DISSENTING OPINION OF ACOBA, J.,
WITH WHOM RAMIL, J. JOINS

I would vacate the conviction and sentence for a petty misdemeanor, exercise jurisdiction under Hawai'i Revised Statutes (HRS) § 602-4 (1993), enter a judgment of violation, and remand for sentencing on the violation.

I.

Defendant-Appellant Alice Brown (Defendant) was charged with the violation rather than the petty misdemeanor version of the offense of disorderly conduct, HRS § 711-1101(1)(a) (1993). A violation is punishable by "a fine, or fine and forfeiture or other civil penalty." HRS § 701-107(5) (1993).[1] See also Commentary to HRS § 701-107 ("No imprisonment may follow conviction of a violation, nor may any civil disabilities be imposed.").

HRS § 711-1101 provides that disorderly conduct is a petty misdemeanor if, inter alia, the defendant persists in the prohibited conduct after a warning or request to desist:

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[1] HRS § 701-107(5) provides as follows:

> An offense defined by this Code or by any other statute of this State constitutes a violation if it is so designated in this Code or in the law defining the offense or if no other sentence than a fine, or fine and forfeiture or other civil penalty, is authorized upon conviction or if it is defined by a statute other than this Code which provides that the offense shall not constitute a crime. A violation does not constitute a crime, and conviction of a violation shall not give rise to any civil disability based on conviction of a criminal offense.

> **Disorderly conduct.** (1) A person commits the offense of disorderly conduct it, with intent to cause physical inconvenience or alarm by a member or members of the public, or recklessly creating a risk thereof, the person
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> (a) Engages in fighting or threatening, or in violent or tumultuous behavior; or
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> (b) Makes unreasonable noise; or
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> (c) Makes any offensively coarse utterance, gesture, or display, or addresses abusive language to any person present, which is likely to provoke a violent response; . . .
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> . . . .
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> (3) Disorderly conduct is a petty misdemeanor if it is the defendant's intention to cause substantial harm or serious inconvenience, or if the defendant persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a violation.

(Emphases added.)

The district court found that Defendant "persisted" in such conduct after being so warned or requested:

> The Court will find that with regard to the events concerning Ms. Taylor, that the State has proven beyond a reasonable doubt that the defendant, with intent to cause physical inconvenience or alarm by a member or members of the public, or recklessly creating the risk thereof, did engage in tumultuous behavior, by using profanities, by refusing to cease her communication, by her gestures towards Ms. Taylor.
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> And there's evidence that there was physical inconvenience or alarm by a member or members of the public because Ms. Taylor testified that people from the Post office were attracted to the commotion, and Mrs. Taylor felt compelled to leave her office and to retreat to the rear of -- rear portion of the building in order to avoid any further confrontation with [Defendant].
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> Furthermore, she persisted in disorderly conduct after a warning or request to desist. Ms. Taylor testified that she asked defendant to leave three times, and the defendant didn't leave.

(Emphases added.) As is plain from the transcript, the court's decision tracked nearly verbatim that conduct punishable as a petty misdemeanor, not a violation. Because Defendant was charged with a violation, the conviction for a petty misdemeanor was erroneous.

Consistent with the conviction it had entered, the court imposed a sentence authorized for petty misdemeanor convictions.

> All right. Okay.
> So the Court will find you guilty. Place you on probation for six months. Standard terms and conditions of probation will be imposed.

The foregoing probationary sentence was not illegal for the conviction entered.

In consonance with the above, the district court calendar refers to "HRS 711-1101 . . . Disorderly Conduct/PM" and to "S 711-1101(1)(A)." The calendar further notes that "Court found Deft. guilty. sentence imposed. Probation 6 months, standard terms and conditions," etc. "P/M" obviously refers to a "petty misdemeanor" offense, as do the citations to HRS § 711-1101. The district court calendar notation is the judgment. See State v. Graybeard, 93 Hawai'i 513, 517, 6 P.3d 385, 389 (App. 2000) ("'The notation of the judgment by the clerk on the calendar constitutes the entry of judgment.'") (quoting Hawai'i Rules of Penal Procedure (HRPP) Rule 32(c)(2)). Manifestly, the judgment entered was for a petty misdemeanor.

Nowhere in the transcript or in the calendar did the court refer to a violation, or to a civil penalty. Had the district court convicted Defendant of a violation, it would not have referred to the language in HRS § 711-1101(1) and (a) and the "persist" provision in HRS § 711-1101(3) or sentenced

Defendant to probation.[2] Both the transcript and the calendar reflect Defendant was convicted of the petty misdemeanor offense. Accordingly, the sentence of probation was not illegal because it was appropriate for a petty misdemeanor conviction; rather, the conviction itself was erroneous.

II.

Defendant appealed, alleging inter alia that the court had erred in convicting her of a petty misdemeanor rather than a violation. Plaintiff-Appellee State of Hawai‘i (the prosecution) conceded in its answering brief that the court had convicted Defendant of a petty misdemeanor, rather than for a violation as charged. In her reply brief, Defendant agreed with the prosecution that the district court convicted her of a petty misdemeanor but should have convicted her of a violation. The Intermediate Court of Appeals (the ICA), by a March 15, 2001 memorandum opinion, affirmed the conviction and, in a footnote, rejected Defendant's violation argument.

On March 27, 2001, Defendant moved for reconsideration, contending that although the district court found Defendant guilty of a petty misdemeanor, she was charged with a violation. On April 3, 2001, the ICA denied reconsideration without

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[2] In light of the notations on the calendar, the district court's error was understandable and innocent. It is the doctrinal compounding of that error by the misapplication of HRPP Rule 35 and the rejection of HRS § 602-4 jurisdiction in this court that is of concern. See discussion infra.

explanation. On May 4, 2001, Defendant filed an application for writ of certiorari, that was one day late. The application calls to our attention that the ICA erred because Defendant was charged with a violation, not a petty misdemeanor. On May 14, 2001, this court denied the writ as untimely. On May 18, 2001, Defendant moved for "relief from default."

III.

Because Defendant's claim that the petty misdemeanor conviction was erroneous was litigated before the ICA, the conviction cannot now be collaterally attacked under HRPP Rule 40. HRPP Rule 35, which pertains only to the sentence imposed, is not available as a remedy because the error was with respect to the conviction, not the sentence.

HRPP Rule 35 provides as follows:

> **CORRECTION OF REDUCTION OF 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. 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 a judgment of conviction. A motion to correct or reduce a sentence which is made within the time period aforementioned 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.

(Emphasis added.) The first sentence of HRPP Rule 35 is identical to Federal Rules of Criminal Procedure (FRCrP)

Rule 35(a) before FRCrP Rule 35 was amended in 1984 and the remaining portion of HRPP Rule 35 is substantially similar to FRCrP Rule 35(b) prior to the 1984 amendment. Under FRCrP Rule 35, "[a] motion for correction of an illegal sentence presupposes a valid conviction and affords procedure for bringing an improper sentence into conformity with the law." C. Wright, 3 Federal Practice and Procedure: Criminal § 582, at 380-81 (2d ed. 1982) (citing Fooshee v. United States, 203 F.2d 247, 248 (5th Cir. 1953); Cook v. United States, 171 F.2d 567, 570 (1st Cir. 1948), cert. denied, 336 U.S. 926 (1948); McClain v. United States, 478 F.Supp. 732, 737 (S.D.N.Y. 1979)) (emphasis added). See also Migdol v. United States, 298 F.2d 513, 515 (9th Cir. 1961) (stating that where an appellant "attacks the validity of the conviction[,]" a court does not have jurisdiction to entertain an attack under Rule 35 "because [such a] proceeding is for the correction of an illegal sentence imposed under a valid conviction") (citation omitted).

Thus, a collateral attack on a conviction is not permitted by invocation of Rule 35. This makes sense because, otherwise, the "anytime" provision in the Rule would allow a defendant to circumvent the time requirements of a direct appeal by challenging an erroneous conviction as an illegal "sentence." State v. Jumila, 87 Hawai'i 1, 950 P.2d 1201 (1998), is not contrary authority. In Jumila, this court concluded that

Defendant should not have been convicted of both murder and a firearm charge and reversed his conviction and sentence as to the firearm charge. HRPP Rule 35 was not used as a vehicle to correct an illegal conviction, but was incidental to this court's reversal of one of two convictions.[3]

IV.

There being "no remedy at law," the only recourse for correction of the error is by way of HRS § 602-4. Under that statute, an error may be corrected as part of our general superintendence of the lower courts. HRS § 602-4 states:

> **Superintendence of inferior courts.** The supreme court shall have the general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law.

That the district court entered a conviction of a petty misdemeanor cannot be ignored if we, as an appellate court, are

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[3] In Jumila, the defendant was sentenced to (1) life imprisonment with the possibility of parole for murder and (2) an indeterminate term of imprisonment of twenty years for use of a firearm. See 87 Hawai'i at 2, 950 P.2d at 1202. He also received a mandatory minimum term of imprisonment of fifteen years on the murder conviction. See id. The defendant moved to reduce sentence and correct illegal sentence under HRPP Rule 35, contending that under HRS § 701-109(1)(a), he should not have received both the twenty-year sentence on the firearm charge and the life sentence with a fifteen-year mandatory minimum term on the murder charge. See id. The trial court denied the motion. See id.

This court reversed his conviction and sentence as to the firearm charge. See id. at 4, 950 P.2d at 1204. It was held that because the defendant should not have been convicted of both offenses, he should not have received separate sentences for each offense. See id. It was in this context that this court held that the trial court erred in denying the defendant's Rule 35 motion.

Thus, in Jumila, HRPP Rule 35 was not used to correct an illegal conviction, but was incidental to this court's reversal of one conviction.

to faithfully adhere to the facts. That obligation to accurately set out the facts is similarly imposed upon the parties and both the prosecution (to its credit) and the defense in this appeal did so. Allowing an attack on the conviction by way of Rule 35 does not comport with the facts and is contrary to the express language and purpose of the Rule. There is no principled basis for avoiding jurisdiction under HRS § 602-4.