DISSENTING OPINION BY ACOBA, J.

I would reverse the decision of the Intermediate Court of Appeals and vacate the judgment of the first circuit court (the court). In my view, the instant case should be remanded for a new trial based on the claim that Petitioner/Defendant-Appellant Evan Kakugawa (Petitioner) did not voluntarily, intelligently, and knowingly waive his right to a jury trial because it is undisputed that Petitioner relied on his counsel's reiteration of the court's statement during a pretrial conference that the case "didn't sound like murder to me" before waiving his right to a jury trial.

I do not believe that the communication by Petitioner's counsel of the court's statement can be categorized as "trial strategy," as the majority would have it, because such advice does not fall within the conventional trial strategy situations recognized by this court. See State v. Vanstory, 91 Hawai'i 33, 37, 979 P.2d 1059, 1063 (1999) (opining that the defendant had stipulated that he had been convicted of felonies in Maryland and Tennessee and being a fugitive from justice in Delaware as part of his trial strategy); State v. Quitog, 85 Hawai'i 128, 149-50, 938 P.2d 559, 580-81 (1997) (holding that the defendant could not be retried for attempted second degree murder where the prosecution, as part of its trial strategy, abandoned the murder charge and sought a conviction for the included offense of first degree assault); Takayama v. Kaiser Found. Hosp., 82 Hawai'i

486, 497, 923 P.2d 903, 914 (1996) (recognizing that "it may be readily understandable as a general matter of trial strategy that a party would choose not to seek to reveal, highlight, or refute a contrary position until the contrary position has actually been taken by the opposition); State v. Irebaria, 55 Haw. 353, 358-59, 519 P.2d 1246, 1250 (1974) (concluding that a defendant's decision to defend against joined robbery and firearm possession charges was a matter of trial strategy); Child Support Enforcement Agency v. Carlin, 96 Hawai'i 373, 377, 31 P.3d 230, 234 (App. 2001) (stating that defense counsel had revealed his trial strategy as "to concede the facts and argue the law").

It is well-settled that not everything an attorney does is considered "trial strategy" and thus, "rarely . . . second-guessed by judicial hindsight." State v. Richie, 88 Hawai'i 19, 39, 960 P.2d 1227, 1247 (1998) (internal quotation marks and citations omitted). See State v. Hoang, 94 Hawai'i 271, 278, 12 P.3d 371, 378 (App. 2000) (positing that "[t]he constitutional right to testify is personal to the defendant, to be relinquished only by the defendant, and may not be waived by counsel as a matter of trial strategy"); State v. Aplaca, 74 Haw. 54, 71, 837 P.2d 1298, 1307 (App. 1992) (holding that counsel's decision "not to conduct a pretrial investigation of prospective defense witnesses cannot be classified as a tactical decision or trial strategy").

Here, Petitioner's counsel expressly stated, and the

court accepted, that he advised Petitioner to waive his right to a jury trial based on what the court had said and what Petitioner believed the court would do based on that statement. Thus, the waiver did not proceed from trial counsel's independent determination as to how the case should be tried, but proceeded from the statement made by the court to counsel in the case.

The situation here is more appropriately categorized as involving inducement by the court, not trial strategy by Petitioner's counsel. In a similar situation this court previously provided relief to a defendant who relied on representations made by a trial judge as to a proposed sentencing disposition that was later withdrawn. See State v. Fogel, 95 Hawai'i 398, 405-06, 23 P.3d 733, 740-41 (2001) (recognizing that a promise made by a trial judge which leads a defendant to change his plea must be "given the same effect . . . as a promise or agreement of a prosecutor, . . . said to be part of the inducement or consideration for a defendant's plea," and allowing the defendant to withdraw his plea because the court did not sentence him in accordance with its "inclination" to grant him a deferred acceptance of no contest plea (internal quotation marks and citations omitted)). This case is more appropriately governed by that case law.

For the foregoing reasons, I respectfully dissent and would remand for a new trial.