CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I concur in the vacation of the case and the remand for a new trial on the ground that the right of confrontation of Defendant-Appellant Danny H. Haili (Defendant) was violated. I would also hold, however, that the instruction of the first circuit court (the court) to the effect that "[t]he question of the Defendant's self-control, or the lack of it, at the time of the offense, is a significant factor in deciding whether he was under the influence of extreme mental or emotional disturbance[]" was error. This court in State v. Perez, 90 Hawai'i 65, 976 P.2d 379 (1999) [hereinafter Perez II], reversed in part the Intermediate Court of Appeals in State v. Perez, 90 Hawai'i 113, 976 P.2d 427 (Haw. Ct. App. 1998) [hereinafter Perez I], aff'd in part and rev'd in part, 90 Hawai'i 65, 976 P.2d 379 (1999), on the ground that "it was not error to instruct the jury that self-control was a 'significant' factor in assessing whether the mitigating defense applied" to the defendant, Perez II, 90 Hawai'i at 74, 976 P.2d at 388. I must respectfully disagree.

Reviewing prior case law and referring to the commentary on Hawai'i Revised Statutes (HRS) § 707-702, Perez I pointed out that "the 'criterion of a general weakening of self-control' seen as 'an advanced and liberal approach for 1853,' was not the same as but rather 'something approximating the Code's already *more general approach to mental and emotional*

extenuation.'" Perez I, 90 Hawai‘i at 123, 976 P.2d at 437 (quoting Commentary on HRS § 707-702) (emphasis in original) (brackets omitted). Thus, "[i]n light of the 'more general approach' of the defense as compared to 'the early criterion of a general weakening of self-control,' . . . the language [referring to self-control as a significant factor] . . . was conceptually too narrow, and thus insufficient in informing the jury of the role of 'self-control' under the penal code formulation of the defense." Id. (brackets omitted). Consequently, as noted in Perez I, "[t]he instruction could thus be, and in fact was used by the prosecution in closing argument to unduly limit the scope of the defense." Id. Thus, in that case, "the State argued to the jury that if Defendant was capable of committing the acts charged, he possessed sufficient self-control to disqualify him from invoking the emotional disturbance defense[.] Id.

I agree, then, with Defendant's objection to the jury instruction referred to supra. As was previously stated in Perez I, "an instruction which merely singles out 'self-control' for consideration by the jury is prejudicially insufficient and misleading." Id. at 124, 976 P.2d at 438. This is because "the emotional disturbance defense *admits* that the defendant intentionally or knowingly caused the death of another or attempted to do so, and therefore, that the defendant possessed the requisite 'self-control' to commit or attempt murder." Id. (emphasis in original). Hence, "[c]ommission of such acts is, in

effect, the factual and legal prerequisite for raising such a defense, and thus not the basis for defeating it." Id. Therefore, "[t]he question is not whether the defendant had sufficient self-control at the time to commit murder . . . , but whether, when the acts were committed, the defendant was *influenced* by the requisite mental and emotional disturbance. Id. (emphasis in original).

"Self control" is not an element of the defense of emotional disturbance manslaughter. It is not surprising that juries, as did the jury in this case, continue to request further instruction from the trial courts as to the definition of mental and emotional disturbance. The defense becomes logically meaningless because the question of self-control is obviated by the legal prerequisite finding of intentional or knowing conduct resulting in murder that the fact finder must make; a point invariably argued by the prosecution in these cases.