CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I concur in part and dissent in part. I would affirm the April 26, 2004 order of the circuit court of the third circuit (the court) denying the Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition for post-conviction relief filed by Petitioner-Appellant Walter De Guair (Defendant) on the ground that, inter alia, "[i]t is appropriate for [the court] to deny Defendant's Petition for Post-conviction relief without a hearing, and to deny Defendant's Motion to Stay the [HRPP] Rule 40 Proceedings pending the outcome of the appeal of the denial of his [HRPP] Rule 35 motion." As to Defendant's HRPP Rule 35 motion, I would vacate a part of the court's January 27, 2003 order and the September 24, 2002 second amended judgment.

Inasmuch as Defendant moved under HRPP Rule 35 to reduce part of his previous sentence on the ground that he had erroneously pled no contest to attempted manslaughter in Count II of the indictment, Defendant, in effect, sought to withdraw his no contest plea. Under HRPP Rule 32(d), a "[d]efendant's post-sentence withdrawal request [is subject to the] 'manifest injustice' provision of HRPP Rule 32(d)." State v. Fogel, 95 Hawai'i 398, 404, 23 P.3d 733, 739 (2001). See HRPP Rule 32(d).[1]

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[1] HRPP Rule 32(d) (1999) stated:

> (d) *Withdrawal of plea of guilty.* A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after

(continued...)

Manifest injustice as a matter of law applies in this case for, as indicated by Defendant, this court has said that "[Hawai'i Revised Statutes (HRS)] § 707-702(2), manslaughter due to [extreme mental or emotional disturbance (EMED)] is neither a chargeable offense nor a lesser included offense." Whiting v. State, 88 Hawai'i 356, 360, 966 P.2d 1082, 1086 (1998).[2] Petitioner, therefore, could not have pled to an "offense" of attempted manslaughter. See State v. Holbron, 80 Hawai'i 27, 43, 904 P.2d 912, 928 (1995) (stating that "insofar as HRS § 707-702(2) does not constitute a criminal 'offense' as such, but is a 'mitigating defense' . . . a defendant can be convicted of this form of manslaughter only if he or she is initially charged with first or second degree murder and the prosecution fails to negative the defense of '[EMED] . . . .'").

Under the circumstances, then, the case should be remanded under HRPP Rule 32(d) for "withdrawal of the plea or

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[1](...continued)
sentence shall set aside the judgment of conviction and permit the defendant to withdraw his plea.

[2] HRS § 707-702 (1993) stated as follows:

> (1) A person commits the offense of manslaughter if:
> (a) He recklessly causes the death of another person; or
> (b) He intentionally causes another person to commit suicide.
> (2) In a prosecution for murder in the first and second degrees it is a defense, which reduces the offense to manslaughter, that the defendant was, at the time he caused the death of the other person, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The reasonableness of the explanation shall be determined from the viewpoint of a person in the defendant's situation under the circumstances as he believed them to be.
> (3) Manslaughter is a class B felony.

enforcement of the [plea] bargain." Fogel, 95 Hawai'i at 406, 23 P.3d at 741. According to Defendant, however, he does not "challenge the plea agreement . . . , only the conviction for attempted manslaughter [as to which he] want[s the] conviction thrown out." But a defendant who seeks to have a plea agreement set aside must plead anew to all charges. Cf. State v. Adams, 76 Hawai'i 408, 415 n.5, 879 P.2d 513, 520 n.5 ("Of course, a defendant who elects to have a violated plea agreement rescinded must plead again to all charges in the original indictment." (Citations omitted)). Because Defendant does not wish to plead anew, the only recourse left is enforcement of the plea bargain. Cf. Fogel, 95 Hawai'i at 406, 23 P.3d at 741 (holding that because the "[d]efendant was not eligible for deferral of his plea[,]" plea bargain could not be enforced and withdrawal of plea was only remedy on remand for HRPP Rule 35 violation).

Of course, on remand Defendant would not be able to plead to a charge of attempted manslaughter because "inasmuch as manslaughter due to EMED is a defense not an offense, 'an alleged violation of . . . HRS § 707-702(2) obviously could not be charged as . . . manslaughter in the indictment or complaint.'" Whiting, 88 Hawai'i at 361, 966 P.2d 1087 (quoting Holbron, 80 Hawai'i at 43, 904 P.2d at 928) (emphasis in original) (brackets omitted). Therefore, with respect to Defendant's HRPP Rule 35 motion, the court's January 27, 2003 finding no. 7 that "there is a valid offense of mitigated Attempted Manslaughter under the Holbron decision[,]" (emphasis added) and conclusion of law that

"Defendant was properly found guilty of Attempted Manslaughter[]" (emphasis added) must be vacated. In that regard also, that part of the September 24, 2002 second amended judgment referring to the "Lesser included offense of Count 2 . . . Attempted Manslaughter" (emphasis added) must be vacated and corrected.

But as the record reflects, the stipulation in the plea agreement as to Count II was to reduce the attempted murder in the second degree charge to attempted manslaughter in order to obtain a lesser prison sentence for Defendant. Thus, "Defendant received the benefit [of the] . . . 10 years . . . in Count 2" for which he had bargained. Hence, to enforce the plea agreement as to the ten-year sentence would be consonant with the ultimate intent of the parties. Enforcement of the plea agreement is permissible as long as the disposition reflected the proper legal premise for a ten-year term, i.e., that Defendant pled in accordance with HRS § 707-702(2) which allows as a defense that murder be reduced to manslaughter, and as coincident with this case, that attempted murder be mitigated to attempted manslaughter. See Holbron, 80 Hawai'i at 43, 904 P.2d at 928 ("Although a defendant charged with attempted murder may, pursuant to HRS §§ 705-500 and 707-702(2), be convicted of attempted manslaughter based upon [EMED], the [Hawai'i Penal Code] does not recognize the offense of attempted manslaughter based upon a defendant's reckless conduct[.]" (Emphasis omitted.) (Emphasis added.)). The findings of fact, conclusions of law, order as to the HRPP Rule 35 motion and second amended

judgment, then, must reflect such a disposition.

For the foregoing reasons, on remand the court must be instructed that its January 27, 2003 finding no. 7, conclusion of law, and order must indicate that Defendant pled in accordance with a defense that would reduce the attempted murder charge to "attempted manslaughter" pursuant to HRS § 707-702(2). In that light, I would affirm that part of the court's January 27, 2003 HRPP Rule 35 order denying reduction of sentence but vacate that part of the order denying amendment of the first amended judgment and vacate that part of the September 24, 2002 second amended judgment referring to the "[l]esser included offense of Count 2: Attempted Manslaughter ([HRS §§] 705-500(1)(b) & 707-702(2))" with instructions to substitute appropriate language therefor.