IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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ROBERT FLUBACHER,
Petitioner/Petitioner-Appellant,

vs.

STATE OF HAWAIʻI,
Respondent/Respondent-Appellee.

SCWC-15-0000363

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-15-0000363; S.P.P. NO. 14-1-00004)

MARCH 21, 2018

DISSENTING OPINION BY NAKAYAMA, J.

On June 12, 2003, over a decade ago, Petitioner/Petitioner-Appellant Robert Flubacher (Flubacher) pleaded guilty to multiple felonies. Pursuant to the guilty pleas, on July 9, 2003, Respondent/Respondent-Appellee State of Hawaiʻi (the State) filed a motion for extended term of imprisonment because it believed Flubacher to be a "multiple offender" within the meaning of Hawaiʻi Revised Statutes

(HRS) § 706-662(4)(a).[1] At Flubacher's sentencing hearing on September 12, 2003, the circuit court granted the State's motion, finding that an extended sentence was necessary to protect the public. Flubacher did not directly appeal his convictions or sentence at that time, and therefore his extended sentence became final on October 13, 2003.

Flubacher now seeks to collaterally challenge his extended term sentence through a Hawaiʻi Rules of Penal Procedure (HRPP) Rule 40 petition for post-conviction relief. The Circuit Court of the First Circuit (circuit court) denied his petition, and the Intermediate Court of Appeals (ICA) affirmed the denial. In Flubacher's application for writ of certiorari, he raises two issues. First, Flubacher argues that his extended term sentence was illegal under the United States Supreme Court's (Supreme Court) decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000),

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[1] At that time, HRS § 706-662(4)(a) (Supp. 1999) provided in relevant part:

> **Criteria for extended terms of imprisonment.** A convicted defendant may be subject to an extended term of imprisonment under section 706-661, if the convicted defendant satisfies one or more of the following criteria:
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> . . . .
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> (4) The defendant is a multiple offender whose criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for the protection of the public. The court shall not make such a finding unless:
> (a) The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for felony[.]

and Ring v. Arizona, 536 U.S. 584 (2002). He further argues that the Supreme Court's later decision in Cunningham v. California, 549 U.S. 270 (2007), should retroactively apply to his sentence. Second, Flubacher contends that he did not waive his claim that the circuit court erred when it found that he had "bashed" a woman with a hammer at sentencing.

The Majority holds that Flubacher's sentence was illegal under the Supreme Court's decision in Apprendi and remands his case to the circuit court for further proceedings. Majority at 4. In doing so, the Majority overrules countless decisions of this court holding the opposite -- that at the time that Flubacher's sentence became final, our extended sentence scheme was not illegal under Apprendi. Majority at 25 n.14. Because I believe that the rule in Apprendi only became clear after Flubacher's sentence became final, and because the circuit court did not abuse its discretion in imposing Flubacher's sentence, his extended term sentence was not illegal and he has no claim for post-conviction relief. I would therefore affirm the ICA's October 13, 2016 Judgment on Appeal.

Accordingly, I respectfully dissent.

I. DISCUSSION

A. Flubacher's extended sentence was not illegal under Apprendi, Ring, or Cunningham.

At the outset, I note my agreement with much of the

Majority's exposition and analysis of our case law after the Supreme Court's decision in Apprendi. I agree that we repeatedly concluded for several years after Apprendi that Hawaii's extended sentence statutory scheme, HRS § 702-662, comported with Apprendi because it reserved to the jury a finding of facts "intrinsic" to the offense charged while allowing a judge to determine facts "extrinsic" to the offense charged.[2] Majority at 16-17. I also joined the opinion of the court in State v. Maugaotega, 115 Hawaiʻi 432, 168 P.3d 562 (2007) (Maugaotega II), where we acknowledged that the Supreme Court, in several decisions after Apprendi (and most importantly, its decision in Cunningham), "rejected the validity of the intrinsic/extrinsic distinction, which formed the basis of these decisions." Majority at 17. At that time, this court concluded that HRS § 702-662 was "unconstitutional on its face." Maugaotega II, 115 Hawaiʻi at 447, 168 P.3d at 577. But now the Majority moves forward the

[2] As the Majority explains, HRS § 706-662 (Supp. 1999) listed multiple bases for which judges could impose extended sentences. Before the Supreme Court's decision in Apprendi, this court had distinguished between "intrinsic" facts (i.e. facts "intrinsic" to the offense with which the defendant was charged) and "extrinsic" facts (i.e. facts that are separable from the offense itself in that they involve consideration of collateral events or information). See State v. Tafoya, 91 Hawaiʻi 261, 271, 982 P.2d 890, 900 (1999). As this court put it, the finding of whether a defendant was a "multiple offender" was clearly a fact extrinsic to the offense. See State v. Kaua, 102 Hawaiʻi 1, 13, 72 P.3d 473, 485 (2003). On the other hand, finding whether a defendant committed a crime against an elder or a minor, or committed a hate crime, was a fact intrinsic to the offense. Id.

In order to afford the defendant his due process rights, this court further explained that intrinsic facts were required "to be found beyond a reasonable doubt by the trier of fact." Id. However, extrinsic facts "should be found by the sentencing judge[.]" Id.

date of our statute's unconstitutionality a full seven years before Maugaotega II, concluding that the Apprendi rule was clear on the day it was decided. Majority at 22. I disagree.

1. When Flubacher's sentence became final, the rule in Apprendi was not clear and our extended sentence scheme was not unconstitutional.

The Majority asserts that it was the Apprendi decision itself, decided on June 26, 2000, that made our extended sentence statute unconstitutional. Majority at 24-25. As such, the Majority similarly concludes that Flubacher's extended sentence, which became final in 2003, is illegal. Majority at 25.

To take this drastic step, the Majority wholly rejects this court's consistent decisions holding the opposite -- that our extended sentence scheme was not unconstitutional, and in conformity with Apprendi. Majority at 17 (citing cases). It does so by claiming that the holding in Apprendi was "clear" and this court's decisions to the contrary were erroneous. Majority at 22. But I am not so certain that the rule was clear in 2000. Neither, it seems, was the Supreme Court.

The issue in Apprendi was whether New Jersey's hate crime statute (allowing a sentencing judge to impose an extended sentence if the defendant committed an offense "with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity") violated the United States Constitution. 530 U.S. at

468-69. The Supreme Court, in a 5-4 decision, concluded that the statute had done so because a judge had found a fact extending Apprendi's sentence beyond the statutory maximum, i.e., that Apprendi had acted "with a racially biased purpose." Id. at 471. The Supreme Court then held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. The Majority considers this language clear, and because Hawaii's extended sentence scheme allowed judges to find certain "extrinsic" facts to impose an extended term sentence, it concludes that our scheme contravened Apprendi's clear holding. Majority at 22.

But subsequent developments in the Supreme Court demonstrate that this supposedly "clear" rule was not so clear in 2000. The Supreme Court's decisions in Blakely v. Washington, 542 U.S. 296 (2004), and United States v. Booker, 543 U.S. 220 (2005), illustrate that the Apprendi rule was still being discussed and debated after 2000, and federal and state appellate courts (not to mention Supreme Court justices) continued to disagree on its holding.

In Blakely, the Supreme Court granted certiorari "to apply the rule [it] expressed in Apprendi[.]" 542 U.S. at 301. Washington's sentencing scheme allowed a judge to impose a

sentence above a standard range prescribed by statute if he or she found "substantial and compelling reasons," as long as that sentence did not exceed the absolute maximum punishment provided by statute. Id. at 299. In Blakely, the defendant pleaded guilty to second-degree kidnapping, which was a class B felony. Id. The sentencing court then found that the defendant acted with "deliberate cruelty" (a statutorily enumerated ground for a departure from the standard range), and in accordance with Washington's extended sentence statute, extended the defendant's sentence from the standard prison term of 49 - 53 months to 90 months. Id. at 300. The 90-month extended term was longer than the statutory maximum for second-degree kidnapping, but shorter than the absolute maximum prison term of ten years for class B felonies. Id. at 300, 303.

The Washington Court of Appeals affirmed the sentence in accordance with State v. Gore, where the Washington Supreme Court held that Washington's statutory scheme complied with Apprendi because the statute only permitted a judge to impose an extended sentence if it was "within the range determined by the Legislature and not exceeding the maximum." 21 P.3d 262, 301 (Wash. 2001).

In the Supreme Court, Washington argued that its statute complied with the Apprendi rule because the defendant did not actually receive a sentence beyond the statutory maximum for

class B felonies (e.g. 10 years).[3] Blakely, 542 U.S. at 303. However, the Supreme Court, in another 5-4 decision, invalidated the defendant's extended sentence. Id. at 305. In doing so, it clarified that for Apprendi purposes, the relevant "statutory maximum" is the maximum sentence a judge may impose without any additional findings. Id.

On its face, the facts in Blakely seem analogous to the facts in Apprendi. If a judge cannot find that a defendant acted with "racial bias," then surely a plain reading of Apprendi would have demanded that a judge could not find that a defendant acted with "deliberate cruelty."[4] However, the Washington court's interpretation of "statutory maximum" in the context of Apprendi, along with the Supreme Court's clarification of that term in Blakely, indicates that the Apprendi rule was not clear when it was announced in 2000.

A year later, the Supreme Court again analyzed Apprendi in Booker, and held that the Federal Sentencing Guidelines, which required a sentencing judge to find additional facts before

[3] There were striking similarities between Washington's extended sentence scheme and our own. Any extended sentence imposed under HRS § 706-662 needed to comply with the terms in HRS § 706-661 (Supp. 1999) (providing the "maximum length" of an extended term based on the class of felony), just as the Washington statute required. See Majority at 4 n.2.

[4] Even under this court's (now erroneous) interpretation of Apprendi as we understood it at the time, it is clear that a jury would have been required to determine whether a defendant acted with "racial bias" or with "deliberate cruelty," because that would clearly have been a fact "intrinsic" to the crime charged. See Kaua, 102 Hawaiʻi at 13, 72 P.3d at 485; State v. White, 110 Hawaiʻi 79, 89-90, 129 P.3d 1107, 1117-18 (2006).

sentencing a defendant to a longer sentence, was no different than Washington's statute in Blakely. 543 U.S. at 235. The Supreme Court then further clarified Apprendi and held that the "mandatory nature" of the federal guidelines made it more akin to a law than a guideline, and therefore the mandatory provisions were incompatible with the Apprendi rule. Id. at 233-34. Again, the decision by the Supreme Court to grant certiorari in Booker further indicates that the Apprendi rule's application to federal and state extended sentence schemes like Hawaii's needed to be clarified. Moreover, the subsequent decisions of numerous federal courts of appeals interpreting the Blakely and Booker rules as "new" rules of criminal procedure (and not "old" rules that merely applied precedent existing at the time, cf. Teague v. Lane, 489 U.S. 288, 301 (1989) (plurality opinion))[5] provide further evidence that the original Apprendi rule was unclear at the time that Blakely and Booker were decided.

Given this history, I would hold that the line of demarcation is not Apprendi, but Booker -- only at that time, after the Apprendi rule was re-analyzed and clarified, did it

[5] See, e.g., Cook v. United States, 386 F.3d 949, 950 (9th Cir. 2004) ("[T]he Supreme Court has not made Blakely retroactive on collateral review."); United States v. Cruz, 423 F.3d 1119, 1120 (9th Cir. 2005) ("Given the dissenting opinions in Booker and the previous cases, it is apparent that the rule was not in fact 'apparent to all reasonable jurists,' and thus, under the Supreme Court's definition, it was in fact a 'new rule.'"); Lloyd v. United States, 407 F.3d 608, 613 (3rd Cir. 2005) ("Every court of appeals to have considered the issue has concluded that, whether denominated as the 'Blakely rule' or the 'Booker rule,' that rule was 'new.'").

become apparent that our extended sentence scheme was unconstitutional.

For the same reasons, I believe the State's concession that "any extended term sentence imposed after June 26, 2000, in which the court, not a jury, found the fact of 'necessary for protection of the public' [was] in violation of Apprendi" was not well-founded. Contra Majority at 13. This court has consistently noted that a State's concession is not binding on an appellate court, and it remains "incumbent on the appellate court [first] to ascertain . . . that the confession of error is supported by the record and well-founded in law." State v. Hoang, 93 Hawaiʻi 333, 336, 3 P.3d 499, 502 (2000) (alterations in original).

As stated previously, this court held repeatedly that our intrinsic/extrinsic distinction was in complete conformity with Apprendi until Maugaotega II. See Kaua, 102 Hawaiʻi at 12-13, 72 P.3d at 484-85; State v. Rivera, 106 Hawaiʻi 146, 159-60, 102 P.3d 1044, 1057-58 (2004), cert. denied, 546 U.S. 829 (2005);[6] State v. Maugaotega, 107 Hawaiʻi 399, 409-10, 114 P.3d 905, 915-16 (2005) (Maugaotega I); White, 110 Hawaiʻi at 81, 129

[6] To be sure, two justices of this court dissented in Rivera, and would have invalidated the defendant's extended sentence. 106 Hawaiʻi at 166, 102 P.3d at 1064 (Acoba, J., dissenting). But even the dissent believed that Blakely "further explicated the holding in Apprendi," and therefore, "[i]n light of [Blakely], [the dissent believed that] our prior decisions in [Kaua] and State v. Hauge, 103 Hawaiʻi 38, 79 P.3d 131 (2003), must be reexamined." Id.

P.3d at 1109. Because I believe the Apprendi rule was not clear in 2000 to indicate to this court that our intrinsic/extrinsic distinction was unconstitutional, I also believe that the State's concession to that effect was not "well-founded in law."[7]

2. Cunningham cannot retroactively apply to Flubacher's sentence.

Because I do not believe Flubacher's extended sentence is illegal under Apprendi, I must also address whether the Supreme Court's 2007 decision in Cunningham, 549 U.S. 270, retroactively makes his extended sentence illegal. It cannot.

On January 22, 2007, the Supreme Court held in Cunningham that California's determinate sentencing law (DSL) violated the Apprendi rule because it allowed a judge to find an aggravating factor that then permitted the judge to order an "upper term" determinate sentence. 549 U.S. at 277. In so doing, the Supreme Court relied on its rule in Apprendi, as applied in Blakely and Booker. Id. at 282 ("Blakely and Booker bear most closely on the question presented in this case."). At that time, the Supreme Court majority also emphatically rejected the dissent's argument in favor of a bifurcated approach, one in which the Apprendi rule would apply to sentencing enhancements

[7] Similarly, Flubacher's sentence was not illegal under Ring, 536 U.S. 584, either. In Ring, the Supreme Court applied Apprendi to capital sentences, and held that Arizona's capital sentencing scheme, which allowed a judge to find an aggravating fact necessary to impose the death penalty, was unconstitutional. Ring, 536 U.S. at 609. Flubacher was not given a capital sentence.

based on the nature of the offense, while "judicial determination [would be] appropriate with regard to factors exhibited by the defendant" like prior convictions. Id. at 297 (Kennedy, J., dissenting).[8] Apprendi, the Supreme Court majority responded, "leaves no room for the bifurcated approach Justice Kennedy proposes." Id. at 291 n.14.

Flubacher argues that Cunningham should retroactively apply to his case on collateral review, because it did not announce a new rule. A case announces a new rule "if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301 (plurality opinion) (emphasis in original). New rules of criminal procedure are not entitled to retroactive application on collateral review. Id. at 303.

Cunningham did not announce a new rule because there is no discernible difference between California's DSL and Washington's sentencing scheme determined to be unconstitutional in Blakely. California's DSL allowed a judge to order an "upper term" sentence instead of the standard "middle term" if he or she found "circumstances in aggravation." Cunningham, 549 U.S. at 277. The Washington statute essentially did the same thing: it allowed a judge to impose a sentence above the standard range if

[8] Basically, this is our court's intrinsic/extrinsic distinction in a nutshell. See supra note 2.

he or she found "substantial and compelling reasons." Blakely, 542 U.S. at 299. Because it appears that the Supreme Court merely applied "precedent existing at the time" (i.e., the rule announced and clarified in Apprendi, Blakely, and Booker), Cunningham did not announce a new rule. Accord Butler v. Curry, 528 F.3d 624, 636 (9th Cir. 2008).

But that does not end the retroactivity inquiry. We must also determine what precedent(s) dictated the "old" rule in Cunningham. See Teague, 489 U.S. at 301. I believe Cunningham only announced an old rule because "[t]aken together, Apprendi, Blakely, and Booker, firmly established that a sentencing scheme in which the maximum possible sentence is set based on facts found by a judge is not consistent with the Sixth Amendment." Accord Butler, 528 F.3d at 635. As discussed previously, Apprendi, Blakely, and Booker all announced new rules.[9] As such, those cases cannot apply retroactively. See Teague, 489 U.S. at 303.

But Cunningham only retroactively applies because it relied on Apprendi, Blakely, and Booker. See Cunningham, 549 U.S. at 282. Therefore, only sentences imposed after Apprendi, Blakely, and Booker should be entitled to retroactive application of Cunningham. Because Flubacher's sentence became final before

[9] See supra note 5.

Blakely and Booker were decided, Flubacher is not entitled to retroactive application of Cunningham. Accord Loher v. State, 118 Hawaiʻi 522, 538, 193 P.3d 438, 454 (App. 2008) (citing Butler, 528 F.3d at 635-36), overruled on other grounds by State v. Auld, 136 Hawaiʻi 244, 254, 361 P.3d 471, 481 (2015).

Finally, while the Teague retroactivity analysis does not apply to the Majority's decision to reverse Flubacher's extended sentence (because Apprendi was decided before Flubacher's sentence became final), I respectfully echo the concern with finality raised in that case. In Teague, the Supreme Court noted that "[w]ithout finality, the criminal law is deprived of much of its deterrent effect." Teague, 489 U.S. at 309 (plurality opinion).

True, the Majority does not announce a "new" rule in the technical sense, as it holds that the Apprendi rule was clear before Flubacher's sentence became final. Majority at 22. But the Majority does uproot our long-established belief in the constitutionality of our extended sentence scheme, and now invites any defendant who received an extended sentence after June 26, 2000 to collaterally challenge that sentence if a judge found a fact needed to impose that sentence. While it is true that the petitioner's sentence would simply be vacated and remanded for another sentencing hearing in accordance with Apprendi and its progeny, the re-opening of these cases would, in

my opinion, "seriously undermin[e] the principle of finality which is essential to the operation of our criminal justice system." Cf. Teague, 489 U.S. at 309 (plurality opinion); see also Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day after his continued incarceration shall be subject to fresh litigation . . . .").

B. The circuit court did not abuse its discretion in ordering Flubacher's extended sentence.

Briefly, while the ICA erred in holding that Flubacher waived his second issue on certiorari, the record demonstrates that the circuit court did not abuse its discretion in imposing Flubacher's extended sentence. Flubacher argues on certiorari that he did not waive his claim that "the sentencing judge erroneously found that [Flubacher] 'bashed' a woman with a hammer and then relied on that erroneous finding in extending [his] sentences[.]" HRPP Rule 40(a)(3) generally precludes petitioners from seeking post-conviction relief on claims that were waived, "[e]xcept for a claim of illegal sentence."[10] Here, Flubacher

[10] HRPP Rule 40(a)(3) (2006) provides,

(continued...)

specifically alleges that because the circuit court relied on erroneous testimony, his sentence was illegal. Therefore, Flubacher did not waive this issue. See HRPP Rule 40(a)(3).

However, on the merits of Flubacher's claim, I believe that the record demonstrates that the circuit court did not abuse its discretion in ordering an extended term sentence. Sentencing decisions are reviewed under the abuse of discretion standard. State v. Sanney, 141 Hawaiʻi 14, 19, 404 P.3d 280, 285 (2017). "Generally, to constitute an abuse of discretion, it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Id.

At sentencing, the circuit court stated:

> You were on parole when you committed these offenses. You have an extensive criminal history of convictions and arrests. This criminality has continued despite your many contacts, and I was well aware of the other situation 'cause I had your case for years.

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[10](...continued)

> **Inapplicability**. Rule 40 proceedings shall not be available and relief thereunder shall not be granted where the issues sought to be raised have been previously ruled upon or were waived. Except for a claim of illegal sentence, an issue is waived if the petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted, or in a prior proceeding actually initiated under this rule, and the petitioner is unable to prove the existence of extraordinary circumstances to justify the petitioner's failure to raise the issue. There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure.

(Emphasis added.)

> You failed to benefit in some ways, in many ways from the criminal justice system such that you took a hammer and bashed poor Ms. Hites. She had her own difficulties, but that's not on her father. It's on you. You stole the car, did the multiple robberies. You have demonstrated, if not a total disregard, almost a total disregard for the rights of others and a bad attitude about the law and the rules that guide our society.
>
> This is indeed a pattern of criminality, and, uh, given the seriousness of the instant offenses, I will make -- respectfully make the finding you are a serious threat to our community and that you need this sentence. This does not keep you from getting paroled at the right time.

While Flubacher disputes that he hit Ms. Hites with a hammer, and only pleaded to "kicking" her, the circuit court also cited several other undisputed factors in its decision -- that Flubacher committed "multiple robberies" and demonstrated a "pattern of criminality" which made him a serious threat to the community. Flubacher does not dispute that he pleaded guilty to multiple felonies. As previously discussed, at the time that Flubacher was sentenced, HRS § 706-662(4)(a) allowed judges to find the facts "extrinsic" to the offenses charged in imposing extended sentences, including whether a defendant committed multiple felonies. Kaua, 102 Hawaiʻi at 13, 72 P.3d at 485. On these bases, the circuit court did not abuse its discretion in ordering Flubacher's extended term sentence.

II. CONCLUSION

I acknowledge that if Flubacher received an extended term sentence based on facts found by a judge today, his sentence would be unconstitutional. See Maugaotega II, 115 Hawaiʻi at

446-47, 168 P.3d at 576-77.[11] However, in 2003, it was not clear that the imposition of an extended sentence on a criminal defendant based upon a judge's finding of a fact "extrinsic" to the offense was unconstitutional. To the contrary, this court repeatedly upheld the intrinsic/extrinsic distinction our courts drew in interpreting our extended sentence scheme. See, e.g., Kaua, 102 Hawaiʻi at 13, 72 P.3d at 485.

In my view, the Majority too easily overlooks subsequent Supreme Court decisions clarifying Apprendi and too quickly abandons our case law upholding the constitutionality of our extended sentence scheme. In moving the line of demarcation separating legal and illegal extended term sentences forward seven years, the Majority also re-opens cases that should be left final.

Instead, the line of demarcation should be drawn at a date in which the Apprendi rule was clear and fully explicated. I agree with several federal courts of appeal that the date

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[11] Therefore, Maugaotega II already placed many of the decisions the Majority now overrules in doubt, if not explicitly overruling them. See Maugaotega II, 115 Hawaiʻi at 447 n.17, 168 P.3d at 577 n.17. To the extent that these cases held that our extended term sentence scheme was constitutional, I agree that they would be contrary to established law if applied to extended sentences imposed after Cunningham.

Indeed, I would even go further than the Maugaotega II majority and hold that any extended term imposed with facts found by a judge after Booker was decided should be vacated and remanded. Contra id. at 445, 168 P.3d at 575. To the extent that Maugaotega II held otherwise, I would overrule that part of our decision.

But the Majority essentially overrules these cases from the moment that they were decided. Majority at 25 n.14. For the reasons stated, I believe that decision is misguided.

should be placed after the Supreme Court decided Blakely and Booker. Therefore, I would only hold as unconstitutional any extended term sentence imposed after January 12, 2005 where a judge, and not a jury, found a fact needed to impose that sentence. Here, because Flubacher's sentence was imposed in accordance with our statutory scheme and became final before the Supreme Court decided Booker, his sentence cannot be unconstitutional, and he is not entitled to post-conviction relief.

For these reasons, I would affirm the ICA's October 13, 2016 Judgment on Appeal. I respectfully dissent.

/s/ Paula A. Nakayama