelming competent evidence admitted at the sentencing phase, there is no reasonable possibility that jury instructions 2 and 4 prejudiced Keohokapu. In light of the entire record, I believe that any evidentiary and instructional errors were harmless beyond a reasonable doubt. Accordingly, I respectfully dissent from the majority's holding that Keohokapu's extended term sentence must be vacated, and I would affirm Keohokapu's extended term sentence.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama