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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I,  
Respondent/Plaintiff-Appellee,

vs

ALLAN H. ABIHAI,  
Petitioner/Defendant-Appellant.

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SCWC-17-0000546

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CAAP-17-0000546; 1PC151000405)

APRIL 28, 2020

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

On certiorari, the majority holds that the Circuit Court of the First Circuit (circuit court) clearly erred in denying Abihai credit for time served on his escape conviction. The majority's interpretation that Hawai'i Revised Statutes (HRS)

§ 706-671(1) entitles Abihai to pre-sentence detention credit creates a new rule, disregards our precedent, and ignores the plain language HRS § 706-671(3) and its legislative history.

Prior to this decision, this court has consistently interpreted HRS § 706-671(1) to mean that a defendant is not entitled to credit for time served in connection with an unrelated criminal offense. This interpretation is supported by the statute's plain language, the legislative history, the purpose behind granting credit for time served, and the relevant commentary. Yet, the majority announces a new rule in this case with no explanation for departing from our prior interpretation or analysis as to why this new rule should apply retroactively to Abihai.

In 2012, the legislature added HRS § 706-671(3) specifically to foreclose the possibility of pre-sentence detention credit for a subsequent crime committed while a defendant is already serving a term of imprisonment. Under the plain language of HRS § 706-671(3), because Abihai was convicted of a crime committed while he was serving a life sentence for separate, unrelated felony convictions, he cannot receive credit for time served against the sentence he received for his subsequent escape conviction.

Therefore, I believe that the circuit court properly

denied Abihai's request for pre-sentence detention credit from the date that Abihai was returned to custody. I would hold that the ICA did not err in affirming the circuit court's sentence.

Accordingly, I dissent.

## I. DISCUSSION

### A. The circuit court did not err in denying Abihai credit for time served on his subsequent escape conviction.

Abihai is not entitled to credit for time served for his prior felony convictions because (1) HRS § 706-671(1) entitles a defendant to credit for time served only in connection with the same criminal offense; and (2) HRS § 706-671(3) prohibits granting pre-sentence detention credit for a subsequent crime committed while a defendant was already serving a term of imprisonment. Thus, the circuit court correctly determined that Abihai was not entitled to credit for time served.

#### 1. Abihai is not entitled to time served under HRS § 706-671(1), because he was serving time for his prior convictions and not his ultimate conviction for escape.

The majority claims that "according to HRS § 706-671(1), Abihai is entitled to pre-sentence detention credit." Majority at 22. This interpretation directly contradicts our precedent, the language of the statute, the legislative purpose behind granting credit for time served, and the relevant

commentary.

In accordance with established rules of statutory construction, the starting point of our inquiry is the language of HRS § 706-671(1) (2014), which provides in relevant part:

**Credit for time of detention prior to sentence; credit for imprisonment under earlier sentence for same crime.** (1)

When a defendant who is sentenced to imprisonment has previously been detained in any State or local correctional or other institution following the defendant's arrest for the crime for which sentence is imposed, such period of detention following the defendant's arrest shall be deducted from the minimum and maximum terms of such sentence.

(Emphasis added.) The title of HRS § 706-671 includes the phrase "credit for imprisonment under earlier sentence for same crime" and the statute itself provides for credit for time served "following the defendant's arrest for the crime for which sentence is imposed." (Emphasis added.) Thus, the plain language of the statute mandates that credit for time served is only available when a defendant is serving time solely for the offense for which the defendant is later sentenced.

Prior to the majority's decision in this case, this court has consistently interpreted HRS § 706-671(1) to mean that a defendant is not entitled to "credit for time served in connection with an unrelated criminal offense." State v. March, 94 Hawai'i 250, 254, 11 P.3d 1094, 1098 (2000). See State v. Miller, 79 Hawai'i 194, 197, 900 P.2d 770, 773 (1995) (holding

that defendant was not entitled to credit for time served after his arrest for a subsequent offense that was not connected to the one for which he was being sentenced); State v. Kami, 71 Haw. 612, 615-16, 801 P.2d 1206, 1208 (1990) (holding that probationer incarcerated for additional unrelated felonies was not entitled to credit for time served for the unrelated felonies upon subsequent revocation of probation and resentencing); State v. Yamasaki, 91 Hawai'i 163, 164, 981 P.2d 720, 721 (App. 1999) (concluding that HRS § 706-671(1) does not entitle a defendant to credit for time served "as a consequence of a different criminal charge and/or conviction."), cert. denied, 91 Hawai'i 163, 981 P.2d 720 (1999); State v. Mason, 79 Hawai'i 175, 183, 900 P.2d 172, 180 (App. 1995) ("[T]he evident purpose of HRS § 706-671(1) is to credit a defendant for the time he or she is confined prior to sentencing in connection with the defendant's ultimate conviction."), cert. denied, 79 Hawai'i 341, 902 P.2d 976 (1995)). Thus, credit for time served is only available for time served in connection with the ultimate offense.

In March, this court held that a sentence that credits a defendant "with the time served for an unrelated offense is illegal because the sentencing court is not authorized by [HRS §

706-671] to grant such a credit.”<sup>1</sup> 94 Hawai‘i at 255, 11 P.3d at 1099. Our reasoning in March was based on the plain language of HRS § 706-671, which mandates that a defendant only receive credit for time served in connection with the defendant’s ultimate conviction. Id. at 254, 11 P.3d at 1098. The March court also noted that the legislative history supported this interpretation. Id. (citing Hse. Conf. Comm. Rep. No. 1, in 1972 House Journal, at 1037 and Sen. Conf. Comm. Rep. No. 1-72, in 1972 Senate Journal, at 736).<sup>2</sup> Accordingly, this court

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<sup>1</sup> While the facts of March are distinguishable, that does not alter the application of this court’s holding and interpretation of HRS § 706-671 in March. In March, the defendant was convicted of a felony in 1994, and while on probation in 1998, he was arrested, incarcerated, and later convicted on another felony. 94 Hawai‘i at 251, 11 P.3d at 1095. There was no dispute that the defendant’s 333 days served while awaiting trial for the subsequent felony was time served for his 1998 felony, and not the subsequent probation revocation for which he sought credit. Id. at 255, 11 P.3d at 1099. Accordingly, this court held that the trial court’s sentence crediting the defendant’s probation revocation sentence with time served on the unrelated felony was an illegal sentence. Id.

<sup>2</sup> The full text of the Committee Reports cited, but not quoted, by the March court states:

Your Committee has agreed to amend Section 671 to provide that when a defendant has previously been detained in any State or local correctional facility following his arrest or his sentence is vacated after serving a part of his sentence and a new sentence for the same offense is imposed, such period of detention shall be deducted from both his minimum and maximum sentence.

(Emphasis added.) This language corresponds to HRS § 706-671(2), which states:

When a judgment of conviction or a sentence is vacated and a new sentence is thereafter imposed upon the defendant for the same crime, the period of detention and imprisonment theretofore served shall be deducted from the

(continued . . .)

concluded that a sentence that credits a defendant with time served for an unrelated offense is not permitted under HRS § 706-671(1). Id. at 255, 11 P.3d at 1099.

The legislature did not intend that HRS § 706-671(1) would provide credit for time served for a subsequent crime committed while a defendant is already serving a term of imprisonment. Rather, the legislative purpose behind credit for time served is to ensure that defendants who cannot afford to post bail are not disadvantaged over those who can.

The commentary to HRS § 706-671 states in relevant part that "[t]his section provides for a result which the Code deems fair" and "provides for some equalization ... between those defendants who obtain pre-sentence release and those who do not." Statutes giving credit for presentence confinement were designed to ensure equal treatment of all defendants whether or not they are incarcerated prior to conviction.

State v. Tauiliili, 96 Hawai'i 195, 199, 29 P.3d 914, 918 (2001) (ellipses in original) (internal citations omitted).

It also bears noting that the legislature chose to enact HRS § 706-671(1) with language that is nearly identical to Model Penal Code and Commentaries § 7.09 at 306-07<sup>3</sup> (Official

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minimum and maximum terms of the new sentence.

(Emphasis added.) Thus, the legislature intended HRS § 706-671 to provide credit for time served only in connection with the same crime that a defendant is being sentenced, and not for time served for unrelated offenses. See March, 94 Hawai'i at 255, 11 P.3d at 1099.

<sup>3</sup> MPC § 7.09 states in relevant part:

(1) When a defendant who is sentenced to imprisonment has  
(continued . . .)

Draft and Revised Comments 1985) (MPC). Thus, the commentary to the MPC is instructive authority "to glean the scope of parallel statutes" that the legislature has codified in the HRS. State v. Yamasaki, 91 Hawai'i at 165, 981 P.2d at 722 (quoting State v. Borochoy, 86 Hawai'i 183, 189, 948 P.2d 604, 610 (App. 1997) (internal citations omitted). The MPC's "Explanatory Note" to § 7.09(1) states that "[s]ubsection (1) establishes the defendant's right to credit against his ultimate sentence for time served prior to the imposition of the sentence as a result of the same criminal charge." MPC § 7.09 explanatory note at 307 (emphasis added). Thus, the MPC supports the interpretation that credit for time served under HRS § 706-671(1) is available only to offset the defendant's ultimate sentence for time served prior to sentencing in connection with the same crime.

The majority announces a new rule in this case, yet offers no explanation to justify departing from our prior interpretations of HRS § 706-671(1), or analysis as to why this new rule should apply retroactively to entitle Abihai to pre-

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previously been detained in any state or local correctional or other institution following his [conviction of] [arrest for] the crime for which such sentence is imposed, such period of detention following his [conviction] [arrest] shall be deducted from the maximum term, and from the minimum, if any, of such sentence.

(Brackets in original.)



sentence detention credit. See Garcia v. State, 125 Hawai'i 429, 443, 263 P.3d 709, 723 (explaining that a decision that "overrules a precedent upon which the contest would otherwise be decided differently" announces a new rule); Rivers v. Roadway Express, Inc., 511 U.S. 298, 312-13 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."). "Because we are announcing a new rule, we must decide whether the rule should be given retroactive effect." State v. Jess, 117 Hawai'i 381, 401, 184 P.3d 133, 153 (2008). However, the majority neither acknowledges that it is making a new rule, nor explains why the rule should apply retroactively to afford Abihai credit for time served for his unrelated prior conviction.

Here, Abihai was already serving a life sentence for multiple felony convictions at the time that he committed the offense of escape. Thus, when Abihai was returned to custody following his escape, he was continuing to serve his life sentence. Consequently, Abihai is not entitled to credit for time served in connection with his prior felony convictions because the time served was unrelated to the subsequent escape offense for which he was ultimately sentenced. See HRS § 706-671(1); March, 94 Hawai'i at 254, 11 P.3d at 1098; Miller, 79

Hawai'i at 197, 900 P.2d at 773; Kami, 71 Haw. at 615-16, 801 P.2d at 1208.

Accordingly, the majority's interpretation that HRS § 706-671(1) entitles Abihai to pre-sentence detention credit for time that he served for his unrelated prior felony convictions against his ultimate sentence for the escape charge finds no support in our prior decisions, the plain and unambiguous language of the statute, its legislative purpose, or the relevant commentary.

**2. The legislature enacted HRS § 706-671(3) to preclude pre-sentence detention credit when a defendant is serving a term of imprisonment for a separate, unrelated felony.**

Not only is Abihai not entitled to pre-sentence detention credit under HRS § 706-671(1), he is explicitly precluded from receiving credit by HRS § 706-671(3). The legislature intentionally added HRS § 706-671(3) to foreclose the possibility of granting pre-sentence detention credit for a subsequent crime committed while a defendant was already serving a term of imprisonment. The majority's conclusion that "[t]he plain language of HRS § 706-671(3) does not eliminate Abihai's entitlement to presentence detention credit pursuant to HRS § 706-671(1) [,]" Majority at 24, is contrary to the plain language of the statute and the legislature's stated purpose and

intent. The majority's interpretation of the statute creates an absurd and unjust result.

The legislature amended HRS § 706-671 to preclude time served for subsequent crimes committed while incarcerated by adding subsection (3) in 2012. HRS § 706-671(3) (2014) provides:

Notwithstanding any other law to the contrary, when a defendant is convicted for a crime committed while serving a sentence of imprisonment on a separate unrelated felony conviction, credit for time being served for the term of imprisonment imposed on the defendant for the separate unrelated felony conviction shall not be deducted from the term of imprisonment imposed on the defendant for the subsequent conviction.

(Emphasis added.) Based on its plain language, HRS § 706-671(3) envisions a scenario where a defendant is convicted of a felony committed while serving a sentence of imprisonment for a "separate unrelated felony conviction." In such a situation, a defendant cannot receive credit for time served for the subsequent conviction when the defendant is serving a term of imprisonment imposed by the earlier unrelated felony conviction. HRS § 706-671(3).

The legislative history demonstrates that HRS § 706-671(3) was added: (1) with the purpose and intent of "clarify[ing] that a defendant will not earn credit for time served for a subsequent crime while the defendant is serving an imprisonment sentence for a separate, unrelated offense[;]"

(2) to resolve ambiguities and inconsistencies in the way that HRS § 706-671 was being interpreted and applied; and (3) to "deter[] imprisoned offenders from incurring new offenses." S. Stand. Comm. Rep. No. 3188, in 2012 Senate Journal, at 998-999.

"Statutes should be interpreted to give them effect." State v. Spencer, 68 Haw. 622, 624, 725 P.2d 799, 800 (1986). It is well-settled that "[s]tatutory construction dictates that an interpreting court should not fashion a construction of statutory text that effectively renders the statute a nullity or creates an absurd or unjust result." Dines v. Pacific Ins. Co., Ltd., 78 Hawai'i 325, 337, 893 P.2d 176, 188 (1995) (internal citation omitted). The facts of this case illustrate how the majority's interpretation that HRS § 706-671(3) "does not eliminate Abihai's entitlement to presentence detention credit" for the sentence he received for his escape conviction while serving time for his separate, unrelated felony convictions leads to an unjust and absurd result. See Majority at 24.

The majority concludes that Abihai is entitled to presentence detention credit because "[t]he time Abihai was serving from March 17, 2015 to June 14, 2017 was not just 'time being served for the separate unrelated felony conviction' but was also 'time being served for the escape.'" Majority at 24 (emphasis added). Thus, the majority reads the word "just" into

the statute, by concluding that HRS § 706-671(3) is only triggered when "credit for time being served for the term of imprisonment imposed on the defendant for the separate unrelated felony conviction"<sup>4</sup> is "just," or solely, for the prior conviction. See HRS § 706-671(3). The insertion of the word "just" in the statute nullifies HRS § 706-671(3), because a defendant who "commits a crime while serving a sentence of imprisonment for a separate unrelated felony conviction" cannot thereafter "just" be serving time for the prior conviction. The majority's interpretation that HRS § 706-671(3) only applies in this fictional scenario leads to an unjust and absurd result, because it effectively means that an imprisoned offender will always be awarded pre-sentence detention credit. Such an outcome completely subverts the legislative intent behind HRS § 706-671(3). See Dines, 78 Hawai'i at 337, 893 P.2d at 188 ("It goes without saying that a legislature does not go through the enactment process to accomplish absolutely nothing.").

Based on the plain language of HRS § 706-671(3) and the legislative history underlying the provision, time served by

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<sup>4</sup> The majority parses HRS § 706-671(3) into six factors and paraphrases the fifth factor as "credit for time being served for the separate unrelated felony conviction." Majority at 23. To be clear, the specific language of HRS § 706-671(3) is: "credit for time being served for the term of imprisonment imposed on the defendant for the separate unrelated felony conviction[.]"

Abihai for his separate, unrelated felony convictions may not be deducted from the sentence he received for his subsequent escape conviction. Accordingly, I would hold that the ICA did not err in affirming the circuit court's sentence which denied Abihai credit for time served.

## II. CONCLUSION

For the reasons stated above, I respectfully dissent. In accordance with our prior decisions interpreting HRS § 706-671(1), and the plain and unambiguous language of HRS § 706-671(3), I would hold that the circuit court properly denied Abihai credit for time served for his subsequent escape offense. Consequently, I would affirm the ICA's September 6, 2018 judgment on appeal, issued pursuant to its July 19, 2018 summary disposition order.

Mark E. Recktenwald

Paula A. Nakayama

