CONCURRING OPINION OF ACOBA, J.,
WITH WHOM LEVINSON, J., JOINS

I write separately in response to the dissent's view that there was no Miranda violation in this case. I do not believe that Defendant-Appellant Peter Alvin Poaipuni (Defendant) knowingly, intelligently, and voluntarily waived his right against self-incrimination when he made statements to the police regarding the possession of firearms.

I.

On July 7, 1998, the police arrested Defendant on charges of thefts of automated teller machines (ATMs). While Defendant was in custody, the police executed a search warrant at his residence. Detective Fletcher found several firearms in the toolshed of the property. Detective Fletcher returned to the Wailuku police station and, at 10:10 PM, about twelve hours after Defendant was placed into custody, commenced interrogation of Defendant with Detective Holokai. Detective Holokai informed Defendant that his investigation involved the theft of an ATM from a grocery store in Haʻikū. Defendant was further told that Detective Ching would later interview Defendant about an investigation involving the Puʻunēnē Post Office, and Detective Fletcher would thereafter question Defendant about an investigation involving the theft of an ATM machine in Kīhei.

When Defendant agreed to discuss these matters with the police, the police provided Defendant with a written warning and waiver form informing him of his constitutional rights. Detective Holokai and Defendant read over the form together and Defendant initialed and signed the form.

However, in the middle of the interrogation, Detective Fletcher questioned Defendant about firearms discovered at Defendant's residence. There were no firearms involved in the cases assigned to Detectives Holokai, Ching, and Fletcher that had been earlier identified. Detective Holokai testified that there was no mention of guns prior to the commencement of the interrogation. During this discussion of weapons, Defendant gave a statement indicating that he was in possession of firearms, and the police subsequently charged him with the offense of felon in possession of firearms, Hawai'i Revised Statutes § 134-7(b) (1993 & Supp. 1998).

In a pre-trial hearing, Defendant moved to suppress the incriminating statement. Defendant's motion was denied and the statement was admitted at trial. Defendant was convicted as charged. On appeal, Defendant argues that the court erred when it found that Defendant's statement was knowingly, voluntarily, and intelligently given.

The following testimony of Detective Holokai is crucial to an understanding of whether Defendant knowingly and intelligently waived his right against self-incrimination under

the directives of Miranda v. Arizona, 384 U.S. 436 (1966), as to the charges in the instant case:

> Q [PROSECUTOR]: What happened after he finished reading the rights?
> A [DETECTIVE HOLOKAI]: When he was through reading the waiver of rights, I asked him if he wanted to give a statement regarding the investigation, and [Defendant] stated that he would, and then he signed under the waiver of rights section, and also placed the date and time in this section.
> . . . .
> Q: Detective Holokai, was there just one case that you were questioning the defendant about?
> A: For my case, yes, it was a burglary case.
> Q: Okay. And did that involve firearms or what?
> A: The firearms case involved a separate case with another detective.
> Q: Okay. Would that be Detective Fletcher?
> A: Yes, it would.
> Q: So during that night, would it be fair to say you and Detective Fletcher were questioning the defendant regarding more than one case that you were investigating or that the police were investigating?
> A: Yes.
> . . . .
> Q [DEFENSE COUNSEL]: . . . [I]n fact, there were three of you who were interested in interrogating [Defendant] and you were telling him basically that that was going to be the subject of this investigation, was not only your investigation, but also Detective Fletcher's and Detective Ching's; correct?
> A: Yes, I informed [Defendant] of that. That's correct.
> . . . .
> Q: Now, when you said, are you willing to talk to me about this case that I'm going to talk to you about, did he already know what case you were talking about?
> A: I'm not sure if he did know or not. . . .
> . . . .
> Q: After you said, are you willing to talk to me about this case that I want to talk to you about, and after [Defendant] answered, okay, then you told him, if you are, that is, if you are willing to talk to me about this case, just sign, date and time [sic] on the form?
> A: Yes, that's the procedure to have the person sign if they are willing to sign.
> Q: And then you told him, Peter, I'm going to talk to you about the case in Haiku that happened. That was your case; right?
> A: That's my case, yes sir.
> Q: This was a case where an ATM machine was taken from a grocery store in Haiku?
> A: That's a burglary case, yes, sir.
> Q: And then you said -- well, in fact, you described it. A burglary at a Haiku General Store, but then you said later on Detective Ching has another case. Detective Ching has another case that he's working on at the Puunene Post Office. I think it's this morning on the 7th of July; right? You told him about that?

A: Told him Detective Ching wanted to talk to him about his case when I was through with my case.

Q: And then you said later on, also Detective Fletcher has a case that he's working on that occurred, I believe it was July 6th, but in this case, Detective Fletcher's case, there was an ATM machine pulled out from an establishment in Kihei, so he wanted to talk to you about that case. Okay. And [Defendant] said okay.

A: Yes.

Q: Then you said, so you are willing to talk to us about these cases tonight, and he said yeah.

A: I believe so. . . .

. . . .

Q: Were you present when the subject then of asking [Defendant] about the guns first came up during this interview?

A: With Detective Fletcher?

Q: Yeah.

A: Yeah, I probably was present, yes.

Q: Okay. Did the guns that are the subject of this case have any connection with the case that Detective Fletcher was investigating?

A: The guns -- Detective Fletcher's case was the burglary case in Kihei.

Q: That involved taking of an ATM machine; right?

A: Yes.

Q: This was an ATM machine that was taken and fell out the back of the truck during the course of the culprits trying to get away?

A: Yes.

Q: No indication of any firearms being involved in that case; was there?

A: I don't believe so, no.

Q: In fact, was there any indication of a firearm being involved in the case that you were investigating, that is the Haiku Grocery Store burglary?

A: I did not get any indication from the complainant, no.

Q: To your knowledge the case that Mervin Ching [sic], likewise, did not involve firearms; did it?

A: I don't think so.

Q: Up until the point when Detective Fletcher asked [Defendant] about the guns that were found during a search of his house that night, had anybody advised him that he was going to be questioned about that subject?

A: I believe Detective Fletcher probably advised him of the weapons.

Q: When you say you believe he probably did, what does that mean? Does that mean that, yes, you're testifying under oath that he did, or you think he probably did?

A: Well, If I can follow the transcript I would know for certain, but this happened awhile back, so.

. . . .

Q: Could you look through that and tell me whether you see any indication of [Defendant] being advised of any investigation involving guns at his house prior to the time he was asked by Detective Fletcher about the guns?

A: There's a portion that Detective Fletcher had asked [Defendant] regarding the search at his residence in Pukalani, and Detective Fletcher mentioned something about locating some shotgun shells in one bedroom and that's what he talked to [Defendant] about.

> Q: To your knowledge were those shotgun shells in any way connected with any of the three investigations that you were discussing with [Defendant] that night?
> A: Regarding the burglary cases?
> Q: Yeah.
> A: No, it's not -- it's not connected with those burglaries, no.
> Q: Okay. And you said there was a place there where Detective Fletcher mentioned the shotgun shells found, and then he proceeds -- it's just -- that is the beginning of his interrogation when he asked [Defendant] about the firearms found in the tool shed?
> A: Yeah, it looks like where Detective Fletcher started the interview with [Defendnat] regarding the items that were found at the house.
> Q: Up until that time that Detective Fletcher started the interview, there was no previous mention of the firearm; correct?
> A: Correct.

(Emphases added.)

The warning of rights and waiver form read to Defendant also reflects he was not informed about the ultimate scope of the interrogation.[1] On the form Defendant initialed that he

---

[1] The form reads:

> WARNING OF RIGHTS
>
> Before we ask you any questions, we want to tell you about your rights.
>
> You have the right to remain silent.
>
> Anything you say can be used against you in court.
>
> You have the right to talk to a lawyer for advise [sic] before we ask you any questions and to have your lawyer with you during questioning.
>
> If you cannot afford a lawyer one will be appointed for you before any questioning if you wish.
>
> . . . .
>
> UNDERSTANDING OF RIGHTS
>
> I understand the English language. I have read and heard this statement of my rights and I understand what my rights are.
>
> WAIVER OF RIGHT
>
> I am willing to make a statement and answer questions without talking to a lawyer or having a lawyer present. No

(continued...)

understood his rights and signed his name under the words "UNDERSTANDING OF RIGHTS" and "WAIVER OF RIGHT." Detective Ching's name is written next to the word "Witness." Detective Holokai's name appears next to the phrase "Warnings given by." As set forth above, Detective Holokai was involved with one of the burglary investigations and Detective Ching with the post office investigation. Detective Fletcher, the person who questioned Defendant regarding the instant case, was apparently investigating the second burglary case. As is evident, the firearms charge was not connected to the burglary cases or to Detective Ching's case.

As a result of the procedure followed, it appears that Defendant could not have known that he was to be asked about the firearms charge at the time he waived his rights. It is plain from the foregoing that, while Defendant was in custody: (1) three detectives interviewed him at the same time about four different cases -- the two burglaries, Detective Ching's case, and the instant case; (2) none of the three other cases involved firearms; (3) at the time he was read the Miranda warnings and prior to questioning, Defendant was informed that he was going to be asked about the three other cases; and (4) Defendant was never warned pursuant to Miranda that he was to be interrogated about the recovery of firearms from his home.

---

[1](...continued)
promises or threats have been made to me and no pressure or force of any kind has been used against me. I understand that I have the right to stop answering questions or to ask for a lawyer at any time.

II.

The facts in Colorado v. Spring, 479 U.S. 564 (1987), differ. In Spring, the United States Supreme Court held that "[a] suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his [f]ifth [a]mendment privilege." Id. at 577. In that case, federal Alcohol Tobacco & Firearms (ATF) agents, interrogating the defendant about a firearms charge, also questioned him about a murder in Colorado, a crime the defendant denied committing. Subsequently, Colorado law enforcement officials interrogated the defendant, specifically informing him in their Miranda warnings that they would question him about the murder. Following the defendant's conviction for that crime, the Colorado Supreme Court affirmed the proposition that the second statement obtained by Colorado officers was the fruit of the poisonous tree of the first statement secured by the ATF agents. Unlike in this case, as to the statement in issue, it was unclear in *Spring* as to whether the ATF agents told the defendant about either topic of the interrogation.

> According to the Colorado Supreme Court, [i]t is unclear whether Spring was told by the agents that they wanted to question him specifically about the firearms violations for which he was arrested or whether the agents simply began questioning Spring without making any statement concerning the subject matter of the interrogation. What is clear is that the agents did not tell Spring that they were going to ask him questions about the killing of Walker before Spring made his original decision to waive his Miranda rights.

Id. at 575 n.7 (emphasis added) (internal quotation marks and citation omitted). Thus, in Spring, it was not established

whether the ATF agents informed the defendant of either crime about which they would question him.

However, in the instant case, Detective Holokai informed Defendant that he and the other detectives were going to interview him about three other cases, but then, during the interrogation, Detective Fletcher questioned him about an entirely different matter -- the firearms violation -- without further Miranda warnings. By only advising him that they intended to ask questions about the other cases at the time of the Miranda warning, the police did not accurately inform Defendant of the ultimate scope of their interrogation.

III.

In State v. Ramones, 69 Haw. 398, 744 P.2d 514 (1987), this court stated that the "Miranda warnings as to one offense provided sufficient notice as to potential criminal liability for the other offense." Id. at 405, 744 P.2d at 518. That case is also distinguishable. While interviewing the defendant regarding an "auto theft," the police in Ramones determined that the defendant had not stolen the vehicle but had merely committed "the more narrow act of the Unauthorized Control of a Propelled Vehicle [(UCPV)][.]" Id. at 400, 744 P.2d at 515. As opposed to Spring, the question decided was "whether Miranda warnings also require the police to apprise criminal suspects of the specific offense which they might be charged with." Id. at 404, 744 P.2d at 517 (emphasis added). In Ramones, the police did not

interview the defendant about several crimes but rather about a single crime. As the court explained, the Miranda warnings form "listed the nature of the charge as 'auto theft' because . . . the police did not know what specific crime Ramones had committed, so the broader offense of auto theft . . . was alleged." Id. (emphasis added). The court then explained that

> Ramones was arrested for auto theft but eventually charged with [UCPV]. The two offenses carry the same penalty and are closely related. *Miranda* warnings as to one offense provided sufficient notice as to potential criminal liability for the other offense.

Id. at 405, 744 P.2d at 518 (emphasis added). Obviously, the police in Ramones interviewed the defendant about the same act for which he was arrested and then determined that he should be charged with UCPV rather than "auto theft." Manifestly, the Miranda warnings provided "sufficient notice" in Ramones, because the interrogation related to only one incident. Here, Defendant was specifically warned as to the burglary incidents and Detective Ching's case, but not as to the firearms charge.

In Ramones, this court proposed that "[o]nce *Miranda* warnings are given, they need not be given again in the same interrogation even if other offenses materialize or become more appropriate." 69 Haw. at 406, 744 P.2d at 518 (citing Spring, 479 U.S. at 577). In the context of the facts in Ramones, this statement appears limited in reach to questioning regarding offenses that materialize as a result of the interrogation, not out of other investigations being pursued by the police.

This limitation in Ramones is made evident in State v. Nelson, 69 Haw. 461, 748 P.2d 365 (1987). In Nelson, the defendant was suspected of making harassing phone calls to ministers. He was interrogated on December 25, 1985, after the police read him his Miranda rights, and specifically indicated that he did not want the assistance of an attorney. See id. at 463, 748 P.2d at 367. Two days later, the police returned to the defendant's home to ask him about other harassing calls made from his telephone. See id. He was again read his rights, but this time did not indicate either way on the Miranda form whether he wanted an attorney. See id.

However, the trial court determined that, on December 27, the defendant had in fact invoked his right to counsel and did not waive it. See id. at 465, 748 P.2d at 368. The State argued on appeal that the court should not have suppressed the defendant's statements made on December 27 and thereafter because there was "actually no reason to 'Mirandize' the defendant[,] . . . the questioning conducted on December 27th [being] a continuation of the earlier interrogation for which there was an unequivocal waiver of counsel." Id. This court stated:

> To be sure, we recently said[,] "Once *Miranda* warnings are given, they need not be given again in the same interrogation even if other offenses materialize or become more appropriate." [Ramones], 69 Haw. [at 406], 744 P.2d [at] 518 . . . (citation omitted). But we were speaking of a situation totally unlike the one at bar. . . .
>
> Unlike Radford John Ramones, Kurt Lance Nelson was subjected to questioning more than once. He was initially questioned by Officer Mariboho on Christmas Day about harassing calls received by two ministers. Armed with information about threatening calls received by other

> persons uncovered by the telephone company in the interim, Mariboho returned two days later with another officer, and they subjected the defendant to further interrogation. This was hardly "the same interrogation" conducted on Christmas Day. The officers had new information regarding different offenses, and it was incumbent upon them to "Mirandize" the defendant again.

Id. at 471-72, 748 P.2d at 371-72 (emphases added).

As in Nelson, Defendant in the instant case was interrogated about an offense different from the offenses about which he was initially warned. These different crimes did not "materialize [as] or become more appropriate" charges as a result of the warning and interrogation. Id. Here, the police did not interview Defendant at two separate times. Nevertheless, in my view, they were required to render Miranda warnings to Defendant again, and inform him of the new topic of investigation, once they themselves introduced "different offenses" from those about which they had originally informed Defendant in obtaining his Miranda waiver.

IV.

In Ramones, this court was not faced with facts similar to the instant one and, in that context, whether Spring would be persuasive under our own constitution. In my view, a defendant cannot be said to have knowingly and intelligently waived his or her Miranda rights when he or she has been led to believe that the police will only ask questions about a specific incident or incidents but, in the course thereof, the defendant is interrogated about a completely different instance. In such a

situation, the defendant, if warned pursuant to Miranda, may, upon intelligent and knowing reflection, decline to speak or to proceed without the aid of an attorney. As Justice Marshall's dissent in Spring points out, it would appear plain that an accused can only knowingly, intelligently, and voluntarily waive the guarantee against self incrimination if he or she is informed that the guarantee is afforded with respect to the subject focus of interrogation:

> It seems to me self-evident that a suspect's decision to waive [the fifth amendment] privilege will necessarily be influenced by his [or her] awareness of the scope and seriousness of the matters under investigation.
>
> To attempt to minimize the relevance of such information by saying that it "could affect only the wisdom of" the suspect's waiver, as opposed to the validity of that waiver, ventures an inapposite distinction. Wisdom and validity in this context are overlapping concepts, as circumstances relevant to assessing the validity of a waiver may also be highly relevant to its wisdom in any given context. Indeed, the admittedly "critical" piece of advice the Court recognizes today -- that the suspect be informed that whatever he [or she] says may be used as evidence against him [or her] -- is certainly relevant to the wisdom of any suspect's decision to submit to custodial interrogation without first consulting his [or her] lawyer.

Spring, 479 U.S. at 578 (Marshall, J. dissenting, joined by Brennan, J.) (emphasis added) (citation omitted). A suspect cannot intelligently or knowingly exercise his or her Miranda rights in one case if, preceding the questioning, the police have led the suspect to believe that they are interviewing him or her about a different crime or crimes:

> Not only is the suspect's awareness of the suspected criminal conduct relevant, its absence may be determinative in a given case. The State's burden of proving that a suspect's waiver was voluntary, knowing, and intelligent is a "heavy" one. Miranda, 384 U.S. at 475, 86 SCt. at 1628. We are to "'indulge every reasonable presumption against waiver' of fundamental constitutional rights" and we shall

> "'not presume acquiescence in the loss of fundamental rights.'" Johnson[v. Zerbst], 304 U.S. [458,] 464 [(1938)] (citations omitted); see Brewer v. Williams, 430 U.S. 387 (1977).

Id. at 581.

Because we do not presume acquiescence in the loss of fundamental rights, see Tachibana v. State, 79 Hawai‘i 226, 234, 900 P.2d 1293, 1301 (1995); State v. Dicks, 57 Haw. 46, 48, 549 P.2d 727, 729 (1976), and are to indulge a reasonable presumption against waiver, see State v. Vares, 71 Haw. 617, 621, 801 P.2d 555, 557 (1990); State v. Dowler, 80 Hawai‘i 246, 250, 909 P.2d 574, 578 (App. 1995), I would hold that Defendant did not waive his Miranda rights as to the firearms investigation, and, thus, the use of his statements as to the resulting charge should have been suppressed from use at trial.