CONCURRING AND DISSENTING OPINION BY ACOBA, J.

While I agree that we have jurisdiction herein, I respectfully disagree that the right to Miranda warnings of Defendant-Appellant Samuel Naititi (Defendant) was not violated, for the present case involves the classic situation of a police interrogation as envisioned by the Miranda decision. Miranda v. Arizona, 384 U.S. 436 (1966). When Detective Lavarias (Lavarias) asked whether Defendant "wanted to make a statement," this constituted "express questioning" within the definition of an interrogation as described by the Supreme Court. Rhode Island v. Innis, 446 U.S. 291, 301 (1980); see infra at 2. Accordingly, Defendant was entitled to a warning regarding his Fifth Amendment privileges to remain silent, to have counsel present, and to advise him "of the consequences of forgoing" such rights. Miranda, 384 U.S. at 468; see infra at 4-5.

I.

In Miranda, the Supreme Court explained that "there can be no doubt that the Fifth Amendment privilege is available . . . to protect persons in all settings in which their freedom is curtailed in any significant way from being compelled to testify. 384 U.S. at 467. The Court reasoned that "[a]t the outset, if a person in custody is to be subjected to interrogation," he or she must first be warned of his or her Fifth Amendment rights. Id. at 467-68. The warning, now embedded in our national culture,

see Dickerson v. United States, 530 U.S. 428, 430 (2000), requires that, prior to an interrogation, a person in custody must be warned, inter alia, "of the right to remain silent" and this warning "must be accompanied by the explanation that anything said may be used against the individual in court." Miranda, 384 U.S. at 469. The Fifth Amendment privilege comprehends not only one's right to remain silent, but also the "right to consult with counsel prior to questioning" and the right "to have counsel present during any questioning if the defendant so desires." Id. at 470. The right to have an attorney present prior to being questioned is one of the "indispensable . . . protection[s] of the Fifth Amendment[,]" which was established to "mitigate the dangers of untrustworthiness" often present during interrogations. Id.

The Supreme Court directed that "the Miranda safeguards come into play whenever a person in custody" is interrogated. Innis, 446 U.S. at 301. The term "interrogation" under Miranda refers to the point at which such a suspect is "subjected to either express questioning or its functional equivalent." Id. "Functional equivalent" refers to "any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police officer should know are reasonably likely to elicit an incriminating response from the suspect." Id.; see State v. Ikaika, 67 Haw. 563, 567, 698 P.2d 281, 284 (1985).

II.

It is undisputed that Defendant was in custody. As the facts indicate, plainly he was subject to express questioning. Detective Lavarias was assigned to investigate allegations of sexual assault. Based on an interview with the complainant, Defendant was named as a suspect. As a result, Defendant was arrested on June 4, 2002, and taken to the main police station cellblock. The next day, Lavarias "went downstairs to the cellblock to get [Defendant]." Because Defendant was deaf and mute, Lavarias had arranged for a sign language interpreter, Hugh Prickett (Prickett), to be present. Lavarias "brought [Defendant] upstairs" from his jail cell, and with Prickett present to interpret, sat Defendant down "in the [Criminal Investigation Division (CID)] interview room." The dimensions of the CID room, occupied by the three men, was only eight feet by eight feet.

In such a setting Miranda envisioned that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Miranda, 384 U.S. at 467 (emphasis added). Thus the Miranda "warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere." Id. at 468 (emphasis added).

The very first statement of Lavarias was the express question posed to Defendant of whether "he wanted to make a statement today." Lavarias did not inform Defendant of his right to remain silent prior to this question. Lavarias testified that Defendant responded, "I'm sorry. I'm sorry." According to Lavarias, at that time he "stopped . . . and asked Mr. Prickett to ask [Defendant] if he wanted an attorney." Lavarias testified that in response to this question, Defendant made some ambiguous yet potentially incriminating statements which the prosecution now seeks to admit as evidence against him.

III.

It is questionable what legitimate purpose Lavarias' first question would serve. Under Miranda's precepts, Defendant could not be expected to make an informed decision on whether or not to make a statement without first having been advised of his right to remain silent, the consequences of forgoing that right, and his right to counsel. "For those unaware of the privilege, the warning is needed simply to make them aware of it[.]" Id. at 468. As the Supreme Court has said,

> this warning is needed in order to make [a suspect] aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system - that he is not in the presence of persons acting solely in his interest.

Id. at 468 (emphases added). To ask whether an accused wants to

give a statement before advising the accused of the legal effect of doing so defeats the purpose of the Miranda warning itself. Thus, prior to asking if Defendant wanted to make a statement, Lavarias was obligated to warn him of his "right to remain silent" and that "anything said [could] and [would] be used against" him in court and that he could consult with an attorney before making a statement. Id.

IV.

As indicated, Lavarias' question as to whether Defendant wanted to make a statement was an express question and plainly fell within the purview of Miranda for purposes of the constitutionally mandated advisory. See Innis, 446 U.S. at 301. If it were necessary to apply the second prong of the interrogation definition, such a question would obviously constitute the "functional equivalent" of express police questioning. Asking Defendant if he "want[ed] to make a statement" is similar to asking if "he had anything to say," or if "he wanted to tell his side of the story," or if "he had anything he wanted to clear up." While each of these types of questions could be answered with a simple "yes" or "no," it is reasonably foreseeable that a person would respond narratively.

Lay persons are not coached in the legal niceties of limiting responses to the specific inquiry and no more. Normal conversation is not so stilted. Thus it is reasonable, and not

difficult to imagine, that if someone is asked whether he or she "want[s] to make a statement" under the coercive atmosphere of police station custody, that he or she would foreseeably answer with something more than a mere "yes" or "no" answer unless properly advised. In light of the circumstances, Lavarias should have known that his words or actions were "reasonably likely to elicit an incriminating response" from Defendant. Id.

V.

Defendant's statements followed upon Lavarias' invitation to make a statement. As such, it cannot be said that Defendant's statements were "communicated spontaneously" or "volunteered" "independent[ly]" from such questioning.[1] Majority

[1] The majority points to State v. Ikaika, 67 Haw. 563, 567, 698 P.2d 281, 284 (1985), and State v. Ketchum, 97 Hawai'i 107, 119, 34 P.3d 1006, 1018 (2001), for its conclusion that Defendant was not subject to interrogation, but instead volunteered his statements. Majority opinion at 18-19, 22-24. In Ikaika, the suspect, "after being advised of his Miranda rights" two times, was asked by a lieutenant "something to the effect of 'What's happening? Must be heavy stuff for two detective to bring you down here." Ikaika, 67 Haw. at 565, 698 P.2d at 283. Subsequently the suspect confessed to murder. See id. The lieutenant's remarks "were intended merely as a greeting." Id. at 567, 698 P.2d at 284. The Ikaika court noted that the lieutenant "did not initiate any questioning until [the d]efendant approached him." Id.

In the present case, however, the questions were initiated by the detective while Defendant was in custody. As discussed, the statements followed after Lavarias initially asked whether Defendant wanted to make a statement. Accordingly, the present case does not involve a scenario similar to Ikaika.

In Ketchum, the suspect involved was under arrest and therefore in custody, but the issue revolved around whether "field booking procedures" such as "straight-forward, non-accusatory" questions regarding one's name and address constituted an interrogation. 97 Hawai'i at 128, 34 P.3d 1027. A majority of this court concluded that the officer "was fully aware that Ketchum's address was relevant to prosecuting him, specifically with regard to establishing that he constructively possessed the drug contraband discovered" at the scene. Id. Accordingly the majority concluded that the officer "interrogated" the suspect, for the officer should have known that his words were reasonably likely to elicit an incriminating response. Id. Similar to the facts in Ketchum, in the present case, Lavarias should have known his question was "reasonably likely to elicit an incriminating response" inasmuch

(continued...)

opinion at 2, 23. Defendant's response was in the context of Lavarias' inquiry about giving a statement. The communication therefore was not "spontaneous" inasmuch as it took place within the context of the interrogation. Nor were the statements volunteered independently from such questioning inasmuch as the statements were not separate from the interrogation process but part of it. Any dispute as to when such statements were made, see majority opinion at 6 n.4, countenance against the conclusion that such statements fall outside the Miranda rule; rather, the record evidences the reason why Miranda warnings, as indicated by the Supreme Court, are mandated before questioning.[2]

VI.

For the reasons stated above, I would affirm the circuit court's conclusions of law that (1) "[a]s a matter of law, [Defendant] . . . was entitled to be informed of his constitutional rights before Detective Lavarias asked the

[1](...continued)
as Defendant was in custody and subject to express questioning. Id. at 119-20, 34 P.3d at 1018-19. Thus, factually, Ketchum does not apply to a situation involving spontaneous or volunteered statements.

[2] Prickett testified that Lavarias "said something about we want to ask you a few questions . . . and something about . . . the right to have a lawyer or something." Pricket recounted that he didn't "know exactly what was said[,]" but that he was interpreting and Defendant "continued to talk as if he was just not responding to what was - what the detective was saying to him." Thus it appears from Prickett's testimony that Lavarias may have asked both questions prior to Defendant's statement. A discrepancy, then, in the testimonies exists regarding what questions were specifically asked, and what questions Defendant was responding to.

But what cannot be controverted is that Lavarias initiated express questioning. The record thus supports the suppression of Defendant's statements, for the failure to give the Miranda warnings engendered confusion that the warnings, if given as required, would have obviated.

preliminary question of whether he wanted to make a statement" and, (2) "[b]ecause [Defendant] was not informed of his constitutional rights, and therefore did not waive them, [Defendant's] statements to Detective Lavarias in response to the question of whether he wanted an attorney were not voluntarily made and cannot be used at trial" as set forth in the court's April 29, 2003 order.