

In the Matter of the  
HAWAII RULES OF PENAL PROCEDURE

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ORDER

\_\_\_\_ (By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

The Permanent Committee on Rules of Penal Procedure and Circuit Court Criminal Rules proposed amendments to Rule 40 of the Hawaii Rules of Penal Procedure (HRPP) that would add the following two sections:

**(j) Time limits.** A five (5) year period of limitation shall apply to a petition filed for post-conviction relief under this rule. The limitation period shall run from the last of:

(1) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(2) the date on which the impediment to filing an application created by a governmental action in violation of the Constitution of the State of Hawaii or the Constitution of the United States that prevented the filing of the petition for post-conviction relief was removed;

(3) the date on which a newly created constitutional rule under the Constitution of the State of Hawaii or the Constitution of the United States was initially recognized and made retroactively applicable to cases on collateral review by the Supreme Court of the State of Hawaii or the Supreme Court of the United States; or

(4) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence; and the newly discovered evidence, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by a preponderance of the evidence that no reasonable fact finder would have found the petitioner guilty of the offense.

**(k) Successive petitions.** A claim presented in a second or successive post-conviction petition under this rule that was not presented in a prior petition shall be dismissed unless:

(1) the petitioner shows that the claim relies on a previously unavailable new rule of constitutional law under the Constitution of the State of Hawaii or the Constitution of the United States, made retroactive to cases on collateral review by the Supreme Court of the State of Hawaii or the Supreme Court of the United States; or

(2) the factual basis for the claim could not have been discovered previously through the exercise of due diligence, and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

After study and consideration of the comments we received, including consideration of the Legislature's authority with regard to the privilege of the writ of habeas corpus, we believe adoption of the proposal would be inappropriate. See HRPP Rule 40(a) ( 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 . . . ); Article VI, Section 7 of the Hawaii Constitution ( The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law. ); and Article I, Section 15 of the Hawaii Constitution ( The power of suspending the privilege of the writ of habeas corpus, and the laws or the execution thereof, shall never be exercised except by the legislature, or by authority derived from it to be exercised in such particular cases only as the legislature shall expressly prescribe. ). Therefore,

IT IS HEREBY ORDERED that the proposed amendments to  
HRPP Rule 40 are rejected.

DATED: Honolulu, Hawaii, November 7, 2007.