DISSENT BY ACOBA, J., WITH WHOM DUFFY, J., JOINS

I respectfully dissent and would accept the petition for writ of certiorari[1] filed by Petitioner/Petitioner-Appellant Jason Kelly Andrews (Petitioner).[2] The sole question presented in his Application is "[w]hether the ICA gravely erred in concluding that [Petitioner] was not entitled to relief under HRPP Rule 40 where the unjustified reassignment of his Hawai'i Rules of Penal Procedure (HRPP) Rule 35 motion to a judge other than the sentencing judge amounted to arbitrary and capricious conduct in violation of his due process rights." As to the merits of the question raised, it would appear logical, efficient, and equitable that the original sentencing judge, who is available and was cognizant of the basis for the original

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[1] Pursuant to Hawai'i Revised Statutes (HRS) § 602-59 (Supp. 2006), a party may appeal the decision of the intermediate appellate court (the ICA) only by an application to this court for a writ of certiorari. See HRS § 602-59(a). In determining whether to accept or reject the application for writ of certiorari, this court reviews the ICA decision for:

> (1) Grave errors of law or of fact; or
> (2) Obvious inconsistencies in the decision of the [ICA] with that of the supreme court, federal decisions, or its own decision,
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> and the magnitude of such errors or inconsistencies dictating the need for further appeal.

HRS § 602-59(b). The grant or denial of a petition for certiorari is discretionary with this court. See HRS § 602-59(a).

[2] Petitioner seeks review of the judgment of the Intermediate Court of Appeals (the ICA) filed on October 10, 2007, pursuant to its August 29, 2007 Summary Disposition Order (SDO) affirming the November 17, 2005 Order of the third circuit court (the court) denying his Hawai'i Rules of Penal Procedure (HRPP) Rule 40 petition. The ICA's SDO was filed by Presiding Judge Corinne K.A. Watanabe and Associate Judges Craig H. Nakamura and Alexa D.M. Fujise.

Respondent/Plaintiff-Appellee State of Hawai'i (Respondent) did not file a memorandum in opposition.

sentence, be the judge who decides whether the original sentence should be reduced or not, in a HRPP Rule 35 hearing, inasmuch as that judge would best know whether factors significant in imposing the existing sentence had been subsequently mitigated.

I.

The following matters, some verbatim, are from the record and the submissions of the parties.

> On November 12, 2004, [Petitioner] was charged by indictment with Count I: Negligence Injury in the First Degree, in violation of HRS § 707-705(1), Count II: Duty Upon Striking Unattended Vehicle, HRS § 291C-15, Count III: No No-fault Insurance, HRS § 431:10C:104(a), Count IV: Driving While License Suspended or Revoked, HRS § 286-132, Count V: Procedure When Title to Vehicle Transferred, HRS § 286-52(b), Count VI: Operating a Vehicle Under the Influence of an Intoxicant, HRS § 291E-61(a)(2), Count VII: Accidents Involving Death or Serious Bodily Injury, HRS § 291C-12(a).

Pursuant to a plea bargain, Petitioner entered a no contest plea to the charges. Both Respondent and the probation department indicated a one-year jail sentence was appropriate.

> On May 3, 2004, [Petitioner] entered a change of plea before The Honorable Ronald Ibarra, Judge of the Circuit [C]ourt of the Third Circuit. He was represented by defense counsel, Ernest Gianotti. Pursuant to a plea agreement with [Respondent], [Petitioner] pled no contest to Counts I, III, IV, VI and VII, and moved for a deferred acceptance of his plea, and [Respondent] agreed to dismiss Counts II, IV and V and to recommend five years probation, with the option to recommend up to one year in jail as a condition of probation. The prosecutor represented that the charges were based on [Petitioner] striking Elena Garcia while driving his vehicle under the influence of Valium and Diazepam, and failing to remain at the scene.
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> At the sentencing hearing held on June 7, 2004, the prosecutor endorsed the recommendation of the probation office who prepared the Presentence Diagnosis and Report ("presentence report"), of a sentence of five years probation with the maximum jail term of one year. . . . [D]efense counsel argued that [Petitioner] was married with two young children, had the support of his employer who was present in court, was on medication when he made the mistake of drinking and driving, and does not remember what

> happened. Counsel also noted that on page 24 of the presentence report, the complainant did not ask for jail time for [Petitioner] as she believed community service would serve a greater cause.
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> The complainant, Ms. Garcia, who was present at the hearing, stated in court that . . . she made the statement in the presentence report . . . [but] was now asking the judge to consider sentencing "to the maximum extent of the law." . . .

(Emphases added.)

Judge Ibarra did not adopt the plea agreement and sentenced Petitioner on the charge, inter alia, of leaving the scene of an accident, to the maximum ten-years' imprisonment. However, the judge told defense counsel to file a HRPP Rule 35 motion if he felt it "appropriate."

> . . . Judge Ibarra stated that he was focusing on the "protection of the public," and sentenced [Petitioner] to concurrent terms of incarceration as follows: five years for the charge of negligent injury (Count I), ten years for leaving the scene of an accident involving death or serious bodily injury (Count VII), 30 days incarceration for no no-fault insurance, driving without a license, and operating a vehicle while under the influence (Counts III, IV and VI, respectively). . . . At the close of the sentencing proceedings, Judge Ibarra invited defense counsel to file a "Rule 35" motion.
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> THE COURT: And, Mr. Gianotti, a Rule 35, if you feel is appropriate.
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> MR. GIANOTTI: I beg your pardon?
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> THE COURT: If you feel a Rule 35 is appropriate, you file one later.
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> MR. GIANOTTI: All right.

(Capitalization omitted.) (Emphases added.) Hawai'i Rules of Penal Procedure (HRPP) Rule 35, Correction or Reduction of Sentence, provides in pertinent part:

> (b) Reduction of sentence. The court may reduce a sentence within 90 days after the sentence is imposed, or within 90 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 90 days after entry of any order or judgment of the Supreme Court of the United States denying review of, or having the effect of upholding the judgment of conviction. A motion to reduce a sentence that is made within the time prior shall empower the court to act on such motion even though the time period has expired. The filing of a notice of appeal shall not deprive the court of jurisdiction to entertain a timely motion to reduce a sentence.

(Emphases added.) On July 2, 2004, Petitioner filed a HRPP Rule 35 motion to reduce imprisonment to one year as had been agreed to in the plea bargain. At the hearing on the motion, Judge Ibarra noted that one year had not yet passed and continued the Rule 35 hearing, as Petitioner states, for "almost exactly one year." However, when the hearing was reconvened approximately a year later, Judge Strance presided over the continued hearing. At the hearing, Respondent did not oppose the one-year imprisonment term inasmuch as it was reflected in the plea bargain. However, Judge Strance denied the motion.

> THE COURT: . . . And it's my sense and I feel it's my obligation to the general community to do what I think is best for the public safety.
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> In light of that, I'm going to deny your motion for reconsideration. It's my opinion that the struggles that you have are not likely to have been overcome[] . . . although this is a tremendous hardship for your family, it's a tremendous loss to our community and not to have you here. It's equally a tremendous risk to our community to put you back out in the community prior to the completion [of] your prison sentence.
>
> So based upon all that, I'm going to deny the motion.
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> . . . .
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> . . . I have an obligation to the community, and it is my considered opinion that [Petitioner] presents a risk to the community if he is released.
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> THE DEFENDANT: Your Honor --
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> THE COURT: That is my opinion.

(Emphases added.)

On June 30, 2005, Petitioner filed a Second "Rule 35 Motion to Reconsider" [also referred to herein as Second Rule 35 Motion] to "reconsider the sentence rendered on or about the 13th day of June, 2005."

> In his "Affidavit of Counsel," Mr. Gianotti outlined the history of the case, and stated that before the June 13, 2005 hearing, Judge Ibarra assumed the position of "Drug Court Judge" of the Third Circuit and that Judge Strance took over his assignment in the Kona Division. Mr. Gianotti also averred that he had written to Judge Ibarra prior to

> the June 13, 2005 [hearing], requesting that he hear the Rule 35 motion. [Respondent] opposed the Second Rule 35 Motion in its "Objection to Motion to Reduce Sentence," filed on July 12, 2005, stating that there were no new circumstances warranting the reconsideration.

In counsel's affidavit in support of the motion to reconsider, Petitioner set forth the following reasons for reconsideration.

> Affiant alleges his position that Judge Ibarra should have disposed of the Motion for Reconsideration falls under Canon 3(B)(8) which says, "A Judge should dispose of all judicial matters promptly, efficiently and fairly." The footnote [sic] to this Canon says, "A Judge should monitor and supervise cases so as to reduce or eliminate . . . avoidable delays . . . . Prompt disposition of the court's business requires a judge to . . . be . . . expeditious in determining matters under submission[.]" . . .
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> . . . Also it could be possible [Judge Strance] was not fully aware of the reasons the Motion was continued for a period of one year. Judge Ibarra's knowledge of the continuance and all previous matter[s] could have a bearing on [Petitioner's] motion.
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> Affiant alleges the [c]ourt should either reconsider its July 13 Order denying the Motion, or, Judge Ibarra should decide the original Motion to Reconsider.

According to Petitioner, Judge Strance ordered Petitioner to file a request for oral hearing. Subsequently, in a written order filed September 7, 2005, Judge Strance entered an order stating, "IT IS HEREBY ORDERED that the Defendant's Application for Oral Hearing of Motion is DENIED." (Capitalization in original.) (Boldfaced font omitted.) Petitioner notes that "[t]he record does not contain a written decision on the Second Rule 35 Motion." (Emphasis added.)

On October 4, 2005, Petitioner filed a HRPP Rule 40 motion that was denied on November 17, 2005 by Judge Strance, without a hearing. Petitioner states that "the Rule 40 Petition . . . argued that allowing Judge Strance to decide the Rule 35 Motion requesting Judge Ibarra to reconsider his sentence

violated Canon 3 of the Judicial Code of Conduct and [Petitioner's] constitutional rights." Petitioner appealed, arguing that "Judge Strance erred in summarily denying the Rule 40 Petition and the case must be remanded for hearing of the Rule 35 Motion before Judge Ibarra . . . ."

On appeal the ICA affirmed denial of the Rule 40 petition, but apparently on procedural grounds.

> The ICA affirmed the denial of the Rule 40 Petition, stating 1) that the grounds for the Rule 40 Petition were raised by [Petitioner] in a motion for reconsideration which was never decided, noting that under HRPP Rule 40(a)(3), relief under Rule 40 is not available "where the issues sought to be raised have been previously ruled upon or were waived," and 2) "the basis for [Petitioner's] petition for HRPP Rule 40 relief is not one of the grounds for seeking relief authorized by HRPP Rule 40(a)(1) or (2)." SDO [at] 2.

II.

A.

Petitioner maintains that (1) "[o]nce the verdict is reached and sentence has been imposed, a 'substantial' reason must exist to justify substitution of the judge" ("In no event should a substitution or replacement after verdict ever be permitted except under unavoidable circumstances, such as sickness, impossibility to act, or other substantial cause which would make the continuance of the trial judge's presence impossible." Commonwealth v. Thompson, 195 A. 115, 117-18 (Pa. 1937)); (2) "failure of a judge to retain a matter, or the reassignment of a case, in the absence of justification, is viewed as a breach of judicial conduct[]" ("[U]nless a justification for reassignment exists, a judge has a duty to

retain a case until it is completed. Canon 3B(1) of the Code of Judicial Conduct[3] states in this regard: 'A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or permitted by rule, or transfer to another court occurs.'" Hi-Country Estates Homeowners Ass'n v. Bagley & Co., 996 P.2d 534, 538 (Utah 2000)).

B.

Alternatively, Petitioner maintains that "[e]ven if the reassignment of the Rule 35 Motion was somehow justified, remand before Judge Ibarra is nevertheless required to remedy the prejudice resulting from the failure to have Judge Ibarra . . . rule on the reconsideration motion." Petitioner asserts that (1) "[a]s stated in the Rule 40 Petition, Judge Ibarra participated in the extensive pre-trial negotiations that resulted in the agreement between [Respondent] and [Petitioner] for five years probation with one year jail and lead [sic] to [Petitioner's] change of plea"; (2) "[i]t is reasonable to conclude that Judge Ibarra's sentence was in some way influenced by the complainant's change of heart at the hearing and her request for the maximum term of incarceration"; (3) "[n]evertheless," "[t]he court's invitation" "to file the

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[3] Hawaii's Canon 3, "A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently," is somewhat similar and states in pertinent part:

> B. Adjudicative Responsibilities.
> (1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

Rule 35 Motion" "strongly indicates that the court was open to reducing the sentence at a later date"; (4) "the fact that Judge Ibarra continued the motion until almost exactly one year after [Petitioner] was incarcerated reinforces the conclusion that the judge was considering reducing the sentence to credit for one-year time served as contemplated by the terms of the plea agreement"; (5) "these indicators support the conclusion that Judge Ibarra was inclined to grant the Rule 35 Motion"; (6) "[i]n denying the Rule 35 motion, . . . Judge Strance made clear . . . that she was relying on her own 'opinion' and assessment of case"; (7) "Judge Ibarra, as the sentencing judge, was afforded greater discretion to reconsider his own sentence than Judge Strance"; (8) Petitioner thus "was clearly prejudiced by the reassignment of the continued hearing before a judge other than Judge Ibarra." (Emphases added.)

As to the sentencing court's broad discretion in HRPP Rule 35 cases, Petitioner notes the following established precedent.

> A sentencing judge is afforded wide discretion to reduce or reconsider its sentence pursuant to a Rule 35 motion. State v. Putnam, 93 Hawai'i 362, 365, 3 P.3d 1239, 1242 (2000). (See State v. Williams, 70 Haw. 566, 569, 777 P.2d 1192, 1194 (1989) (recognizing that "[a] trial court has the discretion to, within the time limits set forth by HRPP Rule 35, reduce a sentence") (citation omitted); State v. Rodrigues, 68 Haw. 124, 134 n.7, 706 P.2d 1293, 1300 n.7 (1985) (noting that following the supreme court's affirmance of the trial court's judgment sentencing the defendant to ten years' imprisonment, the trial court is permitted, under HRPP Rule 35, to exercise its discretionary power to reduce the sentence if such action would be warranted); State v. Le Vasseur, 1 Haw. App. 19, 30, 613 P.2d 1328, 1335 (1980), cert. denied, 449 U.S. 1018, 101 S.Ct. 582, 66 L.Ed.2d 479 (1980) (stating that, "under Rule 35 HRPP, it is open to the court below to reduce the sentence within ninety (90) days

> of the receipt of our mandate [affirming the judgment] if it sees fit").

(Brackets supplied.) On the other hand, Petitioner posits that because "a judge's discretion to overrule or modify the decision of another judge requires 'cogent reasons' and is constrained by considerations of 'courtesy and comity[,] Wong v. City & County of Honolulu, 66 Haw. 389, 396, 665 P.2d 157, 162 (1983)," "Judge Strance was constrained in her discretion to reduce or modify Judge Ibarra's sentence[.]"

III.

Preliminarily, and to reiterate, with respect to the scope of HRPP Rule 40, the ICA stated in its SDO that Petitioner (1) "raised this same issue [concerning a substitution of judges] when he filed a motion for reconsideration of the non-sentencing judge's denial of his HRPP Rule 35 motion," (2) "[t]he record . . . indicates that the motion for reconsideration was never decided[,]" (3) "'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) (2006)[,]" (4) "the basis for . . . HRPP Rule 40 relief is not one of the grounds for seeking relief authorized by HRPP Rule 40(a)(1) or (2)." SDO at 2. Although decided by the ICA on these grounds, these procedural matters were not addressed in the briefs on appeal.

IV.

In his HRPP Rule 40[4] Petition, Petitioner stated inter alia that Judge Ibarra was involved in the plea bargaining

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[4] HRPP Rule 40, entitled "Post-Conviction Proceeding," states in pertinent part as follows:

> (a) Proceedings and grounds. The post-conviction proceeding established by this rule shall encompass all common law and statutory procedures for the same purpose, including habeas corpus and coram nobis; provided that the foregoing shall not be construed to limit the availability of remedies in the trial court or on direct appeal. Said proceeding shall be applicable to judgments of conviction . . . , as follows:
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> (1) FROM JUDGMENT. At any time but not prior to final judgment, any person may seek relief under the procedures set forth in this rule for the judgment of conviction, on the following grounds:
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> (i) that the judgment was obtained or sentence imposed in violation of the constitution of the United States or of the State of Hawai'i;
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> . . . .
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> (v) any ground which is a basis for collateral attack on the judgment.
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> . . . .
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> (2) FROM CUSTODY. Any person may seek relief under the procedure set forth in this rule from custody based upon a judgment of conviction, on the following grounds:
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> (i) that sentence was fully served;
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> (ii) that parole or probation was unlawfully revoked; or
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> (iii) any other ground making the custody, though not the judgment, illegal.
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> (3) INAPPLICABILITY. 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. Except for a claim of illegal sentence, 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.
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> . . . .
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> (f) Hearings. . . . The court may . . . 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.

(Emphases added.)

process and, thus, his continuance of the HRPP Rule 35 hearing for approximately one year was significant:

> Judge Ibarra presided at the time of the pre-trial hearing, heard[,] and listened to the plea-offer, the reasons for said offer, and [P]etitioner's reasons for accepting said offer. Judge Strance had no knowledge of the plea agreement, the change of plea, sentencing, or matters other than her review of the [c]ourt file. Judge Ibarra obviously had his valid reasons for continuing [P]etitioner's initial Rule 35 Motion for a period of one year. Judge Strance would also not have knowledge, other than her examination of the [c]ourt file before hearing on the continued motion, any knowledge of Judge Ibarra's reasons or grounds in continuing said [m]otion.
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> . . . .
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> Petitioner also alleges a possible violation of the Canons of Judicial Conduct could be violated where sentencing Judges be allowed to step aside and let a new Judge handle all subsequent Motions or other sentencing matters. If such case occurred Canon (3) would be violated and the Constitutional rights of a defendant might also be violated when non-trial Judge were allowed to hear subsequent matters.

(Emphases added.) (Boldfaced font omitted.) In response, Respondent maintained (1) "[i]n his petition, [P]etitioner does not show any violation of the United States or State of Hawai'i Constitution[,]" (2) "Canon 3(B)(8), Revised Code of Judicial Conduct, [cited by Petitioner,] states: A judge shall dispose of all judicial matters promptly, efficiently and fairly. The [c]ourt in this case has promptly, efficiently and fairly disposed of this case[,]" and (3) "[t]he Defendant may not choose the judge who presides over his case." Respondent argued that Petitioner's "claims are patently frivolous and without a trace of support either in the record or from the evidence submitted by the Petitioner."

In reply, Petitioner countered that "Petitioner has contended from the beginning there may have been a violation of

the Code of Judicial Conduct" and "[a]s stated by Respondent in its Opposition, Rule 40(a)(1) allows a party to seek relief for[] (v) any ground which is a basis for collateral attack on the judgment."

Apparently referring to the second HRPP Rule 35 motion, Judge Strance ruled that HRPP Rule 40(f) applied because the "matter ha[d] been fully considered in response to prior pleadings." The written order denying the HRPP Rule 40 petition without a hearing declared as follows:

> The Court received [Petitioner's] Rule 40 Petition for Post Conviction Relief, filed herein October 4, 2005; State's Opposition to Petition for Post Conviction Relief, filed herein October 13, 2005; and Reply to Respondent's Opposition to Rule 40 Petition, filed herein October 21, 2005.
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> WHEREAS, the Court considered the documents listed above, and
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> WHEREAS, the Court finds that the matter has been fully considered in response to prior pleadings pursuant to [HRPP Rule] 40(f),
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> IT IS HEREBY ORDERED that the Defendant's Petition for Post-Conviction Relief is DENIED.

(Emphasis added.)

V.

A.

As to ground (4) cited by the ICA's SDO, Petitioner argues in his Application that HRPP Rule 40 coverage potentially falls under HRPP Rule 40(a)(1)(i) or (v). To repeat, HRPP Rule 40(a)(1) provides in pertinent part that relief from the judgment of conviction is available if "(i) the judgment was obtained or sentence imposed in violation of the constitution of the United States or of the State of Hawai'i, [and on] . . . (v) any ground which is a basis for collateral attack on the judgment." At the

least, Petitioner cited a constitutional violation, presumably a due process violation in the imposition of his sentence, in conjunction with Judge Ibarra's failure to complete the HRPP Rule 35 proceeding.

With respect to grounds (1)-(3) in the ICA's opinion, the finding in the November 17, 2005 order denying the Rule 40 Petition because Judge Strance "fully considered [the matter] in response to prior pleadings" is not indicative of whether "a full and fair evidentiary hearing upon that question [had been] held," as required under HRPP Rule 40. HRPP Rule 40(f). The issues relevant to whether Judge Ibarra should have ruled on the Rule 35 proceeding because of his knowledge of the case and his decision to continue the matter for one year were obviously not raised at the continued Rule 35 hearing on June 13, 2005 that was held before Judge Strance rather than Judge Ibarra.

Additionally, subsequently as observed before, "Judge Strance never ruled on . . . [the June 29, 2005] second Rule 35 Motion [regarding such issues], as noted by the ICA[.]" Petitioner correctly observes then, that this "means [that] these issues were never 'previously ruled upon' and cannot amount to a 'waiver' of the issues under HRPP Rule 40(a)(3) as intimated by the ICA."

B.

In light of authority which supports having the sentencing judge decide a HRPP Rule 35 type hearing, see

discussion infra, there would appear to be a "colorable claim" for a hearing as allowed under HRPP Rule 40(f). If a Rule 40 petition raises a colorable claim, the court must hold an evidentiary hearing. See HRPP Rule 40(f) ("If a petition alleges facts that if proven would entitle the petitioner to relief, the court shall grant a hearing which may extend only to the issues raised in the petition or answer.") In such a case, "a full and fair evidentiary hearing is required on Petitioner's claims." Wilton v. State, 116 Hawai'i 106, 122, 170 P.3d 357, 373 (2007).

Jurisdiction may also rest, as it was in the case of United States v. Harper, 460 F.2d 1024, 1025 (5th Cir. 1972) (per curiam), see infra, on an appellate court's exercise of supervisory powers over the lower courts. See also State v. Harrison, 95 Hawai'i 28, 32, 18 P.3d 890, 894 (2001) (holding that "courts have inherent equity, supervisory, and administrative powers as well as inherent power to control the litigation process before them" and "[a]mong courts' inherent powers are the powers to create a remedy for a wrong even in the absence of specific statutory remedies, and to prevent unfair results"); State v. Estrada, 69 Haw. 204, 738 P.2d 812 (1987) (invoking the supervisory power to declare improper and prejudicial a judge's customary practice of entering the jury room to answer jurors' questions); Gannett Pacific Corp. v. Richardson, 59 Haw. 224, 227, 580 P.2d 49, 53 (1978) ("exercis[ing] . . . supervisory jurisdiction over the lower

courts" and "discretionary power to issue its writ of prohibition" despite the fact that the doctrine of res judicata applicable to judgments in prohibition would ordinarily bar such practice as the circuit court had already rendered a judgment on a similar petition for a writ of prohibition); Sapienza v. Hayashi, 57 Haw. 289, 292-93, 554 P.2d 1131, 1134-35 (1976) (holding that "[i]n the exercise of its supervisory powers over grand jury proceedings, the circuit court may order the disqualification of attorneys attending the grand jury where the integrity of the grand jury process and the proper administration of justice require it").

VI.

Wright states that the

> [p]urpose of [a] motion for reduction of sentence is to give every convicted defendant [a] second round before [the] sentencing judge, and, at the same time, to afford [the] judge opportunity to reconsider [the] sentence in light of any further information about [the] defendant or the case which may have been presented to him in the interim.

Charles Alan Wright, Federal Practice & Procedure: Criminal 2d § 586, at 399 (1982) (citing United States v. Morales, 498 F. Supp. 139 (D.C.N.Y. 1980)) (emphasis added).[5] In that regard, "[a] motion under [FRCrP] Rule 35(b) for reduction of sentence should be heard by the judge who imposed [the] sentence, but

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[5] Because HRPP Rule 35 and Federal Rules of Criminal Procedure (FRCrP) Rule 35 are textually similar, federal cases interpreting FRCrP Rule 35 are persuasive to this court's interpretation of HRPP Rule 35. See Gold v. Harrison, 88 Hawai'i 94, 105, 962 P.2d 353, 364 (1998) (stating that "[w]here we have patterned a rule of procedure after an equivalent rule within the [FRCrP], interpretations of the rule by the federal courts are deemed to be highly persuasive in the reasoning of this court" (internal quotation marks and citation omitted)), cert. denied 526 U.S. 1018 (1999).

another judge can act if the sentencing judge is not available." Id. at 405 (footnote omitted).[6] As examples of unavailability,

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[6] HRPP Rule 35, effective as of July 1, 2003, states as follows:

> **Rule 35. CORRECTION OR REDUCTION OF SENTENCE.**
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> **(a) Correction of Illegal Sentence.** The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. A motion made by a defendant to correct an illegal sentence more than 90 days after the sentence is imposed shall be made pursuant to Rule 40 of these rules. A motion to correct a sentence that is made within the 90 day time period shall empower the court to act on such motion even though the time period has expired.
>
> **(b) Reduction of Sentence.** The court may reduce a sentence within 90 days after the sentence is imposed, or within 90 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 90 days after entry of any order or judgment of the Supreme Court of the United States denying review of, or having the effect of upholding the judgment of conviction. A motion to reduce a sentence that is made within the time prior shall empower the court to act on such motion even though the time period has expired. The filing of a notice of appeal shall not deprive the court of jurisdiction to entertain a timely motion to reduce a sentence.

(Emphases omitted and emphases added.) Wright discusses the version of FRCrP Rule 35 that was in effect during 1982:

> (a) Correction of Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.
>
> (b) Reduction of Sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after tentry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

(Emphases omitted and emphases added.)

The version of FRCrP Rule 35 discussed in Wright is similar to HRPP Rule 35 in that both rules allow the court to correct an illegal sentence at any time and to correct a sentence imposed in an illegal manner within the time period prescribed in the rule for sentence reduction. Both rules also allow for the reduction of a sentence within a certain number of days following the imposition of a sentence, the receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or the

(continued...)

Wright cites to cases involving transfer to the appellate court, death, illness, and retirement.[7] Otherwise, as stated in Harper:

> Without undertaking to say whether it is legal error for a non-sentencing judge to pass upon a timely [FRCrP Rule 35f] motion to reduce sentence, we hold under our supervisory power that the proper Judge to pass upon whether or not the sentence was too severe is the sentencing Judge. We therefore vacate the order denying a reduction of sentence and remand this case to the District Court for considered review by the sentencing Judge. To make certain that his decision in this case is made independent of and is not influenced by the prior conclusion of the trying Judge, the sentencing Judge should specifically set forth the reasons for his decision so as to provide this Court with a

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[6](...continued)
entry of any order or judgment of the Supreme Court of the United States denying review or effectively upholding the conviction.

It may be noted that the time period prescribed for sentence reduction in HRPP 35 is 90 days while in the prior version of FRCrP 35 described by Wright, the time period was 120 days. Also, HRPP Rule 35's statement that a motion to correct or reduce a sentence made within the 90-day time period will allow the court to make such correction or reduction even though the time period has expired. The federal rule for correcting or reducing a sentence, set forth in FRCrP Rule 35, was substantially amended effective as of December 1, 2004.

[7] See Gano v. United States, 705 F.2d 1136, 1137 (9th Cir. 1983) (holding that under the court's interpretation of Rule 4(a) governing § 2255 cases, the sentencing judge was unavailable for purposes of the rule when he was appointed to the Ninth Circuit Court because he was "no longer on the district court" and hence another judge could rule on Petitioner's § 2255 motion); United States v. Dobson, 609 F.2d 840 (5th Cir. 1980) (holding that sentence could be reduced pursuant to the defendant's Rule 35 motion by a judge other than the sentencing judge where the sentencing judge died), cert. denied 446 U.S. 955 (1980); Shale v. United States, 418 F.2d 210, 212 (5th Cir. 1969) (holding that where the judge who presided over the petitioner's trial was ill, the petitioner's post-conviction motion to vacate could be decided by another judge of the same district court); Carvell v. United States, 173 F.2d 348, 348-49 (4th Cir. 1949) (per curiam) (stating that "it is highly desirable . . . that the [§ 2255] motions be passed on by the judge who is familiar with the facts and circumstances surrounding the trial, and is consequently not likely to be misled by false allegations as to what occurred"); Tully v. Scheu, 487 F. Supp. 404, 409 (D. N.J. 1980) (holding that where the sentencing judge had retired and returned to the practice of law and politics, it would have been inappropriate for him to preside at a sentence reduction hearing"), reversed on other grounds by 637 F.2d 917 (3rd Cir. 1980); cf. United States v. Angiulo, 852 F. Supp. 54, 57 (D. Mass. 1994) (where the sentencing judge had taken senior status in the court and was "unavailable" to hear the defendants' Rule 35 motions, substitute judge should attempt to give defendants a genuine "second round" of sentencing whereby the substitute judge should read not only the primary materials - transcripts, court records, medical records, etc., but also secondary materials - opinions, memoranda, trial rulings, and orders of the trial judge and state and federal appellate decisions and "use[] them as a gloss on the cold trial record to arrive at . . . [an] appropriate sentence[] in the circumstances").

> correct, albeit limited, basis for review of this highly important determination.
>
> Vacated and remanded.

460 F.2d at 1025 (emphasis added and emphasis in original).[8] Cf. Gaertner v. United States, 763 F.2d 787, 795 n.8 (7th Cir. 1985) (observing, in applying literal application of 120-day rule under FRCrP Rule 35, that "the Fifth Circuit allows the sentencing judge more than 120 days to determine a Rule 35 motion" and that "the Fifth Circuit did not address . . . the propriety of reassigning a Rule 35 motion to a judge other than the original sentencing judge if the original sentencing judge is unavailable[]"), cert. denied, 474 U.S. 1009 (1985), superceded by rule on other grounds in 983 F.2d 78 (7th Cir. 1992).

Moreover, and for future occurrences, Petitioner points out that under our case law a judge who did not originally sentence the defendant is constrained in exercising his or her discretion in a manner contrary to that of the original judge. In other words, greater constraint is placed on the non-sentencing judge in administering HRPP Rule 35, because of the deference our case law requires be given to the decision of the judge who has already ruled on the core issue. See Wong, 66 Haw. at 396, 665 P.2d at 162 ("Unless cogent reasons support the second court's action, any modification of a prior ruling of

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[8] It cannot be determined with certainty what version of FRCrP Rule 35 was applicable in Harper, as the opinion does not indicate the date upon which the defendant filed his FRCrP Rule 35 motion. However, assuming that the motion was filed circa the 1972 date of the opinion, the version of FRCrP Rule 35 applicable in Harper would be the same as that applicable in United States v. Hammer, 496 F.2d 917 (5th Cir. 1974) (per curiam), infra.

another court of equal and concurrent jurisdiction will be deemed an abuse of discretion." (Emphasis in original.) (Citations omitted.)). Nothing in the language or history of HRPP Rule 35 would otherwise contemplate such restraint. As stated in Hammer:

> The second issue raised in the case sub judice is whether it was permissible for a district judge other than the sentencing judge to rule upon the appellant's motion to reduce sentence, without any indication that the sentencing judge is unavailable to make the determination as to the modification of the sentence. As in [Harper], we conclude that the district judge who accepted the appellant's guilty plea and sentenced him is the proper judge to adjudicate his Rule 35 motion.
>
> Accordingly, and without any intimation as to the ultimate determination on the narrow discretionary issue presented by the pleadings, we vacate the judgment denying the appellant's Rule 35 motion, and remand the cause with instructions that it be adjudicated by the judge who sentenced him.
>
> Vacated and remanded.[9]

496 F.2d at 918-19 (emphases added).

VII.

Although not raised by the parties, I believe it is not an uncommon practice in the circuit court for a sentencing judge to impose the maximum sentence with a view to later entertaining a reduction in sentence under HRPP Rule 35. This serves the dual purposes of impressing upon the defendant the seriousness of the offense and of allowing the defendant to show that he or she would be deserving of a reduced sentence based on conduct during the period intervening between the sentencing and the hearing on the HRPP Rule 35 motion.

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[9] The version of FRCrP Rule 35 applicable in Hammer was nearly identical to the version described in Wright with the exception that the Wright version contains the provision clarifying that a judge may, in his discretion, reduce a sentence of incarceration to a sentence of probation as this provision was added by amendment in 1979.

Based on the statements of the court and its invitation to the defense at the original sentencing proceeding to file a HRPP Rule 35 motion, this practice appears to have been followed in this case. Such circumstances make it more imperative that the sentencing judge hear the HRPP Rule 35 motion inasmuch as the sentencing judge initiated it and obviously had his reasons for doing so.

VIII.

Respondent argued in its answering brief that (1) Commonwealth v. Thompson, 195 A. 115, 117-18 (Pa. Sup. Ct. 1937), referred to "'substituting judges . . . for . . . suspending or imposing sentence[,]' . . . [and in the instant case] the sentence was already established and imposed by the original judge hearing the case," (2) Hi-Country is distinguishable because "Unlike Hi-Country where no justification was presented for the transfer, there is a justification for the reassignment of [Petitioner's] case to Judge Strange" inasmuch as "[i]n October 2002, the Third Drug Court was established naming Judge Ibarra as presiding [j]udge . . . and continued to hear other [c]ircuit [c]ourt matters[] . . . and presides over civil and criminal cases[,]" (3) "Harper . . . noted that 'the difficulty is that after receipt of the jury verdict of guilty, petitioner was sentenced by a different [j]udge[,]' [460 F.2d at 1025 (emphasis supplied) (brackets omitted), and t]hat is not the case here[,]" (4) in Harper there was no "indication that the

sentencing judge is unavailable to make the determination as to the modification of the sentence[,]" 496 F.2d at 917 (emphasis supplied)[,] . . . [and] Judge Ibarra was not available because he was transferred to Drug Court[,]" (5) the Ninth Circuit has held "it is common for judges to reassign a portion of their cases to a newly appointed judge[,]" id. (emphasis supplied), and "[t]he mere fact of reassignment does not give rise to an inference of bias or prejudice on the part of any judge[,]" id., (6) "the defense's inference that Judge Ibarra was going to reduce [Petitioner's] sentence was mere speculation[,]" (7) Petitioner pled no contest "[b]ecause of the brevity and clear-cut facts [of the case] . . . Judge Strance [was] able to familiarize herself with the history of the case, the parties and any other concerns which would affect ruling on a Rule 35 motion by looking at the files or having the parties brief her, which was done[,]" and (8) "the court [was not precluded] from reconsidering an earlier ruling if the court feels that the ruling was probably erroneous and more harm would be done by adhering to the earlier rule than from the delay incident to a reconsideration and the possible change in the rule of law to be applied[,]" (quoting Chun v. Bd. of Trs. of Employees' Ret. Sys. of State of Hawai'i, 92 Hawai'i 432, 441, 992 P.2d 127, 136 (2000)).

With respect to Respondent's argument (1), Petitioner persuasively responds that Thompson indicated

> "[t]he sentencing . . . of a person convicted of a crime is a judicial act of serious import in the administration of justice[.]" 195 A. at 31. A motion to reconsider sentence invokes the last judicial act before an individual is required to serve out a sentence . . . . By definition, a motion to reconsider sentence requires review by original sentencing judge [and t]here is no reasonable basis for concluding, as the prosecution does, that a motion to reconsider sentence need not be heard by the sentencing judge in the absence of a trial.

(Emphasis added.)

Apparently with respect to Respondent's arguments (2), (3) and (4), Petitioner asserts that there is no evidence Judge Ibarra would not have been able to hear the HRPP Rule 35 motion.

> [T]here was no necessity or justification for Judge Strance to decide the Rule 35 Motion instead of Judge Ibarra. The fact that Judge Ibarra was available and is still available as a judge of the Third Circuit is not disputed. The fact that Judge Ibarra has assumed primary responsibility for drug court cases does not in any way prevent him from hearing [Petitioner's] continued motion. Inasmuch as the opportunity for a reduction of sentence implicates [Petitioner's] liberty interest, the unjustified reassignment of his Rule 35 Motion to a judge other than the sentencing judge amounted to arbitrary and capricious conduct in violation of Canon 3 of the Revised Code of Judicial Conduct and [Petitioner's] constitutional rights to due process. United States Const., Fifth and Fourteenth Amend., Hawai'i State Const. Art. I § 5 . . . .

(Emphasis added.) There does not appear to have been any indication that Judge Ibarra was "unavailable" for any substantial or substantiated reason.

With respect to argument (5), Petitioner rejoins that he "does not dispute the general rule . . . which allows reassignment 'in order to promote efficiency, avoid conflicts, or to spread the case load . . .," including to newly assigned judges. However, Petitioner maintains Respondent's cases "involve[d] pre-trial reassignments which occurred following a motion for recusal and before the commencement of trial[, and

thus] . . . are inapplicable[.]"

Seemingly with respect to arguments (6), (7), and (8), Petitioner declares that

> [Petitioner's . . . change of plea was the result of plea negotiations conducted by Judge Ibarra. . . . [A]s [Respondent] notes, "Judge Ibarra invited [Petitioner] to file a Rule 35 motion. . . ." (Emphasis added.) Thereafter, Judge Ibarra . . . ordered that the hearing be furthered until a date when [Petitioner] would have served almost one year, exactly as contemplated by the plea agreement. . . .
>
> . . . It is reasonable to infer from his order continuing the motion . . . that Judge Ibarra intended to seriously reconsider the open term sentence in light of the passage of time and [Petitioner's] conduct during the one year of incarceration. . . . [T]o have [Petitioner] transported back to Hilo from the mainland facility for the furthered hearing . . . would be an unnecessary waste of expense if the judge was not seriously inclined to reduce [Petitioner's] sentence[.]"

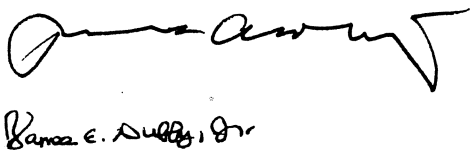
(Emphasis in original and emphases added.) Thus, there appears to be a factual basis for the contention that Judge Ibarra was intending to follow-up on the HRPP Rule 35 motion.

IX.

In sum, because there were colorable claims regarding Rule 35 and due process, Judge Strance should not have denied the HRPP Rule 40 motion without a hearing. However, rather than delay the proceeding by a further HRPP Rule 40 hearing, it would appear appropriate, as exemplified in Harper and Hammer, that the October 10, 1007 ICA judgment affirming the November 17, 2005 Order of Judge Strance denying Petitioner's Rule 40 petition, and the June 13, 2005 oral decision of Judge Strance denying the Rule 35 reconsideration motion (there was no written order denying this motion), should be vacated and that the Rule 35 motion be remanded with instructions that it be heard by Judge Ibarra.

X.

In light of the particular circumstances of this case, i.e., Judge Ibarra's involvement and statements at sentencing and post-sentencing, and the policy underlying Rule 35, that the sentencing judge should decide the Rule 35 motion unless unavailable for substantial reasons, Petitioner has met his burden in establishing "the need for further appeal," i.e., review, see HRS § 602-59(b) (Supp. 2007), and I would accept certiorari.



Ramsa E. Duffy, Jr.