CONCURRING AND DISSENTING OPINION
BY WATANABE, ACTING C.J.

I agree with Associate Judge Daniel R. Foley that the Circuit Court of the First Circuit (the circuit court) erred by considering Defendant-Appellant Gervin Sorino's (Sorino) Motion to Withdraw Plea under Hawai'i Rules of Penal Procedure (HRPP) Rule 32(d) instead of Hawaii Revised Statutes (HRS) § 802E-3 (1993). I also agree that HRPP Rule 11(c)(5), which was adopted by the Hawai'i Supreme Court to implement HRS chapter 802E, "mak[es] it clear that the court shall address the defendant personally in open court and determine that the defendant understands the advisement contained in Rule 11(c)(5) and HRS § 802E-2." Majority Opinion at 9. Finally, I agree that the circuit court failed to "recit[e] the advisement contained in HRPP Rule 11(c)(5) and HRS § 802E-2" to Sorino in open court. Id.

However, I respectfully disagree with the majority's conclusion that Sorino's Motion to Withdraw Plea was properly denied.

A.

It is well-settled that a guilty plea "shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." Kercheval v. United States, 274 U.S. 220, 223 (1927) (emphasis added). See also Brady v. United States, 397 U.S. 742, 748-49 n.6 (1970)

(emphasizing the "importance of assuring that a defendant does not plead guilty except with a full understanding of the charges against him and the possible consequences of his [or her] plea").

The United States Supreme Court has never fully delineated what "consequences" of a guilty plea a defendant must fully understand before his or her plea is accepted. In Hawai'i, however, the general rule is that "[c]ourts need not inform defendants prior to accepting their guilty or nolo contendere pleas about every conceivable collateral effect that a conviction might have." State v. Nguyen, 81 Hawai'i 279, 287, 916 P.2d 689, 697 (1996). Applying this general rule, our supreme court concluded in Nguyen that "absent a rule or statute, a court has no duty to warn defendants pleading guilty or 'no contest' about the possibility of deportation as a collateral consequence of conviction." Id.

In Nguyen, the retrospective operation of HRS chapter 802E was at issue. However, the supreme court expressly acknowledged that

> HRS Chapter 802E[] currently requires courts, prior to accepting a plea of nolo contendere, to advise defendants that, if they are not citizens of the United States, their convictions "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." HRS § 802E-2 (1993). Effective September 2, 1988, an amendment to HRPP Rule 11(c)(5) also requires courts to determine that such defendants understand the collateral consequence of possible deportation.

81 Hawai'i at 288, 916 P.2d at 698 (footnotes omitted; emphases added). Thus, with the enactment of HRS chapter 802E, defendants

have a statutory right to receive the immigration advisements set forth in HRS § 802E-2 (1993).

In my view, the language of HRS § 802E-2 is plain and unambiguous. It mandated that the circuit court give a very explicit advisement to Sorino "on the record" before accepting his no-contest plea. The circuit court clearly did not recite the advisement to Sorino and, therefore, violated the terms of HRS § 802E-2.

The language of HRS § 802E-3 is also plain and unambiguous in setting forth the consequences that must follow if a court fails to give the statutory advisement:

> **Failure to advise; vacation of judgment.** If the court fails to advise the defendant as required by section 802E-2 and the defendant shows that conviction of the offense to which the defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, on defendant's motion, the court shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty.

(Emphasis added.)

Since the circuit court failed to give Sorino the statutory advisement required by HRS § 802E-2 and Sorino showed that his conviction had deportation consequences, as evidenced by the deportation proceedings initiated against him by the Immigration and Naturalization Service on September 19, 2002, I would conclude that HRS § 802E-3 required the circuit court to "vacate the judgment" and permit Sorino to withdraw his no-contest plea.

B.

In addition to HRS § 802E-2, HRPP Rule 11(c)(5) imposed the following duty on the circuit court when it accepted Sorino's plea of nolo contendere:

> 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 [or she] understands the following:
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> . . . .
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> . . . that if he [or she] is not a citizen of the United States, a conviction of the offense for which he [or she] 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.

(Emphasis added.)

In McCarthy v. United States, 394 U.S. 459, 89 S. Ct. 1166 (1969), the United States Supreme Court was called upon to determine the effect of a district court's failure to follow the provisions of Federal Rules of Criminal Procedure Rule 11,[1/] the federal counterpart to HRPP Rule 11. The Supreme Court noted that there were two purposes for Rule 11:

[1/] At the time that McCarthy v. United States, 394 U.S. 459, 89 S. Ct. 1166 (1969), was decided, Federal Rules of Criminal Procedure Rule 11(c) provided as follows:

> A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

> First, although the procedure embodied in Rule 11 has not been held to be constitutionally mandated, it is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary. Second, the Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination. Thus, the more meticulously the Rule is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas.
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> . . . .
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> These two purposes have their genesis in the nature of a guilty plea. A defendant who enters such a plea simultaneously waives several constitutional rights, including his [or her] privilege against compulsory self-incrimination, his [or her] right to trial by jury, and his [or her] right to confront his [or her] accusers. For this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464[, 58 S. Ct. 1019] (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

McCarthy v. United States 394 U.S. 459, 465-66 (footnotes omitted).

The Supreme Court then held:

> To the extent that the district judge thus exposes the defendant's state of mind on the record through personal interrogation, he not only facilitates his own determination of a guilty plea's voluntariness, but he also facilitates that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary. Both of these goals are undermined in proportion to the degree the district judge resorts to "assumptions" not based upon recorded responses to his inquiries. For this reason, we reject the Government's contention that Rule 11 can be complied with although the district judge does not personally inquire whether the defendant understood the nature of the charge.

Id. at 467 (footnote omitted).

Having decided that Rule 11 had not been complied with, the Supreme Court next considered what effect the noncompliance had on the defendant's guilty plea. The Supreme Court concluded that "a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew[.]" Id. at 472. The Court reasoned that this holding

> not only will insure that every accused is afforded those procedural safeguards, but also will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate.

Id.

The Supreme Court's reasoning in McCarthy is persuasive as applied to the facts of this case, particularly since the remedy that the Supreme Court concluded was appropriate for a Rule 11 violation is consistent with the remedy set forth in HRS § 802E-3.

C.

The majority overlooks the circuit court's failure to comply with HRS § 802E-2 and HRPP Rule 11(c)(5) by relying on the fact that Sorino read the advisement on a preprinted written change of plea form. This written advisement, however, did not satisfy HRS § 802E-2 because it was not made by "the court" and was not made "on the record." See HRS § 802E-2. Likewise, the written advisement did not satisfy HRPP Rule 11(c)(5) in that it

was not made "personally in open court[.]" See HRPP Rule 11(c)(5).

An otherwise sufficient advisement contained in a written change of plea form does not meet the express requirements of HRS § 802E-2. To hold otherwise would render meaningless the legislature's command that "the court shall administer the following advisement on the record to the defendant[.]" HRS § 802E-2.

D.

Other states that have enacted immigration advisement statutes similar to HRS chapter 802E[2/] have required either strict or substantial compliance with the statutes.

In State v. Douangmala, 646 N.W.2d 1 (Wis. 2002), the Wisconsin Supreme Court applied the strict compliance standard and held that if a circuit court failed to give a defendant the specific deportation warning required by Wisconsin Statutes (Wis. Stat.) § 971.08(1)(c)[3/] and the "defendant moves the court and

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[2/] The District of Columbia and the following seventeen states have enacted statutes that require immigration advisements that are substantially similar to the advisement required by Hawaii Revised Statutes § 802E-2: California, Connecticut, Florida, Georgia, Maryland, Massachusetts, Minnesota, Montana, New Mexico, New York, North Carolina, Ohio, Oregon, Rhode Island, Texas, Washington, and Wisconsin. See Immigration and Naturalization Serv. v. St. Cyr, 533 U.S. 289, 322 n.48 (2001).

[3/] Wisconsin Statutes (Wis. Stat.) § 971.08(1)(c) (1999-2000) required a court accepting a guilty or no-contest plea to personally advise the defendant as follows:

> If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law.

demonstrates that the plea is likely to result in the defendant's deportation, then [Wis. Stat.] § 971.08(2)[4/] requires the circuit court to vacate the conviction and to permit the defendant to withdraw the guilty or no-contest plea." Id. at 10 (footnote added).

In Douangmala, the State of Wisconsin argued that the circuit court's failure to give the statutory advisement was harmless, since the defendant was aware of the deportation consequences at the time he entered his plea. The state pointed out that the defendant had filed a Request to Enter Plea and Waiver of Rights form, on which the defendant acknowledged the following statement by initialing the blank margin next to the statement:

> I understand that if I am not a citizen of the United States of America, a plea of guilty or no contest to the offense(s) for which I am charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law.

Id. at 3. Rejecting the state's argument, the Wisconsin Supreme Court concluded that, given the clear statutory directive to the circuit courts and the specific statutory remedy provided by the

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State v. Douangmala, 646 N.W.2d 1, 2 (Wis. 2002).

4/ Wis. Stat. § 971.08(2) provided as follows:

> If a court fails to advise a defendant as required by sub. (1)(c) and a defendant later shows that the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization, the court on the defendant's motion shall vacate any applicable judgment against the defendant and permit the defendant to withdraw the plea and enter another plea. This subsection does not limit the ability to withdraw a plea or no contest on any other grounds.

legislature for failure to comply with the directive, the harmless error rule did not apply. Id. at 9.

The majority of states with statutes similar to HRS chapter 802E require substantial, not literal, compliance with the statutory advisement requirement. See, e.g., State v. Malcolm, 778 A.2d 134, 139 (Conn. 2001); Slytman v. United States, 804 A.2d 1113, 1116 (D.C. 2002); State v. Francis, 820 N.E.2d 355, 363 (Ohio 2004); Machado v. State, 839 A.2d 509, 513 (R.I. 2003). These courts hold that although verbatim recitation of the statutory advisement is preferable, the denial of a defendant's guilty or nolo contendere plea will be upheld on appeal as long as the defendant is substantially informed of the three specific immigration consequences of (1) deportation, (2) exclusion, and (3) denial of naturalization.

The case of Machado v. State is instructive because its underlying facts are very similar to the facts of this case. The issue in Machado was whether the trial court's pre-plea colloquy with the defendant satisfied the command of a Rhode Island statute that "the court shall inform the defendant that if he or she is not a citizen of the United States, a plea of guilty or nolo contendere may have immigration consequences, including deportation, exclusion of admission to the United States, or denial of naturalization[.]" At the plea hearing, the trial court informed the defendant as follows:

> You also understand that because of the fact that you are a resident alien here that this may have some effect upon what happens with the immigration service. Do you understand that?

Id. at 511. Additionally, defense counsel stated on the record that he had explained to his client that an alien entering a plea faces the possibility of deportation.

The Rhode Island Supreme Court, applying the substantial compliance standard, held that although verbatim recitation of the statutory warning was not required, "neither a generalized reference to potential immigration consequences nor an advisement of deportation alone gives adequate notice to an alien defendant of the possibility of exclusion or denial of naturalization." Id. at 513 (footnote omitted).

In this case, the circuit court advised Sorino: "I'm required to tell you that if you're not a citizen, this plea may have a bearing on whatever relationship you have with the Immigration and Naturalization Service. Do you understand that?" This colloquy was vague and generalized and did not address any of the specific immigration-related consequences set forth in HRS § 802E-2. Under either the literal or substantial compliance test, therefore, the circuit court's advisement was improper.

For the foregoing reasons, I hold that Sorino was entitled to the remedy provided by HRS § 802E-3.

Corinne K.A. Watanabe
Acting Chief Judge