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CAAP-13-0003270,
CAAP-13-0002792, and CAAP-13-0002731

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

ROY RITA, Petitioner-Appellant,
v.
STATE OF HAWAII, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(SPP NO. 13-1-0001 (CR NO. 02-1-0139))

SUMMARY DISPOSITION ORDER

(By: Nakamura, C.J., and Foley and Fujise, JJ.)

Petitioner-Appellant Roy Rita (Rita) appeals from the "Findings of Fact; Conclusions of Law; Order Denying Petitioner Roy Rita's [Hawaii Rules of Penal Procedure (HRPP)] Rule 40 Petition for Post-Conviction Relief, Filed March 6, 2013" (Order Denying Petition), which was entered by the Circuit Court of the Fifth Circuit (Circuit Court)^{1/} on July 10, 2013. As explained below, we vacate the Order Denying Petition and remand for further proceedings.

^{1/} The Honorable Kathleen N.A. Watanabe presided.

I.

In 2003, Rita was convicted of continuous sexual assault of a minor under the age of fourteen, in violation of Hawaii Revised Statutes (HRS) § 707-733.5 (Supp. 1997), and was sentenced to twenty years of imprisonment. On March 6, 2013, Rita filed a "Petition for Post-Conviction Relief" (Petition), pursuant to HRPP Rule 40 (2006), that is at issue in this case. In his Petition, Rita asserted various grounds for relief including: (1) ineffective assistance of trial counsel; (2) prosecutorial misconduct; and (3) the trial court's violation of his rights to due process and a fair trial. In conjunction with his Petition, Rita filed an application for appointment of counsel. By order filed on March 6, 2013, the Circuit Court granted the application and appointed the Public Defender's Office to represent Rita in the HRPP Rule 40 proceedings.

Despite the Circuit Court's appointment of counsel, the record indicates that the Public Defender's Office could not represent Rita due to a conflict and that Rita was never represented by counsel prior to the Circuit Court's filing of its Order Denying Petition on July 10, 2013. After Rita, *pro se*, filed a notice of appeal, the Circuit Court appointed private counsel, Emmanuel Guerrero, to represent Rita in this appeal.

II.

On appeal, Rita argues that because the Circuit Court appointed counsel to represent him in the HRPP Rule 40 proceedings, the Circuit Court erred in entering its Order Denying Petition without affording Rita the benefit of counsel. Respondent-Appellee State of Hawai'i concedes error and states that the Order Denying Petition should be vacated and the case remanded "so that [Rita] may receive the assistance of counsel before disposition of his Rule 40 petition." Under the particular circumstances of this case, and in light of the State's concession of error, we conclude that Rita should have been afforded the benefit of counsel before the Circuit Court entered its Order Denying Petition. We therefore vacate the

Order Denying Petition, and we remand the case for further proceedings consistent with this Summary Disposition Order.

DATED: Honolulu, Hawai'i, April 29, 2014.

On the briefs:

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Craig H. Nakamura
Chief Judge

Cherie R. Foley
Associate Judge

Anna R. Fujim
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