

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 26801

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

GARY KARAGIANES, Petitioner-Appellant, v.
STATE OF HAWAII, Respondent-Appellee

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(S.P.P. NO. 03-1-0005(2))

SUMMARY DISPOSITION ORDER

(By: Recktenwald, C.J., Watanabe, and Leonard, JJ.)

Petitioner-Appellant Gary Karagianes (**Karagianes**) appeals pro se from an order denying him relief pursuant to Hawai'i Rules of Penal Procedure (**HRPP**) Rule 40, filed on August 6, 2004 (**Order**), in the Circuit Court of the Second Circuit (**Circuit Court**).¹ With the assistance of counsel, on March 27, 2003 and June 6, 2003, respectively, Karagianes filed his Petition - and then an Amended Petition - to Vacate, Set Aside, or correct Judgment or to Release Appellant from Custody in S.P.P. No. 03-1-0005 (the Amended Petition will be referred to as the **Rule 40 Petition**). For the reasons set forth herein, we affirm the Order.

I. PRIOR PROCEEDINGS

A brief history of Karagianes's prior criminal proceedings aids in our review of the Circuit Court's Order on the Rule 40 Petition.

A. The Conviction - Cr. No. 92-0340(2)

Karagianes was arrested and charged after the June 27, 1992 shooting to the back of the head of a Maui teenager. Karagianes maintained that the victim walked backwards into him,

¹ The Honorable Shackley F. Raffetto presided.

thereby caused the gun to go off. On September 15, 1993, after a jury trial, Karagianes was convicted of: (1) Count 1 - Murder in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 707-701.5 (Supp. 1992); and (2) Count 2 - Possession or Use of a Firearm in the Commission of a Felony, in violation of HRS § 134-6(a) (Supp. 1992). On November 18, 1993, Karagianes was sentenced as follows: (1) Count 1 - life imprisonment with the possibility of parole; (2) Count 2 - a maximum term of twenty years imprisonment; (3) a mandatory minimum term of fifteen years imprisonment on Count 1, pursuant to HRS § 706-660.1 (Supp. 1992); and (4) \$5,000 restitution. Karagianes was represented by Thomas Griswold at trial and sentencing.

B. The Direct Appeal - S.Ct. No. 17612

Represented by Benjamin M. Acob, Karagianes timely appealed his conviction. On his direct appeal, Karagianes raised the following contentions as points of error: (1) the trial court erred when it failed to instruct the jury, *sua sponte*, to consider the mitigating defense provided by HRS § 707-702(2) (Supp. 1992), *i.e.*, that the defendant was under the influence of extreme mental or emotional disturbance for which there was a reasonable explanation; (2) the trial court erred when it failed to disqualify three jurors who were reported to be prematurely discussing the case, failed to instruct the jurors regarding the reported conduct, and failed to question the offending jurors; (3) the prosecutor engaged in several instances of misconduct including mischaracterizing the juror misconduct, making prejudicial remarks in closing argument, and injecting his personal opinion/feelings about Karagianes, the State's witnesses, and Karagianes's expert witness; and (4) ineffective assistance of trial counsel including failure to request the aforementioned mitigating defense, failure to request a mistrial or an inquiry regarding the jurors' misconduct, and failure to

bring in a particular witness to impeach the State's expert Fred Zain (**Zain**).

On January 12, 1996, the Hawai'i Supreme Court issued a Memorandum Opinion holding: (1) the failure of the trial court, *sua sponte*, to give an instruction as to manslaughter as a result of an extreme mental or emotional disturbance was not error; (2) Karagianes was not denied a fair trial and the trial court did not abuse its discretion in failing to declare a mistrial as a result of the alleged juror misconduct; (3) there was no evidence of prosecutorial misconduct; and (4) the assistance provided by trial counsel was within the range of competence demanded of attorneys in criminal cases.²

C. The Rule 35 Motions

On May 11, 1999, Karagianes filed a Motion to Correct Illegal Sentence Pursuant to State v. Jumila (**First Rule 35 Motion**). In the First Rule 35 Motion, relying on State v. Jumila, 87 Hawai'i 1, 950 P.2d 1201 (1998), Karagianes argued that his sentence on Count 2 was illegal because the felony underlying an HRS § 134-6(a) offense is an included offense of

² Regarding the testimony of prosecution witness Zain, the supreme court explained its holding as follows:

Finally, the prosecution moved to preclude Appellant from eliciting testimony regarding an investigation into Zain's participation at a previous trial. Appellant's trial counsel explained to the court that he understood that there was an ongoing investigation; however, he did not have any witnesses to corroborate the allegations that arose from Zain's prior case participation, and, therefore, he had not planned to imply any wrongdoing.

In claiming ineffective assistance of trial counsel, however, Appellant fails to present on appeal any information as to what evidence Appellant's trial counsel could have presented at trial to impeach Zain. Appellant merely recites what was acknowledged at trial - that there was an ongoing investigation as to Zain's participation in a previous trial. Moreover, Appellant's trial counsel challenged the veracity of Zain's testimony by presenting an expert witness that completely contradicted Zain's testimony.

the HRS § 134-6(a) offense, pursuant to HRS § 109(1)(a), and that he should not have been convicted of both the HRS § 134-6(a) offense (Count 2) and the underlying second degree murder offense (Count 1). On September 29, 1999, the Circuit Court denied the First Rule 35 Motion.

On June 8, 1999, Karagianes filed a Motion to Correct Illegal Sentence Imposed Under HRS Section 706-660.1 Based On Double Jeopardy Violation (**Second Rule 35 Motion**). In the Second Rule 35 Motion, Karagianes argued that the fifteen-year mandatory minimum sentence imposed on the second-degree-murder conviction pursuant to HRS § 706-660.1 should be vacated based on double jeopardy grounds because HRS § 706-660.1 does not require proof of a fact that HRS § 134-6(a) does not.

In a published opinion,³ the Hawai'i Supreme Court explained that the holding in State v. Jumila was overruled in State v. Brantley 99 Hawai'i 463, 56 P.3d 1252 (2002), based on the recognition that the language of HRS § 134-6(a) at issue in both Jumila and Brantley was the language that existed as a result of 1993 amendments to the statute. State v. Van Den Berg, 101 Hawai'i 187, 190-92, 65 P.3d 134, 137-39 (2003). The supreme court stated that, through the 1993 amendments, the legislature intended to permit separate convictions of both HRS § 134-6(a) and the separate felony at the time of Brantley's 1994 conviction. Id. Noting that the legislative history expressly stated that the 1993 amendments were not to affect proceedings begun *before* the effective date, and that Karagianes's criminal proceedings began in 1992, prior to the effective date, the supreme court concluded that neither Brantley nor Jumila were dispositive. Id. The supreme court held that the original 1990

³ The opinion was published as State v. Van Den Berg, 101 Hawai'i 187, 65 P.3d 134 (2003), after Karagianes's appeal was consolidated with another appeal that presented identical issues.

enactment of HRS § 134-6(a) prohibited the conviction of a defendant for both an HRS § 134-6(a) offense and its underlying felony and, therefore, reversed Karagianes's conviction on Count II. Id. In light of the reversal on the HRS § 134-6(a) charge, the supreme court did not address Karagianes's double jeopardy argument.⁴ The Hawai'i Supreme Court's decision was filed on March 17, 2003.

II. THE RULE 40 PROCEEDINGS

A. The Proceedings Below

In the Rule 40 Petition, with representation by Emlyn H. Higa, Karagianes requested relief on six grounds:

1. Newly discovered evidence. Since Karagianes's conviction, the West Virginia and Texas investigations of Zain's testimony were completed, with findings that Zain's testimony was fraudulent. Karagianes asserts that Zain's testimony in this case was fraudulent, as well, and that this evidence could not have been discovered with the exercise of due diligence before trial or appeal. Karagianes contended that he is entitled to a new trial.
2. Ineffective assistance of trial counsel, including that:
 - a. Trial counsel failed to discover and present evidence of Zain's history of fraudulent testimony;
 - b. Trial counsel failed to keep Zain from testifying;

⁴ Concurring in the result, Justice Acoba opined that, in light of the reversal of Jumila, the question of double jeopardy was squarely presented. He would have reversed Karagianes's HRS § 134-6 conviction on the basis of double jeopardy.

- c. Trial counsel failed to challenge the admissibility of Dr. Alvin Omori's testimony on gunpowder residue in the victim's hair;
 - d. Trial counsel failed to investigate and present physical evidence of the victim's hat and skull, which indicated a close range shot, consistent with Karagianes's defense;
 - e. Trial counsel failed to adequately challenge the testimony of the State's ballistics expert as an expert witness;
 - f. Trial counsel failed to impeach eyewitnesses with prior inconsistent testimony at preliminary hearing; and
 - g. Trial counsel failed to inform Karagianes of the State's offer to plea bargain to a charge of Manslaughter.
3. Ineffective assistance of appellate counsel, including that:
 - a. If the results of the Zain investigations were complete, then appellate counsel failed to raise the issue of the new evidence of Zain's fraudulent testimony; and
 - b. Appellate counsel failed to raise the above-referenced issues of ineffective assistance of trial counsel.
 4. The State used false and misleading testimony of Zain.
 5. The trial court failed to exclude testimony of Zain, in violation of Hawai'i Rules of Evidence (HRE) Rule 702, after it was brought to the court's attention that Zain was fired from his job in Texas before Karagianes's second trial.

6. The trial court violated HRE Rule 615 by failing to exclude the victim's father, Thomas Bocanegra, from the courtroom after he testified, over objections of defense counsel.

On August 6, 2004, the Circuit Court entered the Order, which denied the Rule 40 Petition without a hearing on the grounds that Karagianes had failed to state a colorable claim for relief on any of the points raised in the petition. The Order set forth the Circuit Court's rationale on each of the above-referenced issues. A notice of appeal was timely filed on September 3, 2004.

B. Points of Error Raised on Appeal

In this appeal, Karagianes raises nineteen points of error or issues, identified as "A" to "R" plus an additional point which we will refer to as "S". Karagianes's issues are as follows:

A. Rule 40 counsel failed to research the records and files and failed to raise meritorious issues or to submit evidence in support of the grounds raised.

B. The prosecutor's remarks at trial denied Karagianes a fair trial. Karagianes refers to comments on reasonable doubt in voir dire, opening statement, speaking objections, comments on credibility, hiding Zain's problems, and closing argument.

C. The trial court erred in allowing prosecutor to correct jurors regarding reasonable doubt during voir dire.

D. Karagianes was denied a fair and impartial jury. The judge did not excuse jurors who knew or heard of the prosecutor, the defense attorney, the defendant or police witnesses. The trial court failed to investigate juror misconduct when one juror reported hearing other jurors discussing the case outside of court.

E. The trial court violated HRE Rule 615 by failing to exclude the victim's father from the courtroom, who allegedly threatened other witnesses.

F. The trial court erred in allowing Zain to testify.

G. Trial counsel failed to secure certain witnesses for the defense, including: (1) exculpatory witnesses David Sereno who was Karagianes's attorney at the preliminary hearing; (2) expert Frank Krau to testify on crime recreation, and (3) Melissa Quesnel who lived with and knew that Marc and Jay Thompson had been threatened.

H. Trial counsel failed to reconstruct the crime scene to show that Watari, Mava, and Jai could not have seen the shooting because of obstructions including, Marc and Ray.

I. Trial counsel failed to object to or request curative instructions for events described in B, C, and D.

J. Trial counsel was ineffective because he failed to call Joseph Castorena to testify. Mr. Castorena was from Bexar County Lab where Zain was fired. Castorena would have testified that Zain did not know how to perform ballistic forensic tests.

K. Judicial misconduct occurred when Zain was allowed to testify without exposing the reasons Zain was fired.

L. Rule 40 counsel was ineffective for not obtaining the prior testimony of the State's rebuttal witness, John P. Riley, in a 1988 murder trial. A federal report of a panel of scientific advisors allegedly found that Riley testified about a ballistics conclusion based on impossible findings.

M. Rule 40 counsel was ineffective for failing to file a reply to the State's memorandum in opposition to the Rule 40 Petition.

N. It was plain error for the trial court to not exclude the victim's father from the courtroom and to not

investigate a sheriff's report of threat made against two witnesses.

O. It was plain error for the State to intentionally destroy exculpatory evidence. The Request for Withdrawal of Exhibits and Receipt is dated July 27, 2004 and states that "the case has been tried and completed; appeal will not be taken, and the withdrawal of the exhibits will not prejudice the parties." Karagianes alleges that it was a violation of due process for the State to destroy exculpatory evidence based upon a false document. Trial exhibits that were disposed of included ballistics results on a cloth, xrays of the gunshot wound, photographs of the crime scene, and a bullet fragment.

P. It was plain error for the trial court to issue an August 17, 2004 order of disposal, which authorized the destruction of exhibits, without notifying Karagianes.

Q. Appellate counsel failed to raise the grounds raised in the Rule 40 Petition and refused to provide Karagianes with copies of the records and file.

R. The trial court erred in denying Karagianes's motion to correct illegal sentence after remand in S.Ct. No. 22931.

S. Karagianes was highly prejudiced by the State's use of false testimony regarding the reliability of the use of the sodium rhodizonate test to determine muzzle-of-the-gun-to-target distance.

III. APPLICABLE STANDARDS AND AUTHORITIES

We review the Circuit Court's denial of Karagianes's Rule 40 Petition de novo under the right/wrong standard. State v. Ng, 105 Hawai'i 74, 76, 93 P.3d 1181 (App. 2004) (citations omitted). The Hawai'i Supreme Court has articulated the general standard for granting a hearing on a Rule 40 Petition as follows:

As a general rule, a hearing should be held on a Rule 40 petition for post-conviction relief where the petition states a colorable claim. To establish a colorable claim, the allegations of the petition must show that if taken as

true the facts alleged would change the verdict; however, a petitioner's conclusions need not be regarded as true. Where examination of the record of the trial court proceedings indicates that the petitioner's allegations show no colorable claim, it is not error to deny the petition without a hearing. The question on appeal of a denial of a Rule 40 petition without a hearing is whether the trial court record indicates that Petitioner's application for relief made such a showing of a colorable claim as to require a hearing before the lower court.

Stanley v. State, 76 Hawai'i 446, 449, 879 P.2d 551, 554 (1994) (citations omitted).

HRPP Rule 40(f) (2003) provided, in pertinent part:

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. The court may also deny a hearing on a specific question of fact when a full and fair evidentiary hearing upon that question was held during the course of the proceedings which led to the judgment or custody which is the subject of the petition or at any later proceeding.

The petitioner shall have a full and fair evidentiary hearing on the petition. The court shall receive all evidence that is relevant and necessary to determine the petition, including affidavits, depositions, oral testimony, certificate of any judge who presided at any hearing during the course of the proceedings which led to the judgment or custody which is the subject of the petition, and relevant and necessary portions of transcripts of prior proceedings. The petitioner shall have a right to be present at any evidentiary hearing at which a material question of fact is litigated.

However, HRPP Rule 40(a) (3) (2003) provided:

Rule 40 proceedings shall not be available and relief thereunder shall not be granted where the issues sought to be raised have been previously ruled upon or were waived. An issue is waived if the petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted, or in a prior proceeding actually initiated under this rule, and the petitioner is unable to prove the existence of extraordinary circumstances to justify the petitioner's failure to raise the issue. There is a rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure.

IV. DISCUSSION

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Karagianes's points of error, by reference to the points and authorities listed above, as follows:

A. (Ineffective Rule 40 Counsel) There is no constitutional right to counsel in a post-conviction collateral proceeding. State v. Levi, 102 Hawai'i 282, 287-89, 75 P.3d 1173, 1178-80 (2003). Moreover, upon review of the record as a whole, it appears that the assistance provided on the Rule 40 Petition was within the range of competence expected of attorneys in criminal cases. See Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994).

B. (Prosecutorial Misconduct) This issue was not raised in the Rule 40 Petition. See Hawai'i Rules of Appellate Procedure (**HRAP**) HRAP 28(b)(4). However, this issue was previously raised and ruled upon in the direct appeal. "Rule 40 proceedings shall not be available and relief thereunder shall not be granted where the issues sought to be raised have been previously ruled upon or were waived." HRPP Rule 40(a)(3). Therefore, this issue is precluded from further review.

C. (Error in Voir Dire) This issue was not raised at trial (and Karagianes waived five of his six peremptory challenges), not raised on direct appeal, and not raised in the Rule 40 Petition below. There are no extraordinary circumstances to justify the failure to raise it. There is no plain error. Therefore, this issue is deemed waived and will not be reviewed on this appeal. See HRPP Rule 40(a)(3) and HRAP Rule 28(b)(4).

D. (Juror Misconduct) This issue was not raised in the Rule 40 Petition. However, this issue was previously raised

and ruled upon in the direct appeal. Therefore, this issue is precluded from further review. See HRPP Rule 40(a)(3).

E. (Violation of HRE 615) This issue was not previously raised in the direct appeal. Karagianes has failed to demonstrate any extraordinary circumstances to justify his failure to raise it. Karagianes has failed to rebut the presumption that his failure to raise the issue was a knowing and understanding failure. Therefore, this issue is waived. See HRPP Rule 40(a)(3).

F. (Failure to Exclude Zain) Although discussed in the context of Karagianes's allegation that he received ineffective assistance of counsel, this issue was not previously raised in Karagianes's direct appeal. In the Rule 40 Petition, this issue was framed as newly discovered evidence and false testimony by the State's witness. The standards established by the supreme court for a new trial based on newly discovered evidence were set forth in State v. McNulty, 60 Haw. 259, 588 P.2d 438 (1978), cert. denied, 441 U.S. 961 (1979), overruled, in part, on other grounds in Raines v. State, 79 Hawai'i 219, 900 P.2d 1286 (1995).

A motion for new trial based on newly discovered evidence will only be granted if (1) the evidence has been discovered after trial; (2) such evidence could not have been discovered before or at trial through the exercise of due diligence; (3) the evidence is material to the issues and not cumulative or offered solely for purposes of impeachment; and (4) the evidence is of such a nature as would probably change the result of a later trial.

State v. Mabuti, 72 Haw. 106, 112-13, 807 P.2d 1264, 1268 (1991) (citations omitted). As noted above, Karagianes also alleges that Zain gave false evidence in this case.⁵ Under certain

⁵ We note that, although allegations of misconduct that were pending against Zain (in West Virginia and Texas) at the time of Karagianes's trial were later confirmed, there is no support in the record for the proposition that Zain gave false evidence in this case.

circumstances, we have applied a more stringent test to the prosecutor's case in such matters. In State v. Teves, 5 Haw. App. 90, 96, 679 P.2d 136, 141 (1984) (footnote omitted), we stated:

[W]e announce a new test to be applied in criminal cases where the defendant seeks a new trial under Rule 33, HRPP, on the grounds that a prosecution witness gave false testimony at trial. We hold that upon a proper and timely motion under Rule 33, HRPP, a new trial must be granted by the trial court when it decides that (1) it is reasonably satisfied that the testimony at trial of a material prosecution witness is false; (2) defendant and his agents did not discover the falseness of the testimony until after the trial; (3) the late discovery is not due to a lack of due diligence by defendant or his agent; and (4) the false testimony is not harmless because there is a reasonable possibility that it contributed to the conviction.

Under either standard, after a meticulous review of the record and the parties' arguments, Karagianes is not entitled to a new trial, because there is no reasonable possibility the purportedly false testimony contributed to Karagianes's conviction. As previously concluded by the supreme court, Zain's testimony was "completely contradicted" by expert testimony presented by Karagianes's trial counsel. January 12, 1996 Memo. Op. at 17. Moreover, the other evidence in the record overwhelmingly supports Karagianes's conviction on Count 1.

G., H., I., and J. (Ineffective Trial Counsel - re Witnesses, Reconstruction, and Objections) Karagianes raised various allegations of ineffectiveness of trial counsel on his direct appeal, which overlap somewhat, but not entirely, with the grounds stated in the Rule 40 Petition and on this appeal. To the extent that these issues were raised in Karagianes's direct appeal, we will not review them. To the extent that they are raised in the first instance in Karagianes's Rule 40 Petition, Karagianes has failed to demonstrate any extraordinary circumstances to justify his failure to raise them in his direct appeal. Karagianes has failed to rebut the presumption that his failure to raise these particular issues was a knowing and

understanding failure. Therefore, these issues are waived. See HRPP Rule 40(a)(3). In addition, upon careful review of the record, we agree with the Circuit Court's grounds for concluding that Karagianes failed to establish a colorable claim for ineffective assistance of trial counsel.

K. (Judge's Failure to Exclude Zain) Karagianes has not identified any basis for the trial judge to have excluded Zain's testimony. Indeed, had there been grounds for reversing Karagianes's conviction based on the judge's failure to exclude Zain, they should have been raised in Karagianes's direct appeal, in conjunction with Karagianes's assertion that his trial counsel was ineffective in failing to adequately impeach Zain. Karagianes has failed to demonstrate any extraordinary circumstances to justify his failure to raise this issue on his direct appeal. Karagianes has failed to rebut the presumption that his failure to raise the issue was a knowing and understanding failure. Therefore, this issue is waived. See HRPP Rule 40(a)(3).

L. and M. (Ineffective Rule 40 Counsel) See discussion re point A.

N. (Alleged Threats to Witnesses) See discussion re point E.

O. and P. (Post-Trial Disposal of Exhibits) The July 27, 2004 order granting the prosecuting attorney's request for withdrawal of exhibits and receipt and the August 17, 2004 order of disposal entered in Cr. No. 92-0340(2) pursuant to HRS § 606-4 were not raised in the Rule 40 Petition. We note, however, that HRS § 606-4 (1993) provides, *inter alia*, that:

The attorney of the party who introduced the exhibits or things in evidence or left them in the custody of the court, or the party, if not represented by any attorney, shall remove them from the court within six months after the final termination of the action to which the exhibits or things are related. The clerks shall have the authority and power, upon the written approval of a judge of the court given in

particular actions or proceedings, to sell, destroy, or otherwise dispose of exhibits and things marked for identification, other than original files belonging to other actions, which have come into their possession or custody under this section, when such exhibits or things have not been already removed by their owners or by the attorneys representing the owners and when more than six months have elapsed since the final termination of the action to which the exhibits or things are related.

The statute required the removal of the exhibits from the court. The record in Cr. No. 92-0340(2) is devoid of any request for preservation or retention of exhibits in conjunction with Karagianes's Rule 40 Petition, which was a separate action. We find no plain error in this case.

Q. (Ineffective Appellate Counsel - Failed to Raise all Grounds in Rule 40 Petition) Karagianes failed to show that appellate counsel could have discovered that Zain gave false testimony in other cases. It appears to this court, for example, that the report regarding Zain's misconduct was submitted to the West Virginia Supreme Court of Appeals on November 3, 1993 and adopted on November 10, 1993. See In the Matter of The Investigation of the West Virginia State Police Crime Laboratory, Serology Division, 190 W. Va. 321, 438 S.E.2d 501 (1993). Thus, this information was not available at the time of Karagianes's appeal. Appellate counsel in No. 17612, though unsuccessful, presented substantial and significant issues, including ineffective assistance of trial counsel. Appellate counsel in No. 22931 successfully presented issues to the supreme court resulting in a reversal of Karagianes's conviction and sentencing on Count 2. We have previously held that "appellate counsel is not required to advance every conceivable argument on appeal that the trial court record supports, but only that appellate counsel's choice of issues for appeal not fall below an objective standard of reasonableness." Bryant v. State, 6 Haw. App. 331, 337, 720 P.2d 1015, 1019 (1996) (internal quotation marks and citations omitted). Karagianes has failed to establish specific

errors or omissions reflecting appellate counsel's lack of skill, judgment or diligence and that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense. See State v. Antone, 62 Haw. 346, 348-49, 615 P.2d 101, 104 (1980).

R. (Post-Appeal Motion re Sentence) In Appeal No. 22931, the Hawaii Supreme Court reversed Karagianes's conviction and sentence for Count 2. A notice and judgment on appeal was entered on May 5, 2003. No further action by the Circuit Court was required or warranted upon that reversal. See HRAP 35(e). Karagianes does not allege that his sentence on Count 1 has been fully served. He does not otherwise state a colorable claim that he is entitled to further relief. Therefore, the Circuit Court did not err in entering its March 22, 2005 order denying Karagianes's February 22, 2005 motion to correct illegal sentence, etc., which was based on the supreme court's March 17, 2003 decision.

S. (Objection to State's Expert Testimony) This issue was not raised on direct appeal and not raised in the Rule 40 Petition below. There are no extraordinary circumstances to justify the failure to raise it previously. Therefore, this issue is deemed waived and will not be reviewed on this appeal. See HRPP Rule 40(a)(3).

In sum, Karagianes failed to state a colorable claim for relief.

V. CONCLUSION

In light of the record on appeal and after duly considering and analyzing the law relevant to the arguments and issues raised by the parties, we conclude that the Circuit Court did not err in denying Karagianes's Rule 40 Petition without a hearing. The Circuit Court's August 6, 2004 Order denying the Rule 40 Petition is affirmed.

DATED: Honolulu, Hawai'i, May 8, 2008.

ON THE BRIEFS:

Gary Karagianes
Pro Se Petitioner-Appellant.

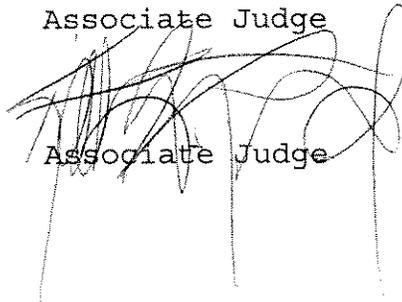
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for Respondent-Appellee.



Chief Judge



Associate Judge



Associate Judge