DISSENT BY ACOBA, J.

I would accept the application for certiorari.

The Intermediate Court of Appeals (ICA) held that there were at least two grounds upon which the first circuit court (circuit court) should have held an evidentiary Hawai'i Rules of Penal Procedure (HRPP) Rule 40 hearing:

> 1. *[Petitioner/Petitioner-Appellant Mason Harold Hirakawa's (Petitioner's)] Belated Minimum-Term Hearing*
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> There is no dispute in the present case that [Petitioner's] minimum-term hearing before the [Hawai'i Paroling Authority (HPA)] did not take place before the expiration of the six-month statutory deadline established by [Hawai'i Revised Statutes (HRS)] § 706-669 [(1993)].
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> In Monalim v. State, 89 Hawai'i 474, 974 P.2d 1064 (App. 1998), this court vacated a circuit court's decision summarily denying as patently frivolous a [Hawai'i Rules of Penal Procedure (HRPP)] Rule 40 petition [(Rule 40 petition)] which alleged that the petitioner was entitled to post-conviction relief because the State had failed to uphold a parole revocation hearing within sixty days after the petitioner was recommitted to prison, as required by HRS § 706-670(7) (1993). . . .
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> . . . .
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> As to the second prong of the Monalim test, [Petitioner] had the burden of establishing that he suffered prejudice as a result of the delay. In his petition, [Petitioner] claimed that the delay in his minimum-term hearing prejudicially prolonged the period of time before he became eligible for parole because he was told that he could only apply for a reduction of his minimum term six months after the minimum term was set. In light of the undisputed violation of HRS § 706-669 and [Petitioner's] allegation of prejudice as a result of the violation, [Petitioner's] claim was not patently frivolous. A colorable claim was therefore presented and warranted an evidentiary hearing.
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> 2. *The Ineffective-Assistance-of-Counsel Claim*
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> [Petitioner] clearly had a constitutional due-process and statutory right to representation by counsel at his minimum-term hearing. D'Ambrosio v. State, 112 Hawai'i 446, 466, 146 P.3d 606, 626 (App. 2006). [Petitioner] claims that he was denied the effective assistance of counsel as a result of his attorney's failure to appear at [Petitioner's] minimum-term hearing. [Respondent/Respondent-Appellee State of Hawai'i (Respondent)] asserts, however, that [Petitioner] waived his right to counsel.
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> As in D'Ambrosio, the record on appeal does not include the record or transcript . . . . Under these circumstances, [Petitioner's] claim was not patently frivolous and a hearing would have been useful to discern the relevant facts. Id. . . . .

Hirakawa v. State, No. 28445, Order Dismissing Appeal at 8, 9, 10, 2008 WL 2486596, at *4-5 (App. Jun. 12, 2008) [hereinafter,

Dismissal Order] (italicized and some underscored emphases in original and some emphases added). However, the ICA sua sponte concluded that the petition was moot:

> Although [Petitioner] asserts that his chance at parole was illegally delayed because his enrollment in required prison programming was likewise delayed, he admits that he completed all of the originally required programming by October 27, 2006. Furthermore, [Petitioner] has already served the minimum term of imprisonment set by the HPA, and we are unaware of any legal authority that would allow [Petitioner] to be released from prison on parole due to a delay in the setting of his minimum prison term.

Dismissal Order at 11, 2008 WL 2486596, at *6 (footnote omitted) (emphases added).

To the contrary, the controversy here is not moot. Obviously Petitioner did not have any opportunity to argue why his petition was not moot. Significantly, Respondent did not argue the petition was moot, but primarily contended that Petitioner's claims were waived because he failed to raise such claims in his Rule 40 petition and that Petitioner's due process claim based on the HPA's failure to timely set his minimum terms were "patently frivolous and without support in the record or the evidence submitted." Per Respondent's arguments, it may be inferred that Petitioner's claims could be of merit if such facts and evidence were raised in his Rule 40 petition. Such an inference is further supported by the fact that Respondent recommended in its conclusion that, in the alternative, "this matter be remanded to the [c]ircuit [c]ourt for an evidentiary hearing on the [Rule 40 p]etition," to give Respondent an "opportunity to brief these issues or the [c]ircuit [c]ourt an opportunity to rule on them." (Emphasis added.)

There is an effective remedy here based on several grounds. First, granting Petitioner a new minimum term hearing is an appropriate remedy to resolve the HPA's four-month delay

and its domino effect on Petitioner's sentence. Coulter v. State, 116 Hawai'i 181, 184, 172 P.3d 493, 496 (2007). In Coulter, a new hearing was an appropriate remedy when the new hearing "could lead to a different minimum term order because the HPA's decision-making will be constrained by the requirement that it provide a basis for its decision, or otherwise explain a deviation from its guidelines." Id. at 186, 172 P.3d at 498.

Second, in this case, the imposition of the Lifeline program after Petitioner completed his original program requirements could be considered a deviation from the minimum-term sentence as Petitioner argued. Requiring Petitioner to complete the Lifeline program extended his minimum-term for an additional twelve to eighteen months, in effect extending his minimum-term without a hearing or explanation.

Finally, if in fact Petitioner was not appropriately represented by an attorney at his minimum term hearing (a matter which only an evidentiary hearing can determine), then the Rule 40 petition is not moot inasmuch as Petitioner's minimum sentence would have been imposed in an invalid proceeding. For the reasons stated, I would accept the application and permit this court to review the ICA's decision.