IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

STANLEY S.L. KONG, Petitioner/Defendant-Appellant.

SCWC-11-0000393

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000393; CR. NO. 09-1-0683(2))

December 10, 2013

DISSENTING OPINION BY ACOBA, J., WITH WHOM McKENNA, J., JOINS

I would hold,[1] first, that pursuant to State v.

[1] This court declined to hold oral argument in this case, thus foreclosing the parties from an opportunity to fully explain their positions before this court, in a case where the Intermediate Court of Appeals (ICA) published its opinion and there were, as discussed herein, manifest and substantial questions regarding the court's ruling. See Order Accepting Application for Writ of Certiorari, No. SCWC-11-0000393, 2013 WL 2936070 (June 13, 2013) (Acoba J., dissenting to rejection of oral argument). "'Oral arguments can assist judges in understanding issues, facts, and arguments of the parties, thereby helping judges decide cases appropriately.'" Blair v. Harris, 98 Hawaiʻi 176, 186, 45 P.3d 798, 808 (2002) (Acoba, J., concurring and dissenting) (citing R.J. Martineau, The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom, 72 Iowa L. Rev. 1, 4 (1986)); see also Clark Collings, Note, Oral Argument Reform In Utah's Appellate Courts: Seeking to Revitalize Oral Argument Through Procedural Modification, 2013 Utah L. Rev OnLaw 174, 176 (2013) (stating that oral argument "'enlivens the written

(continued...)

Hussein, 122 Hawaiʻi 495, 229 P.3d 313 (2010), the Circuit Court of the Second Circuit (the court) failed to provide adequate reasons on the record for sentencing Petitioner/Defendant-Appellant Stanley S.L. Kong (Kong) to consecutive, rather than concurrent sentences, thus failing to "confirm for the defendant, the victim, the public, and the appellate court, that the decision to impose consecutive sentences was deliberate, rational and fair." Hussein, 122 Hawaiʻi at 510, 229 P.3d at 328.

Second, the presumption of validity in the Pre-Sentence-Investigation Report (PSI) absent an objection by the defendant, as set out in State v. Sinagoga, 81 Hawaiʻi 421, 918 P.2d 228 (App. 1996) (Burns, C.J., majority opinion)[2], is

[1](...continued)
briefs, heightens [the court's] awareness of what is significant to the parties, and invigorates [its] analytical senses.'") (quoting Blair, 98 Hawaiʻi at 186, 45 P.3d at 808) (Acoba, J., concurring and dissenting)); cf. J. Mark White, Request for Oral Argument Denied: The Death of Oral Argument in Alabama's Appellate Courts, 69 Ala. Law. 123, 125 (2008) (noting that "[t]he impact that oral argument has on the perception of the parties as to the legitimacy of our legal system is compelling.") (citing Interview, 11 Haw. B.J. 4, 9-10 (2007)).

[2] Sinagoga contained two majority opinions and a dissenting opinion. In the first opinion, the ICA unanimously held, inter alia, that "if a sentencing court gives consideration to the defendant's previous convictions in choosing to impose consecutive, rather than concurrent, terms of imprisonment, the court must ensure that any prior felony, misdemeanor, and petty misdemeanor conviction relied on was a counseled one." Sinagoga, 81 Hawaiʻi at 435, 918 P.2d at 242 (Acoba, J., majority opinion) (citation omitted). In the second opinion (Part IV.B.4), two judges held that "if the presentence report states that the defendant has a prior criminal conviction and the defendant does not respond . . . with a good faith challenge . . . that the reported criminal conviction was (1) uncounseled, (2) otherwise invalidly entered, or (3) not against the defendant, that prior criminal conviction is reliable for all sentencing purposes." Id. at 444-45, 918 P.2d at 251-52 (Burns, C.J., majority opinion).

The dissent argued in response to the second opinion, inter alia, that the burden should be placed on the State, and not the defendant, to "come
(continued...)

inapplicable inasmuch as (1) Sinagoga is irrelevant where none of the parties dispute that prior convictions in the PSI were vacated on appeal; (2) the probation department erroneously included vacated convictions in the PSI; and (3) the vacated convictions are "not against the defendant[,]" State v. Heggland, 118 Hawaiʻi 425, 440 n.7, 193 P.3d 341, 356 n.7 (2008). Lastly, Kong's due process rights were violated by the court's use of the two dismissed convictions in sentencing Kong, and the violation was obvious plain error that "seriously affected the fairness, integrity, or public reputation of judicial proceedings[.]" State v. Miller, 122 Hawaiʻi 92, 100, 223 P.3d 157, 165 (2010).[3]

I.

Kong was convicted of one count of Promoting a Dangerous Drug in the Second Degree, HRS § 712-1242 (Supp. 2007)[4]

[2](...continued)
forward with proof of the validity of the relevant prior convictions[,]" because "the State is obviously the only party which can define that part of a defendant's criminal record it will use to support its request for consecutive sentencing." Id. at 436, 918 P.2d at 243 (Acoba, J., dissenting). The dissent further questioned the procedure suggested by the two-judge majority, inasmuch as under that procedure, "a defendant's failure to raise an uncounseled conviction constitutes, in effect, a waiver of his state constitutional right to effective assistance of counsel, . . . and permits the State to use such a conviction, even if uncounseled, in the sentencing process." Id. at 437, 918 P.2d at 244 (emphases in original).

[3] I also believe there was plain error inasmuch as Kong's waiver of rights with respect to the so-called "stipulated facts trial" was insufficient and failed to establish that all of his constitutional trial rights were knowingly, intelligently, and voluntarily waived.

[4] HRS § 712-1242 provides in relevant part as follows:

> (1) A person commits the offense of promoting a dangerous drug in the second degree if the person knowingly:

(continued...)

(Count 1) and one count of Prohibited Acts Related to Drug Paraphernalia, HRS § 329-43.5 (1993)[5] (Count 2), following Kong's self-termination from the Drug Court program. Prior to Kong's sentencing hearing, on March 31, 2011, the probation department prepared a PSI. The report stated that Kong had ten prior felony convictions, including seven burglary convictions. However, that total included two felonies, including one burglary conviction, listed under Cr. No. 92-0138, that had been vacated by the ICA. State v. Kong, 77 Hawaiʻi 264, 269, 883 P.2d 686, 691 (App. 1994) (Kong I). Thus, the total number of felony convictions listed in the PSI was in error.

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[4](...continued)

> . . . .
> (b) Possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of:
> (I) One-eighth ounce or more, containing methamphetamine, heroin, morphine, or cocaine or any of their respective salts, isomers, and salts of isomers;
> . . . .
> (2) Promoting a dangerous drug in the second degree is a class B felony.

(Emphasis added.)

[5] HRS § 329-43.5 provides in relevant part as follows:

> (a) It is unlawful for any person to use, or to possess with the intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter. Any person who violates this section is guilty of a class C felony and upon conviction may be imprisoned pursuant to section 706-660 and, if appropriate as provided in section 706-641, fined pursuant to section 706-640.

On April 11, 2011 the court conducted a continued sentencing hearing. Kong requested either a sentence of probation or concurrent sentences. Respondent/Plaintiff-Appellee State of Hawaiʻi (the State) took no position with regard to a concurrent sentence. The PSI recommended that Kong receive a concurrent sentence. However, the court sentenced Kong to two consecutive terms of imprisonment:

> Taking into consideration all of the factors set forth in [HRS §] 706-606 [(1993)], including the extensive record of the defendant, which includes six burglary convictions, which really represents -- I'm sorry. Yeah, six burglary convictions, ten felonies, which represents a lot of harm in our community.
>
> The [c]ourt is going to impose the following sentence in this matter. The defendant will be committed to the care and custody of the Director of the Department of Public Safety for a period of ten years on Count 1, five years on Count 2.
>
> . . . .
>
> In view of his extensive criminality, the [c]ourt is going to make these counts run consecutive for a total of fifteen years, mittimus forthwith, full credit for time served.

(Emphases added.) On the same date, the court entered its Judgment of Conviction and Sentence.

II.

A.

Kong appealed to the ICA, arguing in relevant part, (1) the court erred by imposing consecutive terms of imprisonment without adequately articulating its reasons and (2) the circuit court violated Kong's due process rights by basing its sentence on the PSI, which included two convictions that were later vacated. In its Answering Brief, Respondent argued (1) "the

trial court clearly stated [that] the specific fact of Kong's extensive criminal record was the reason for its imposition of consecutive sentencing," which was sufficient pursuant to [] Hussein [], and (2) because Kong failed to object to the PSI at sentencing, "he should not [] be allowed to argue that the [PSI] [was] inaccurate[]," pursuant to Sinagoga and Heggland.

B.

The ICA affirmed Kong's sentence. State v. Kong, 129 Hawaiʻi 135, 145, 295 P.3d 1005, 1015 (App. 2013) (Kong II). First, the ICA held that the court's statement at sentencing was sufficient to satisfy the requirements of Hussein:

> Kong's "extensive record" and the fact that he caused "a lot of harm in our community" are specific circumstances that led the Circuit Court to conclude that a consecutive sentence was appropriate in this case. Given these circumstances, the Circuit Court likely concluded that [Petitoner] was "dangerous to the safety of the public, or poses an unacceptable risk of re-offending [.]" Hussein, 122 Hawaiʻi at 509, 229 P.3d at 327. In fact, Kong had re-offended, admitting that he had used drugs while participating in the MDC program. Kong had been given a second chance when he was allowed to continue in the MDC program after relapsing. Yet, Kong decided to self-terminate from the program, suggesting that "rehabilitation appears unlikely due to his [ ] lack of motivation and a failure to demonstrate any interest in treatment [.]" Hussein, 122 Hawaiʻi at 509, 229 P.3d at 327. These specific circumstances support the conclusion that the Circuit Court's "decision to impose consecutive sentences was deliberate, rational, and fair." Hussein, 122 Hawaiʻi at 510, 229 P.3d at 328.

Id. at 141, 295 P.3d at 1012 (emphases added).

Second, the ICA held that the court properly considered Kong's PSI which included the two convictions that Kong contended were vacated. Id. at 143, 295 P.3d at 1013. The ICA did not

discuss whether those two convictions were actually vacated. See id. However, the ICA concluded that Kong's failure to challenge the PSI "resulted in a concession of its accuracy." Id. (citing Heggland, 118 Hawaiʻi at 445-46, 193 P.3d at 361-62). The ICA also held that the potential use of two vacated convictions "did not rise to the level of plain error," because the court "based its sentence on Kong's extensive criminal record in general and not specifically on the [vacated] convictions." Id.

III.

A.

Hussein represented a sea change in this court's jurisprudence. Prior to Hussein, courts were not required to provide reasons on the record to justify imposition of a particular sentence. See State v. Lau, 73 Haw. 259, 263, 831 P.2d 523, 525 (1992). Rather, this court "urged and strongly recommended that the sentencing court do so[.]" Id. In Hussein, the defendant challenged the court's imposition of consecutive rather than concurrent sentences. Hussein, 122 Hawaiʻi at 499, 229 P.3d at 317. In addressing this point of error, Hussein adopted as mandatory the advisement in Lau, when it stated that "[a]lthough to this point we have recognized the benefits of a statement of reasons but not mandated it, we now conclude . . . that a court must state its reasons as to why a consecutive

sentence rather than a concurrent one was required." Id. at 509, 229 P.3d at 327 (emphasis added).[6]

Hussein provided extensive rationale as to why such a requirement was adopted, including inter alia, the following:

> Such a requirement serves dual purposes. First, reasons identify the facts or circumstances within the range of statutory factors that a court considers important in determining that a consecutive sentence is appropriate. An express statement, which evinces not merely consideration of the factors, but recites the specific circumstances that led the court to impose sentences consecutively in a particular case, provides a meaningful rationale to the defendant, the victim, and the public.
>
> Second, reasons provide the conclusions drawn by the court from consideration of all the facts that pertain to the statutory factors. It is vital, for example, for the defendant to be specifically informed that the court has concluded that he or she is dangerous to the safety of the public, or poses an unacceptable risk of re-offending, or that rehabilitation appears unlikely due to his or her lack of motivation and a failure to demonstrate any interest in treatment, or that the multiplicity of offenses and victims and the impact upon the victims' lives warrant imposition of a consecutive term. Hence, reasons confirm for the defendant, the victim, the public, and the appellate court, that the decision to impose consecutive sentences was deliberate, rational, and fair.

Id. at 509-10, 229 P.3d at 327-28 (emphases added). It was further noted that "'the absence, or refusal, of reasons is a hallmark of injustice.'" Id. at 505, 229 P.3d at 323 (quoting ABA Standards for Criminal Justice, Sentencing, at 211-12,

[6] It has been explained that in a "typical" case, the court imposes concurrent, rather than consecutive sentences. See Sinagoga, 81 Hawaiʻi at 436, 918 P.2d at 243 (Acoba, J, dissenting) (noting that the effect of a consecutive sentence was "an additional ten years [added to the defendant's sentence] over the typical concurrent sentence of imprisonment.") (emphasis added); cf. Hussein, 122 Hawaiʻi at 509, 229 P.3d at 327 (holding that judges' discretion in imposing consecutive sentences is "limit[ed]" because "in order to impose a consecutive sentence, the judge must find certain facts").

Commentary Standard 18-5.19, Imposition of Sentence (3d ed. 1994)(hereinafter ABA Standards for Sentencing)).

B.

Precisely that sort of injustice took place in the instant case, inasmuch as the court's limited statement did not satisfy Hussein and did not sufficiently justify on the record the imposition of consecutive sentences on the defendant.

1.

It is readily apparent that the only mention of the court's decision to sentence the defendant to consecutive sentences was its statement that, "[i]n view of his extensive criminality, the [c]ourt is going to make these counts run consecutive . . . ." The ICA maintained that this was sufficient to "[t]ak[e] into consideration all of the factors set forth in HRS Section 706-606, including the extensive record of the defendant, which includes six burglary convictions . . . ten felonies,[7] which represents a lot of harm in our community." Kong II, 129 Hawaiʻi at 141, 295 P.3d at 1011. However, that statement was not directed toward explaining the imposition of consecutive rather than concurrent sentences. Kong had asked for probation and the State had requested an "open ten year term." The statements of the court cited by the ICA served to justify

[7] As noted infra, this number was erroneous.

the court's decision to sentence Kong to a prison term, instead of probation, as had been requested by Kong. Thus, that statement was not a justification of the court's decision to impose consecutive sentences. See Hussein, 122 Hawaiʻi at 509, 229 P.3d at 327 (holding that "a court must state its reasons as to why a consecutive sentence rather than a concurrent one was required").

2.

The court devoted only a single statement to explain the necessity of imposing consecutive sentences. The court merely related that "[i]n view of Kong's extensive criminality, the [c]ourt is going to make these counts run consecutive." This abbreviated recitation contravenes the holding in Hussein that giving reasons on the record for imposing consecutive sentences assures "the defendant, the victim, the public, and the appellate courts, that the decision to impose consecutive sentences was deliberate, rational, and fair." Id. at 509, 229 P.3d at 327.

In Hussein, this court set forth examples of constructive information that would satisfy the requirement of on-the-record reasons. Id. Hussein explained that "[i]t is vital, for example, for the defendant to be specifically informed that the court has concluded that he or she is dangerous to the safety of the public, or poses an unacceptable risk of re-offending, or that rehabilitation appears unlikely due to his or

her lack of motivation and a failure to demonstrate any interest in treatment, or that the multiplicity of offenses and victims and the impact upon the victims' lives warrant imposition of a consecutive term." Id. The court's remarks in the instant case plainly ignored these examples, thus reverting to the practice existing prior to Hussein that did not provide assurance that the decision was (1) rational, or (2) fair.

Additionally, Hussein explained that "the less burdensome procedural alternative of consecutive term sentencing may be viewed as a way to obtain the same sentencing result as would be reached in extending sentences, but without the necessity of convening the more lengthy jury procedures required by Apprendi[v. New Jersey, 530 U.S. 466 (2000)]." Hussein, 122 Hawaiʻi at 508, 229 P.3d at 326. It was further noted that in many trials, the State "moves for both extended and consecutive sentences in the same case, and [] it is not uncommon for the court to deny a motion for an extended term, while granting a motion for consecutive terms." Id. at 508 n.19, 299 P.3d at 326 n. 19. Hence, this court explained that "if consecutive terms sentencing may be employed as a possible alternative to extended sentencing and the jury fact-finding requirements imposed in Apprendi, such a possibility warrants closer scrutiny of consecutive sentences[,]" id. at 509, 229 P.3d at 327, or a

reformulation of the basis for justification of consecutive sentences.

Because it failed to provide reasons, the court's solitary statement did not evince any rationality. From the court's reference to "extensive criminality," it does not follow that Kong should have been sentenced to consecutive, rather than concurrent sentences. The court failed to explain the particular facts relating to Kong that led to its decision to impose consecutive sentences, in the absence of a recommendation by any party or by the probation office for such sentences. In a rational sentencing context, it is not possible to draw a connection between consecutive sentences and a vague reference to "extensive criminality." As discussed infra, this court should not have to guess, on appeal, what about the nature of the prior offenses justified, in the court's mind, the sentences imposed.

For example, if the court's concern was the safety of the public, the court should have said as much, citing supporting facts, at which point Kong would have been informed of why the court had decided that his prior convictions meant he posed a risk to the public and hence warranted consecutive terms. On the other hand, if the court's concern was that the defendant posed an unacceptable risk of re-offending due to specific factors in his background, and had stated that on the record, Kong, the appellate courts, and the public would, again, have been informed

about why he was sentenced to consecutive sentences. Indeed, "inherent in the nature of justice is the notion that those involved in the litigation should understand and be understood." In re Doe, 99 Hawaiʻi 522, 534, 57 P.3d 447, 459 (2002).

Further, because the court neglected to recite the specific circumstances that led it to impose the sentences consecutively, rather than concurrently, there is no confirmation that under the circumstances, the court's sentence was fair. Hypothetically, if the court had reasoned that Kong was dangerous to the public, even though there was no indicia of violence from his earlier convictions, it is possible that the court abused its sentencing discretion.[8] On appeal, a reviewing court would not have the facts in the record available to it to determine whether the court had abused its discretion or not, if, as here, all the court articulated was a general reference to "extensive criminality." There would be no way to ensure that the sentence was arrived at fairly, based upon this lone phrase.

[8] In the instant case, the nature of the defendant's prior felonies may be relevant. Excluding the vacated Cr. No. 92-1038 convictions for burglary and unauthorized use of a propelled vehicle in Cr. No. 92-1038, see Kong I, 77 Hawaiʻi at 265, 883 P.2d at 687, Kong was convicted of eight total felonies, none of which were violent crimes. Instead, the crimes listed on Kong's PSI are primarily property offenses. The nature of Kong's prior felony convictions illustrates the usefulness of having the court articulate the specific facts that led to its decision, rather than generally referencing "criminality," which adds nothing to sentencing procedures for crimes. Assuming from the court's statement that the past crimes were the basis for the consecutive sentences, the court needed to elucidate the specific matters that led it to conclude consecutive sentences rather than concurrent ones were warranted, in order to provide a "meaningful rationale to the defendant, the victim, and the public." Hussein, 122 Hawaiʻi at 509-10, 229 P.3d at 327-28.

The inadequacy of the court's recitation is further highlighted by the ABA Standards for Sentencing, which this court quoted with approval in Hussein. The Commentary to Standard 18-5.19 states that "a concise statement [of reasons] may appropriately accompany a sentence that is within the parameters of the presumptive sentence for the offense." ABA Standards for Sentencing, Commentary to Standard 18-5.19 at 213. However, a "concise statement" is inappropriate when the court imposes consecutive sentences. Id. at 213 n.2. Instead, "[a] more extensive statement [is] necessary to explain the reasons for the sentence." Id. at 213. Clearly, the court's single sentence did not amount to an "extensive statement" that explained the reasons for the consecutive sentences.

Moreover, as noted, no one requested a sentence of consecutive terms. Hence, the only justification for the consecutive sentences was the court's single statement about Kong's "extensive criminality." In this context, the court's solitary statement violated its duty to recite the specific circumstances related to the factors leading it to impose consecutive, as opposed to concurrent sentences, see Hussein, 122 Hawaiʻi at 510, 229 P.3d at 328, despite the lack of any recommendation to that effect from any party or the probation department.

"A good sentence is one that can be explained with reasons." Id. at 505, 229 P.3d at 323 (quoting State v. Hall, 648 N.W.2d 41, 45 (Wis. Ct. App. 2002)). By failing to provide supportive reasons for sentencing Kong to consecutive sentences, the court abused its discretion and violated its duty under Hussein. It would seem plain, then, that Kong's sentence should be vacated and the case remanded for re-sentencing.

IV.

With all due respect, the ICA's conclusion regarding the adequacy of the court's reasons undermines the sentencing process, in view of the fact, as discussed, that "reasons confirm for the defendant, the victim, the public, and the appellate court, that the decision to impose consecutive sentences was deliberate, rational, and fair." Id. at 510, 229 P.3d at 328. The absence of such reasons deprives us all of the benefit of this hallmark of judicial process. Instead of following this court's precedent in Hussein, and recognizing the public interest in rational and fair sentences, the ICA's decision effectively returns Hawaiʻi jurisprudence to the pre-Hussein standard, wherein trial courts are only advised, rather than required to give reasons when imposing consecutive sentences. See Lau, 73 Haw. at 263, 831 P.2d at 525.

Respectfully, first, the ICA incorrectly characterizes the court's statement regarding the "extensive record of the

defendant . . . which represents a lot of harm in our community[,]" as underlying its decision to sentence Kong to consecutive, rather than concurrent sentences. See Kong II, 129 Hawaiʻi at 141, 295 P.3d at 1011. As discussed supra, this statement supports the court's imposition of prison rather than probation, but cannot also support its decision to impose consecutive sentences.

Second, according to the ICA, the court's statement regarding sentencing included the "specific circumstances that led the [court] to conclude that a consecutive sentence was appropriate in this case." Id. To the contrary, the court's statement contained no specific circumstances other than a general reference to Kong's record. No discussion of facts or analysis supported the court's brief reference to criminality, and, respectfully, the ICA points to no facts expressed by the court which demonstrate that the court considered Kong's particular circumstances, such as the fact that the bulk of Kong's prior felony convictions were for property crimes. By referring to the court's discussion as one of "specific circumstances," the examples set forth in Hussein, noted above, that would reflect the trial court's consideration of particular matters, such as, for example, a court's fact-supported determination that a particular defendant "is dangerous to the

safety of the public," Hussein, 122 Hawaiʻi at 509, 229 P.3d at 327, are disregarded.

Third, the ICA held that the court "'likely concluded' that Kong was 'dangerous to the safety of the public, or pose[d] an unacceptable risk of re-offending,'" and that the imposition of consecutive sentences was supported by Kong's decision to self-terminate, because that decision demonstrated that rehabilitation was unlikely. Kong II, 129 Hawaiʻi at 141, 295 P.3d at 1011 (emphasis added). In proposing what the court "likely concluded," the ICA mentions factors that were never articulated or even suggested by the court.

The court never concluded that Kong was "dangerous to the safety of the public" or "posed an unacceptable risk of reoffending." Not once during the sentencing hearing did the court ever reference Kong's decision to leave the drug court program. Hence, respectfully, the ICA in effect conducted its own sentencing evaluation, drawing inferences that the court itself was duty bound to place on the record to engender confidence that the sentence was deliberate, rational and fair. Hussein, 122 Hawaiʻi at 509-10, 229 P.3d at 328. It is not the obligation of the ICA and of this court to justify a sentence based on the ICA's or our own evaluation of the record, because the sentencing court failed to provide reasons for its sentence.

In sum, the ICA could not rely on factors expressly enumerated by the court because there was no particularized expression of the facts impacting the court's choice. Instead, respectfully, the ICA rested on what it believed the court "likely concluded," despite the fact that such conclusions nowhere appear in the record. This is precisely the type of guesswork Hussein was intended to avoid. The purpose of Hussein was to remove doubt as to the sentencing court's reasons for imposing consecutive sentences by mandating that the court provide a "meaningful rationale." Id. at 509, 229 P.3d at 327. Respectfully, nothing could be more indicative of the insufficiency of the court's remarks than the inability to justify Kong's sentence without resort to speculation and conjecture.

V.

Furthermore, respectfully, the majority in this case wrongly affirms the ICA, agreeing that the court's terse statement regarding Kong's "excessive criminality" was sufficient because it "satisfied the dual purposes set forth in Hussein." Majority opinion at 17.

First, the majority cites Hussein for the proposition that "the sentencing court is not required to articulate and explain its conclusions with respect to every factor listed in

HRS § 706-606."[9] Id. at 16 (citing Hussein, 122 Hawaiʻi at 518-19, 122 Hawaiʻi at 337-38). Hussein did state that there was a "presumption that all HRS § 706-606 factors were considered." 122 Hawaiʻi at 519, 122 Hawaiʻi at 337 (emphasis omitted). However, the majority omits altogether that the presumption was qualified in the very next sentence, which explained that "merely because all of the factors were considered does not mean that the requirement of giving reasons was satisfied. A presumption that the court considered the HRS § 706-606 factors does not indicate what the judge's rationale was in arriving at the conclusion that a consecutive sentence should be entered." Id. (emphases added).

In this case, the court's short statement left it impossible to ascertain the court's rationale. The court did not explicitly refer to any of the statutory factors or to any facts

[9] HRS § 706-606 provides as follows:

> 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.

as to why Kong's so called "excessive criminality" mandated consecutive sentences. By failing to acknowledge the fundamental mandate in Hussein -- that the court justify its sentencing decision with reasons -- the majority effectively upends this court's decision in Hussein and, like the ICA, would appear to return this court's jurisprudence to its pre-Hussein state.[10]

Second, the majority maintains that the first purpose of Hussein was satisfied because the court's statement "identified the facts or circumstances within the range of statutory factors that the court considered." Majority opinion at 17. According to the majority, "the [] court's statement regarding [Kong's] 'extensive criminality' related directly to the first of the relevant statutory factors . . . 'the history and characteristics of the defendant.'" Id. at 18.

This conclusion is contrary to Hussein. The mandate presented in Hussien is not satisfied by a broad statement which simply "relates directly" to one of the statutory factors. Under Hussein, the court's statement must do more than merely evince consideration of the statutory factors. See Hussein, 122 Hawaiʻi

[10] Respectfully, it is difficult to comprehend, in light of the court's abbreviated justification for its sentence, the majority's assertion that it is not upending this court's holding in Hussein. See majority opinion at 20 n.7. To reiterate, Hussein held that a court must provide a "meaningful rationale" for the imposition of a consecutive sentence. Hussein, 122 Hawaiʻi at 509, 229 P.3d at 327. The majority's holding that this requirement is satisfied by a solitary statement devoid of any reasons connecting the defendant's specific circumstances to the imposition of a consecutive sentence renders Hussein virtually meaningless.

at 509, 229 P.3d at 327. Instead, the statement must "recite the specific circumstances that led the court to impose sentences consecutively in a particular case," thereby providing a "meaningful rationale" for all affected. Id. (emphases added). Respectfully, the majority misapplies the court's consideration of the statutory factors in HRS § 706-606(1) as also satisfying the court's obligation to give reasons on the record for its imposition of a consecutive sentence. As Hussein explains, these "are two separate matters." Id. at 519, 229 P.3d at 337 (emphasis added).

As discussed, the court mentioned no specific circumstances to justify the imposition of a consecutive sentence, nor did it mention any specific facts related to Kong's history or personal characteristics. The court's statement could have applied to any person with a criminal record. Nothing in the court's statement explained what facts or circumstances led it to impose a consecutive sentence in this particular case. This is precisely what Hussein prohibited -- a general statement that provides no specific information or circumstances that amount to a "meaningful rationale" for imposing consecutive sentences. See id. at 510, 229 P.3d at 328.

Third, the majority claims that the court did not have to use any of the specific examples discussed in Hussein, because "the examples [Hussein] provided were illustrative." Majority

opinion at 19. Respectfully, the examples in Hussein were plainly intended to provide guidance to courts on the nature of the recitals that were necessary. The examples were emblematic of the articulation that a court should employ in explaining its sentencing decision. Each of the examples offered require the court to discuss specific facts about the defendant's circumstances and to explain the conclusions drawn from those facts that justified a consecutive sentence. Such an analysis was not provided by the court here.

As noted above, it is not evident whether the court even considered the question of whether Kong was dangerous to the safety of the public, or that he posed an unacceptable risk of re-offending, or that his rehabilitation appeared unlikely. See Hussein, 129 Hawaiʻi at 509-10, 229 P.3d at 327-28. To reiterate, the court did not recite any circumstances that applied specifically to the defendant, Kong, (except for the reference to an erroneous number of convictions) nor did the court provide any analysis linking Kong's particular circumstances to the pronouncement of a consecutive sentence. Such solitary comments contravene the guidance provided in Hussein.

Moreover, the list of examples given in Hussein do not "introduce sentencing factors in excess of the statutory factors set out by the legislature," as the majority here argues.

See Majority opinion at 19. Rather, the examples ensure that based on its consideration of the HRS § 706-606 factors, a court gives reasons sufficient to demonstrate that the statutory factors were applied in a meaningful fashion. Thus, Hussein does not conflict with the legislative mandate contained in HRS § 706-606. Again, the majority mislabels "factors" as "reasons," even though Hussein explains that these are two separate matters. Hussein, 122 Hawaiʻi at 519, 229 P.3d at 337. While it is presumed that the court has considered all the statutory sentencing factors, the giving of reasons, a separate requirement, ties those general factors to the specific circumstances of the defendant. Id. "Because the two requirements are separate, no dilemma or confusion results." Id. (internal quotation marks omitted).

Fourth, contrary to the majority's position, the conclusions drawn by the court do not evince that the court's decision was rational and fair. Majority opinion at 17. As discussed supra, the court's basis for its sentence cannot be discerned simply from the reference to Kong's record and the remark of "excessive criminality." As noted, one of the bases for requiring courts to identify at sentencing the facts and circumstances within the range of statutory factors was to assist the appellate courts in meaningful appellate review. Hussein, 122 Hawaiʻi at 509-10, 229 P.3d at 327-28. Inasmuch as the court

did not identify the facts and circumstances underlying its sentence in this case, it cannot be determined on appeal whether the court's consecutive sentence was rational and fair.

VI.

A.

Contrary to the majority's position, the validity of prior convictions under Sinagoga does not apply here, because Kong's challenge to the validity of his prior convictions falls outside the scope of Sinagoga. In Sinagoga, the ICA held that prior convictions would be considered valid if the defendant failed to challenge a prior conviction as "(1) uncounseled, (2) otherwise invalidly entered, and/or (3) not against the defendant." 81 Hawaiʻi at 447, 918 P.2d at 254 (Burns, C.J., majority opinion). However, in State v. Veikoso, 102 Hawaiʻi 219, 74 P.3d 575 (2003), this court held that the "otherwise invalidly entered" language "should be disregarded," thereby limiting Sinagoga's holding to the first and third prongs. Veikoso, 102 Hawaiʻi at 226 n.8, 74 P.3d at 582 n.8; see also Heggland, 118 Hawaiʻi at 440 n.7, 193 P.3d at 356 n.7 ("Pursuant to Veikoso's modification of the Sinagoga procedure, a defendant is permitted to challenge a prior conviction on the grounds that it was (1) uncounseled and/or (2) not against the defendant."); Heggland, 118 Hawaiʻi at 447, 193 P.3d at 363 (Acoba, J., concurring) ("[T]he import of Veikoso is that [] Sinagoga . . .

does not apply in situations where the defendant does not raise a good faith challenge based on an uncounseled prior conviction and/or a prior conviction that was not rendered against the defendant.").

In the instant case, Kong does "not raise an uncounseled conviction or a mistaken identity challenge." Heggland, 118 Hawaiʻi at 448, 193 P.3d at 364 (Acoba, J., concurring). To the contrary, on appeal to the ICA, Kong challenged the convictions relied on by the court on the basis that those convictions did not exist. Hence, Sinagoga would not apply at all and the State should not "benefit from the presumption of validity accorded an alleged prior conviction, as provided under step three of the Sinagoga analysis." Id.

B.

Nevertheless, the majority maintains that (1) Kong's challenge falls within the third Sinagoga prong, majority opinion at 26-27, (2) "nothing in Veikoso or Heggland . . . relieve[s] a defendant of the burden of challenging prior convictions . . . ," id. at 27, and (3) requiring Kong's objection to the use of invalid convictions would be contrary to Heggland. Id. at 28.

1.

According to the majority, "a conviction that has been vacated is void, and thus is not a conviction 'against the defendant'" within the meaning of Sinagoga. Id. at 26 (citing

Black's Law Dictionary 1688 (9th ed. 2009)). Because Kong did not challenge the two invalid prior convictions in the PSI, the majority contends the invalid prior convictions must be considered valid. Majority opinion at 23-24 ("Because Kong failed to raise a good faith challenge to the convictions . . . the [court] did not err in relying on the PSI[.]") (citing Sinagoga, 81 Hawaiʻi at 445, 918 P.3d at 252 (Burns, C.J., majority opinion)). However, the holding in Sinagoga stating that a defendant may challenge a conviction as "not against the defendant" applies only in cases in which the defendant claims the conviction was "not against [him or her]" because of mistaken identity. See Heggland, 118 Hawaiʻi at 448, 193 P.3d at 364 (Acoba, J., concurring) (noting that Sinagoga did not apply because, inter alia, the defendant did not raise a mistaken identity challenge").

This is apparent from the text of Sinagoga. In stating that the five-step procedure applied when a defendant raises a challenge that the conviction "is not against the defendant[,]" Sinagoga, 81 Hawaiʻi at 424, 918 P.2d at 231 (Burns, C.J., majority opinion), the ICA majority indicated that the conviction exists, but may relate to someone else, for example as a result of two people having the same name or another type of clerical error. A conviction that is "void," however, is not applicable to anyone. See Black's Law Dictionary 1709 (defining "void" as

"of no legal effect; null"). Hence, an objection that a conviction was void does not fall within the Sinagoga category of "not against the defendant," Sinagoga, 81 Hawaiʻi at 424, 918 P.2d at 231, and accordingly the Sinagoga presumption does not apply.

2.

Second, the majority contends that because Veikoso "prohibit[s] collateral attacks on the validity of a prior conviction[,]" "the sole purpose behind [the] limitation on Sinagoga[, as] set forth in Veikoso [(abrogating the "otherwise invalidly entered" category in Sinagoga)] is not implicated in the instant case." Majority opinion at 27. This argument disregards the express holding in Veikoso and Heggland that Sinagoga's initial three categories of challenges to prior convictions, see Heggland, 118 Hawaiʻi at 439-40, 193 P.3d at 355-56, were reduced to two categories. See id. at 440 n.7, 193 P.3d at 356 n.7. The Sinagoga rule never encompassed any possible challenge that might be brought to the PSI, as the majority implies. As such, Sinagoga was never intended to apply where a conviction was overturned on appeal and therefore was no longer in effect.

Further, the majority asserts that "there is no logical reason for requiring a defendant to raise an identity challenge

pursuant to [Sinagoga] . . . , but relieving a defendant of this burden for convictions that are vacated," because in both instances, "'the defendant, more than anyone else, knows whether or not his or her prior criminal conviction was . . . irrelevant.'" Majority opinion at 27 (quoting Sinagoga, 81 Hawaiʻi at 445, 918 P.2d at 252 (Burns, C.J., majority opinion)). Respectfully, this argument is not only wrong, it turns a blind eye to the fact that the PSI was erroneous, not because of the defendant's conduct, but because of the government's negligence. As discussed infra, levying the burden on the defendant to object in these cases serves only to absolve the State and the courts of accountability, while defendants are unjustly made to bear the cost of the government's mistakes.[11]

3.

Next, the majority contends that refusing to apply Sinagoga in this case would "requir[e] the State to prove the validity of each of the defendant's prior convictions at the time of sentencing." Majority opinion at 27. This position, the

[11] It would seem apparent that a great number of criminal defendants lack the resources and understanding necessary to determine whether the sentences listed in a PSI are valid. "Time and time again, the cases indicate that lay persons are typically unaware of the nature and import of court procedures." Sinagoga, 81 Hawaiʻi at 437, 918 P.2d at 244 (Acoba, J., dissenting). "Because defense counsel does not have equal access to court records" it is "far more burdensome on the defense to search out each and every conviction on the defendant's record." Shirley M. Cheung, Note, State v. Sinagoga: The Collateral Use of Uncounseled Misdemeanor Convictions in Hawaiʻi, 19 U. Haw. L. Rev. 813, 841 (1997) (hereinafter Misdemeanor Convictions).

majority maintains, was rejected by Heggland. Id. at 27-28. To the contrary, as explained supra, Veikoso directed that "the 'otherwise invalidly entered' language in Sinagoga . . . should be disregarded[,]" Veikoso, 102 Hawaiʻi at 226 n.8, 74 P.3d at 582 n.8 (emphasis added), and therefore, as explained by both the majority and the concurrence in Heggland, the procedure outlined in Sinagoga applies only to challenges that a conviction was (1) uncounseled (i.e., without benefit of attorney representation), or (2) not against the defendant. Heggland, 118 Hawaiʻi at 440 n.7, 193 P.3d at 356 n.7; see also Heggland, 118 Hawaiʻi at 363, 193 P.3d at 447 (Acoba, J., concurring). To reiterate, Kong's challenge to his prior conviction does not fall into either one of these categories. Consequently, the Sinagoga procedures do not apply.

Furthermore, Heggland is distinguishable, inasmuch as there, the defendant had stipulated to a prior felony conviction in another state, including stipulating to the state conviction identification number. Id. at 428, 193 P.3d at 334. Ultimately this court found that there was sufficient evidence to support the existence of the defendant's prior conviction, noting that "[t]he most critical factor . . . is the fact that [the defendant] does not contest the fact that he has a prior conviction (in fact he stipulated to it) . . . ." Id. at 445, 193 P.3d at 361 (emphases added).

Under those facts, the questions of fairness presented by this case were not presented in Heggland. Unlike in Heggland, here, Kong did not stipulate to his convictions, but simply failed to object at the hearing, something he now raises as plain error. Furthermore, as noted, it is undisputed that the convictions at issue in this case no longer exist and did not exist at the time of sentencing. Thus, this case is in an entirely different position than Heggland.

Finally, the majority contends that the State would run the risk of having the sentence vacated on appeal, majority opinion at 26-27, if it failed to prove the validity of prior convictions. However, this is nothing more than what is to be expected. Removing the presumption would result in sentences being vacated on appeal only if they are premised on convictions that are invalid. As discussed, this result rests on basic notions of rationality and fairness in sentencing.

If, prior to sentencing, the State has any reason to believe that a particular conviction listed on the PSI is invalid, then indeed that conviction should not be considered. It rightfully is the State's responsibility to ascertain the correctness of a conviction, because the State owes its own good faith duty of candor to the court. If it is later determined that a conviction does not in fact exist, then the integrity of the sentencing process commands vacation of that sentence.

VII.

Contrary to the majority's holding, where convictions do not exist, the Sinagoga framework is irrelevant. As reiterated by the majority, the Sinagoga majority indicated that "'if . . . the defendant does not [raise] . . . a good faith challenge . . . [a] prior criminal conviction is [treated as] reliable for all sentencing purposes.'" Majority opinion at 21 (quoting Sinagoga, 81 Hawaiʻi at 445, 918 P.2d at 252 (Burns, C.J., majority opinion)).[12] But, the failure to raise a good faith challenge is inconsequential when Kong's convictions are

[12] The majority's conclusion with respect to the validity of the sentence fails in any event, because even applying the Sinagoga framework to the instant case, the court failed to satisfy the procedures set forth in Sinagoga step three, part (a). That is, that "prior to imposing the sentence, the court shall inform the defendant that (a) each reported criminal conviction that is not validly challenged by the defendant is defendant's prior, counseled, validly entered, criminal conviction[.]" Sinagoga, 81 Hawaiʻi at 447, 918 P.2d at 254 (Burns, C.J., majority opinion) (emphasis added). In the instant case, the court did not inform Kong that the convictions listed on the PSI that were not challenged would be considered his prior, counseled, validly entered, criminal convictions.

The majority alleges that a court need not proceed with step three if the defendant does not challenge the convictions listed in the PSI. Majority's opinion at 24 n.10. However, nothing in Sinagoga or this court's later cases reiterating the Sinagoga procedures limits the application of step three to cases where the defendant is challenging prior convictions. In fact, step three is even more critical where the defendant has not challenged a conviction, because it informs the defendant of the consequences of not challenging the conviction. See Sinagoga, 81 Hawaiʻi at 447, 918 P.2d at 254. The five-step procedure in Sinagoga was established to be followed "where ordinary sentencing procedures are applicable and there is a possibility that the court may use the defendant's prior conviction(s) as a basis for the imposition or enhancement of a prison sentence." Id.

The majority states that in Heggland, for example, steps three through five of Sinagoga were not addressed, after it was concluded that the defendant failed to raise a good-faith challenge to his prior conviction. Majority's opinion at 24 n.10. However, in Heggland this court had no need to address steps three through five of Sinagoga, because it concluded, inter alia, that the circuit court erred in applying step two, and therefore vacated the sentencing portion of the circuit court's judgment and remanded for resentencing. See Heggland, 118 Hawaiʻi at 356-57, 362, 193 P.3d at 440-41, 446.

acknowledged to be invalid. We know that two of the convictions listed on the PSI are non-existent and therefore are not reliable. Hence, Sinagoga would not apply. Applying Sinagoga would result in treating invalid convictions as valid, despite the fact that such convictions were vacated. No presumption should survive in the face of undisputed facts rebutting it.

Further, the mistakes in the PSI are not attributable to Kong. It would be unfair under these circumstances to fault Kong for not challenging what, in the first instance, was an egregious error by the probation department. As related, the probation department was statutorily mandated to prepare accurate information not only for the parties, but for the court's proper exercise of its sentencing authority. See Commentary to HRS § 706-601 (Supp. 1997)[13]. References to good faith challenges only

[13] HRS § 706-601 provides as follows:

§ 706-601 Pre-sentence diagnosis and report
(1) Except as provided in subsections (3) and (4), the court shall order a pre-sentence correctional diagnosis of the defendant and accord due consideration to a written report of the diagnosis before imposing sentence where:
(a) The defendant has been convicted of a felony; or
(b) The defendant is less than twenty-two years of age and has been convicted of a crime.
(2) The court may order a pre-sentence diagnosis in any other case.
(3) With the consent of the court, the requirement of a pre-sentence diagnosis may be waived by agreement of both the defendant and the prosecuting attorney.
(4) The court on its own motion may waive a pre-sentence correctional diagnosis where:
(a) A prior pre-sentence diagnosis was completed within one year preceding the sentencing in the instant case;

(continued...)

serve to obscure the court's own error in relying on an inaccurate PSI prepared by its probation officers.

Hence, this case exemplifies the questionable basis for placing the burden of raising a good faith objection on a defendant. Aside from the probation department, because "the [prosecution] is obviously the only party which can define that part of a defendant's criminal record it will use to support it's request for [enhanced] sentencing," the prosecution should be the party most responsible for confirming the validity of those sentences. Sinagoga, 81 Hawaiʻi at 435, 918 P.2d at 242 (Acoba, J., dissenting). "It [is] rational, logical, and efficient to require the proponent of any evidence of a prior conviction to ascertain its validity and to carry the burden of going forward with proof in that regard." Id.; accord Cheung, Misdemeanor Convictions, at 841.

Thus, it runs contrary to fundamental fairness to absolve the State and the probation department of accountability and to place the responsibility for ascertaining the accuracy of

[13](...continued)

> (b) The defendant is being sentenced for murder or attempted murder in any degree; or
> (c) The sentence was agreed to by the parties and approved by the court under rule 11 of the Hawaiʻi rules of penal procedure.

(Emphasis added.)

a criminal record maintained by the government exclusively on the defendant.[14] Leaving in place the burden on defendants or their counsel to verify the accuracy of each conviction relied on by the prosecution or the court will only perpetuate the illogicality of this rule.

VIII.

Irrespective of Kong's failure to raise a good faith challenge to the validity of the convictions listed on the PSI, the court's reliance on the two vacated convictions violated Kong's due process rights. Put simply, the infirmity of Kong's sentence cannot be disputed. Kong's failure to object to the validity of the PSI at trial is irrelevant in light of what Kong pointed out on appeal and what we know to be true -- that Kong was sentenced on the basis of convictions that were voided.

[14] The majority maintains that its holding does not absolve the State and probation office of responsibility for ensuring the accuracy of the PSI, because the prosecution has the ultimate burden of proving that a defendant's conviction is valid, assuming that the defendant raises a good faith challenge in the first place. See majority opinion at 28 n.11. However, it is precisely because, under Sinagoga, the defendant must first challenge the accuracy of the PSI that the defendant bears the exclusive responsibility of ascertaining the accuracy of his or her criminal record. It is only once the defendant has ascertained the potential inaccuracy that the burden is shifted to the State.

Thus, under this questionable precept, so long as the defendant is unaware of any potential problems, the State need not ensure the accuracy of the PSI-listed convictions. This entirely ignores the statutory responsibility of the probation department to prepare an accurate report in the first instance. See Commentary to HRS § 706-601. Moreover, placing the initial burden on the defendant is improper inasmuch as the State is seeking the enhanced sentence, and therefore should be held to the accuracy of the convictions it relies on to justify a longer term of incarceration. See Sinagoga, 81 Hawaiʻi at 435, 918 P.2d at 242 (Acoba, J., dissenting); see also Cheung, Misdemeanor Convictions, at 841.

It is not disputed that, in sentencing Kong, the court relied on two prior convictions that were nullified when it stated that the defendant had "six burglary convictions, [and] ten felonies." (Emphasis added.) As noted, Kong's October 13, 1992 convictions in Cr. No. 92-0138(3), for burglary and unauthorized control of propelled vehicle, had been dismissed. These were two of the "ten felonies" relied on by the court in arriving at its sentencing decision. For all we know, these two felonies, bringing the total to ten (erroneously), may have been the tipping point for the court.

As noted before, this error was not the responsibility of Kong, but of the court and its probation department. The purpose of the PSI is to ensure that the sentencing court has "sufficient and accurate information" so that it may "rationally exercise its discretion." Commentary to HRS § 706-601 (emphasis added). An accurate PSI is essential for a fair sentencing process, inasmuch as "the court must have correct information to render a just sentence." State v. Durham, 125 Hawaiʻi 114, 124, 254 P.3d 425, 435, amended on reconsideration in part, 125 Hawaiʻi 249, 258 P.3d 946 (2011). Thus, in the interests of a rational and fair sentencing process, the probation department must prepare a PSI that correctly states, inter alia, "the

defendant's history of . . . criminality." See HRS § 706-602 (Supp. 1998).[15] That mandate was not followed here.

Because of the inaccuracies contained within the PSI, Kong's sentence rests on two convictions that were void. This result offends the due process guarantee of fairness. See State v. Huelsman, 60 Haw. 71, 86, 588 P.2d 394, 403 (1978) ("To say that the discretion of a sentencing judge may be exercised in a purely arbitrary fashion does violence to the concept of fairness embodied in due process."); cf. United States v. Tucker, 404 U.S. 443, 449 (1972) (vacating a defendant's sentence because it was based upon two sentences that were unconstitutionally obtained).

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[15] HRS § 706-602(1) provided, at the time of sentencing in this case:

> (1) The pre-sentence diagnosis and report shall be made by personnel assigned to the court, intake service center or other agency designated by the court and shall include:
>
> (a) An analysis of the circumstances attending the commission of the crime;
>
> (b) The defendant's history of delinquency or criminality, physical and mental condition, family situation and background, economic status and capacity to make restitution or to make reparation to the victim or victims of the defendant's crimes for loss or damage caused thereby, education, occupation, and personal habits;
>
> (c) Information made available by the victim or other source concerning the effect that the crime committed by the defendant has had upon said victim, including but not limited to, any physical or psychological harm or financial loss suffered;
>
> (d) Information concerning defendant's compliance or non-compliance with any order issued under section 806-11; and
>
> (e) Any other matters that the reporting person or agency deems relevant or the court directs to be included.

(Emphases added.)

It is impossible to maintain that Kong's sentence was rational and fair when it rests upon two convictions that were no longer valid.

By increasing Kong's sentence on the basis of convictions, two of which were vacated in 1994, see Kong I, 77 Hawaiʻi at 269, 883 P.2d at 691, the court effectively punished him on the basis of crimes that the courts had nullified. Respectfully, the manifest injustice committed at the sentencing stage is perpetuated by the ICA's and the majority's continued reliance on the erroneous PSI, to uphold the court's sentence even though we all know better.[16] Unquestionably, then, Kong's sentence is violative of due process. See Huelsman, 60 Haw. at 86, 588 P.2d at 403.

To correct this error, Kong must be resentenced. See Tucker, 404 U.S. at 449. Even in Sinagoga, upon which the majority relies, once the ICA held that the defendant's constitutional rights had been violated by the court's sentence, both the majority and the dissent acknowledged the necessity of remanding for the entry of a new sentence. See Sinagoga, 81 Hawaiʻi at 447, 918 P.2d at 254 (remanding the case to allow the defendant an opportunity to challenge the PSI) (Burns, C.J.,

[16] Despite the fact that, at this point, no one disputes that these two convictions were subsequently invalidated, see Kong I, 77 Hawaiʻi at 269, 883 P.2d at 691, the majority, in effect, concurs in maintaining the fiction that the two subject felonies under Cr. No. 92-0138 in the PSI were allegedly erroneous, by affirming the ICA.

majority opinion), see also Sinagoga, 81 Hawaiʻi at 437, 918 P.2d at 244 (Acoba, J., dissenting). Thus, even Sinagoga recognized that the violation of Kong's due process rights can be remedied only through the convening of a new sentencing hearing.[17]

IX.

Kong did not object to the PSI at trial. Thus, the doctrine of plain error potentially applies, as it does in every situation in which a defendant should have but fails to raise an objection at trial. See Hawaiʻi Rules of Penal Procedure Rule 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."). As explained in greater detail infra, it is necessary to notice plain error to protect the integrity of the judicial system and to prevent the manifest injustice that results from a sentence based on invalid convictions. The majority's contention that the defendant waived his objections ignores the effect of the erroneous PSI on Kong's sentence. Hence, it is necessary to vacate the sentence to preserve the public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of Kong's fundamental rights.

[17] The majority asserts that Kong did not assert that his due process rights were violated in his Application, and therefore waived this argument. See majority opinion at 29 n.13 (citing Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 40.1(d)(1)). However, under HRAP Rule 40.1(d)(1), even if a party fails to raise an issue, "[t]he supreme court, at its option, may notice a plain error not presented." See also Miller, 122 Hawaiʻi at 116, 223 P.3d at 181.

A.

To reiterate, the ICA held that the inaccuracy in the PSI did not constitute plain error because "the record indicates that the Circuit Court based its sentence on Kong's extensive criminal record in general and not specifically on the [overturned convictions]." Kong II, 129 Hawaiʻi at 143, 295 P.3d at 1013. The majority argues the same.[18]

Because the court referred to Kong's "extensive criminality" without further explanation, there is absolutely no basis for concluding that the court did not rely on the invalid convictions. The majority's assertion, then, that "there was sufficient evidence to support the [] court's determination that Kong had an 'extensive' record of criminality[,]" majority opinion at 29, does not square with the pronouncement of the court. Respectfully, it is not clear how the majority can affirm the ICA's determination that the court relied on all of Kong's prior charges and convictions, including the two that were invalid. See Kong II, 129 Hawaiʻi at 143, 295 P.3d at 1013. The court did not express at all any awareness that two convictions were invalid. Obviously, nothing on the record

[18] The majority maintains that "the alleged inaccuracy in the PSI does not rise to the level of plain error because the record indicates that the [] court based its imposition of a consecutive sentence on Kong's 'extensive' criminal record as a whole and not solely on the specific convictions that Kong alleges are invalid[,]" majority opinion at 28, despite the lack of any indication in the court's sentence that it did not consider the two invalid convictions.

indicates the prosecutor, defense counsel, or probation officer called this error to the court's attention.

The court's statement regarding Kong's "extensive criminality", then, plainly refers to all of Kong's convictions listed in the PSI. That the court included in its consideration those convictions that had been nullified cannot be disputed. The court mentioned all ten felonies in rendering its sentence.

Plainly, it is impossible to separate the court's statement regarding excessive criminality from all of the convictions mentioned, including the vacated ones, because the court itself made no distinction among the convictions it cited. There is nothing in the record to support the ICA's and the majority's position that the court's sentence did not rely on the two void convictions yet somehow relied on Kong's "extensive criminality." What part of "the criminal record in general," Kong II, 129 Hawaiʻi at 143, 295 P.3d at 1013, mentioned by the ICA and what part of the "criminal record as a whole," majority opinion at 31, mentioned by the majority cannot be understood as including the two invalid convictions? Respectfully, the facts are simply contrary.

B.

To reiterate, the probation department is duty bound to prepare an accurate PSI to aid the court in exercising its discretion in a rational manner. Commentary to HRS § 706-601.

As said before, this court will notice plain error to "correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." Miller, 122 Hawaiʻi at 100, 223 P.3d at 165 (internal quotation marks and emphases omitted). All four bases for recognizing plain error are eminently prominent here.

First, few scenarios could be more injurious to the fairness and integrity of our judicial system than for any court to sustain a sentence based on convictions that in fact do not exist. One of the ultimate injustices must be to sentence a defendant based on non-existent convictions.

Second, subjecting a defendant to an enhanced penalty of consecutive sentences based upon crimes that he did not commit can only serve to undermine the public reputation of judicial proceedings. For this court to fail to notice plain error and to sanction such an approach confirms for the parties, the trial courts, and the public that sentencing based on invalid convictions is legitimate and acceptable. Respectfully, greater injury to the public reputation of this court's integrity is difficult to imagine.

Third, it is self-evident that the ends of justice are promoted by vacating a sentence that is tainted by the court's

reliance on two void convictions and by remanding for a new sentencing hearing.

Finally, plain error must be recognized to prevent the denial of Kong's fundamental right to a fair sentencing procedure.

These circumstances are precisely those in which this court must apply the plain error doctrine in order to preserve the integrity of the sentencing process and to prevent injustice. The vacation of a sentence based on prior void convictions would appear to be the obvious effectuation of this doctrine. Under the law, this is the right thing to do.

X.

Based on the foregoing, I respectfully dissent.

/s/ Simeon R. Acoba, Jr.

/s/ Sabrina S. McKenna