DISSENTING OPINION OF ACOBA, J.,
WITH WHOM RAMIL, J. JOINS IN PART I

In this case the majority permits the impeachment of trial testimony of the key witness that was given with respect to a written statement not received in evidence, on the ground it conflicts with statements in an audio tape received in evidence but as to which no foundation was ever laid. The majority cites no cases to support this approach, one wholly novel to and subversive of the safeguards intended to justify the substantive use of impeachment evidence.

Such a decision is a significant departure from the provisions set forth in the Hawaiʻi Rules of Evidence and established case law. See Hawaiʻi Rules of Evidence (HRE) Rules 613(b) (1993) and 802.1 (1993). Because it is, I believe that principles of stare decisis require that this decision be published, in view of the proposition that like cases should be decided alike. See State v. Tauʻa, 98 Hawaiʻi 426, 441, 49 P.3d 1227, 1242 (2002) (Acoba, J., dissenting, joined by Ramil, J.).

I.

We believe that in the public interest, this case should be published. See Torres v. Torres, No. 23089, 2002 WL 31819669, at *36 (Hawaiʻi Dec. 17, 2002) (Appendix A) (Acoba, J., dissenting, joined by Ramil, J.).

This court is split 3-1-1. Accordingly, there are three different opinions as to the reasoning and outcome of this

appeal. As such, this case is plainly not one suitable for summary disposition. Summary disposition cases are generally those which are likely "not to break new legal ground or contribute otherwise to legal development[.]" 1st Cir. R. 36.1. Essentially, these are opinions the publication of which would be redundant, inasmuch as they "merely decide particular cases on the basis of well-settled principles of law," 4th Cir. R. 47.5, and apply these principles to indistinguishable facts. In this case, the members of the court have taken three separate but strongly held positions, reflecting a current controversy in the law as to the use of the past recollection recorded and the prior inconsistent statement hearsay exceptions in domestic violence cases.

Views of justices that are unpublished are in effect suppressed, inasmuch as the only practical way to search for and locate points of law is through the formal established indexing system of the Reporter system, which does not include unpublished opinions. Again, rather than providing the trial courts and counsel with guidance, our failure to publish leaves them in a dilemma in cases like these as to which out-of-state precedent to apply. In State v. Marcy, 680 A.2d 76 (Vt. 1996), cited by Justice Ramil, the Vermont Supreme Court was faced with the same issues, split 2-2-1, and published their opinion. We should do no less.

II.

A.

For the reasons stated herein, I would vacate the December 1, 1999 judgment of conviction and sentence of the first circuit court (the court) and remand the case because a proper foundation was not established for admission of the audiotaped interview upon which the convictions of Defendant-Appellant Juan Vega Agpaoa (Defendant) essentially rested, and such error was not harmless.

B.

On April 1, 1999, Defendant was charged by complaint with Terroristic Threatening in the First Degree, Hawaiʻi Revised Statutes (HRS) § 707-716(1)(d) (1993)[1] and Terroristic Threatening in the Second Degree, HRS § 707-717(1) (1993)[2], as follows:

> Count I: On or about the 20th day of March, 1999, in the City and County of Honolulu, State of Hawaii, [Defendant] threatened by word or conduct to cause bodily injury to Letty A. Agpaoa [(Complainant)] with the use of a dangerous instrument, in reckless disregard of the risk of terrorizing said [Complainant], thereby committing the offense of Terroristic Threatening in the First Degree in

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[1] HRS § 707-716(1)(d) provides in relevant part:

> **Terroristic threatening in the first degree.** (1) A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:
> . . . .
> (d) With the use of a dangerous instrument.

[2] HRS § 707-717(1) provides as follows:

> **Terroristic threatening in the second degree.** (1) A person commits the offense of terroristic threatening in the second degree if the person commits terroristic threatening other than as provided in section 707-716.

> violation of Section 707-716(1)(d) of the Hawaii Revised Statutes.
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> Count II: On or about the 23[r]d day of March, 1999, in the City and County of Honolulu, State of Hawaii, [Defendant] threatened by word or conduct to cause bodily injury to [Complainant], in reckless disregard of the risk of terrorizing said [Complainant], thereby committing the offense of Terroristic Threatening in the Second Degree, in violation of section 707-717(1) of the Hawaii Revised Statutes.

(Emphases added.) On October 1, 1999, a jury returned verdicts of guilty as to both counts. On December 1, 1999, the court filed a judgment of conviction and sentence against Defendant.

III.

The relevant facts preceding Defendant's conviction follow. On March 23, 1999, Honolulu Police Department (HPD) Officer Corinne Rivera obtained a written statement (the written statement) about the charged incidents from Complainant. Subsequently, at 11:00 p.m. on March 23, 1999, HPD detective Owen Lovell interviewed Complainant at the HPD station and obtained a second statement from her which was tape recorded (the audio interview). The audio interview contained the following rendition of events.

On Saturday, March 20, 1999, Complainant and her husband argued as they drove on California Avenue in Wahiawā. Defendant accused Complainant of "fooling around" with another man. He told Complainant that if she admitted that she was, he would "never kill [her] . . . [b]ut if she [did not admit it], he [would] kill [her]." Complainant explained, "So that's why I

[told him] that I accept already.  And then we apologize . . . . So we can go home[.]"

However, Defendant "[brought] out [a] knife . . . [from u]nder the driver's seat" and touched its tip to Complainant's neck.  Defendant also retrieved a glove, a plastic bag, and masking tape from beneath the driver's seat.  Complainant believed that these items were intended to suggest Defendant would kill her.  Defendant showed Complainant the knife a second time and said, "I gonna kill you."  Defendant then drove himself and Complainant home.  Complainant did not call the police because she was afraid.

On March 23, 1999, Complainant and Defendant got into a car and stopped at a bank where Complainant cashed a paycheck for $600.  Defendant "told [her] that he [would] like to kill [her] again."  They drove to Mākaha Beach and Defendant parked the car and repeated his threat.  Defendant asked Complainant for $500, which she gave him because she was afraid.  Defendant then drove to a friend's home on Apoke Street.  At that point, Defendant left Complainant in the car.  Complainant apparently saw a woman at a nearby house and asked the woman if she could call the police from the woman's home.  She explained that she "need[ed] help . . . because her husband [wanted to] kill [her.]" Complainant then called the police.  The audio interview contained no further pertinent information.

IV.

A.

At the jury trial that had begun on September 28, 1999, Dolores E. White testified for Plaintiff-Appellee State of Hawai‘i (the prosecution) to the matters following. When she arrived home on March 23, 1999, she noticed a gray automobile parked in the vicinity of her home. After White entered her home, a woman (Complainant) with a baby knocked on her door and asked to use her telephone to call the police because "her husband was trying to kill her." White invited Complainant into her home, called "911," and waited with Complainant for the police to arrive. While waiting, White "observed a gentleman walking towards the . . . gray car, [which] reversed out, and went down North Road." After the police arrived, Rivera questioned Complainant. White was asked to witness Complainant's signature on a "consent to search" form. On cross-examination, White admitted that she could not tell the jury anything about what had actually happened between Complainant and Defendant that day.

Officer Corinne Rivera testified on behalf of the prosecution. On March 23, 1999, she received a dispatch call from a "woman saying that her husband wanted to hit her." She proceeded to White's address. At White's home, Rivera interviewed Complainant. As they talked, a vehicle drove by and the driver looked towards them. Both Complainant and White said, "[T]hat's him," as they pointed to the vehicle.

Rivera asked Complainant if she would be willing to write down what happened, but Complainant "appeared to be nervous" and "scared." Rivera related that Complainant agreed Rivera would do the writing for Complainant. When the process of taking Complainant's statement was completed, Rivera "asked her if [the statement] was correct, if there was anything she needed to add or anything that shouldn't have been there." Complainant said, "[N]o," and signed the statement. Rivera identified the written statement marked as prosecution's Exhibit 9, in court.

Rivera reported that she had obtained Complainant's consent to search the gray automobile that had passed by White's home. Complainant was taken to the location where the vehicle had been stopped and identified the male there as Defendant. HPD officer Brian Johnson conducted a search of the vehicle.

B.

Complainant was called as a prosecution witness. She testified that, on March 23, 1999, she called the police from White's home, that she had been with her husband prior to the call, and that her husband was at a friend's house when she called. That morning, she and her husband and daughter ran several errands, and she cashed her six hundred dollar paycheck. However, when the prosecution inquired about the reason she called the police, Complainant declared that she either did not

know or could not remember.[3]

The prosecution then examined Complainant using the written statement taken by Rivera on March 23, 1999:

> Q: Okay. So do you remember telling Officer Rivera that on March 20, Saturday, March 20, that you and your husband drove to California Avenue? Do you remember telling Officer Rivera that?
> THE INTERPRETER: I don't know.
> Q: You don't know, or you don't remember?
> THE INTERPRETER: I don't remember.
> Q: Do you remember telling Officer Rivera that while you and your husband were parked in your car in the California Avenue area that he accused you of fooling around?
> THE INTERPRETER: What did I say?
> Q: That your husband accused you of fooling around.
> THE INTERPRETER: He didn't accuse me of it. I was guilty of it.
> Q: And while you were in the car at California Avenue, didn't he ask you to admit that you were fooling around, and that if you don't that he would kill you?
> THE INTERPRETER: No, he didn't. He didn't.

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[3] Q: Did [Ms. White] ask you why you wanted to call the police?
THE INTERPRETER: Yes.
Q: What did you tell her?
THE INTERPRETER: I don't know already how everything else happened.
Q: You don't remember what you told her?
THE INTERPRETER: I don't.
Q: Were you afraid, is that why you forgot?
THE INTERPRETER: No.
. . . .
Q: And what did you tell the police [on the phone]?
THE INTERPRETER: I don't know already.
Q: Did the police come?
THE INTERPRETER: Yes.
. . . .
Q: And did you tell the police what happened to you that day?
THE INTERPRETER: I don't know.
. . . .
Q: Did the police -- specifically did Officer Corrine Rivera ask you questions about what happened to you?
THE INTERPRETER: I don't remember already.
Q: So why don't you tell the jury then . . . what you remember happened on Tuesday, March 23rd, 1999.
THE INTERPRETER: I don't remember anything.
. . . .
Q: When you talked to the police officers [on] March 23rd, this year, didn't you tell the police that your husband had driven you and your baby to Makaha beach?
. . . .
THE INTERPRETER: I don't know.

> Q: And didn't you tell him that you were not fooling around?
> THE INTERPRETER: I don't know.
> Q: And when you told him that you were not fooling around, didn't you tell officer Corrine Rivera that he said he doesn't believe you?

(Emphases added.) At this point, defense counsel objected based on "foundation" and the parties approached the bench for a conference. The questioning of Complainant, as the prosecutor indicated, was a line-by-line rendition from the written statement.

> THE COURT: [Prosecutor], are you planning to go through -- statement line-by-line --
> [PROSECUTOR]: I believe that's what I have to do in order to lay a foundation for substantive use under [HRE Rules] 802 and 613.
> THE COURT: Okay. And your objection?
> [DEFENSE COUNSEL]: My objection is after she says she didn't know he says well, you did -- he's tying in a positive response to his question and going on to the next question. He needs to get a yes or no response if he is going to impeach her. . . . That's not proper foundation for the follow-up question.

(Emphases added.) In response to Defendant's objections, the court suggested, in lieu of employing the prior inconsistent statement exception under HRE Rule 802.1(1), that the written statement be admitted as past recollection recorded under HRS § 802-1(4).

> THE COURT: Counsel, let me raise a collateral point. The bulk of [Complainant's] answers have not been at least right now inconsistent as much as professed lack of memory. And I was looking at [HRE Rule] 802.1(4), past recollection recorded. . . . [T]hat's one possible alternative to the concern that [defense counsel] stated. I mean, if she continues to profess a lack of memory rather than going through that bit by bit you could . . . proffer it under that [rule], read it in and be done with it. It will not go in as an exhibit under this rule unless there's an agreement.

(Emphases added.)

Also at the bench conference, the prosecutor disclosed that he "intend[ed] to question [Complainant] about giving a[n audio] taped statement to . . . [D]etective [Lovell] that same day, which pretty much follow[ed] the thrust of [questions regarding that] written statement." However, responding to the prosecution's statement that he "need[ed] to finish up foundation" on the written statement, the court indicated it found sufficient foundation had been laid for admission of the written statement as past recollection recorded:

> [T]his witness . . . established enough foundational testimony under [HRE Rule] 802.1, sub[section] (4), [(the hearsay exception of past recollection recorded),] to show that she once obviously had knowledge of what occurred that day but now has insufficient recollection. . . .
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> . . . And in that regard, since we already have a foundation of Officer Rivera, if State proffers [the written statement] under this hearsay exception, the [c]ourt would allow the unredacted portions to be read.

(Emphasis added.) The court instructed that counsel "both take a look at [the written] statement, and then the transcript for the audio statement, and decide what . . . to argue[.]"

When questioning resumed, Complainant responded that she did not "remember" any of the following: (1) giving consent for the police to search the gray automobile; (2) seeing her husband arrested on March 23, 1999; (3) the police searching the car and pulling out a plastic bag; (4) going to the police station at 11:00 p.m. on March 23, 1999 to meet with Lovell; (5) her sister-in-law accompanying her to the station; or (6) giving an audio interview. She did remember listening to the audio interview and reviewing a transcript of it on the previous day

with the court interpreter; however, this did not “refresh” her memory.

On cross-examination, Complainant declared that she did recall that at a March 30, 1999 preliminary hearing, she responded, “Yes, sir,” when asked if she “g[o]t into an argument with [her] husband.” She also confirmed to having denied at the preliminary hearing that Defendant held a knife to her throat and threatened to kill her. Defense counsel then asked, “[W]hile you were under oath . . . you were acknowledging reluctantly that you had lied to the police, right?” Complainant answered, “Yes.”

V.

A.

After Complainant’s testimony, the parties argued the admissibility of both the audio interview and the written statement. Defendant objected to the admissibility of either exhibit under HRE Rule 802.1, allowing hearsay exceptions, on the ground that the exhibits would violate Defendant’s right to confrontation. In overruling the objection, the court explained, inter alia, that “[Complainant]’s insistence on lack of memory at every turn really doesn’t put us squarely in [HRE Rule] 802.1(1), which is the inconsistent statement [exception to the hearsay rule.]” (Emphasis added.)

Defense counsel further maintained that, as to the past recollection recorded exception under HRE Rule 802.1(4), the prosecution had failed to lay a proper foundation, that is, that

the prosecution had not proven that Complainant once had personal knowledge of the matter or that she made "the memorandum" while the matter was "fresh in the witness' memory" or that she had adopted it. The court overruled Defendant's objection, declaring that the prosecution had succeeded in establishing a foundation for admission of the written statement as past recollection recorded.

Although no foundation had been laid with respect to the audio statement, the court indicated it would make a similar "reasonable inference . . . with respect to the" foundation requirements for past recollection recorded as to the audio interview:

> [The prosecutor] established the foundation in his rather painstaking manner, taking [Complainant] first to an -- seeking an independent recollection. She failed to [provide one]. Then, asking her whether she at least recalled going over the consent, the written statement, the transcript yesterday. She recalled that, but she couldn't recall the events noted on there.
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> The court will also make a reasonable inference, at least with respect to the 11:00 taping, that these events would be events that the witness once had knowledge of.

(Emphasis added.)

The court went on to find the written statement and audio interview to be "cumulative of each other" and, on that basis, excluded the written statement obtained by Officer Rivera from evidence:

> I'm gonna find, after having reviewed both the written statement and the transcript of the audio statement, that both of these are cumulative of each other. I will, on the basis of that -- as well as the arguments raised by [defense counsel] about the composition or the method of composition of the written statement, I will not allow this to be read[.]
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> . . . .

> [T]he written statement will not be read, for those reasons. However, they [sic] will be secured for appellate review. As State's number [9].

(Emphases added.) The parties did not stipulate the audio interview into evidence.

B.

On the next day of trial, the audio interview was played for the jury. The audio tapes were marked as prosecution's Exhibit No. 10 and a written transcript of the tapes marked as prosecution's Exhibit No. 11 for identification.[4]

VI.

Johnson, the officer who conducted the search of the gray automobile, testified he recovered "[a] black trash bag, a green rubber glove, a roll of masking tape, and . . . a kitchen knife in a black plastic sheath" from the rear of the automobile.

Lovell testified that he interviewed Complainant at the HPD station at 11:00 p.m. on March 23, 1999. The interview had been tape recorded, and based on his review prior to the trial, the tapes, marked as prosecution's Exhibit No. 10, fairly and accurately represented the statements Complainant had made to him. He recalled Complainant answering, "Yes sir" many times in response to his recitation of the statement.

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[4] Although in its answering brief, the prosecution states that the audio interview was marked as Exhibit 11, the September 28, 1999 trial transcript and the Exhibit list designate the audio interview as Exhibit 10. Exhibit 11 is a transcript of the taped interview.

Defendant moved for a judgment of acquittal at the close of the prosecution's case-in-chief. The court denied the motion.

VII.

On appeal, Defendant argues that (1) a proper foundation was not established for admission of the transcript of the audio interview and (2) its receipt in evidence violated the confrontation clauses of the United States and Hawaiʻi State Constitutions. I believe that the audio tapes were improperly received into evidence and therefore do not reach Defendant's second contention.

VIII.

A.

Hearsay evidence is inadmissible in court, unless a foundation is laid for an exception to the hearsay rule:

> Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." HRE 801(3) (1985). Generally, because hearsay is not subject to the same safeguards as are present during in-court testimony before a factfinder, "hearsay is inadmissible at trial, unless it qualifies as an exception to the rule against hearsay." [State v. ]Ortiz, 74 Haw. [343,] 357, 845 P.2d [547,] 554 [(1993) abrogated on other grounds by, State v. Moore, 82 Hawaiʻi 202, 921 P.2d 122 (1996)] (citations and internal brackets omitted); see also HRE 802 (hearsay is not admissible at trial, unless falling under an exception provided in HRE, in rules prescribed by the Hawaiʻi Supreme Court, or by statute).

State v. Apilando, 79 Hawaiʻi 128, 131-32, 900 P.2d 135, 138-39 (1995) (brackets omitted); see also State v. Jhun, 83 Hawaiʻi 472, 477, 927 P.2d 1355, 1360 (1996); State v. Clark, 83 Hawaiʻi

289, 296, 926 P.2d 194, 201 (1996). A past recorded recollection is admissible, despite its hearsay nature, so long as each of the foundational requirements for the past recollection recorded exception is met. See State v. Sua, 92 Hawai'i 61, 72, 987 P.2d 959, 970 (1999) (affirming determination by the Intermediate Court of Appeals (ICA) that "grand jury transcript satisfied the foundational requirements of HRE Rule 802.1(4)); State v. Bloss, 3 Haw. App. 274, 278, 649 P.2d 1176, 1178-79 (1982) (outlining requirements of past recollection recorded and explaining that witness's record satisfied such requirements because he "once had personal knowledge [of the matter] but at trial had insufficient recollection to enable him to testify fully and accurately" and the record "was made . . . when the matter was fresh in his memory . . . and accurately reflected [his] knowledge of the matter").

B.

1.

Plainly, no foundation was established for admission of the audio interview in evidence as past recollection recorded. HRE Rule 802.1(4) (1993), the past recollection recorded exception to the hearsay rule, provides as follows:

> **Hearsay exception; prior statements by witnesses.** The following statements previously made by witnesses who testify at the trial or hearing are not excluded by the hearsay rule:
>
> . . . .

> (4) Past Recollection Recorded. A memorandum or record concerning a matter about which the witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(Emphasis added.)

This court has outlined the past recollection recorded requirements by explaining that

> under HRE Rule 802.1(4), '[a] record or memorandum is admissible as an exception to the hearsay rule if the proponent can show that the witness once had personal knowledge of the matter, . . . that the record or memorandum was prepared or adopted by [the witness] when it was fresh in his [or her] memory, that it accurately reflected his [or her] knowledge, and that the witness currently has insufficient recollection to enable him [or her] to testify fully and accurately[.]'"

Sua, 92 Hawaiʻi at 84, 987 P.2d at 982 (quoting 31 M. Graham, Federal Practice and Procedure: Evidence § 6756, at 321-23 (Interim ed. 1997) [hereinafter 31 Federal Practice and Procedure] (footnotes omitted)); see also Apilando, 79 Hawaiʻi at 134, 900 P.2d at 141 (holding that a videotape in sexual assault trial was not admissible as a past recollection recorded where complainant testified that she had forgotten some aspects of crime, but could recall that the defendant touched her in a "bad" way, "because the requisite showing that the declarant 'once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately," HRE Rule 802.1(4), was not demonstrated prior to the introduction of the videotape"); Bloss, 3 Haw. App. at 278, 649 P.2d at 1179 (determining that police officer's use of a traffic citation during testimony was

proper because it "was a record concerning appellant's parking violation, of which [the officer] once had personal knowledge but at trial had insufficient recollection to testify fully and accurately[,]" and because "[t]he citation was made by [the officer] when the matter was fresh in his memory, . . . and accurately reflected [his] knowledge of the matter").

In Sua, the ICA held, inter alia, that a grand jury transcript admitted at trial satisfied the requirements of HRE Rule 802.1(4). First, during his direct examination at trial, the witness stated that he recalled the alleged robbery when he testified before the grand jury and, thus, "once had knowledge" of the matter about which he had testified. 92 Hawai‘i at 84, 987 P.2d at 982. Second, the witness agreed that he had been able to "testify fully and accurately" about the incident before the grand jury. Id. Third, the court inferred that the transcript "was made when the events were still 'fresh in his memory' and accurately reflected his knowledge of the events" because the witness acknowledged he testified fully and accurately at the grand jury proceedings. Id.

2.

As contrasted to the facts in Sua, Complainant, at trial, did not affirmatively testify to the foundational requirements for admission of the audio interview. Complainant did not remember going to the police station on March 23, 1999 to meet with Officer Lovell. She did not remember giving an audio

interview to Lovell. Accordingly, she did not testify, as required under HRE Rule 802.1(4), (1) that she made or adopted the taped statement, (2) that she did so when the matter was fresh in her memory, and (3) most significantly, that the tape "reflected that knowledge correctly." Obviously, then, she did not confirm that she once had knowledge of the contents of the audio interview, that the contents of the audio interview were made when the events were fresh in her memory, and that it reflected her knowledge accurately.

In explicating the past recollection recorded exception, it is said, regarding the identically-worded federal rule, that

> [t]he witness may testify either that he [or she] remembers making an accurate recording of the event in question which he [or she] no longer sufficiently remembers, that he [or she] routinely makes accurate records of this kind, or, if the witness has entirely forgotten the exact situation in which the recording was made, that <u>he [or she] is confident from the circumstances that he [or she] would not have written or adopted such description of the facts unless that description truly described his [or her] observations at the time</u>.

31 <u>Federal Practice and Procedure</u>, <u>supra</u>, § 6756, at 323-24 (footnote omitted) (emphasis added).[5] There was no evidence Complainant remembered making an accurate recording regarding the charges, or that she routinely made records of statements involving her husband's threats to kill her. Nor did she testify

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[5] The federal evidence rule for past recollection recorded is the same as the Hawai'i rule. <u>See</u> <u>Sua</u>, 92 Hawai'i at 84, 987 P.2d at 982 ("HRE Rule 802.1(4) is 'identical with' Federal Rules of Evidence (FRE) Rule 803(5).") When the Hawai'i rule is identical to the FRE, "'we may refer to federal case law for assistance in construing our Rule.'" <u>State v. Jhun</u>, 83 Hawai'i 472, 478, 927 P.2d 1355, 1361 (1996) (quoting <u>Touche Ross Ltd. v. Filipek</u>, 7 Haw. App. 473, 485-86, 778 P.2d 721, 729 (1989)) (brackets omitted).

that she was confident from the circumstances that she would not have adopted the description of the facts in the audio interview unless that description truly described her observations at the time.  Proper foundation for admission of the audio interview as past recollection recorded was obviously and patently lacking.

IX.

The importance of the foundational requirements of the past recollection recorded exception to the hearsay rule cannot be understated.  "'[T]he inherent unreliability of hearsay statements raises special problems within the context of a criminal case since the admission of an out-of-court declaration also involves a denial of a defendant's constitutional right to cross-examine and confront the witnesses against him [or her]' at trial."  Sua, 92 Hawaiʻi at 84-85, 987 P.2d at 982-83 (citing State v. Hoffman, 73 Haw. 41, 47, 828 P.2d 805, 809 (1992) (brackets omitted).[6]  However, "a literal application of the confrontation clause 'would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.'"  Id. at 86, 987 P.2d at 984 (quoting Ohio v. Roberts, 448 U.S. 56, 63 (1980)).

[6] The sixth amendment United States Constitution states in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [or her.]"  Similarly, article I, section 14 of the Hawaiʻi Constitution provides criminal defendants with "the right . . . to be confronted with the witnesses against [him or her]."  The "right of confrontation affords the accused both the opportunity to challenge the veracity of the prosecution's witnesses and an occasion for the jury to weigh the demeanor of those witnesses."  Ortiz, 74 Haw. at 360, 845 P.2d at 555.

The United States Supreme Court in Roberts explained that the reason some hearsay may be admitted, despite the confrontation clause problem inherent in most hearsay, is because the foundational requirements of such hearsay exceptions establish an "indicia of reliability" of the statements:

> "The focus of the Court's concern has been to insure that there are 'indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.' Dutton v. Evans, [400 U.S. 74,] 89 [(1970)], and to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement,' California v. Green, [399 U.S. 149,] 161 [(1970)]. It is clear from these statements, and from numerous prior decisions of this Court, that even though the witness be unavailable his [or her] prior testimony must bear some of these 'indicia of reliability.'" [Mancusi v. Stubbs], 408 U.S. [204,] 213 [(1972)].
>
> The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection." Mattox v. United States, 156 U.S. [237,] 244 [(1895)].

Roberts, 448 U.S. at 65-66 (emphasis added). When hearsay is admitted, a defendant is foreclosed from cross-examination of the declarant, and the fact finder is denied observation of the declarant's demeanor. See supra note 6. For those reasons, the necessity of establishing the "indicia of reliability" inhering in a hearsay exception's foundational requirements becomes paramount. The abrogation or erosion of any foundational mandate of the past recollection recorded exception would remove the fundamental safeguard conditioning the receipt of hearsay, in derogation of a defendant's confrontation clause rights, not only

in this case, but in all cases.[7]

X.

On the foregoing analysis, the audio interview was not admissible in its own right. Neither was it admissible for substantive evidentiary purposes under the prior inconsistent statement exception to the hearsay rule. That is because Complainant was not "subject to cross-examination" concerning the subject matter of the audio interview as required under HRE Rule 802.1(1). That rule states:

> The following statements previously made by witnesses who testify at the trial or hearing are not excluded by the hearsay rule:
>
> (1) Inconsistent statement. The declarant is subject to cross-examination concerning the subject matter of the declarant's statement, the statement is inconsistent with the declarant's testimony, the statement is offered in compliance with rule 613(b), and the statement was:
>
> (A) Given under oath and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition; or
>
> (B) Reduced to writing and signed or otherwise adopted or approved by the declarant; or
>
> (C) Recorded in substantially verbatim fashion by stenographic, mechanical, electrical, or other means contemporaneously with the making of the statement[.]

(Emphasis added.) See also Clark, 83 Hawaiʻi at 294-95, 926 P.2d at 199-200 (in order to admit a recorded statement as substantive evidence, HRE Rule 802.1(1) requires, inter alia, that "the witness must testify about the subject matter of his or her prior statement so that the witness is subject to cross-examination concerning the subject matter of the prior statement;" and, "in

[7] I am concerned in this case with the application of the confrontation clause as found in our own state constitution.

compliance with HRE Rule 613(b), . . . the circumstances of the prior inconsistent statements have been brought to the attention of the witness and . . . the witness . . . [has been] asked whether he or she made the prior inconsistent statements”[8] (citing State v. Eastman, 81 Hawai‘i 131, 137, 913 P.2d 57, 63 (1996)) (emphasis added)). Complainant did not testify about the statements in the prior audio interview. Therefore, she could not be subjected to cross-examination concerning the subject matter of the prior statement in the audio interview. Rather, she testified she could not remember the circumstances or contents of the interview.

In State v. Canady, 80 Hawai‘i 469, 911 P.2d 104 (App. 1996), the ICA addressed the question of whether a statement is admissible as a prior inconsistent statement where its declarant no longer remembers the important details of the incident. There, the complainant reported to the police that the defendant had struck her in the face and head. See id. at 471, 911 P.2d at 106. The complainant completed a statement which asked her “a series of questions relating to the circumstances surrounding the injury” and therein inculpated the defendant. Id. at 472, 911 P.2d at 107. At trial, she could not remember how or why “her

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[8] “The legislative history of HRE Rule 613(b) shows that the Hawai‘i legislature intended to allow a proponent to lay the foundation for extrinsic evidence of a witness’s prior inconsistent statement pursuant to HRE Rule 802.1 during direct examination or cross-examination of the witness[.]” State v. Eastman, 81 Hawai‘i 131, 138 n.4, 913 P.2d 57, 64 n.4 (1996) (emphasis added). See also State v. Tomas, 84 Hawai‘i 253, 258, 933 P.2d 90, 95 (App. 1997) overruled on other grounds by, State v. Gonsales, 91 Hawai‘i 446, 449, 984 P.2d 1272, 1275 (App. 1999); State v. Zukevich, 84 Hawai‘i 203, 209, 932 P.2d 340, 347 (App. 1997).

head was bleeding" and also stated that "[s]he could not recall whether a police officer spoke to or questioned her while at the hospital." Id. at 473, 911 P.2d at 108. The ICA held that the statement was not admissible as a prior inconsistent statement in part because the complainant could not be cross-examined about its contents:

> Here, the subject matter of the [s]tatement referred to the identity of [the c]omplainant's assailant and how [the c]omplainant sustained her injuries. At trial, [she] testified that she could not recall the events that she allegedly described in the [s]tatement. She was, therefore, not able to testify about the substantive events reported in the [s]tatement. Because the witness could not be "cross-examined about the events," the trier of fact was not "free to credit the present testimony or the prior statement" to determine "where the truth lay." Commentary to HRE Rule 802.1. Accordingly, under the present state of the record, the [s]tatement was not admissible under HRE Rule 802.1(1) because [the c]omplainant could not be "subjected to cross examination concerning the subject matter of the statement" as "envisioned" under the [r]ule.

Id. at 481, 911 P.2d at 116 (emphases and brackets added) (brackets omitted). Because, at trial Complainant could not remember her audio interview statements, she could not be subjected to cross-examination about such statements by Defendant and the audio interview therefore was not admissible as prior inconsistent statements.

XI.

A.

The only time Complainant addressed the threats alleged in either count was when, as previously mentioned, she was questioned about the prior written statement she made to Officer Rivera:

Q [PROSECUTOR]: Ms. Agpaoa, I was showing you State's Exhibit 9, a three-paged [written] statement. My question is, do you remember giving a statement to Officer Corrine Rivera on Tuesday, March 23rd, 1999?

THE INTERPRETER: I don't know.

Q: Do you see your signature on that document, State's Exhibit 9?

THE INTERPRETER: Yes.

Q: And is that your signature?

THE INTERPRETER: Yes.

Q: Did you have a chance to read this statement yesterday before you came -- when you came to court yesterday?

THE INTERPRETER: Yes.

Q: And did that help refresh your memory as to what you told the police in March of this year?

THE INTERPRETER: I don't know already.

Q: But did you sit with [the interpreter] to review this statement, State's Exhibit 9?

THE INTERPRETER: Yes.

Q: So my question is, did it help refresh your memory as to what you told the police in March 23rd, 1999?

THE INTERPRETER: Yes.

Q: Okay. So do you remember telling Officer Rivera that on March 20, Saturday, March 20, that you and your husband drove to California Avenue? Do you remember telling Officer Rivera that?

THE INTERPRETER: I don't know.

Q: You don't know, or you don't remember?

THE INTERPRETER: I don't remember.

Q: Do you remember telling Officer Rivera that while you and your husband were parked in your car in the California Avenue area that he accused you of fooling around?

THE INTERPRETER: What did I say?

Q: That your husband accused you of fooling around.

THE INTERPRETER: He didn't accuse me of it. I was guilty of it.

Q: And while you were in the car at California Avenue, didn't he ask you to admit that you were fooling around, and that if you don't that he would kill you?

THE INTERPRETER: No, he didn't. He didn't.

Q: And didn't you tell him that you were not fooling around?

THE INTERPRETER: I don't know.

Q: And when you told him that you were not fooling around, didn't you tell officer Corrine Rivera that he said he doesn't believe you?

As stated before, immediately after this questioning, the court asked the prosecution if it was "planning to go through [the written] statement line-by-line[.]"

Up until the point when defense counsel objected to the prosecution's use of the written statement in conducting a line-by-line examination of Complainant, and the court ruled there was

“enough foundational testimony” to establish the past recollection recorded exception, it was evident the prosecution was attempting to lay the foundation for the substantive use, through Complainant’s impeachment, of the written statement pursuant to HRE Rule 802.1(1). In this instance, it was following established procedure. See Eastman, 81 Hawai‘i at 137, 913 P.2d at 63 (explaining that written statements are admissible as substantive evidence under prior inconsistent statement exception where, in addition to meeting other traditional foundational requirements such as that set forth in Clark, see supra page 21, “the prior inconsistent statement [is] reduced to writing and signed or otherwise adopted or approved by the witness”); State v. Tomas, 84 Hawai‘i 253, 262, 933 P.2d 90, 99 (App. 1997) (“[I]n our jurisdiciton, HRE Rule 802.1(1) expressly permits substantive use of a prior written statement by a witness who gives trial testimony inconsistent with that statement as an ‘exception’ to the hearsay rule.”); Canady, 80 Hawai‘i at 480, 911 P.2d at 115 (“HRE Rule 802.1(1) requires, as a guarantee of the trustworthiness of a prior inconsistent statement, that the witness be subject to cross-examination about the subject matter of the prior statement.”).

Because the attempt to impeach Complainant was based on her written statement, see supra, arguably, her written statement may have been admissible as substantive evidence under HRE Rule 802.1(1), to the extent it conflicted with any of her trial

testimony.[9] However, any potential substantive use of the written statement through HRE Rule 802.1(1) was foreclosed by the court's sua sponte determination that the written statement was cumulative of the audio interview and would be, and therefore was, excluded from consideration by the jury.

B.

The majority opinion appears to assert that, because Complainant was questioned about the substance of the written interview, and asked about whether she had listened to the tape of the audio interview, the audio interview was properly considered by the jury. See Majority opinion at 4-5.

Complainant was never asked about the substance of the statement she made in the course of the audio interview. Allowing use of the audio interview, based on answers to questions asked specifically with regard to the written statement, is contrary to the foundational requirements for admission of a prior inconsistent statement.

It has been said that the purpose of the foundational requirements for the use of a prior inconsistent statement as impeachment is to advise a witness as to the forthcoming impeachment. For example, the Appellate Division of the New York

[9] Complainant's written statement indicated that, while in an empty lot off California Avenue, Defendant, using a knife, threatened to kill her. When cross-examined about the written statement, however, Complainant denied Defendant's threats near California Avenue. Conceivably, then, the written statement was admissible as a prior inconsistent statement regarding the charge of Terroristic Threatening in the First Degree (Count I).

Supreme Court has explained that, when using a prior inconsistent statement as impeachment, the witness must be advised of the language he or she used when making the statement so that the witness is aware of the impending impeachment:

> It is well settled that before a witness can be impeached with a prior inconsistent statement, <u>a proper foundation must be laid which requires asking the witness whether he or she made the statement, specifying the time, place and person to whom the statement was made</u>, and the language or substance of the language used. <u>The purpose of this rule is to give the witness timely warning</u> that <u>a certain statement alleged to have been made by him or her may be subject to impeachment and to afford the witness an opportunity to explain any apparent inconsistency</u> between his or her trial testimony and the previous statement.

<u>People v. Carter</u>, 641 N.Y.S.2d 908, 908 (1996) (emphases added) (citations omitted); <u>see</u> <u>also</u> <u>Aliff v. Cody</u>, 26 S.W.3d 309, 318 (Mo. Ct. App. 2000) ("'The purposes of this traditional requirement are: to avoid unfair surprise to the adversary; to save time, since an admission by the witness may make extrinsic proof unnecessary; and to give the witness a fair chance to explain the discrepancy.'" (Quoting J. Strong, <u>McCormick on Evidence</u> § 33, at 133 (5th ed. 1999).)).

In the instant case, Complainant was not provided a chance to explain any inconsistency between her testimony and the written statement. Because she never acknowledged making an audio taped statement, and because she was not asked about the contents of the audio interview, she was not placed on any notice that she would be impeached with the audio interview and, thus, was not afforded an opportunity to explain any discrepancy between that interview and her trial testimony. In essence, because Complainant did not comment on what she said in the audio

interview, she did not provide any trial testimony that could be impeached with that statement.

Several other jurisdictions similarly advise that, when seeking to impeach a witness with a prior inconsistent statement, the actual language used or the particularities of the statement must be brought to the witness's attention in order for a proper foundation to be laid. See Anderson v. State, 811 So.2d 410, 413 (Miss. Ct. App. 2001) ("Proper predicate requires the witness be asked whether or not on a specific date, at a specific place, and in the presence of specific persons, the witness made a particular statement." (Citations omitted.)); Aliff, 26 S.W.3d at 318 ("In laying the proper foundation [for introducing a prior inconsistent statement for impeachment purposes], it is necessary to ask the witness whether he or she made the statement, quote the statement, and point out the precise circumstances under which it was allegedly made[.]" (Emphasis added.) (Internal quotation marks and citation omitted.)); Sessoms v. State, 744 A.2d 9, 19 (Md. 2000) ("When using a previously made oral statement for impeachment, the cross-examiner must inform the witness of [the] time and place [the] statement was made, [the] person to whom it was made, and its substance." (Internal quotation marks, emphasis, and citations omitted.)).

In the instant case, because Complainant could not recollect the audio interview, and because she was not questioned regarding her actual statements in the audio interview, her trial testimony could not have been impeached by the audio interview.

The cross-examination of Complainant did not "'satisf[y] constitutional and trustworthiness concerns over admitting [her audio interview] into evidence'" because she was not allowed the "'opportunity to . . . fully explain to the trier of fact why her in-court and out-of-court statements were inconsistent, which in turn, [did not] enable[] the trier of fact to determine where the truth lay.'" State v. Zukevich, 84 Hawai'i 203, 210, 932 P.2d 340, 347 (App. 1997) (quoting Eastman, 81 Hawai'i at 139, 913 P.2d at 65).

XII.

A.

I must respectfully disagree with Justice Ramil that the holding in Marcy, supra, be adopted. See dissenting opinion at 4-8.

In Marcy, the complainant had given a tape-recorded statement to the police. The complainant testified at trial that she could not recall the incident discussed in the recording. However, she indicated she would not lie to the police. Under Vermont law, a past recorded recollection is admissible as substantive evidence, if its proponent establishes the following:

> (1) The document must pertain to matters about which the declarant once had knowledge; (2) The declarant must now have an insufficient recollection as to such matters; (3) The document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matters were fresh in his [or her] memory.

Id. at 92 (internal quotation marks and citations omitted) (emphasis added).

Marcy was not a plurality opinion regarding the application of the past recollection recorded exception.[10] Of the five justices who heard the case, Justice Johnson authored what is referred to as the "majority" opinion and was joined by another justice. Two justices concurred, but explained that "the disagreement between the majority and the dissent on the foundational requirements [of the past recollection recorded exception] need not be resolved to decide this appeal." Id. at 99 (emphasis added) (Allen, C.J., concurring, joined by Gibson, J.). Because the complainant there testified that she would not have lied to the police, the concurring justices concluded that "the tape recording of the victim's statements was properly admitted under either the majority or dissent's interpretation of the foundational requirements of [the past recollection recorded exception]." Id. at 100-01. The concurring justices therefore did not join the "majority" in its opinion. See id. at 83. A fifth justice, Justice Dooley, wrote a dissenting opinion, discussed infra. Marcy's precedential value is therefore questionable. Marcy is also inapposite to the instant case.

In reaching his conclusion, Justice Johnson determined that the difficult question was whether the prosecution met the third requirement, which, in itself, could only be met if:

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[10] However, there was a plain majority on other matters addressed in that opinion that are not pertinent to the instant case.

(1) the statement was "made by the witness" or "adopted by the witness" and (2) "the statement must be shown to [have] accurately reflect[ed] the witness's knowledge when the matter was fresh in her memory." Id. at 93 (citations omitted). Justice Johnson believed that the testimony of the police officer indicating that the recording was of a statement the complainant made was sufficient to meet the first prong. See id. Regarding the second prong, the "majority" held that the statement accurately reflected the witness's knowledge because, as the trial court found,[11] (1) the statement was made "within a day of the assault"; (2) the statement was made "shortly after and was consistent with a prior interview with the police officer"; (3) the statement addressed the details of the assault in chronological order; (4) the complainant was apparently coherent when she made the statement; (5) there was corroboration, through other witness's testimony, that the contents of the recording were accurate; and (6) the complainant "never recanted the statement, or indicated that the statement was inaccurate or given involuntarily, but rather testified that if she had talked to a police officer she would have tried to be truthful [and] that she would not have 'intentionally' or 'deliberately' lied to the officer." Id. at 94 (emphases added).

In the instant case, Complainant never testified that she would not have lied if she was subjected to a police

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[11] The reasons provided by the trial court as proof of the accuracy of the complainant's statement were relied upon by the Vermont Supreme Court to reach its conclusion.

interview. See dissenting opinion at 7 n.4. Rather, at trial, Complainant related that, at a preliminary hearing, she testified that she had lied to the police and recanted her statement. Complainant did not testify or state in the course of the audio interview that the contents of the recording were accurate. Thus, Marcy is distinguishable from the instant case.

B.

In his dissent in Marcy, Justice Dooley pointed out that the Marcy "majority" relied on United States v. Porter, 986 F.2d 1014 (6th Cir. 1993), a federal case not followed by any other federal court. See 680 A.2d at 86.

In Porter, the trial court allowed portions of a witness's written statements to be read into evidence under the past recollection recorded exception to the hearsay rule. 986 F.2d at 1016. The declarant at trial testified "that while she did recall giving the written statement and signing it, she now really did not remember much about what she had said in the statement because, she testified, she was confused and on drugs at the time the statement was made." Id. The Sixth Circuit Court of Appeals upheld admission of the statement, based on the district court's consideration of the following factors:

> (1) [the declarant] admitted making the statement; (2) the statement was made soon after the events related in the statement; (3) the statement was signed by [the declarant] on each of its five pages; (4) the wording of the statement had been changed and initialed by [the declarant] 11 times; (5) the statement was made under penalty of perjury; (6) the statement contained considerable detail which was internally consistent, as well as consistent with other uncontradicted

> evidence which had already been admitted; and (7) [the declarant] gave the statement at a time when she was fearful of reprisal from the defendant.

Id. at 1017 (emphases added). The appellate court also noted that

> the district judge, who had full opportunity to view the witness'[s] demeanor and evaluate her testimony, determined that [the declarant], in attempting to distance herself from the . . . statement, was being "disingenuous" and "evasive," and was acting either out of her recently professed desire to marry the defendant or out of fear of the defendant.

Id. Thus, Porter, upon which the "majority" in Marcy relied, was distinguishable not only from Marcy, but also from the instant case. Complainant here did not admit to making the audio interview, or making the statement under penalty of perjury and the court did not make a finding that the witness was untruthful.

XIII.

Secondly, as one commentator notes, the Marcy opinion "took a relatively unique approach to the hearsay problem in domestic violence cases by admitting a prior tape-recorded statement of the victim after she claimed at trial, that she could not remember the domestic violence." N. Hudders, The Problem of Using Hearsay in Domestic Violence Cases: Is a New Exception the Answer? 49 Duke L.J. 1041, 1058 (2000) [hereinafter, The Problem of Using Hearsay] (emphasis added).

Justice Dooley also attacked the Marcy majority's reliance on Porter as a departure from the requirement of the past recollection recorded exception that the statement reflect the declarant's knowledge accurately:

> The majority relies primarily on Porter for the contention that the accuracy of the statement can be shown according to objective indicia of reliability in lieu of the witness's own attestations. Although Porter contains some broad language, I cannot read it as supporting the majority's conclusion. . . .
>
> Porter is, in the words of McCormick, an example of the "extreme, where it is even sufficient if the individual testifies to recognizing his or her signature on the statement and believes the statement correct because the witness would not have signed it if he or she had not believed it true at the time." 2 McCormick on Evidence § 283, at 259 (4th ed. 1992). Here, the wife, unlike the witness in Porter, does not remember meeting the police officer and giving the statement to him. She consistently testified that because of her memory loss, she could not verify the accuracy and truthfulness of the statement. If Porter represents the "extreme" case, we now have gone well beyond the extreme and made that normal.

Marcy, 680 A.2d at 105-06 (brackets and footnote omitted) (emphases added).

As another commentator explains, mere presence of the declarant on the stand does not dispense with the requirement that the witness himself or herself acknowledge the accuracy of his or her prior statement:

> With the [past recollection recorded] exception, accuracy depends upon the witness'[s] own testimony at the current trial, and limited cross-examination is available of a type found sufficient under Rule 801(d)(1) [the prior inconsistent statement exception]. See Porter, 986 F.2d at 1017 (exception gains reliability from presence of declarant on the stand subject to jury's evaluation in determining which version of events to accept). However, for this analysis to hold fully, the other requirements of the instant exception must be met, in particular the requirement that the witness acknowledge the accuracy of the prior statement.

J. Strong, 2 McCormick on Evidence § 283, at 245 n.9 (5th ed. 1999) (emphases added). Thus, McCormick would disapprove of allowing prior recordings to be received where the witness claims no memory of the recording and, thus, does not testify that the recording is accurate, as is the situation in the case before

us.[12] Porter and Marcy, therefore, are simply not compelling, either factually or legally, as bases for embracing the viewpoint of the Marcy "majority."

XIV.

Only one other state has relied on the Marcy decision, in a situation itself inapposite to the instant case. In State v. Alvarado, 949 P.2d 831 (Wash. Ct. App. 1998), a murder case, a witness had made three tape recorded statements to the police. In the first, the witness stated that he did not know anything about the crime, while in the second and third, he inculpated the defendants in the murder. See id. at 833. At trial, he recalled that the police had tape recorded his statements, but "testified that he could neither remember any of the events surrounding the murder nor verify that his statements had been accurate." Id. Nevertheless, all three statements were admitted as past recollections recorded. See id.

The Washington Court of Appeals, faced with a claim of ineffective assistance of counsel, considered the past recollection recorded rule, Washington Evidence Rule 803(a)(5),[13]

[12] Two other state cases, Impson v. State, 721 N.E.2d 1275 (Ind. Ct. App. 2000), and State v. Locke, 663 A.2d 602 (N.H. 1995), that cite Porter, are, like Marcy, distinguishable from the instant case because, in those cases, the declarants acknowledged that the statements admitted were truthful and the defendants were able to conduct meaningful cross-examinations of the declarants.

[13] Washington Evidence Rule 803(5) states:

> *Recorded Recollection.* A memorandum or record concerning a matter about which a witness once had knowledge

(continued...)

and concluded that the trial court did not err in admitting all of the taped statements. The court determined that "indicia of reliability . . . support admission of the second and third statements." Id. at 836. Among the indicia of reliability mentioned, the Washington Court of Appeals considered the fact that the declarant "affirmatively asserted the[] accuracy [of the second and third statements[14]] at the time he made them" and that "[a]fter making the last statement [the declarant] acknowledged on the tape that all the information was 'true and correct.'" Id. (emphasis added). The court also pointed out that "the first statement was properly admitted under the rule of completeness, because the statement provided a context from which defense counsel could assail [the declarant]'s credibility." Id. at 837 (emphasis added) (citation omitted).

Alvarado is therefore similarly distinguishable from the instant case.[15] Complainant did not (1) admit to giving the

[13](...continued)

> but now has insufficient recollection to enable the witness to testify fully and accurately, shown to be made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received into evidence unless offered by an adverse party.

[14] Because the second and third statements inculpated the defendant, those statements would have been used as substantive evidence of the defendant's guilt.

[15] Not only is Alvarado distinguishable, it is arguably contrary to precedent in this jurisdiction in a situation involving the inconsistencies between the declarant's several statements. In State v. Lincoln, 71 Haw. 274, 789 P.2d 497 (1990), this court held that a trial court erred in admitting the former testimony of a witness because that witness's testimony "lacked reliability," considering the fact that he had "retracted his testimony under oath, retracted his retraction, and finally refused to testify at trial," despite the fact that the jury had been informed of the retractions. Id. at

(continued...)

audio interview to the police or (2) vouch for the truthfulness of the statement at the time she made it. More importantly, while the defense in Alvarado had an opportunity to meaningfully cross-examine the declarant by using the first statement, there was no meaningful opportunity for Defendant to cross-examine Complainant, considering her professed complete lack of memory.

Complainant has not acknowledged that she told the truth in the audio interview, either at trial or while making the statement. Indeed, as mentioned, she indicated that, at the preliminary hearing, she lied to the police. There is nothing to establish that the audio interview accurately reflected Complainant's knowledge. Complainant could not be subjected to meaningful cross-examination as to the contents of the interview. Therefore, the foundational requirements of the past recollection recorded exception have not been met. The indicia of reliability -- which would otherwise justify forbearance of confrontation rights -- are not present.[16]

XV.

The past recollection recorded exception is an inadequate method of admitting, as substantive evidence, a prior statement of assaultive conduct when the complainant claims at

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[15](...continued)
277, 279, 789 P.2d at 498, 500.

[16] As Justice Dooley observed, "a full memory loss will make absolutely useless cross-examination on a record of past recollection. . . . Without memory of giving the past statement, the witness is as close to a mannequin as we are ever likely to have." Marcy, 680 A.2d at 88, 88-89.

trial to have forgotten the entire episode:

> [For the past recollection recorded exception],[[17]] [t]he witness must make a live endorsement by testifying in court that the writing reflects their [sic] firsthand knowledge.
> . . .
> There are several problems with using the past recollection recorded exception to provide substantive evidence of domestic violence. <u>The main problem is that the "forgetful" domestic violence victim must make a live endorsement of the statement in the trial. The failure to endorse the statement is fatal to the statement's admissibility as substantive evidence</u>. For a victim who is recanting because of a loss of memory, an endorsement of a statement inculpating the alleged batterer is unlikely to occur. <u>Thus, the past recollection recorded exception is of little benefit</u> because control over the admissibility of the prior inculpating statement is left in the hands of the domestic violence victim, who is susceptible to batterer coercion.

D. Beloof and J. Shapiro, <u>Let the Truth be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out[-]of[-]Court Statements as Substantive Evidence</u>, 11 Colum. J. Gender & L. 1, 9 (2002) (emphases added). The instant case brings to our attention an issue faced by prosecutors and law enforcement -- the recantation by a complainant of statements relating to alleged domestic violence. However, the fair and equal application of the past recollection recorded exception to the hearsay rule simply does not allow for the admission of Complainant's audio interview in the instant case. The temptation to bend the rules of evidence will only invite the adulteration of hearsay rules in all cases:

> Hearsay exceptions may be particularly susceptible to expansion in domestic violence cases because there is a

[17] The authors of the law review article, when examining the inadequacy of the past recollection recorded exception to the hearsay rule in domestic violence cases, specifically referred to the federal rule, FRE Rule 803(5), which, as discussed <u>supra</u>, is identical to the Hawaiʻi rule. <u>See</u> D. Beloof & J. Shapiro, <u>Let the Truth be Told: Proposed Hearsay Exceptions to Admit Domestic Violene Victims' Out of Court Statements as Substantive Evidence</u>, 11 Colum. J. Gender & L. 8 n.26 (2002).

strong social policy interest in reducing domestic violence . . . . However, the expansion of hearsay exceptions has implications for the broad use of the hearsay rule.

. . . [A] strong social policy argument can be made for admitting hearsay in domestic violence cases. The private nature of domestic violence, in which only the victim and the perpetrator have firsthand knowledge of the incident, makes the need to use hearsay significant. At the same time, we must recognize that expanding existing hearsay exceptions would have a significant impact on non-domestic violence cases. For example, by expanding the state of mind exception in a domestic violence case, the door may be opened in another, non-domestic violence case, where the policy arguments and the need to use hearsay are not nearly as strong. The elastic nature of the common law system may allow the interpretation of these exceptions in domestic violence cases to carry precedential value in cases where there is little or no social policy justification, or necessity, for admitting hearsay.

Perhaps the only alternative to expanding existing hearsay exceptions would be to create a new hearsay exception for use only in the domestic violence context.

Hudders, The Problem of Using Hearsay, supra, at 1059 (emphases added). Under an impartial application of the past recollection recorded exception to the hearsay rule, Complainant's audio interview is not admissible.

XVI.

The prosecution did question Complainant as to the statements she made in her written statement but did not ever question her as to the statements made in the audio interview. The foundation for establishing the introduction of the inconsistent statements in the audio interview was not laid. The court admitted in evidence the contents of the audio interview. Accordingly, while we may affirm the admission of a hearsay statement based on an exception not relied upon by the trial court, see Zukevich, 84 Hawaiʻi at 208 n.5, 932 P.2d at 345 n.5 (explaining that court's admission of testimony pursuant to

inapplicable hearsay exception was "harmless" because the statement was admissible under a different exception), the foundational requirements for the putative exception must be established. Complainant's trial testimony was elicited with respect to the statements in her written statement. That testimony cannot be attributed fairly to her with respect to the statements in her audio interview, as to which she was not specifically questioned. Therefore, the transcript of the audio interview should not have been admitted into evidence under HRE Rule 802.1(1).

XVII.

The playing of the audio interview for the jury was prejudicial, or harmful, error with respect to both counts. There is more than a "reasonable possibility" the audio interview "might have contributed to the conviction." State v. Pokini, 55 Haw. 640, 646, 526 P.2d 94, 101 (1974) (internal quotation marks and citations omitted). Other evidence, consisting of White's testimony and the physical objects recovered from the car, would not have been sufficient to sustain a conviction of the charged offenses. The written statement taken by Officer Rivera was not received in evidence because the court considered it cumulative. It cannot be concluded, then, that the error in this case was harmless beyond a reasonable doubt.

XVIII.

Accordingly, Defendant's December 1, 1999 judgment of conviction and sentence should be vacated and the case remanded for a new trial.