IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Respondent/Plaintiff-Appellee,

vs.

LUIS GOMEZ-LOBATO, Petitioner/Defendant-Appellant.

SCWC-11-0000338

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000338; FC-CR NO. 10-1-279K)

October 30, 2013

CONCURRING OPINION BY ACOBA, J.

I would hold that the waiver of the right to jury trial in this case was invalid, because under the circumstances, the Family Court of the Third Circuit (the court) did not engage

Petitioner/Defendant-Appellant Luis Gomez-Lobato (Gomez-Lobato) in an on-the-record colloquy that would ensure that he fully understood the right that he was waiving.[1]

I would also hold that in the future, in order to ensure that a waiver of the constitutional right to a trial by jury, Haw. Const. art. I, § 14, is knowingly, intelligently and voluntarily made, courts must conduct an on-the-record colloquy that includes informing the defendant that (1) twelve members of the community compose a jury, (2) defendants may take part in jury selection, (3) jury verdicts must be unanimous, and (4) the court alone decides guilt or innocence if defendants waive a jury trial. See State v. Friedman, 93 Hawaiʻi 63, 68, 996 P.2d 268, 273 (2000) (citations omitted).

Such an admonition is especially imperative where there is a "salient fact," see State v. Duarte-Higareda, 113 F.3d 1000 (9th Cir. 1997), such as the language barrier in this case, that should alert the court of the need to ensure that the defendant fully understands his or her waiver of jury trial. Indeed, "inherent in the nature of justice is the notion that those involved in the litigation should understand and be understood." In re Doe, 99 Hawaiʻi 522, 534, 57 P.3d 447, 459 (2002).

[1] I concur with the majority in the result.

I.

A.

On October 26, 2010, Gomez-Lobato was charged by Complaint with Abuse of Family or Household Member, Hawaiʻi Revised Statutes (HRS) § 709-906(1) (Supp. 2010)[2]. On December 22, 2010, Gomez-Lobato appeared before the court,[3] assisted by a Spanish language interpreter. Gomez-Lobato was provided with a waiver of jury trial form, and the court called a recess in order for the interpreter to review the form with Gomez-Lobato outside of the courtroom. The form stated as follows[4]:

> 1. I waive my right to a jury trial in the following charge(s):
> AFHM [Abuse of Family or Household Member]
>
> 2. LGL [Gomez-Lobato] I understand that I have the constitutional right to a jury trial. Furthermore, I understand that a jury trial is a trial in the Circuit Court before a judge and a jury and that I can participate in the process of selecting a jury of twelve (12) citizens from the

[2] HRS § 709-906(1) provides:

> It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member or to refuse compliance with the lawful order of a police officer under subsection (4). The police, in investigating any complaint of abuse of a family or household member, upon request, may transport the abused person to a hospital or safe shelter.
>
> For the purposes of this section, "family or household member" means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit.

[3] The Honorable Aley K. Auna, Jr. presided.

[4] Emphases indicate a handwritten portion of the form, strike-through indicates that a line was put through the text on the form.

Third Circuit. This jury would hear the evidence in my case, and then decide if I am guilty or not guilty. Finally I understand that in order for me to be convicted by a jury, their vote must be unanimous.

3. LGL I know that if I give up my right to a jury trial, the trial will be held in this Court before a judge who alone would decide if I am guilty or not guilty. I request that my case be tried by a judge.

~~4a. I have intelligently and of my own free will decided to represent myself and do now waive and give up my right to an attorney for the purposes of this hearing.~~

OR

4b. LGL I am satisfied with my attorney, and am entering this waiver with his/her advice.

5. LGL I know that the punishment cannot be increased merely because I want a jury trial.

6. LGL I am entering this waiver of my own free will after careful consideration. No promises or threats have been made to me to induce me to waive my right to a jury trial.

Dated: Kealakekua Naalehu Kapaau, Hawaiʻi, 12/22/10
Luis Gomez Lobato
Defendant

CERTIFICATE OF COUNSEL

As counsel for defendant and as an officer of the Court, I certify that I have read and explained fully the foregoing, that I believe that the defendant understands the document in its entirety, that the statements contained therein are in conformity with my understanding of the defendant's position, that I believe that the defendant's waiver is made voluntarily and with intelligent understanding of the nature of the charge and possible consequences, and that the defendant signed this form in my presence.

Dated: Kealakekua Naalehu Kapaau, Hawaiʻi. 12/22/10
[signature illegible]
Attorney for Defendant

I acknowledge that ~~Judge Joseph P. Florendo, Jr.~~ (or Judge A.K. Akuna, Jr.) questioned me personally in open court to make sure that I knew what I was doing and understood this form before I signed it.

Luis Gomez Lobato
Defendant
(To be signed in open court.)

Upon returning to the courtroom after the recess, the following exchange took place:

> [Gomez-Lobato's attorney]: [Gomez-Lobato] has reviewed the waiver of jury trial form.
> . . . .
> THE COURT: Good morning, Mr. Gomez[-]Lobato. I have with me a waiver of jury trial form. Are these your initials, and is this your signature on this form?
> [Gomez-Lobato]: Yes.
> THE COURT: Prior to placing your initials and signature on this form, did you understand what you were doing and signing?
> [Gomez-Lobato]: Yes.
> THE COURT: And was that explained to you in Spanish?
> [Gomez-Lobato]: Yes.
> THE COURT: Did you discuss this with your attorney?
> [Gomez-Lobato]: Yes.
> THE COURT: Okay. Do you have any questions for me?
> [Gomez-Lobato]: No.
> THE COURT: Okay. The [c]ourt concludes that the defendant knowingly, voluntarily, intelligently waived his rights to a jury trial.

(Emphasis added.) The waiver of jury trial form signed by Gomez-Lobato was in the English language.

On March 1, 2011, an Amended Complaint was filed, changing the dates on which the offense was allegedly committed.

The bench trial took place on March 9, 2011.[5] The proceedings were conducted with the assistance of a Spanish language interpreter. At the conclusion of trial, the court found Gomez-Lobato guilty and sentenced him to thirty (30) days imprisonment and 30 days imprisonment suspended for two years on the condition that he comply with the terms and conditions of

[5] The Honorable Joseph P. Florendo, Jr. presided.

probation.[6] The Judgment of Conviction and Sentence was filed on March 15, 2011.

B.

Gomez-Lobato appealed to the Intermediate Court of Appeals (ICA), alleging that the court plainly erred because it (1) did not obtain a valid waiver of Gomez-Lobato's right to trial by jury, and (2) sentenced Gomez-Lobato based on uncharged conduct, namely, attempted murder. Respondent/Plaintiff-Appellee State of Hawaiʻi (the State) responded that (1) the colloquy and facts of the case indicate a valid waiver, and (2) the court did not sentence Gomez-Lobato for an uncharged crime and did not rely on any fact outside the record of the trial.

In his Reply Brief, Gomez-Lobato maintained that he did not knowingly, intelligently and voluntarily waive his right to trial by jury because there was a language barrier, and the court elicited only one word "yes" or "no" responses, rather than

[6] The court stated, inter alia, as follows:

> THE COURT: I have found you guilty of a criminal offense, and you as of yet failed to take responsibility for your actions. Did you wish to make any statement before the [c]ourt sentences you?
> . . . .
> THE COURT: All right. The [c]ourt would find you guilty and order that you be placed on probation for a period of two years. I will order that you be imprisoned for a period of 30 days.
> I will suspend 30 days of jail for two years on condition you comply with all of the terms and conditions of probation[.]
> . . . .

determining whether Gomez-Lobato clearly understood the constitutional right he was giving up.[7] Gomez-Lobato also explained that, in his view, the judge's words concerning attempted murder indicated that the judge had in mind a felony crime when sentencing Gomez-Lobato.

The ICA issued a Summary Disposition Order (SDO) on October 25, 2012.[8] State v. Gomez-Lobato, No. CAAP-11-0000338, 128 Hawaiʻi 312, 288 P.3d 130, 2012 WL 5272234 at *1 (App. Oct. 25, 2012) (SDO). The ICA held that under the totality of the circumstances, "'taking into account the defendant's background, experience, and conduct[,]'" id. (quoting Friedman, 93 Hawaiʻi at 70, 996 P.2d at 275), "Gomez-Lobato failed to demonstrate by a preponderance of the evidence that his waiver was involuntary[,]" id. at *2. In support of this conclusion, the ICA noted that (1) Gomez-Lobato provided no authority supporting the proposition that the court had to do more than ask him yes or no questions about his waiver, (2) Gomez-Lobato had the assistance of an interpreter and the court recessed so that the interpreter could

[7] On appeal to the ICA and before this court, Gomez-Lobato also argued that because he signed the waiver of jury trial form before the State filed an amended complaint to alter the dates of the alleged offense, his waiver was invalid. On this issue, I concur with the majority's statement that "[t]he general rule is that a valid waiver remains effective after a complaint is amended, unless the amended complaint added additional counts or substituted a more serious offense." Majority's opinion at 17 n.11. Thus, Gomez-Lobato's jury trial waiver form was ostensibly valid despite the subsequent alteration of dates in the amended complaint.

[8] The ICA's SDO was filed by the Honorable Daniel R. Foley, the Honorable Alexa D.M. Fujise, and the Honorable Lawrence M. Reifurth.

review the waiver form with Gomez-Lobato, (3) after recess Gomez-Lobato's attorney stated that he had reviewed the form, and (4) the court asked Gomez-Lobato a number of questions about his understanding, to which he responded "Yes." Id. at *1. The ICA entered its Judgment on November 23, 2012.[9]

II.

On certiorari to this court, Gomez-Lobato argues, with respect to his first point, that he did not validly waive his right to trial by jury, and that the ICA erred in affirming the court's sentence. The State did not file a Response to the Application.

III.

A.

The right to trial by jury is a fundamental right protected by the sixth amendment to the United States

[9] Inasmuch as this case must be vacated, Gomez-Lobato's point of error with respect to his sentence need not be addressed.

However, two brief points are noted with respect to the ICA's decision on this issue. First, respectfully, the ICA mistakenly noted that Gomez-Lobato was sentenced to one thirty-day term of incarceration, suspended for two years. See Gomez-Lobato, 2012 WL 5272234, at *1. Rather, Gomez-Lobato was sentenced to one 30-day term of imprisonment, and to an additional 30-day term of imprisonment, which was suspended provided that Gomez-Lobato comply with the terms and conditions of his probation.

Second, at sentencing, the court apparently decided that Gomez-Lobato had failed to take responsibility for his actions before asking him if he would like to make a statement. Cf. State v. Chow, 77 Hawaiʻi 241, 246-47, 883 P.2d 663, 668-69 (1994) (recognizing that a defendant's "right to be heard in criminal proceedings prior to sentencing is constitutionally protected"). Although the court eventually heard from Gomez-Lobato at sentencing and so his constitutional right to be heard was satisfied, the court had apparently decided, before giving him a chance to speak, that he had not taken responsibility for his actions.

Constitution[10], article I, section 14 of the Hawaiʻi Constitution[11], and by statute. See Hawaiʻi Revised Statutes (HRS) § 806-60 (1993) ("Any defendant charged with a serious crime shall have the right to trial by a jury of twelve members. 'Serious crime' means any crime for which the defendant may be imprisoned for six months or more.")[12]; see also State v. Ibuos, 75 Haw. 118, 120, 857 P.2d 576, 577 ("In Hawaiʻi, a statutory right to a jury trial arises whenever a criminal defendant can be imprisoned for six months or more upon conviction of the offense.") (citing HRS § 806-60).

Hawaiʻi Rules of Penal Procedure (HRPP) Rule 5(b)(1) requires that "the court shall in appropriate cases inform the

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[10] The Sixth Amendment to the United States Constitution provides, in relevant part that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]" U.S. Const. amend. VI.

[11] The Hawaiʻi Constitution similarly provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the district wherein the crime shall have been committed[.]" Haw. Const. art. I, § 14.

[12] Although HRS § 806-60 provides that a "serious crime" for which there is a right to trial by jury means "any crime for which the defendant may be imprisoned for six months or more[,]" this court has taken into account multiple factors when determining if an offense is petty or serious, for purposes of the right to trial by jury. See State v. Ford, 84 Hawaiʻi 65, 69-70, 929 P.2d 78, 82-83 (1996). Three factors are analyzed to determine whether an offense is constitutionally petty or serious: "(1) treatment of the offense at common law; (2) the gravity of the offense; and (3) the authorized penalty." Id. at 70, 929 P.2d at 82; State v. Sullivan, 97 Hawaiʻi 259, 264, 36 P.3d 803, 809 (2001); see also State v. Lindsey, 77 Hawaiʻi 162, 164, 883 P.2d 83, 85 (1994) (noting the presumption that this jurisdiction will not recognize the right to a jury trial where the maximum term of imprisonment is less than thirty days). Consequently, an offense involving a term of imprisonment that is less than six months can still constitute constitutionally a "serious" crime for which there is a right to trial by jury.

defendant that he has a right to a jury trial in the circuit court or may elect to be tried without a jury in the district court." See Ibuos, 75 HawaiʻI at 120, 857 P.2d at 577. "[A]ppropriate cases" are those cases where the defendant has a constitutional right to a jury trial. See Friedman, 93 Hawaiʻi at 68, 996 P.2d at 273 (2000) (citing Ibuos, 75 Hawaiʻi at 120, 857 P.2d at 577).

"A defendant may, orally or in writing, voluntarily waive his or her right to trial by jury[,]" but for a valid waiver, "the trial court has a duty to inform the accused of that constitutional right." Id. (citing Ibuos, 75 Haw. at 120, 857 P.2d at 577) (citation omitted)). The colloquy preceding any waiver of the right to jury trial serves several functions: "'(1) it more effectively insures voluntary, knowing and intelligent waivers; (2) it promotes judicial economy by avoiding challenges to the validity of waivers on appeal; and (3) it emphasizes to the defendant the seriousness of the decision [to waive a jury trial].'" Id. (quoting United States v. Cochran, 770 F.2d 850, 851-52 (9th Cir. 1985)) (alterations omitted) (other citations omitted).

HRS § 806-61 (1993) provides that "[t]he defendant in a criminal case may, with the consent of the court, waive the right to a trial by jury either by written consent filed in court or by oral consent in open court entered on the minutes." (Emphasis

added.) This is reiterated in Hawaiʻi Rule of Penal Procedure (HRPP) Rule 23(a), which provides that "[c]ases required to be tried by jury shall be so tried unless the defendant waives a jury trial with the approval of the court. The waiver shall be either by written consent filed in court or by oral consent in open court entered on the record." (Emphasis added.) While the foregoing rule and statute seem to indicate a written form would suffice to effect a waiver, a colloquy between the court and the defendant in open court and on-the-record would appear necessary in waiving a constitutional right to a jury trial. This court has required an oral waiver in the context of entrance of a guilty plea, see State v. Vaitogi, 59 Haw. 592, 585 P.2d 1259 (1978), and the waiver of the right to counsel, see Wong v. Among, 52 Haw. 420, 477 P.2d 630 (1970). Ibuos, 75 Haw. at 121 n.1, 857 P.2d at 576 n.1. Similarly, the constitutional nature of the right to trial by jury requires that a waiver of that right be made on-the-record. See Haw. Const. art. I, § 14. The Hawaiʻi Constitution controls over any inconsistent language permitting waiver by written consent alone.

While a defendant may waive his or her right to a jury trial, the waiver must be made knowingly, intelligently, and voluntarily. Id.; see also State v. Han, 130 Hawaiʻi 83, 89, 306 P.3d 128, 134 (2013) (noting that the waiver of a fundamental right must be made knowingly, intelligently, and voluntarily).

"The failure to obtain a valid waiver of this fundamental right constitutes reversible error." Friedman, 93 Hawaiʻi at 68, 996 P.2d at 274 (citing Ibuos, 75 Hawaiʻi at 120, 857 P.2d at 577).

B.

As discussed supra, "the validity of a criminal defendant's waiver of his or her right to a jury trial presents a question of state and federal constitutional law."[13] Friedman, 93 Hawaiʻi at 67, 996 P.2d at 272. This court reviews questions of constitutional law, including the waiver of a jury trial, under the right/wrong standard. Id. Gomez-Lobato's waiver of jury trial was deficient for two reasons.

First, as a general matter, the court's colloquy consisted of only yes and no questions, and under the circumstances, was not sufficient to gauge his understanding of the constitutional right. Second, his language barrier was a "salient fact" requiring that the court conduct an on-the-record colloquy to ensure Gomez-Lobato's understanding of the right. In connection with this ground, because Gomez-Lobato went over the

[13] It is noted that Gomez-Lobato did not raise his points of error at trial. However, it is well established that this court may sua sponte notice "[p]lain errors or defects affecting substantial rights . . . [,]" HRPP Rule 52(b), and that "this court will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v. Miller, 122 Hawaiʻi 92, 100, 223 P.3d 157, 165 (2010) (citations omitted). Because of the fundamental constitutional nature of the right to a jury trial, this court has held that the failure to waive a jury trial constitutes plain error that can be recognized for the first time on appeal. See Friedman, 93 Hawaiʻi at 68, 996 P.2d at 272.

form with the interpreter outside the presence of the court, the court should have inquired of Gomez-Lobato as to his understanding of the matters on the form, so that the court could be assured that such matters were correctly translated to him.

IV.

As noted, "[f]or a valid waiver of the right to a jury trial, the trial court has a duty to inform the accused of that constitutional right." Friedman, 93 Hawaiʻi at 68, 996 P.2d at 273. This is accomplished through a colloquy conducted in open court. Id. "'Colloquy' is defined as '[a]ny formal discussion, such as an oral exchange between a judge, the prosecutor, the defense counsel, and a criminal defendant in which the judge ascertains the defendant's understanding of the proceedings and of the defendant's rights.'" Han, 130 Hawaiʻi at 90, 306 P.3d at 135 (emphases in original) (quoting Black's Law Dictionary 300 (9th ed. 2009)). Under the circumstances of this case, it does not appear that the court properly engaged Gomez-Lobato in such a colloquy, and therefore did not adequately ascertain his understanding of the proceedings.

In the exchange between the court and Gomez-Lobato, the court made a number of omissions. Namely, it did not ask Gomez-Lobato any questions about the content of the jury trial waiver form or the rights articulated on the form itself, but

instead only asked whether he generally understood what he was "doing and signing" prior to initialing the form. That question by itself does not indicate that Gomez-Lobato understood what a jury trial means or that he was waiving the right to a jury trial. As discussed infra, inquiring directly of the defendant as to his understanding of the material parts of the form may help the court to confirm that the waiver form was properly translated for the defendant. Finally, the court's last question, "[d]o you have any questions for me?" also would not provide any indication as to whether the defendant understood his right to a jury trial, because the court had not articulated the content of the right to the defendant in the first instance.

Although in State v. Sprattling, 99 Hawaiʻi 314, 55 P.3d 276 (2002), discussed further, infra, this court upheld the defendant's waiver of the right to jury trial where the defendant answered the court's questioning with, in effect, yes or no responses, that case is distinguishable from the instant case. See 99 Hawaiʻi at 315, 55 P.3d at 276. In Sprattling, the trial court articulated to the defendant the content of the right to a jury trial, including that he would have an opportunity to select twelve people from the community to make a decision on guilt or innocence. Id. As a result, when the defendant answered "yes" or "I understand that, sir[,]" id., the defendant was answering

questions about what the right to jury trial actually meant. In this case, on the other hand, Gomez-Lobato only answered questions about the act of signing the waiver form, and generally whether he understood the form. The questions did not address any specific portions of the form, or the substance of the right at issue.

Under the circumstances of a case, simply asking yes or no questions, even in connection with a signed jury trial waiver form, may not sufficiently confirm that a criminal defendant understands the right that he or she is waiving. Asking the defendant to articulate back to the court his or her understanding of the right at issue may establish an "oral exchange" that would provide assurance of "the defendant's understanding of the proceedings and of the defendant's rights." Han, 130 Hawaiʻi at 90, 306 P.3d at 128 (citation omitted).

In Friedman, this court noted that the colloquy suggested that the defendant was aware of his right to trial by jury, because "[the defendant] did not simply acknowledge his right to a jury trial with a simple 'yes'; rather, [the defendant] articulated to the trial court that '[a] jury trial is where the outcome of . . . whether it's guilty or not is to be determined by 12 adults instead of a judge.'" 93 Hawaiʻi at 70, 996 P.2d at 268. The discussion between the court and Gomez-

Lobato, therefore, did not establish that he understood the right that he was waiving by signing the form, and that he knowingly, intelligently, and voluntarily gave up that right. His waiver of the right to trial by jury would therefore be invalid on these grounds alone.

V.

A.

Additionally, Gomez-Lobato's lack of English proficiency was a "salient fact" the court was required to consider in conducting its colloquy. In Duarte-Higareda, a federal case discussed in Friedman at length, see Friedman, 93 Hawaiʻi at 69, 996 P.2d at 274, the defendant had used a Spanish language interpreter throughout the proceedings, but signed a written jury waiver form that was written entirely in English. 113 F.3d 1003. Duarte-Higareda held that "[the defendant's] language barrier, like [] mental illness, is a salient fact that was known to the district court and put the court on notice that [the defendant's] waiver might be less than knowing and intelligent[.]" Id. (emphasis added). The Ninth Circuit thus held that the language barrier triggered an additional reason for the district court to engage in a colloquy with the defendant "to carry out its 'serious and weighty responsibility' of ensuring that a defendant's jury waiver is voluntary, knowing, and

intelligent." Id. (quoting United States v. Christensen, 18 F.3d 822, 826 (9th Cir. 1994)).[14]

Recently, this court, in Han, employed the rationale in Friedman in holding that the trial court's colloquy with the defendant regarding his right to testify or not to testify was insufficient, because of the "salient fact" of the defendant's language barrier. See Han, 130 Hawaiʻi at 92, 306 P.3d at 137. Previously, the ICA had interpreted Friedman to require that the court conduct the specific, four-part on-the-record colloquy articulated in Friedman whenever there is a "salient fact" drawing the court's attention to the fact that the defendant may not understand the right to jury trial he or she is waiving. See State v. Barros, 105 Hawaiʻi 160, 169, 95 P.3d 14, 24 (App. 2004) ("[The defendant] has failed to direct us to any 'salient fact' bearing upon his ability to understand his jury waiver. . . such as the defendant's lack of English in Duarte-Higareda . . . that would have created the need for an extensive colloquy by the trial court[.]") (emphasis omitted) (internal quotation marks and citations omitted), cert. denied, 105 Hawaiʻi 196, 95 P.3d 627 (2004); State v. Mitchell, 94 Hawaiʻi 388, 395, 15 P.3d 314, 321

[14] Obviously if it is evident on-the-record that a non-native speaker is articulate in the English language, no barrier to understanding the proceeding would exist, and thus a "salient fact" consideration would not apply. See note 15, infra.

(App. 2000) ("[The defendant] has not pointed to any 'salient fact' indicating an inability to understand or to make a constitutionally effective waiver of his jury trial right, that would have created the need for an extensive colloquy by the court.") (citation omitted).

There is no question that Gomez-Lobato's language barrier in the instant case was a "salient fact" within the meaning of Duarte-Higareda, as articulated by this court in Friedman. Gomez-Lobato was assisted by a Spanish language interpreter throughout trial and, as noted, in reviewing the jury trial waver form. Thus, having established that there was a "salient fact" that could inhibit the defendant's understanding, pursuant to this court's holding in Friedman, 93 Hawaiʻi at 69, 996 P.2d at 274, the court was required to relate the specific, four-part inquiry discussed supra, in its colloquy with Gomez-Lobato.

B.

Additionally, the use of a Spanish language interpreter to assist Gomez-Lobato out of the presence of the court in reading the English language jury trial waiver form should have alerted the court of the need to conduct a more complete on-the-record colloquy with Gomez-Lobato regarding his signing of the jury trial waiver form. Pursuant to HRPP Rule 28(b), the court

may appoint an interpreter to assist a criminal defendant.[15] This is in accordance with procedural due process, which requires that "an individual whose rights are at stake understand the nature of the proceedings he or she faces." In re Doe, 99 Hawaiʻi at 533, 57 P.3d at 458. The court in this case should have asked the defendant to articulate back, through the interpreter, the contents of the right that he was waiving.

By having Gomez-Lobato describe for the court in his own words, with the assistance of the interpreter, the right to jury trial, the court would have had a basis for concluding that the translation by the interpreter enabled Gomez-Lobato to understand the jury trial waiver form, and accordingly, the

[15] However, an interpreter may not always be required where an individual's first language is not English. In re Doe held that "[t]o assess whether an interpreter is necessary," courts should consider the following guidance:

> "[a]n interpreter is needed if upon examination by the court, (1) a party or witness is unable to speak English so as to be understood directly by counsel, court, and jury, or (2) if a party is unable to hear, understand, speak and/or use English sufficiently to comprehend the proceedings and to assist counsel in the conduct of the case."

In re Doe, 99 Hawaiʻi at 535, 57 P.3d at 460 (emphases omitted) (quoting Supreme Court of Hawaiʻi, Policies for Interpreted Proceedings in the Courts of the State of Hawaiʻi Rule 1(a) (adopted June 22, 1995), available at Supreme Court of Hawaiʻi, Hawaii Rules for Certification of Spoken and Sign Language Interpreters, Appendix B (adopted July 11, 2007)). See also, Hawaii Rules for Certification of Spoken and Sign Language Interpreters Rule 1.3 ("A person who is Limited English Proficient (LEP), deaf, or hard-of-hearing shall, throughout a legal proceeding, have the right to the assistance of an interpreter appointed by the court as provided by court rule.").

nature of the constitutional right to a trial by jury. Haw. Const. art. I, § 14. The colloquy that the court did conduct with Gomez-Lobato provided no such assurances, because the court did not question Gomez-Lobato on the substance of the right he was waiving.

Based on the insufficiency of the colloquy at trial, the case must be remanded for a new trial. As will be discussed infra in the next section, however, the circumstances of this case highlight the need for a uniform inquiry to be given where the defendant is waiving his or her right to a jury trial.

VI.

This court has provided guidance to the courts as to the type of colloquy that should be conducted in order to ensure that a defendant's waiver of the right to a jury trial is valid. As discussed supra, during the colloquy, a court should inform the defendant that "'(1) twelve members of the community compose a jury, (2) the defendant may take part in jury selection, (3) a jury verdict must be unanimous, and (4) the court alone decides guilt or innocence if the defendant waives a jury trial.'" Friedman, 93 Hawaiʻi at 69, 996 P.2d at 274 (quoting Duarte-Higareda, 113 F.3d at 1002) (citation omitted).

This court has not heretofore adopted the requirement in a published opinion that the above four-part advisement be

included in the colloquy given in every case.[16] State v. Kaupe, No. 22725, slip op. at 18 (Haw. May 10, 2001) (mem.). However, as discussed infra, the ICA in a published opinion did hold that the four-part advisory derived from Friedman was apropos in a jury trial waiver proceeding. State v. Valdez, 98 Hawaiʻi 77, 79, 42 P.3d 654, 656 (App. 2002) (stating that "we believe the four-part colloquy referred to in Friedman is apropos"). In determining whether such an admonition should be required, a brief historical discussion of the evolution of this court's law in this area is instructive.

In 1972, in State v. Olivera, 53 Haw. 551, 497 P.2d 1360 (1972), this court upheld as valid a defense counsel's waiver of jury trial on behalf of his client, where the waiver was given in the presence of the defendant. 53 Haw. at 551-52, 497 P.2d at 1361. It was concluded that under the circumstances, the defendant was "well informed" of his right to trial by jury. Id. at 553, 497 P.2d at 1362. Later, this court held in State v. Swain, 61 Haw. 173, 599 P.2d 282 (1979), that "a defendant's waiver of his constitutional right must be knowing and voluntary[.]" 61 Haw. at 175, 599 P.2d at 284. There, the State argued that defense counsel had implicitly waived the defendant's right to jury trial by proceeding to trial. Id. Swain concluded

[16] To provide a historical perspective, it must be noted that this court did discuss the implementation of the four-part colloquy requirement in an unpublished memorandum opinion, Kaupe, No. 22725, slip op. at 18.

that where the attorney stated that the defense was "ready to proceed" to trial, the defendant had not effectively waived his right to jury trial because "[a]lthough an attorney may waive the right to trial by jury for his client, express or implied concurrence of the defendant must be obvious for the waiver to be effective." Id. at 176, 599 P.2d at 287.

State v. Young, 73 Haw. 217, 830 P.2d 512 (1992), overruled Olivera and Swain, by requiring that "it is the defendant who must make the waiver, upon being well informed of his right to trial by jury." 73 Haw. at 221, 830 P.2d at 514 (emphasis added). Young explained that "[i]t is a better practice for the trial court to exact a knowing and voluntary waiver from the defendant either in writing or orally in open court at the time of the arraignment and plea." Id. (citing United States v. Cochran, 770 F.2d 850, 852 (9th Cir. 1985)). Thus, Young concluded, "[i]n order to provide clearer instructions to the lower courts and to ensure the safeguard of the right to jury trial, we now overrule Olivera." Id. at 221, 830 P.2d at 515.

In Ibuos, the prosecution argued that Young was limited to situations where defense counsel's waiver was ambiguous, but did not require that defense counsel could never waive the right to a jury trial on behalf of his or her client. 75 Haw. at 122, 857 P.2d at 578. Ibuos rejected that argument, and stated that

"we now clarify that the personal waiver requirement of Young applies to situations beyond the ambiguous waiver in Young." Id.

Following Ibuos, in Friedman, this court discussed the attributes of a valid waiver of the right to jury trial. Friedman, 93 Hawaiʻi at 68-71, 996 P.2d at 273-76. There, the trial court had engaged in the following colloquy with the defendant:

> THE COURT: All right, Mr. Friedman. Do you understand what [Defense counsel] just told me?
> [FRIEDMAN]: Yes, I do.
> THE COURT: You're going to enter a plea of not guilty to the complaint in this case, you're also going to give up your right to a jury trial; is that correct?
> [FRIEDMAN]: Yes.
> THE COURT: And, you understand what a jury trial's about?
> [FRIEDMAN]: Yes.
> THE COURT: And can you explain in your own words what you understand that to mean?
> [FRIEDMAN]: A jury trial is where the outcome of the - the results of whether it's guilty or not is to be determined by 12 adults instead of a judge.
> THE COURT: So by waiving that right means that your case will be decided by a judge, the judge alone is to decide your guilt or innocence.
> [FRIEDMAN]: Yes, Your Honor.
> THE COURT: Is your decision to waive your right to jury trial something you thought about and decided to do yourself voluntarily.
> [FRIEDMAN]: Yes.
> THE COURT: All right. Since a waiver to jury trial has been entered, this matter will be set for trial here in the Family Court . . . .

Id. at 66, 996 P.2d at 271 (emphases added). On appeal, Friedman had argued that the trial court had a duty to inform him of all four of the aspects of a jury trial described in Duarte-Higareda. Id. at 69, 996 P.2d at 274 (citing Duarte-Higareda, 113 F.3d at 1002) (citation omitted). At that time, Friedman rejected a

bright line rule requiring all four advisements to be given, and held instead, that under the circumstances, Friedman had not demonstrated that his waiver was involuntary, and failed to point "to any 'salient fact' bearing upon his ability to understand his jury waiver that would have created the need for an extensive colloquy by the trial court[.]" Id. at 70, 996 P.2d at 275.

In Sprattling, the defendant challenged the sufficiency of his jury trial waiver, and this court reviewed the circumstances under which the waiver was made, concluding that it was valid. 99 Hawaiʻi at 315, 55 P.3d at 279. It noted, inter alia, that the defendant was assisted by capable counsel, and that the district court had informed him that he could select twelve members of the community as jurors, and that if he chose to waive his right, the judge would determine his guilt or innocence. Id. at 322, 55 P.3d at 286. Thus, the court had articulated two of the components of a jury trial to the defendant, but this court did not require that the court inform the defendant of all four components. Id.

In Valdez, discussed infra, the ICA reiterated the advice to trial courts from Friedman. Valdez, 98 HawaiʻI at 79, 42 P.3d at 656. As noted, the ICA stated that it was "apropos" that trial courts inform defendants of the four-part advisement set forth in that case to ensure valid jury trial waivers and to

curtail the number of appeals premised on defective waivers. Id.[17] In Valdez, the ICA stated as follows:

> [T]o provide guidance to the trial court in performing its duty to inform the defendant of his/her constitutional right to a jury trial, we believe the four-part colloquy referred to in Friedman is apropos. The Hawaiʻi Supreme Court in Friedman advised the trial court "to engage in such a colloquy to aid in ensuring voluntary waivers." [93 Hawaiʻi at 69, 996 P.2d at 274.] We reiterate that advice. To "ensure a voluntary waiver" of the defendant's right to a jury trial, the trial court should, in open court, directly inform the defendant that "(1) twelve members of the community compose a jury, (2) the defendant may take part in jury selection, (3) a jury verdict must be unanimous, and (4) the court alone decides guilt or innocence if the defendant waives a jury trial." Id. (internal quotation marks omitted). By the trial court's use of this procedure, the three purposes of an open-court colloquy . . . are fully satisfied; the trial court's ascertainment of the defendant's waiver is facilitated; and any appeal premised on the defendant's defective waiver claims is curtailed.

Valdez, 98 Hawaiʻi at 79, 42 P.3d at 656 (emphases added) (second alteration added, other alterations in original).

VII.

In practice, courts have articulated the right to a jury trial in a number of different ways to defendants, leading to a number of appeals, some with merit and some without, on whether the defendant's waiver was in fact made knowingly, intelligently, or voluntarily. Where such important rights are

[17] The majority distinguishes Valdez on the basis that the State had conceded that the defendant's waiver was invalid. Majority's opinion at 17 n.11. However, respectfully, the State's concession appears to have had little or no impact on the ICA's analysis and conclusion in that case with respect to the implementation of the four-part colloquy. Valdez, 98 Hawaiʻi at 79, 42 P.3d at 656.

at stake, and where the remedy of a violation of such a right is a remand for a new trial, the advantage of requiring courts to include a specific inquiry on-the-record is readily apparent.

Indeed, the reasons underlying the requirement that a court conduct a colloquy at all support the mandate of certain specific questions. First, the Friedman inquiry would be more effective than the current, generalized requirement of ensuring knowing, intelligent, and voluntary waivers, because it would specifically advise each criminal defendant of the nature of a jury trial, and therefore, what rights the defendant would be foregoing.

Second, the inquiry would limit the number of appeals, because appellate courts would no longer be reviewing the content of the colloquy on a case-by-case basis, but would instead consider whether the court's colloquy included the four-part advisement, curtailing the potential defective waiver claims that could be appealed. Courts would be assured that cases would not be vacated on appeal for failure to properly set forth the nature of a jury trial and the consequences of waiving such a trial. Third, a more in-depth description of the jury trial process would serve to emphasize to the defendant the seriousness of what he or she would be deciding to waive and to lend confidence to the parties and the courts that the waiver was properly made.

The four-part advisement described in Friedman is already contained in the Hawaiʻi Criminal Bench Book.[18] Thus, no undue hardship would result from mandating that the above model inquiry be given as part of the colloquy in each case where the defendant has expressed an intent to waive his or her right to a jury trial.

VIII.

The majority notes that where a defendant is assisted by an interpreter, defense counsel is obligated to explain to the defendant the waiver of a constitutional right, and that, in this case, it is not clear whether defense counsel did in fact explain the waiver to Gomez-Lobato. Majority's opinion at 14-15 n.8. It is evident that counsel has a duty to his or her client based on the client's right to effective counsel to explain the contents of a jury trial waiver form. But, such a duty does not excuse the court from ensuring that the defendant understood the right being waived, before accepting a waiver of a jury trial.

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[18] The Hawaii Criminal Bench Book provides as follows:

> Also, court should directly inform defendant in open court that:
>
> Twelve members of the community compose a jury;
>
> Defendant may take part in jury selection;
>
> A jury verdict must be unanimous; and
>
> In a bench trial, the court alone decides guilt or innocence if defendant waives trial by jury.

Hawaii Criminal Bench Book, Jury Trial, Right to Trial by Jury, Section D - "Court's Duty to Inform Defendant of Right." (emphasis added).

It is well-established that the waiver of a jury trial is a personal one. See Young, 73 Haw. at 221, 830 P.2d at 514. Insofar as the majority indicates that a defendant could waive his right based on the explanation by the defense counsel, it poses a new limitation on the court's obligation to ensure that the waiver is validly made. Further, the uncertainty as to whether defense counsel explained the waiver form through the interpreter, or whether the interpreter simply went over the text of the waiver form with the defendant is further reason for requiring a uniform inquiry to assure validity of waivers.

The majority also concludes there was ambiguity in the court's colloquy with respect to whether Gomez-Lobato discussed "this" with his attorney and whether by "this" the court meant the waiver form, the waiver of the right to jury trial, or the initialing and signing of the form. Majority's opinion at 14 n.7. Again, such ambiguity illustrates precisely why this court should adopt for the trial courts a specific inquiry to include in the court's colloquy, to ensure that not only Gomez-Lobato, but all defendants, understand this right, so that on appeal, a reviewing court can determine whether or not a particular exchange resulted in a valid waiver. In this case, as discussed supra, the exchange did not result in a valid waiver.

IX.

Hawaiʻi case law requires that specific admonitions be

given in other cases where the rights at stake are those of a fundamental constitutional nature. For example, in the context of the criminal defendant's right to testify, the trial court must conduct two separate advisements to a defendant explaining the right, one at the start of trial -- the "Lewis advisement", see State v. Lewis, 94 Hawaiʻi 292, 296-97, 12 P.3d 1233, 1237-38 (2000), and one at the close of the defendant's case -- the "Tachibana colloquy", see Tachibana v. State, 79 Hawaiʻi 237 n.9, 900 P.2d 1304 n.9 (1995). Han, 130 Hawaiʻi at 90, 306 P.3d at 135. The second of these advisements requires the court to engage in a specific colloquy with the defendant where he or she has indicated the preference not to testify, advising him or her

> "[(1)] that he or she has a right to testify, [(2)] that if he or she wants to testify that no one can prevent him or her from doing so, and [(3)] that if he or she testifies the prosecution will be allowed to cross examine him or her. In connection with the privilege against self-incrimination, the defendant should also be advised that [(4)] he or she has a right not to testify and [(5)] that if he or she does not testify then the jury can be instructed about that right."

Id. (quoting Tachibana, 79 Hawaiʻi at 236 n.7, 900 P.2d at 1303 n.7). Significantly, one of the rationales that this court has recognized for requiring this specific colloquy is "'the minimization of post-conviction disputes over the actual waiver of the right to testify[.]'" Han, 130 Hawaiʻi at 88, 306 P.3d at 133 (emphasis added) (quoting Lewis, 94 Hawaiʻi at 295, 12 P.3d at 1236).

Lewis expanded upon Tachibana, requiring that the court give an additional advisement regarding the defendant's right to testify or not to testify. 94 Hawaiʻi at 297, 12 P.3d at 1238. On this point, Lewis stated that, "we now mandate that . . . the trial courts 'prior to the start of trial, shall (1) inform the defendant of his or her personal right to testify or not to testify and (2) alert the defendant that, if he or she has not testified by the end of the trial, the court will briefly question him or her to ensure that the decision not to testify is the defendant's own decision.'" Id. (quoting Tachibana, 79 Hawaiʻi at 237 n.9, 900 P.2d at 1304 n.9). This additional advisement, like the Tachibana colloquy, was instituted in order to "limit[] any post-conviction claim that a defendant testified in ignorance of his or her right not to testify." Id.

Additionally, in State v. Murray, 116 Hawaiʻi 3, 169 P.3d 955 (2007), this court held that the trial court must conduct a colloquy regarding waiver of proof of an element of the offense. 116 Hawaiʻi at 12, 169 P.3d at 964. There, this court discussed the requirement that a defendant could stipulate to the element of a prior felony conviction only if the court engaged in an on-the-record colloquy with the defendant "acknowledging the prior felony conviction and acceding to the stipulation." Id. at 13, 169 P.3d at 965. Thus, in the context of a stipulation as to an element of the offense, this court also required that the

trial court conduct a colloquy to obtain an informed on-the-record acknowledgment of the defendant's waiver of the prosecutorial obligation to prove each element of a crime beyond a reasonable doubt. Id. Notably, Murray grounded its specific mandate in the reasoning in Ibuos and Tachibana, stating that "[t]hose cases indicate that a colloquy between the trial court and defendant is the best way to ensure that a defendant's constitutional right . . . is protected, and that the defendant has knowingly and voluntarily waived such a right." Id. at 12, 169 P.3d at 964.[19]

X.

As constituted in Hawaiʻi, requiring as part of the colloquy, a specific inquiry of criminal defendants on their right to a jury trial would not, in effect, be foreign to our procedure at all. Instead, it would be a salutary measure to effectuate the guidance that has existed in this jurisdiction

[19] Moreover, a number of other jurisdictions require a specific colloquy in the context of a waiver of the right to a jury trial. In Pennsylvania, for example, "[p]rior to accepting a defendant's waiver of his right to a jury trial, the trial court must conduct a colloquy wherein it apprises the defendant of the three essential elements of a jury trial: that the jury would be selected from members of the community; that the verdict must be unanimous; and that the defendant would be allowed to participate in the selection of the jury." Comm. v. Hughes, 639 A.2d 763, 772 (Pa. 1994) (citing Comm. v. Williams, 312 A.2d 597 (1973)). Similarly, "as a matter of judicial administration," the Wisconsin supreme court has imposed the requirement that "a circuit court in a criminal case must advise the defendant that the court cannot accept a jury verdict that is not agreed to by each member of the jury." State v. Resio, 436 N.W.2d 603, 607 (Wis. 1989); see State v. Anderson, 638 N.W.2d 301, 306 (Wis. 2002) (affirming this requirement).

since Friedman was decided in 2000. See Friedman, 93 Hawaiʻi at 69, 996 P.2d at 274.

If the court fails to advise the defendant in accordance with this four-part inquiry, then the defendant's waiver of the right to trial by jury would be deemed invalid unless the prosecution can show that the error was harmless beyond a reasonable doubt with respect to the defendant's waiver of his or her right to a jury trial. That is, the State must then show that there is no reasonable possibility that the error might have contributed to the defendant's waiver of his or her right. See State v. Schnabel, 127 Hawaiʻi 432, 450, 279 P.3d 1237, 1255 (2012). However, if the court's colloquy includes this advisement, the defendant's waiver will be presumptively valid, and the defendant must show, by a preponderance of the evidence, that his or her waiver was involuntary. See Friedman, 93 Hawaiʻi at 69, 996 P.2d at 274 (citing Ibuos, 75 Haw. at 121, 857 P.2d at 578).

It is not difficult to foresee that courts will continue to be faced in the future with similar questions as to the validity of jury trial waivers. The frequency with which this issue has arisen indicates that a specific inquiry should be included in the colloquy with respect to the right to trial by jury. Just as this court, in Young, overruled Olivera's holding that defense counsel could waive the right to jury trial on

behalf of their clients, similarly Friedman's holding as to the nonobligatory nature of the Duarte-Higareda four-part inquiry should be overruled, in favor of the assurance that in every case, the defendant's right to a jury trial has been waived knowingly, intelligently, and voluntarily.[20]

XI.

Despite the majority's holding that such a four-part inquiry is not required as part of the colloquy, individual courts are free to institute such procedures to protect the jury trial right and to avoid recurring appeals from disparate waiver colloquies. This may be easily accomplished, as set forth in Valdez, 98 Hawaiʻi at 79, 42 P.3d at 656, and the Hawaii Criminal Bench Book.

XII.

In accordance with the above, I would therefore hold that Gomez-Lobato's waiver of the right to jury trial was insufficient in this case, and thus the March 15, 2011 judgment of the court must be vacated, and the case remanded for a new trial. Furthermore, in my view, a trial court must engage the

[20] The jury waiver advisement could be grounded in this court's supervisory powers, and accordingly, would be prospective in effect. See State v. Cabagbag, 127 Hawaiʻi 302, 316, 277 P.3d 1027, 1042 (2012) (applying this court's holding regarding eyewitness instructions on a prospective basis); see also Tachibana, 79 Hawaiʻi at 238, 900 P.2d at 1305 (holding that "the colloquy requirement established . . . shall only apply prospectively to cases in which the trial is not completed until after the date of [the] decision."); Lewis, 94 Hawaiʻi at 297, 12 P.3d at 1238 ("we now mandate that, in trials beginning after the date of this opinion," trial courts give specific information to defendants prior to the start of trial).

defendant in the on-the-record colloquy that includes a four-part inquiry described herein, subject to harmless error review on appeal.

/s/ Simeon R. Acoba, Jr.