

OPINION OF LIM, J., CONCURRING
IN PART AND DISSENTING IN PART

I agree with the majority that the circuit court's summary denial of Magbual's Rule 40 petition should be vacated and that the circuit court should be instructed to allow him to clarify the grounds asserted in his petition, pursuant to HRPP Rule 40(e).

I do not agree, however, that the circuit court should also be instructed to hold a hearing on the petition. To that extent, I respectfully dissent.

In requiring a hearing, we short-circuit the Rule 40 process by essentially nullifying HRPP Rule 40(f): "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 trace of support either in the record or from other evidence submitted by the petitioner." (Emphasis supplied.) By requiring a hearing on the petition, we in effect deprive the circuit court of the discretion afforded it by HRPP Rule 40(f) to deny a hearing should the clarification fail to cure the lack of a colorable claim.

In doing so, we also place the State in an untenable position. With a hearing on his petition assured, Magbual has no HRPP Rule 40(f) incentive to meaningfully clarify his position in

advance of the hearing. Hence we deprive the State of any benefit in the opportunity to respond to the petition afforded it by HRPP Rule 40(d): "The State of Hawaii shall be named as the respondent in the petition Within 30 days after the service of the petition or within such further time as the court may allow, the respondent shall answer or otherwise plead The respondent shall file with its answer any records that are material to the questions raised in the petition which are not included in the petition." We also place the State in the unenviable position of preparing for a hearing in which the possible issues raised are as extensive and varied as those speculated upon in the majority opinion.

By doing so, we also encourage petitioners to be as vague and general as possible in drafting their Rule 40 petitions. Knowing that a hearing will be forthcoming in any event, it would be gross negligence for a petitioner to file a clear and detailed petition or to provide meaningful clarification of the petition and thereby risk denial of a hearing pursuant to HRPP Rule 40(f).

To the extent that the instruction to hold a hearing is based upon the conclusion that Magbual anywhere in his petition stated a colorable claim, I strongly disagree.

The bare fact that no appeal was filed does not, in my view, present a colorable claim of denial of the right to appeal due to ineffective assistance of counsel.

Given the attorney-client privilege, it is quite understandable that there is no record that defense counsel advised Magbual regarding his right to testify. Surely this lacuna cannot by itself constitute a colorable claim of ineffective assistance of counsel for failure to advise about the right to testify. Note, in addition, that Ground (b) of the memorandum of law in support of the petition asserts that "[t]he motions court and defense counsel failed to fully advise Magbual of his right to testify." (Emphasis supplied.) This indicates that the motions court or defense counsel, or perhaps both, did indeed advise Magbual in some fashion of his right to testify.

Finally, the mere fact that Magbual did not formally testify at the hearing says absolutely nothing about whether there was ineffective assistance of counsel in not calling him to testify. Even assuming that Ground c of the memorandum of law refers to this issue, mere reference to defects or omissions in advice given concerning proof and evidence at a probation revocation hearing fails to explain how and why Magbual was thereby misled into remaining silent during the evidentiary portion of the hearing, and thus fails to imbue his claim.

In my opinion, Magbual failed to present a colorable claim anywhere in his Rule 40 petition. The circuit court should have afforded him an opportunity to clarify his petition but did not, and we should instruct the circuit court to do just that.

The circuit court may then exercise the discretion provided it by HRPP Rule 40(f) to grant or deny a hearing on the petition.