***** NOT FOR PUBLICATION *****

NO. 25541

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

RONALD ANDREW PONG KEE JHUN, also known as Ronald A. Jhun, Petitioner-Appellee,

vs.

STATE OF HAWAI'I, Respondent-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(S.P.P. NO. 00-1-0027)
(CR. NO. 43968)

AMENDED MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

In 1972, petitioner-appellee Ronald Andrew Pong Kee Jhun, also known as Ronald A. Jhun, entered a plea of guilty in the Circuit Court of the First Circuit, the Honorable Thomas S. Ogata presiding, to one count of a reduced charge of other aggravated battery, in violation of Hawai'i Revised Statutes (HRS) §§ 724-2 and 724-6 (1968).[1] On August 8, 2000, Jhun

[1] HRS chapter 724 was repealed in its entirety in connection with the enactment of the Hawai'i Penal Code, 1972 Haw. Sess. Laws Act 9, § 1, at 140. HRS § 724-2 stated:

> **Battery defined.** A battery is:
> (1) Any unlawful and intentional commission of an injury on or to the person of another, or
> (2) The unlawful and intentional commission of any act which directly or indirectly, causes a harmful or offensive contact on or to the person of another.

Pursuant to HRS § 724-6:

> **Other aggravated offenses.** Whoever[ ] . . . commits

(continued...)

petitioned the circuit court for post-conviction relief pursuant to Hawai‘i Rules of Penal Procedure (HRPP) Rule 40 (2000),[2] which was granted.[3] Jhun asserted in his Rule 40 petition that his conviction was invalid inasmuch as he was not advised prior to entering his guilty plea of, inter alia, the privilege against self-incrimination or the right to confront witnesses, in violation of the United States Supreme Court's decision in Boykin v. Alabama, 395 U.S. 238 (1969).

Respondent-appellant State of Hawai‘i [hereinafter, the prosecution or the State] appeals from the circuit court's (1)

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[1](...continued)

an assault and battery:

(1) By intentionally wounding or inflicting grievous bodily harm upon another, either with or without a weapon, or

(2) By attempting to injure another by use of a weapon or other instrument or thing likely to produce grievous bodily harm,

shall, unless a greater penalty is otherwise provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

[2] HRPP Rule 40 states in pertinent part:

POST-CONVICTION PROCEEDING.

(a) Proceedings and Grounds. The post-conviction proceeding established by this rule shall encompass all common law and statutory procedures for the same purpose, including habeas corpus and coram nobis; provided that the foregoing shall not be construed to limit the availability of remedies in the trial court or on direct appeal. Said proceeding shall be applicable to judgments of conviction and to custody based on judgments of conviction, as follows:

(1) *From Judgment.* At any time but not prior to final judgment, any person may seek relief under the procedure set forth in this rule from the judgment of conviction, on the following grounds:

(i) that the judgment was obtained or sentence imposed in violation of the constitution of the United States or of the State of Hawai‘i[.]

. . . .

[3] The Honorable Karl K. Sakamoto presided over Jhun's Rule 40 petition.

October 22, 2002 findings of fact (FOFs) and conclusions of law (COLs) granting Jhun's HRPP Rule 40 petition and (2) December 9, 2002 FOFs, COLs, and order denying its motion for reconsideration. On appeal, the prosecution contends that the circuit court erred in ruling that, inasmuch as the record was "silent" as to the issue whether Jhun knowingly and voluntarily waived the privilege against self-incrimination and the right to confront witnesses at the time he entered his guilty plea, it was the prosecution's burden to prove that Jhun waived these rights, which it failed to meet. For the reasons discussed infra, Section III, we agree that the circuit court erred in vacating Jhun's conviction. Accordingly, we vacate the circuit court's October 22, 2002 FOFs, COLs, and order granting Jhun's petition for post-conviction relief and remand this case to the circuit court with instructions to deny Jhun's petition for post-conviction relief and reinstate his conviction. We also reverse the December 9, 2002 FOFs, COLs, and order denying the prosecution's motion for reconsideration.

I. BACKGROUND

On April 14, 1972, Jhun filed a waiver of indictment and consented to prosecution by information whereby he was charged with two counts of aggravated battery, in violation of

HRS §§ 724-2 and 724-3(1) (1968) (Counts I and II).[4] At arraignment and plea, Jhun entered a plea of not guilty.

On August 8, 1972, a change of plea hearing was held before Judge Ogata. The record on appeal does not contain a transcript of the change of plea hearing. However, at the April 18, 2002 hearing before Judge Sakamoto on Jhun's Rule 40 petition, the prosecution introduced into evidence, without objection from Jhun, the minutes from the August 8, 1972 change of plea hearing. Inasmuch as the circuit court received the minutes into evidence and Jhun does not raise any objection on appeal as to their admissibility, they are part of the record on appeal. See State v. Quitog, 85 Hawai'i 128, 131 n.7, 938 P.2d 559, 562 n.7 (1997).

The minutes from the change of plea hearing provide in relevant part:

> At 8:53 the Court convened. The record will show the presence of counsel and defendant.
> [Defense counsel] stated that [Jhun] wished to withdraw his plea of Not Guilty heretofore entered and to plea anew to Other Aggravated Battery, being a lesser included offense under Count II.
> [The prosecutor] stated that counsel would stipulate that Other Aggravated Battery was a lesser included offense under Count II and that the State would nolle pros[equi] Count I.
> [Defense counsel] concurred.

[4] Pursuant to HRS § 724-3(1):

> **Aggravated offenses**. Whoever commits an assault or a battery
> (1) With an [sic] weapon obviously and imminently dangerous to life,
> . . .
> shall, unless a greater penalty is otherwise provided by law, be fined not more than $5,000 or imprisoned at hard labor not more than ten years, or both.

> At 8:54 the Court authorized [Jhun] to withdraw his plea of Not Guilty to Count II and to plea anew to Other Aggravated Battery under Count II.
>
> At 8:55 [Jhun] entered a plea of Guilty to Other Aggravated Battery under Count II.
>
> The Court examined [Jhun].
>
> At 9:08 upon being asked by the Court, [defense counsel] and [Jhun] agreed to the disclosure of plea bargaining made by [the prosecution].
>
> The Court further examined [Jhun].
>
> At 9:10 upon being asked by the Court, [defense counsel] stated that he had discussed the facts of the case and charge with [Jhun].
>
> At 9:10 the Court examined [Jhun] as to his written plea of Guilty.
>
> At 9:11 the Court ordered [Jhun]'s written plea of Guilty received and filed.
>
> The Court found [Jhun]'s plea of Guilty to Other Aggravated Battery was voluntary and unconditional and made with intelligent understanding of the nature of the offense and possible consequences and accepted [Jhun]'s plea and adjudged him Guilty of the offense of Other Aggravated Battery under County II of the Information.
>
> . . . .

Additionally, the guilty plea form signed by Jhun states in relevant part:

> 1. I plead GUILTY to the charge of Other Aggravated Battery, HRS § 724-2 and § 724-6[,] Count II[.]
> 2. I have a copy of the indictment or information.
> 3. I have read it or I have had it read to me by my lawyer.
> 4. I talked with my lawyer about it; he explained it to me.
> 5. I understand the charges against me.
> 6. I told my lawyer everything I know about the case.
> 7. My lawyer gave me advice about the case.
> 8. I know that no matter what the facts or evidence of a criminal case may be and even if the defendant feels he is guilty, he has the right to have a trial by jury, or, if he does not want a jury trial, a trial by a judge. My lawyer explained all this to me.
> 9. I know that when I make this plea I give up my right to trial by jury or trial by the judge and the Court will find me guilty without any trial and sentence me.
> 10. I know that the maximum punishment is imprisonment for 5 years and fine of $2,000.
> 11. I know that if there is more than one count against me in this case and the Court finds me guilty of each count, the Court can give me consecutive sentences.
> 12. I know that if I was convicted before in another case the Court can give me consecutive sentences.
>
> . . . .
>
> 15. Nobody is forcing me to make this plea.
> 16. Nobody is promising me leniency or promising to give me a break.
> 17. I know that the Court is not a party to any deal my lawyer and I may have with the prosecutor. I know

that any deal my lawyer and I may have with the prosecutor is not binding on the Court. I know that the Court is not promising me leniency.

18. I do not claim to be innocent. I make this plea because my lawyer and I talked about the evidence in my case, about the law in my case, and about other things about my case.

19. I do not have any gripes or complaints about my lawyer.

On September 15, 1972, the circuit court sentenced Jhun to a five-year term of imprisonment for Count II. On September 25, 1972, the circuit court approved and ordered the prosecution's motion to nolle prosequi Count I in light of Jhun's guilty plea to Count II. Jhun did not take a direct appeal from his conviction or sentence.

On August 8, 2000, Jhun, acting pro se, filed his HRPP Rule 40 petition for post-conviction relief, alleging two grounds for relief. As his first claim for relief, Jhun stated that "[he] was not informed of and did [sic] waive his *Boykin* Rights prior to entering a plea of guilty," arguing:

> The record of the Court demonstrates that [he] was not informed of [1(a)] his Right to jury trial, [1(b)] the Right to confront adverse witnesses, and [1(c)] the Right/Privilege against self-incrimination.[5] Thus the plea of guilty was neither knowing or voluntary.

As his second claim for relief, Jhun contended that "[he] was not informed of [the] relevant consequences of [a] guilty plea, and made no Constitutionally valid waiver of Rights[,]" stating in relevant part that:

> The record of the Court shows that [he] was not informed or advised by Court or counsel that at a future date, that the guilty plea and subsequent conviction could be, and in fact

[5] We note that, for the sake of consistency and ease of reference, we adopt the circuit court's labeling of these three points as 1(a), 1(b), and 1(c).

> was used against him in a foreign jurisdiction to substantially enhance a penalty for an offense totally unrelated to the subject plea and conviction. . . .

On February 21, 2000, the circuit court issued its FOFs, COLs, and order denying Jhun's petition, without a hearing, as to claims 1(a) and 2 and granting a hearing as to claims 1(b) and 1(c). In granting a hearing as to claims 1(b) and 1(c), the circuit court ruled in pertinent part that:

> 12. [Jhun]'s Guilty plea form is silent as to the constitutional rights of the privilege against self-incrimination and the right to confront one's accusers. Since only the waiver of a right to a jury trial or a jury-waived trial is contained in [Jhun]s' Guilty plea form, this court will not assume waiver of constitutional rights; specifically, the privilege against self-incrimination and the right to confrontation, when the record is silent and no documentation exists to indicate otherwise. See Boykin v. Alabama, 395 U.S. 238, 243 (1969).
> 13. [Jhun] has stated a colorable claim for relief as to claims 1(b) and 1(c): that [he] did not voluntarily, knowingly, and intelligently waive his constitutional rights of the privilege against self-incrimination and the right to confront one's accusers. A hearing is hereby granted to address claims 1(b) and 1(c).

We note that, as part of its February 21, 2000 order, the circuit court referred Jhun's petition to the Office of the Public Defender for appointment of counsel. On March 21, 2002, due to a conflict of interest on the part of the Office of the Public Defender, the circuit court appointed Emlyn Higa as counsel for Jhun.

Following an April 18, 2002 hearing to address claims 1(b) and 1(c) of Jhun's Rule 40 petition, the circuit court issued its October 22, 2002 FOFs and COLs granting his petition. On November 12, 2002, the prosecution moved for reconsideration of the circuit court's October 22, 2002 ruling, **RA at 155-61**,

which was denied on December 9, 2002, **RA at 165-71.** The prosecution timely appealed.

II. STANDARDS OF REVIEW

A. Findings of Fact

A court's FOF are reviewed under the clearly erroneous standard. Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994). An FOF "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. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995) (citation omitted). This court has defined "substantial evidence" as "credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Okumura, 78 Hawai'i at 403, 894 P.2d at 100 (citation omitted). See also State v. Kotis, 91 Hawai'i 319, 328, 984 P.2d 78, 87 (1999).

B. Conclusions of Law

"An appellate court may freely review conclusions of law and the applicable standard of review is the right/wrong test. A conclusion of law that is supported by the trial court's findings of fact and that reflects an application of the correct rule of law will not be overturned." Dan, 76 Hawai'i at 428, 879 P.2d at 533 (citations and internal quotation marks omitted).

III. DISCUSSION

At the April 18, 2002 hearing on Jhun's Rule 40 petition, the circuit court ruled in relevant part:

> THE COURT: Okay, the court is looking at Wong v. Among[, 52 Haw. 420, 477 P.2d 630 (1970),] as state law for the premise that if there's a[n] official record that's silent, the presumption is that defendant did not voluntarily and understandably enter their guilty pleas. State v. Vaitogi[, 59 Haw. 592, 602, 585 P.2d 1259 (1978),] recognizes pre-Boykin and the post-Boykin law, and under post-Boykin, which this case is, there must be an affirmative showing that the guilty plea was intelligently and voluntarily given.
>
> Here, looking at all the evidence submitted by the State, the court still cannot conclude that Mr. Jhun understood or was given his right against self-incrimination in his change of plea or that he would have understood what that meant on the evidence submitted by the State. The court finds that, and pointed out in *Boykin*, that is one of the essential constitutional rights that must be understood or at least given to a defendant at the time of change of plea. And I don't think this is a procedural matter. I mean we're talking about constitutional rights, and the constitutional right against self-incrimination is important. And there's no indication that Mr. Jhun understood that important constitutional right. And I'm not sure if that constitutional right, at any time, could have been waived. The State as well as the court had an obligation to inform Mr. Jhun of that important constitutional right, and they just -- from the record, there's just no showing that that was done.

(Emphases added.)

In its October 22, 2002 FOFs and COLs granting Jhun's petition, the circuit court entered the following relevant FOFs and COLs:

> I. FINDINGS OF FACT
>
> . . . .
>
> 3. [Jhun]'s Written Plea of Guilty form, as well as the clerk's minutes of the August 8, 1972 hearing for change of plea is the only record of Jhun's change of plea hearing.
>
> 4. That record is silent as to whether Jhun waived his right against self-incrimination and his right to confront witnesses against him.
>
> . . . .
>
> II. CONCLUSIONS OF LAW
>
> . . . .
>
> 3. In order that a guilty plea be voluntarily and intelligently made, it must, inter alia, include an explicit, on the record, waiver of three

> constitutional rights: the right to jury trial, the right against self-incrimination, and the right to confront accusers.
>
> . . . .
>
> 5. The record is silent as to whether Jhun waived his right against self-incrimination.
> 6. Where the record is silent, the presumption is that Jhun did not waive this right.
> 7. The State bears the burden to persuade this court that Jhun did waive these rights.
> 8. The State has not borne its burden of proof, in the fact of a silent record, that Jhun did waive his right against self-incrimination.
> 9. Jhun's petition as to Claim 1(b), therefore, is granted. The judgment of conviction against him . . . is vacated.

(Emphases added).

In its December 9, 2002 FOFs, COLs, and order denying the prosecution's motion for reconsideration, the circuit court, inter alia, repeated its finding that Jhun was not informed of his right against self-incrimination, adding that he was not informed of "his right to confront his accusers" either.[6] The circuit court, therefore, reiterated its ruling that "[Jhun]'s guilty plea was not voluntarily and intelligently waived." Additionally, the circuit court noted that, "[e]ven if the record was not silent or minimal, [Jhun] would have met his burden to prove beyond a preponderance of the evidence that his constitutional rights were not voluntarily and knowingly waived [sic]."

[6] In support of its findings, the circuit court pointed to a letter dated May 13, 1993 from Jhun's trial counsel to the public defender's office wherein trial counsel stated in relevant part that "the [guilty plea] form addresses the waiver of trial and not confrontation and self-incrimination. So I don't think we told our clients about those rights in those days." The circuit court concluded that, in view of the "silent" or "minimal" record in this case, the prosecution "failed to prove [Jhun] waived his constitutional rights to confrontation and self-incrimination."

As previously indicated, the prosecution argues the circuit court erred in ruling that, inasmuch as the record was "silent" as to the issue whether Jhun knowingly and voluntarily waived the privilege against self-incrimination and the right to confront witnesses at the time he entered his guilty plea, it was the prosecution's burden to prove that Jhun waived these rights, which it failed to meet. We agree that the circuit court erred in vacating Jhun's conviction, but for different reasons. First, in reaching its decision that Jhun did not enter a knowing and voluntary guilty plea, the circuit court misconstrued Boykin v. Alabama, 395 U.S. 238 (1969). Second, the circuit court's reliance upon Wong v. Among, 52 Haw. 420, 477 P.2d 630 (1970) is misplaced.

In Boykin, the defendant, who was represented by counsel, pled guilty to five counts of armed robbery and was sentenced to death. 395 U.S. at 239. At the time the defendant entered his guilty pleas, the trial judge did not ask any questions of the defendant regarding his plea and the defendant did not address the court. Id. Notwithstanding the defendant's failure to raise the issue of the voluntary or knowing character of his guilty plea on direct appeal, the Supreme Court concluded that "[i]t was error, plain on the face of the record, for the trial judge to accept [the defendant]'s guilty plea without an affirmative showing that it was intelligent and voluntary." Id. at 242.

Analogizing to the situation of waiver of the sixth amendment right to counsel where the waiver must be explicitly shown on the record, the Boykin court stated:

> The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation. In Carnley v. Cochran, 369 U.S. 506, 516, 82 S. Ct. 884, 890, 8 L. Ed. 2d 70, we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

395 U.S. at 242. The Court went on to hold "that the same standard must be applied to determining whether a guilty plea is voluntarily made[,]" reasoning:

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Second, is the right to trial by jury. Third, is the right to confront one's accusers. We cannot presume a waiver of these three important federal rights from a silent record.

Id. at 243 (internal citations and footnote omitted).

The circuit court interpreted the holding in Boykin to require an "explicit, on the record, waiver of three constitutional rights: the right to jury trial, the right against self-incrimination, and the right to confront accusers." (Emphasis added.) However, neither the decisions of this court nor those of the United States Supreme Court support such a stringent interpretation.

As explained by the Ninth Circuit Court of Appeals in Wilkins v. Erickson, 505 F.2d 761, 763 (9th Cir. 1974):

> In Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970), the Court citing Boykin, upheld held a guilty plea as voluntary and intelligent even though defendant had not been specifically advised of the three rights discussed in Boykin. The Brady Court clarified Boykin by stating, "the new element added in Boykin was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily." 397 U.S. at 747-748 fn. 4 [.] . . . In North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L. Ed. 2d 162 (1970), the Court stated that in determining the validity of guilty pleas the "standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Specific articulation of the Boykin rights is not the sine qua non of a valid guilty plea.
>
> . . . .

The Wilkins court went on to hold that Boykin does not require specific articulation of the three above mentioned rights in a state proceeding, as long as it is clear from the record that the plea was voluntary and intelligent. 505 F.2d at 763, 765. We note that this is the prevailing view among the federal appellate courts. Alexander v. Whitley, 940 F.2d 946, 947 (5th Cir. 1991); United States v. Carroll, 932 F.2d 823, 824-25 (9th Cir. 1991); Riggins v. McMackin, 935 F.2d 790, 794-95 (6th Cir. 1991); United States v. Henry, 933 F.2d 553, 559-60 (7th Cir. 1991), cert. denied, 503 U.S. 997 (1992); Gonzales v. Grammer, 848 F.2d 894, 897 (8th Cir. 1988); Holloway v. Lynaugh, 838 F.2d 792, 793-94 (5th Cir.), cert. denied, 488 U.S. 838 (1988); Stacey v. Solem, 801 F.2d 1048, 1050-51 (8th Cir. 1986); Wilkins, 505 F.2d at 763-64; Todd v. Lockhart, 490 F.2d 626, 628 n.1 (8th Cir. 1974); United States v. Vallejo, 476 F.2d 667, 671 (3d Cir. 1973); Stinson v. Turner, 473 F.2d 913, 915-16 (10th Cir. 1973); United States v. Sherman, 474 F.2d 303, 305-06 (9th Cir. 1973); Davis v. United States, 470 F.2d 1128, 1132 (3d Cir. 1972); Wade v. Coiner, 468 F.2d 1059, 1060-61 (4th Cir. 1972).

Hawai‘i courts have not specifically addressed the question whether Boykin requires trial courts to explicitly advise defendants of the three Boykin rights prior to accepting a guilty plea. Nonetheless, this court has not departed from the standard articulated in Boykin, as clarified in Brady, 397 U.S. at 747 n.4, and reaffirmed in North Carolina, 400 U.S. at 31, for determining the validity of guilty pleas. See, e.g., State v. Merino, 81 Hawai‘i 198, 217, 915 P.2d 672, 691 (1996); State v. Vaitogi, 59 Haw. 592, 598, 602, 585 P.2d 1259, 1263, 1265 (1978); Reponte v. State, 57 Haw. 354, 362, 556 P.2d 577, 583 (1976); State v. Dicks, 57 Haw. 46, 51, 549 P.2d 727, 731 (1976); see also, Conner v. State, 9 Haw. App. 122, 826 P.2d 440 (1992) (citing Vaitogi, 59 Haw. at 601-02, 585 P.2d at 1265). This court's decision in Vaitogi is instructive.

In that case, the defendant entered guilty pleas to two counts of assault in the third degree and two counts of contempt. 59 Haw. at 592-93, 585 P.2d at 1260. The trial court neither formally acknowledged nor accepted the defendant's guilty plea and failed to inquire as to whether the defendant, who was represented by counsel, understood the ramifications of his plea. Id. at 593, 585 P.2d at 1260. On appeal, the Vaitogi court observed that, prior to Boykin, "the test on appellate review as to the voluntariness of a guilty plea was less stringent."

> The pre-Boykin standards did not require the court to personally question the defendant and indulge in a ritualistic ceremony to determine whether his plea was voluntary. Rather, it was held that if counsel was present, the court could rely on the representations of counsel.

Id. at 596, 585 P.2d at 1262.

The Vaitogi court interpreted Boykin as follows:

> Boykin had a tremendous impact on the standard of review of guilty pleas, thus insuring that such pleas were genuinely voluntary. First, an appellate court can no longer presume from a silent record that a guilty plea was voluntarily and understandingly given. The presence of counsel alone is not sufficient to uphold the validity of the plea. Second, although no specific "litany" or "ritual" is required, the record on review must affirmatively show that the defendant's guilty plea was voluntarily and understandingly given before the plea can be accepted.

Id. at 598, 585 P.2d at 1263 (emphasis added) (footnote and citations omitted).

Holding that the defendant's guilty plea had not been voluntarily and knowingly entered, the Vaitogi court stated that id. at 593-94, 585 P.2d at 1260-61, "pursuant to Boykin it was . . . incumbent on the court to address defendant personally to determine if defendant actually understood the charges against him and the consequences of a plea of guilty[,]" id. at 601, 585 P.2d at 1264. The Vaitogi court concluded that the record failed to affirmatively show that the plea was voluntary inasmuch as

> [n]o inquiry whatsoever was made of defendant when he entered his plea. He was neither informed of the charges against him, the consequences of a conviction for assault nor of the constitutional rights waived by entering a guilty plea. In addition, defendant's counsel told the court that defendant had "a difficult time with the language." In light of this potential language barrier, the court should have been aware of a possible misunderstanding by defendant of any portion of the proceedings and made an effort to determine if defendant actually understood the nature of the hearing and the ramifications of his plea.

Id. at 601, 585 P.2d at 1264-65 (emphases added).

The Vaitogi court continued:

> We adhere to the rule enunciated in State v. Dicks, [57 Haw. 46, 549 P.2d 727 (1976)], that the court need not indulge in a ritualistic litany in determining the voluntariness of a guilty plea. However, at a minimum, the court should make

> an affirmative showing by an on-the-record colloquy between the court and the defendant wherein the defendant is shown to have a full understanding of what the plea of guilty connotes and its consequences. . . .

Id. at 601-02, 585 P.2d at 1265 (emphasis added).

Clearly, neither Boykin nor Vaitogi requires that a defendant be specifically advised of all his constitutional rights by the trial court for his plea to be valid. Cf. Wilkins, 505 F.2d at 765. Indeed, requiring a specific waiver of every one of a defendant's constitutional rights would only sow the seeds for later collateral attack. Id. (citing Boykin, 395 U.S. at 244). Therefore, inasmuch as the record in the present matter plainly reflects that Jhun entered his guilty plea knowingly and voluntarily in compliance with the standards set forth in Boykin and Vaitogi, we hold that the circuit court erred in granting Jhun's Rule 40 petition. More specifically, the trial court, unlike in Boykin and Vaitogi, personally questioned Jhun in open court regarding his oral and written guilty plea, thereafter expressly finding that "[Jhun]'s plea of Guilty to Other Aggravated Battery was voluntary and unconditional and made with intelligent understanding of the nature of the offense and possible consequences." (Emphasis added.) As Jhun's written guilty plea indicates, Jhun was given a copy of the information and acknowledged that he read it (or had it read to him by defense counsel), discussed the information with defense counsel, and understood the charges against him. Jhun also acknowledged in his written guilty plea, inter alia, that (1) he was advised

of the maximum penalty provided by law, (2) he had a right to a jury trial and by pleading guilty he was giving up that right, (3) nobody was forcing him to make the plea, and (4) "I do not claim to be innocent. I make this plea because my lawyer and I talked about the evidence in my case, [and] the law in my case[.] . . ." Based on these facts, we hold that the record affirmatively shows that Jhun had "a full understanding of what the plea of guilty connotes and its consequences." Vaitogi, 59 Haw. at 602, 585 P.2d at 1265.[7]

As for this court's decision in Wong, in that case the defendant-petitioner was charged with various offenses and, unlike Jhun, was not represented by counsel at the time he

[7] We note that the circuit court complied with the requirements of the Hawai'i Rules of Criminal Procedure (predecessor to the HRPP) Rule 11 (1960), which at the time Jhun entered his guilty plea in 1972, provided in pertinent part that "[t]he court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge." HRPP Rule 11 (1993) currently provides in relevant part that:

> **(c) Advice to Defendant.** The court shall not accept a plea of guilty or nolo contendere without first addressing the defendant personally in open court and determining that he understands the following:
>
> (1) the nature of the charge to which the plea is offered; and
>
> (2) the maximum penalty provided by law, and the maximum sentence of extended term of imprisonment, which may be imposed for the offense to which the plea is offered; and
>
> (3) that he has the right to plead not guilty, or to persist in that plea if it has already been made; and
>
> (4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and
>
> (5) that if he is not a citizen of the United States, a conviction of the offense for which he has been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

entered guilty pleas to the charges. The defendant appealed, arguing that he was deprived his constitutional right to assistance of counsel. Wong, 52 Haw. at 421, 477 P.2d at 632. This court vacated the defendant's convictions, holding that the defendant did not voluntarily and intelligently waive the right to counsel. In so holding, the Wong court observed that "[c]ourts are most solicitous to assure an accused adequate legal representation and guardingly indulge in a strong presumption against waiver of this fundamental right." Id. at 424, 477 P.2d at 633 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). The Wong court pointed out that "[the defendant]'s own testimony disclaiming any intention to waive his right to counsel stands unrefuted[,]" stating it could not conclude that the defendant "had the appreciation necessary for a broad understanding of the whole matter." Id. (citation and internal quotation marks omitted).

Furthermore, insofar as a portion of the record had been destroyed and the available portion of the record was silent on the issue, the Wong court observed that "to presume an accused's waiver of counsel from a silent record is constitutionally impermissible." Id. at 424-25, 477 P.2d at 634 (citations omitted). Stating that, "[w]here the record is silent the respondents have the burden of proving that the [defendant] voluntarily and intelligently waived his right to counsel[,]" the

Wong court concluded that the prosecution had failed to carry this burden. Id. at 425, 477 P.2d at 634.

Although the Wong court next addressed whether the defendant's guilty pleas were voluntarily and knowingly entered, it did so in the context where, as previously stated, a portion of the record had been destroyed and the available portion of the record was silent on the issue. The Wong court applied the following standard for determining the validity of the defendant's guilty plea:

> A plea of guilty in itself is a conviction and a simultaneous waiver of several important constitutional guarantees-the privilege against self-incrimination, a trial by jury, and the confrontation of one's accusers. Such a waiver is not constitutionally acceptable unless made voluntarily and with full understanding of the consequences.

Id. (citations omitted) (emphasis added). Inasmuch as the record was silent as to the issue whether the defendant's guilty plea was entered voluntarily and with full understanding of the consequences, the Wong court held that the prosecution had the burden, which it failed to carry, of proving the validity of the defendant's guilty pleas. Id. (citations omitted).

As discussed in detail supra, the record in this case, contrary to Wong, affirmatively shows that Jhun understood what the plea of guilty connotes and its consequences. Vaitogi, 59 Haw. at 602, 585 P.2d at 1265. We, therefore, disagree that the record is "silent" as to the knowing and voluntary nature of Jhun's guilty plea and hold that Wong is inapposite. Regardless, even assuming the prosecution had the burden of proving that Jhun

voluntarily and knowingly entered his guilty plea, we hold that, for the reasons discussed supra, the prosecution successfully carried this burden.

IV. CONCLUSION

For the foregoing reasons, we hold that the circuit court erred in vacating Jhun's conviction. Accordingly, we vacate the circuit court's October 22, 2002 FOFs, COLs, and order granting Jhun's petition for post-conviction relief and remand this case to the circuit court with instructions to deny Jhun's petition for post-conviction relief and reinstate his conviction. We also reverse the December 9, 2002 FOFs, COLs, and order denying the prosecution's motion for reconsideration.

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