DISSENTING OPINION BY FUJISE, J.

Today, this court vacates the judgment entered against Defendant-Appellant Gene Angel Mancia (Mancia) because an on-the-record colloquy regarding his waiver of his right to a jury trial was not conducted by the circuit court before it approved his stipulation to remand this case to the family court for a bench trial. Because I believe that Mancia failed to carry his burden of showing his waiver was not knowing, intelligent, and voluntary, I respectfully dissent.

Mancia was charged in the Family Court of the Third Circuit (Family Court) with one count of Abuse of Family or Household Member, a violation of Hawaii Revised Statutes (HRS) § 709-906(1) (Supp. 2011), which is a misdemeanor. HRS § 709-906(5) (Supp. 2011). Misdemeanors, which carry a maximum penalty, *inter alia*, of one year of imprisonment, HRS § 701-107 (2014), are jury-triable. HRS § 806-60 (2014). Hawai'i Rules of Penal Procedure (HRPP) Rule 5(b)(3) provides in pertinent part that, "[i]n appropriate cases, the defendant shall be tried by jury in the circuit court unless the defendant waives in writing or orally in open court the right to trial by jury."

Mancia demanded a jury trial at his arraignment in Family Court, causing the case to be transferred to the Circuit Court of the Third Circuit (Circuit Court). Prior to his scheduled jury trial, Mancia, his counsel, and counsel for the State entered into a stipulation to remand the case to the Family Court "based on [Mancia's] waiver of trial by jury, attached hereto and incorporated herein." The waiver was signed by Mancia. No hearing was conducted by the Circuit Court before it approved the stipulation.

Mancia's written waiver stated that he had been informed by his counsel of his right to a jury trial because he was facing the maximum penalties of one year in jail and a $2000 fine, that a jury consisting of twelve men and women from his community would be selected through a process in which he could be involved, that the jury would listen to the evidence presented at trial and based on that evidence would determine his guilt, and that their verdict must be unanimous. Mancia stated that he waived this right and agreed to a disposition of this case by the

court, and that he made the waiver of his own free choice and with a clear mind.

On appeal, Mancia maintains that "[w]ithout a colloquy between the family court and the defendant, the waiver of jury trial is invalid." I disagree.

HRPP Rule 5(b)(3) provides that a waiver of jury trial may be made in writing or orally in open court. Mancia does not dispute that he signed the "Waiver of Right to Trial By Jury" (Waiver). As summarized above, said Waiver sets out the nature of the right and explicitly states that it was entered into of his own free choice and with a clear mind. Thus, the written Waiver satisfied HRPP Rule 5(b)(3) and the content was sufficient to constitute a valid waiver.

Moreover, the surrounding circumstances do not cast any doubt on the validity of this Waiver. Mancia was represented by counsel, and he does not claim that counsel was ineffective. Mancia undoubtedly knew of his right to a jury trial as he was present when his attorney entered his jury trial demand that sent the case to the Circuit Court.[1] Furthermore, Mancia also signed the "Stipulation to Remand Case to Hilo Family Court" which stated that the "parties agree" that the remand was based on his waiver of jury trial.

Where the record supports a valid waiver, the burden is on the defendant to show otherwise by a preponderance of the evidence. State v. Baker, 132 Hawai'i 1, 6, 319 P.3d 1009, 1014 (2014), State v. Gomez-Lobato, 130 Hawai'i 465, 469, 312 P.3d 897, 901 (2013), State v. Friedman, 93 Hawai'i 63, 69, 996 P.2d 268, 274 (2000), State v. Ibuos, 75 Haw. 118, 121, 857 P.2d 576, 578 (1993), State v. Valdez, 98 Hawai'i 77, 42 P.3d 654 (App. 2002). Mancia has failed to do this. Instead, he argues that the absence of a colloquy, *per se*, renders his waiver insufficient.

[1] Mancia was also present when, prior to the jury trial demand, his counsel asked for a continuance of the arraignment proceedings in order to allow the prosecution to speak to its witnesses "before Deft makes a decision as to his waiver of demand of J/T[.]"

This is not the law in this State. While it would no doubt be preferable for the court to engage in an oral colloquy before accepting a waiver of jury trial, neither HRPP Rule 5(b)(3) nor case authority require it. The cases Mancia cites do not require a colloquy and, in any event, are distinguishable.

In Baker, the waiver form executed by Baker was incomplete, in that he did not initial the paragraph attesting that the waiver was entered into "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." Thus, the written waiver lacked indicia of the crucial component of voluntariness that a colloquy could have clarified and did not, standing alone, support a determination that the waiver was voluntary. Here, Mancia's Waiver expressly stated that it was entered of his own free will, that his mind was clear, and appears complete in all other respects.[2]

In Gomez-Lobato, the defendant argued there was a "language barrier" as English was not his first language, that rendered his jury trial waiver, even with a colloquy with the trial court, defective. Gomez-Lobato, 130 Hawai'i at 469, 312 P.3d at 901. Noting that a "bright line" rule had already been rejected in Friedman, the Gomez-Lobato court ruled that this language barrier was a "salient fact" that required the trial court to engage in questions that would verify Gomez-Lobato's

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[2] Mancia argues that "the purported waiver on its face was deficient" because (1) it failed to discuss the burden of proof, (2) it failed to specify that he had the opportunity to help select the jurors and question them, (3) it failed to explain the "significant difference" between a single judge rather than a twelve-member jury deliberate on the case and (4) there was no evidence that at the time he signed the waiver he was not under the influence of any drugs, his mind was clear, the decision was entirely his choice, he understood the nature of the charge, he understood the consequences of a waiver, or that "he understood the document that he signed in its entirety."

Contrary to these assertions, the written Waiver does state that Mancia understood that he could be involved in the jury selection process and that he waived his right "of [his] own free choice and with a clear mind." Mancia cites no authority for his assertion that a waiver requires a discussion of the requisite burden of proof--that does not change depending on the trier of fact--or that an unspecified, "significant difference" between a single judge or twelve-member jury deciding his case must be explained.

Consequently, Mancia's arguments do not undermine the validity of his written Waiver.

understanding of the right he was waiving. Mancia claims no language barrier. Gomez-Lobato, 130 Hawai'i at 471, 312 P.3d at 903.

In Friedman, the court rejected the "bright line rule" urged by Friedman, that a "colloquy [setting out the aspects of the right to a jury trial] is constitutionally required in every case." Friedman, 93 Hawai'i at 69, 996 P.2d at 274. Rather, the court reaffirmed that review of a waiver of jury trial would be based on "the totality of the facts and circumstances of the particular case[,]" and concluded that the trial court's colloquy with Friedman was sufficient. 93 Hawai'i at 69-70, 996 P.2d at 274-75.

In Ibuos, no written waiver was discussed, and the oral waiver was entered by defendant's counsel, not Ibuos himself. 75 Haw. at 119, 857 P.2d 577. Likewise, in State v. Murray, 116 Hawai'i 3, 5, 169 P.3d 955, 957 (2007), the stipulation--to an element of the offense--was made by counsel, not by the defendant.

In Valdez, this court agreed with the parties that the jury trial waiver in that case was invalid. There, it appears that no written waiver was presented, and although the trial court asked Valdez for his choice between jury and bench trial, it did not engage in a colloquy with Valdez to assure his understanding of the right. 98 Hawai'i at 79, 42 P.3d at 655.

Thus, based on the current state of the jurisprudence in this jurisdiction, no oral colloquy is required for a valid waiver of jury trial. I would conclude, on this record, that Mancia entered a valid, written waiver of his right to jury trial and would reject this point of error.

Presiding Judge