DISSENTING OPINION BY ACOBA, J.

I would vacate the conviction and remand on the grounds that (1) the indictment failed to adequately inform Defendant that he was in jeopardy of the mandatory minimum term of imprisonment under Hawai‘i Revised Statutes (HRS) § 706-660.1 (1993) and (2) Defendant's statement to the police and the items which may have been the fruit of the statement should have been suppressed.

I.

As to the first ground, the aggravating circumstance in this case is set forth in HRS § 706-660.1 as follows:

> **Sentence of imprisonment for use of a firearm, semiautomatic firearm, or automatic firearm in a felony.** . . .
>
> (2) A person convicted of a second firearm felony offense as provided in subsection (1) where the person had a firearm in the person's possession or threatened its use or used the firearm while engaged in the commission of the felony, . . . shall in addition to the indeterminate term of imprisonment provided for the grade of offense be sentenced to a mandatory minimum term of imprisonment without possibility of parole or probation . . . .

(Emphases added.) In that respect,

> [i]f the "aggravating circumstances" justifying the imposition of an enhanced sentence are "enmeshed in," or, put differently, intrinsic to the "commission of the crime charged," then, . . . such aggravating circumstances "must be alleged in the indictment in order to give the defendant notice that they will be relied on to prove the defendant's guilt and support the sentence to be imposed and that they must be determined by the trier of fact."

State v. Kang, 84 Hawai‘i 352, 355, 933 P.2d 1386, 1389 (App. 1997) (emphases added) (brackets and emphases omitted) (ellipsis points in original) (quoting State v. Schroeder, 76 Hawai‘i 517, 528, 880 P.2d 192, 203 (1994)). Here, the aggravating

circumstance of the possession of a firearm (Count I) is enmeshed in the offense of promoting a dangerous drug in the third degree (Count III) because the firearm was apparently possessed by Defendant when he also possessed the dangerous drug.[1]

The fact that the indictment referred to the offenses being committed on the same day is insufficient in my view to provide sufficient notice that Defendant would be subject to an enhanced sentence under HRS § 706-660.1. A person of reasonable intelligence would not discern from the indictment that possession of the drug in a cigarette case and separate possession of a gun in a backpack would be legally linked so as to be informed that he or she had in effect been charged with "possess[ing] . . . [a] firearm while engaged in the commission of a felony" unless so informed by the indictment.

In the absence of such notification, a defendant would fail to apprehend the jeopardy of a mandatory minimum term of imprisonment that was posed by the separate charges. See State v. Kaua, 102 Hawai'i 1, 10, 72 P.2d 473, 482 (2003) (reiterating that "aggravating circumstances '*must* be alleged in the indictment in order to give the defendant notice that they will be relied on to prove the defendant's guilt and support the sentence to be imposed, and they must be determined by the trier of fact'" (quoting Schroeder, 76 Hawai'i at 528, 880 P.2d at 203

[1] Consequently, I would vacate Count III and the sentence for mandatory minimum.

(emphasis in original)); Schroeder, 76 Hawai‘i at 526, 880 P.2d at 201 (holding that "the better rule is to include in the indictment the allegations, which if proved, would result in application of a statute enhancing the penalty for the crime committed"); State v. Apao, 59 Haw. 625, 634-35, 586 P.2d 250, 257 (1978) (holding that "due process requires that an indictment contain all the essential elements of the offenses charged, and the omission of an essential element of the crime charged is a defect in substance"), superseded by statute on other grounds; Kang, 84 Hawai‘i at 557, 933 P.2d at 1391 (stating that facts specific to the defendant's charge and "supportive of an enhanced sentence . . . must . . . be pled in the charge").

Thus, I believe the prosecution was required to allege the possession of a firearm in Count III in order to bring home to Defendant his liability for a mandatory minimum sentence which hinged on his separate possession of a dangerous drug.

II.

A.

As to the second ground, once a defendant invokes a right to remain silent, interrogation as to same case must cease.

Defendant acknowledged his rights on Form 103, the waiver of rights form, at 12:01 p.m. When questioned by Officer Ah Loo, Defendant refused to waive his rights and declined to consent to a search of his possessions. At 12:42 p.m., Officer

Ah Loo signed the form. On these facts, State v. Uganiza, 68 Haw. 28, 31, 702 P.2d 1352, 1355 (1985), is on point.

Uganiza was arrested and subsequently detained in the cellblock. Id. at 29, 702 P.2d at 1352. The next morning Uganiza stated to an officer that he did not know why he was being detained. Id. The officer stated to Uganiza "that he would return within an hour if [Uganiza] wanted to talk." Id. An hour later the cellblock turnkey informed [the officer] that [Uganiza] did not want to talk with [the officer]". Id. Nevertheless, immediately thereafter, the officer went to Uganiza's cell with a waiver of rights form to obtain written verification that Uganiza was exercising his right to remain silent. Id. However, when Uganiza asked the officer why he was being held, the officer proceeded to show him the written statements of several witnesses, explaining how these incriminated him. Id. Uganiza stated that he wanted to explain what had happened. The officer returned a half hour later at which time Uganiza agreed to give a statement.

In "revers[ing]" the court's order denying the motion to suppress, this court held that "if any individual indicates in any manner, at any time prior to or during interrogation that he wishes to remain silent, the interrogation must cease." Id. at 31, 702 P.2d at 1354 (emphasis added). In the instant case, the police did not cease interrogation. Rather, within about an hour after Officer Ah Loo had questioned Defendant and Defendant

refused to give a statement, Officer Victorine again sought to obtain a statement and did so.

With respect to such like conduct, this court noted in Uganiza that "[a]lmost immediately upon learning that the [d]efendant did not wish to make a statement, the police officer engaged in the functional equivalent of questioning." Id. at 31, 702 P.2d at 1355. Because there was "no evidence in the record to indicate that the effect of this violation had sufficiently dissipated at the time [the d]efendant waived his rights and made his statement[,]" this court held that "[h]is confession cannot be other than the product of coercion and should have been suppressed." Id.

This court has said that "[w]e are mindful that the right to remain silent does not create a per se proscription of infinite duration upon any further police-initiated questions; the test being whether assertion of the right was scrupulously honored." Id. (emphasis added) (citing Michigan v. Mosley, 423 U.S. 96 (1975); State v. Kaeka, 3 Haw. App. 444, 653 P.2d 96 (1982)). Here, Defendant's right to remain silent was not "scrupulously honored" because only an hour had elapsed between the first officer's questioning and the second officer's questioning. Cf. Kaeka, 3 Haw. App. at 448, 653 P.2d at 100 (holding that defendant's right to remain silent was not violated because the officer "did not talk to [the defendant] until 31 hours after her prior invocation of her right to remain silent").

The reference to "infinite duration" from Mosley is inapplicable. Although in Mosley the Court held that the defendant's "'right to cut off questioning' was fully respected in this case[,]" the facts are plainly inapposite. 423 U.S. at 104. In Mosley, the police resumed questioning after two hours, provided "a fresh set of warnings, and restricted their second interrogation to a crime that had not been a subject of the earlier interrogation." Id. at 106 (emphasis added). Clearly, that is not the case here. Within an hour, Defendant was reinterrogated using the same Form 103 that Officer Ah Loo had previously employed. Officer Victorine then obtained a statement and consent to search the backpack. The subject matter of the two interrogations that took place within an hour of each other were of the same case, and not of two different crimes. Id.

B.

Additionally as to the second ground, it is uncontroverted that Defendant established at the motion to suppress that Defendant's refusal indicated that he not only declined to give a statement, but also wanted an attorney. On cross-examination, Officer Ah Loo testified as follows:

> Q. Okay. And this is, for the record, referring to State's Exhibit 1. So, at that point in time, he refused; right?
> A. Yes.
> Q. And what that means to you is he wants an attorney and he does not want to make a statement?
> A. Basically, yes.

(Emphases added.) Officer Ah Loo spent approximately forty minutes with Defendant. Hence, Office Ah Loo's evaluation as to

Defendant's responses should be controlling under the evidence and the court erred in that regard.

Obviously, once a person in police custody requests counsel, interrogation must cease unless counsel is present. State v. Hoey, 77 Hawai'i 17, 33, 881 P.2d 504, 520 (1994) (explaining the right to counsel may be invoked at any point, and when invoked, all substantive questioning must cease until counsel is provided); State v. Mailo, 69 Haw. 51, 53, 731 P.2d 1264, 1266 (1987) (stating that once the right to counsel has been invoked, all questioning must cease); Miranda v. Arizona, 384 U.S. 436, 473-74 (1966) ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.").

Under the evidence in this case Defendant's refusal encompassed his right to counsel as understood by the officer interrogating him. Manifestly, the police should not have thereafter interrogated Defendant.