

NOT FOR PUBLICATION

NO. 25328

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

SOLONU'U TUUA, Petitioner-Appellant, v.
STATE OF HAWAI'I, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(SPP NO. 01-1-0025)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Foley, J.J.)

On May 16, 2001, Petitioner-Appellant Solonu'u Tuua (Tuua) filed a "Motion for Correction of Illegal Sentence Pursuant to HRPP [Hawai'i Rules of Penal Procedure] Rule 35" (HRPP Rule 35 Motion). The court considered the HRPP Rule 35 Motion as a "Nonconforming Petition for Post-Conviction Relief subject to the requirements of Rule 40 of the Hawaii Rules of Penal Procedure".¹

Tuua appeals from the August 22, 2002 "Order Denying

¹ Hawai'i Rules of Penal Procedure (HRPP) Rule 40(c)(2) (2004) states, as it did in 2002, as follows:

Nonconforming Petition. Where a post-conviction petition deviates from the form annexed in these rules, it shall nevertheless be accepted for filing and shall be treated as a petition under [Rule 40] provided that the petition (i) claims illegality of a judgment or illegality of "custody" or "restraint" arising out of a judgment, (ii) is accompanied by the necessary filing fee or by a well-founded motion for waiver of the filing fee or request to proceed in forma pauperis, and (iii) meets minimum standards of legibility and regularity.

NOT FOR PUBLICATION

Motion for Correction of Illegal Sentence Pursuant to HRPP Rule 35 Without Hearing" entered in the Circuit Court of the First Circuit, Judge Derrick Chan presiding. We affirm.

BACKGROUND

The record shows that, on February 10, 1978, at about 8:30 p.m., Tuua, armed with a handgun and accompanied by two male companions, entered a restaurant on Liliha Street in Honolulu. Tuua emptied the cash register, robbed the restaurant's patrons, and physically assaulted and injured two of them. Following the robberies, Tuua and his companions fled the restaurant. The restaurant owner, Kai Man Leung, gave chase and was fatally shot by Tuua.

In Cr. No. 51455, a jury found Tuua guilty of one count of Murder, Hawaii Revised Statutes (HRS) § 707-701 (1976 Repl.)², and eight counts of Robbery in the First Degree, of which two were in violation of HRS § 708-840(1)(b)(i) (1976 Repl.) and six were in violation of HRS § 708-840(1)(b)(ii) (1976 Repl.). The September 29, 1980 Amended Judgment sentenced Tuua to serve (a) concurrent nonmandatory terms of imprisonment of (i) life with

² As originally enacted in 1972, HRS § 707-701 stated as follows:

Murder. (1) Except as provided in section 707-702, a person commits the offense of murder if he intentionally or knowingly causes the death of another person.

(2) Murder is a class A felony for which the defendant shall be sentenced to imprisonment as provided in section 706-606.

the possibility of parole for the Murder conviction,³ and (ii) twenty years for each conviction of Robbery in the First Degree, and (b) mandatory terms of imprisonment of ten years, without the possibility of parole, for each count.

Tuua filed a notice of appeal on October 2, 1980. In the appeal, Tuua was represented by counsel. In State v. Tuua, 3 Haw. App. 287, 649 P.2d 1180 (1982), this court affirmed the Murder conviction and six of the eight Robbery in the First Degree convictions and reversed two of the Robbery in the First Degree convictions.

On May 16, 2001, Tuua filed the HRPP Rule 35 Motion.⁴

³ HRS § 706-606 (1976 Repl.) stated in relevant part:

Sentence for offense of murder. The court shall sentence a person who has been convicted of murder to an indeterminate term of imprisonment. In such cases the court shall impose the maximum length of imprisonment as follows:

- (a) Life imprisonment without possibility of parole in the murder of:
 - (i) A peace officer while in the performance of his duties, or
 - (ii) A person known by the defendant to be a witness in a murder prosecution, or
 - (iii) A person by a hired killer, in which event both the person hired and the person responsible for hiring the killer shall be punished under this subsection, or
 - (iv) A person while the defendant was imprisoned.

. . . .

- (b) Life imprisonment with possibility of parole or twenty years as the court determines, in all other cases.

⁴ HRPP Rule 35 (2002) stated in relevant part:

Correction or reduction of sentence.

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the

Tuua alleges in the motion that the sentence he received for the Murder conviction was illegal because: (1) "at the time [Tuua] was sentenced the statutes' [sic] for class 'A' felonies is [sic] twenty years, as stated in Hawai'i legislation [sic] enactments at the time [Tuua] was sentenced"; and (2) "the sentencing judge did not sentence [Tuua] to the statutory code that defines different classes of offense[s]."

On July 3, 2001, the State filed a memorandum in opposition to Tuua's motion (State's Memorandum) stating, in relevant part, as follows:

Before discussing the facts and law in this case, the State requests that the Motion be treated as a nonconforming petition under [HRPP Rule 40], and that the court issue a written order that the requirements of [HRPP Rule 40] apply:

. . . .

If the Motion is not treated as a [HRPP Rule 40] petition,

time provided herein for the 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 a judgment of conviction. A motion to correct or reduce a sentence which is made within the time period aforementioned 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.

(2004) Pursuant to an amendment effective July 1, 2003, HRPP Rule 35 states in relevant part:

Correction or reduction of sentence.

(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. . . .

NOT FOR PUBLICATION

the State moves to dismiss the Motion for lack of jurisdiction because it is in substance a motion to reduce sentence and was not filed within 90 days after sentence was imposed, thus depriving this court of jurisdiction. [HRPP Rule 35].

On July 16, 2001, in Cr. No. 51455, the court ordered:

(1) the removal of the HRPP Rule 35 Motion and the State's Memorandum from Cr. No. 51455; and (2) their placement in a Special Proceedings Prisoner (SPP) case newly created for that purpose. That same day, Tuua filed a "Motion to Supplement HRPP Rule 35" (Motion to Supplement). In this motion, Tuua alleged that: (1) "[t]he [HRPP Rule 35 Motion] [was] incomplete as to include the repeal of the statute [Hawai'i Penal Code (HPC)] § 706-606 [SENTENCE] FOR OFFENSE OF MURDER"; and (2) "[n]o person convicted under [HPC § 706-606] cannot [sic] be held in accordance with a statute that no longer exists." On August 14, 2001, the court ordered the filing of the Motion to Supplement in SPP 01-1-0025.

On August 15, 2001, in SPP 01-1-0025, it appears that the court entered an "ORDER DESIGNATION [sic] MOTIONS AS NONCONFORMING PETITION FOR POST-CONVICTION RELIEF & DIRECTING PETITIONER TO FILE SUPPLEMENTAL PETITION".

It appears that Tuua never filed the supplemental petition. Instead, on August 31, 2001, in Cr. No. 51455, Tuua filed a "Motion for Reconsideration of Order Removing Defendant's Motion for Correction of Illegal Sentence Pursuant to HRPP Rule 35". On August 22, 2002, the court entered its "Order Denying

Defendant's Motion for Reconsideration of Order Removing Defendant's Motion for Correction of Illegal Sentence Pursuant to HRPP Rule 35."

On August 22, 2002, in SPP No. 01-1-0025, the court entered an "Order Denying Motion for Correction of Illegal Sentence Pursuant to HRPP Rule 35 Without Hearing." The order stated in pertinent part:

The Court finds that [Tuua] is mistaken as to the applicable law and therefore his Petition is patently frivolous.

Accordingly, the Court finds the Petition is without merit as a claim for relief under Rule 40 of the Hawaii Rules of Penal Procedure and hereby denies the same.

Tuua filed a notice of appeal on September 16, 2002. The appeal was assigned to this court on May 19, 2003.

POINTS ON APPEAL

Tuua contends that, in deciding the HRPP Rule 35 Motion and entering its August 22, 2002 Order in Cr. no. 51455, the court:

1. erred when it considered his motion as a HRPP Rule 40 motion rather than as a HRPP Rule 35 motion;
2. disregarded applicable legislative acts and laws;
3. violated his constitutional right to counsel; and
4. was swayed by fear of criticism, and performed its duties with bias and prejudice.

NOT FOR PUBLICATION

STANDARDS OF REVIEW

Conclusions of Law

"An appellate court may freely review conclusions of law and the applicable standard of review is the right/wrong test. A conclusion of law that is supported by the trial court's findings of fact and that reflects an application of the correct rule of law will not be overturned." Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994) (citations and internal quotation marks omitted).

Abuse of Discretion

"Generally, to constitute an abuse[,] it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." State v. Crisostomo, 94 Hawai'i 282, 287, 12 P.3d 873, 878 (2000) (citations omitted).

Statutory Interpretation

"[T]he interpretation of a statute . . . is a question of law reviewable *de novo*." State v. Kotis, 91 Hawai'i 319, 327, 984 P.2d 78, 86 (1999) (citations omitted). "Under the *de novo* standard, this court must examine the facts and answer the pertinent question of law without being required to give any weight or deference to the trial court's answer to the question. In other words, we are free to review a trial court's conclusion of law for its correctness." State v. Kelekolio, 94 Hawai'i 354,

357, 14 P.3d 364, 367 (App. 2000) (citation omitted).

The Hawai'i Supreme Court has repeatedly stated that when interpreting a statute, an appellate court's

foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And where the language of the statute is plain and unambiguous, [a court's] only duty is to give effect to the [the statute's] plain and obvious meaning.

State v. Wells, 78 Hawai'i 373, 376, 894 P.2d 70, 73 (1995)

(citations, brackets, and internal quotation marks omitted).

Accordingly,

we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. . . .

In construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool. This court may also consider the reason and spirit of the law, and the cause which induced the legislature to enact it to discover its true meaning. Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another.

State v. Rauch, 94 Hawai'i 315, 322, 13 P.3d 324, 331 (2000)

(citations, brackets, ellipses and internal quotation marks and block quote format omitted).

Questions of Constitutional Law

We review questions of constitutional law "by exercising our own independent constitutional judgment based on the facts of the case." State v. Rogan, 91 Hawai'i 405, 411, 984

P.2d 1231, 1237 (1999) (citations omitted). Therefore, "we review questions of constitutional law under the right/wrong standard." State v. Mallan, 86 Hawai'i 440, 443, 950 P.2d 178, 181 (1998) (citation omitted).

Plain Error

HRPP Rule 52(b) (2004) states, "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Therefore, in criminal cases, an appellate court "may recognize plain error when the error committed affects substantial rights of the defendant." State v. Davia, 87 Hawai'i 249, 253, 953 P.2d 1347, 1351 (1998) (citing State v. Cullen, 86 Hawai'i 1, 8, 946 P.2d 955, 962 (1997)).

Harmless Error

In State v. Holbron, the Hawai'i Supreme Court made it clear that, with the possible exception of a limited class of trial errors not relevant here, the standard of review applicable to all trial errors is the "harmless beyond a reasonable doubt" standard. 80 Hawai'i 27, 32 n.12, 904 P.2d 912, 917 n.12 (1995). Holbron also teaches that

[e]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error might have contributed to conviction.

Id. at 32, 904 P.2d at 917 (internal quotation marks, citation,

and internal block quote format omitted).

DISCUSSION

1.

Whether the circuit court erred in
considering Tuua's HRPP Rule 35 Motion
as an HRPP Rule 40 Motion.

We agree with Tuua that the court erred when it considered Tuua's HRPP Rule 35 Motion as an HRPP Rule 40 motion.

Tuua's HRPP Rule 35 Motion alleged that the sentence imposed on him by the September 29, 1980 Amended Judgment was an illegal sentence and asked the court to correct that illegality. The fact that, if his motion was successful, the result would have been a reduced sentence did not convert his motion from a motion for a mandatory correction of an illegal sentence into a motion for a discretionary reduction of a legal sentence. As noted supra n.4, HRPP Rule 35 (2004) permits the court to "correct an illegal sentence at any time[.]" The time limits imposed by HRPP Rule 35 apply to requests to "reduce a sentence" or to "correct a sentence imposed in an illegal manner[.]" Tuua's HRPP Rule 35 Motion was a motion to "correct an illegal sentence" that was timely under HRPP Rule 35.

However, the court's treatment of Tuua's HRPP Rule 35 Motion as a nonconforming HRPP Rule 40 petition for post-conviction relief had no effect on the merits of Tuua's claim that his sentence is illegal. Consequently, Tuua has not

suffered any detriment from the circuit court's erroneous decision to treat his HRPP Rule 35 Motion as a nonconforming petition for post-conviction relief, pursuant to HRPP Rule 40. Therefore, the error was harmless.

2.

Whether the circuit court disregarded legislative acts and laws supporting Tuua's claim.

Tuua contends that his September 29, 1980 sentence is now incorrect because (a) Act 314, Session Laws of Hawai'i 1986 (Act 314) permits him to "collaterally attack his sentence now, in this day and age[,]" (b) his present sentence which was imposed pursuant to HRS § 706-606 (1976 Repl.) is illegal because that version of that statute was repealed by Act 314, and (c) "the only remedy" is to sentence him to a twenty-year term, as set forth in HRS § 706-659 (1994), because this statute establishes the current sentence for a class A felony.⁵

(a)

Effect of HRS § 701-101 (1993)

As a result of Act 314, effective January 1, 1987, HRS § 701-101 (1993) states, in relevant part, as follows:

⁵ HRS § 706-659 (Supp. 2003) states in relevant part:

Sentence of imprisonment for class A felony. Notwithstanding part II; sections 706-605, 706-606, 706-606.5, 706-660.1, 706-661, and 706-662; and any other law to the contrary, a person who has been convicted of a class A felony . . . shall be sentenced to an indeterminate term of imprisonment of twenty years without the possibility of suspension of sentence or sentence of probation.

Applicability to offenses committed before the effective date of amendments. (1) Except as provided in subsection (2), amendments made by Act 314, Session Laws of Hawaii 1986, to this Code do not apply to offenses committed before the effective date of Act 314, Session Laws of Hawaii 1986. Prosecutions for offenses committed before the effective date of Act 314, Session Laws of Hawaii 1986, are governed by the prior law, which is continued in effect for that purpose, as if amendments made by Act 314, Session Laws of Hawaii 1986, to this Code were not in force. For purposes of this section, an offense is committed before the effective date of Act 314, Session Laws of Hawaii 1986, if any of the elements of the offense occurred before that date.

(2) In any case pending on or commenced after the effective date of amendments made by Act 314, Session Laws of Hawaii 1986, to this Code, involving an offense committed before that date upon the request of the defendant, and subject to the approval of the court, the provisions of chapter 706 [Disposition of Convicted Defendants] amended by Act 314, Session Laws of Hawaii 1986, may be applied in particular cases.

We conclude that Act 314 is not applicable to Tuua's case under either HRS § 701-101(1) or HRS § 701-101(2).

As indicated in HRS § 701-101(1), Tuua's case is "governed by the prior law . . . as if amendments made by Act 314 . . . were not in force." Tuua committed the offense in 1978, before the effective date of Act 314. Thus, under HRS § 701-101(1), Act 314 is inapplicable to Tuua's case "[e]xcept as provided in [HRS § 701-101](2)."

HRS § 701-101(2) allows the sentencing provisions of HRS chapter 706, as amended by Act 314, to be applied (1) as to any case concerning any offense committed before January 1, 1987, (2) if the case is pending on or commenced after January 1, 1987 (3) upon the request of the defendant and (4) subject to the approval of the court. Tuua was sentenced on September 29, 1980. His case was neither pending on, nor commenced after, January 1, 1987. Therefore, the requirements of HRS § 701-101(2) were not

met, and Tuua was not entitled to be sentenced under the provisions of chapter 706, as amended by Act 314.

(b)

Repeal of HRS § 706-606 (1976 Repl.)

Tuua's contention that the repeal of HRS § 706-606 (1976 Repl.) on January 1, 1987, renders his sentence illegal relies on Kaiser Foundation Health Plan, Inc. v. Department of Labor and Industrial Relations, Unemployment Insurance Division, 70 Haw. 72, 762 P.2d 796 (1988). This reliance, however, is misplaced. In Kaiser, the Hawai'i Supreme Court held that "[i]n the absence of clear legislative intent to the contrary, repeal means the statute or statutory provision no longer exists." Id. However, it was not held that the repeal of a law has any effect on past applications of that law. Moreover, in other cases, the Supreme Court has held that "a change to the law, such as repeal, has no bearing on previous applications of the prior law absent legislative expression to the contrary." State v. Levi, 102 Hawai'i 282, 287, 75 P.3d 1173, 1178 (2003) (citing Hun v. Ctr. Props., 63 Haw. 273, 282, 626 P.2d 182, 188-89 (1981)). See generally United States v. Woods, 986 F.2d 669, 674 (3rd Cir. 1993) ("Our legal system has a strong interest in the finality of adjudication. Accordingly, we do not apply new judicial decisions retroactively without substantial justification.").

Regarding the repeal of HRS § 706-606, the Hawai'i

Supreme Court stated in Levi, "We discern no legislative intent or expression in Act 314 indicating that the repeal of the life sentencing language in HRS § 706-606 on January 1, 1987 rendered any sentence previously imposed thereunder invalid." 102 Hawai'i at 287, 75 P.3d at 1178. Therefore, Tuua was properly sentenced on September 29, 1980 under the law set forth in HRS § 706-606 (1976 Repl.).

(c)

Applicability of HRS 706-659 (1993)

Tuua's contention that he should be sentenced to a twenty-year term pursuant to the sentencing guidelines for class A felonies set forth in HRS § 706-659 is without merit. While it is true that until its repeal on January 1, 1987, HRS § 707-701 (1973 Repl.) described Murder as a class A felony, it also specifically directed that a defendant "shall be sentenced to imprisonment as provided in [HRS §] 706-606." For the reasons stated earlier, the repeal of HRS § 706-606 (1976 Repl.) on January 1, 1987 had no bearing on Tuua's sentence imposed in 1980. Thus, HRS § 706-659 would not have been applicable, as Tuua's sentence would have been properly governed by HRS § 706-606 (1976 Repl.).

In his reply brief, Tuua contends that a term of twenty years is the statutory maximum sentence for a murder conviction, and that an increase to a sentence of life imprisonment with the

possibility of parole constitutes an enhanced sentence. This argument is likewise without merit. Under HRS § 706-606 (1976 Repl.), the court was required to impose a sentence of "Life imprisonment with possibility of parole or twenty years as the court determines." The sentence imposed by the court conforms to the requirements of the statute, as it was clearly within the court's discretion to impose either a sentence of life imprisonment with the possibility of parole or a term of twenty years. Tuua's sentence is not an enhanced sentence.

We note that even if Tuua were sentenced under current guidelines, HRS § 706-659 would still not apply. As with HRS § 706-606, Act 314 also amended the language of HRS §707-701. As a result, effective January 1, 1987, Murder is now classified as either "first degree murder" or "second degree murder," and is no longer defined as a class A felony. Sentences imposed upon murder convictions are now governed by HRS § 706-656 (Supp. 2003), which states in relevant part:

Terms of imprisonment for first and second degree murder and attempted first and second degree murder. (1) Persons convicted of first degree murder or first degree attempted murder shall be sentenced to life imprisonment without possibility of parole.

. . . .

(2) Except as provided in section 706-657, pertaining to enhanced sentence for second degree murder, persons convicted of second degree murder and attempted second degree murder shall be sentenced to life imprisonment with possibility of parole.

Therefore, a murder conviction is still punishable by a sentence of life imprisonment. In fact, contrary to Tuua's contentions, a

twenty-year sentence for a murder conviction is no longer an option under current sentencing guidelines.

3.

Whether the circuit court abused its discretion by failing to appoint counsel for Tuua.

We conclude that, even if Tuua's HRPP Rule 35 Motion was an HRPP Rule 40 motion, Tuua was not entitled to appointed counsel, either as a matter of constitutional right or under HRPP Rule 40(i).

Tuua contends that the circuit court abused its discretion by failing to appoint counsel for him. He cites HRS § 802-1 (1993), which describes the right of an indigent person to representation by the public defender or other appointed counsel.⁶ However, this right does not extend to HRPP Rule 40 proceedings.

It is well settled that an indigent defendant in a criminal case has a constitutional right to court appointed counsel on his/her appeal of right from a judgment of conviction. See Douglas v. California, 372 U.S. 353, 354-58 (1963). In Pennsylvania v. Finley, however, the United States Supreme Court

⁶ HRS § 802-1 (1993) states in relevant part:

Right to representation by public defender or other appointed counsel. Any indigent person who is (1) arrested for, charged with or convicted of an offense or offenses punishable by confinement in jail or prison or for which such person may be or is subject to the provisions of chapter 571 . . . shall be entitled to be represented by a public defender. If, however, conflicting interests exist, or if the public defender for any other reason is unable to act, or if the interests of justice require, the court may appoint other counsel.

held that the federal constitutional right to counsel does not extend to post-conviction challenges:

We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, a *fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process.

481 U.S. 551, 555 (1987) (citations omitted).

In the instant case, counsel was appointed for Tuua for his appeal of right from the judgment of conviction. See Tuua, 3 Haw. App. at 299, 649 P.2d at 1182. Therefore, under the guidelines established by Douglas and Finley, Tuua was afforded his constitutional right to counsel.

The Hawai'i Supreme Court has held that while there is no constitutional right to appointed counsel in post-conviction collateral proceedings, such counsel may nonetheless be appointed at the discretion of the court.⁷ See Engstrom v. Naauao, 51 Haw. 318, 321, 459 P.2d 376, 378 (1969). In Engstrom, the Hawai'i Supreme Court concluded:

⁷ HRPP Rule 40 (2004) describes conditions under which appointment of counsel is required, in the event a Rule 40 motion is brought:

(i) *Indigents*. If the petition alleges that the petitioner is unable to pay the costs of the proceedings or to afford counsel, the court shall refer the petition to the public defender for representation as in other penal cases; provided that no such referral need be made if the petitioner's claim is patently frivolous and without trace of support either in the record or from other evidence submitted by the petitioner.

The constitutional right to assistance of counsel under the sixth amendment of the United States Constitution, does not apply to habeas corpus proceedings. The petition here is one for post-conviction collateral remedy. Appointment of counsel for an indigent in such proceedings is discretionary with the court. Appointment may be properly made if the petition raises substantial issues which require marshalling of evidence and logical presentation of evidence and logical presentation of contentions. No such issue has been raised in the petition in this case.

Id. (citations omitted).

In this case, Tuua has not demonstrated his eligibility for appointed counsel. It does not even appear, from the record, that he ever requested counsel by submitting an HRPP Appendix Form B, In Forma Pauperis Declaration. Further, as discussed in the previous section, Tuua has failed to raise "substantial issues" that would justify the appointment of counsel. Therefore, even if we were to assume Tuua's inability to pay for the costs of proceedings or to afford counsel, we cannot conclude that the court abused its discretion by deciding not to appoint counsel for Tuua.

4.

Whether the court was swayed by fear of criticism or exhibited bias or prejudice.

Finally, Tuua contends that the court was swayed by fear of criticism and exhibited bias and prejudice against him, and the presiding judge should therefore have *sua sponte* recused himself from the case. Tuua bases this contention on the facts

that (a) the court failed to appoint him counsel, (b) other appellants (presumably raising similar issues) were appointed counsel, and (c) the court gave "more credible consideration" to the State's position and denied his petition. We conclude that none of these alleged facts is evidence that the court was swayed by fear of criticism or exhibited bias or prejudice against Tuua.

Our conclusion above that Tuua was not entitled to appointed counsel, either as a matter of constitutional right or under HRPP Rule 40(i), proves that facts (a) and (b) do not provide any indication that the court was swayed by fear of criticism or exhibited bias or prejudice against Tuua.

As for Tuua's remaining argument, that the circuit court gave "more credible consideration" to the State's position, Tuua appears to simply take issue with the court's substantive analysis and subsequent ruling against him. We have previously concluded that the court's August 22, 2002 ruling was correct. Further, it has long been recognized by the Hawai'i Supreme Court that "petitioners may not predicate their claims of disqualifying bias on adverse rulings, even if the rulings are erroneous." State v. Ross, 89 Hawai'i 371, 378, 974 P.2d 11, 18 (1998). We apply the same rule to Tuua's assertion that the court was swayed by fear of criticism.

CONCLUSION

Accordingly, we affirm the circuit court's August 22, 2002 "Order Denying Motion for Correction of Illegal Sentence Pursuant to HRPP Rule 35 Without Hearing".

DATED: Honolulu, Hawai'i, April 28, 2004.

On the briefs:

Solonu'u Tuua
for Petitioner-Appellant. Chief Judge

Daniel H. Shimizu,
Deputy Prosecuting Attorney.
City and County of Honolulu,
for Respondent-Appellee. Associate Judge

Associate Judge