

DISSENTING OPINION BY ACOBA, J.

I believe the motion to suppress the Defendant's statement should have been granted and thus the use of the statement at trial must result in a new trial. During the giving of the Miranda warning, Detective Kellett apparently misled Defendant into believing an attorney could not be obtained at the time of the interrogation and one would be available only "later on for court or whatever it is, you can get one[.]":

. . . .

Q. Okay, do you want an attorney now?

A. You know, I haven't really had an attorney for like that but what difference would that make or how long --

Q. Well, you know what, if you ask for one attorney, I cannot talk to you, --

A. Oh.

Q. -- okay. And what will happen is I'll just put -- we'll walk back upstairs and basically that would be it, yeah. The attorney for here, I really cannot get you one right now, okay, at this time. So if you had your own that could come, that might be better, yeah. But . . . if you want one maybe for later on, for court or whatever it is, you can get one, okay. Right now, like I said, we're just going to sit here, I'm going to talk to you and question you about some stuff, okay. And . . . if at any time you decide hey, you know what, that's it, I want to go back or, you know, enough already, you can let me know, and we'll end it.

A. Okay.

. . . .

In fact, under the Miranda warnings, Defendant was entitled to have an attorney present during the questioning.

Miranda v. Arizona, 384 U.S. 436, 470 (1966) (explaining that the Fifth Amendment comprehends "the right to consult with counsel prior to questioning" as well as the "right to have counsel present during any questioning if the defendant so desires)"). But the detective told Defendant, "the attorney for here, I really cannot get you one right now, okay, at this time," indicating to Defendant that any exercise of the right to have an attorney present while the interrogation took place was in effect, futile.

In subsequent statements the detective again improperly qualified this Miranda mandate, indicating that Defendant could get an attorney "maybe for later on" if he "wanted one." This is not the kind of "clarification" by the police as to which it can be said that Defendant validly waived the "presence of counsel." See State v. Hoey, 77 Hawai'i 17, 36, 881 P.2d, 504, 536 (1994). In light of the nature of the detective's responses to Defendant, it is highly unlikely that Defendant would believe "an unequivocal demand for counsel" would be effective. Id.

In fact, during the hearing on the motion to suppress, Detective Kellet testified that he was aware that the Honolulu Police Department had a list of attorneys from the public defenders' office available to be called at the time of his interview with Defendant. The detective acknowledged that he neither informed Defendant of the list's existence, nor told

*** * * NOT FOR PUBLICATION * * ***

Defendant that Defendant could have called an attorney from the list. Under the circumstances, the record does not support a finding that Defendant knowingly, intelligently, and voluntarily waived his right to the presence of counsel.