CONCURRING OPINION BY NAKAMURA, C.J.

I concur in the majority's disposition of this appeal because I believe it is compelled by the precedents established by the Hawai'i Supreme Court. See State v. Krstoth, 138 Hawai'i 268, 378 P.3d 984 (2016); State v. Solomon, 107 Hawai'i 117, 111 P.3d 12 (2005). I write separately to express my own thoughts on the issues raised by this appeal.

I.

Defendant-Appellant Napali Paa (Paa) was represented by counsel when he entered into a plea agreement with Plaintiff-Appellee State of Hawai'i (State) and when he entered his no contest pleas. The plea agreement called for the dismissal of two class A, one class B, and six class C felonies, in return for Paa's no contest pleas to one class A and two class B felonies. Paa did not move to withdraw his pleas in the trial court. He does not allege, much less demonstrate, that his no contest pleas were induced by any of lack of understanding of his right to a jury trial. Nevertheless, based on Hawai'i Supreme Court precedents, we are vacating Paa's convictions due to deficiencies in his plea colloquy relating to his right to a jury trial -- deficiencies which are linked to the trial court's failure to advise Paa of the four Duarte-Higareda factors.[1/]

Because I do not believe there is a bona-fide way to distinguish the supreme court's precedents, I concur in the result. However, in my view, rather than properly focusing on whether a defendant *in fact* understood his or her right to a jury trial in entering a guilty or no contest plea, these precedents place undue emphasis on, and overvalue the effectiveness of, the plea colloquy. In doing so, I believe these precedents erroneously discount and diminish the role of defense counsel in

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[1/] In United States v. Duarte-Higareda, 113 F.3d 1000, 1002 (9th Cir. 1977), the federal Ninth Circuit Court of Appeals stated that as guidelines to ensure a valid jury trial waiver, a trial court should advise a defendant of the following four matters: "(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."

the plea process and impose unrealistic burdens on the trial judge.

II.

With respect to the waiver of the right to a jury trial, Hawai'i Rules of Penal Procedure (HRPP) Rule 11 (2014) does not require that a trial court advise a defendant of the four Duarte-Higareda factors for a plea of guilty or no contest to be valid. HRPP Rule 11(c) provides in relevant part:

> **(c) Advice to defendant.** The court shall not accept a plea of guilty or no contest without first addressing the defendant personally in open court and determining that the defendant understands the following:
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> . . .
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> (4) that if the defendant pleads guilty or no contest there will not be a further trial of any kind, so that by pleading guilty or no contest the right to a trial is waived[.]

In my view, where a defendant such as Paa is represented by counsel, the defendant's affirmative statement on the record that he or she understands and is waiving the right to a jury trial should be sufficient to constitute prima facie proof of a valid waiver of that right. See State v. Ancheta, No. 26750, 2007 WL 316911 (Hawai'i App. 2007) (holding that a plea colloquy very similar to the one given in this case was sufficient).[2/] The defendant can subsequently move to withdraw the plea on the ground that it was not entered knowingly because he or she did not understand the right to a jury trial. But, it

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[2/] See also State v. Fitzpatrick, 810 N.E.2d 927, 934 (Ohio 2004) ("[T]here is no requirement for a trial court to interrogate a defendant in order to determine whether he or she is fully apprised of the right to a jury trial." (internal quotation marks and citation omitted)); Chang v. United States, 305 F.Supp.2d 198, 204 (E.D.N.Y. 2004) ("[P]etitioner cites no case from the [United States] Supreme Court or the Second Circuit that requires an explanation that the jury must reach a unanimous verdict, and [Federal Rules of Criminal Procedure] Rule 11 by its terms does not require such explanation."); People v. Doyle, 209 Cal. Rptr.3d 828, 832-33 (Cal Ct. App. 2016) ("[T]here is no requirement that the trial court explain to a defendant every aspect that he is giving up in entering a waiver to a jury trial. . . . We have found no case, and defendant has provided no controlling authority, that the failure to advise defendant that the jury would be comprised of 12 jurors who must unanimously find his guilt renders the waiver of jury trial inadequate.").

should be the defendant's burden to show that *in fact* he or she did not understand the right to a jury trial. In this inquiry, whether the trial court advised the defendant of the Duarte-Higareda factors during the plea colloquy is relevant, but it should not be dispositive of whether the defendant knowingly waived the right to a jury trial.

It is the role of defense counsel, not the trial court, to explain to the defendant the pros and cons of entering into a plea agreement. Obviously, a critical component of the decision-making process is whether the defendant should give up the right to a jury trial. Thus, in discussing a plea agreement, competent defense counsel can be expected to advise a defendant of the right to a jury trial and what that right entails, including the Duarte-Higareda factors.[3/] Yet, through its emphasis on the plea colloquy, the supreme court precedents have largely rendered irrelevant whether the defendant in fact understood his or her right to a jury trial and whether defense counsel explained this right and what it entails to the defendant.

III.

In this case, with the assistance of counsel, Paa pleaded no contest pursuant to a plea agreement. He did not move to withdraw his plea in the trial court, and he does not claim or cite to anything in the record indicating that he did not understand his right to a jury trial. However, in Solomon, the supreme court vacated the defendant's conviction even though he

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[3/] See Libretti v. United States, 516 U.S. 29, 50-51 (1995) ("Apart from the small class of rights that require specific advice from the court under [Federal Rules of Criminal Procedure] Rule 11(c), it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forgo."); People v. Acosta, 96 Cal. Rptr. 234, 237 (Cal. Ct. App. 1971) ("We are not aware of any rule of law that entitles a defendant who is represented by counsel and who has discussed waiver of a jury trial with his counsel, as here, to have the court advise him of the merits or the disadvantages of a trial by jury, as against a court trial. . . . Certainly a court is in no position to discuss the merits of the two kinds of trial either philosophically or tactically, with a defendant where the defendant is represented by competent counsel[.] It is enough that the court determine that the defendant understands that he is to be tried by the court and not a jury.").

did not move to withdraw his plea in the trial court, and in Krstoth, the supreme court vacated the defendant's conviction for a deficiency in the plea colloquy regarding the right to jury trial that was not raised by the defendant. In addition, because I do not believe there is a legitimate way to distinguish the circumstances surrounding Paa's plea colloquy from those presented in Krstoth, I agree with the majority that we must vacate Paa's convictions.

However, by vacating Paa's convictions based on the inadequacy of the trial court's plea colloquy, we ignore whether *in fact* Paa understood his right to a jury trial. Indeed, Paa's counsel may have fully explained to Paa, and Paa may have fully underdstood, his right to a jury trial, including all the Duarte-Higareda factors. But defense counsel's advice and Paa's actual understanding of his right to a jury trial becomes irrelevant where an overriding emphasis is placed on the adequacy of the plea colloquy.

IV.

To me, the overriding emphasis on the plea colloquy to ensure the defendant's understanding of his or her rights is misplaced. As between defense counsel and the trial judge, defense counsel is in a much better position to advise the defendant of, and to ensure that the defendant understands, the rights that he or she will be giving up by pleading guilty or no contest. Defense counsel is familiar with the defendant, spends far more time (than the trial judge) with the defendant, has the opportunity to learn the defendant's personality and gain the defendant's trust, and is ethically bound to advance the defendant's interests. In contrast, the trial judge is not in a position to become familiar with the defendant, develop rapport with the defendant, or gain the defendant's trust. Similarly, there is no good reason to expect that in the short span of time encompassed by a plea colloquy, and given the anxiety and stress associated with pleading guilty or no contest, that the defendant will develop a sufficient rapport with and trust of the trial

judge to enable the judge to effectively explain the implications and nuances of the jury trial right and other rights the defendant is waiving by pleading guilty or no contest.

Given these circumstances, I believe it is unrealistic to place the burden on the trial judge to address, and to make the plea colloquy the forum for determining, whether the defendant understands the various concepts and principles underlying the rights a defendant gives up in pleading guilty. Rather, I believe that the proper function of the plea colloquy is to serve as a broad check on whether defense counsel has discussed the advisability of the plea with, and has explained the accompanying waiver of rights to, the defendant.

In this case, Paa in both his written plea agreement and during his plea colloquy stated that he understood and was waiving his right to a jury trial. In my view, this should have been sufficient to establish prima facie the validity of his jury trial waiver. Thereafter, if Paa wanted to withdraw his plea based on a claim that he did not understand his right to a jury trial, it should have been Paa's burden to prove this claim. See State v. Friedman, 93 Hawai'i 63, 69-70, 996 P.2d 268, 274-75 (2000). Allowing Paa to withdraw his plea based on the purported deficiency in the plea colloquy renders the question of whether Paa actually understood his right to a jury trial irrelevant. The focus on the plea colloquy elevates form over substance in that it allows Paa to automatically withdraw his plea (after learning the sentence imposed by the trial court) even if he fully understood his right to a jury trial, including all the Duarte-Higareda factors. To me, this approach is flawed, undervalues the societal costs of authorizing automatic plea withdrawals, is based on an unrealistic view of a trial judge's proper role and responsibilities in the plea process, and should be revisited.

V.

That said, the precedents of the Hawai'i Supreme Court are binding until they are overruled. The supreme court has not

required the trial judge to advise the defendant of all the Duarte-Higareda factors for a jury trial waiver to be valid in every case. Friedman, 93 Hawai'i at 69, 996 P.2d at 274. ("declining to adopt [the defendant's] contention that the Duarte-Higareda colloquy is constitutionally required in every case" and reviewing the validity of a jury trial waiver "under the totality of the facts and circumstances of the particular case"). However, it is unclear under what circumstances the trial judge's failure to address some or all of the Duarte-Higareda factors would render a plea colloquy deficient and thereby invalidate the defendant's guilty or no contest plea. Thus, to guard against the risk that a guilty or no contest plea (or a separate jury trial waiver) will subsequently be invalidated, it would be prudent for the State to include an acknowledgment by the defendant of his or her understanding of the Duarte-Higareda factors in its written plea agreements or jury trial waivers. It would also behoove trial judges to obtain the defendant's on-the-record acknowledgment of his or her understanding of the Duarte-Higareda factors in all plea colloquies and hearings on jury trial waivers.

Craig H. Nakamura