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CLERK, APPELLATE COURTS
STATE OF HAWAII

NO. 28240

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

DE MONT R. D. CONNER, Petitioner-Appellant,
HAWAII PAROLING AUTHORITY and CORY REINCKE,
Respondents-Appellees, and CAROL TYLER, Respondent

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(SPP No. 06-1-0021
(Cr. Nos. 59460, 60121, 84-0553, and 85-0110))

MEMORANDUM OPINION
(By: Watanabe, Presiding J., Nakamura, and Leonard, JJ.)

This appeal arises from a petition for release from custody (Petition) that Petitioner-Appellant De Mont R. D. Conner (Conner or Petitioner) filed in the Circuit Court of the First Circuit (circuit court) on March 30, 2006 pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40. The Petition alleged that Respondents-Appellees Hawaii Paroling Authority (HPA) and Cory Reincke (Reincke), Conner's parole officer; and Respondent Carol Tyler (Dr. Tyler), Conner's treating psychologist, (collectively, Respondents) arbitrarily and capriciously revoked Conner's parole, absent a clear violation by Conner of the terms and conditions of his parole, and thereby violated Conner's rights under the due process clause of the Fourteenth Amendment to the United States Constitution (Ground 1), the equal protection clause of the Fourteenth Amendment to the United States Constitution (Ground 2), and the Eighth Amendment to the United States Constitution (Ground 3).

Conner appeals from the findings of fact, conclusions of law, and order entered by the circuit court[1] on September 28, 2006 (September 28, 2006 Order), summarily denying Grounds 1 and 2 of his Petition and ordering that Ground 3 of the Petition, to the extent that it requested relief based on a civil claim, be transferred to the circuit court civil calendar for disposition

[1] The Honorable Virginia Lea Crandall presided.

under the civil rules. On appeal, Conner raises the following issues:

(1) The HPA acted arbitrarily and capriciously in revoking his parole for "[f]ailure to participate in sex offender therapy until clinically discharged" because he did not willingly violate the terms of his parole by failing to participate in treatment; rather, he was precluded by Dr. Tyler, for baseless reasons, from participating in treatment.

(2) The circuit court erred in denying his Petition without a hearing.

We conclude that an evidentiary hearing was required as to Ground 1 of Conner's Petition. Accordingly, we vacate that part of the circuit court's September 28, 2006 Order that denied Ground 1 of Conner's Petition without a hearing and remand this case for further proceedings consistent with this opinion. In all other respects, we affirm the circuit court's September 28, 2006 Order.

BACKGROUND

A. Conner's, Conviction, Imprisonment, Parole, and Parole Revocation

On October 26, 2004, more than twenty years after his 1983 convictions for robbery, attempted murder, rape, sodomy, and kidnapping, Conner was released on parole by the HPA. On October 6, 2005, Conner was arrested for allegedly threatening and assaulting his stepson. On October 10, 2005, while in custody following his arrest, Conner was served with an HPA warrant of arrest (re-take warrant), which stated, in relevant part, as follows:

> To the High Sheriff of the State of Hawaii or his Deputy; the Sheriff of the city and county of Honolulu or his Deputy; or any law enforcement officer in any county or city and county of the State of Hawaii;
>
> GREETING: You are hereby directed forthwith to arrest and take the body of the above-named Demont R. D. Conner, a paroled prisoner, accused of violation of the terms of his parole, if he can be found, and return as soon as possible to the custody of the Director, Department of Public Safety, Honolulu, State of Hawaii, to be held pending a hearing by the [HPA] to determine if there is sufficient cause to warrant re-imprisonment of said parolee or any other action authorized by law.

> It is alleged that [Conner,] whose maximum parole term is LIFE, did violate the terms and conditions of parole dated 10/5/04 in the following manner:
>
> 1. In violation of Rule#8, Special Condition#6, [Conner] failed to participate in sex offender treatment plan until clinically discharged with the concurrence of his Parole Officer.

The following notation appeared at the top of the re-take warrant: "THE PAROLEE SHALL NOT BE RELEASED FROM CONFINEMENT WITHOUT THE AUTHORIZATION OF THE HAWAII PAROLING AUTHORITY (HPA)[.]"

On October 14, 2005, Conner was served with: (1) a "Notice of Right to Pre-Revocation Hearing" (Pre-Revocation Hearing Notice), and (2) a "Notice of Hearing, Rights for Revocation Hearing and Request for Legal Counsel" (Revocation Hearing Notice). The Pre-Revocation Hearing Notice informed Conner, in relevant part, as follows:

> You are hereby notified that the [HPA], State of Hawaii, will hold a pre-hearing on _____, at _____ a.m./p.m. to determine whether there is probable cause or reasonable grounds to believe that you committed acts which would constitute a violation of parole conditions.
>
> You were arrested as a result of an investigation which disclosed that you violated your parole in the following manner:
>
> 1. In violation of Rule #8, Special Condition #6 (E9), the subject failed to participate in sex offender treatment plan until clinically discharged with the concurrence of his Parole Officer.
>
>  Supporting Evidence: On file is Chronological Entry dated October 7, 2005, parole officer and Dr. Carol Tyler discussed subject's progress in treatment. Dr[.] Tyler is concerned with subject being suicidal and is a risk to the community. Subject must be terminated at this time.
>
>  On file is Chronological Entry dated October 10, 2005, parole officer received a letter from Dr. Carol Tyler that subject was terminated from treatment.
>
>  If the hearing officer finds that there is probable cause or reasonable grounds to believe that you have committed acts which would constitute a violation of your parole conditions, you will remain confined pending a hearing before the [HPA] of the alleged parole violations.
>
>  If the hearing officer does not find probable cause or reasonable grounds, you will be returned to your prior status although the [HPA] may consider the entire case.

> You may waive your right to pre-revocation hearing. If you do so, you will remain confined until the [HPA] hears your case.

Conner acknowledged by his signature that after having received and read the Pre-Revocation Hearing Notice, or having had it read and explained to him, he fully understood the notice. The bottom of the Pre-Revocation Hearing Notice included several boxes for Conner to check off to indicate his decisions relative to his right to a pre-revocation hearing. Conner checked off the boxes and acknowledged by his signature his choices, as follows:

> Further, having had explained to my satisfaction my right to waive a Pre-Revocation Hearing and what the result of such waiver means, namely continued confinement, the following is my decision relative to this matter:
>
> 1. I waive my right to a Pre-Revocation Hearing. ☒YES ☐NO
>
> 2. Having waived my right to Pre-Revocation Hearing, I understand that I will be held in confinement pending a full hearing before the [HPA] and that this in no way means that the [HPA] will give me favorable consideration. ☒YES ☐NO
>
> 3. I wish to have a Pre-Revocation Hearing. ☐YES ☒NO

(Formatting adjusted.)

The Revocation Hearing Notice informed Conner, in pertinent part, as follows:

> ☒ You are hereby notified that the [HPA] will hold hearing within <u>60 days</u> to determine whether or not you violated the terms and conditions of your parole. You will be notified of the date of the hearing. The Department of Public Safety will arrange for your appearance at a time and location to be determined.
>
> You are charged with violating the terms and conditions of your parole in the following manner:
>
> 1. In violation of Rule #8, Special Condition #6 (E9), the subject failed to participate in sex offender treatment plan until clinically discharged with the concurrence of his Parole Officer.
>
> <u>Supporting Evidence:</u> On file is Chronological Entry dated October 7, 2005, parole officer and Dr. Carol Tyler discussed subject's progress in treatment. Dr. Tyler is concerned with subject being suicidal and is a risk to the community. Subject must be terminated at this time.

> On file is Chronological Entry dated October 10, 2005, parole officer received a letter from Dr. Carol Tyler that subject was terminated from treatment.
>
> ☐ You are hereby notified that the [HPA] will hold a hearing on _____ 20___ at _____.m. at the _____ to determine whether or not your parole should be revoked as you were found guilty of violation of parole on _____.
>
> You are hereby advised of your rights to:
>
> 1. Consult with any person(s) you reasonably desire;
>
> 2. Be assisted and represented by counsel prior to and during your hearing;
>
> 3. Have counsel appointed for you if you so request and cannot afford to retain counsel on your own;
>
> 4. Appear in person and be heard;
>
> 5. Waive any of the above rights.

Conner acknowledged by his signature that after having received and read the Revocation Hearing Notice, or having had it read and explained to him, he fully understood the notice. He also checked off boxes on the notice to indicate that he "will obtain legal counsel of [his] choosing[,]" did not "wish to have assistance in acquiring legal services[,]" consented "to have the [HPA] release all pertinent information to legal counsel[,]" and wished "to personally appear at the hearing." Conner also checked off the "no" box after the following statement: "5. I do not wish to appear but I wish to have legal counsel appear in my behalf."

By a Notice of Hearing dated November 4, 2005, the HPA notified Conner that his parole-revocation hearing was scheduled for Wednesday, December 7, 2005, at noon at the Halawa Correctional Facility. This hearing was subsequently rescheduled to January 4, 2006, apparently because Conner "want[ed] another attorney[.]"

Following a January 4, 2006 parole-revocation hearing at which Conner apparently represented himself, the HPA entered an order on January 12, 2006 (January 12, 2006 Order) that determined that Conner had violated the terms and conditions of his parole, as alleged; revoked Conner's parole for the balance of his maximum sentence; stated that the HPA's "[f]indings of

guilt were based on [Conner's] pleas of guilty to the violation as charged"; and informed Conner that a "[h]earing for parole consideration will be scheduled July 2009."

On April 11, 2006, the HPA issued a "corrected copy" of the January 12, 2006 Order that substituted the basis for the HPA's "findings of guilt" with the following: "Finding of guilt was based on evidence provided by parole officer."

B. Conner's Rule 40 Petition

On March 30, 2006, prior to the HPA's issuance of the April 11, 2006 "corrected copy" of the order revoking Conner's parole, Conner filed his Petition, requesting that the circuit court reverse the HPA's decision, dismiss the alleged parole violation, and restore his parole status of October 5, 2005. In his Petition, Conner alleged numerous facts in support of his Petition, including the following:

> 8. [Conner] remained in therapy with [Dr.] Tyler throughout his parole and never missed a therapy session.
>
> 9. By July, 2005, [Dr.] Tyler apparently concluded [Conner] had greatly benefited [sic] from the therapy sessions and thereupon reduced the frequency of [Conner's] therapy sessions from once a week to once a month.
>
> . . . .
>
> 11. [Conner's] last therapy session with [Dr.] Tyler occurred on October 3, 2005 and [Dr.] Tyler scheduled the next session for November 2005.
>
> 12. On October 5, 2005, an altercation occurred between [Conner] and Tai Narawa. Tai Narawa is the biological son of [Conner's] wife, Nancy Conner.
>
> 13. After the altercation, [Conner] was involved in an automobile accident as he drove toward his former foster parent's house. [Conner] was examined for injuries at Queen's Hospital and admitted to the psychiatric ward for observation and diagnosis.
>
> 14. Thereafter, two psychiatrists examined [Conner] in person at Queen's Hospital, determined [Conner] was not a suicide risk, and recommended [Conner's] release from the hospital.
>
> 15. On October 6, 2005, a Honolulu Police Officer arrested [Conner] on suspicion of assault and terrorist threatening arising from the altercation and transported [Conner] to the Honolulu Police Department cellblock.
>
> 16. In a letter dated October 10, 2005, addressed to Respondent Reincke, [Conner's] parole officer, [Dr.] Tyler stated that, based on a conversation between herself and

Nancy Conner, [Dr.] Tyler clinically diagnosed [Conner] as suicidal and made clinical prognosis that [Conner] posed a risk to the community. . . .

17. Upon information and belief, the sole source of the "suicide attempt" information was a comment by a police officer at the scene of [Conner's] automobile accident, which comment was relayed to another police officer, who relayed the comment to Nancy Conner, who relayed the comment to [Dr.] Tyler.

18. [Dr.] Tyler's "clinical diagnosis", admittedly based on fourth-hand information from a biased source, directly contradicted the in-person evaluations made by two psychiatrists at Queen's Hospital.

19. On October 10, [Dr.] Tyler, <u>without talking to [Conner] or notifying [Conner]</u>, terminated [Conner's] course of therapy. . . .

20. Based on [Dr.] Tyler's October 10 letter, Respondent Reincke filed a "Re Take" arrest warrant for [Conner]. . . .

21. [Conner] first learned his therapeutic sessions with [Dr.] Tyler had been terminated when Respondent Reincke served [Conner] with the "Re-Take" warrant on October 10, 2005.

22. At [Conner's] preliminary hearing the court granted bail for $20,000, but [Conner] was denied release due to the "Re-Take["] warrant.

23. [Conner] could have engaged another, better, therapist in time to prevent a break in his therapy, had not Respondent Reincke issued the ["]Re Take" warrant based on [Dr.] Tyler's misdiagnosis and unfounded prognosis.

24. On October 14, 2005, Respondent Reincke served upon [Conner] a "Notice of Revocation Hearing" notifying [Conner] that a Parole Revocation hearing was set for December 7, 2005. . . .

25. Respondent HPA and Respondent Reincke failed to notify [Conner] he had the right to confront the witnesses against him as required by [Hawaii Administrative Rules (HAR) §] 23-700-44(a). . . .

26. [Conner] elected to obtain legal counsel of his choosing for the December 7 revocation hearing.

27. [Conner's] legal counsel was out of town and due to return on December 6.

28. On December 6, Respondent HPA, without notifying [Conner], appointed the Office of the Public Defender ("OPD") to represent [Conner].

29. On December 7, a Deputy Public Defender notified [Conner] the OPD could not represent [Conner] due to a conflict of interest.

30. Therefore, any representations made by the Deputy Public Defender to [R]espondent HPA were not made on [Conner's] behalf.

> 31. On December 7, Respondent HPA unilaterally postponed the parole revocation hearing and so informed [Conner].
>
> 32. Respondent HPA failed to give [Conner] a parole revocation hearing within the 60-day time limit imposed by administrative rule. . . .
>
> 33. Respondent HPA arbitrarily assigned the OPD to represent [Conner] at the revocation hearing, despite [Conner's] notice to [Respondent] HPA that he did not want OPD to represent him.
>
> 34. Respondent HPA's unilateral decision to deny [Conner] a revocation hearing within 60 days prejudiced [Conner's] liberty interest in freedom from incarceration, keeping his job, and undergoing therapy.
>
> 35. On January 4, 2006, Respondent HPA summoned [Conner] to the rescheduled parole revocation hearing.
>
> 36. To prevent Respondent HPA's further postponement of the parole revocation hearing, [Conner] elected to represent himself at the hearing.
>
> 37. [Respondent] HPA Board Chairman Tufono did not attend the hearing. At the hearing, [Conner] pleaded "not guilty" to the charge he violated parole by failure to participate in sex offender treatment until clinically discharged.
>
> 38. In defense of his issuance of the "Re Take" warrant, Respondent Reincke testified at the parole revocation hearing that [Dr.] Tyler informed him by letter that her clinical diagnosis of suicidality was based on information in a written police report.
>
> 39. [Conner] requested to see [Dr.] Tyler's letter to Respondent Reincke. In the letter, [Dr.] Tyler stated the information upon which she based her decision to terminate treatment came from hearsay within hearsay within hearsay, not a written police report.
>
> 40. On January 12, 2006, Respondent HPA Notified [sic] [Conner] that the finding of guilt at the revocation hearing was based on "your pleas of guilty to the violation as charged." . . .
>
> 41. [Conner] did not violate the terms and conditions of parole by failure to participate in sex offender treatment plan until clinically discharged, and no evidence presented at the revocation [sic] supported the charged violation of parole.
>
> 42. Respondent HPA's decision to revoke [Conner's] parole for an alleged violation of terms and conditions is not based on evidence presented at the revocation hearing and is contrary to the evidence presented.

Conner's Petition asserted the following grounds for relief:

A. First Cause of Action

. . . .

44. Respondents violated [Conner's] rights under the Due Process Clause of the 14th Amendment to the United States Constitution.

45. [Dr.] Tyler violated [Conner's] right to due process by unilaterally terminating [Conner's] therapy without notice and with full knowledge that based on her unfounded allegations, [Conner] would be arrested. [Conner] submits that if a parole violation is to be predicated on a medical practitioner's report[,] said report must conform to acceptable medical standards for assessment and diagnosis.

46. Respondent Reincke violated [Conner's] due process right by issuing a re-take warrant alleging a violation of a condition of parole with full knowledge that [Conner's] arrest on the re-take warrant would be the sole reason [Conner] could not fulfill the condition. By issuing the Re-Take warrant Respondent Reincke also violated [Conner's] liberty interest in being on parole and posting bail in his pending criminal case.

47. Respondents HPA and Reincke violated [Conner's] right to due process by failing to hold the Parole Revocation Hearing <u>within</u> 60 days and by failing to notify [Conner] he had the right to confront the witnesses against him at the revocation hearing, as required by HRS § 706-670(7), HAR 23-700-43(f), and HAR 23-700-44(a).

48. Respondents HPA and Reincke further violated [Conner's] right to due process by finding [Conner] violated a condition of his parole when no evidence of such violation was presented at the revocation hearing.

49. Respondent Reincke further violated [Conner's] right to due process by falsely testifying at the parole hearing.

50. Respondent HPA further violated [Conner's] right to due process by finding [Conner] made a "plea of guilty to the violation as charged" when in fact [Conner] pled not guilty to the violation. Furthermore, no evidence presented in the hearing contradicted [Conner's] claim that the sole cause of the break in [Conner's] therapy was execution of the "Re-Take" warrant. . . .

<u>B. Second Cause of Action</u>

. . . .

52. Respondents violated [Conner's] rights under the Equal Protection of the 14th Amendment to the United States Constitution.

53. Respondents violated [Conner's] right to Equal Protection when they acted in concert to revoke [Conner's] parole based on false and unfounded allegations contrary to the treatment afforded similarly situated parolees.

<u>C. Third Cause of Action</u>

. . . .

55. Respondents violated [Conner's] rights under the [E]ighth Amendment to the United States Constitution.

> 56. Respondents violated [Conner's] rights under the Eighth Amendment to the United States Constitution by arbitrarily and capriciously subjecting [Conner] to a deprivation of his liberty interest by which [Conner] suffered atypical and significant hardship.
>
> 57. Respondents caused [Conner] to suffer atypical and significant hardships by acting in concert to subject [Conner] to a grievous loss of freedom, loss of job, loss of good credit rating; loss of membership in a trade union; deprivation of therapy; loss of consortium and the benefits of family life; and loss of the opportunity to repair relationships with family members.

In its September 28, 2006 Order regarding Conner's Petition, the circuit court entered findings of fact that essentially summarized the procedural history of Conner's criminal cases that led to his imprisonment, subsequent parole, and parole revocation. The circuit court also entered the following relevant conclusions of law:

> 1. HRPP Rule 40(c)(3) states:
>
> (3) *Separate Cause of Action.* If a post-conviction petition alleges neither illegality of judgment nor illegality of post-conviction "custody" or "restraint" but instead alleges a cause of action based on a civil rights statute or other separate cause of action, the court shall treat the pleading as a civil complaint not governed by this rule. However, where a petition seeks relief of the nature provided by this rule and simultaneously pleads a separate claim or claims under a civil rights statute or other separate cause of action, the latter claim or claims shall be ordered transferred by the court for disposition under the civil rules.
>
> 2. Ground Three of [Conner's] Petition For Release From Custody Pursuant to Hawaii Rules of Penal Procedure Rule 40, which alleges, in part, that Dr. Tyler, Cory Reincke, and the HPA acted in concert to subject [Conner] to a grievous loss of freedom, loss of job, loss of good credit rating, loss of membership in a trade union, depravation [sic] of therapy, loss of consortium and the benefits of family life, and loss of the opportunity to repair relationships with family members, is a civil claim and is hereby transferred to the civil calendar for disposition.
>
> 3. [Conner's] Ground One alleges that [Conner's] right to due process was violated by [Respondents] when his parole was revoked.
>
> 4. Rule 40(g)(2) of the [HRPP] states:
>
> *Against the Petitioner.* The court may dismiss a petition at any time upon finding the petition is patently frivolous, the issues have been previously raised and ruled upon, or the issues were waived. **The court may deny a petition upon determining the**

> **allegations and arguments have no merit.** [emphasis added].

5. A hearing on a HRPP Rule 40 Petition for Post-Conviction Relief should be held only when the petition states a colorable claim. Dan v. State, 76 Haw. 423 (1994).

> 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's proceedings indicates that the petitioner's allegations show no colorable claim, it is not error to deny the petition without a hearing.
>
> Id. at 427, citing State v. Allen, 7 Haw. App. 89 (1987).

6. "The full panoply of rights due a defendant" in a criminal prosecution is not required to revoke a parole. Ringor v. State[,] 88 Hawaii 229, 235 (1998) (citing Morrissey v. Brewer, 408 U.S. 471, 480 (1972).

. . . .

10. In addition to the preliminary hearing, the United States Supreme Court in Morrissey held that at a minimum, due process requires:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him [or her]; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. Id. at 489.

11. The actions taken by the HPA in revoking [Conner's] parole afforded [Conner] all the protections due process requires under both the United States Constitution and the Hawaii State Constitution.

. . . .

14. Absent a constitutional or statutory violation, this court does not have the jurisdiction to review the HPA's decision revoking [Conner's] parole.

. . . .

21. [Conner's] Ground One is without merit and is dismissed without a hearing.

22. [Conner's] Ground Two which alleges that [Conner's] right to equal protection was violated is without merit.

. . . .

> 25. [Conner] is serving multiple terms of life imprisonment for a multitude of counts, including attempted murder and sexual offenses. [Conner] previously served multiple offenses of twenty years [sic] imprisonment for kidnapping, robbery and burglary. On October 6, 2005, while on parole, [Conner] was arrested for allegedly threatening his stepson, choking him and biting off part of his ear in FC No. 05-1-0019. Based on this behavior, Dr. Tyler terminated [Conner] from his sex offender treatment. The HPA revoked [Conner's] parole for failing to participate in sex offender treatment until clinically discharged.

DISCUSSION

A.

HRPP Rule 40(f) provides, in pertinent part:

> **(f) Hearings.** 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.

The *de novo* standard of review applies in determining whether a trial court erred in denying a petition for post-conviction relief without a hearing. Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994). In Dan, which involved a Rule 40 petition seeking relief from a judgment of conviction, the Hawai'i Supreme Court adopted the analysis of the Intermediate Court of Appeals (ICA) in State v. Allen, 7 Haw. App. 89, 744 P.2d 789 (1987), to explain what is required in a *de novo* review of a trial court's failure to conduct a hearing on a Rule 40 petition:

> 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 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.*

*Allen*, 7 Haw. App. at 92-93, 744 P.2d at 792-93 (emphasis added).

As the ICA's analysis indicates, the appellate court steps into the trial court's position, reviews the same trial record, and redecides the issue. Because the appellate court's determination of "whether the trial 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" is a question of law, the trial court's decision is reviewed *de novo*. *See United States v. Burrows*, 872 F.2d 915 (9th Cir. 1989) (denial of a post-conviction motion based on ineffective assistance of counsel without conducting an evidentiary hearing is reviewed *de novo* for a determination of whether the files and records of the case conclusively show that petitioner is entitled to no relief). Therefore, we hold that, on appeal, the issue whether the trial court erred in denying a Rule 40 petition without a hearing based on no showing of a colorable claim is reviewed *de novo*; thus, the right/wrong standard of review is applicable.

Dan v. State, 76 Hawai'i at 427, 879 P.2d at 532.

In this case, Conner's Rule 40 petition did not seek relief from a judgment of conviction but, rather, relief from custody based on an unlawful revocation of Conner's parole, pursuant to HRPP Rule 40(a)(2)(ii). Therefore, we must determine, based on an examination of the record before the circuit court, whether the allegations of Conner's petition show that, if taken as true, the facts alleged would change the HPA's decision to revoke Conner's parole.

B.

We observe initially that although Conner alleged in Ground 2 of his Petition that Respondents had violated his "rights under the Equal Protection Clause of the 14th amendment to the United States Constitution," he did not allege any facts to support a claim that he was treated differently from others similarly situated when his parole was revoked. Accordingly, we agree with the circuit court that Conner did not present a

colorable claim as to Ground 2 and no hearing was required as to that ground.

C.

Ground 1 of the Petition alleged that Respondents had violated Conner's right to due process under the Fourteenth Amendment to the United States Constitution by improperly revoking his parole.

The United States Supreme Court has recognized that parolees possess a conditional-liberty interest protected under the Fourteenth Amendment:

> Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.
>
> . . . .
>
> . . . The liberty of a parolee enables him [or her] to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he [or she] shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his [or her] parole, he [or she] can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him [or her] to many restrictions not applicable to other citizens, his [or her] condition is very different from that of confinement in a prison. He [or she] may have been on parole for a number of years and may be living a relatively normal life at the time he [or she] is faced with revocation. The parolee has relied on at least an implicit promise that parole will be revoked only if he [or she] fails to live up to the parole conditions. In many cases, the parolee faces lengthy incarceration if his [or her] parole is revoked.
>
> We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege." By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.

Morrissey v. Brewer, 408 U.S. 471, 480-82, 92 S. Ct. 2593, 2600-01 (1972) (footnotes omitted).

The United States Supreme Court explained in Morrissey that

> [i]mplicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his [or her] liberty as long as he [or she] substantially abides by the conditions of his [or her] parole. The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his [or her] parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation? The first step is relatively simple; the second is more complex. The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts. This part of the decision, too, depends on facts, and therefore it is important for the board to know not only that some violation was committed but also to know accurately how many and how serious the violations were. Yet this second step, deciding what to do about the violation once it is identified, is not purely factual but also predictive and discretionary.
>
> If a parolee is returned to prison, he [or she] usually receives no credit for the time "served" on parole. Thus the returnee may face a potential of substantial imprisonment.

Id. at 479-80, 92 S. Ct. at 2599-600 (emphases added; footnote omitted).

The Morrissey court then outlined the minimum due process required for parole revocation:

> What is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior.
>
> . . . .
>
> We now turn to the nature of the process that is due, bearing in mind that the interest of both State and parolee will be furthered by an effective but informal hearing. In analyzing what is due, we see two important stages in the typical process of parole revocation.
>
> *(a) Arrest of Parolee and Preliminary Hearing.* The first stage occurs when the parolee is arrested and detained, usually at the direction of his [or her] parole officer. The second occurs when parole is formally revoked. There is typically a substantial time lag between the arrest and the eventual determination by the parole board whether parole should be revoked. Additionally, it may be that the parolee is arrested at a place distant from the state institution, to which he [or she] may be returned before the final decision is made concerning revocation. Given these factors, due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. Such an inquiry should be seen as in the nature of a "preliminary hearing" to determine whether

there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions.

In our view, due process requires that after the arrest, the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case. . . .

This independent officer need not be a judicial officer. . . .

With respect to the preliminary hearing before this officer, the parolee should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he [or she] has committed a parole violation. The notice should state what parole violations have been alleged. At the hearing the parolee may appear and speak in his [or her] own behalf; he [or she] may bring letters, documents, or individuals who can give relevant information to the hearing officer. On request of the parolee, person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his [or her] presence. However, if the hearing officer determines that an informant would be subjected to risk of harm if his [or her] identity were disclosed, he [or she] need not be subjected to confrontation and cross-examination.

The hearing officer shall have the duty of making a summary, or digest, of what occurs at the hearing in terms of the responses of the parolee and the substance of the documents or evidence given in support of parole revocation and of the parolee's position. Based on the information before him [or her], the officer should determine whether there is probable cause to hold the parolee for the final decision of the parole board on revocation. Such a determination would be sufficient to warrant the parolee's continued detention and return to the state correctional institution pending the final decision. . . .

*(b) The Revocation Hearing.* There must also be an opportunity for a hearing, if it is desired by the parolee, prior to the final decision on revocation by the parole authority. This hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he [or she] can, that he [or she] did not violate the conditions, or, if he [or she] did, that circumstances in mitigation suggest that the violation does not warrant revocation. The revocation hearing must be tendered within a reasonable time after the parolee is taken into custody. A lapse of two months, as respondents suggest occurs in some cases, would not appear to be unreasonable.

We cannot write a code of procedure; that is the responsibility of each State. Most States have done so by legislation, others by judicial decision usually on due process grounds. Our task is limited to deciding the minimum requirements of due process. They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him [or her]; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to

> confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Id. at 484-89, 92 S. Ct. at 2602-04 (emphases added; citations and footnote omitted).

In this case, the record clearly reveals that Conner waived his right to a preliminary hearing to establish probable cause for his arrest for a parole violation. Therefore, no colorable claim, requiring an evidentiary hearing, was presented regarding the preliminary-hearing requirement imposed by Morrissey.

Conner's due-process claim regarding the basis for his parole revocation is more problematic because no record from the proceedings before the HPA is contained in the record on appeal. We are therefore unable to determine exactly what Conner's parole conditions were and what evidence was presented at the parole-revocation hearing. For purposes of our analysis, we assume that the language of Rule #8 is accurately reflected in the Pre-Revocation Hearing Notice and the Revocation Hearing Notice given to Conner and that Conner was required to "participate in [a] sex offender treatment plan until clinically discharged with the concurrence of his Parole Officer."

The HPA's Revocation Hearing Notice to Conner that was attached to Conner's Petition stated, in relevant part:

> You are charged with violating the terms and conditions of your parole in the following manner:
>
> 1. In violation of Rule #8, Special Condition #6 (E9), the subject failed to participate in sex offender treatment plan until clinically discharged with the concurrence of his Parole Officer.
>
> Supporting Evidence: On file is Chronological Entry dated October 7, 2005, parole officer and Dr. Carol Tyler discussed subject's progress in treatment. Dr. Tyler is concerned with subject being suicidal and is a risk to the community. Subject must be terminated at this time.
>
> On file is Chronological Entry dated October 10, 2005, parole officer received a letter from Dr. Carol Tyler that subject was terminated from treatment.

> . . . .
>
> You are hereby advised of your rights to:
>
> 1. Consult with any person(s) you reasonably desire;
>
> 2. Be assisted and represented by counsel prior to and during your hearing;
>
> 3. Have counsel appointed for you if you so request and cannot afford to retain counsel on your own;
>
> 4. Appear in person and be heard;
>
> 5. Waive any of the above rights.

Although the circuit court concluded that "the HPA . . . afforded [Conner] all the protections due process requires[,]" we fail to see how the circuit court could have reached this conclusion based on the available record. Conner was charged with violating the conditions of his parole by failing to participate in a sex-offender-treatment plan until clinically discharged. However, Conner's allegations, taken as true, were that he had never missed a sex offender treatment session and that Dr. Tyler unilaterally terminated his treatment plan based on false and unreliable information.

Based on our review of Conner's Petition and the limited information contained in the record on appeal, it appears that Conner raised a colorable claim that Dr. Tyler's "'termination' of [him] from therapy, ha[d] nothing to do with [him] 'failing to participate' in his [sex offender] therapy." The record supports Conner's assertion that he fully participated in sex-offender treatment to the extent possible. This is confirmed in the HPA's summary of Conner's parole history, which unequivocally states that Conner was in good standing with his therapy through his monthly session on October 3, 2005. Accordingly, we conclude that Conner's allegations raise a colorable claim that his due-process rights under Morrissey may have been violated.

The Supreme Court emphasized in Morrissey that parole-revocation hearings must be "structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." (Emphasis added.) Id. at

484, 92 S. Ct. at 2602. There is nothing in the record to indicate what evidence was produced at the parole-revocation hearing to support the allegations made in the Revocation Hearing Notice to Conner that he "failed to participate in [a] sex offender treatment plan until clinically discharged[.]" The record also does not reveal that the Revocation Hearing Notice to Conner was ever modified to include other grounds for revocation of his parole. The record also does not establish, as required by Morrissey, that the HPA (1) disclosed to Conner all the material evidence against him, or (2) provided a written statement of the evidence upon which the HPA relied and the HPA's reasons for revoking Conner's parole. Id. In the absence of the record from the parole-revocation hearing, the circuit court could not reasonably find that the latter condition was satisfied by the HPA's cursory statement that the "[f]inding of guilt was based on evidence provided by parole officer."

We are cognizant that at the time Conner's parole was revoked, HRS § 353-66(b) (Supp. 2005) provided:

> No parole shall be revoked . . . without cause, which cause must be stated in the order revoking the parole, . . . after notice to the paroled prisoner of the paroled prisoner's alleged offense and an opportunity to be heard; . . . provided further that when any duly licensed psychiatrist or licensed psychologist finds that continuance on parole will not be in the best interests of a parolee or the community, the paroling authority, within the limitations of the sentence imposed, shall order the detention and treatment of the prisoner until such time as the prisoner shall be found by any duly licensed psychiatrist or licensed psychologist to be eligible for continuance on parole.

(Emphasis added.) However, neither the Pre-Revocation Hearing Notice nor the Revocation Hearing Notice stated that revocation of Conner's parole was being sought based on a finding by a licensed psychiatrist or licensed psychologist that continuance on parole would not be in the best interests of Conner or the community. Instead, these notices informed Conner that he was charged with violating a condition of his parole that required him to participate in a sex-offender-treatment plan until clinically discharged. Implicit in Morrissey, as well as basic notions of due process, is that Conner's parole could only be

revoked for the alleged violation with which he was charged and of which he received notice.

Conner's parole could properly be revoked if he engaged in conduct that justified the termination of his treatment plan. The existing record, however, is insufficient to refute Conner's allegations that there was no valid reason to terminate his treatment plan.

CONCLUSION

In summary, Conner has asserted various facts regarding the circumstances of his parole revocation which, if true, raise a colorable claim that the HPA may have failed to adhere to the due-process requirements outlined in Morrissey as to Ground 1. Accordingly, a hearing was warranted as to Ground 1 and the circuit court erred in failing to conduct a hearing on that claim.

For the foregoing reasons, we vacate the circuit court's September 28, 2006 Order as it relates to Ground 1 of Conner's Petition and remand this case to the circuit court for a hearing as to that ground.

DATED: Honolulu, Hawai'i, October 13, 2008.

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