CONCURRING AND DISSENTING OPINION BY NAKAYAMA, J.

I concur in the majority's opinion except as to that part of the opinion holding that Hutch made a showing of a colorable claim that he was illegally or unconstitutionally confined in the Special Holding Unit for assisting other inmates with legal matters, thereby entitling him to a hearing under Hawai'i Rules of Penal Procedure (HRPP) Rule 40(f) (2002).[1] Majority Opinion (Majority) at 17, 19. Inasmuch as Hutch's HRPP Rule 40 petition fails to establish a "colorable claim" sufficient for habeas relief, and his fourteen-day disciplinary segregation punishment for possessing other inmates' legal documents and making duplicate copies for them was an ordinary incident of prison life and fell within the range of confinement to be normally expected for such prison infraction, I do not believe the circuit court was wrong to deny Hutch's HRPP Rule 40 petition without a hearing. Therefore, in this regard, I must respectfully dissent.

This court reviews a trial court's denial of a HRPP Rule 40 petition without a hearing de novo. Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994). Under de novo

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[1] HRPP Rule 40(f) provides, in relevant 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.

review, this court must discern whether the trial court's records demonstrate that a petitioner's application for post-conviction relief made such a showing of a "colorable claim" to warrant a hearing before the lower court. See Stanley v. State, 76 Hawai'i 446, 448, 879 P.2d 551, 553 (1994); see also Dan, 76 Hawai'i at 427, 879 P.2d at 532. "To establish a colorable claim, the allegations of the petition must show that if taken as true the facts alleged would change the verdict[.]" Dan, 76 Hawai'i at 427, 879 P.2d at 532 (citation omitted). Accordingly, in reviewing Hutch's present HRPP Rule 40 petition, we must ascertain whether Hutch established a "colorable claim" that his fourteen-day disciplinary segregation punishment allegedly resulting from a violation of Hawai'i Administrative Rules (HAR) § 17-202-1(b), a repealed prison rule, was illegal.

Initially, I note that, contrary to Hutch's allegation in his HRPP Rule 40 petition, his fourteen-day disciplinary segregation punishment resulted solely from his refusal to obey the orders of prison staff members with respect to his unauthorized possession of the legal documents of fellow inmates -- a prison infraction subject to discipline.

Nevertheless, presuming that Hutch was punished under the repealed HAR § 17-202-1(b) for assisting inmates with legal matters, we must determine whether Hutch's punishment was unconstitutional. I do not believe it was.

The majority relies on Johnson v. Avery, 393 U.S. 483, 89 S. Ct. 747, 21 L. Ed. 2d 718 (1969), to conclude that Hutch "made a showing of a colorable claim that he was illegally punished for providing assistance to other inmates." Majority at

8-10, 16-17. In Johnson, the petitioner, a "jailhouse lawyer" or "writ writer" who helped inmates prepare legal documents, was transferred to a maximum security building for violating a prison regulation that prohibited prisoners from advising, assisting, or contracting to aid other inmates in legal matters. Id. at 484, 89 S. Ct. at 748. Recognizing the fundamental importance of a writ of habeas corpus and acknowledging the high percentage of illiterate and poorly educated prisoners incarcerated in jails and penitentiaries, the United States Supreme Court held that, "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation such as that here in issue, barring inmates from furnishing such assistance to other prisoners." Id. at 490, 89 S. Ct. at 751 (emphasis added). The crux of Johnson turned on the adequacy of the alternatives available to inmates in the preparation of petitions for post-conviction relief, namely, legal assistance and access to legal materials and/or a law library.[2] See, e.g.,

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[2] The United States Supreme Court admonished the lack of meaningful alternatives available to prisoners incarcerated in the Tennessee State Penitentiary:

> Tennessee does not provide an available alternative to the assistance provided by other inmates. The warden of the prison in which petitioner was confined stated that the prison provided free notarization of prisoners' petitions. That obviously meets only a formal requirement. He also indicated that he sometimes allowed prisoners to examine the listing of attorneys in the Nashville telephone directory so they could select one to write to in an effort to interest him in taking the case, and that on several occasions he had contacted the public defender at the request of an inmate. There is no contention, however, that there is any regular system of assistance by public defenders. In its brief the State contends that there is absolutely no reason to believe that prison officials would fail to notify the court should

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Sizemore v. Lee, 20 F. Supp. 2d 956, 958 (W.D. Va. 1998) ("[The Marion Correctional Treatment Center] has satisfied the primary concerns of Johnson by providing inmates with a law library and inmate legal assistants."). The majority, however, fails to appreciate as much.

The majority essentially conjures a piecemeal construction of Johnson to conclude that Hutch "made a showing of a colorable claim that he was illegally punished for providing assistance to other inmates[.]" Majority at 17. The majority posits that Hutch was entitled to habeas relief under Johnson, based on the allegation made in his HRPP Rule 40 petition that "the prison was still enforcing the repealed HAR § 17-202-1(b) and that he was confined to the Special Holding Unit for

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[2](...continued)

> an inmate advise them of a complete inability, either mental or physical, to prepare a habeas application on his own behalf, but there is no contention that they have in fact ever done so.
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> This is obviously far short of the showing required to demonstrate that, in depriving prisoners of the assistance of fellow inmates[,] Tennessee has not, in substance, deprived those unable themselves, with reasonable adequacy, to prepare their petitions, of access to the constitutionally and statutorily protected availability of the writ of habeas corpus. By contrast, in several States, the public defender system supplies trained attorneys, paid from public funds, who are available to consult with prisoners regarding their habeas corpus petitions. At least one State employs senior law students to interview and advise inmates in state prisons. Another State has a voluntary program whereby members of the local bar association make periodic visits to the prison to consult with prisoners concerning their cases. We express no judgment concerning these plans, but their existence indicates that techniques are available to provide alternatives if the State elects to prohibit mutual assistance among inmates.

Johnson, 393 U.S. at 490, 89 S. Ct. at 751 (internal quotation marks and footnotes omitted).

assisting other inmates with legal matters where he had obtained warden permission to do so." Majority at 12. In holding as much, the majority employs the following reading of Johnson:

> [p]rohibiting the "jailhouse lawyer" from "possessing" the legal documents of the inmate he has been authorized to "assist," means that the inmate must be able to read and convey what is written in the papers to the "jailhouse lawyer" in order to obtain assistance. If the statement in the adjustment committee report is accurate, such a policy, standing alone, may "effectively" "forbid[] illiterate or poorly educated prisoners to file habeas corpus petitions[,]" running afoul of Johnson.

Majority at 16 (some brackets in the original) (citation omitted). The majority's application of Johnson is unavailing. First, unlike Johnson, there is no blanket prohibition against "mutual assistance" at the Halawa Correctional Facility. Second, Hutch has not established that he was "actually" injured by the prohibition against the unauthorized possession of the legal materials of his fellow inmates. Thus, the majority's attempt to reconcile Johnson's mandate to support its conclusion that Hutch made a showing of a colorable claim sufficient for habeas relief is ill-advised.

In distinct contrast to the majority's interpretation of Johnson, Johnson teaches that prison officials can regulate the scope and frequency of assistance that "jailhouse lawyers" provide to other inmates, so long as meaningful alternatives are available. Inasmuch as Hutch and the other inmates have access to the law library, and are permitted to "assist" each other in legal matters through discussion and correspondence, Johnson instructs that these alternative avenues of access to the courts validate the regulation Hutch claims formed the basis of his

illegal and unconstitutional punishment.[3]

Accordingly, assuming that Hutch was punished under the repealed HAR § 17-202-1(b), as alleged in his HRPP Rule 40 petition, it cannot be said that Hutch's fourteen-day disciplinary segregation punishment was "illegal" under Johnson. As such, Hutch's HRPP Rule 40 petition alleging that he was "illegally punished" fails to establish a "colorable claim" sufficient for habeas relief.[4] Therefore, the circuit court did not err in denying Hutch's HRPP Rule 40 petition without a hearing.

Finally, I highlight that the sole basis for Hutch's fourteen-day disciplinary segregation punishment resulted from his unauthorized possession of the legal materials of fellow inmates -- a prison infraction subject to disciplinary action:

> The committee wants to make it very clear to [Hutch] that he

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[3] The majority insists that "access to the law library and assistance from the jailhouse lawyer via 'discussion and correspondence,' . . . are not 'meaningful' for the illiterate or poorly educated prisoner who may not [be] able to read materials in the law library nor communicate what is stated in his or her legal documents in order to facilitate any 'discussion' or 'correspondence' with the jailhouse lawyer." Majority at 17 n.15 (emphasis omitted). First, I emphasize that Hutch, as well as the other inmates, are not prohibited from "assisting" fellow inmates with legal matters. Second, I am mindful of the access illiterate and poorly educated prisoners have to habeas relief. Consistent with Johnson's mandate, it is imperative that prisons provide reasonable and meaningful alternatives to assist inmates in preparing petitions for post-conviction relief. Based on the records in the instant case, the Halawa Correctional Facility has done just that. To reiterate, there is no blanket prohibition against "mutual assistance" at the Halawa Correctional Facility. Moreover, Hutch neither established nor alleged that he suffered actual injury from the available alternatives -- namely, using the law library and "discussing" and "corresponding" with fellow inmates regarding legal matters. Indeed, it is incumbent upon Hutch to demonstrate the shortcomings of these alternatives, as applied to him. Habeas relief merits as much.

[4] I note, however, that because Hutch's claim of "illegal punishment" appears to be the proper subject of the conditions of his confinement or the effects of actions by prison officials on his life as an inmate, it should be processed as a civil complaint. See HRPP Rule 40(c)(3).

> is not being charged with assisting inmates with legal matters. He is charged with being in possession of their legal documents and making duplicate copies for them. It is not [Hutch's] responsibility to make these copies and retain the actual legal documents of other inmates for the purpose of mailing these documents to the courts. It is the responsibility of inmate Genaro Gualdarama. [Hutch] should only be assisting in legal issues by discussion and correspondence with the inmate.

(Emphasis in the original.) Despite Hutch's contention to the contrary, the record supports that Hutch's punishment was an ordinary incident of prison life and fell within the range of confinement to be normally expected for such prison infractions.[5] See Sandin v. Connor, 515 U.S. 472, 485, 115 S. Ct. 2293, 2301, 132 L. Ed. 2d 418 (1995) ("Discipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law."). Habeas relief does not lie for this discipline. Accordingly, the circuit court did not err in ruling that Hutch's HRPP Rule 40 petition "[was] without merit, [was] patently frivolous, and [was] without support in either the record or evidence submitted by [Hutch]."

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[5] Hutch submitted numerous grievance forms referencing the prison's "mutual assistance" policy, which he claims served the basis of his illegal punishment. However, Hutch's actual discipline (fourteen-day disciplinary segregation punishment), as documented, resulted from his refusal to obey the orders of prison staff members with respect to his unauthorized possession of the legal documents of fellow inmates, in violation of HAR §§ 17-201-8(10), (11), and (32).