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IN THE SUPREME COURT OF THE STATE OF HAWAII

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ARTHUR BIRANO,
Petitioner/Petitioner-Appellant,

vs.

STATE OF HAWAII,
Respondent/Respondent-Appellee.

SCWC-15-0000841

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-15-0000841; S.P.P. NO. 09-1-0040; CR. NO. 01-1-1154)

AUGUST 31, 2018

DISSENTING OPINION BY NAKAYAMA, J.
IN WHICH CIRCUIT JUDGE AYABE, JOINS

In 2001, Petitioner/Petitioner-Appellant Arthur Birano (Birano) was charged with robbery in the first degree, kidnapping, burglary in the first degree, possession of a prohibited firearm, ownership or possession prohibited of any firearm or ammunition by a person convicted of certain crimes, and carrying, using, or threatening to use a firearm in the commission of a separate felony after he, accompanied by co-defendants Nicolas Nakano (Nakano) and Bryce Takara (Takara),

allegedly threatened Frederick Dumlao (Dumlao) at gunpoint. Nakano, who pled no contest to the charges against him arising out of his participation in the underlying incident, testified against Birano at trial. A jury found Birano guilty on all counts. His conviction and sentence were affirmed on appeal.

In 2009, Birano filed a petition for post-conviction relief pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 40 (2009 Petition). Therein, Birano asserted that Nakano's testimony at trial was false, and was the product of an off-the-record, unwritten agreement between Nakano and Respondent/Respondent-Appellee State of Hawai'i (the State), whereby the State promised to recommend that Nakano be sentenced more leniently as a youthful offender in exchange for his testimony against Birano. Hence, Birano argued that he was entitled to post-conviction relief because several of his constitutional rights were violated due to the State's failure to disclose the agreement's existence to Birano prior to trial. Following a two-day evidentiary hearing, the Circuit Court of the First Circuit (circuit court) denied Birano's 2009 Petition. The Intermediate Court of Appeals (ICA) affirmed.

On certiorari, the Majority holds that the circuit court clearly erred in finding that no off-the-record agreement pertaining to sentencing existed between Nakano and the State. The Majority reasons that although several witnesses expressly

denied that Nakano and the State had entered into such an agreement, the record contains "overwhelming evidence" to support that the agreement actually existed. Thus, the Majority holds that by failing to disclose the agreement to Birano before trial, the State deprived Birano of key evidence that could have been used to impeach Nakano's credibility, and violated his right to a fair trial and his right to confrontation. Hence, the Majority concludes that Birano's 2009 Petition should have been granted.

I respectfully disagree. From my perspective, the credible evidence in the record before us could lead a person of reasonable caution to conclude that there was no off-the-record agreement regarding sentencing between Nakano and the State. Therefore, I believe that the circuit court did not clearly err in finding that Nakano's testimony at Birano's trial was not the product of an off-the-record agreement between himself and the State. Consequently, I would hold that the circuit court correctly denied Birano's 2009 Petition, and that the ICA did not err in affirming the circuit court's order to that effect.

Accordingly, I dissent.

I. DISCUSSION

Over the course of the two-day evidentiary hearing held on the 2009 Petition, several witnesses testified, including:

(1) Nakano,¹ (2) the judge who presided over Birano's trial (trial judge), (3) the attorney who represented Nakano at the time of Birano's trial (Nakano's trial counsel), and (4) the prosecutor who tried Birano's case on behalf of the State (prosecutor). In ruling on Birano's 2009 Petition, the circuit court found that the trial judge, Nakano's trial counsel, and the prosecutor were credible, but that Nakano was not credible. Based upon the credible evidence before it, the circuit court found that "there was no off-the-record plea agreement that induced Nakano's cooperation to testify against [Birano] in the trial[.]" Accordingly, the circuit court ruled: "Inasmuch as

¹ Nakano testified on Birano's behalf. Nakano testified that about a week and a half before Birano's trial, he entered into an informal agreement with the State, in which the prosecutor promised to recommend that Nakano receive youthful offender treatment at sentencing in exchange for his testimony against Birano. Nakano related that earlier in the morning on the day that he was supposed to testify, he told the prosecutor that he was not sure if he wanted to testify, and asked her to put the agreement in writing. According to Nakano, the prosecutor responded that she "cannot put it in writing because it's illegal and she can't have a paper trial."

Nakano explained that he invoked the Fifth Amendment upon taking the stand at Birano's trial because he did not trust the prosecutor, and wanted the sentencing agreement between himself and the State to be placed in writing before he gave his testimony. Nakano testified that during the recess that was held after he invoked the Fifth Amendment, he met directly with the trial judge in her chambers, accompanied by the prosecutor and his trial counsel. There, Nakano related, the trial judge personally told him that she would sentence him as a youthful offender if he testified on the State's behalf. Nakano stated after getting "the judge's assurance from her own mouth that if [he] testified . . . [he] would get the youth act," he chose to take the stand and testify against Birano at trial.

The circuit court found that Nakano's testimony at the evidentiary hearing was not credible. Accordingly, I do not rely upon Nakano's testimony in reviewing the circuit court's factual findings for substantial evidence in the present case. See State v. Silva, 75 Haw. 419, 432, 864 P.2d 583, 590 (1993) (defining "substantial evidence" as "credible evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to reach a conclusion" (brackets in original) (emphasis added) (quoting State v. Matias, 74 Haw. 197, 207, 840 P.2d 374, 379 (1993))).

there was no plea agreement, there was nothing for [the State] to disclose to [Birano] or his trial counsel, nor was there any reason for the prosecution to correct Nakano's assertion at trial that he did not have a plea agreement."

The Majority holds that the circuit court's finding regarding the existence of an off-the-record sentencing agreement between Nakano and the State is clearly erroneous. Majority at 51. In support of this conclusion, the Majority avers that there is "overwhelming evidence in the record" to support that such an agreement actually existed. Majority at 47. Specifically, the Majority states, "the hearing testimony strongly contradicted the circuit court's conclusion that no agreement existed between Nakano and the State." Majority at 48.

The circuit court's ruling as to the existence of an off-the-record agreement between Nakano and the State is a finding of fact. We review a trial court's findings of fact under the clearly erroneous standard. Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994). "A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made." State v. Eleneki, 92 Hawai'i 562, 564, 993 P.2d 1191, 1193 (2000) (quoting State v. Wilson, 92 Hawai'i 45, 48, 987 P.2d

268, 271 (1999)). "Substantial evidence" is "credible evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to reach a conclusion." Silva, 75 Haw. at 432, 864 P.2d at 590 (brackets in original) (quoting Matias, 74 Haw. at 207, 840 P.2d at 379).

I respectfully disagree with the Majority insofar as I do not believe that the record contains "overwhelming evidence" to support that Nakano's testimony was induced by an informal agreement between himself and the State. Contra Majority at 47. Rather, in my view, the record contains ample evidence upon which a person of reasonable caution could conclude that there was no off-the-record agreement regarding sentencing between Nakano and the State. Therefore, on the record in this case, I would hold that the circuit court's finding that no such agreement existed is supported by substantial evidence. Moreover, in light of the nature and extent of the evidence supporting the circuit court's factual finding on this point, I am not left with a definite and firm conviction that a mistake has been made in this case.

The trial judge testified on the State's behalf. The trial judge testified that when the State called Nakano to testify at Birano's trial, Nakano "seemed to be very frightened." The trial judge recalled that she immediately called a recess right after Nakano refused to testify upon taking the stand. The trial judge related that during the recess, she spoke with

the prosecutor and Nakano's trial counsel about why Nakano had refused to testify, and how the trial was going to proceed.

On cross-examination, Birano's counsel questioned the trial judge on whether, during the recess, she was aware of any discussions between the prosecutor and Nakano's trial counsel regarding an agreement whereby Nakano had agreed to testify on behalf of the State in exchange for the State's recommendation that he be sentenced as a youthful offender. On this point, the following discussion took place:

[Birano's counsel:] And is it your recollection that while there was no deal that would be -- that might be considered a [HRPP] Rule 11 deal --

[Trial judge:] Um-hum.

[Birano's counsel:] -- that there nevertheless was an agreement between [Nakano's trial counsel] and Mr. Nakano and the State that Nakano would be testifying, if he did testify, in exchange for a recommendation at sentencing from the State?

[Trial judge:] I'm -- I don't know if I would characterize it as that. I was not a party to that but I understood that that's what they talked about, yes.

. . . .

[Birano's counsel:] Okay. But your recollection is that after Nakano took the Fifth, when [Nakano's trial counsel] came down to court, he and [the prosecutor] were talking about this agreement that if Nakano testified truthfully against Mr. Birano, then the State would recommend at sentencing that he receive the youth act, it was still up to you whether or not he would get the youth act?

[Trial judge:] I -- I can't talk about what they discussed among themselves, if that's what they discussed, yeah.

[Birano's counsel:] Okay. But your recollection is that they were -- they were talking about that to some degree, that's what you recall, you were not a party to it but --

[Trial judge:] They were talking about it but they were also talking about, you know, what happened as to why he wouldn't testify at that particular time.

[Birano's counsel:] Which is -- well, what did they say?

[Trial judge:] I don't remember. I mean, I wasn't like in all their discussions but we did meet in chambers and that was a concern 'cause we had -- [the prosecutor] and [Nakano's trial counsel] both thought that he would just proceed with testimony and he chose not to in that moment.

. . . .

[Birano's counsel:] Okay. But it's fair to say that part of what was discussed was some agreement that you were not a party to?

[Trial judge:] That's fair, yes.

. . . .

[Birano's counsel:] Okay. And you told us earlier that there was some discussion that you were not -- you weren't privy to all the details but there was discussion about an agreement between Mr. Nakano, his lawyer, and [the prosecutor] representing the State, correct?

[Trial judge:] Yeah.

[Birano's counsel:] Okay. And would it be fair to say that, again, you weren't privy to all the details but the gist of that agreement was that if he, Nakano, testified against Mr. Birano, the State would recommend the Youthful Offender Act?

[Trial judge:] I guess you could say that but yeah.

(Emphases added.)

Put succinctly, the trial judge's testimony supported that: (1) the trial judge met with the prosecutor and Nakano's counsel during a recess at Birano's trial, which was taken when Nakano invoked the Fifth Amendment immediately after getting onto the witness stand; (2) the trial judge was aware that, outside of their meeting with her, the prosecutor and Nakano's trial counsel had discussed other matters amongst themselves; (3) the trial judge surmised that the prosecutor and Nakano's trial counsel may have discussed an agreement whereby Nakano would be recommended for youthful offender sentencing in exchange for his testimony against Birano at his trial; and (4) the trial judge was not a

party to that conversation, and declined to testify to its contents because she was not privy to the details.

Nakano's trial counsel also testified on the State's behalf. He attested that, based upon the materials he received from the State in discovery, he believed that the State had "a very solid case" against Nakano, and that Nakano did not have "a viable defense to the charges" against him. Hence, Nakano's trial counsel related that before Birano's trial, he spoke with Nakano "about his chances at trial versus work[ing] out a plea agreement or trying to work toward some type of resolution." Specifically, Nakano's trial counsel clarified, he spoke to Nakano directly "at various times about where the direction of the case could go if he cooperated, which was obviously a discussion about the . . . applicability of the youth offender statute." During these conversations, Nakano's trial counsel and Nakano discussed "the advantage of cooperating [with the State]," which he believed would put him in a more advantageous position "to argue for youth offender treatment" on Nakano's behalf.

Nakano's trial counsel also stated that he and Nakano met with the prosecutor before Birano's trial, during which they "discussed [Nakano's] cooperation and whether or not he'd be eligible for youth offender treatment" at sentencing. However, Nakano's trial counsel testified that the prosecutor did not make any promises to Nakano in exchange for his testimony.

Additionally, Nakano's trial counsel averred that the prosecutor did not threaten Nakano into testifying against Birano, nor did she "do anything to suggest a coercive atmosphere to procure Mr. Nakano's cooperation." Rather, according to Nakano's trial counsel, Nakano primarily expressed his concerns with being housed with Birano while he was in custody. While Nakano's trial counsel acknowledged that Nakano may have demanded "an assurance in writing from [the prosecutor] as to a sentencing recommendation," he testified that "it was made very clear to [Nakano that] he wasn't going to get a written agreement."

On cross-examination, the following exchange took place regarding whether Nakano had agreed to testify against Birano in exchange for the State's recommendation for youthful offender treatment at sentencing:

[Birano's counsel:] Okay. And sometimes those are deals where the State's going to make a recommendation for your client at sentencing but the judge is not bound by that recommendation, correct?
[Nakano's trial counsel:] You're using the word "deal." There's an understanding. If that's what you mean by deal, that's a little different. There's an understanding sometimes the prosecutor will make a recommendation.

. . . .

[Birano's counsel:] . . . [Y]ou talked about there was no written agreement in this case?
[Nakano's trial counsel:] Um-hum.
[Birano's counsel:] Correct?
[Nakano's trial counsel:] Correct.
[Birano's counsel:] Okay.
[Nakano's trial counsel:] There was no agreement, period.
[Birano's trial counsel:] Well, are you saying that there was no written agreement or you're saying there was no agreement at all?

[Nakano's trial counsel:] There was no agreement at all. There was an understanding that if he cooperated, then . . . the prosecutor . . . would take it into consideration and recommend, we were hoping, youth offender treatment. She couldn't get approval for it. She couldn't say that she had authority to do that and there was nothing in writing.

(Emphases added.)

Nakano's trial counsel acknowledged that Nakano's cooperation was not required for him to receive youthful offender treatment at sentencing. In the following dialogue, Nakano's trial counsel clarified how, in his view, cooperating with the State was in Nakano's best interest:

[Birano's counsel:] Well, cooperation is not a requirement to obtain youthful offender treatment, is it?

[Nakano's trial counsel:] No, it's not. But it makes a big difference . . . if you know your client's cooperating, you hope the prosecutors will take it into consideration and also sends a message to the court that your client without a plea agreement was willing to risk, you know, everything and cooperate.

[Birano's counsel:] And it would be even better, given all the circumstances you just described, if the prosecutor also was recommending youthful offender?

[Nakano's trial counsel:] Of course if [the prosecutor] recommended it, that'd be great. If she didn't, she didn't. But the fact remains that it'd be hard not to recommend it if he was cooperating and that's exactly what [Nakano] did.

(Emphases added.) Nakano's trial counsel further indicated that he did not, at any time, "exert pressure over Mr. Nakano to testify as a government witness in the prosecution against Mr. Birano."

In other words, Nakano's trial counsel testified that before Birano's trial, he spoke with Nakano privately on numerous occasions, and explained to him that Nakano's cooperation with

the State could improve his chances of receiving a youthful offender sentence. He observed that although he and the prosecutor may have discussed Nakano's eligibility for youth offender treatment and Nakano's cooperation with the State during a pre-trial meeting, the prosecutor did not represent that she would recommend youthful offender treatment at sentencing if Nakano testified for the State at Birano's trial. Nakano's trial counsel acknowledged that while there was no agreement between Nakano and the State, he had hoped, but was not unequivocally certain, that if Nakano testified for the State at Birano's trial, the prosecutor would take his cooperation into consideration and recommend that he be sentenced as a youthful offender. However, Nakano's trial counsel did not promise, guarantee, or otherwise represent to Nakano that the State was, in fact, going to recommend youthful offender treatment at sentencing in exchange for his testimony. Rather, Nakano was only informed of the possibility that his cooperation could improve his chances of receiving such a favorable sentence.

Finally, the prosecutor testified on behalf of the State. The prosecutor stated that she met with Nakano and Nakano's trial counsel prior to Birano's trial in order to determine whether Nakano would be a viable witness for the State. The prosecutor testified that there was no discussion about an "agreement between the Prosecutor's Office and Mr. Nakano in

exchange for any testimony against Defendant Birano," and that Nakano did not ask her for a written agreement at any time during the meeting. Additionally, the prosecutor attested that, at that meeting, she did not make "any sort of promises or inducements to Mr. Nakano . . . regarding what [she] would do, say, or recommend in exchange for his testimony," nor did she "make any promise to him with regards to what is known as Youthful Offender or Young Adult sentencing." The prosecutor recalled that they "didn't talk about sentencing at all during that time because [she] didn't even know if [she] was going to call him as a witness" in Birano's trial.

The prosecutor further related that, some time before Birano's trial and after Nakano had pled guilty to the charges against him, Nakano's trial counsel approached her, and asked whether the State would be willing to recommend that Nakano receive youthful offender treatment at sentencing in exchange for his testimony against Birano. The prosecutor testified that she declined the request because she did not believe that she needed Nakano's testimony.

The prosecutor stated that when she ultimately called Nakano to testify for the State at Birano's trial, Nakano got onto the witness stand, but immediately invoked his right to remain silent under the Fifth Amendment. At that point, the trial judge called a recess.

During the recess, the prosecutor first met with Nakano's trial counsel. She described the discussion that took place during their meeting as follows: "[Nakano's trial counsel] came to me. I was sitting in the gallery. He asked me what happened. I told him [Nakano] took the Fifth. [Nakano's trial counsel] was angry. He asked why. I said I don't know."

After speaking with the prosecutor, Nakano's trial counsel met privately with Nakano, outside of the prosecutor's presence. Subsequently, Nakano's trial counsel informed the prosecutor that Nakano was afraid to testify, and needed to make a phone call. Thereafter, the prosecutor and Nakano's trial counsel met with the trial judge in her chambers. The prosecutor stated that the trial judge "wanted to know what was going on" and "whether [the prosecutor] was ready with another witness or whether Mr. Nakano was going to testify."

Following her meeting with the trial judge and Nakano's trial counsel, the prosecutor met with Nakano for about fifteen minutes, and went over the questions that she was planning to ask him while he was on the witness stand. The prosecutor stated that during this time, she did not make any promises to Nakano. The prosecutor further testified: "I've never spoke to Mr. Nakano about sentencing, ever." The prosecutor clarified that she did not make any decisions regarding whether to recommend

Nakano for youthful offender treatment at sentencing until the date of Nakano's sentencing hearing.²

² On cross-examination, Birano's counsel questioned the prosecutor regarding what she had said during a phone call with Terry Pennington (Pennington), a private investigator hired by Birano. The prosecutor testified that she and Pennington discussed, inter alia, her meeting with the trial judge and Nakano's trial counsel during the recess in Birano's trial. The prosecutor related, in relevant part:

What I told your investigator was that [Nakano's trial counsel] was very concerned that [the trial judge], after taking the Fifth Amendment, would not consider his client a candidate for Youthful Offender, and he talked to us about that, and he asked her "Would you still consider a Youthful Offender if my client testifies?" and [the trial judge] told him, "Well, it's clear that he's very, very afraid of Birano and that's why we have all these sheriffs." [The trial judge] says, "Well it's going to depend on what the State asks. If the State asks for it, then I'm inclined to follow it," and I told him, "I cannot tell you anything. I don't know. We don't have any plea agreement."

When asked to further clarify what took place during her meeting with the trial judge and Nakano's trial counsel, the prosecutor stated:

[Nakano's trial counsel's] concern was because his client had taken the Fifth, if he did testify, would the Court be inclined or open to entertain a Youthful Offender sentencing, and [the trial judge's] reply was, "Well, I don't know. It depends on what the State asks," and I said, "I don't know because we don't have a plea agreement.["]

Relying on the foregoing testimony, the Majority states: "The uncontroverted evidence in the record also demonstrates that the circuit court made representations regarding its inclination to follow the State's recommendation at Nakano's sentencing." Majority at 56. Based upon this premise, the Majority posits: "In light of the circuit court's sentencing inclination, which informed Nakano that the determination of his eventual sentence had essentially been delegated to the State," Nakano may have had the incentive to slant his testimony to align with the State's theory of the case against Birano. Majority at 60. Thus, the Majority holds that this further supports that the circuit court clearly erred in "concluding that there was no impeachment evidence that was required to be disclosed to Birano." Majority at 60-61.

In my view, the Majority's analysis on this point is questionable, insofar as it relies entirely upon indirect evidence of the trial judge's purported sentencing inclination. Upon independent review, it appears that the record does not contain any direct evidence to support that the trial judge expressed a sentencing inclination. For example, the trial judge did not herself testify or suggest that she expressed or made any representations

(continued...)

Put simply, the prosecutor's testimony suggests that the prosecutor did not, at any time, represent to Nakano or his trial counsel that the State would provide a recommendation for youthful offender treatment at sentencing in exchange for his cooperation at Birano's trial. Although Nakano's trial counsel had attempted to negotiate an agreement of this sort with the prosecutor, the prosecutor denied his request. The prosecutor's testimony also supports that the prosecutor never spoke to Nakano about sentencing, and did not make any decisions regarding whether to recommend that he receive youthful offender treatment until the date of Nakano's sentencing hearing.

Based upon the record as summarized above, I believe that the circuit court did not clearly err in finding that Nakano's testimony at Birano's trial was not the product of an off-the-record agreement between Nakano and the State, in which

²(...continued)
regarding such a sentencing inclination. Similarly, Nakano's trial counsel did not indicate that the trial judge made any representations regarding a sentencing inclination during her conversation with him and the prosecutor.

Accordingly, it appears that the sole evidence supporting the Majority's conclusion that the trial court expressed a sentencing inclination is the prosecutor's account of a phone conversation that she had with Pennington, during which she related to Pennington what she believed the trial judge had said during her meeting with the trial judge and Nakano's trial counsel. I am not persuaded by the Majority's analysis in section IV.A.2.b of its opinion, inasmuch as it is significantly, if not entirely, premised upon the foregoing statement, which is arguably hearsay-within-hearsay, and therefore, of questionable reliability as to whether the trial judge had actually, in fact, made such representations. See Addison M. Bowman, Hawaii Rules of Evidence Manual 8-1 (2016) (commenting that hearsay is generally excluded by Hawai'i Rules of Evidence Rule 802 "because its reliability is suspect and not amenable to adversary testing").

the State promised to recommend youthful offender sentencing in exchange for Nakano's cooperation.

True, the evidence indicates that the trial judge suggested that Nakano's trial counsel and the prosecutor may have discussed an informal agreement of this nature outside of her presence, and thereby acknowledged the possibility of the agreement's existence. However, the record also supports that the trial judge repeatedly clarified that she was not a party to this conversation, and that she was not privy to the details of what the prosecutor and Nakano's trial counsel had discussed. Moreover, both Nakano's trial counsel and the prosecutor expressly denied having such a conversation.

Additionally, Nakano's trial counsel explicitly stated that there was no agreement of any sort between Nakano and the State. The record indicates Nakano's trial counsel advised Nakano that he could improve his chances in receiving a youthful offender sentence by cooperating with the State. However, the evidence does not appear to support that Nakano's trial counsel represented to Nakano that, if he testified on the State's behalf at Birano's trial, the State was likely or certain to offer a recommendation for youthful offender treatment at sentencing. Rather, the record indicates that based upon his prior experience as a defense attorney, Nakano's trial counsel hoped, and was even

optimistic, that the prosecutor would take Nakano's cooperation into consideration and recommend youthful offender sentencing.

The prosecutor also denied that the State and Nakano had entered into an agreement of any sort. Moreover, the evidence illustrates that the prosecutor never promised, suggested, or represented to either Nakano or Nakano's trial counsel that the State could or would provide Nakano with any benefit, including a recommendation for youthful offender sentencing, if he testified on behalf of the State at Birano's trial. Indeed, the record supports that the prosecutor never spoke to Nakano about sentencing, and that she declined a request by Nakano's trial counsel for such an agreement.

Moreover, the circuit court made a finding as to credibility when she ruled that the trial judge, the prosecutor, and the defense attorney were credible, and that Nakano was not credible. I see nothing in the record to disturb this finding.

Accordingly, in light of the foregoing, I believe that the record in this case contains "credible evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to reach [the] conclusion" that there was no off-the-record agreement regarding a sentencing recommendation between Nakano and the State. Silva, 75 Haw. at 432, 864 P.2d at 590 (first alteration in original) (quoting Matias, 74 Haw. at 207, 840 P.2d at 379). Thus, in my view, the record contains

substantial evidence to support that "there was no off-the-record plea agreement that induced Nakano's cooperation to testify against [Birano]." See id. Furthermore, in light of the nature and extent of the evidence supporting the circuit court's factual finding, I am not left with a definite and firm conviction that a mistake has been made.

Consequently, I would hold that the circuit court did not clearly err in finding that "there was no off-the-record plea agreement that induced Nakano's cooperation to testify against [Birano]." I would further hold that because this finding was not clearly erroneous, the circuit court did not err in concluding that "there was nothing for the prosecution to disclose to [Birano] or his trial counsel, nor was there any reason for the prosecution to correct Nakano's assertion at trial that he did not have a plea agreement." Therefore, in my view, the ICA did not err in affirming the circuit court's order denying Birano's 2009 Petition.

II. CONCLUSION

For the reasons stated above, I respectfully dissent. I would hold that the circuit court correctly denied Birano's 2009 Petition. Consequently, I would affirm the ICA's March 10, 2017 judgment on appeal, issued pursuant to its January 26, 2017 summary disposition order.

/s/ Paula A. Nakayama

/s/ Bert I. Ayabe

