DISSENTING OPINION BY RAMIL, J.

I would extend this court's decision in State v. Friedman, 93 Hawai'i 63, 996 P.2d 268 (2000), to adopt a bright-line rule that a waiver of the right to jury trial is not valid unless the trial court judge first informs the defendant of the key components of a jury trial by engaging in the Friedman four-part colloquy.

In Friedman, this court advised trial courts to engage in a brief four-part colloquy highlighting the key components of a jury trial when a defendant wishes to waive trial by jury. Id. at 69, 996 P.2d at 274. To ensure a voluntary waiver, the trial judge 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 jury trial. Id.

We declined to adopt a bright-line rule in Friedman and adhered to the traditional totality of the circumstances test because we had "long observed that the validity of a waiver concerning a fundamental right is reviewed under the totality of the facts and circumstances of the particular case[,]" and thus, such a colloquy requirement was not constitutionally required. Id. I do not suggest, however, that we dispose of the totality of the circumstances test, but rather, I propose that the Friedman four-part colloquy must be read before a valid waiver can be made. If the colloquy is read, there is a presumption

that the waiver was knowing and intelligent. The waiver may nevertheless be found invalid, however, if under the totality of the circumstances it was not voluntary, knowing, and intelligent.

Similar requirements already exist to guarantee the protection of other constitutional rights. Before a defendant can enter a valid guilty plea or a plea of nolo contendere the trial judge must ask the defendant in open court whether he understands the nature of the charge, the maximum penalty, that he has the right to plead not guilty, that there will not be a further trial, whether the plea is voluntary, and whether it is the result of any plea agreement. Haw. R. Penal P. 11 (2001). In order to protect the right to testify, this court has adopted a colloquy requirement for the waiver of the right to testify. Tachibana v. State, 79 Hawai‘i 226, 236, 900 P.2d 1293, 1303 (1995) (holding that trial courts must advise criminal defendants of their right to testify and must obtain an on-the-record waiver of that right).

Imposing a colloquy requirement for the waiver of jury trial, while taking only a few moments to discuss with the defendant, would serve judicial economy by eliminating long hours spent on appealing the validity of waivers and would also further the protection of constitutional rights by ensuring an informed decision and a valid waiver.

This case exemplifies the problems associated with the lack of a standard colloquy requirement. Bush's statements made to the judge evidenced his obvious confusion about the

consequences of waiving a jury trial. He stated,

> I'm in a confusing spot 'cause I haven't spoken to [my attorney], Your Honor. And it's real scary right now in the situation I'm at. I don't know what to say right now. If I waive it and it would just be the judge, can I still call my own witnesses?

Although the judge explained that in a bench trial the judge alone makes the decision, Bush was not informed that he was entitled to participate in the selection of the jury and that the jury must make a unanimous decision to sustain a conviction. In addition, the judge should have inquired into whether Bush had discussed his options with counsel before accepting the waiver. A simple recitation and discussion of the key components of a jury trial would have revealed that Bush was not ready to make an intelligent waiver of his constitutional right to a trial by jury. In this case, Bush expressed his confusion about what the consequences of waiving jury trial were and, after a cursory explanation of one component of a jury trial, made the uninformed decision to waive jury trial a few moments later. These salient facts point toward an invalid waiver. Thus, I would hold that Bush's waiver was not voluntary, knowing, and intelligent and that this court should adopt a rule requiring trial court judges to engage in the Friedman four-part colloquy with a defendant before accepting his waiver of jury trial.

For the foregoing reasons, I respectfully dissent.