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NO. CAAP-20-0000650

(CONSOLIDATED NOS. CAAP-20-0000438, CAAP-20-0000506, AND CAAP-20-0000650)

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

STATE OF HAWAII,

) **CRIMINAL NO. 1PC091001524**

) (CR 09-1-1524)

Plaintiff-Appellee,

) APPEAL FROM THE

) 1) JUDGMENT OF CONVICTION AND

) SENTENCE; NOTICE OF ENTRY, and

VS.

) MITTIMUS, WARRANT OF

) COMMITMENT, filed June 4, 2020 (CAAP-
20-0000438)

) 2) AMENDED JUDGMENT OF

STANLEY CANOSA,

) CONVICTION AND SENTENCE; NOTICE

) OF ENTRY, and AMENDED MITTIMUS,

) WARRANT OF COMMITMENT, filed July

Defendant-Appellant

) 10, 2020 (CAAP-20-0000506)

) 3) ORDER DENYING DEFENDANT'S

) MOTION TO CORRECT ILLEGAL

) SENTENCE PURSUANT TO RULE 35(a)

) OF THE HAWAII RULES OF PENAL

) PROCEDURE FILED 8/24/20,

) filed October 21, 2020 (CAAP-20-0000650)

)

) FIRST CIRCUIT COURT

)

) The Honorable Karen Tooko Nakasone

)

) **[Caption continued next page]**

OPENING BRIEF OF DEFENDANT-APPELLANT STANLEY CANOSA

APPENDICES "A"-“E”

and
CERTIFICATE OF SERVICE

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OPENING BRIEF OF DEFENDANT-APPELLANT STANLEY CANOSA

Comes now Defendant-Appellant STANLEY CANOSA (hereinafter “Appellant” or “CANOSA”), by and through his court-appointed counsel of record, SHAWN A. LUIZ, ESQ., and hereby submits his *Opening Brief*¹ in accordance with Hawaii Rules of Appellate Procedure (hereinafter “HRAP”), Rules 28 and 32.

The Jurisdiction of this Court is based upon Hawaii Revised Statutes (hereinafter “HRS”) § 641-11 and Rules 3 and 4(b) of the HRAP.

¹ Appellant respectfully notes, the reason this case is once again before this Honorable Court, is that that an unusual number of prejudicial errors have befallen Appellant in CR 09-1-1524. For example, in Appellant’s first trial before the Honorable Karen Ahn, Appellant was convicted of two of three charges (only the property crimes) and on November 29, 2011, sentenced to a maximum sentence of 20 years. A first appeal followed. On February 7, 2014, the Intermediate Court of Appeals (ICA) remanded CR 09-1-1524 for a new trial. A second trial upon remand before the ended in a mistrial in April of 2015. A third trial upon remand commenced on March 24, 2016. Following a third trial, Appellant was convicted once again of two of three charges (only the property crimes). On June 22, 2016, a post-conviction extended hearing was held in accordance with HRS 706-664[3] where the jury found the facts under HRS 706-662 proven beyond reasonable doubt, i.e., that Appellant is a persistent offender and that an extended sentence of imprisonment is necessary for the protection of the public. On June 27, 2016, the Honorable Karen Ahn sentenced Appellant to a harsher and maximum sentence of 30 years following the third trial. Appellant appealed a second time and on April 20, 2018, the Intermediate Court of Appeals (ICA) in its Summary Disposition Order remanded the above-entitled case for re-sentencing due to the trial court’s violation of HRS Section 706-609. On November 15, 2018, the ICA filed its judgment on appeal. On January 18, 2019, the Hawaii Supreme Court denied a *Writ of Certiorari*. Appellant was re-sentenced on June 4, 2020 before the Honorable Karen Nakasone. This third appeal follows seeking a fair and just sentence follows.

I. STATEMENT OF FACTS

Procedural History

On September 29, 2009, Appellant was charged by indictment with:

CT. 1: Burglary in the First Degree (708-810(1)(c), HRS)

CT. 2: Sexual Assault in the First Degree (§707-730, HRS)

CT. 3: Unauthorized Entry in a Dwelling (708-812.6, HRS)

See ROA PDF p. 5; Trial Court Docket No. 2.

Following the first Jury Trial where Appellant was convicted in Counts 1 and 3, and after an extended term jury trial, after the same jury found that Appellant was eligible to serve an extended term of imprisonment in counts 1 and 3, Appellant was sentenced to an extended term of twenty (20) years in Count 1, and ten (10) years in Count 2 to run concurrently.

The first Appeal was CAAP-11-1051 and resulted the judgment being vacated and an order for a new trial based on improper argument by the Prosecuting Attorney. See ROA PDF p. 21; Trial Court Docket Nos. 172. See MEMORANDUM OPINION (ICA CAAP-11-0001051). See ROA PDF p. 25; Trial Court Docket Nos. 212.

Following a second jury trial, Appellant was sentenced to an extended term of twenty (20) years in Count 1, and ten (10) years in Count 2 to run consecutively. Appellant's second APPEAL was ICA CAAP-16-0000497. See ROA PDF p. 33; Trial Court Docket Nos. 304. On November 24, 2018, Summary Disposition Order was issued in the second appeal resulting in re-sentencing. See ROA PDF p. 79; Trial Court Docket Nos. 508.

On June 4, 2020, Appellant was re-sentenced and the mittimus was issued forthwith. (Appendix "A"). See ROA PDF p. 80; Trial Court Docket Nos. 522.

Appellant incorporates by reference Appendices “A”-“C” for the specific sentence for the 2 counts in which Appellant was convicted. In Short, Appellant was sentenced to an extended term of twenty (20) years in Count 1, and ten (10) years in Count 2 to run concurrently.

June 4, 2020 Sentencing proceedings:

On June 4, 2020, resentencing came on for hearing before the Honorable Karen Nakasone. Thalia Murphy, Deputy Prosecuting Attorney, appeared for the State. Court appointed counsel Shawn A. Luiz was present via WebEx. See June 4, 2020 transcript at page 3. The trial court took judicial notice of the records and files, including the appellate proceedings, the ICA summary disposition order, the judgment on appeal, and the order rejecting certiorari filed by the Supreme Court. Id. at 3. “And the Court’s understanding is the sentences were vacated by the ICA due to improper imposition of consecutive sentencing following a retrial in violation of the 706-609 statute. So this is a remand for resentencing. I did review defendant Stanley Canosa’s written objection to resentencing. Okay, sir? So I did review that.” Id. at 4.

The State presented its argument for extended terms to run concurrent as to the convictions in Counts 1 and 3:

THE COURT: Okay. All right. And for the record, the Court did review defendant’s written objections to resentencing. So I did review them.

And we’ll start with the State’s position on sentencing.

MS. MURPHY: Thank you, Your Honor. Consistent with the summary disposition order, which states that the defendant must be resentenced as to -- and that it was a violation to impose the consecutive sentence in this case, the State’s requesting that the defendant be resentenced to the 20 years in the Burglary in the First Degree and to the extended term of 10 years in the unlawful entry of dwelling and that said sentences run concurrently.

THE COURT: So the State is requesting that

the extended terms of the 20 and the 10 be imposed concurrently?

MS. MURPHY: Yes, Your Honor. I believe that's on the table for -- in terms of today's sentencing. Thank you, Your Honor.

Id. at 6-7.

Appellant addressed the Court regarding resentencing (p. 8-10):

THE DEFENDANT: First of all, the -- my sentence wasn't vacated because the consecutive was illegal. I think because the Court at that time violated the statute by imposing a more severe sentence than my prior sentence. And -- and when they vacated that sentence -- and that wasn't my only concern, that the consecutive was off the table. I mean there's a lot of other issues. I don't know what. I don't know what. I didn't see the motion that my attorney filed. I didn't have a chance to see it. So I don't know what --

THE COURT: The written objections attach -- let's see -- as an Exhibit A a six-page handwritten document from you.

THE DEFENDANT: Right. That's my supplemental argument.

THE COURT: Okay. And I've reviewed that. Okay. Anything else, sir?

THE DEFENDANT: Well, I was wondering what was the -- my attorney's argument in terms of the -- the delay, the delay to bring me forth for resentencing, you know, on a, you know, one reasonable time.

MR. LUIZ: Well, I had prepared oral arguments for this morning. I filed a written objection and attached my client's written colloquy objection as an Exhibit A. So it's basically like a pleading with a declaration of counsel and attaching his. But I had prepared oral arguments for this morning in lieu in writing. And the oral arguments that I have prepared are now moot because the State conceded on the consecutive and isn't going forward. So that kind of moots out all the oral arguments I had prepared and studied for this morning.

THE COURT: Okay.

MR. LUIZ: And my client's position is he still -- I think he's going to argue in his colloquy that he believes that the entire sentence is vacated -- that

he should be released immediately. And that's pretty much -- two things that was set forth in his written objection is (a) that the consecutive was waived because the amount of time that passed between when the ICA vacated the judgment and when we went forward with sentencing ultimately. And then his second argument is that he believed that when the ICA vacated the judgment, that that vacated his extended as well, and that he served his maximum incarceration, which would have been expired on September 21st, 2019, with ten years from when he was taken into custody, and that he served the sentence and that he's eligible for release. And that's the other part that's set forth in his written objection that he wants to argue.

THE COURT: Okay. I've reviewed that...

Id. at p. 8-10.

The State responded:

MS. MURPHY: Yes, Your Honor. Regarding the delay of sentencing, the State argues that defendant was not prejudiced as he still stands -- that he was sentenced to an extended term of 20 years. Thus there is no prejudice in the delay.

Id. at 14.

The Appellant argued that his ordinary term expired² so he could not be resentenced to an extended term of imprisonment:

THE DEFENDANT: Okay. So now, now we can go to that part where I was prejudiced because now that everything is vacated -- and I even -- I get one letter before September, 'cause the ordinary term for one burglary is ten years.

Id. at 16.

The Court understood Appellant's argument:

THE COURT: I understand your argument.

² In other words, the maximum penalty prescribed by law for the underlying charged offenses.

That's what you're arguing in here. The ordinary terms -- you're saying the ordinary term is still in effect and it ran.

Id. at p. 17.

The Court ruled regarding the defense's objections:

THE COURT: Okay. I understand what you're saying. Okay? So I'm going to rule. I'm going to rule, sir? Okay. I'm going to rule and then we're going to go forward with the resentencing.

THE DEFENDANT: Resentencing?

THE COURT: Okay. So the Court's ruling on the objections. There was an objection. One of the objections defendant raised is the delay. And there was a delay from the time that the Supreme Court rejected certiorari from January 2019 to the time the sentencing -- we began to try to schedule -- try to reschedule this resentencing. So you know, Mr. Canosa, I can tell you that it's unfortunate that the delay occurred. But the fact that there was a delay in having this resentencing -- and this is my ruling -- does not mean that in any way that the Court cannot legally resentence you or that the State -- there's any kind of waiver by the State. And the Court's ruling is that the fact that there was a delay in coming to this resentencing does not mean that there is an infirmity with the Court proceeding with sentencing today.

Id. at 18-19.

The Court addressed the argument that once the ordinary term expires, the extended sentence cannot be imposed:

THE COURT: I will let you speak at resentencing. Okay? I'm going to address the objections regarding imposition of extended terms.

Defendant argued today and in his written pleading that the extended terms cannot be imposed because the ordinary maximum term already expired. And he argues that it's logically impossible to extend a sentence that is already expired and does not exist.

This Court interprets the remand as having vacated the prior sentences and the ICA remanded it back here for resentencing consistent with the appellate court

order. Defendant's status is post conviction pending resentencing, and the Court retains jurisdiction to resentence.

So the ICA's order vacated the June 27, 26 sentence with an order to resentence. So this Court -- my conclusion is that the 2016 sentence is vacated. Defendant's pending sentencing. He is being held on existing trial custody orders. He is receiving all jail credit he's entitled to on Counts 1 and 3.

The vacated sentence does not mean that the ordinary sentence for Counts 1 and 2 was still running. And it doesn't mean that the ordinary sentence was running and expired and can no longer exist. So the Court rejects that argument that the Court can no longer sentence defendant to extended term because the ordinary sentence has run.

Id. at 19-20.

The court added:

This argument -- the Court's ruling is that this argument made by the defense is premised on the erroneous legal assumption that the ordinary sentences are still in effect and are running. And that's not the case.

So for these reasons, the objections are rejected and overruled. I've made my ruling. And I've already heard the State and defense counsel's position on resentencing. Mr. Luiz, do you have anything further to add on the resentencing?

MR. LUIZ: No, Your Honor.

Id. at 21.

The trial court ruled:

Based on the Court taking judicial notice of the entire record and files, I did go back and review the presentence report, the entire sentencing transcript, the jury verdict findings. All sentencing options are available to the Court. However, based on the jury verdict's finding and in view of defendant's extensive criminal history and the nature of the current offenses, this Court does find that the State's request for

extended term sentencing based on the jury's findings --
that such sentencing was appropriate.

So based on the persistent offender -- based
on the persistent offender status and that extended terms
were necessary for the protection of the public, the
Court finds that the extended terms are appropriate, that
it constitutes just punishment, and that they are
necessary to protect the public.

The terms will run concurrent. It is the
judgment and sentence of the Court that defendant will
committed to the custody and care of the department --
Director of the Department of Public Safety for
indeterminate terms of imprisonment as follows:

Count 1, 10 years extended to 20 years in the
Burglary.

Count 3. UED, 5 years extended to 10 years.

Terms to run concurrent. Defendant is to
receive all credit for time served.

Mittimus to issue forthwith.

And this concludes this proceeding.

Id. at p. 24-25.

On July 3, 2020, a notice of appeal was timely filed from the June 4, 2020 resentencing (ICA CAAP-20-0000438). See ROA PDF p. 81; Trial Court Docket Nos. 526.

On July 10, 2020, "Amended Judgment of Conviction and Sentence; Notice of Entry", was filed (Appendix "B"). See ROA PDF p. 81; Trial Court Docket Nos. 530.

On August 10, 2020, a notice of appeal was timely filed from the amended judgment (ICA CAAP-20-0000506). See ROA PDF p. 81; Trial Court Docket Nos. 534.

On October 21, 2020, "Order Denying Motion to Correct Illegal Sentence" was filed. See ROA PDF p. 85; Trial Court Docket Nos. 591. (Appendix "C").

On October 27, 2020, a notice of appeal was timely filed from the "Order Denying Motion to Correct Illegal Sentence" (ICA CAAP-20-0000650). See ROA PDF p. 85; Trial Court Docket Nos. 593.

This consolidated appeal follows while Appellant remains in custody during the duration of this current appeal³.

II. POINTS ON APPEAL

1. The trial court abused its discretion in re-sentencing Appellant to an extended sentence after his underlying maximum sentence⁴ as to both counts of the underlying charges had already expired. **See Appendix A, PDF 80, ROA at document 522; see also June 4, 2020, transcript at 16-21; 24-25**, attached as **Appendix D** in accordance with HRAP, Rule 28(b)(4). As a result, Appellant was deprived of his constitutional right to be free of double jeopardy, deprived of his constitutional right to a fair and just sentence and Appellant's sentence must be vacated and Appellant released from custody.
2. The trial court abused its discretion in denying Appellant's Motion for Correction of Illegal Sentence as Appellant's underlying maximum sentence as to both counts of the underlying charges had already expired. The Court decided the Motion without a hearing. **See October 21, 2020 Order Denying Motion to Correct Illegal Sentence filed August 24, 2020, PDF ROA at document 591; see also Appendix "C"**.

III. STANDARDS OF REVIEW

A. Sentencing

A sentencing judge generally has broad discretion in imposing a sentence. State v. Gaylord, 78 Hawai'i 127, 143-44, 890 P.2d 1167, 1183-84 (1995). The applicable standard of review for sentencing or re-sentencing matters is whether the court committed plain and manifest abuse of discretion in its decision. Gaylord, 78 Hawaii at 144, 890 P.2d at 1184.

Factors which indicate a plain and manifest abuse of discretion are arbitrary or capricious action by the judge and a rigid refusal to consider the defendant's contentions." State v. Kumukau, 71 Haw. 218, 227-28, 787 P.2d 682, 687-88 (1990).

Generally, to constitute an abuse it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant. Keawe v. State, 79 Hawai'i 281, 284, 901 P.2d 481, 484 (1995).

³ Appellant is currently incarcerated at Halawa, has had his mandatory minimum set and has not been released on parole yet for this case.

⁴ In other words, the maximum penalty prescribed by law for the underlying charged offenses.

B. Plain Error

If the substantial rights of the defendant have been affected adversely, the error will be deemed plain error. State v. Nichols, 111 Hawai'i 327, 334, 141 P.3d 974, 981 (2006); Where plain error has been committed and substantial rights have been affected thereby, the error may be noticed even though it was not brought to the attention of the trial court. State v. Sanchez, 82 Hawai'i 517, 524-25, 923 P.2d 934, 941-42 (App. 1996); State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (App. 1998).

C. Motion for Reconsideration

"The trial court's ruling on a motion for reconsideration is reviewed under the abuse of discretion standard." *Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co.*, 100 Hawai'i 97, 110, 58 P.3d 608, 621 (2002). An abuse of discretion occurs if the trial court has "clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." *Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Haw. 85, 114, 839 P.2d 10, 26 (1992). Cho v. State, 115 Haw. 373, 381, 168 P.3d 17, 25 (2007).

IV. QUESTIONS PRESENTED

1. Did the trial court abuse its discretion in re-sentencing Appellant to an extended sentence after his underlying maximum sentence⁵ had already expired?
2. Did the trial court abuse its discretion in denying Appellant's Motion for correction of Illegal Sentence?

V. ARGUMENT

A. Regarding Appellant's Objection to re-sentencing after already having served his underlying maximum sentences:

Appellant, in this case of first impression, contends that on June 4, 2020, the trial court committed reversible error by extending the expired ordinary terms of imprisonment prescribed by H.R.S., 706-660 for both Appellant's burglary (708-810 (1)(c), H.R.S.) and Unauthorized Entry in a Dwelling (708-812.6, H.R.S.) convictions without being authorized by statute, and thereby imposed the extended terms of imprisonment as described herein. This constitutes an illegal sentence not authorized by statute and a violation of appellant's right to due process.

⁵ In other words, the maximum penalty prescribed by law for the underlying charged offenses.

The Hawaii Supreme Court held that “although the court has broad discretion in sentencing defendants, the sentence imposed must be authorized by statute. See State v March, 94 Haw 250, P.3d 1094 (2000).

In this case of first impression the court did not have authority by statute to extend the expired ordinary terms of imprisonment prescribed by H.R.S. Section 706-660 for both burglary and unauthorized entry in a dwelling beyond its statutorily prescribed range by which to impose the extended terms of imprisonment in this case. Thus, this constitutes an illegal sentence not authorized by statute. See State v. Kahalewai, 71 Haw. 624, 626 801 P.2d 558, 560 (1990) (“Clarifying that an illegal sentence is one that the court is not authorized to impose”). Accordingly, pursuant to Chapter 706-600 of the H.R.S., “No sentence shall be imposed otherwise than in accordance with this chapter.”

Accordingly, by operation of serving and satisfying the ordinary terms of imprisonment prescribed by H.R.S. 706-660 for both Appellant’s burglary and unauthorized entry into a dwelling convictions before a legal sentence was ever imposed, Appellant has already served the statutorily imposed maximum penalties for both convictions, and as a result on June 4, 2020, the court’s duty in rendering a legal disposition of this case was to declare time served, *Nunc pro tunc* on the expiration dates of the ordinary terms of imprisonment prescribed by H.R.S. Section 706-660 because no other sentence could be imposed in accordance with H.R.S. 706-660 and nor could any other sentence of imprisonment be authorized by statute.

This sound principle that when a court imposes an extended sentence there must be a basis on which the court can extend from and beyond to impose the extended terms of imprisonment as provide in H.R.S. Section 706-661, which state in pertinent part.

The court, pursuant to HRS § 706-661, may sentence a person who satisfies the criteria for any of the categories set forth in section H.R.S. 706-662 to an extended term of imprisonment, which shall have the maximum length as follows pursuant to HRS § 706-661:

- (3) For a class B felony-indeterminate twenty-year terms of imprisonment; and
- (4) For a class C felony-indeterminate ten-year terms of imprisonment

Here, in relevant part, although H.R.S. Section 706-661 provides the maximum length of imprisonment when a court extends a term of imprisonment for class B and class C felonies, to find the basis on which they are extend from, one must look to H.R.S. Section 706-660, which provides the ordinary terms of imprisonment for class B and class C felonies.

Because Appellant's Burglary in the first-degree conviction is a class B felony, H.R.S. Section 706-660 prescribes a 10-year ordinary term of imprisonment. Because unauthorized entry into a dwelling conviction is a class C felony, H.R.S. Section 706-660 prescribes a 5-year ordinary term of imprisonment.

Accordingly, paragraph (3) of H.R.S. Section 706-661 (for a Burglary in the first-degree conviction) is the basis to extend from and beyond the ordinary 10-year terms to impose a 20-year term of imprisonment pursuant to H.R.S. Section 706-661. In like fashion, Paragraph (4) of H.R.S. Section 706-661 (for an unauthorized entry into dwelling) is the basis to extend from and beyond the ordinary 5-year term of imprisonment to impose an indeterminate 10-year term of imprisonment as provided in HRS 706-661.

Now before the court can exercise its discretion on whether to extend from the ordinary term of imprisonment and thereby impose extended terms of imprisonment as provided by H.R.S. Section 706-661, H.R.S. Section 706-664 (3) provides the procedure that must be carried out and the criteria that must be satisfied, specifically, H.R.S. Section 706-664 (3) states:

(3) If the jury, or the court if the defendant has waived the right to a jury determination, finds that the facts necessary for the imposition of an extended term of imprisonment under section 706-662 have been proven beyond a reasonable doubt, the court may impose an indeterminate term of imprisonment as provided in section 706-661.

Haw. Rev. Stat. Ann. § 706-664 (West)

After being convicted on both Burglary in the First Degree and Unauthorized Entry into a Dwelling, and after this case was remanded for a new trial by the ICA due to the State's improper arguments during closing arguments in the first trial, on June 22, 2016, a post-conviction-extended term hearing was held in accordance with H.R.S. Section 706-664(3), where a jury did find that the facts under H.R.S. Section 706-662 have been proved beyond a reasonable doubt that appellant is a persistent offender and that extended terms of imprisonment is necessary for the protection of the public.

Subsequently, during sentencing on June 27, 2016, the trial court extended the 10-year ordinary term of imprisonment prescribed by H.R.S. Section 706-660 for Appellant's conviction to 20-years and thereby sentenced Appellant to an extended 20-years. However, by this time, Appellant had already fully served and satisfied the 10-year ordinary term of imprisonment prescribed by H.R.S. Section 706-660, which expired 10-years from September 22, 2009 (date of

arrest), on September 22, 2019. Likewise, the 5-year ordinary term of imprisonment prescribed by H.R.S. Section 706-660, expired in 5-years from September 22, 2009 (date of arrest), which would be on September 22, 2014.

During Appellant's resentencing proceeding held on June 4, 2020, the Court ruled that the fact there was a delay in having resentencing does not mean that the court cannot resentence. See June 4, 2020 transcript at page 18:13-24 (Appendix "D"). The court stated further that the court retains jurisdiction and the power, the authority, and the duty to resentence defendant in accordance with the directive of the Appellate courts and that was the ruling to the Appellant's objection based on delay. *Id.* at 19:7-10 (Appendix "D").

The court's jurisdiction and duty to resentence Appellant is limited to redressing a legal disposition in accordance with HRS 706-600 ("No sentence shall be imposed otherwise than in accordance with this chapter"). Hence that power ended when the maximum sentences for each conviction were served on September 22, 2014 and September 22, 2019, respectively.

Moreover, the State had from the November 15, 2018 ICA's Judgement on Appeal ordering a remand for resentencing until September 22, 2019, to act diligently and prudently in completing resentencing and failed to do so. Appellant is under no duty to compel his own punishment. That duty falls on the State, through its agent, the Department of the Prosecuting Attorney. In light of the State's failure to act from November 15, 2018 until September 22, 2019⁶, the State gave up its right to pursue extended sentencing as Appellant had fully served the maximum term of imprisonment for the underlying charges prior to an extended sentence being sought to be imposed. Accordingly, there was no underlying sentence to extend at that time after and after September 22, 2019 and doing such is an egregious violation of Canosa's right to not be punished twice for the same offense in accordance with the principles of double jeopardy.

B. Regarding Appellant's Motion for Reconsideration of Illegal Sentence

Appellant was deprived of his right to a fair and just sentence based on the fact that his underlying sentences had already expired on the day Appellant was resentedenced to extended terms of imprisonment.

Rule 35(a) of the Hawaii Rules of Penal Procedure, provides:

⁶ From November 15, 2018 until September 22, 2019 gave the State a total of over 10 months to pursue extended sentencing and the state failed to do so.

Hawai'i Rules of Penal Procedure, Rule 35.

Rule 35. Correction or Reduction of Sentence

(a) Correction of Illegal Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. A motion made by a defendant to correct an illegal sentence more than 90 days after the sentence is imposed shall be made pursuant to Rule 40 of these rules. A motion to correct a sentence that is made within the 90 day time period shall empower the court to act on such motion even though the time period has expired.

(b) Reduction of Sentence. The court may reduce a sentence within 90 days after the sentence is imposed, or within 90 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 90 days after entry of any order or judgment of the Supreme Court of the United States denying review of, or having the effect of upholding the judgment of conviction. A motion to reduce a sentence that is made within the time prior shall empower the court to act on such motion even though the time period has expired. The filing of a notice of appeal shall not deprive the court of jurisdiction to entertain a timely motion to reduce a sentence.

Haw. R. Penal P. 35

Canosa has in essence raised a due process violation in his August 24, 2020, *pro se* motion (See Motion to Correct illegal sentenced pursuant to Rule 35 (A) of the Hawaii Rules of Penal Procedure; Declaration of Defendant, Memorandum in Support and Certificate of Service, filed August 24, 2020).

Canosa argues that because his underlying non-enhanced maximum sentences expired, he was not eligible to be resentenced to an extended sentence.

One case that is closest by analogy in this case of first impression is Ex parte Lange, 85 U.S. 163, 164, 21 L. Ed. 872 (1873).

Ex Parte Lange stands for the proposition that a judgment of the court having been executed so as to be a full satisfaction of one of the alternative penalties, a second judgment on the same verdict is void, and the prisoner must be discharged.

Since Canosa served his underlying maximum sentence of ten years, prior to being re-sentenced on June 4, 2020, he served a full ten-year term and made full satisfaction of one of the alternative penalties, a second judgment on the same verdict is void, and the prisoner must be discharged.

Canosa's argument is that the court lost jurisdiction to sentence him to an enhanced term as his underlying maximum sentence had already expired. Canosa's argument appears well placed based on the reasoning set forth in Ex Parte Lange:

In Ex Parte Lange, the Court aptly noted:

The judgment of the court to this effect being rendered and carried into execution before the expiration of the term, can the judge vacate that sentence and substitute fine or imprisonment, and cause the latter sentence also to be executed? Or if the judgment of the court is that the convict be imprisoned for four months, and he enters immediately upon the period of punishment, can the court, after it has been fully completed, because it is still in session of the same term, vacate that judgment and render another, for three or six months' imprisonment, or for a fine? Not only the gross injustice of such a proceeding, but the inexpediency of placing such a power in the hands of any tribunal is manifest.

Ex parte Lange, 85 U.S. 163, 168, 21 L. Ed. 872 (1873) (Emphasis added).

And again:

We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone. That the principle we have discussed then interposed its shield, and forbid that he should be punished again for that offence. The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case, and for that very offence, the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offence, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offence was at an end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its

further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist.

Ex parte Lange, 85 U.S. 163, 176, 21 L. Ed. 872 (1873).

The Supreme Court of the United States concluded,

But why could it not? Not because it wanted jurisdiction of the property or of the offence, or to render a judgment of confiscation, but because in the very act of rendering a judgment of confiscation it condemned more than it had authority to condemn. In other words, in a case where it had full jurisdiction to render one kind of judgment, operative upon the same property, it rendered one which included that which it had a right to render, and something more, and this excess was held simply void. The case before us is stronger than that, for unless our reasoning has been entirely at fault, the court in the present case could render no second judgment against the prisoner. Its authority was ended. All further exercise of it in that direction was forbidden by the common law, by the Constitution, and by the dearest principles of personal rights, which both of them are supposed to maintain.

There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied. Without straining either the Constitution of the United States, or the well-settled principles of the common law, we have come to the conclusion that the sentence of the Circuit Court under which the petitioner is held a prisoner was pronounced without authority, and he should therefore be discharged.

C. The extended sentence was an abuse of discretion as the State did not prove that Appellant was a danger to the public.

The extended sentence was an abuse of discretion as the State did not prove that Appellant was a danger to the public. Appellant was not convicted of the sexual assault in the first degree, but rather only property crimes, burglary in the first degree and unauthorized entry in a dwelling in the second degree.

HRS § 706-662, Criteria for extended terms of imprisonment, provides:

A defendant who has been convicted of a felony may be subject to an extended term of imprisonment under section 706-661 if it is proven beyond a reasonable doubt that an extended term of imprisonment is necessary for the protection of the public and that the convicted defendant satisfies one or more of the following criteria:

- (1) The defendant is a persistent offender in that the defendant has previously been convicted of two or more felonies committed at different times when the defendant was eighteen years of age or older;
- (2) The defendant is a professional criminal in that:
 - (a) The circumstances of the crime show that the defendant has knowingly engaged in criminal activity as a major source of livelihood; or
 - (b) The defendant has substantial income or resources not explained to be derived from a source other than criminal activity;
- (3) The defendant is a dangerous person in that the defendant has been subjected to a psychiatric or psychological evaluation that documents a significant history of dangerousness to others resulting in criminally violent conduct, and this history makes the defendant a serious danger to others. Nothing in this section precludes the introduction of victim-related data to establish dangerousness in accord with the Hawaii rules of evidence;
- (4) The defendant is a multiple offender in that:
 - (a) The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for any felony; or
 - (b) The maximum terms of imprisonment authorized for each of the defendant's crimes, if made to run consecutively, would equal or exceed in length the maximum of the extended term imposed or would equal or exceed forty years if the extended term imposed is for a class A felony;

HRS § 706-662.

HRS § 706-668.5. Multiple sentence of imprisonment

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

HRS § 706-668.5

In Appellant's case, a ten year sentence for the burglary in the first degree and a five year sentence for unauthorized entry in a dwelling in the second degree, to run concurrently, would have been more than sufficient to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the

most effective manner; and would provide the Appellant with needed educational or other correctional treatment in the most effective manner.

Canosa respectfully requests that this Honorable Court vacate his sentence and order him immediately released after having fully served a ten-year term which was fully served prior to being re-sentenced on June 4, 2020.

VI. CONCLUSION:

Based on the foregoing, Appellant respectfully requests that this Honorable Court remand this matter for further proceedings consistent with the points raised in this brief⁷.


Dated: Honolulu, Hawaii, April 28, 2021.

/s/ SHAWN A. LUIZ
SHAWN A. LUIZ
Attorney for Defendant-Appellant
STANLEY CANOSA


⁷ Appellant requested that his court-appointed counsel attach Appellant's *pro se* arguments which he articulated and set forth in Appendix "E". Rather than allow a break-down in the attorney-client relationship, court appointed counsel respectfully requests that Appendix "E" be allowed to remain attached to the Opening Brief.

STATE OF HAWAII CIRCUIT COURT OF THE FIRST CIRCUIT		JUDGMENT OF CONVICTION AND SENTENCE NOTICE OF ENTRY		Electronically Filed FIRST CIRCUIT 1PC091001524 04-JUN-2020 02:47 PM
CASE NUMBER 1PC191001524		REPORT NUMBERS: Ct. 1: 09-343791 Ct. 2: 09-343792 Ct. 3: 09-347804		
STATE VS. (DEFENDANT) STANLEY LARRY CANOSA Social Sec. No.: XXX-XX- 7112 SID: A 0129912 DOB: XX-XX- 1962				
DEFENSE COUNSEL: SHAWN LUIZ		DATE OF HEARING: JUNE 4, 2020		
PLEA: NOT GUILTY		JURY TRIAL		
ORIGINAL CHARGES: CT. 1: BURGLARY IN THE FIRST DEGREE (708-810(1)(c), HRS) CT. 2: SEXUAL ASSAULT IN THE FIRST DEGREE (707-730(1)(a), HRS) CT. 3: UNAUTHORIZED ENTRY IN A DWELLING (708-812.6, HRS)		CHARGE(S) TO WHICH DEFENDANT PLED		
DEFENDANT IS CONVICTED AND FOUND GUILTY OF: CT. 1: BURGLARY IN THE FIRST DEGREE (708-810(1)(c), HRS) CT. 3: UNAUTHORIZED ENTRY IN A DWELLING (708-812.6, HRS) Note: Ct. 2 dismissed without prejudice by the court.				
FINAL JUDGMENT AND SENTENCE OF THE COURT: INCARCERATION: Defendant is committed to the custody of the Director of Public Safety for indeterminate terms of imprisonment: Ct. 1: Ten Years Extended to Twenty (20) Years Ct. 2: Five Years Extended to Ten (10) Years Terms to run concurrently. Defendant to receive credit for time served. Mittimus to issue. CRIME VICTIM COMPENSATION FEE: \$105 in each count, for a total of \$210. DNA REGISTRY SPECIAL FUND: \$500 or the actual cost of the DNA analysis, whichever is less. Defendant shall provide specimen samples and print impressions as required by H. R. S. Chap. 844D				
DATE: JUNE 4, 2020	JUDGE KAREN T. NAKASONE	SIGNATURE		
NOTICE OF ENTRY				
THIS JUDGMENT HAS BEEN ENTERED AND COPIES MAILED OR DELIVERED TO ALL PARTIES				
DATE: JUNE 4, 2020	CLERK: A. FONG	SIGNATURE		

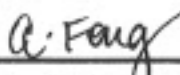



STATE OF HAWAII`I CIRCUIT COURT OF THE FIRST CIRCUIT	MITTIMUS WARRANT OF COMMITMENT		Electronically Filed FIRST CIRCUIT 1PC091001524 04-JUN-2020 02:48 PM
CASE NUMBER 1PC191001524	POLICE REPORT NUMBERS Ct. 1: 09-343791 Ct. 3: 09-347804		
STATE OF HAWAII vs. (DEFENDANT) STANLEY LARRY CANOSA			
OFFENSES OF WHICH DEFENDANT WAS ADJUDGED GUILTY CT. 1: BURGLARY IN THE FIRST DEGREE (708-810(1)(c), HRS) CT. 3: UNAUTHORIZED ENTRY IN A DWELLING (708-812.6, HRS)			
<p>THE STATE OF HAWAII TO: The Sheriff of the State of Hawaii, or Deputy or to any police officer authorized by law:</p> <p>The defendant has been adjudged guilty in this court of the offense indicated.</p> <p>This court imposed the sentence upon the defendant which is stated in the filed judgment/order.</p> <p>YOU ARE HEREBY ORDERED to take the defendant into your custody for the purpose of causing the sentence to be executed.</p> <p><input checked="" type="checkbox"/> THIS MITTIMUS IS EFFECTIVE IMMEDIATELY.</p> <p><input type="checkbox"/> THIS MITTIMUS IS EFFECTIVE</p> <p>JUDGMENT/ORDER FILED ON JUNE 4, 2020.</p>			
NAME OF JUDGE ISSUING SENTENCE KAREN T. NAKASONE			
DATE MITTIMUS ISSUED JUNE 4, 2020	CLERK A. FONG	SIGNATURE	
 In accordance with the Americans with Disabilities Act, and other applicable state and federal laws, if you require a reasonable accommodation for a disability, please contact the ADA Coordinator at the First Circuit Court Administration Office at PHONE NO. 539-4400, FAX 539-4402, at least ten (10) working days prior to your hearing or appointment date			



STATE OF HAWAII CIRCUIT COURT OF THE FIRST CIRCUIT		AMENDED JUDGMENT OF CONVICTION AND SENTENCE NOTICE OF ENTRY		Electronically Filed FIRST CIRCUIT 1PC091001524 10-JUL-2020 01:27 PM
CASE NUMBER IPC091001524		REPORT NUMBERS: Ct. 1: 09-343791 Ct. 2: 09-343792 Ct. 3: 09-347804		
STATE VS. (DEFENDANT) STANLEY LARRY CANOSA Social Sec. No.: XXX-XX- 7112 SID: A 0129912 DOB: XX-XX- 1962				
DEFENSE COUNSEL: SHAWN LUIZ		DATE OF HEARING: JUNE 4, 2020		
PLEA: NOT GUILTY		JURY TRIAL		
ORIGINAL CHARGES: CT. 1: BURGLARY IN THE FIRST DEGREE (708-810(1)(c), HRS) CT. 2: SEXUAL ASSAULT IN THE FIRST DEGREE (707-730(1)(a), HRS) CT. 3: UNAUTHORIZED ENTRY IN A DWELLING (708-812.6, HRS)		CHARGE(S) TO WHICH DEFENDANT PLED		
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FINAL JUDGMENT AND SENTENCE OF THE COURT: INCARCERATION: Defendant is committed to the custody of the Director of Public Safety for indeterminate terms of imprisonment: Ct. 1: Ten Years Extended to Twenty (20) Years Ct. 3: Five Years Extended to Ten (10) Years Terms to run concurrently. Defendant to receive credit for time served. Mittimus to issue. CRIME VICTIM COMPENSATION FEE: \$105 in each count, for a total of \$210. DNA REGISTRY SPECIAL FUND: \$500 or the actual cost of the DNA analysis, whichever is less. Defendant shall provide specimen samples and print impressions as required by H. R. S. Chap. 844D				
DATE: JULY 10, 2020	JUDGE KAREN T. NAKASONE	SIGNATURE 		
NOTICE OF ENTRY				
THIS JUDGMENT HAS BEEN ENTERED AND COPIES MAILED OR DELIVERED TO ALL PARTIES				
DATE: JULY 10, 2020	CLERK: A. FONG	SIGNATURE A. Fong		

"B"

STATE OF HAWAII`I CIRCUIT COURT OF THE FIRST CIRCUIT	AMENDED MITTIMUS WARRANT OF COMMITMENT		Electronically Filed FIRST CIRCUIT 1PC091001524 10-JUL-2020 01:29 PM
CASE NUMBER 1PC091001524	POLICE REPORT NUMBERS Ct. 1: 09-343791 Ct. 3: 09-347804		
STATE OF HAWAII vs. (DEFENDANT) STANLEY LARRY CANOSA			
OFFENSES OF WHICH DEFENDANT WAS ADJUDGED GUILTY CT. 1: BURGLARY IN THE FIRST DEGREE (708-810(1)(c), HRS) CT. 3: UNAUTHORIZED ENTRY IN A DWELLING (708-812.6, HRS)			
THE STATE OF HAWAII TO: The Sheriff of the State of Hawaii, or Deputy or to any police officer authorized by law: The defendant has been adjudged guilty in this court of the offense indicated. This court imposed the sentence upon the defendant which is stated in the filed judgment/order. YOU ARE HEREBY ORDERED to take the defendant into your custody for the purpose of causing the sentence to be executed. <input checked="" type="checkbox"/> THIS MITTIMUS IS EFFECTIVE IMMEDIATELY. <input type="checkbox"/> THIS MITTIMUS IS EFFECTIVE JUDGMENT/ORDER FILED ON JUNE 4, 2020. AMENDED JUDGMENT FILED ON JULY 10, 2020.			
NAME OF JUDGE ISSUING SENTENCE <p style="text-align: center;">KAREN T. NAKASONE</p>			
DATE MITTIMUS ISSUED: 6/4/20. AMENDED MITTIMUS ISSUED: 7/20/20.	CLERK A. FONG	SIGNATURE 	
 <p>In accordance with the Americans with Disabilities Act, and other applicable state and federal laws, if you require a reasonable accommodation for a disability, please contact the ADA Coordinator at the First Circuit Court Administration Office at PHONE NO. 539-4400, FAX 539-4402, at least ten (10) working days prior to your hearing or appointment date</p>			

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FIRST CIRCUIT
1PC091001524
21-OCT-2020
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII

vs.

STANLEY CANOSA,

Defendant.

CASE NO. 1PC091001524

Ct 1: BURGLARY IN THE FIRST
DEGREE, HRS § 708-810(1)(c)
Ct. 2: SEXUAL ASSAULT IN THE FIRST
DEGREE, HRS § 707-730(1)(a)
CT 3: UNAUTHORIZED ENTRY IN A
DWELLING, HRS § 708-812.6

ORDER DENYING DEFENDANT'S
MOTION TO CORRECT ILLEGAL
SENTENCE PURSUANT TO RULE 35(a)
OF THE HAWAII RULES OF PENAL
PROCEDURE FILED 8/24/20

HONORABLE KAREN T. NAKASONE
JUDGE

NON-HEARING MOTION

ORDER DENYING DEFENDANT'S MOTION TO CORRECT ILLEGAL SENTENCE
PURSUANT TO RULE 35(a) OF THE HAWAII RULES OF PENAL PROCEDURE FILED
8/24/20

This Court takes judicial notice of the records and files of this case, having reviewed and considered Defendant's Motion to Correct Illegal Sentence Pursuant to Rule 35(a) of the Hawaii

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"C"

Rules of Penal Procedure filed 8/24/20,¹ State's Memorandum in Opposition filed 10/16/20, and Defendant's Reply filed 10/20/20, DENIES Defendant's Motion without hearing under Rule 8 of the Rules of the Circuit Court of Hawai'i, because the sentence imposed herein, was not illegal. A species of this same argument was raised previously at the time of resentencing, and was addressed and rejected by this court for the reasons set forth on the record at that time. This court's reasoning and rejection of Defendant's arguments is incorporated herein by reference.

THEREFORE, IT IS HEREBY ORDERED THAT THE MOTION IS DENIED.

Dated: Honolulu, Hawai'i, October 21, 2020.

/s/ Karen T. Nakasone

Judge of the above-entitled Court

¹ Defendant filed the motion pro se, even though he is still represented by counsel. This is not permitted. However, because Defendant explained in the motion that the filing was necessary to be done pro se in order to make the deadline, this court has allowed this pro se filing to be considered, as a one-time exception. Defendant's counsel filed a Reply to the State's opposition by the deadline imposed by the court.

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,

vs.

STANLEY CANOSA,

Defendant.

Electronically Filed
Intermediate Court of Appeals
CAAP-20-0000438
17-AUG-2020
05:25 PM

18C091001524

TRANSCRIPT OF ELECTRONICALLY RECORDED
 PROCEEDINGS had before the HONORABLE KAREN T. NAKASONE,
 Judge presiding, on JUNE 4, 2020, regarding the
 above-entitled matter; to wit, SENTENCING.

APPEARANCES:

THALIA MURPHY For the State
 Deputy Prosecuting Attorney

SHAWN LUIZ, ESQ. For the Defendant

TRANSCRIBED BY:
 Jamie S. Miyasato

"D"

1 JUNE 4, 2020

2 -o0o-

3 THE CLERK: Calling Case No. 9 on the
4 calendar, Criminal No. 9-1-1524, State of Hawaii versus
5 Stanley Canosa. Counsel, appearances please.

6 MS. MURPHY: Good morning. Thalia Murphy,
7 deputy prosecutor for the State.

8 THE COURT: Good morning.

9 MR. LUIZ: Good morning, Your Honor. Shawn
10 Luiz.

11 THE COURT: Okay. Good morning, Mr. Luiz.
12 Mr. Luiz, you have a jacket?

13 MR. LUIZ: Yes, I do. You want me to put it
14 on?

15 THE COURT: Yes.

16 MR. LUIZ: Okay. I'll be right back.

17 THE COURT: Okay.

18 MR. LUIZ: Okay. Can you hear me okay, Your
19 Honor?

20 THE COURT: Yes. Can you folks hear Mr. Luiz?

21 MS. MURPHY: Yes, Your Honor.

22 THE COURT: Okay. Yeah. Mr. Luiz, your
23 appearance.

24 MR. LUIZ: Good morning, Your Honor. Attorney
25 Shawn Luiz on behalf of Stanley Canosa.

1 THE COURT: Okay.

2 MR. LUIZ: And thank you for letting me
3 participate by WebEx.

4 And I understand that Mr. Canosa is present in
5 the courtroom.

6 THE COURT: Yes. And Mr. Canosa is present in
7 the courtroom. Good morning, sir.

8 THE DEFENDANT: Good morning.

9 THE COURT: And I permitted defense counsel to
10 appear by video due to a reason related to COVID-19. So
11 Mr. Luiz, the Court has extended you that courtesy. Are
12 both sides ready to proceed with sentencing today?

13 MS. MURPHY: Yes, Your Honor.

14 MR. LUIZ: Yes, Your Honor.

15 THE COURT: Okay. I'll take judicial notice
16 of the records and files, including the appellate
17 proceedings, the ICA summary disposition order, the
18 judgment on appeal, and the order rejecting certiorari
19 filed by the Supreme Court.

20 And the Court's understanding is the sentences
21 were vacated by the ICA due to improper imposition of
22 consecutive sentencing following a retrial in violation
23 of the 706-609 statute. So this is a remand for
24 resentencing.

25 I did review defendant Stanley Canosa's

1 written objection to resentencing. Okay, sir? So I did
2 review that.

3 Mr. Luiz, your client is asking to address the
4 Court. Do you know what this is about, sir?

5 MR. LUIZ: I suspect he probably just wants to
6 kind of address in colloquy why he thinks that the State
7 waives its right to go forward with the consecutive
8 sentence. And that's consistent with his written
9 objection.

10 THE COURT: Okay. Mr. Canosa, you gotta speak
11 through your counsel. What is this regarding?

12 THE DEFENDANT: That's why, I just wanted to
13 talk to him before we proceed. I don't know --

14 THE COURT: Okay. Go ahead.

15 THE DEFENDANT: Oh, I thought he was going to
16 be here, so I wanted to speak to him, like I wanted him
17 to brief me on -- on today's proceedings --

18 THE COURT: Mr. Luiz, your client says he has
19 not had a chance to talk to you before today, and he
20 wants to speak to you.

21 MR. LUIZ: We've talked over several meetings.
22 Before COVID, I went to the prison. We had several
23 meetings. I mean, if -- if he wants like in person, then
24 that would have to -- we'd have to continue the hearing
25 and do that some other time. But I'm not even going to

1 go to Halawa to visit him right now or come to the court
2 to talk just 'cause of the COVID and just issues with --
3 with -- with that. So --

4 THE COURT: Okay. Wait. Do you want to speak
5 to him now?

6 THE DEFENDANT: Yeah. That's what I wanted to
7 do if --

8 THE COURT: How long? How long do you guys
9 need to confer?

10 THE DEFENDANT: Maybe just talk --
11 (inaudible).

12 THE COURT: So I cannot leave you in -- in
13 here. The sheriffs are going to have to stay here with
14 you. Okay. I'm going to ask everybody to vacate the
15 courtroom except for the sheriffs and the defendant. So
16 I'm going to give you guys like up to five minutes to
17 confer, and then we're going to come back and move
18 forward. Okay?

19 THE DEFENDANT: Okay.

20 THE COURT: Okay.

21 (A recess was taken.)

22 THE COURT: All right. We are back on the
23 record. The record should reflect the presence of
24 counsels and the defendant. And we took the recess so
25 that Mr. Luiz and Mr. Canosa could confer. And so are

1 both sides ready to proceed?

2 MS. MURPHY: Yes, Your Honor.

3 MR. LUIZ: Yes, Your Honor. And I just wanted
4 to mention for the record thank you for the brief recess.
5 I kind of went over this procedure with my client. But I
6 think just being in the courtroom, it just helps him to
7 just be reminded of exactly how the proceeding will go
8 this morning. So thank you for that indulgence.

9 THE COURT: Okay. All right. And for the
10 record, the Court did review defendant's written
11 objections to resentencing. So I did review them.

12 And we'll start with the State's position on
13 sentencing.

14 MS. MURPHY: Thank you, Your Honor.
15 Consistent with the summary disposition order, which
16 states that the defendant must be resentenced as to --
17 and that it was a violation to impose the consecutive
18 sentence in this case, the State's requesting that the
19 defendant be resentenced to the 20 years in the Burglary
20 in the First Degree and to the extended term of 10 years
21 in the unlawful entry of dwelling and that said sentences
22 run concurrently.

23 THE COURT: So the State is requesting that
24 the extended terms of the 20 and the 10 be imposed
25 concurrently?

1 MS. MURPHY: Yes, Your Honor. I believe
2 that's on the table for -- in terms of today's
3 sentencing. Thank you, Your Honor.

4 THE COURT: Defense's position on sentencing,
5 Mr. Luiz?

6 MR. LUIZ: It looks like the State is not
7 moving forward with its consecutive, so that kind of
8 moots the objection to the consecutive that my client had
9 put forth in writing.

10 So if I understand correctly, the State just
11 asked for concurrent instead of consecutive. So that
12 would -- that would -- that would moot the issue as to
13 the consecutive sentencing.

14 THE COURT: Yes. Yeah. They're just asking
15 for the extended terms to run concurrent.

16 MR. LUIZ: So in light of that, I guess that
17 was my client's biggest concern, was that he was going to
18 be resentenced to consecutive terms. So I guess during
19 his colloquy, he can address the Court. But the
20 consecutive issue has now been taken off the table and
21 that's no longer an issue. So basically we won on the
22 issue that he wanted, which was the consecutive.

23 THE COURT: Okay. All right. So I'm going to
24 turn to your client then, Mr. Luiz. Okay?

25 MR. LUIZ: Okay. Very good. Thank you, Your

1 Honor.

2 THE COURT: Mr. Canosa, you have the right to
3 make a statement before the Court sentences you. Is
4 there anything you would like to say at this time?

5 THE DEFENDANT: First of all, the -- my
6 sentence wasn't vacated because the consecutive was
7 illegal. I think because the Court at that time violated
8 the statute by imposing a more severe sentence than my
9 prior sentence. And -- and when they vacated that
10 sentence -- and that wasn't my only concern, that the
11 consecutive was off the table. I mean there's a lot of
12 other issues. I don't know what. I don't know what. I
13 didn't see the motion that my attorney filed. I didn't
14 have a chance to see it. So I don't know what --

15 THE COURT: The written objections attach --
16 let's see -- as an Exhibit A a six-page handwritten
17 document from you.

18 THE DEFENDANT: Right. That's my supplemental
19 argument.

20 THE COURT: Okay. And I've reviewed that.
21 Okay. Anything else, sir?

22 THE DEFENDANT: Well, I was wondering what was
23 the -- my attorney's argument in terms of the -- the
24 delay, the delay to bring me forth for resentencing, you
25 know, on a, you know, one reasonable time.

1 MR. LUIZ: Well, I had prepared oral arguments
2 for this morning. I filed a written objection and
3 attached my client's written colloquy objection as an
4 Exhibit A. So it's basically like a pleading with a
5 declaration of counsel and attaching his. But I had
6 prepared oral arguments for this morning in lieu in
7 writing. And the oral arguments that I have prepared are
8 now moot because the State conceded on the consecutive
9 and isn't going forward. So that kind of moots out all
10 the oral arguments I had prepared and studied for this
11 morning.

12 THE COURT: Okay.

13 MR. LUIZ: And my client's position is he
14 still -- I think he's going to argue in his colloquy that
15 he believes that the entire sentence is vacated -- that
16 he should be released immediately. And that's pretty
17 much -- two things that was set forth in his written
18 objection is (a) that the consecutive was waived because
19 the amount of time that passed between when the ICA
20 vacated the judgment and when we went forward with
21 sentencing ultimately. And then his second argument is
22 that he believed that when the ICA vacated the judgment,
23 that that vacated his extended as well, and that he
24 served his maximum incarceration, which would have been
25 expired on September 21st, 2019, with ten years from when

1 he was taken into custody, and that he served the
2 sentence and that he's eligible for release. And that's
3 the other part that's set forth in his written objection
4 that he wants to argue.

5 THE COURT: Okay. I've reviewed that.

6 THE DEFENDANT: Your Honor.

7 THE COURT: Okay. Go ahead, sir.

8 THE DEFENDANT: Can I speak to my attorney
9 further and take another five-minute break? Please.

10 THE COURT: Okay. Okay. So Mr. Luiz, your
11 client has asked for another five-minute recess so that
12 he can confer with you. So I'm going to do this one more
13 time, but you guys gotta make sure you talk about
14 whatever you need to talk about, and then I'm not going
15 to do it again. So I'll give you one more recess, five
16 minutes. I'm going to ask everybody to vacate the
17 courtroom so that the defendant can talk to his attorney,
18 except for the sheriffs. Okay?

19 THE DEFENDANT: Thank you.

20 MR. LUIZ: Yes, Your Honor. Thank you.

21 (A recess was taken.)

22 THE COURT: All right. The record should
23 reflect we are back on record with defendant and
24 counsels. And we took a second recess to allow defense
25 and defense counsel to talk.

1 You know, what I'm going to do -- I'm going to
2 rule on defendant's objections just so that the record is
3 clear.

4 And I know you voiced some of the objections
5 today, Mr. Canosa. But I'm going to go through and rule
6 on what you put in your -- the statement of objections.
7 And then we'll proceed that way.

8 One of the objections was of the delay. Does
9 the defense have any further argument on the delay? I
10 did review what is in defendant's handwritten objection
11 that was filed by defense counsel. Anything else,
12 Mr. Luiz?

13 MR. LUIZ: Well, just -- yeah, just that the
14 delay, it's kind of -- it was the issue of the delay in
15 resentencing to consecutive sentence that has prejudiced
16 my client. But now that the State withdrew its request
17 for consecutive, that argument that I had is mooted out.

18 THE COURT: I'm going to let -- I usually
19 don't allow a defendant to speak, but just in the
20 interest of -- I don't want to take another recess so
21 that you guys can talk. So do you have any other point,
22 Mr. Canosa, you want to add regarding the delay in us
23 resentencing today? I did review what you wrote. Okay?

24 THE DEFENDANT: Okay. I'd like to ask the
25 Court with all due respect, if you can just bear with me,

1 might take some time because --

2 MS. MURPHY: I'm going to object, Your
3 Honor --

4 THE COURT: Yeah.

5 MS. MURPHY: -- to Mr. Canosa speaking. He
6 has written a very lengthy document that has been filed
7 before the Court. And he -- he is represented by
8 counsel. If he were pro se, that would be another
9 matter.

10 THE COURT: You know what, Mr. Canosa? I
11 thought you were just going to add, but I'm -- I did
12 review what is here. So I'm going to sustain the State's
13 objection. And so Mr. Luiz, the Court is going to rule
14 on the objection regarding the delay as set forth in the
15 written papers. Do you have anything further to add?
16 Your counsel.

17 MR. LUIZ: Yeah. If I might just have a
18 moment, Your Honor.

19 THE DEFENDANT: Your Honor, I think -- one
20 minute. One second.

21 THE COURT: No. You can talk at the end, sir.

22 THE DEFENDANT: The end might be too late.
23 The end might be too late. Because he's saying -- he's
24 saying because they're not moving for consecutive, it
25 makes the argument moot. And that's not true.

1 THE COURT: I understand -- I understand
2 that's not what you're saying. So I'm going to rule on
3 the argument as written.

4 So Mr. Luiz, do you have anything further to
5 add?

6 MR. LUIZ: Nothing further at this time. Just
7 I don't know if it's helpful just to say that -- an issue
8 we read at pretrial, and we just discussed some of the
9 pretrial issues and how to proceed this morning. So I
10 was given the leave to let my client file a written
11 objection, and that's where -- that's where we're at this
12 morning, is we objected to the consecutive sentencing.
13 And my client -- you can -- you can see from what he
14 wrote, he believes that when the judgment was vacated by
15 the ICA, that -- when the judgment was vacated, that that
16 vacated his entire sentence and that he's being held
17 illegally. And that's -- that's essentially his
18 argument.

19 THE COURT: Okay.

20 THE DEFENDANT: No. Your Honor, I gotta
21 speak.

22 THE COURT: No, sir. You can't speak. And I
23 will rule on all the objections as I interpret them to be
24 in the written objections.

25 THE DEFENDANT: There's more to it.

1 THE COURT: I'm going to rule on the
2 objections. Does the State have anything further on the
3 objections?

4 MS. MURPHY: Yes, Your Honor. Regarding the
5 delay of sentencing, the State argues that defendant was
6 not prejudiced as he still stands -- that he was
7 sentenced to an extended term of 20 years. Thus there is
8 no prejudice in the delay.

9 THE COURT: Okay. The Court is going to --

10 MR. LUIZ: If I may respond to that? There is
11 prejudice because he didn't get to go to parole hearing
12 sooner.

13 THE DEFENDANT: No.

14 MR. LUIZ: Because if -- if the consecutive
15 had went forward, then it would have determined whether
16 or not he would have been eligible for parole sooner. So
17 there is a prejudice to him because it's been about a
18 year and a half and he hasn't gotten to go forward to the
19 Parole Board because of the delay in the resentencing
20 with a possible consecutive. And now the State's
21 withdrew that, so there definitely is prejudice there
22 that he was delayed that year and a half to approach the
23 Parole Board sooner. So I do believe that my client has
24 sufficiently -- (inaudible) -- that point.

25 So my client's request is that because he is

1 prejudiced and he didn't get to go to the Parole Board
2 sooner, that he be immediately released. That's his
3 argument.

4 THE DEFENDANT: No, that's not. Your Honor, I
5 gotta speak. It's not fair.

6 THE COURT: Okay. I'm going to give you one
7 minute. Okay? Go ahead. If you're going to repeat
8 everything in the written, I'm not going to let you
9 speak, sir. I've read the written. I'm going to address
10 all of it.

11 THE DEFENDANT: Okay. First of all, first of
12 all, with all due respect, I don't think the extended
13 term is still upheld. The ICA vacated that sentence.
14 And when they said to the extent -- okay. It's read as
15 this, but I think they read it wrong because the
16 consecutive sentence is not in violation. It's the --
17 that Court at that time, with all due respect, violated
18 that statute by imposing a more severe sentence that
19 violated that statute. That's the gist of that statute
20 is that you cannot give one more severe sentence. Not
21 the consecutive. And when it says that the judgment on
22 appeal -- but so they read it wrong by saying the
23 consecutive is in violation. It's not. It's the Court
24 at that time that violated the statute by giving a more
25 severe sentence, which is why the sentence was vacated.

1 And when it says -- okay. The judgment on
2 appeal. The Intermediate Court of Appeals -- the
3 Intermediate Court of Appeals of the State of Hawaii
4 entered on April 20, 2018 -- the Circuit Court of the
5 First Circuit's June 27th, 2016 judgment of conviction
6 and sentence is vacated to the extent -- I'm arguing that
7 when they say to the extent, they're distinguishing from
8 the judgment of conviction and the sentence, because I
9 understand the judgment of conviction still stands. So
10 they're just trying to distinguish it only to the extent
11 that the sentence is vacated, but not the judgment of
12 conviction. Because I understand that still stands.

13 And nowhere in here does it say that the
14 extended term is still upheld, or they never modify 'em
15 in part or -- they wouldn't say that specifically if the
16 extended term still stands but the consecutive is
17 vacated. No. They would have said it. If not, they not
18 saying that in here. Everything is vacated. Same with
19 Samante.

20 THE COURT: Actually, sir, I agree with you.

21 THE DEFENDANT: Okay. So now, now we can go
22 to that part where I was prejudiced because now that
23 everything is vacated -- and I even -- I get one letter
24 before September, 'cause the ordinary term for one
25 burglary is ten years.

1 THE COURT: I understand your argument.
2 That's what you're arguing in here. The ordinary
3 terms -- you're saying the ordinary term is still in
4 effect and it ran.

5 THE DEFENDANT: And I could have had one
6 chance to persuade you; right? One fair opportunity to
7 persuade you to give me that, at least consider it. But
8 now I cannot have one fair opportunity to do that because
9 that expired.

10 But you know what else? I wrote to my lawyer.
11 I wrote to my lawyer before September, before the
12 ordinary terms expired asking him, eh, how come I not
13 getting sentenced? I like present this so I can convince
14 you to just give me the 10 and the 5 and run 'em
15 concurrent. I get one letter right here. You want to
16 see it?

17 THE COURT: No, sir. It's not part of what I
18 can consider today. Okay?

19 THE DEFENDANT: Okay. But I been trying to do
20 my part at least for have one fair hearing where I can
21 consider -- I can ask you, eh, okay, everything -- I no
22 more one sentence right now. It's vacated. So now we
23 coming for resentence. How come I not getting
24 resentenced? So I wanted to get resentenced before the
25 10 years went expire because that way I can at least have

1 one fair opportunity to propose it for your
2 consideration. Now I'm prejudiced forever because I
3 cannot propose it. I cannot have one fair opportunity
4 under what? 706-604(1) to a fair opportunity to present
5 mitigation and/or allocution of my sentence. I cannot
6 propose a fair consideration because that sentence
7 expired. I am forever prejudiced.

8 THE COURT: Okay. I understand what you're
9 saying. Okay? So I'm going to rule. I'm going to rule,
10 sir? Okay. I'm going to rule and then we're going to go
11 forward with the resentencing.

12 THE DEFENDANT: Resentencing?

13 THE COURT: Okay. So the Court's ruling on
14 the objections. There was an objection. One of the
15 objections defendant raised is the delay. And there was
16 a delay from the time that the Supreme Court rejected
17 certiorari from January 2019 to the time the
18 sentencing -- we began to try to schedule -- try to
19 reschedule this resentencing. So you know, Mr. Canosa, I
20 can tell you that it's unfortunate that the delay
21 occurred. But the fact that there was a delay in having
22 this resentencing -- and this is my ruling -- does not
23 mean that in any way that the Court cannot legally
24 resentence you or that the State -- there's any kind of
25 waiver by the State. And the Court's ruling is that the

1 fact that there was a delay in coming to this
2 resentencing does not mean that there is an infirmity
3 with the Court proceeding with sentencing today.

4 THE DEFENDANT: What do you mean one
5 infirmity?

6 THE COURT: I'm ruling, sir. Okay?

7 The Court retains jurisdiction, the power, the
8 authority, and the duty to resentence defendant in
9 accordance with the directive of the appellate court. So
10 that is the ruling on the delay objection.

11 There was objections made on consecutive
12 sentencing. The State is not asking for consecutive
13 terms. I'm not going to impose consecutive terms, so I'm
14 not going to address those objections. They are moot.

15 THE DEFENDANT: Your Honor -- (inaudible).
16 Excuse me one minute. I understand what you're saying,
17 but he not arguing, you know, for me. That's why I gotta
18 speak on my behalf.

19 THE COURT: Sir, I've read your objections. I
20 let you talk today briefly. I understand what you're
21 saying. I'm going to rule. Okay?

22 THE DEFENDANT: How can I have one fair
23 opportunity to argue myself? He not arguing for me.

24 THE COURT: I will let you speak at
25 resentencing. Okay? I'm going to address the objections

1 regarding imposition of extended terms.

2 Defendant argued today and in his written
3 pleading that the extended terms cannot be imposed
4 because the ordinary maximum term already expired. And
5 he argues that it's logically impossible to extend a
6 sentence that is already expired and does not exist.

7 This Court interprets the remand as having
8 vacated the prior sentences and the ICA remanded it back
9 here for resentencing consistent with the appellate court
10 order. Defendant's status is post conviction pending
11 resentencing, and the Court retains jurisdiction to
12 resentence.

13 So the ICA's order vacated the June 27, 26
14 sentence with an order to resentence. So this Court --
15 my conclusion is that the 2016 sentence is vacated.
16 Defendant's pending sentencing. He is being held on
17 existing trial custody orders. He is receiving all jail
18 credit he's entitled to on Counts 1 and 3.

19 The vacated sentence does not mean that the
20 ordinary sentence for Counts 1 and 2 was still running.
21 And it doesn't mean that the ordinary sentence was
22 running and expired and can no longer exist. So the
23 Court rejects that argument that the Court can no longer
24 sentence defendant to extended term because the ordinary
25 sentence has run.

1 This argument -- the Court's ruling is that
2 this argument made by the defense is premised on the
3 erroneous legal assumption that the ordinary sentences
4 are still in effect and are running. And that's not the
5 case.

6 So for these reasons, the objections are
7 rejected and overruled. I've made my ruling.

8 And I've already heard the State and defense
9 counsel's position on resentencing.

10 Mr. Luiz, do you have anything further to add
11 on the resentencing?

12 MR. LUIZ: No, Your Honor.

13 THE DEFENDANT: I do.

14 THE COURT: Mr. Canosa, you have the right to
15 make a statement before I resentence you. So you may go
16 ahead, sir.

17 THE DEFENDANT: Okay. First of all, I -- if I
18 not mistaken, I heard you say that the ordinary terms was
19 not running while I was waiting for resentence.
20 That's -- that don't sound like my right, with all due
21 respect. The thing -- you cannot stop the time.

22 THE COURT: It's not stopped.

23 THE DEFENDANT: No. But the ordinary time;
24 right? The ordinary terms prescribed by --

25 THE COURT: Time is running because you're

1 getting credit.

2 THE DEFENDANT: Right, okay.

3 THE COURT: But there's no sentence yet.
4 You're pending.

5 THE DEFENDANT: I know, but -- I know, I know,
6 I know. But -- but the time still run. And before you
7 was able to sentence me, that time expired, the ordinary
8 terms. And one extended term is in essence extending the
9 ordinary sentences beyond the statutory terms. And once
10 that expired, I mean, what is there to extend?

11 It's like -- it's like say if I get this. If
12 I get this. Oh, the thing no can extend. Let's say --
13 let's say this was over here and I went extend 'em to
14 here and this is the expiration.

15 THE COURT: I understand your argument,
16 Mr. Canosa. I don't agree with it. And I don't think
17 that's what the law says, so I made my ruling, you made
18 your argument. You can take it up later. Okay?

19 THE DEFENDANT: Okay. And one other thing is
20 I cannot have one fair opportunity for present mitigation
21 and allocution of my sentence. How? And to persuade you
22 for just give me the ordinary term and run 'em
23 concurrent. You cannot even consider that. That's not
24 fair. Because the thing expired. The thing went expire.
25 So what now? Now you going -- you going -- you going

1 have to give me one more enhanced sentence because if you
2 do give me that, then it might put the State in liability
3 because now they would hold me over the ordinary term.
4 That's not fair. I am prejudiced. Forever prejudiced.
5 This not one fair hearing. I never did have one fair
6 hearing.

7 This -- seeing you, the State knew -- the
8 Court at that time knew that giving me one more enhanced
9 sentence under the -- under 706-609 was prohibited
10 because it suggests retaliation for me exercising my
11 right to one appeal. All of my sentences was illegal.

12 THE COURT: Okay.

13 THE DEFENDANT: They knew that they was
14 punishing me for exercising my right. And I still not
15 going have a fair sentence. 'Cause you going have to
16 protect the State from liability.

17 THE COURT: The Court's sentence is based on
18 the entirety of the record. You have anything else, sir?

19 THE DEFENDANT: Just that this whole thing is
20 not fair. I never did have one fair sentence. Two times
21 I come back on appeal and people just do what they like
22 because they in that position instead of doing what is
23 right by integrity.

24 I going tell you right now too, my attorney
25 told me I was going home. That's why I brought my family

1 over here. That's why I brought them. Because he -- if
2 I knew I was going do some more time, I wouldn't tell
3 them for come over here. I'd be here by myself.

4 THE COURT: Okay.

5 MR. LUIZ: Your Honor, I said to my client --

6 THE DEFENDANT: No. You lying, son of a
7 bitch.

8 THE COURT: Okay.

9 THE DEFENDANT: You lying.

10 THE COURT: Okay. That's enough. I've heard
11 enough and I'm going to move forward and impose the
12 sentence.

13 Based on the Court taking judicial notice of
14 the entire record and files, I did go back and review the
15 presentence report, the entire sentencing transcript, the
16 jury verdict findings. All sentencing options are
17 available to the Court. However, based on the jury
18 verdict's finding and in view of defendant's extensive
19 criminal history and the nature of the current offenses,
20 this Court does find that the State's request for
21 extended term sentencing based on the jury's findings --
22 that such sentencing was appropriate.

23 So based on the persistent offender -- based
24 on the persistent offender status and that extended terms
25 were necessary for the protection of the public, the

1 Court finds that the extended terms are appropriate, that
2 it constitutes just punishment, and that they are
3 necessary to protect the public.

4 The terms will run concurrent. It is the
5 judgment and sentence of the Court that defendant will
6 committed to the custody and care of the department --
7 Director of the Department of Public Safety for
8 indeterminate terms of imprisonment as follows:

9 Count 1, 10 years extended to 20 years in the
10 Burglary.

11 Count 3. UED, 5 years extended to 10 years.

12 Terms to run concurrent. Defendant is to
13 receive all credit for time served.

14 Mittimus to issue forthwith.

15 And this concludes this proceeding.

16 THE DEFENDANT: Your Honor, how can I appeal
17 this?

18 THE COURT: Sir, you're free to use whatever
19 appellate remedies you --

20 THE DEFENDANT: No. How can I appeal 'em?
21 'Cause I don't know about this attorney.

22 THE COURT: We are done here, sir.

23 MR. LUIZ: Your Honor, can I ask -- can I make
24 one request?

25 THE COURT: Yes.

1 MR. LUIZ: Could the Court just address
2 Mr. Canosa and ask him if he wants me to remain as his
3 court-appointed counsel or if he wants new appellate
4 counsel to take this case of first impression on appeal?

5 THE COURT: Do you -- okay. Did you hear what
6 he said?

7 THE DEFENDANT: What?

8 THE COURT: Do you want him to remain as your
9 counsel and in the event there's an appeal?

10 THE DEFENDANT: I want an appeal.

11 MR. LUIZ: Actually it's to first impression.

12 THE COURT: Okay. So he says he wants an
13 appeal.

14 MR. LUIZ: Okay.

15 THE COURT: You guys talk after this. Okay?
16 You guys need to talk after this. If there's going to be
17 a motion, you file it with this court. Or once the
18 notice of appeal is filed, then you guys gotta file the
19 motion upstairs. Okay?

20 THE DEFENDANT: Shawn, file the notice of
21 appeal.

22 THE COURT: The record notes that defendant is
23 requesting a notice of appeal be filed.

24 MR. LUIZ: Okay. And I just want to make the
25 representation I'll file it, Your Honor. Thank you.

1 THE COURT: Okay.

2 MS. MURPHY: Thank you.

3 THE DEFENDANT: Shawn, you going file the
4 appeal?

5 MR. LUIZ: Yes, Mr. Canosa. I'll file it.

6 THE DEFENDANT: Try come and see me too.

7 THE COURT: I'm going to go --

8 MR. LUIZ: Yeah. I can't 'cause the COVID.
9 I'll write you a letter. And I'll try calling you too.
10 Okay?

11 (End of proceedings.)

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I, JAMIE S. MIYASATO, hereby certify that the foregoing comprises a full, true, and correct transcription of an electronically recorded proceeding had before the Honorable Karen T. Nakasone, presiding in the above-entitled matter, so transcribed by me to the best of my ability.

Dated this 17th day of August 2020.

/s/ Jamie S. Miyasato

 JAMIE S. MIYASATO, CSR 394

IN THE INTERMEDIATE COURT OF APPEALS OF THE
STATE OF HAWAII

STATE OF HAWAII

PLAINTIFF - APPELLEE

VS.

STANLEY CANOSA

DEFENDANT - APPELLANT

CAAP - 20 - 0000438

CR. NO. 09 - 1 - 1524

APPEAL FROM SENTENCE

IMPOSED ON JUNE 4 2020

CIRCUIT COURT OF THE
FIRST CIRCUIT

KAREN NAKASONE

JUDGE

SUPPLEMENTAL BRIEF TO DEFENDANT - APPELLANT

STANLEY CANOSA'S OPENING BRIEF

EXHIBIT "A" - E - CERTIFICATE OF SERVICE

STANLEY CANOSA

HALAWA CORRECTIONAL FACILITY

99 - 902 moanalua road

Aiea, Hawaii 96701

Defendant - Appellant

"E"

I. INTRODUCTION

I, Stanley Canosa, defendant-appellant in the above-entitled matter, hereby presents this supplemental Brief on a case of first impression contending that on June 4 2020 the resentencing court defied sound principle by extending the "expired" ordinary terms of imprisonment prescribed by HRS 706-660 for both my Burglary and unauthorized entry in a dwelling convictions without being authorized by statute, and thereby imposed the extended terms of imprisonment as described herein. Thus, constitutes an illegal sentence not authorized by statute and a violation of my right to due process.

II. PROCEDURAL HISTORY

on September 22 2009 I was arrested for the offense of Burglary in the first degree, in violation of HRS 708-810 (1)(c), and while in custody on that Burglary offense, on September 29 2009 the state charged me via indictment not only for the above-mentioned Burglary offense, but also for the offense

of unauthorized entry in a dwelling, in violation of HRS 70B-812.6. I was convicted on both offenses and during sentencing on November 29 2011 the trial court imposed a 20 year extended sentence for my Burglary conviction and a 10 year extended sentence for my unauthorized entry in a dwelling conviction, to be served concurrently. I appealed and on February 7 2014 the Intermediate Court of Appeals (ICA) filed its memorandum opinion vacating the trial court's November 29 2011 judgment of conviction and sentence and remanded for a new trial due to prosecutorial misconduct during closing arguments.

After retrial I was convicted again for both Burglary and unauthorized entry in a dwelling offenses. on June 22 2016 a post-conviction extended term hearing was held in accordance with HRS 706-664(3) where the trial jury did find that the facts under HRS 706-662 have been proved beyond a reasonable doubt that I am a persistent offender and that an extended term of imprisonment is necessary for the protection of the

Public. During sentencing on June 27 2016 the trial court imposed the same 20 year extended sentence for my Burglary conviction that was imposed on November 29 2011, and subsequently, the trial court extended the "expired" 5 year ordinary term of imprisonment for my unauthorized entry in a Dwelling conviction to 10 years, and thereby sentenced me to a 10 year extended sentence for my unauthorized entry in a Dwelling conviction, but this time it was ordered to be served consecutively to the 20 year extended sentence for my Burglary conviction rather than the concurrent sentence imposed on November 29 2011. I appealed again and on April 20 2018 the ICA filed its summary disposition order vacating the trial court's June 27 2016 judgment of sentence because the trial court violated HRS 706-609 by imposing a more severe sentence than my prior sentence imposed on November 29 2011 and thereby remanded this case back to the circuit court to resentence me for my Burglary and unauthorized entry in a Dwelling convictions. On November 15 2018 the ICA

Filed its Judgment on Appeal stating the same. There were other issues raised in the appeal that the ICA denied and a writ of certiorari was filed contending the ICA's denial of those issues. On January 18 2019 the Hawaii Supreme Court rejected the writ. However, the ICA's order for resentencing stands.

III. STATEMENT OF FACTS

The court: "so this is a remand for resentencing". See Exhibit "A" TRANSCRIPTS OF RESENTENCING PROCEEDINGS HELD ON JUNE 4 2020 on page 3: 23-24. "And we'll start with the state's position on sentencing." Id on pg 6: 12-13. The state: "... the state's requesting that the defendant be resentenced to the 20 years in the Burglary in the first degree and to the extended term of 10 years in the unlawful entry of a dwelling and that said sentences run concurrently." Id on pg 6: 18-22. The court: "so the state is requesting that the extended terms of the 20 and the 10 be imposed concurrently?" The state: "yes, your Honor". Id on pg 6: 23-25 and 7:1. The court: "And for the record, the court did review defendant's written objections to resentencing, so I did review them." Id on pg

6:9-11. "Okay. So the court's ruling on the objections, there was an objection. One of the objections defendant raised is the delay. And there was a delay..." Id on pg 18:13-16.

"So you know, Mr. Canosa, I can tell you that it's unfortunate that the delay occurred. But the fact that there was a delay in having this resentencing -- and this is my ruling -- does not mean that in any way that the court cannot legally resentence you..." Id on pg 18:19-24. "The court retains jurisdiction, the power, the authority, and the duty to resentence defendant in accordance with the directive of the appellate court. So that is the ruling on the delay objection."

Id on pg 19:7-10. "I'm going to address the objections regarding imposition of extended terms. Defendant argued today and in his written pleading that the extended terms cannot be imposed because the ordinary maximum term already expired. And he argues that it's logically impossible to extend a sentence that is already expired and does not exist". Id on pg 19:25 and 20:1-6.

"The vacated sentence does not mean that the ordinary sentence for counts 1 and 2 was

still running. And it doesn't mean that the ordinary sentence was running and expired and can no longer exist. So the court rejects that argument that the court can no longer sentence defendant to extended term because the ordinary sentence has run. This argument -- the court's ruling is that this argument made by the defense is premised on the erroneous legal assumption that the ordinary sentences are still in effect and are running. And that's not the case. So for these reasons, the objections are rejected and overruled. I've made my ruling". Id on pg 20:19-25 and 21:1-7 "Mr. Canosa, you have the right to make a statement before I resentence you. So you may go ahead, sir." Id on pg 21:14-16. The defendant: "Okay. First of all, I -- if I not mistaken, I heard you say that the ordinary terms was not running while I was waiting for resentence. That's -- that don't sound like my right, with all due respect. The thing -- you cannot stop the time". The court: "It's not stopped". Id on pg 21:14-22. The defendant: "And before you was able to sentence me, that time expired, the

ordinary terms. And one extended term is in essence extending the ordinary sentences beyond the statutory terms. And once that expired, I mean, what is there to extend?" Id on pg 22:6-10. The court: "I understand your argument, Mr. Canosa, I don't agree with it. And I don't think that's what the law says, so I made my ruling, you made your argument, you can take it up later, okay?" Id on pg 22:15-18 "... I'm going to move forward and impose the sentence". Id on pg 24:11-12. "All sentencing options are available to the court". Id on pg 24:16-17. "It is the judgment and sentence of the court that defendant will be committed to the custody and care of the department -- Director of the Department of Public Safety for indeterminate terms of imprisonment as follows: Count 1, 10 years extended to 20 years in the Burglary. Count 3. UED, 5 years extended to 10 years. Terms to run concurrent. Defendant is to receive all credit for time served. Mittimus to issue forthwith. And this concludes this proceeding." Id on pg 25:4-15.

IV. POINTS ON APPEAL

1. on June 4 2020 the resentencing court, without being authorized by statute, extended the "expired" 10 year ordinary term of imprisonment prescribed by HRS 706-660 for my class B felony Burglary conviction to 20 years, and thereby illegally resentedenced me to a 20 year extended sentence for my Burglary conviction in violation of my right to due process and
2. on June 4 2020 the resentencing court, without being authorized by statute, extended the "expired" 5 year ordinary term of imprisonment prescribed by HRS 706-660 for my class C felony unauthorized entry in a dwelling conviction to 10 years, and thereby illegally resentedenced me to a 10 year extended sentence for my unauthorized entry in a dwelling conviction in violation of my right to due process.

V. STANDARD OF REVIEW

I believe the plain error standard of review should be applied because by extending the "expired" ordinary terms of imprisonment prescribed HRS 706-660 for both my Burglary and unauthorized entry in a dwelling convictions without being authorized by statute it was error that seriously affected the fairness and integrity of my resentencing proceeding held on June 4 2020 and thereby needs to be corrected to serve the ends of justice and to discontinue the denial of my fundamental right to be free from the unlawful restraint of my liberty. State v. Sawyer, 88 Hawaii 325, 330, 966, P.2d 637, 642 (1998) I further request that in the interest of justice this Honorable Court apply any other standard of review applicable to the merits of this supplemental Brief.

VI. QUESTIONS PRESENTED

1. Was the court authorized by statute to extend the "expired" ordinary terms of imprisonment prescribed by HRS 706-660

for both my Burglary and unauthorized entry in a Dwelling convictions in the manner described herein and thereby imposed the extended terms of imprisonment on June 4 2020 for both my Burglary and unauthorized entry in a Dwelling convictions?

VII. ARGUMENT

The Hawaii Supreme Court held that "although the court has broad discretion in sentencing defendants, the sentence imposed must be authorized by statute". see State v. March, 2000 94 Hawaii 250, P.3d 1094. In this case of First impression I hereby present the following argument that the court did not have authorization by statute to extend the "expired" ordinary terms of imprisonment prescribed by HRS 706-660 for both my Burglary and unauthorized entry in a Dwelling convictions beyond its statutorily prescribed range by which to impose the extended terms of imprisonment in this case. Thus, constitutes an illegal sentence not authorized by statute. see

State v. Kahalewai, 71 Haw. 624, 626 801 P.2d 558, 560 (1990) ("clarifying that an illegal sentence is one that the court is not authorized to impose"). As such, pursuant to chapter 706-600 of the Hawaii Revised Statutes:

"No sentence shall be imposed otherwise than in accordance with this chapter"

Accordingly, by operation of serving and satisfying the ordinary terms of imprisonment prescribed by HRS 706-660 for both my Burglary and unauthorized entry in a Dwelling convictions before a legal sentence was ever imposed, I had already served the statutorily imposed maximum penalties for both my Burglary and unauthorized entry in a Dwelling convictions, and as a result, on June 4 2020 the court's duty in rendering a legal disposition of this case was to declare time served, nunc pro tunc, on the expiration dates of the ordinary terms of imprisonment prescribed by HRS 706-660 for both my Burglary and unauthorized entry in a Dwelling convictions because no other sentence of imprisonment could be imposed in accordance with HRS 706-600

and nor could any other sentence of imprisonment be authorized by statute.

It is sound principle that when a court imposes an extended sentence there must be a basis on which the court can extend from, and beyond, to impose the extended terms of imprisonment as provided in HRS 706-661, which states in relevant part:

The court may sentence a person who satisfies the criteria for any of the categories set forth in section 706-662 to an extended term of imprisonment, which shall have the maximum length as follows:

(3) For a class B Felony - indeterminate twenty-year term of imprisonment; and

(4) For a class C Felony - indeterminate ten-year term of imprisonment.

Here, in relevant part, although HRS 706-661 provides the maximum length of imprisonment when a court extends a term of imprisonment for class B and class C Felonies, in order

to find the basis on which they are extended from, we turn to HRS 706-660, which provides the ordinary terms of imprisonment for class B and class C Felonies. Because my Burglary in the First degree conviction is a class B Felony, HRS 706-660 prescribes a 10 year ordinary term of imprisonment; and because my unauthorized entry in a Dwelling conviction is a class C Felony, HRS 706-660 prescribes a 5 year ordinary term of imprisonment. Accordingly, paragraph (3) of HRS 706-661 represents that the 10 year ordinary term of imprisonment prescribed by HRS 706-660 for my Burglary conviction is the basis on which the court extends from, and beyond, to impose an indeterminate 20 year term of imprisonment as provided in HRS 706-661; and paragraph (4) of HRS 706-661 represents that the 5 year ordinary term of imprisonment prescribed by HRS 706-660 for my unauthorized entry in a Dwelling conviction is the basis on which the court extends from, and beyond, to impose an indeterminate 10 year term of imprisonment as provided in HRS 706-661.

Now, before the court can exercise its discretion on whether or not to extend from the ordinary term of imprisonment and thereby impose extended terms of imprisonment as provided by HRS 706-661, HRS 706-664(3) provides the procedure that must be carried out and the criteria that must be satisfied; specifically, HRS 706-664(3) states:

(3) IF the jury, or the court if the defendant has waived the right to a jury determination, finds that the facts necessary for the imposition of an extended term of imprisonment under section 706-662 have been proven beyond a reasonable doubt, the court may impose an indeterminate term of imprisonment as provided in section 706-661.

In retrospect, after being convicted on both Burglary and unauthorized entry in a Dwelling offenses after this case was remanded for a new trial by the ICA due to the state's misconduct during closing arguments in my first trial, on June 22 2016 a post-conviction - extended term hearing was held in accordance with

HRS 706-664(3), where a jury did find that the facts under HRS 706-662 have been proved beyond a reasonable doubt that I am a persistent offender and that extended terms of imprisonment is necessary for the protection of the public. Subsequently, during sentencing on June 27 2016 the trial court extended the 10 year ordinary term of imprisonment prescribed by HRS 706-660 for my Burglary conviction to 20 years, and thereby sentenced me to a 20 year extended sentence for my Burglary conviction. However, by this time I had fully served and satisfied the 5 year ordinary term of imprisonment prescribed by HRS 706-660 for my unauthorized entry in a dwelling conviction, which expired 5 years from September 29 2009, with the expiration date being sometime in September 2014, and as a result, during my sentencing on June 27 2016, and not to undermine the jury's findings that I am a persistent offender and that they did find that an extended term of imprisonment is necessary for the protection of the public, but due to the fairness of due process the trial court could no longer use the satisfaction

of that criteria to extend the 5 year ordinary term of imprisonment prescribed by HRS 706-660 for my unauthorized entry in a Dwelling conviction because I had already served it to its expiration, and as a result, the trial court had no basis on which to extend the 5 year ordinary term of imprisonment because it had already expired. However, during sentencing on June 27 2016 the trial court took it upon itself to defy sound principle and arbitrariness, without being authorized by statute, did extend the "expired" 5 year ordinary term of imprisonment prescribed by HRS 706-660 for my unauthorized entry in a Dwelling conviction to 10 years, and thereby sentenced me to a 10 year extended sentence for my unauthorized entry in a Dwelling conviction, to be served consecutively to the 20 year extended sentence for my Burglary conviction. Here, the 10 year extended sentence for my unauthorized entry in a Dwelling conviction constitutes an illegal sentence and a violation of my right to due process because not only did the trial court not have a basis on

which to extend from, but the trial court was not authorized by statute to extend the "expired" 5 year ordinary term of imprisonment prescribed by HRS 706-660 for my unauthorized entry in a Dwelling conviction to 10 years, and thereby to impose the 10 year extended sentence for my unauthorized entry in a Dwelling conviction. At that time, although my defense counsels overlooked and/or failed to see this issue and never raised it, as stated in the PROCEDURAL HISTORY of this Supplemental Brief, this June 27 2016 Judgment of sentence was vacated by the ICA because the trial court violated HRS 706-609 by imposing a more severe sentence than my prior sentence imposed on November 29 2011 and thereby remanded for resentencing.

During my resentencing proceeding held on June 4 2020 the court ruled that "the fact that there was a delay in having this resentencing -- and this is my ruling -- does not mean that in any way that the court cannot legally resentence you..." see

Exhibit "A" on pg 18:13-24. The court further stated that "The court retains jurisdiction, the power, the authority, and the duty to resentence defendant in accordance with the directive of the appellate court. So that is the ruling on the delay objection." *Id* on pg 19:7-10. I argue that the court's jurisdiction and duty to resentence me is limited to rendering a legal disposition in accordance with HRS 706-600 which states that "No sentence shall be imposed otherwise than in accordance with this chapter". Accordingly, the court's power and authority to legally resentence me comes from statute. Here, I argue that the court was wrong for ruling that the delay to resentence me does not mean that the court cannot legally resentence me.

The ICA's Judgment on Appeal remanding for resentencing was filed November 15 2018. I had fully served and satisfied the 10 year ordinary term of imprisonment prescribed by HRS 706-660 for my Burglary conviction which expired 10 years from September 22 2009, with the expiration

date being sometime in September 2019. Here, the court had sufficient time, 10 months, from November 15 2018 to September 2019 to resentencing me and to extend the 10 year ordinary term of imprisonment prescribed by HRS 706-660 for my Burglary conviction before it expired, but due to its lack of due diligence and unreasonable delay, failed to do so. moreover, it wasn't until 9 months after the expiration of the 10 year ordinary term of imprisonment prescribed by HRS 706-660 for my Burglary conviction that I was called upon to be resentenced, which was on June 4 2020, and there, the court took it upon itself to defy sound principle and arbitrarily, without being authorized by statute, did extend the "expired" 10 year ordinary term of imprisonment prescribed by HRS 706-660 for my Burglary conviction to 20 years, and thereby resentenced me to a 20 year extended sentence for my Burglary conviction. Here, the court also extended the "expired" 5 year ordinary term of imprisonment prescribed by HRS 706-660

For my unauthorized entry in a Dwelling conviction to 10 years, which was extended for the second time, and thereby resentenced me to a ten (10) year extended sentence for my unauthorized entry in a Dwelling conviction, to be served concurrently with the 20 year extended sentence for my Burglary conviction.

Again, "although the court has broad discretion in sentencing defendants, the sentence imposed must be authorized by statute." see State v. March, supra. There is no statute that authorized the court to extend the "expired" ordinary terms of imprisonment prescribed by HRS 706-660 for both my Burglary and unauthorized entry in a Dwelling convictions beyond its statutorily prescribed range by which to impose the extended terms of imprisonment in this case. Thus, constitutes an illegal sentence not authorized by statute. see State v. Kahalewai, supra, "clarifying that

an illegal sentence is one that the court is not authorized to impose." Accordingly, as stated in HRS 706-600:

"No sentence shall be imposed otherwise than in accordance with this chapter."

VIII CONCLUSION

By operation of serving and satisfying the ordinary terms of imprisonment prescribed by HRS 706-660 for both my Burglary and unauthorized entry in a dwelling convictions before a legal sentence was ever imposed, I had already served the statutorily imposed maximum penalties for my Burglary and unauthorized entry in a dwelling convictions, and as a result, on June 4 2020, the court's duty in rendering a legal disposition of this case was to declare time served, nunc Pro tunc, on the expiration dates of the ordinary terms of imprisonment prescribed by HRS 706-660 for both my

Burglary and unauthorized entry in a Dwelling conviction because no other sentence could be imposed in accordance with HRS 706-600 and nor could any other sentence be authorized by statute.

VIII RELIEF

That this Honorable court agrees with the sound argument of this case of first impression, the authorities in support and the conclusion as stated above, and thereby declare time served, nunc pro tunc, on the expiration dates of the ordinary terms of imprisonment prescribed by HRS 706-660 for both my Burglary and unauthorized entry in a Dwelling convictions.

Respectfully Submitted.

Dated: Honolulu, Hawaii December 2 2020

Stanley Canosa

Stanley Canosa - Defendant

IN THE INTERMEDIATE COURT OF APPEALS OF THE
STATE OF HAWAII

STATE OF HAWAII
PLAINTIFF - APPELLEE

CAAP-20-0000438

CR. NO. 09-1-1524

VS.


CERTIFICATE OF SERVICE

STANLEY LARRY CANOSA
DEFENDANT - APPELLANT

CERTIFICATE OF SERVICE

I, Stanley Canosa, hereby certify that on December 2 2020 I placed this Supplemental Brief in the mail addressed to Shawn A. Luiz at 841 Bishop Street, suite 200, Honolulu, Hawaii 96813, to attach as a Supplement to the opening Brief.

Dated: Honolulu, Hawaii December 2 2020


Stanley Canosa
Defendant

C.C.

NO. CAAP-20-0000650

(CONSOLIDATED NOS. CAAP-20-0000438, CAAP-20-0000506, AND CAAP-20-0000650)

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

STATE OF HAWAII,	) CRIMINAL NO. 1PC091001524
	) (CR 09-1-1524)
Plaintiff-Appellee,)
	) APPEAL FROM THE
VS.	) 1) JUDGMENT OF CONVICTION AND
	) SENTENCE; NOTICE OF ENTRY, and
	) MITTIMUS, WARRANT OF
	) COMMITMENT, filed June 4, 2020 (CAAP-
	) 20-0000438)
	) 2) AMENDED JUDGMENT OF
STANLEY CANOSA,	) CONVICTION AND SENTENCE; NOTICE
	) OF ENTRY, and AMENDED MITTIMUS,
	) WARRANT OF COMMITMENT, filed July
Defendant-Appellant	) 10, 2020 (CAAP-20-0000506)
	) 3) ORDER DENYING DEFENDANT'S
	) MOTION TO CORRECT ILLEGAL
	) SENTENCE PURSUANT TO RULE 35(a)
	) OF THE HAWAII RULES OF PENAL
	) PROCEDURE FILED 8/24/20,
	) filed October 21, 2020 (CAAP-20-0000650)
)
	) FIRST CIRCUIT COURT
)
	) The Honorable Karen Tooko Nakasone
)

STATEMENT OF RELATED CASES

Appellant discloses that this case was before the Intermediate Court of Appeals of Hawai'i two other times prior to the instant appeal (See *State v. Canosa*, NO. CAAP-11-0001051-February 7, 2014, Decided, February 7, 2014; see also *State v. Canosa*, NO. CAAP-16-0000497, 2014 Haw. App. LEXIS 56, *1, 133 Haw. 451, 2014 WL 503045 (Haw. Ct. App. 2014); Writ of certiorari denied *State v. Canosa*, 2014 Haw. LEXIS 191 (Haw., June 17, 2014).

Dated: Honolulu, Hawaii, April 28, 2021.

/s/ SHAWN A. LUIZ
SHAWN A. LUIZ

Attorney for Defendant-Appellant
STANLEY CANOSA

NO. CAAP-20-0000650

(CONSOLIDATED NOS. CAAP-20-0000438, CAAP-20-0000506, AND CAAP-20-0000650)

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

STATE OF HAWAII,

Plaintiff-Appellee,

VS.

STANLEY CANOSA,

Defendant-Appellant

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)
) FIRST CIRCUIT COURT
)
) The Honorable Karen Tooko Nakasone

CERTIFICATE OF SERVICE

I, Shawn A. Luiz, Esq., a member of the Bar of this Honorable Court, do hereby certify that on, April 28, 2021, I served a copy of the forgoing by JEFS, addressed as follows:

Thalia B.P. Murphy (tmurphy@honolulu.gov)
Loren J. Thomas (lthomas@honolulu.gov)

Dated: Honolulu, Hawaii, April 28, 2021.

/s/ SHAWN A. LUIZ
SHAWN A. LUIZ
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STANLEY CANOSA