No. SCWC-15-0000111

IN THE SUPREME COURT OF THE STATE OF HAWAII

ALBERT VILLADOS, Petitioner-Appellant, vs. STATE OF HAWAII, Respondent-Appellee.	ON APPLICATION FOR A WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS ICA SDO: Sep. 21, 2018 ICA Judgment: Oct. 25, 2018 SPP No. 13-1-0009(2) Circuit Court of the Second Circuit Hon. Peter T. Cahill Order: Feb. 24, 2015

APPLICATION FOR A WRIT OF CERTIORARI

APPENDIX 1

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For every wrong, the law provides a remedy (ubi jus, ibi remedium)[1]

Every court below agreed Petitioner Alberto Villados suffered a grave constitutional wrong: the circuit court concluded—and the ICA affirmed—that his lawyer was ineffective. As a consequence, Villados missed a jurisdictional deadline. But both courts also held that a Hawaii Rules of Penal Procedure 40 post-conviction petition afforded no remedy, because it was Villados' *appellate* counsel who rendered ineffective assistance: she failed to apply to this Court for a writ of certiorari, and as a consequence, this Court dismissed as untimely the certiorari application which Villados later submitted in *pro se*.

The circuit court and the ICA assumed the only remedy available was to have this Court reconsider the certiorari application Villados' counsel's malfeasance caused him to file too late. Neither court could compel that, of course, so the ICA affirmed the circuit court's dismissal of Villados' Rule 40 petition because the remedy for the constitutional defect lay outside Rule 40, and solely with this Court. In essence, the courts below dismissed the petition because they believed the only "appropriate order" under Rule 40 would require them to effectively overrule this Court's earlier dismissal of Villados' untimely application for certiorari. This merits this Court's review.

Rule 40 provides that if the circuit court finds in favor of the petitioner, "it shall enter an appropriate order with respect to the judgment[.]" Haw. R. Penal P. 40(g)(1). The court found that Villados' appellate lawyer was unconstitutionally ineffective because she did not apply for certiorari. The ICA affirmed. But because the circuit court could not order that Villados' untimely certiorari application be reconsidered by this Court, the ICA agreed that it was without power to act. That, however, only meant that the "appropriate order" in this case was to enforce some other remedy, not deny the petition. *Briones v. State*, 74 Haw. 442, 467, 848 P.2d 966, 978

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[1] *See Feist v. Young*, 138 F.2d 972, 974 (7th Cir. 1943) ("It is an elementary maxim of equity jurisprudence that there is no wrong without a remedy . . .").

(1993) ("A conviction will be reversed, therefore, if the defendant was denied effective assistance at trial or on appeal.") (citation omitted). But even though the ICA recognized the constitutional error and that the circuit court was the proper forum to address it, it affirmed the circuit court's denial of the petition, concluding that Villados "must obtain relief from the supreme court." Dkt. 109 (ICA SDO, Sep. 21, 2018) at 6 (Appendix 1).

This Court should accept certiorari because the ICA gravely erred when it concluded that "Villados was not entitled to an order vacating his conviction, a new trial, or resentencing" and the circuit court "could not provide Villados with this requested relief." SDO at 5.

QUESTION PRESENTED

> When a circuit court determines, on a petition for post-conviction relief under Rule 40 of the Hawaii Rules of Penal Procedure, that the petitioner's appellate lawyer rendered ineffective assistance of counsel by missing the deadline to seek a writ of certiorari, is the "appropriate" remedy limited to allowing the petitioner to file an application for certiorari, or must the court effect another remedy such as vacating the judgment, or ordering a new trial or resentencing?

STATEMENT OF THE CASE AND PRIOR PROCEEDINGS

I. The ICA Affirmed The Conviction

On April 15, 2010, the Circuit Court for the Second Circuit convicted Villados of promoting a dangerous drug in the second degree and a related charge. SDO at 1; Dkt. 21 at 581. Villados appealed the conviction and 35-year sentence. *Id*. at 584. During briefing, the court appointed him a new lawyer. *Id*. at 585. She filed his Reply Brief. *Id*. at 1217. The ICA affirmed on November 28, 2011. SDO at 1.

II. Villados' Appellate Counsel Missed The Certiorari Deadline

By letter dated December 31, 2011—after the ICA issued the opinion, but before it issued the Judgment on Appeal—Villados' lawyer acknowledged that she understood he wanted to seek certiorari review. Dkt. 19 at 624. She also informed him, however, that she would not do so, because after reviewing the ICA's ruling, she could not identify any basis to do so under Haw. Rev. Stat. § 602-59. Dkt. 19 at 92. But she later changed her mind, because in a letter dated January 20, 2012, she in-

formed Villados that she would seek a writ. Dkt. 19 at 93.

The ICA issued the Judgment on Appeal on January 4, 2012. Dkt. 21 at 1207. Villados' lawyer did not request an extension, which meant the deadline to have applied for certiorari was February 6, 2012. Dkt. 17 at 17. This deadline passed without an application. On February 15, 2012 she informed him she had not applied for certiorari, and that the deadline for doing so had lapsed. Dkt. 19 at 94-96.

On June 18, 2012, representing himself, Villados applied to this Court for a writ of certiorari. SDO at 2; Dkt. 19 at 1492. This Court dismissed the application as untimely. *State v. Villados*, No. 30442 (Haw. July 20, 2011). *See* SDO at 2. Justice Acoba dissented, concluding the Court in the interest of justice should have accepted the untimely application. Dkt. 19 at 1499. Justice Acoba noted that Villados' appellate counsel "rendered ineffective assistance of appellate counsel." Dkt. 19 at 1500; SDO at 2 ("Justice Acoba opined that Villados' appellate counsel was ineffective and he would have excused the untimely filing of the application of writ of certiorari.").

Villados, again acting in *pro se*, sought reconsideration, mistakenly filing the motion in circuit court (further emphasizing how in the dark he was without counsel), on the basis that "[i]neffective [sic] of counsel led the defendant to file a late notice of appeal."). Dkt. 21 at 1218. The circuit court denied reconsideration "on the ground that it appears Defendant was attempting to file a Motion for Reconsideration with the Hawaii Supreme Court . . ." Dkt. 21 at 1234.

III. Villados Petitioned For Rule 40 Post-Conviction Relief

On September 20, 2013, Villados filed a petition for Rule 40 post-conviction relief in the Second Circuit Court. SDO at 2; Dkt. 19 at 48.[2] The petition alleged he

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[2] That rule establishes the procedures by which a person who asserts that "the judgment was obtained or sentence imposed [was] in violation of the constitution of the United States or the State of Hawaii," may obtain post-conviction relief. Haw. R. Penal P. 40(a)(1)(i). The petition "shall be instituted" in "the court in which the conviction took place." Haw. R. Penal P. 40(b). If the court "finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceeding[.]" Haw. R. Penal P. 40(g)(1).

was denied effective assistance of counsel because his appellate lawyer failed to timely apply for certiorari, despite assuring him she would do so. Dkt. 19 at 56. The petition asked to vacate the judgment, for a new trial, or for resentencing. SDO at 2.

IV. The Circuit Court Concluded Villados' Appellate Counsel Was Ineffective, But Declined To Render Rule 40 Relief

On February 24, 2015, the circuit court agreed Villados had been denied his constitutional right to effective assistance of counsel. SDO at 2; Dkt. 19 at 1558-1559. The court, however, denied the petition because it concluded it could not grant the relief requested, because the only "appropriate remedy in this case is to permit Petitioner to seek review by the Hawaii Supreme Court of the ICA's affirming of the judgment of conviction." Dkt. 19 at 1559.

V. The ICA Affirmed: Counsel Was Ineffective, But Villados' Only Remedy Was To Ask This Court To Allow Certiorari

Villados appealed, raising a single point of error in the ICA: having concluded that appellate counsel had rendered constitutionally-ineffective representation, the circuit court should not have denied the petition, but should have entered an "appropriate order." His argument focused on this Court's rule that "[a] conviction will be reversed, therefore, if the defendant was denied effective assistance of counsel at trial or on appeal." *Briones*, 74 Haw at 461-67, 848 P.2d at 976-78. The State cross-appealed, arguing that Villados' appellate lawyer's missing of the certiorari deadline was not constitutionally defective. SDO at 3.

The ICA affirmed. The court rejected the State's cross-appeal, agreeing that Villados' appellate lawyer rendered unconstitutional assistance:

> Appellate counsel's failure to file an application for writ of certiorari by the applicable deadline despite Villados' request constituted ineffective assistance of counsel.

SDO at 5 (citing *Maddox v. State*, 141 Haw. 196, 203, 407 P.3d 152, 159 (2017)). The ICA recognized that "court-appointed appellate counsel has a duty to diligently fulfill the procedural requirements to file an application for writ of certiorari if a defendant elects to do so." SDO at 4. Thus, "the Circuit Court has held and we agree

that Villados' appellate counsel was ineffective in failing to file an application for writ of certiorari from this court's Summary Disposition Order issued on November 28, 2011." *Id*. at 5. The State has not timely applied for certiorari review of the ICA's conclusion that appellate counsel was ineffective, and it is thus final and cannot now be challenged. *See* Haw. R. App. P. 40.1 (no provision for conditional cross-petitions for certiorari).

But the ICA also affirmed the circuit court's conclusion that Rule 40 relief was unavailable: "Villados must obtain relief from the supreme court as to whether it will entertain at this juncture a further review of [the ICA]'s Summary Disposition Order issued on November 28, 2011." SDO at 6. It based this conclusion solely on *Maddox*, concluding that "*Maddox* does not indicate that, if the defendant's allegations prove true, vacating his conviction is the appropriate remedy," because this Court "previously affirmed his conviction." SDO at 5.

Instead, the ICA concluded that because appellate counsel's ineffective action was her failure to timely apply for certiorari, "[u]nder *Maddox*, decided in 2017, it appears that the remedy would be to allow the petitioner to proceed with the appeal that was precluded by the ineffective counsel." *Id*. at 6. And because this Court had already denied, over Justice Acoba's dissent, Villados' untimely *pro se* application for certiorari, there was nothing the circuit court or the ICA could do under Rule 40. Instead, the ICA held that Villados must ask this Court to allow "further review" of this Court's July 20, 2011 order dismissing his certiorari application as untimely. *Id*.

REASONS FOR ACCEPTING THE APPLICATION

Because Villados' conviction was tainted by constitutional error, he must have a remedy, whether in the circuit court under Rule 40, or in this Court. The ancient maxim—*ubi jus, ibi remedium*—holds true: where there's a wrong, the law provides a remedy, a principle confirmed in American law repeatedly in decisions from *Marbury v. Madison*, 5 U.S. 137 (1803), to *Brown v. Board of Education*, 347

U.S. 483 (1954).[3] Our case follows in that long tradition.

The remedy to which Villados is entitled is plainly set out in Rule 40, which recognizes the jurisdiction of the court which entered a conviction to also enter "an appropriate order" to remedy constitutional violations which occurred during the course of that conviction. That includes, as this Court held in *Briones*, vacating a conviction because of constitutional shortcomings in an appellate court. Villados was not limited to asking this Court to reconsider the application for certiorari which he filed late due to his appellate lawyer's malfeasance, as both the ICA and circuit court concluded. Because the circuit court obviously was without the authority to compel this Court to revisit its earlier dismissal of Villados' untimely *pro se* certiorari application, its response should have been to do something else—vacate the conviction, order a new trial, or resentence him—not deny the petition.

I. Rule 40: Circuit Court "Shall" Enter "Appropriate" Relief

In crafting an "appropriate order" under Rule 40 to remedy unconstitutional appellate lawyering, the circuit court was not limited to ordering that the things ineffective counsel did wrong be corrected. As always, the starting point is the text of Rule 40:

> If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceeding, or with respect to custody based on such judgment, and such supplementary orders as to rearraignment, retrial, custody, bail, discharge or other matters as may be necessary or proper.

Haw. R. Penal P. 40(g)(1). Thus, once "the court finds in favor of the petitioner" by concluding, as here, "the judgment was obtained or sentence imposed in violation of

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[3] *See*, *e.g.*, Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 San Diego L. Rev. 1633 (2016) ("One of the legacies of *Brown v. Board of Education* is its endorsement of affirmative remedial action to enforce constitutional rights.") (footnote omitted).

the constitution[s]," Haw. R. Penal P. 40(a)(1), it *must* enforce a remedy, and cannot dismiss a petition.[4]

II. Ineffective Assistance Of Counsel Taints The Entire Case, And Cannot Be Cured

In *Briones*, this Court addressed these issues when it concluded that ineffective assistance of counsel on appeal cannot be corrected by revisiting the appeal. Because a "[v]iolation of an accused's constitutional right to effective assistance of counsel warrants the *irrebuttable* presumption of prejudice," the only cure is to vacate the conviction. *Briones*, 74 Haw. at 467, 848 P.2d at 978 (emphasis original) (citing *State v. Antone*, 62 Haw. 346, 349, 615 P.2d 101, 105 (1980) ("A finding of ineffective assistance of counsel mandates reversal of a defendant's conviction.")).[5] That is because a finding of prejudice is "baked in" to the determination that counsel was constitutionally ineffective. *See*, *e.g.*, *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (petitioner must show (1) counsel's representation fell below an

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[4] Although Rule 40 does not *confer* jurisdiction, it does recognize it, and has the force of law. "Article VI, section 7 of the Hawaii Constitution (1978) provides that this 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.' HRS § 602-11 (1993) contains the identical language, except that it deletes any reference to 'regulations.' Having 'the force and effect of law' this court's rules of court are analogous to statutes." *State v. Arceo*, 84 Haw. 1, 29, 928 P.2d 843, 872 (1996).

[5] There, Briones' appellate counsel omitted an appealable issue as a result of counsel's "constitutionally inadequate preparation." *Id.* This Court reversed the conviction. *Id*. at 469, 848 P.2d at 979. The ICA, however, did not address *Briones*, relying instead on *Maddox* to conclude that the circuit court was powerless. *Maddox* does not support that conclusion because the issue in that case was whether Maddox was wrongly denied a circuit court hearing on his Rule 40 petition because it concluded his arguments were frivolous. *Maddox*, 141 Haw. at 202, 407 P.3d at 158. He argued his Rule 40 claim that counsel had been ineffective were colorable, and thus the court should have held a hearing. This Court agreed, concluding that the Rule 40 petition set out a colorable claim for ineffective assistance of counsel, and thus Maddox was entitled to a hearing in circuit court. *Id*. at 206, 208, 407 P.3d at 162, 164. *Maddox* provided no guidance about the remedy in our case.

objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different). "That is, the petitioner must also show that the deficiency was prejudicial." *Id*. at 692; *accord Antone*, 62 Haw. at 349, 615 P.2d at 105.

That is why when counsel has provided unconstitutional representation at trial or on appeal (a conclusion that here is final and conclusive), the appropriate remedy under Rule 40 need not attempt to directly cure the constitutional error. Because prejudice has already been irrebuttably determined, there's nothing that can be subsequently ordered by a court to "untaint" the conviction or appeal. *Antone*, 62 Haw. at 349, 615 P.2d at 105 ("The standard for proving ineffective assistance of counsel, however, requires that the appellant establish the substantial impairment or withdrawal of a potential defense. Once that requirement is met, harmlessness beyond a reasonable doubt could never be shown.").

Thus, this Court held, "[a] conviction will be *reversed*, therefore, if the defendant was denied effective assistance at trial or *on appeal*." *Briones*, 74 Haw. at 467, 848 P.2d at 978 (emphasis added) (citing *State v. Aplaca*, 74 Haw. 54, 73, 837 P.2d 1298, 1308 (1992)). Although the general rule is that "the appropriate remedy for ineffective assistance of appellate counsel is to grant a new appeal," *see*, *e.g*., *Lynch v. Dole*, 789 F.3d 303, 320 (2d Cir. 2015), this Court recognizes that the exceptional circumstance of a finding of ineffective assistance of appellate counsel compels a departure from the usual approach:

> This court will not create a precedential quagmire by re-examining via a rule 40 petition its own opinions on the basis that the first appeal was incorrectly decided. Nevertheless, a claim of ineffective assistance of counsel requires review notwithstanding our opinion.

Briones, 74 Haw at 453 n.5, 848 P.2d at 972 n.5. *See also Ezell v. State*, 548 S.E.2d 852, 854 (S.C. 2001) ("the appropriate remedy for the ineffective assistance of [appellate] counsel . . . is to grant respondent a new trial); *White v. Smith*, 637 S.E.2d 686, 686-87 (Ga. 2006) (Appellate counsel rendered ineffective assistance of counsel. "Since White's conviction has already been reviewed on direct appeal, 'the habeas corpus court erred in ordering a new appeal for [White]. The proper remedy would

have been to order a new trial.'") (quoting *Milliken v. Stewart*, 583 S.E.2d 30, 31 (Ga. 2003)); *Ramchar v. Conway*, 601 F.3d 66, 78 (2d Cir. 2010) (Appellate counsel was ineffective; nothing "precludes the district court from ordering a new trial in circumstances such as those here."); *Ben-Yisrayl v. State*, 738 N.E.2d 253 (Ind. 2008) (post-conviction court ordered new penalty phase trial after it concluded appellate counsel ineffectively presented the issue of trial counsel's ineffectiveness during the penalty phase); *Gregg v. State*, No. 20090255, 20090567, 2012 Utah LEXIS 65,*at 41 (Utah June 1, 2012) ("We conclude that Mr. Gregg received ineffective assistance from both his trial and appellate counsel in violation of the Sixth Amendment. Therefore, we vacate his conviction and remand for new trial.").

III. The Circuit Court's Inability To Allow Villados To Proceed With An Application For Certiorari Meant It Should Have Ordered A Different Remedy, Not Dismiss The Petition

The ICA, however, misapprehended the scope of the "appropriate remedy" authority, concluding that the only thing the circuit court could do under Rule 40 was to put Villados back in the place he had been when his appellate lawyer slipped. SDO at 6 ("it appears that the remedy would be to allow the petitioner to proceed with the appeal that was precluded by the ineffective counsel"). In other words, the most the circuit court thought it could do was allow Villados to timely apply for certiorari. The ICA correctly considered that impossible, because this Court previously dismissed Villados' untimely *pro se* certiorari application. *See State v. Mamalias*, 69 Haw. 581, 582, 751 P.2d 1029, 1030 (1988) ("The clear provisions of HRAP 4(b) and of HRPP 40(g) do not allow the trial judge the power to enter an order, in an HRPP 40 proceeding, extending the expired time for appeal in the underlying criminal case.").[6]

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[6] Although it did not cite any authority, the ICA was apparently motivated by the general rule that "the appropriate remedy for ineffective assistance of appellate counsel is to grant a new appeal." *See, e.g.*, *Lynch v. Dole*, 789 F.3d 303, 320 (2d Cir. 2015). *See also Gramiak v. Beasley*, 820 S.E.2d 50, 60 (Ga. 2018) ("a remedy must neutralize the taint of a constitutional violation . . . while at the same time not grant a windfall to the defendant") (citing *Lafler v. Cooper,* 566 U.S. 156, 170 (2012)

(*footnote continued on next page*)

But that should not have compelled the dismissal of Villados' petition and punting it upstairs. As the court which had convicted Villados, the Second Circuit was the *only* court which could consider his Rule 40 petition and enter "appropriate" relief. Haw. R. Penal P. 40(b) (The petition "shall be instituted" in "the court in which the conviction took place.").[7] The inability of the circuit court to compel this Court to reconsider Villados' untimely certiorari application only meant that there was some *other* appropriate remedy that the circuit court must have entered.[8]

("Sixth Amendment remedies should be 'tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.'") (citation omitted)).

[7] If, however, the courts below correctly concluded that the only remedy for appellate counsel's unconstitutional failure to apply for certiorari would be to have this Court now consider his certiorari application, this Court may now do so, even if it previously dismissed the application as untimely. Rule 2 of the Hawaii Rules of Appellate Procedure authorizes this Court, "for good cause shown," to "suspend the requirements or provisions of any of these rules in a particular case[.]" Haw. R. App. P. 2. That includes the power to suspend the usual requirements for motions for reconsideration under the appellate rules, which permit "[o]nly one motion for reconsideration" by any party, "unless the court modifies the substance of its opinion, dispositional order, or ruling." Haw. R. App. P. 40(e). The Court's Rule 2 authority is appropriately exercised here. The Rule 40 hearing and the circuit court's finding that Villados' appellate lawyer was unconstitutionally ineffective came after this Court's dismissal, which provides the extraordinary circumstances supporting suspension of the usual rules.

[8] This conclusion is reinforced by the text of Rule 40, which recognizes the circuit court's authority to enter relief formerly associated with writs of habeas corpus and coram nobis. *See* Haw. R. Penal P. 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[.]"). *See also* Haw. R. Civ. P. 60(b) (abolishing writs of coram nobis). Because of the unique procedural posture of this case, in the absence of Rule 40, a writ coram nobis may have been the appropriate remedy. *See*, *e.g.*, *State v. Veikoso*, 102 Haw. 219, 225-26, 74 P.3d 575, 581-82 (2003) ("A defendant who is prevented from challenging the constitutionality of a prior conviction at trial or during a sentencing proceeding is not thereby divested of an opportunity for relief. That defendant may thereafter mount a . . . challenge by any means that remain available, including post-conviction procedures, habeas corpus, error coram nobis, or other statutory or common law remedies.") (quoting *Fair-*

(*footnote continued on next page*)

CONCLUSION

Every wrong has a remedy, and this case is no different. This Court should accept certiorari, vacate the dismissal of Villados' Rule 40 petition, and remand to the circuit court to enter an appropriate order which vacates the conviction, or orders a new trial or resentencing.

DATED: Honolulu, Hawaii, December 24, 2018.

Respectfully submitted.

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banks v. State, 629 A.2d 63, 65-66 (Md. App. 1991)). Thus, Rule 40 provides the sole remedy here, and the circuit court is the only court which can enforce it.