OPINION BY ACOBA, J.,
CONCURRING IN PART AND DISSENTING IN PART

I would vacate and remand for a Hawai‘i Rules of Penal Procedure (HRPP) Rule 40 hearing on the claim by Petitioner-Appellant David Parker (Petitioner) that a thirty-five-year minimum term of imprisonment for attempted murder in the second degree violated the guidelines of the Hawai‘i Paroling Authority (HPA) and/or his right to equal protection, but affirm the June 10, 2003 order of the first circuit court (the court) denying Petitioner's HRPP Rule 40 petition on all other grounds for the reasons set forth herein.

I.

On October 27, 1992, Respondent-Appellee State of Hawai‘i (the prosecution) filed an indictment charging Petitioner on three counts: Attempted Murder in the Second Degree, Hawai‘i Revised Statutes (HRS) §§ 707-701.5 (Supp. 1986) and 705-500 (1985) (Count I); Murder in the Second Degree, HRS § 707-701.5 (Count II); and Attempted Murder in the First Degree, HRS §§ 707-701(1)(a) (Supp. 1986) and 705-500 (Count III). On November 18, 1992, a public defender was appointed legal counsel for Petitioner. On April 14, 1993, in anticipation of an insanity and/or extreme mental or emotional disturbance defense, the prosecution requested that Petitioner be subjected to a mental examination. Petitioner objected to this request. On October 28, 1993, Count III was dismissed through a Motion For Nolle Prosequi. On November 16, 1993, a jury found Petitioner

guilty of both Count I and Count II. On January 28, 1994, the the court sentenced Petitioner to two consecutive terms of life imprisonment.

On appeal to this court, the public defender withdrew as counsel for Petitioner, and Richard Kawana, Esq. ("appellate counsel") was appointed as counsel for Petitioner on February 14, 1994. Petitioner's appellate counsel raised the following points of error: (1) the trial court erred in not severing the counts against Petitioner; (2) the motions court erred when it did not suppress Petitioner's statements and evidence regarding one of the complainants in the case; and (3) the trial court improperly admitted certain photographs. On May 23, 1994, after a hearing on May 6, 1994, the HPA set a minimum term of imprisonment on each of Counts I and II at thirty-five years. On November 8, 1996, this court affirmed Defendant's conviction and sentence.

On February 19, 2003, Petitioner acting pro se filed a HRPP Rule 40 petition (petition). According to the court, Petitioner alleged: (1) ineffective assistance of appellate counsel for failure to raise trial counsel's ineffective assistance and the sentencing court's error in not ordering a pre-sentence mental examination of Petitioner; (2) ineffective assistance of appellate counsel for failure to raise the unconstitutionality of consecutive sentences; and (3) the unconstitutionality of the minimum term set by the HPA as in

violation of the equal protection clauses of both the Hawai‘i[1] and United States Constitutions.[2] On June 10, 2003, the court filed its Findings of Fact and Conclusions of Law which denied Petitioner's petition without a hearing on the grounds that each of the above mentioned issues was either "without merit" or "unfounded." On June 30, 2003, Petitioner filed a Notice of Appeal from the June 10, 2003 order of the court denying Petitioner's petition without a hearing.

II.

On appeal, Petitioner contends: (1) appellate counsel was ineffective because he neither raised trial counsel's failure to request a pre-sentence mental examination under HRS § 706-603 (1993),[3] nor the court's failure to order a pre-sentence mental

[1] In pertinent part, the Equal Protection Clause of the Hawai‘i State Constitution states:

> No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws . . . .

Haw. Const. art. I, § 5.

[2] In pertinent part, the Equal Protection Clause of the United States Constitution states:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. 14.

[3] HRS § 706-603(a) stated, in relevant part:

> **Pre-sentence mental and medical examination.** (a) Before imposing sentence, the court may order a defendant who has been convicted of a felony or misdemeanor to submit to mental or other medical observation and examination for a period not exceeding sixty days or a longer period, not to exceed the length of permissible imprisonment, as the court

(continued...)

exam, sua sponte; (2) HRS § 706-668.5 (1993)[4] is unconstitutional because it "fails to ensure state and federal due process protection"; and (3) the thirty-five-year minimum term sentence for attempted murder in the second degree imposed by the HPA violated Petitioner's constitutional right to equal protection. Petitioner requests that the June 10, 2003 order denying Petitioner's petition without a hearing be vacated and the case remanded to the court with instructions to grant the petition.

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[3](...continued)

> determines to be necessary for the purpose. In addition thereto or in the alternative, the court may appoint one or more qualified psychiatrists, physicians, or licensed psychologists to make the examination. The three examiners shall be appointed from a list of certified sanity examiners as determined by the state department of health. The report of the examination shall be submitted to the court. . . .

(Emphasis added.)

[4] HRS § 706-668.5 states:

> **Multiple sentence of imprisonment.** (1) If multiple terms of imprisonment are imposed on a defendant at the same time, 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 consecutively. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms run concurrently.
>
> (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.

(Emphases added.)

III.

On appeal, the issue of whether the trial court erred in denying a Rule 40 petition without a hearing is reviewed de novo; thus, the right/wrong standard of review is applicable. See Barnett v. State, 91 Hawai‘i 20, 26, 979 P.2d 1046, 1052 (1999); Dan v. State, 76 Hawai‘i 423, 427, 876 P.2d 528, 532 (1994).

IV.

Since Petitioner is contesting the constitutionality of his sentences, this petition falls under HRPP Rule 40(a)(1)(i).[5] As to his petition, HRPP Rule 40(f) provides that,

> If a petition alleges facts that if proven would entitle the petitioner to relief, the court shall grant a hearing which may extend only to the issues raised in the petition or answer. However, the court may deny a hearing if the petitioner's claim is patently frivolous and is without a trace of support either in the record or from other evidence submitted by the petitioner.

(Emphasis added.)

[5] HRPP Rule 40(a)(1)(i) and (iii) states in pertinent part:

> (a) **Proceedings and grounds**. The post-conviction proceeding established by this rule shall encompass all common law and statutory procedures for the same purpose, including habeas corpus and coram nobis; provided that the foregoing shall not be construed to limit the availability of remedies in the trial court or on direct appeal. Said proceeding shall be applicable to judgments of conviction and to custody based on judgments of conviction, as follows:
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> (1) **From judgment**. At any time but not prior to final judgment, any person may seek relief under the procedure set forth in this rule from the judgment of conviction, on the following grounds:
>
> (i) that the judgment was obtained or sentence imposed in violation of the constitution of the United States or of the State of Hawai‘I.
>
> . . . .
>
> (iii) that the sentence is illegal[.]

(Emphases added.)

V.

In order to establish a claim of ineffective counsel on appeal,

> a petitioner must show that (1) his appellate counsel omitted an appealable issue, and (2) in light of the entire record, the status of the law, and the space and time limitations inherent in the appellate process, a reasonably competent, informed and diligent criminal attorney would not have omitted that issue.

State v. Domingo, 76 Hawai'i 237, 242, 873 P.2d 775, 780 (1994) (quoting Briones v. State, 74 Haw. 442, 466-67, 848 P.2d 966, 977-78 (1993)). "An 'appealable issue' is an error or omission by counsel, judge, or jury resulting in the withdrawal or substantial impairment of a potentially meritorious defense." Briones, 74 Haw. at 466-67, 848 P.2d at 977.

The standard by which a claim of ineffective assistance of trial counsel is measured has been previously set forth by this court.

> [T]he defendant has the burden of establishing ineffective assistance of [trial] counsel and must meet the following two-part test: 1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and 2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.

Barnett v. State, 91 Hawai'i 20, 27, 979 P.2d 1046, 1053 (1999) (quoting State v. Silva, 75 Haw. 419, 439-40, 864 P.2d 583, 593 (1993)).

VI.

In support of his first point of error, Petitioner cites State v. Valera, 74 Haw. 424, 435-37, 848 P.2d 376, 381 (1993). In Valera, defendant was convicted of four offenses and

sentenced to consecutive and concurrent terms of imprisonment. Id. at 432, 848 P.2d at 379. However, this court determined that the sentencing court abused its discretion in considering suppressed statements in imposing Valera's sentences. Id. at 436-37, 848 P.2d at 381. Accordingly, the case was remanded for "re-sentencing by a different judge." Id. at 440, 848 P.2d at 383.

Petitioner asserts that under Valera a mental examination should have been requested by his trial counsel in order to ensure that "the sentencing judge had 'complete information' about Parker." (Quoting Valera, 74 Haw. at 435, 848 P.2d at 381.) However, the "complete information" in Valera refers to the statutory sentencing factors outlined in HRS § 706-606.[6] See Valera, 74 Haw. at 435, 848 P.2d at 381. HRS § 706-

[6] HRS § 706-606, in its entirety, states:

> **Factors to be considered in imposing a sentence.** The court, in determining the particular sentence to be imposed, shall consider:
>
> (1) The nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) The need for the sentence imposed:
>
> (a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
>
> (b) To afford adequate deterrence to criminal conduct;
>
> (c) To protect the public from further crimes of the defendant; and
>
> (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) The kinds of sentences available; and
>
> (4) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

606 does not state that a pre-sentence mental examination is required to determine whether a particular sentence should be imposed. Accordingly, Petitioner's argument is without merit.

Petitioner's argument that HRS § 706-603[7] requires a pre-sentence mental examination to be conducted is also without merit. "When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself." Gray v. Admin. Dir. of the Court, 84 Hawai'i 138, 148, 931 P.2d 580, 590 (1997). In its answering brief, the prosecution contends that HRS § 706-603 merely permits a court to use its discretion in ordering a mental examination and does not require it. Obviously, the plain language of the statute merely states that "the court may order," and does not mandate the court to order a pre-sentence mental examination. See id. at 149, 931 P.2d at 591 (determining the word "may" connotes a discretionary function).

Furthermore, in order to prevail on his claim of ineffective assistance of appellate counsel, Petitioner must prove that such a mental examination could lead to a "potentially meritorious defense." Barnett, 91 Hawai'i at 27, 979 P.2d at 1053. A meritorious defense could include a defense of mental defect or disease. See State v. Alo, 57 Haw. 418, 420, 558 P.2d 1012, 1014 (1976). But, since Petitioner has not pointed to

[7] See supra note 3.

anything in the record, or advanced specific evidence suggesting that such a mental examination would provide a meritorious defense, Petitioner's claim that he should have been given a pre-sentence mental examination under HRS § 706-603 is frivolous and without support.

VII.

Next, Petitioner contends that his appellate counsel failed to argue that HRS § 706-668.5[8] "is constitutionally inadequate." Petitioner argues that the sentencing court's determination did not include "findings of fact and no mention or consideration of protection of the public based on a real (not imagined) finding . . . . " He apparently asserts that the consecutive term sentencing statute, HRS § 706-668.5, bestows upon the sentencing court the "authority to engage in arbitrary and discriminatory" sentence determinations.

Petitioner attempts to extend the rationale of State v. Huelsman, 60 Haw. 71, 588 P.2d 394 (1978), overruled on other grounds by State v. Tafoya, 91 Hawai'i 261, 982 P.2d 890 (1999), to this case. In Huelsman, defendant pleaded guilty to four separate offenses. Id. at 72, 588 P.2d at 396. Eventually, he was given extended term sentences for each offense pursuant to HRS § 706-662(4). Id. In holding that HRS § 706-662(4)[9]

[8] See supra note 4.

[9] The version of HRS § 706-662(4) in effect at the time stated, in relevant part:

(continued...)

violated the "due process guarantee of the Hawaii Constitution," id. at 73, 588 P.2d at 396, this court explained that even though "due process permits the court to exercise a wide discretion in selecting the appropriate sentence," id. at 83, 588 P.2d at 402, such discretion cannot be exercised arbitrarily or capriciously, id. at 85-86, 588 P.2d at 403-04. It was determined that the term "warranted," in HRS § 706-662(4), allowed an overly broad, or arbitrary use of a judge's discretion. Id. at 91, 588 P.2d at 406. This court therefore held that the term "warranted," in HRS § 706-662(4),[10] should be construed to mean the more "limited

[9](...continued)

> **Criteria for sentence of extended term of imprisonment for felony**. . . .
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> . . . .
>
> (4) Multiple offender. The defendant is a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted.

(Emphasis added.)

[10] The current version of HRS § 706-662(4) states:

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

(Emphasis added.) However, the version of HRS § 706-662(4) in dispute in Huelsman contained the word "warranted," rather than the emphasized words

(continued...)

standard 'necessary for the protection of the public.'" Id.

Huelsman is inapplicable to the case at bar because Huelsman pertains to extended term sentencing and not consecutive term sentencing. The Hawai'i Intermediate Court of Appeals (ICA) has stated that extended term sentencing is not, in any legal sense, similar to consecutive sentences. See State v. Sinagoga, 81 Hawai'i 421, 429-30, 918 P.2d 228, 236-37 (App. 1996) ("Consecutive sentences . . . are not extended sentences."), overruled on other grounds by State v. Veikoso, 102 Haw. 219, 74 P.3d 575 (2003). In Sinagoga, the ICA defined consecutive term sentences as "follow[ing] one another," with "one being completely served before the next is begun." Id. (internal quotation marks and citation omitted). An extended term sentence, on the other hand, "enlarges the ordinary sentence for any given offense." Id. (internal quotation marks and citation omitted).

In addition, the consecutive sentencing statute, HRS § 706-668.5(1),[11] provides that "[m]ultiple terms of imprisonment imposed at the same time run concurrently unless the court orders . . . that the terms run consecutively." A court's determination of whether to impose concurrent or consecutive terms must be made with due consideration of the factors outlined in HRS § 706-

[10](...continued)
noted above.

[11] See supra note 4.

606.[12] See HRS § 706-668.5(2); Sinagoga, 81 Hawai‘i at 429, 918 P.2d at 236. The exercise of the court's discretion, thus, is not without statutory limits. The manner in which a sentencing court weighs the various factors in HRS § 706-606 is "left to the discretion of the sentencing court, taking into consideration the circumstances of each case." Sinagoga, 81 Hawai‘i at 429, 918 P.2d at 236 (internal quotation marks and citation omitted). While a sentencing court is not required to state its reasons for imposing a sentence, it is "strongly recommended that the sentencing court do so . . . . " Id. HRS § 706-668.5(2) thus does not allow for arbitrary and capricious exercise of sentencing discretion.

Petitioner repeatedly contends that the sentencing judge erred when imposing the sentence because the sentencing judge uttered the words "I guess."[13] As pointed out by the prosecution, although the sentencing judge used the words "I guess" when imposing a consecutive sentence on Petitioner, the judge made several findings in support of her determination. These findings are as follows: (1) Petitioner had an apparent "normal life" due to the lack of any "real revelations or explanations" for Petitioner's conduct; (2) "by all appearances, by all accounts of [Petitioner's] background," Petitioner seemed

[12] See supra note 6.

[13] For example, the sentencing judge stated, "But what remains hidden, I guess is what, as Mr. Takata indicates, makes you dangerous . . . I guess it's - it's hidden in some dark corner or something, but there's a part of you that commits these offenses."

"to be a normal kind of guy"; (3) Petitioner's actions nevertheless suggested that "there's something wrong," which neither Petitioner nor the court could identify; (4) the offenses indicated "there is that part of [Petitioner] . . . hidden in some dark corner or something, . . . that [allows him to] commit[] these offenses"; (5) this "hidden" characteristic "makes [Petitioner] dangerous"; (6) due to Petitioner's "hidden" characteristic, Petitioner was an "extremely high risk" to recommit the same offenses; (7) the nature of the committed offenses was "serious"; and (8) Petitioner was probably incapable of being rehabilitated.

Considering the sentencing judge's comments in their entirety, it is apparent that the sentencing judge considered the various HRS § 706-606 factors. The court in fact did make findings of fact and considered the threat Petitioner posed to the public. Hence, the sentencing court's use of its discretion was not arbitrary, and there was no error when the sentencing judge determined that consecutive sentences were proper in this case.

VIII.

As stated, supra, "[i]f a petition alleges facts that if proven would entitle the petitioner to relief, the court shall grant a hearing which may extend only to the issues raised in the petition or answer." HRPP Rule 40(f). Here, Petitioner has attached several appendices to his opening brief in support of his assertion that his thirty-five-year minimum term sentence for

attempted murder in the second degree (attempted murder) violates his constitutional right to equal protection. The truth and/or accuracy of these appendices is not contested by the prosecution.

Attached to Petitioner's opening brief as Appendix 4 is a copy of the minimum sentencing term guidelines adopted by the HPA. These guidelines place those who are to be sentenced into one of three possible categories. According to Appendix 4, for a person facing a maximum term of imprisonment of Life with Parole, such as Petitioner, the minimum term of imprisonment is set as follows: Level I: 5 - 10 years (60 - 120 months); Level II: 10 - 20 years (120 - 240 months); Level III: 20 - 50 years (240 - 600 months).

Appendix 2 contains two lists. The first list enumerates the minimum term sentences of those people who were convicted of attempted murder for the fiscal year 1993-1994. The other list contains the minimum term sentences of those people who were convicted of murder in the second degree (murder) for the fiscal year 1993-1994. According to Appendix 2, the minimum term sentences for attempted murder ranged from ten to twenty years, with Petitioner's sentence being the only one set at thirty-five years.[14] Petitioner does not contest any minimum sentence disparity as to his murder conviction. Rather, he contends that he is entitled to a hearing because his thirty-

[14] There were sixteen minimum term sentences for Murder that ranged from twelve years to thirty-five years. Of those sixteen sentences, five sentences were set at thirty years, and two sentences were set at thirty-five years.

five-year minimum term of imprisonment for attempted murder violated his constitutional right to equal protection.

Rather than addressing the alleged disparity of Petitioner's minimum term of imprisonment for attempted murder, the court focused on Petitioner's minimum term of imprisonment for murder. In its entirety the trial court stated:

> HRS § 706-656(2)[15] states in pertinent part, "The minimum length of imprisonment shall be determined by the Hawaii paroling authority . . . ." It is apparent that the legislature intended the Hawaii Paroling Authority to have the authority and the discretion to set minimum terms of imprisonment. However, Petitioner alleges that his fixed minimum terms of imprisonment are unconstitutional. This argument is without merit. Petitioner claims his thirty-five year minimum term violates the equal protection clause, however, Petitioner's "Exhibit 4" for murder in the second degree indicates that for the period of 1993 - 1994, in addition to Petitioner, two other inmates received minimum terms of imprisonment of thirty-five years, and five other inmates received terms of thirty years each. Out of sixteen inmates, eight received minimum terms of thirty or thirty-five years, which does not indicate disparate treatment.

IX.

According to the prosecution, Petitioner is the only person who was convicted of both attempted murder and murder in the fiscal year 1993-1994, and, thus, Petitioner was not similarly situated as the other persons convicted of attempted murder. (Citing State v. Miller, 84 Hawai'i 269, 276, 933 P.2d

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[15] HRS § 706-656(2) (1993) states in its entirety:

> **Terms of imprisonment for first and second degree murder and attempted first and second degree murder**. . . .
> (2) Except as provided in section 706-657, pertaining to enhanced sentence for second degree murder, persons convicted of second degree murder and attempted second degree murder shall be sentenced to life imprisonment with possibility of parole. The minimum length of imprisonment shall be determined by the Hawaii paroling authority; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

606, 613 (1997).[16] However, whether that was the reason Petitioner was given his minimum sentence amounts to mere speculation. For the record is silent as to the reasons why the HPA subjected Petitioner to a much higher minimum term of imprisonment for attempted murder than imposed on others convicted of this offense. For the same reason, it cannot be presumed that the HPA "undoubtedly" took into consideration the nature of Petitioner's attempted murder case and his murder conviction when imposing Petitioner's minimum term sentence on the attempted murder charge.

"[E]qual protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." Miller, 84 Hawai'i at 276, 933 P.2d at 613 (internal quotation marks and citation omitted) (emphasis added). As noted, Petitioner has established through undisputed facts that during the 1993-1994 fiscal year, the HPA has uniformly determined that those persons convicted of attempted murder be subject to minimum terms of imprisonment ranging from ten to twenty years, or squarely within the Level II

[16] According to Miller,

> The guarantee of equal protection of the laws under Hawai'i and United States Constitutions requires that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made.

84 Hawai'i at 276, 933 P.2d at 613 (emphasis added).

classification. Petitioner is the only person listed with a minimum term sentence of thirty-five years for attempted murder, or within the Level III classification.

The HPA's guidelines do not provide that, in cases like Petitioner's, the HPA imposes a much longer minimum term of imprisonment on one offense to make it congruent with the minimum terms imposed for another separate conviction in the same case. It appears also that, based on the sentencing judge's comments,[17] Petitioner did not have a significant criminal history or any criminal history at all in light of the "normal life" that Petitioner lived. Further, the record is silent as to the facts and circumstances surrounding the other persons whose minimum sentences for attempted murder were set during the 1993-1994 fiscal year so as to justify the upward adjustment of Petitioner's sentence as compared to such persons.

Under the circumstances, it cannot be concluded that the "distinction made [had] some relevance to the purpose for which the classification is made," id., in the absence of any explanation in the record by the HPA as to the reasons for the disparity in Petitioner's minimum sentence. Because this court lacks the necessary facts by which to adjudge that the HPA's decision was not arbitrarily made, affirmance of that decision would be based on speculation. Such speculation was obviously intended to be prevented by the requirement that written reasons

[17] See supra pages 12-13.

be provided when the HPA deviates from its own guidelines, as is colorably evident here.

X.

While it is true that the HPA has "broad discretion" in imposing minimum term sentences, Williamson v. Hawai'i Paroling Auth., 97 Hawai'i 183, 189, 35 P.3d 210, 216 (2001), such discretion is not unbridled. Specifically, this "broad discretion" is circumscribed by "[t]he guidelines upon which these [minimum term] determinations are made . . . . " Id. The "guidelines" involved are those established by the HPA pursuant to the statutory mandate in HRS § 706-669(8) (1993)[18] that the HPA "shall establish guidelines" for the "uniform determination of minimum sentences." See Appendix 4, page 2 ("The purpose of minimum sentencing guidelines is to provide a degree of uniformity and consistency in the setting of minimum terms while providing the community-at-large, public policy makers and planners, the criminal justice system, and victims and offenders with information as to the criteria used in establishing minimum terms of imprisonment.").

[18] HRS § 706-669(8) states:

> **Procedure for determining minimum term of imprisonment.** (8) The authority shall establish guidelines for the uniform determination of minimum sentences which shall take into account both the nature and degree of the offense of the prisoner and the prisoner's criminal history and character. The guidelines shall be public records and shall be made available to the prisoner and the prosecuting attorney and other interested government agencies.

(Emphasis added.)

While the HPA is permitted to deviate from these guidelines, any such deviation must be made in writing. According to Appendix 4, "[t]he Hawaii Paroling Authority may deviate from the guidelines, . . . but all deviations shall be accompanied by written justification and be made a part of the Order Establishing Minimum Terms of Imprisonment." (Emphasis added.) In the absence of such a guideline or written reason as noted above, the undisputed facts as alleged by Petitioner amount to a colorable claim and would warrant a hearing. See HRPP Rule 40(f). Accordingly, Petitioner is entitled to a HRPP Rule 40 hearing to determine whether the HPA's decision was arbitrary and in violation of his right to equal protection of the laws. Therefore, the court erred when not granting a HRPP Rule 40 hearing on this claim. See HRPP Rule 40(f).

XI.

The June 10, 2003 order of the court, then, should be vacated and remanded for a HRPP Rule 40 hearing on Petitioner's claim that a thirty-five-year minimum term of imprisonment for Attempted Murder violated the HPA's guidelines and/or his right to equal protection, but be affirmed in all other respects.