AMENDED DISSENTING OPINION BY ACOBA, J.

I respectfully dissent.

In his Application for Writ of Certiorari Petitioner/Defendant-Appellant Reginald Fields (Petitioner or Fields) contends that the Intermediate Court of Appeals (the ICA) gravely erred (1) by failing to find that the admission of the hearsay statements of Melinda Staggs (Staggs) and Dave Richards (Richards) did not violate the confrontation clause of the Hawai'i Constitution, (2) by declining to find plain error and in abdicating judicial review in favor of a Hawai'i Rules of Penal Procedure (HRPP) Rule 40 Petition, and (3) by not vacating Petitioner's conviction for insufficient evidence, because only evidence that is "substantial" and "admissible" can support a conviction.

In my view, Petitioner raises meritorious claims as to issues (2) and (3) that are pre-eminent and dispositive because under the Hawai'i Rules of Evidence (HRE), Staggs' hearsay statement was not admissible in evidence. Thus, issue (1) need not be reached. Consequently, the October 11, 2002 judgment of the family court of the fifth circuit (the court), convicting Petitioner of abuse of a family or household member, must be reversed. Assuming arguendo issue (1) must be reached, I believe the majority's analysis regarding the Hawai'i Constitution's confrontation clause is faulty.

I.

Staggs' out-of-court statement as related in the testimony of Officer Elliot Ke (Officer Ke) should not have been admitted in evidence because it was hearsay and did not qualify as an exception to the hearsay rule. Admission of such evidence under the circumstances of this case constituted plain error. Although the majority fails to decide it, this proposition is dispositive of Petitioner's writ application.

A.

1.

"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). . . . Hearsay is inadmissible at trial, unless it qualifies as an exception to the rule against hearsay." State v. Sua, 92 Hawai'i 61, 70, 987 P.2d 959, 968 (1999) [hereinafter Sua II], rev'g State v. Sua, 92 Hawai'i 78, 987 P.2d 976 (App. 1999) [hereinafter Sua I] (internal quotation marks, citation, and brackets omitted). It is not disputed that Staggs' statement was made outside of court and was offered for the truth of the matter asserted therein. Accordingly, unless falling within an exception to the hearsay rule, the statement should not have been admitted into evidence.

2.

Staggs' statement does not fall under any exception to the hearsay rule. The question of whether the statement fell

within any exception does not appear to have been joined by the parties at trial. However, Petitioner declares that the "questioning of Staggs [by Respondent/Plaintiff-Appellee State of Hawai'i (Respondent)] . . . suggests that it sought to admit her purported statement to Officer Ke under HRE Rule 802.1 [(1993)]." HRE Rule 802.1[1] sets forth an exception to the hearsay rule, which, when satisfied, permits the substantive use of prior statements that are either inconsistent or consistent with the declarant's trial testimony. As relevant here, pursuant to HRE Rule 802.1(1), several requirements must be satisfied before a prior inconsistent statement may be admitted as substantive evidence. First, the declarant must be "subject to cross-

---

[1] HRE Rule 802.1 entitled, "Hearsay exception; Prior statement by Witnesses" states in relevant part:

> 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 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;
>
> (2) Consistent Statement. The declarant is subject to cross-examination concerning the subject matter of the declarant's statement, the statement is consistent with the declarant's testimony, and the statement is offered in compliance with rule 613(c)[.]

(Emphases added.)

examination concerning the subject matter of [his or her prior] statement." HRE Rule 802.1(1). In addition, the prior statement must be "inconsistent" with the declarant's testimony and be offered in compliance with HRE Rule 613(b) (1993).[2] HRE Rule 802.1(1). Finally, the prior inconsistent statement must have been either "[g]iven under oath[,]" "[r]educed to writing and signed or otherwise adopted or approved by the declarant," or contemporaneously "[r]ecorded in substantially verbatim fashion." HRE Rule 802.1(1)(A)-(C).[3]

B.

The statement that Officer Ke attributed to Staggs did not meet any of the requirements under HRE Rule 802.1. First, it was inadmissible because Staggs was not subject to cross-examination concerning the subject matter of her reputed prior statement. See State v. Canady, 80 Hawai'i 469, 477, 911 P.2d 104, 112 (App. 1996) (concluding that the prior inconsistent statement "would not be admissible because . . . the record

---

[2] HRE Rule 613(b) states:

> (b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless, on direct or cross-examination, (1) the circumstances of the statement have been brought to the attention of the witness, and (2) the witness has been asked whether the witness made the statement.

[3] As noted, see supra note 1, with regard to prior consistent statements, HRE Rule 802.1(2) also requires that the declarant be "subject to cross-examination concerning the subject matter of [his or her] prior statement." HRE Rule 802.1(2) additionally requires that the prior statement be "consistent with the declarant's testimony," and "offered in compliance with HRE Rule 613(c)." HRE Rule 802.1(2).

failed to establish that [the complainant] was 'subject to cross-examination concerning the subject matter' of the [s]tatement as required under HRE Rule 802.1(1)"). HRE Rule 802.1(1) requires "as a guarantee of the trustworthiness of a prior inconsistent statement, . . . that the witness be capable of testifying substantively about the event, allowing the trier of fact to meaningfully compare the prior version of the event with the version recounted at trial before the statement would be admissible as substantive evidence of the matters stated therein." Id. at 115-16, 911 P.2d at 480-81 (footnote omitted) (emphasis added); see also State v. Clark, 83 Hawai'i 289, 295, 926 P.2d 194, 200 (1996) (discussing HRE 802.1 and holding that because the defendant had the opportunity to have the declarant "fully explain . . . why her in-court and out-of-court statements were inconsistent, . . . the trier of fact [could] determine where the truth lay[]" (citation omitted)); State v. Eastman, 81 Hawai'i 131, 139, 913 P.2d 57, 65 (1996) (concluding that the cross-examination of the complainant "satisfied constitutional and trustworthiness concerns over admitting [her] prior inconsistent statements . . . into evidence [under HRE Rule 802.1], because the cross-examination gave [the defendant] the opportunity to have [the complainant] fully explain to the trier of fact why her in-court and out-of-court statements were inconsistent, which, in turn, enabled the trier of fact to determine where the truth lay" (emphasis added)).

Staggs, like the complainant in Canady, "could not recall the events that she allegedly described" in her prior statement. Canady, 80 Hawai'i at 481, 911 P.2d at 116. As such, Staggs was "not able to testify about the substantive events reported" in her prior statement. Id. Staggs' failure to recall, at trial, the incident that her prior statement described precluded Petitioner from subjecting the accusation attributed to her to cross-examination. Consequently, "[b]ecause 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." Id. (citing Commentary to HRE Rule 802.1) (brackets and internal quotation marks omitted). Staggs' hearsay statement was therefore not admissible under HRE Rule 802.1.[4]

II.

In its Answering Brief, Respondent does not dispute that Staggs' statement was not admissible under HRE Rule 802.1. Instead, Respondent argues that "the [court] did not abuse its discretion in accepting [Staggs'] statement to Officer Ke into evidence" under HRE Rule 804(b)(8) (1993 & Supp. 2005)[5] because

[4] Moreover, because Staggs' prior statement was not given under oath, reduced to writing and signed, or otherwise adopted by her, nor contemporaneously recorded in a substantially verbatim fashion, the requisite foundation under HRE Rule 802.1(1) was not laid. In his Opening Brief, Petitioner additionally states that "Staggs' prior statement did not . . . fall within any other firmly rooted exception to the hearsay rule."

[5] HRE Rule 804(b)(8) states:

> The following are not excluded by the hearsay rule if (continued...)

"[t]he statement that [Staggs] made to Officer Ke . . . [has an] indicia of trustworthiness." In his Reply Brief, Petitioner argues that "Staggs' alleged statement to Officer Ke does not carry the same 'equivalent circumstantial guarantees of trustworthiness' as the other exceptions listed in [HRE Rule 804(b) (1993 & Supp. 2005)]." In any event, Respondent did not establish that the foundational requirements of HRE Rule 804(b)(8) were met, as the ICA also noted. See infra. Staggs' hearsay statement was thus not admissible under HRE Rule 804(b)(8).

III.

On September 14, 2004, the ICA ordered the parties to submit supplemental briefing regarding the impact of Crawford, 541 U.S. 36 (2004) and State v. Haili, 103 Hawai'i 89, 79 P.3d

---

[5](...continued)
the declarant is unavailable as a witness:
. . . .
(8) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (B) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

(Emphases added.)

1263 (2003), in the resolution of Petitioner's appeal.[6] In his Supplemental Brief, Petitioner properly complied with the ICA's request, and as relevant to this discussion, maintained that Staggs' hearsay statement did not fall within a hearsay exception, "much less a 'firmly rooted' one" that would satisfy the Hawai'i confrontation clause. Haili, 103 Hawai'i at 104, 79 P.3d at 1278.

In response to Respondent's Answering Brief, Petitioner argued, "to the extent that [Respondent] relies, in its answering brief, on the so-called 'residual' hearsay exception set forth in [HRE] Rule 804(b)(8), . . . even if Staggs' . . . statements are deemed to fall within HRE Rule 804(b)(8), that does not satisfy the requirement that they fall within a 'firmly rooted' hearsay exception."

On the other hand, Respondent, in its Supplemental Answering Brief, argues as pertinent here, that under HRE Rule 803(b)(2) (1993 & Supp. 2005),[7] Staggs' hearsay statement

---

[6] Crawford and Haili were decided on March 8, 2004, and December 3, 2003, respectively.

[7] HRE Rule 803 entitled "Hearsay Exceptions; Availability of Declarant Immaterial" states in relevant part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (b) Other Exceptions.
>
> . . . .
>
> (2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

qualifies as an excited utterance and, therefore, falls within a "firmly rooted hearsay exception" and that Staggs' statement "has particular guarantees of trustworthiness." However, Respondent's position regarding an excited utterance is contrary to that taken in its Answering Brief, in which it contended that Staggs' statement was admissible under HRE Rule 804(b)(8), relevant only when no other enumerated exception applies. See supra. The doctrine of judicial estoppel "prevents parties from playing 'fast and loose' with the court or blowing 'hot and cold' during the course of litigation." Roxas v. Marcos, 89 Hawai'i 91, 124, 969 P.2d 1209, 1242 (1998) (citations and some internal quotation marks omitted)). Therefore, Respondent is judicially estopped from changing its position regarding the admissibility of Staggs' hearsay statement.

Moreover, because the ICA limited the scope of the supplemental briefing to the applicability of Crawford and Haili, Respondent's discussion regarding an excited utterance exception exceeded the scope of the ICA's order. Respondent's argument thus is foreclosed because it would be unfair to address it in light of Petitioner's reliance on Respondent's position in its Answering Brief that Staggs' hearsay statement was admissible under the catchall provision of HRE 804(b)(8). See, e.g., Tauese v. State Dept. of Labor & Indus. Relations, 113 Hawai'i 1, 29, 147 P.3d 785, 813 (2006) (noting that although the appellant "provided some argument regarding the specificity of charges in

his reply brief, he has waived this issue, and it would be unfair for us to address it" (citing Taomae v. Lingle, 110 Hawai'i 327, 333 n.14, 132 P.3d 1238, 1244 n.14 (2006) (denying plaintiffs' request for attorneys' fees on a ground raised for the first time in their reply memorandum)).

Finally, the ICA also apparently did not consider Respondent's belated excited utterance exception argument. Respondent did not apply for a writ of certiorari as to that contention and so it must be deemed waived for purposes of our review.

IV.

In sum, Staggs' hearsay statement did not qualify for admission as an exception to the hearsay rule under HRE Rule 802.1, HRE Rule 804(b)(8), or HRE Rule 803(b)(2). Thus, Staggs' hearsay statement was not admissible. I believe the ICA was correct, then, insofar as it also concluded that Staggs' statement was hearsay, the statement did not qualify for admission under any hearsay exception, and had an objection been made, "the objection . . . could not have been validly denied."

> Officer Ke's testimony, repeating what [Staggs] said, is hearsay under HRE Rule 801 (Supp. 2003). According to HRE Rule 804(a)(3) [(1993 & Supp. 2005)], [Staggs] was unavailable to testify. Thus, the question is whether [Staggs'] statement is admissible under one of the exceptions listed in HRE Rule 804(b). The only possibility is HRE Rule 804(b)(8), and [Staggs'] statement is not admissible under it because (a) the record does not show that [Respondent] complied with the notice requirements of HRE Rule 804, and (b) [Staggs'] statement lacks the required "equivalent circumstantial guarantees of trustworthiness." Therefore, if counsel for [Petitioner] had objected to the introduction of [Staggs'] prior testimonial statement into evidence on the ground that it violated the HRE, the objection would have had merit and could not have been validly denied.

State v. Fields, No. 25455, 2005 WL 1274539, at *16 (App. May 21, 2005) (brackets omitted) (emphases added). The hearsay statement, then, should not have been allowed in evidence. This salient fact is not addressed by the majority. Indeed the majority does not indicate at all how the hearsay statement properly could be admitted in the first instance in light of plain error.

The ICA went on to discuss Crawford because it believed Petitioner's failure to object to the statement at trial waived his right to object on direct appeal on plain error grounds (although not his right to claim error in a subsequent HRPP Rule 40 proceeding). Fields, 2005 WL 1274539, at *18-19 (concluding that "[g]enerally . . . absent an objection by the defendant," "the trial court did not violate a duty not to admit inadmissible hearsay testimony into evidence or a duty to strike inadmissible hearsay testimony after it was admitted into evidence").[8]

[8] Richards' statement, "Reggie get off her," related to the court by Kharma Lhamo (Lhamo) was also inadmissible because it was also hearsay and did not qualify as an exception to the hearsay rule. See Fields, 2005 WL 1274539, at *17. Contrary to the majority's contention that "the ICA declined to address Fields' claim that Richards' out-of-court statement, as related by Lhamo, violated Fields' right of confrontation under the Hawai'i Constitution[,]" majority opinion at 52 (footnote omitted), the ICA did indeed address Richards' out-of-court statement.

The ICA stated that "[Lhamo's] testimony, repeating what Richards said, is hearsay under HRE Rule 801" and "[t]he record does not answer the question [of] whether Richards was or was not unavailable to testify" so "if counsel for Fields had objected to the introduction of Richards' prior testimonial statement into evidence on the ground that it violated the HRE, the objection would have had merit and could not have been validly denied." Fields, 2005 WL 1274539, at *17 (emphasis added). The ICA concluded that "the two hearsay statements that could have been validly objected to and excluded from evidence . . . present the possibilities that Fields is the victim of (a) the ineffective assistance of trial counsel or (b) the trial court's plain error." Id. at *16. Thus, according to the ICA, which the majority explains did "no[t] grave[ly] err[,]" majority opinion at 52 (emphasis added), neither Staggs' nor Richards' hearsay statement was admissible.

V.

Because Fields did not object at trial to the admission of Staggs' statement, it is subject only to a review for plain error. In Fields' application for certiorari, he directly raises the issue of whether "[t]he ICA gravely erred in declining to find plain error and abdicating judicial review in favor of a Rule 40 petition" and that "appellate courts in this jurisdiction have found plain error and reversed convictions for the erroneous admission of evidence despite the lack of an objection." (Citing State v. Fox, 70 Haw. 46, 56, 760 P.2d 670, 676 (1988) (stating this court will not "stand[] idly by though clear error affecting substantial rights of the defendant was committed")).

So, although not objected to, the admission of Staggs' hearsay testimony at trial should have been noticed as plain error by the ICA as Fields argues in his application. See State v. Nichols, 111 Hawai'i 327, 334, 141 P.3d 974, 981 (2006) ("If the substantial rights of the defendant have been affected adversely, the error will be deemed plain error." (Citing State v. Pinero, 75 Haw. 282, 292, 859 P.2d 1369, 1374 (1993))); HRPP Rule 52(b) ("Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); State v. Sanchez, 82 Hawai'i 517, 524-25, 923 P.2d 934, 941-42 (App. 1996) ("'[W]here plain error has been committed and substantial rights have been affected thereby, the error may be noticed even though it was not brought to the attention of the

trial court.'" (Quoting State v. Kelekolio, 74 Haw. 479, 515, 849 P.2d 58, 75 (1993).)).[9] In that regard, this court has stated that, even if hearsay is not objected to at trial, "where inadmissible hearsay is so prejudicial as to deprive the defendant of his constitutional right to a fair trial, its admission will constitute ground for reversal[.]" State v. Pastushin, 58 Haw. 299, 302, 568 P.2d 504, 506 (1977) (emphasis added) (citation omitted). Accordingly, as to Petitioner's issue (3), neither Staggs' nor Richard's hearsay statements, see supra note 8, were properly admitted at trial and, thus, the evidence was insufficient to convict. State v. Wallace, 80 Hawai'i 382, 910 P.2d 695 (1996). Thus, the court's judgment must be reversed.

VI.

The majority focuses its discussion of plain error on whether Fields explicitly raised the right to a fair trial. See, e.g., majority opinion at 53 (stating "[i]nsofar as Fields does not advance any other plain error argument on certiorari, he has failed to demonstrate that his substantial rights have been

[9] The majority appears to agree that the right of confrontation is a substantial right. See majority opinion at 53 (stating that it has "already determined that the admission of Staggs' prior out-of-court statement did not violate Fields' right of confrontation, [thus] his assertion that his substantial rights have been adversely affected on confrontation grounds is likewise without merit"). It would follow, then, that because substantial rights include constitutional rights, the right to a fair trial is also a substantial right. See State v. Rapoza, 95 Hawai'i 321, 326, 22 P.3d 968, 973 (2001) (equating a substantial right with a constitutional right by stating a "defendant's substantial rights-- to wit, his or her constitutional rights to a trial by an impartial jury and to due process of law- . . . may be recognized as plain error").

adversely affected"). As stated above, the inadmissibility of Staggs' statement on hearsay grounds was raised in Fields' application as plain error implicating his right to a fair trial. The ICA decided that admission of Staggs' statement violated the HRE and in his Opening Brief before the ICA, Fields argued, inter alia, that he "has a substantial, fundamental right" to "due process of law" and a "fair trial[,] which necessitates that [Respondent] carry its burden to prove its case against him beyond a reasonable doubt by competent evidence." (Emphasis added.) In making these claims, Fields cited to article I, sections 5 and 14 of the Hawai'i Constitution and the Sixth and Fourteenth Amendments to the United States Constitution which protect the right to a fair trial. As Fields raises these constitutional rights in his opening brief, the majority's contention that Fields "has failed to demonstrate that his substantial rights have been adversely affected[,]" majority opinion at 53, is patently in error. This court's jurisdiction obviously extends to an error that affects a defendant's substantial rights.[10] See also cases infra.

[10] As noted, contrary to the majority, and to be accurate, Fields did raise, and the ICA implicitly acknowledges, what would be deemed an infringement of Fields' substantial rights. With all due respect, to say that Fields does not show that his substantial rights have been affected when he was convicted based on the admission of incompetent hearsay evidence, and sentenced to probation for two years and imprisonment for two days, is disingenuous and raises the question of how this court could ever find an infringement of substantial rights significant enough to find plain error. As noted, Fields plainly asserted that his substantial rights were violated by the admission of Staggs' hearsay statement.

Additionally, while an application for certiorari must address "(1) grave errors of law or of fact, or (2) obvious inconsistencies in the decision of the [ICA] with that of the supreme court, federal decisions, or its own decision and the magnitude of such errors or inconsistencies dictating the need for further appeal," Hawai'i Revised Statutes (HRS) § 602-59(b) (Supp. 2006), items (1) and (2) are not limitations on this court's discretion to take certiorari. See State v. Chong, 86 Hawai'i 282, 282-83, 949 P.2d 122, 122-23 (1997) (explaining that "[t]he legislative history of HRS § 602-59 makes clear we have the authority to consider any issues that arise in this case (citation omitted)); State v. Bolosan, 78 Hawai'i 86, 89 n.5, 890 P.2d 673, 676 n.5 (1995) (The legislative history of HRS § 602-59 (1985) indicated that although "the application for writ of certiorari must state 'errors of law or fact' or 'inconsistencies in the decision of the ICA with that of the Supreme Court, Federal decisions, or its own decisions, and the magnitude of such errors or inconsistencies dictating the need for further appeal' . . . [,] such requirement is directed only to the application for the writ[,]" and, hence, the application requirement "'is not descriptive of the scope of review determinative of the [s]upreme [c]ourt's decision to grant or deny certiorari'" and "'[t]he [s]upreme [c]ourt's power in that regard is intended to be discretionary.'" (Quoting Conf. Comm. Rep. No. 73, in 1979 Senate Journal, at 992.) (Emphases in

original.) (Brackets omitted.))). Accordingly, assuming arguendo, that only the right of confrontation was expressly raised in the application, we are not constrained by the application to a review of that right, especially as here, where the right to a fair trial was raised by Petitioner on appeal before the ICA, and the ICA agreed admission of the hearsay statement violated the rules of evidence.

Moreover, even if Fields had failed to raise these issues in his certiorari application, the majority itself notes that it is "cognizant of our inherent power to notice plain error sua sponte[,]" majority opinion at 53(citations omitted), a power the majority recently exercised in State v. Ruggiero, 114 Hawai'i 227, 160 P.3d 703 (2007), and this court has many times employed, see In re Doe, 102 Hawai'i 75, 87, 73 P.3d 29, 41 (2003) State v. McGriff, 76 Hawai'i 148, 155, 871 P.2d 782, 789 (1994) (citing State v. Grindles, 70 Haw. 528, 530, 777 P.2d 1187, 1189 (1989) ("the power to sua sponte notice 'plain errors or defects affecting substantial rights' clearly resides in this court" (quoting State v. Hernandez, 61 Haw. 475, 482, 605 P.2d 75, 79 (1980))); State v. Iaukea, 56 Haw. 343, 355, 537 P.2d 724, 733 (1975) (This court "ha[s] the power, sua sponte, to notice plain errors or defects in the record affecting substantial rights not properly brought to the attention of the trial judge or raised on appeal" (citing State v. Yoshino, 50 Haw. 287, 289, 439 P.2d 666, 668 (1968); State v. Cummings, 49 Haw. 522, 528,

423 P.2d 438, 442 (1967); State v. Ruiz, 49 Haw. 504, 507, 421 P.2d 305, 308 (1966))). As Wharton's notes, "hearsay evidence which has been admitted without objection may properly be considered in determining the facts, unless its admission constituted plain error." Barbara E. Bergman & Nancy Hollander, Wharton's Criminal Evidence § 6:9 (15th ed. 1998) (emphasis added). Thus, inadmissible hearsay admitted without objection is always subject to the plain error standard. The majority's discussion of whether the right to a fair trial was waived, then, is irrelevant to the discussion of plain error.

VII.

This court has recognized plain error where the admission of inadmissible hearsay evidence violates the defendant's right to a fair trial.[11] See Pastushin, 58 Hawai'i at 302, 568 P.2d at 506. In Pastushin, the defendant, Eugene Pastushin (Pastushin), was indicted with co-defendant Henry Cho Chu (Chu) for promotion of prostitution in the second degree. The two were tried together. Id. at 300, 568 P.2d at 505. Chu "did not testify at trial [but his] statement to the police directly and pointedly implicated [Pastushin] in the commission of the offense charged." Id. This court concluded that "Chu's oral statement to the police implicated himself as well as the defendant. Id. at 303, 568 P.2d at 506. It was competent

[11] The majority ignores this precedent discussing the plain error analysis of inadmissible hearsay and instead, only states without explanation that exercising plain error is not "appropriate." Majority opinion at 54.

evidence against Chu, but it was inadmissible against [Pastushin]" and "was highly prejudicial to [Pastushin's] cause." Id. Further "[i]t was Chu's statement, more than any other evidence, which established before the jury that [Pastushin] . . . was 'advancing and profiting' from prostitution." Id. at 303, 568 P.2d at 506-07. This court held that, because "[t]he error in this case was not harmless[,] it must be "reversed and remanded for a new trial." Id.

Similarly, the statement at issue in the instant case "was not harmless."[12] See HRPP Rule 52(a) (stating that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded"). Staggs' hearsay statement was the primary evidence used to convict Fields in this case. The court expressly relied on Staggs' statement to establish that Petitioner abused Staggs. In fact, the statement Officer Ke attributed to Staggs was the only evidence which identified Petitioner as having abused Staggs.

Similar to the case in Pastushin, it was Staggs' "statement, more than any other evidence . . . which established" Fields' abuse conviction. 58 Hawai'i at 303, 568 P.2d at 506-07. Because of the court's express reliance on Staggs' statements, there was no reasonable possibility that the hearsay statements

[12] It should be noted that Respondent does not argue the admission of Staggs' hearsay statement should be deemed harmless. On the other hand, Respondent argued in its Supplemental Answering Brief that "the error in admitting Richards' statement was harmless beyond a reasonable doubt." (Emphasis added.)

did not contribute to Petitioner's conviction. The hearsay statements related by Officer Ke directly implicated Petitioner and, thus, adversely affected Petitioner's substantial right to a fair trial. See id.

Cases from other jurisdictions find plain error where inadmissible hearsay affects a defendant's substantial rights, including the right to a fair trial. See United States v. Tellier, 83 F.3d 578 (2d Cir. 1996) (finding plain error where inadmissible hearsay was admitted despite a lack of objection and reversing convictions of the defendant); United States v. Williams, 133 F.3d 1048, 1051-53 (7th Cir. 1998) (finding it was plain error to admit [FBI] agent's hearsay testimony relating confidential informant's identification of defendant as suspect).; United States v. Holmquist, 36 F.3d 154 (1st Cir. 1994) (explaining that under federal rules, objection to evidentiary proffer had to be reasonably specific in order to preserve right to appellate review, unless so-called hearsay evidence rose to level of plain error which it did not); Smith v. United States, 343 F.2d 539 (5th Cir. 1965) (explaining that a jury may consider hearsay evidence absent a timely objection but may nonetheless reverse if there has been plain error affecting the substantial rights of the accused and determining that even without hearsay statement, remaining evidence was sufficient to justify the verdict)

VIII.

A.

With all due respect, in its most fundamental error, the ICA rested its rejection of plain error application on "the trial court's duty, if any, to control the admission of hearsay testimony into evidence, in the absence of an objection by defendant's trial counsel." Fields, 2005 WL 1274539, at *18 (emphasis added). The ICA stated, without citing authority, that "[g]enerally, at trial, absent an objection by the defendant to the hearsay testimony offered by the prosecution, the court lacks sufficient information to decide that its failure to preclude admission of the hearsay testimony into evidence, or to strike it after it has been admitted into evidence, is a plain error." Id. It concluded that "the trial court did not violate a duty" and, thus, "[t]here being no error [by the trial court], there is no plain error." Fields, 2005 WL 1274539, at *19.

In doing so it wrongly proposes that because there was no objection, the court violated no duty and the violation of such a duty is the prerequisite for finding plain error. Under this incorrect reasoning the entire concept of plain error as established under HRPP Rule 52 would be abrogated. For it is the very fact that defense counsel did not object that invokes the plain error rule. If the governing principle, as the ICA posits, is that counsel should have made an objection, the plain error rule obviously would be nullified. This proposition is flawed

and contravenes applicable case law. See e.g., Sanchez, 82 Hawai'i at 525, 923 P.2d at 942; Fox, 70 Haw. at 56, 760 P.2d at 676; State v. Domingo, 69 Haw. 68, 733 P.2d 690 (1987); see also State v. Page, 104 P.3d 616 (Or. Ct. App. 2005); Virgil v. State, 267 N.W.2d 852 (Wis. 1978).

B.

Secondly, the ICA and the majority assert, "[t]his court's power to deal with plain error is one to be exercised sparingly and with caution because the . . . rule represents a departure from . . . the adversary system[.]" Fields, 2005 WL 1274539, at *18 (quoting State v. Vanstory, 91 Hawai'i 33, 42, 979 P.2d 1059, 1068 (1999) (internal quotation marks and other citation omitted)); Majority opinion at 54 (citations omitted).[13]

However, Vanstory recognized that "[i]f the substantial rights of the defendant have been affected adversely, the error

[13] The cases cited by the majority for this proposition all recognize that plain error may be recognized even though they were never brought to the attention of the court and applied plain error in the particular case. See State v. Rodrigues, 113 Hawai'i 41, 47, 147 P.3d 825, 831 (2006) ("[w]e may recognize plain error when the error committed affects the substantial rights of the defendant" (citation omitted)); State v. Aplaca, 96 Hawai'i 17, 22, 25 P.3d 792, 797 (2001) ("We may recognize plain error when the error committed affects substantial rights of the defendant." (Citation omitted.)); Kelekolio, 74 Haw. at 515, 849 P.2d at 75 ("Nevertheless, where plain error has been committed and substantial rights have been affected thereby, the error may be noticed even though it was not brought to the attention of the trial court." (Citation omitted.)).

Further, the majority's deviation into federal authority is misplaced inasmuch as the majority ignores the overwhelming precedent from our own jurisdiction. Majority opinion at 54-55 (citing Penson v. Ohio, 488 U.S. 75, 84 (1988); Hines v. United States, 971 F.2d 506, 509 (10th Cir. 1992); Ford v. United States, 533 A.2d 617, 624 (D.C. 1987); Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983)). See supra discussion reiterating that there is no distinction in the plain error analysis between plain error raised on appeal and plain error raised sua sponte. The standard, again, is whether the substantial rights of a defendant have been affected.

will be deemed plain error." 91 Hawai'i at 42, 979 P.2d at 1068 (citing State v. Sawyer, 88 Hawai'i 325, 330, 966 P.2d 637, 642 (1998); Pinero, 75 Haw. at 291-92, 859 P.2d at 1374). Moreover, as this court noted in Nichols, although the recognition of plain error is discretionary, there has not been "any reported criminal case in which this court has found plain error but refused to reverse in the exercise of discretion" and "although such discretion may exist in the federal courts, [this court] ha[s] never employed the four-pronged plain error standard of review set forth in United States v. Olano, 507 U.S. 725 . . . (1993)[.]" 111 Hawai'i at 335, 141 P.3d 982 (emphasis added).

Indeed courts of this jurisdiction have found plain error in numerous cases in which defense counsel failed to object to the admission of evidence. See e.g., Pastushin, 58 Haw. at 303, 568 P.2d at 506-07 (concluding that the case must be reversed and remanded because "[t]he error in this case was not harmless"); Sanchez, 82 Hawai'i at 525, 923 P.2d at 942 (concluding that "[i]t was plain error to allow the probation officer's testimony to establish [the defendant's] prior felony conviction where the State had not shown the unavailability of [the defendant's] prior conviction judgment"); Fox, 70 Haw. at 57, 760 P.2d at 676 (concluding that there was plain error where statements made by defense counsel to prosecutor during plea negotiations were erroneously admitted at trial in violation of HRE Rule 410, even though proper objection was not made, because

such error "seriously affected the fairness of the proceedings"); Domingo, 69 Haw. at 68, 733 P.2d at 690 (holding that admission of the testimony of mental health examiner for purpose of attacking the defendant's credibility at trial was forbidden by statute, and constituted plain error, despite the lack of an objection).[14] Under the circumstances of this case, declining to recognize plain error is an arbitrary rejection of that doctrine.

C.

The ICA's third consideration was that "'[m]atters presumably within the judgment of counsel, like trial strategy, will rarely be second-guessed by judicial hindsight.'" Fields, 2005 WL 1274539, at *18 (quoting State v. Richie, 88 Hawai'i 19, 39-40, 960 P.2d 1227, 1247-48 (1998) (emphasis in original)). Such a factor is simply not germane to the facts of this case.

In Richie, this court considered the defendant's argument that defense counsel erred in not calling four witnesses at trial. 88 Hawai'i at 40, 960 P.2d at 1248. The Richie court relied on the American Bar Association (ABA) Defense Function Standards which said that "[s]trategic and tactical decisions should be made by defense counsel after consultation with the

[14] Obviously, other courts have concluded that there was plain error in admitting evidence in violation of a defendant's confrontation rights, despite defense counsel's failure to object. See e.g., Page, 104 P.3d at 616 (holding that the erroneous admission of co-defendant's testimonial, hearsay statement without granting the defendant an opportunity to cross-examine violated the confrontation clause, and was plain error despite no objection); Virgil, 267 N.W.2d at 865 (holding that the erroneous admission of evidence of the co-defendant's out-of-court statement pursuant to the hearsay rule but in violation of the confrontation clause constituted plain error, despite the lack of an objection).

client where feasible and appropriate" and that "[s]uch decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced." Id. (quoting ABA, Standards for Criminal Justice-Prosecution Function and Defense Function, Standard 4-5.2 (3d ed. 1993)). Thus, the Richie court concluded that "the calling of witnesses is generally a strategic decision for defense counsel." Id. at 39, 960 P.2d at 1247.

However, any supposed strategy or tactical decision on the part of defense counsel would not excuse the failure to object to Staggs' hearsay statement admitted via Officer Ke's testimony. See id. at 40, 960 P.2d at 1248. Based on the facts recounted, "the record on appeal is sufficiently developed to establish that 'there were no legitimate 'tactical' bases upon which defense counsel's omissions could have conceivably have been predicated.'" State v. Poaipuni, 98 Hawai'i 387, 395, 49 P.3d 353, 361 (2002) (citing State v. Pacheco, 96 Hawai'i 83, 102, 26 P.3d 572, 591 (2001)).

The majority fails to advance any legitimate tactical reasons for why an objection would not be made to Staggs' hearsay statement. Indeed, counsel for Petitioner was also trial and appellate counsel. In raising plain error counsel has in effect conceded that failure to make the objection prejudiced Fields -- an implicit concession that no strategic reason existed for the

failure to object. Inasmuch as no rational basis exists to support the view that the failure to object was a matter of trial strategy but, rather, was an omission that affected Petitioner's substantial rights, plain error must be recognized.

IX.

The ICA's fourth consideration indicated that "[w]hen defendant's trial counsel does not exercise his right to object to inadmissible hearsay evidence offered by the prosecution, and the record is unclear or void as to the basis for counsel's actions or inactions, counsel shall be given the opportunity to explain his or her actions or inactions in an appropriate proceeding before the trial court judge" and that "such an opportunity to explain is best provided in a post-conviction proceeding initiated by the defendant, pursuant to HRPP Rule 40[.]" Fields, 2005 WL 1274539, at *18 (internal quotation marks, brackets, and citation omitted).

It bears repeating that in rejecting the application of plain error, the ICA fundamentally misapplied the plain error doctrine by requiring as a prerequisite thereto that counsel object to the inadmissible evidence. See discussion supra. Accordingly, the ICA's conclusion that a HRPP Rule 40 proceeding is the "best" alternative to applying plain error is inherently wrong. Predictably this contention is not supported by any authority and is contrary to this court's precedent. See State v. Silva, 75 Haw. 419, 864 P.2d 583 (1993). Despite this, the

majority concludes that because Petitioner "retains the ability to vindicate his rights by filing a petition, pursuant to [HRPP] Rule 40, asserting a claim of ineffective assistance of counsel[,]" it will not recognize plain error. Majority opinion at 55.

However, HRPP Rule 40(a) plainly states that a post-conviction proceeding "shall not be construed to limit the availability of remedies[,(*i.e.*, the recognition of plain error),] . . . on direct appeal."[15] (Emphasis added.) Thus, the majority's refusal to address the issue of Petitioner's substantial rights directly violates the express terms of HRPP Rule 40. But most tellingly, as noted above, it is trial and appellate counsel who, on the petition for certiorari argues that the failure to object to the hearsay statement was prejudicial error and, hence, it follows -- counsel does not justify the failure to object as resting on a strategic reason.

X.

To be clear, the plain error that this court should recognize was the admission of the inadmissible hearsay statement

---

[15] In greater context HRPP Rule 40(a) states:

> The post-conviction proceeding established by this rule shall encompass all common law and statutory procedures for the same purpose, including habeas corpus and coram nobis; provided that the foregoing shall not be construed to limit the availability of remedies in the trial court or on direct appeal. Said proceeding shall be applicable to judgments of conviction and to custody based on judgment of conviction . . . .

(Emphasis added.)

Officer Ke attributed to Staggs which was, as noted supra, the only evidence that identified Fields as having abused Staggs. Fields, 2005 WL 1274539 *16. Addressing that issue resolves the case. The HRPP Rule 52(b) standard is the only test which authorizes this court to recognize plain error and it states that "plain errors or defects affecting substantial rights may be noticed[.]" Indeed, the cases cited by the majority affirm what this dissent has noted repeatedly, that plain error is to be recognized where there is an error that affects the substantial rights of a defendant, as this court has done. See Nichols, 111 Hawai'i at 335, 141 P.3d at 982.

XI.

The majority opines that "Fields retains the ability to vindicate his rights by filing a petition, pursuant to HRPP Rule 40, asserting a claim of ineffective assistance of counsel." Majority opinion at 55. The defect in this reasoning is that, irrespective of the merits of an ineffective assistance claim, a determination that admission of Staggs' statement violated Fields' right to a fair trial has in effect been made because the inadmissibility of Staggs' statement has already been decided. The ICA has already ruled Staggs' statement was inadmissible, it is plainly inadmissible as a matter of law, and further delay to reiterate this fact is unwarranted. Hence, there is no reason to delay that determination to a Rule 40 proceeding. See Silva, 75 Haw. at 437, 864 P.2d at 592, discussed supra. The majority

makes no argument that contradicts this point, admitting that the statement is hearsay, and, as noted supra, even seemingly acknowledging that admission of the statement was in error.

Additionally, to reiterate, a HRPP Rule 40 proceeding is unnecessary because the lack of any strategic reason for not objecting has in effect been conceded by defense counsel on appeal and no obvious tactical advantage appears for failing to object. See Poaipuni, 98 Hawai'i at 395, 49 P.3d at 361. Fields has yet to make an ineffective assistance of counsel claim, and, hence, there is no just reason to postpone the resolution of the plain error. See Fields, 2005 WL 1274539, at *16 (determining that the "hearsay statements . . . could have been validly objected to and excluded from evidence, pursuant to the HRE").

XII.

Moreover, even if the express language of Rule 40 is incorrectly ignored by the ICA and the majority, the fact that Fields may have an opportunity to argue ineffective assistance of counsel in a subsequent HRPP Rule 40 petition does not cure the fact that error has already occurred and Petitioner's substantial rights have been adversely affected. See HRPP Rule 52(b). The availability of a separate proceeding in which to challenge a conviction on a confirmed error does not justify declining to recognize plain error now. In fact, the ICA and the majority do not cite to any authority as to this point. For as this court has repeatedly recognized, "the decision to take notice of plain

error" rests on "errors that 'seriously affect the fairness, integrity, or public reputation of judicial proceedings.'" Fox, 70 Haw. at 56, 760 P.2d at 676 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)) (emphasis added). Staggs' hearsay statement violated Petitioner's substantial right to a fair trial and provided the basis for Petitioner's conviction; hence, "the fairness . . . of the judicial proceeding" was seriously affected. Id. (citation omitted). Again, this court has never failed to apply the plain error doctrine where the error has affected substantial rights. See Nichols, 111 Hawai'i at 335, 141 P.3d at 982. The failure to do so here calls into question the circumstances which will justify doing so, aside from the obvious but undifferentiating fact that a majority of the court must take notice of such error.

XIII.

Assuming, arguendo, that an issue exists as to ineffective assistance of counsel, as the majority and ICA insist, Silva governs. In Silva, this court rejected the proposition proffered by the prosecution that "a criminal defendant may not assert ineffective assistance of counsel for the first time on appeal" and that "the question of ineffective assistance of counsel requires an independent hearing" through the vehicle of a HRPP Rule 40 proceeding. 75 Haw. at 434, 864 P.2d at 591. Silva observed that "convicted defendants . . . almost always have multiple appealable issues in addition to an

ineffective assistance of counsel claim." Id. at 437, 864 P.2d at 592.

Accordingly, in that case, this court rejected the prosecution's view that "a convicted defendant could either (1)allow the time for appeal to run and forgo all other appealable claims, if any, before filing a [HRPP] Rule 40 petition, or (2)appeal all issues, except for the ineffective assistance of counsel claim, then bring a [HRPP] Rule 40 petition when the appeal process is terminated." Id. The second prosecution option rejected in Silva is apparently resurrected by the ICA and the majority.

With respect to that option, Silva said that "requiring a defendant to wait until the appeal process is completed before raising a [HRPP] Rule 40 ineffective assistance claim would result in a waste of attorneys' fees and costs as well as an unnecessary expenditure of our limited judicial resources[.]" Id. (emphasis added). Silva explained that "under the prosecution's suggested general rule, a defendant's post-conviction claims would always be divided." Id. at 437-38, 864 P.2d at 592 (emphasis added).

Turning again to the facts of this case, it must be observed that "[t]o prevail on [an] ineffective assistance of counsel claim, [a defendant] must establish that his 'trial counsel's performance was not objectively reasonable--i.e., that it was not within the range of competence demanded of attorneys

in criminal cases.'" Poaipuni, 98 Hawai'i at 394, 49 P.3d at 360 (quoting Briones v. State, 74 Haw. 442, 462, 848 P.2d 966, 976) (internal quotation marks, other citation, and brackets omitted)). Consequently, there must be "a specific error or omission that 'resulted in either the withdrawal or substantial impairment of a potentially meritorious defense,' which includes 'the assertion of [his] constitutional rights[,]'" id. (quoting Briones, 74 Haw. at 462, 848 P.2d at 976 (other citation omitted)), and that "there were no legitimate 'tactical' bases upon which defense counsel's omissions could conceivable have been predicated[,]" id. at 395, 49 P.3d at 361. To reiterate, the existence of such an error or omission has already been decided by the ICA,[16] see Fields, 2005 WL 1274539, at *19 (stating "without prejudice to [Petitioner's] right to . . . a . . . proceeding pursuant to HRPP Rule 40, that his trial counsel's failure to object to the evidence of [Staggs'] statement . . . [was] the ineffective assistance of his trial counsel" (emphasis added), and confirmed by the majority, see majority opinion at 55 ("Fields retains the ability to vindicate his rights by filing a petition . . . asserting a claim of ineffective assistance of counsel").

[16] Again, as the ICA plainly stated, "if counsel for [Petitioner] had objected to the introduction of [Staggs'] prior testimonial statement into evidence on the ground that it violated the HRE, the objection would have had merit and could not have been validly denied." Fields, 2005 WL 1274539, at *16 (emphasis added). Thus, it is obvious that the ICA determined that defense counsel's failure to object was error.

XIV.

Further, as noted supra, it was the ICA and the majority affirming it, that invite an ineffective assistance claim. If, as the ICA and majority maintain -- there is a claim for ineffective assistance of counsel -- Silva and Poaipuni control because there is no trial strategy that would merit the admission of Staggs' statement as the ICA itself noted, the defense itself has acknowledged that the statement was inadmissible hearsay, stating expressly that "the family court relied upon "inadmissible hearsay[,]"; the existence of such an error or omission has already been decided by the ICA, see Fields, 2005 WL 1274539, at *17, 19 (stating "without prejudice to [Petitioner's] right to . . . a . . . proceeding pursuant to HRPP Rule 40, . . . his trial counsel's failure to object to the evidence of [Staggs'] statement . . . [was] the ineffective assistance of his trial counsel" (emphasis added)), and confirmed by the majority, see majority opinion at 55 (determining that in a subsequent Rule 40 proceeding Petitioner may challenge Staggs' out-of-court statement "asserting a claim of ineffective assistance of counsel" (emphasis added)). Thus, the matter should be decided here. To postpone that determination would be an egregious violation of HRPP Rule 52. See Silva discussion infra.

XV.

Also, the ICA and the majority mistakenly assume that defense counsel is required to have an opportunity to explain its

failure to object. See Fields, 2005 WL 1274539, at *18. In Silva, this court said that whether "an ineffective assistance of counsel claim requires an independent hearing to determine the relevant facts presupposes that the record on appeal is insufficient to support a ruling of ineffective assistance of counsel." 75 Haw. at 438, 864 P.2d at 592 (emphasis added). Hence, this court has said that "in some instances, the ineffective assistance of counsel may be so obvious from the record that a [HRPP] Rule 40 proceeding would serve no purpose except to delay the inevitable and expend resources unnecessarily." Id. at 438-39, 864 P.2d at 592 (citing Aplaca, 74 Haw. 54, 837 P.2d 1298).

As discussed supra, in light of the ICA's position and Petitioner's briefs, "the record on appeal is sufficiently developed to establish that 'there were no legitimate 'tactical' bases upon which defense counsel's omissions could conceivably have been predicated.'" Poaipuni, 98 Hawai'i at 395, 49 P.3d at 361 (quoting Pacheco, 96 Hawai'i at 102, 26 P.3d at 591). As a result, a HRPP Rule 40 proceeding would serve no meritorious purpose. Rather, the admonition that "piecemeal disposition of a defendant's post-conviction claim[] should be avoided whenever possible," Silva, 75 Haw. at 438, 864 P.2d at 592, applies.[17]

[17] The majority maintains that Poaipuni is distinguishable because in that case "the defendant raised and argued the ineffective assistance of counsel claim on appeal" and because "no such argument was asserted [here], . . . there may be other portions of the trial court record that were not made part of the record on appeal because they were not relevant to the points of error actually presented." Majority opinion at 55-56 n.17 (citing Poaipuni, (continued...)

But most significantly, allowing Petitioner to contest his trial counsel's failure to object in a subsequent HRPP Rule 40 petition, majority opinion at 55, is an empty gesture. For despite advocating the availability of a HRPP Rule 40 proceeding, the majority states "we have already determined that the admission of Staggs' prior out-of-court statement did not violate Fields' right of confrontation[.]" Majority opinion at 53 (emphases added). Additionally, a HRPP Rule 40 proceeding would be purposeless since the majority in effect has indicated the statement is admissible in the face of a plain error challenge.[18]

XVI.

Thus, it is difficult to comprehend the majority's position inasmuch as it appears to agree there was error in admitting Staggs' hearsay statement, see, e.g., majority opinion at 56 n.17 (concluding that "Fields' trial counsel's failure to

---

[17](...continued)
98 Hawai'i at 388, 49 P.3d at 354).

As in Silva, however, the record is sufficiently developed to make a determination regarding ineffective assistance because the error is clear and the Petitioner makes no pretense on appeal that the failure to object was a strategic move. See Silva, 75 Haw. at 438-39, 864 P.2d at 592 (stating that "in some instances, the ineffective assistance of counsel may be so obvious from the record that a [HRPP] Rule 40 proceeding would serve no purpose except to delay the inevitable and expend resources unnecessarily" (citation omitted)).

[18] Again, the ICA has already recognized that Staggs' statement was otherwise inadmissible hearsay, and the majority has affirmed the ICA. See Fields, 2005 WL 1274539, at *16 (stating that "if counsel for [Petitioner] had objected to the introduction of [Staggs'] prior testimonial statement into evidence on the ground that it violated the HRE, the objection would have had merit and could not have been validly denied"). Moreover, as noted above, the issue of ineffective assistance need not be reached and is only discussed because of the ICA's and majority's insistence that Fields' rights at trial may be vindicated via a Rule 40 proceeding. Instead, this case should be decided based on the fact that error has already occurred and Fields' substantial rights have been adversely affected. See HRPP Rule 52(b).

object will require . . . a great deal of explanation"), but expends much discussion explaining why plain error is to be "exercised sparingly[,]" majority opinion at 54-55 (quoting Rodrigues, 113 Hawai'i at 47, 147 P.3d at 831 (other citations omitted). The majority fails to elucidate why the error is not "plain" or, in other words, does not affect Fields' substantial rights. It maintains only, without explication, that recognizing plain error is not "appropriate . . . under the present circumstances." Majority opinion at 54 (emphasis added). The majority, however, does not disclose why it would be "appropriate" to postpone the issue and how delaying resolution of whether Petitioner's substantial rights were violated to a future HRPP Rule 40 proceeding could possibly be a better solution.

XVII.

Certainly, the ICA's and majority's positions are particularly egregious in this case. The record indicates that on October 11, 2002, Petitioner was sentenced to a term of two years probation, and two days in prison with credit for time served.[19] However, mittimus was stayed pending appeal. On May

[19] The court's "Judgment; Notice of Entry (For Probation Sentence)," dated October 8, 2002, but filed in the court on October 11, 2002, indicates the following: "Judgment and Sentence of the Court: Probation"; "Term Two (2) Years." (Capitalization omitted.) In addition to the usual terms and conditions of probation, the court also imposed special conditions. At the sentencing hearing on October 8, 2002, Petitioner filed in open court, a "Motion to Stay Mittimus Pending Appeal," in which he requested "an order granting a stay of incarceration pending appeal[,]" pursuant to HRS § 804-4. On October 8, 2002, his mittimus was stayed pending appeal.

20, 2003, the court held a Proof of Compliance Hearing where Petitioner was found to be compliant. It appears the two-year term of probation has run, although it is unclear from the record whether Petitioner satisfactorily completed the term. Thus, this case has been pending to this point for five years.

Obviously, a HRPP Rule 40 proceeding would needlessly prolong the length of court proceedings. Following judgment entered by this court the steps to begin the new proceeding would have to be taken. Petitioner was represented by the public defender at the court and on appeal to the ICA, as well as on certiorari to this court. Under the majority disposition a new attorney would have to be found and appointed because of a conflict within the public defender's office brought about by the ineffective assistance comments by both the ICA and the majority. After new counsel is appointed, he or she would have to become familiar with the facts of this case and the proceedings that have transpired over the past five years.

Then the new attorney would be required to institute a proceeding for post-conviction relief "by filing a petition with the clerk of the court in which the conviction took place." HRPP Rule 40(b). The State of Hawai'i would be named as the respondent and would have 30 days to "answer or otherwise plead[.]" HRPP Rule 40(d). As the case is cast by the ICA and majority, a hearing would be necessary to receive the testimony of trial counsel on the ineffective assistance claim. Following

the hearing the court will have to "state its findings of fact and conclusions of law[,]" HRPP Rule 40(g)(3), and render a judgment on the petition.

After the judgment is rendered, the parties are afforded an appeal "in accordance with Rule 4(b) of the Hawai'i Rules of Appellate Procedure." HRPP Rule 40(h). If an appeal is taken, the case will proceed again through the entire process and could plausibly end up once more before this court for review upon a certiorari application. Plainly, as in Silva, a HRPP Rule 40 proceeding would "serve no purpose except to delay the inevitable" and would "result in a waste of attorney's fees and costs as well as an unnecessary expenditure of our limited judicial resources[.]" Silva, 75 Haw. at 437, 438-39, 864 P.2d at 592 (citation omitted). The majority and ICA ignore this anomalous consequence.

XVIII.

In this instance, the majority "stand[s] idly by though clear error affecting substantial rights of the defendant was committed. Under the circumstances, an invocation of the plain error rule would be the better part of discretion." Fox, 70 Haw. at 56, 760 P.2d at 676. This case must be reversed because of plain error in the admission of Staggs' and Richards's hearsay statements, and I would so hold.

XIX.

In sum, this case should be disposed of on the foregoing analysis. However, inasmuch as the majority discusses

the confrontation clause, I join that discussion and would hold that there was a violation of Petitioner's confrontation rights. I respectfully disagree with the majority because (1) the majority relies on case law that treats a witness as "available" even if that witness cannot remember the events described in the hearsay statement sought to be introduced, (2) under Hawai'i case law a witness' inability to recall events described in the hearsay statement renders the witness "unavailable" and the statement inadmissible, (3) the majority's approach thus conflicts with Hawai'i case law, (4) the majority's retention of the proposition stated in (2) in "non-testimonial" cases but not in "testimonial" cases undermines the twin objectives of maintaining "the integrity of the fact finding process" and "ensur[ing] fairness to defendants[,]" Sua II, 92 Hawai'i at 71, 987 P.2d at 969 (internal quotation marks and citation omitted), served by the unavailability requirement under the Hawai'i Constitution, and (5) in this case Staggs' inability to recall the events in the hearsay statement renders her unavailable to that extent and, therefore, her statement inadmissible under the Hawai'i Constitution.

XX.

Some examination of the evolution of our confrontation case law and of Crawford is necessary. The Sixth Amendment Confrontation Clause requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be

confronted with the witnesses against him." The text of article I, section 14 of the Hawai'i Constitution is nearly identical to the Sixth Amendment Clause. In relevant part, article I, section 14 provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against the accused[.]"

Our own confrontation clause jurisprudence, prior to the instant case, stemmed from the analysis in Ohio v. Roberts, 448 U.S. 56 (1980). In Roberts, the Court held that introduction at trial of preliminary hearing testimony from a witness who did not appear at trial was constitutionally permissible where the witness' testimony was tested by questioning that was equivalent to cross-examination and where the circumstances established that the witness was unavailable "in the constitutional sense" from appearing at trial. Id. at 75. The Roberts test "condition[ed] admissibility of all hearsay evidence on whether it [fell] under a 'firmly rooted hearsay exception' or [bore] 'particularized guarantees of trustworthiness.'" Crawford, 541 U.S. at 60 (citing Roberts, 448 U.S at 66).

In Sua I, the ICA adopted the approach by the Supreme Court with respect to what in effect were "testimonial" statements as later defined in Crawford.[20] 92 Hawai'i at 86 n.13,

---

[20] The Court further explained the difference between testimonial and nontestimonial statements in Davis v. Washington, -- U.S. at -, 126 S.Ct. 2266, 2273-74 (2006),

> [Statements] are nontestimonial when made in the course of police interrogation under circumstances objectively

(continued...)

987 P.2d at 984 n.13. The ICA held, inter alia, that admission at trial of the grand jury testimony of a witness who had no memory of the statement violated the confrontation clause. Id. at 87, 987 P.2d at 985. The ICA reasoned that the witness's "grand jury testimony closely resembled a deposition or ex parte affidavit of the sort condemned in Mattox[v. United States], 156 U.S. [237,] 242-43 [(1895)]." Id. at 89, 987 P.2d at 987.[21] It was explained that the confrontation clause was intended to

---

[20](...continued)
indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

[21] The ICA reasoned as follows:

> Obviously, [the witness,] Gooman[,] testified ex parte at the grand jury proceeding. [The d]efendant was not allowed to be present and his defense was not placed before the grand jurors. Unlike the procedure afforded at a preliminary hearing, [the d]efendant had no opportunity to question Gooman. The State was free to develop Gooman's testimony for the grand jury in any manner it chose to, free of any adversarial or judicial intervention. Plainly, Gooman's statement cannot be said to have been given under circumstances closely approximating those that surround the typical trial.
>
> The confrontation clause is intended to ensure the defendant an effective means to test adverse evidence. [The d]efendant was foreclosed from cross-examining Gooman at the grand jury proceeding; hence, there was no means by which he could test the evidence presented against him. Gooman's lack of memory at trial further prevented [the d]efendant from challenging the grand jury statement.
>
> . . . Our review establishes that the grand jury procedure is primarily intended to facilitate the government's interest in obtaining an indictment. Accordingly, a hearsay exception for grand jury testimony cannot be said to substantively preserve [the d]efendant's right of cross-examination.

Sua I, 92 Hawai'i at 89, 987 P.2d at 987 (internal quotation marks, citations, and brackets omitted) (emphases added).

exclude some hearsay altogether and that cross-examination was central to the right of confrontation.

> The historical evidence leaves little doubt . . . that the Clause was intended to exclude some hearsay. See California v. Green, 399 U.S. [149,] 156-57, and nn. 9 and 10 [(1970)]; see also [E. Cleary,] McCormick [on Evidence] § 252, p. 606 [(2d ed.1972)]. Moreover, underlying policies support the same conclusion. The Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that "a primary interest secured by [the provision] is the right of cross-examination." Douglas v. Alabama, 380 U.S. 415, 418 (1965). . . .
>
> . . . .
>
> These means of testing accuracy are so important that the absence of proper confrontation at trial "calls into question the ultimate 'integrity of the fact-finding process.'" Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (quoting Berger v. California, 393 U.S. 314, 315 (1969)).

Id. at 86, 987 P.2d at 984.

This court applied Hawaii's adaptation of Roberts in Sua II.[22] In the course of its opinion, Sua II held that a witness, although "present at trial, ... [who] was unable to recollect any substantive elements of his grand jury testimony . . ., was 'unavailable' by virtue of his loss of memory." 92 Hawai'i at 73, 987 P.2d at 971 (citation omitted). It was explained that a showing of unavailability was necessary to "'to promote the integrity of the fact finding process and to ensure fairness to defendants." Id. at 71, 987 P.2d at 969 (quoting State v. Lee, 83 Hawai'i 267, 276, 925 P.2d 1091, 1100) (other citations omitted). Thus, this court concluded in Sua II, that a

[22] This court granted certiorari in Sua I and in Sua II, reversed the ICA in part, indicating that "[i]n contrast to the ICA's opinion, we hold that, under certain circumstances, receipt of grand jury testimony pursuant to a firmly rooted exception to the general rule against hearsay may adequately preserve a defendant's right of cross-examination." Sua II, 92 Hawai'i at 63, 987 P.2d at 961.

witness who was physically present at trial and took the stand, was nevertheless "unavailable" in the "constitutional sense" envisioned by Roberts, where the witness lacked memory of his alleged prior statement. Id.

After more than two decades of applying its Roberts test, the Supreme Court in Crawford stated that the rationales for admitting hearsay evidence under Roberts had not "generally been faithful to the original meaning of the Confrontation Clause." 541 U.S. at 60. The Court decided that the Roberts test was both "too broad" and "too narrow." Id. The problem, the Court opined, was that Roberts "applies the same mode of analysis whether or not the hearsay consists of ex parte testimony" which "often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause." Id. However, "the test [was also] too narrow: It admit[ted] statements that do consist of ex parte testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations." Id. (emphasis added).

Relying on Mattox, as had Sua I,[23] the Court said:

> [T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. . . .
>
> . . . .
>
> The historical record also supports a second proposition: that the Framers would not have allowed

[23] As noted before, in Sua I, 92 Hawai'i at 89, 987 P.2d at 987, the ICA had observed that "[the witness's] grand jury testimony closely resembled a deposition or ex parte affidavit of the sort condemned in Mattox, 156 U.S. at 242-43."

> admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. . . .
>
> . . . .
>
> Our later cases conform to Mattox's holding that prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine.

Id. at 50, 53-54, 57 (emphasis added) (citations omitted). In line with this rationale, Crawford, like Sua I, directed that grand jury statements are inherently testimonial and not subject to cross-examination and, thus, were precluded by the Confrontation Clause. The Court said, "Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." Id. at 68 (emphasis added).

It was explained that the federal Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Id. at 61. The Court declared that it did "not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements." Id. at 55. It was thus held that, to the extent that an out-of-court statement is testimonial in nature, such hearsay is admissible "[(1)] only where the declarant is unavailable, and [(2)] only where the defendant has had a prior

opportunity to cross-examine" the declarant about the statement. Id. at 59 (emphasis added).

In footnote nine, the Court made apparent that when it spoke of unavailability it meant the physical absence of the witness from trial: "[W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." Id. at 59 n.9 (emphasis added) (citing Green, 399 U.S. at 162. As discussed herein, the majority adopts this proposition as the basis for its confrontation clause approach. Majority opinion at 26-28.

XXI.

In the instant case it is not disputed that Staggs' hearsay statement in and of itself would be considered "testimonial" under the second aspect of Crawford identified above. Instead, disagreement with the majority rests on the unavailability requirement, the first aspect of the Crawford rule. The majority adopts the federal view of witness unavailability as described by footnote nine in Crawford. 541 U.S. at 59 n.9. However, as elucidated in the discussion following, under the broader construction that has been afforded the Hawai'i Constitution's confrontation clause, a hearsay statement is not admissible in evidence insofar as the declarant witness cannot recall the events described in the statement, even

though that witness is physically present for cross-examination at trial.

XXII.

A.

First, the majority relies incorrectly on case law which treats a witness as available for confrontation purposes even as to hearsay matters the witness cannot remember. The majority imposes the view of footnote nine upon the Hawai'i confrontation clause with respect to testimonial statements.

> The point here is that the protections guaranteed by Hawaii's confrontation clause have been fully afforded to an accused where the hearsay declarant attends trial and is cross-examined about the prior hearsay statement. The explicit right conferred by both the state and federal confrontation clauses is the right to "confront adverse witnesses."

Majority opinion at 42 (quoting Sua II, 92 Hawai'i at 70, 987 P.2d at 968)). Based upon this, the majority apparently concludes that because Staggs was physically present and testified, she was available pursuant to footnote nine, and the requirements of Crawford do not apply.[24] As a result, the majority holds Staggs' statement was admissible.[25]

Addressing the underlying premise of footnote nine, it is arguable that a witness who is present to testify but cannot

---

[24] Footnote nine is somewhat ambiguous. It may be read, as the majority apparently does, that a witness' physical presence for cross-examination is sufficient to satisfy the availability requirement. On the other hand, the reference to "defend[ing] or explain[ing]" the statement could be read as a requirement that the witness be able to respond substantively to defend the statement or to explain it.

[25] Crawford aside, as noted before, the majority does not explain how Staggs' hearsay testimony is nevertheless admissible.

recall the hearsay statement in issue can, in any meaningful way, "defend it," much less "explain it." See supra note 22. In this case Staggs was not able to "defend" her hearsay statement or "explain it," because she did not remember it. See discussion infra. The question is not whether a defendant is guaranteed a "successful cross-examination," Sua II, 92 Hawai'i at 75, 987 P.2d at 973, but whether the opportunity afforded to cross-examine a witness is a real one or not. Plainly, a witness who cannot remember cannot be cross-examined about what cannot be recollected, cf. Clark, 83 Hawai'i at 295, 926 P.2d at 200, supra; Eastman, 81 Hawai'i at 139, 913 P.2d at 65, supra; Canady, 80 Hawai'i at 480-81, 911 P.2d at 115-16, supra, and, hence, cannot be said to be confronted under the Hawai'i Constitution.

B.

The majority also cites to several state cases interpreting Crawford in support of the proposition that "the federal confrontation clause is not concerned with the admission of an out-of-court statement where the declarant appears at trial and is cross-examined." Majority opinion at 27 (emphasis in original). These cases are immaterial insofar as they do not implicate the established jurisprudence construing our state constitution's confrontation clause. See discussion infra. The assertion that "[o]ther jurisdictions . . . have reached similar conclusions[,]" majority opinion at 27, is wholly irrelevant to the basis of Petitioner's certiorari application, which is

premised on Hawaii's constitution only. Thus, the majority's contention that "the factual dissimilarities highlighted by the dissent do nothing to undermine the underlying rationale that the federal confrontation clause is not concerned with the admission of out-of-court statements where the declarant appears and is cross-examined[,]" majority opinion at 39, n.11 (emphasis added), is essentially beside the point.

This case is concerned with the federal clause only to the extent that it establishes a minimal requirement our own confrontation clause may not breach. Consequently, because of our broader construction, whether or not the federal confrontation clause merely requires "the declarant appear[] and [be] cross-examined about [his] statements at trial[,]" Crawford, 541 U.S. at 59 n.9. is not pertinent. As set out in the margin, the majority's cited cases are factually and legally distinguishable and, hence, present little relevance to the question raised in the certiorari petition.[26]

---

[26] The cases cited by the majority are also distinguishable because they involved (1) statutes expressly (a) allowing admission of hearsay where persons are "available" for cross-examination or (b) allowing hearsay testimony of minors or persons mentally retarded, and/or (2) involve cases where the witnesses did not lack memory or (3) the witness was able to respond to some of the questions, or (4) the testimonial aspect of Crawford was not argued.

As to (1)(a) and (b), in State v. Corbett, 130 P.3d 1179, 1189 (Kan. 2006), the court held that the trial court did not err by admitting the transcripts of the two eyewitnesses' depositions pursuant to Kansas Statutes Annotated § 60-460(a), which states that "[e]vidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible except . . . [where a] statement [is] previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness." (Emphasis added.)

Unlike Staggs, who could not recall and, thus, defend or explain

(continued...)

[26](...continued)
her previous out-of-court testimony, the eyewitnesses in Corbett did not experience such a loss of memory. In fact, the eyewitnesses testified at the defendant's trial, and were also available for extensive cross-examination, which incorporated significant portions of their deposition testimony. In State v. Tester, 895 A.2d 215, 221 (Vt. 2006), unlike Staggs' testimony, the evidence in question was admitted under Vermont Rules of Evidence (VRE) Rule 804a, which allows a witness to testify to hearsay statements made by a child ten years old or younger if the statements are offered in a sexual abuse case where the child is an alleged victim, the statements were not taken in preparation for a legal proceeding, the child is available to testify, and the "time, content and circumstances of the statements provide substantial indicia of trustworthiness." VRE Rule 804a(a)(1)-(4).

In People v. Johnson, 845 N.E.2d 645 (Ill. Ct. App. 2005), the victim, a mentally disabled minor, was able to recall the alleged incidents of sexual acts that had taken place with the defendant, although he later retracted his story. Furthermore, the victim's status as mentally retarded permitted the admission of the statements under 725 Illinois Compiled Statutes Annotated 5/115-10(b)(3), which provides for the admission of hearsay evidence in prosecutions for physical or sexual acts committed against children under the age of thirteen or persons who are moderately mentally retarded. Finally, the time, content, and circumstances of the victim's hearsay statements provided sufficient safeguards of reliability inasmuch as the victim used terminology unexpected of a child of a similar age, the victim consistently repeated the statements, the statements to the respite worker and investigator were consistent with each other, and the statements were made spontaneously. Id.

By contrast, Staggs had a difficult time remembering the alleged assault, could not recall her conversation with Officer Ke, was not a minor or mentally disabled at the time of the alleged assault, and her statement was not spontaneous, but in response to Officer Ke's questioning.

In Gomez v. State, 183 S.W.3d 86, 90 (Tex. Ct. App. 2005), the witness, unlike Staggs, was able to answer questions regarding specific details about the assault during three of the State's direct examinations, provide testimony regarding her living arrangements with the appellant during the first two of the State's direct examinations, be cross-examined regarding the assault during the appellant's first two cross-examinations, and undergo a lengthy questioning during the appellant's first cross-examination regarding her living arrangements with the appellant.

As to (2) and (3), in Robinson v. State, 610 S.E.2d 194, 196 (Ga. Ct. App. 2005), "although [two witnesses] testified that they did not recall many of the facts surrounding the incident, both also gave responsive answers to some questions." The first witness "testified that he did not know who shot him, that he did not speak with Detective Johnson, and that he never even saw Detective Foster. [The second witness] denied telling Detective Foster anything." Staggs, however, was unable to answer questions regarding her conversation with Officer Ke.

As to (4), in Mumphrey v. State, 155 S.W.3d 651 (Tex. Ct. App. 2005), and Commonwealth v. Ruiz, 817 N.E.2d 771 (Mass. 2004), the witnesses' statements were admitted through the spontaneous utterance exception to the hearsay evidence rule. In Ruiz, the court found that the trial court properly admitted under the spontaneous utterance hearsay exception the daughter's statement made to the officer shortly after the daughter witnessed her father stab her mother. 817 N.E.2d at 832-33. Unlike Staggs, the defendant did not argue that the admission of the spontaneous utterance constituted a violation of the principles stated in Crawford. Id. at 833 n.5. Therefore, Ruiz is not relevant.

XXIII.

In essence, the broader protection afforded by the Hawai'i Constitution[27] requires that Staggs be presumed "unavailable" in the confrontation sense, and, thus, her out-of-court statement inadmissible. Even if mere physical presence at trial is enough to make a witness "available" under Crawford (the underlying premise for the majority's determination that Staggs was therefore deemed subject to cross-examination), Petitioner makes his claim under the Hawai'i Constitution and not under the federal constitution. Hence, it is necessary to examine our jurisprudence concerning the "unavailability requirement."

The majority acknowledges that "we may, under the Hawai'i Constitution give broader protection than that afforded by the United States Constitution" but contends "that maxim does not justify the construction of constitutional barriers where none are appropriate." Majority opinion at 26 n.9. However, because this court, as previously noted, has repeatedly held that the Hawai'i Constitution's confrontation clause affords broader protection than its federal counterpart, the majority's decision to employ the federal view of unavailability ignores past precedent. See McGriff, 76 Hawai'i at 156, 871 P.2d at 790

[27] Accordingly, the analysis in this opinion is grounded in article I, section 14 of the Hawai'i Constitution. See Michigan v. Long, 463 U.S. 1032, 1039 n.4 (1983) (stating that, "'where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment'" (quoting Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935))).

(stating that this court has "parted ways with the United States Supreme Court which has held that the sixth amendment confrontation clause does not necessitate a showing of unavailability for evidence falling within certain hearsay exceptions" (internal quotation marks, brackets, and citation omitted)); Sua I, 92 Hawai'i at 92, 987 P.2d at 990 (confirming "that the Hawai'i confrontation clause affords broader rights to Hawaii's citizens than the federal confrontation clause in the sixth amendment").

A.

As noted before, this court has said that cross-examination is at the heart of the right of confrontation:

> The right of confrontation affords the accused both the opportunity to challenge the credibility and veracity of the prosecution's witnesses and an occasion for the jury to weigh the demeanor of those witnesses. . . . Thus, chief among the interests secured by the confrontation clause is the right to cross-examine one's accuser.

Sua II, 92 Hawai'i at 70, 987 P.2d at 968 (emphasis added) (internal quotation marks and citations omitted). In previously applying Roberts, it was declared that the admission of hearsay is limited by the unavailability requirement:

> [T]he confrontation clause restricts the range of admissible hearsay in two ways. First, the prosecution must either produce, or demonstrate the unavailability of, a declarant whose statement it wishes to use against a defendant. Second, upon a showing that the witness is unavailable, only statements that bear adequate indicia of reliability are admissible.

Id. at 71, 987 P.2d at 969 (quoting State v. Ortiz, 74 Haw. 343, 361, 845 P.2d 547, 555-56 (1993)) (citing Roberts, 448 U.S. at 65) (other citations omitted) (emphasis added). In adopting this

test, this court chose not to follow the U.S. Supreme Court's abandonment of the unavailability requirement post-Roberts. As the ICA noted in Sua I:

> [A]s to the rule of necessity, the Hawai'i Supreme Court has "parted ways with the United States Supreme Court which after [Roberts,] has held that the sixth amendment confrontation clause does not necessitate a showing of unavailability for evidence falling within certain hearsay exceptions." [McGriff], 76 Hawai'i [at] 156, 871 P.2d [at] 790 (citing United States v. Inadi, 475 U.S. 387 (1986) (statements of a non-testifying co-conspirator may be introduced against the defendant regardless of the declarant's unavailability at trial); White v. Illinois, 502 U.S. 346 (1992) (unavailability not required for excited utterance exception)).

Sua I, 92 Hawai'i at 86 n.13, 987 P.2d at 987 n.13 (emphasis added) (some parallel citations omitted). Likewise, Sua II declared that, "[a]s regards the first part of the Roberts test, we have 'remained resolute that, under the confrontation clause of the Hawai'i Constitution, a showing of the declarant's unavailability is necessary to promote the integrity of the fact finding process and to ensure fairness to defendants.'" 92 Hawai'i at 71, 987 P.2d at 969. (quoting Lee, 83 Hawai'i at 276, 925 P.2d at 1100 (other citations and brackets omitted). Further, this court declared that "'[u]navailability may be demonstrated by a showing of . . . loss of memory.'" Id. (quoting Apilando, 79 Hawai'i at 137, 900 P.2d at 144) (emphasis added) (other citation omitted) (ellipses points in original). Thus, even prior to Crawford, this court staunchly retained an unavailability requirement that encompassed lack of memory. See Id. at 71, 987 P.2d at 969.

B.

Under this paradigm, to the extent that a witness cannot remember her statement, she must be considered unavailable, at least with respect to the subject of such statement. Manifestly Staggs' mere presence at trial as a witness would not enable Petitioner to cross examine her about the hearsay statement admitted through Officer Ke. Consequently, there was no opportunity for Petitioner to challenge the assertions in that statement by cross-examination.

> Thus, "the primary object of the constitutional [confrontation] provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him or her, and judge by his or her demeanor upon the stand and the manner in which he or she gives his or her testimony whether he or she is worthy of belief."
>
> State v. Faafiti, 54 Haw. 637, 640-41, 513 P.2d 697, 700 (1973) (quoting Mattox[, 156 U.S. at 242-43] (emphases added) (brackets omitted).

Sua I, 92 Hawai'i at 85, 987 P.2d at 983 (brackets omitted). To the extent, then, that Staggs could not remember her statement to Officer Ke, she was an "unavailable" witness as to the subject matter of the statement even though she was present to testify and subject to cross examination, Crawford, to the contrary, notwithstanding. Understandably, then, Petitioner observes that, "under Sua [II]'s definition of unavailability as including memory loss, [Staggs] was unavailable." In light of our case law, the admission of Staggs' hearsay statement thus was a violation of the Hawai'i confrontation guarantee.

XXIV.

Throughout its opinion, the majority repeatedly attempts to draw a supposed distinction between the "semantic statement 'available for cross-examination'" (emphasis added) and the "constitutionally infused statement 'available as a witness for the prosecution.'" See, e.g., majority opinion at 48. The majority proposes distinguishing between the declarant who appears on the stand "available for cross-examination," id., and the declarant who is "available as a witness for the prosecution[,]" id., but for confrontation clause purposes, this is a distinction without a difference inasmuch as the dual description identifies witnesses who are, in fact, one and the same. The confrontation clause guarantee, by its terms, only applies to a "witness for the prosecution" because the clause protects only the accused. It is only the defendant who "shall enjoy the right . . . to be confronted with the witnesses against him." HI Const. Art. I, § 14. Because it is established that the right of cross-examination is the crux of the right of confrontation, for purposes of this case Staggs, as a "witness for the prosecution," is the same witness "available for cross examination." See, e.g., State v. Peseti, 101 Hawai'i 172, 180, 65 P.3d 119, 127 (2003) (stating that "'[t]he Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him [or her], and the right to conduct cross-

examination'" (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987).).

Further, it is curious that the majority proposes that whether a witness is "available for cross-examination" is not a matter of constitutional importance, in that we have said cross-examination is the defendant's primary means of confronting the witnesses against him. See e.g. id. at 180, 65 P.3d at 127 (explaining that "'[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested[]'" (quoting Davis v. Alaska, 415 U.S. 308, 316 (1974) (citations omitted)). Finally, the proposed distinction drawn by the majority, with all due respect, rests on an enigmatic and incomprehensible rubric. The majority repeatedly employs this supposed distinction[28] without citation to any authority and paradoxically maintains "[i]t is not contradictory to suggest that a witness may be constitutionally 'unavailable' as a witness for the prosecution by virtue of that witness' claimed loss of memory at trial as to a prior out-of-court statement, yet simultaneously semantically 'available for cross-examination' as a result of the witness' physical presence on the stand." Majority opinion at 48 (emphasis added). To the

[28] For example, the majority argues that it is "the dissent's erroneous substitution of the phrase, 'available for cross-examination,' with the phrase 'available as a witness for the prosecution,' that creates the foregoing appearance of incompatibility[,]" majority opinion at 50-51; and that "the dissent believes that an application of Crawford here mandates the conclusion that Staggs was constitutionally 'available' despite the fact that her memory loss would render her constitutionally 'unavailable' under Sua[II,]" majority opinion at 50.

contrary, the former concept rests on Sua II and is diametrically opposed to the latter so called "semantic" availability that is incorporated in Crawford's footnote nine.

In this regard, and with all due respect, the majority engages in linguistic gymnastics in an effort to revise Sua II. The majority contends that "Sua [II] is consistent with that distinction, holding, inter alia, that (1) Gooman was constitutionally 'unavailable' as a witness for the prosecution by virtue of his loss of memory, and (2) Gooman was nevertheless semantically available for cross-examination by virtue of his physical presence at trial," majority opinion at 48 (emphasis added); according to the majority, "thereby providing Sua with an opportunity to cross-examine Gooman," id. One is either "available" or "unavailable" for constitutional purposes and not "constitutionally unavailable" on the one hand and "semantically available" on the other.[29]

---

[29] The majority cites to Lee, 83 Hawai'i at 275, 925 P.2d at 1100, for the proposition that the "'unavailability' paradigm has alternatively been referred to as the 'rule of necessity[,]'" majority opinion at 41, which "imposes a burden on the prosecution to demonstrate the necessity of introducing a prior out-of-court statement by demonstrating the 'unavailability' of the declarant at trial[,]" id., but that "the constitutionally infused term, 'unavailable,' means that the declarant is unavailable as a witness for the prosecution at trial[,]" id. (emphasis in original). This distinction does not legally exist and is wholly absent in Lee.

The issue in Lee was whether the prosecution could show the declarants' unavailability which, per HRE 804(a)(5) required that the declarant "[i]s absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means." 83 Hawai'i at 269, 925 P.2d at 1093 (quoting HRE Rule 804(a)(5)). Because the prosecution was unable to make a good faith showing of its efforts to procure the declarants' attendance at trial, the statements were inadmissible and did not meet the "exception to the confrontation clause requirement." Id. at 278, 925 P.2d at 1102. The case focused on the unavailability prong because if it was shown that the declarants were unavailable, then their statements would be admissible under

(continued...)

XXV.

In attempting to refute the import of Sua II, the majority purports to rely on the following passage from that case:

> Similarly, in the present matter, Gooman made assertions before the grand jury and later claimed a loss of memory at trial. Sua was provided with the opportunity to cross-examine Gooman regarding his loss of memory. Inasmuch as Gooman's grand jury testimony met both requirements of the Roberts test, and Sua was able to cross examine Gooman for his failure to remember the alleged incident, we cannot say that the admission of Gooman's grand jury testimony violated Sua's right to confrontation.

Majority opinion at 46 (quoting Sua II, 92 Hawai'i at 75, 987 P.2d at 973) (some emphases omitted and emphasis in original). Citing this paragraph, the majority maintains that, although Staggs claimed she could not recall the incident in question or her statements to Officer Ke, Petitioner nevertheless "had a sufficient opportunity to cross-examine Staggs about her prior out-of-court statement" because "Staggs was physically present at trial and thereby available for cross examination."[30] Majority opinion at 43-44 (emphasis added). This plainly misconstrues the passage.

---

[29](...continued)
the "former testimony" hearsay exception. Id. at 276, 925 P.2d at 1100.

In this case, as the majority correctly notes, "Staggs' 'unavailability' has been conclusively established by her lack of memory[,]" majority opinion at 42, thus whether unavailability was shown by Respondent is irrelevant. Further, because Lee was decided prior to Crawford, had the Lee court found that the declarants were unavailable, under Crawford, the statement would nevertheless be inadmissible unless it could be shown that the defendant had a "prior opportunity to cross-examine" the declarants. 541 U.S. at 53.

[30] Although at one point the majority states the question is whether Petitioner was afforded "a meaningful opportunity to cross-examine," majority opinion at 42 (emphasis added), it rests its ultimate decision on whether the opportunity to cross-examine was "sufficient."

A.

First, this quote from Sua II had nothing to do with the unavailability requirement, but with the second prong of "reliability." Indeed, this court found that Gooman, although present at trial, was unavailable for confrontation purposes as to his grand jury testimony because of his lack of memory.

> The first prong of the Roberts test was satisfied in the present case. Although he was present at trial, Gooman was unable to recollect any substantive elements of his grand jury testimony and, therefore, was "unavailable" by virtue of his loss of memory. See Apilando, 79 Hawai'i at 137, 900 P.2d at 144.

Sua II, 92 Hawai'i at 73, 987 P.2d at 971 (emphasis added). This court then went on to the "reliability" prong of Roberts.

> Upon demonstrating that a witness is unavailable, under the second half of the Roberts test, only statements that bear "adequate indicia of reliability" may be admitted into evidence. "Reliability" may be shown in two ways. First, reliability may be inferred without more if it falls within a firmly rooted hearsay exception. . . .
>
> Alternatively, reliability may be demonstrated upon a showing of particularized guarantees of trustworthiness.

Id. at 71, 987 P.2d at 969 (brackets, internal quotation marks, and citations omitted). It was determined that the reliability prong was met because Gooman's grand jury testimony fell within the hearsay exception of "recollection recorded."

> The second prong of the Roberts analysis, once unavailability has been demonstrated, focuses upon the reliability of the witness' statement. Inasmuch as Gooman's grand jury testimony falls within a "firmly rooted hearsay exception," as "past recollection recorded," and therefore bears an adequate indicia of reliability, see Ortiz, 74 Haw. at 361, 845 P.2d at 556, the testimony should satisfy the confrontation clause.

Id. at 73, 987 P.2d at 971 (emphasis added). Although it had already decided Roberts had been satisfied, this court went on to consider whether the testimony was also marked by "guarantees of

trustworthiness," stating that, "to ensure the highest standard of protection of Sua's constitutional right of confrontation, we analyze whether Gooman's grand jury testimony bore 'particularized guarantees of trustworthiness.'" Id. The passage cited by the majority is found at the conclusion of the discussion of "guarantees of trustworthiness," and concerned not unavailability, but reliability. Id.

Thus, in Sua II, as noted supra, this court "resolute[ly]" reaffirmed the unavailability prong as encompassing memory loss and held that Gooman's grand jury testimony was admissible because it "met both requirements of the Roberts test, and[,]" in addition, in applying a second but unnecessary reliability test, stated that Sua had the opportunity to cross-examine Gooman on his failure to remember the grand jury transcript. Id. at 75, 987 P.2d at 973 (emphasis added). As explicitly set forth in the passage, admission of Gooman's grand jury transcript in Sua II hinged on the fact that Gooman's grand jury testimony "met both requirements of the Roberts' test." Id. (emphasis added).

Under this court's construction of Roberts, "unavailability" includes loss of memory. See id. Thus, in concluding that "both requirements" were met, Sua II confirmed that Gooman was unavailable because of his lack of memory. It would be inconsistent with Sua II, then, to conclude that despite Gooman's lack of memory, he was available for confrontation

purposes, as the majority proposes. Likewise, based on Sua II, it would be contradictory to decide, as the majority does, that despite Staggs' lack of memory, she was available for confrontation clause purposes as to her hearsay statement.

B.

1.

Second, to construe Sua's opportunity "to cross examine Gooman regarding his failure to remember," id. at 75, 987 P.2d at 973, as more than a circumstantial fact would render Sua II internally inconsistent. As noted, in Sua II, admission of the grand jury testimony rested on the fact that "Gooman's grand jury testimony met both requirements of the Roberts' test." Id. Further, as prescribed by this court, then, Gooman's lack of memory as to his grand jury testimony established the unavailability prong of the Roberts test. That conclusion must be viewed as paramount to the observation that Gooman was present and subject to cross-examination at trial, i.e., available, which was unnecessary to the decision. This is because Sua II holds that, as to Hawaii's confrontation clause, "unavailability may be demonstrated by . . . loss of memory," id. at 71, 987 P.2d at 969; "both requirements" of Roberts were met according to Sua II; unavailability, one of the two said requirements, incorporates loss of memory; satisfaction of the unavailability prong was necessary for admission of the grand jury testimony; the grand jury testimony was deemed admissible by this court; hence, Gooman

was deemed unavailable in fulfillment of the first requirement in Roberts.

2.

The majority opines that "[t]o interpret the conclusion that Sua was able to cross-examine Gooman regarding his failure to remember the alleged incident as a mere 'circumstantial fact,' . . . ignores Sua's citation of [United States v.]Carey, [647 A.2d 56 (D.C. 1994)," majority opinion at 46-47, and "a fair reading of Sua indicates this court rejected the confrontation clause analysis on two independent and dispositive but coequal grounds: (1) both prongs of the Roberts test were met and (2) Sua had sufficient opportunity to cross examine[,]" majority opinion at 46.

Thus, the majority appears to assert that if neither of the prongs of the Roberts test were met in Sua II, the testimony would nevertheless be admissible on the grounds that there was a purported "sufficient opportunity to cross-examine." Majority opinion at 46. This assertion is wrong because it negates the necessity of following the Roberts test at all. As this court noted in Sua II, "[t]his court has repeatedly followed the test in Roberts[.]" 92 Hawai'i at 71, 987 P.2d at 969 (emphasis added). It also ignores Sua II's statement that Carey was employed to additionally confirm the holding already rendered under Hawaii's version of Roberts; not to supplant that holding. If considered other than a circumstantial fact, Carey would be

contradictory of Sua II's formulation of Roberts, because Gooman's memory loss made him unavailable for confrontation purposes on the same facts that *Carey* would deem him available. Therefore, the purported "two independent . . . grounds," majority opinion at 46, asserted by the majority cannot coexist.

The majority further cites the proposition that a "forgetful declarant [is] . . . available for cross examination." Majority opinion at 47 (internal quotation marks and citation omitted). The other considerations discussed aside, Carey is inapplicable. First, the witness's statement, admitted as past recollection recorded, Carey, 647 A.2d at 58, satisfied four requirements.[31] Thus, Carey concluded that the declarant "was available for cross-examination by appellant's trial counsel" only because the four requirements were shown. Id. at 59. Unlike in Carey, see supra note 31, in the present case, Staggs has not "vouch[ed] for the accuracy" of any written memorandum of the statement. Thus Carey affords nothing upon which to base

---

[31] The four criteria were:

> (1) the witness must have had first-hand knowledge of the event;
> (2) the written statement must be an original memorandum made at or near the time of the event and while the witness had a clear and accurate memory of it;
> (3) the witness must lack a present recollection of the event; and
> (4) the witness must vouch for the accuracy of the written memorandum.

Mitchell v. United States, 368 A.2d 514, 517-18 (D.C. 1977) (per curiam) (citation and internal quotation marks omitted).

Carey, 647 A.2d at 58.

admission of Staggs' hearsay statement. Additionally, in its decision Carey relied solely on United States v. Owens, 484 U.S. 554 (1988), which, as noted infra, has been disavowed by our own jurisprudence. Because the facts and the controlling precedent at play in Carey are indisputably distinguishable from and inapplicable to the instant case, Carey does not support the majority's use of it.

In sum, to preserve the integrity of the holding in Sua II, the unavailability analysis must necessarily rest on the proposition that, while Gooman was physically "available" because he was present at trial, he was nevertheless "unavailable" for purposes of admitting his forgotten grand jury testimony. Otherwise, the first factor referred to -- unavailability under the Roberts test -- could not have been satisfied. Read correctly and in context, then, the statement in Sua II that "Sua was provided with an opportunity to cross examine Gooman regarding his failure to remember[,]" 92 Hawai'i at 75, 987 P.2d at 973, would not support the conclusion that the admission of Staggs' out-of-court statement complied with the confrontation clause in the Hawai'i Constitution, as the majority argues.

XXVI.

The infirmity of the majority's reading of Sua II is expanded by the inconsistency in the majority's decision to apply the federal version of unavailability in testimonial statements, but apparently to retain Sua II's Roberts test of unavailability

with respect to non-testimonial statements. As was the case with our approach post-Roberts, this court is not required to adhere to the U.S. Supreme Court's view of unavailability set forth in Crawford. Sua II, 92 Hawai'i at 71, 987 P.2d at 969.

As mentioned, the majority adopts the Roberts test in "nontestimonial" situations. Majority opinion at 51-52; see Davis, -- U.S. at --, 126 S.Ct. at 2273-74 ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.") In adopting the Roberts' test in "nontestimonial situations," the majority preserves the unavailability paradigm as explained in Sua II, i.e., a witness is unavailable for confrontation purposes if the witness lacks memory of the hearsay statement. But as to testimonial situations, the majority adopts the federal view that a witness is available for confrontation purposes even if the witness lacks memory of the hearsay statement. Because the majority saves the unavailability paradigm in Sua II for nontestimonial situations, the unavailability requirement logically must be applied in testimonial situations as well.

The Court noted in Crawford that "[t]he constitutional text, like the history underlying the common-law right of confrontation, . . . reflects an especially acute concern with a specific type of out-of-court statement [(testimonial

statements)]." 541 U.S. at 51. Consequently, affording more substantial protections for nontestimonial statements as the majority does, than for testimonial statements, would be incompatible with the greater constitutional concerns regarding testimonial statements. To rule thusly would produce the anomalous result of allowing inculpatory hearsay matters into evidence despite the declarant's unavailability in testimonial situations but of requiring unavailability to be shown in nontestimonial situations. A departure from Sua II's unavailability paradigm with respect to testimonial hearsay statements compromises the "integrity" and "fairness" of the process heretofore enveloped in our state constitution's confrontation clause.

XXVII.

In opposition to the foregoing, the majority baldly contends that "the 'unavailability' paradigm is retained in both testimonial and nontestimonial situations, and [that] the result achieved is not anomalous." Majority opinion at 51. According to the majority, "if an out-of-court statement is testimonial, it is subject to the Crawford analysis, which mandates that (1) the witness be 'unavailable,'" and "[i]f an out-of-court statement is nontestimonial, it is subject to the Roberts analysis, requiring a showing that . . . the declarant is 'unavailable[.]'" Majority opinion at 51 (emphases added). But as noted previously, although employing the same term, --

"unavailable" -- the majority applies the term differently in testimonial as opposed to non-testimonial situations.

For "unavailability" under Crawford does not apply at all if the witness is present for examination, as the majority itself asserts, see majority opinion at 27-28, even if the statement is otherwise "testimonial." Contrastingly, under this court's version of the Roberts test, a witness is considered "unavailable" as to the relevant subject matter, even if present and subject to cross-examination, if the witness lacks memory of the subject matter. To reiterate, pursuant to Crawford, a declarant is unavailable only if the declarant is not present at trial to testify.[32] But under Hawaii's version of Roberts, as explicated in Sua II, a declarant is unavailable even if present at trial to testify if the declarant is lacking in memory as to the hearsay subject matter. In fact, then, the term "unavailability" as it is employed by the majority refers to two

---

[32] The majority maintains that "Crawford does not state that a declarant is constitutionally 'unavailable' only if the declarant is not present at trial," but asserts instead that the confrontation clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. Crawford at 541 U.S. at 60 n.9." Majority opinion at 49. However, the majority does not explain how these two statements are distinguishable in the present case.

There is no difference between being "present at trial" and "being present at trial to defend or explain" the hearsay statement if, as the majority would have it, one is present to defend and explain one's statement even though he or she has no recollection of ever making it. Further, on the prior page, the majority posits that in Sua II, "Gooman was nevertheless semantically available for cross-examination by virtue of his physical presence at trial, thereby providing Sua with an opportunity to cross-examine Gooman." Majority opinion at 48 (emphases added). Thus, both Crawford's footnote nine and the majority's own statements lead to the conclusion that the majority believes so long as a declarant is merely present on the stand for examination, the confrontation clause is satisfied.

disparate concepts. The two concepts are not identical as the majority implies but, rather, contradictory.

At its core, then, the "result achieved" by the majority, majority opinion at 51, is indeed anomalous. As mentioned before, this court has said, in administering Hawaii's confrontation clause, that "the integrity of the fact finding process and . . . ensur[ing] fairness to defendants" encompasses the proposition that a witness who lacks memory is unavailable in the confrontation sense. Sua II, 92 Hawai'i at 71, 987 P.2d at 969. In eschewing this approach, the majority abrogates a safeguard long in place in our constitution.

XXVIII.

It must be emphasized that Staggs' hearsay statement was used as substantive evidence by Respondent. Our cases have recognized that mere presence and amenability to cross-examination in the context of a witness' memory loss would not satisfy confrontation interests with respect to admission of hearsay as substantive evidence. See Eastman and Clark, supra, and infra. This is consistent with the rationale in Sua II. Thus, in his opening brief, Petitioner "urges this court to reach the same conclusion as did the Canady court: that the complainant's alleged prior statement was not admissible because she could not be subjected to cross examination concerning the subject matter of the statement as envisioned under the rule."

In Canady, the ICA noted that the drafters of the HRE had rejected the Owens approach embraced by the majority in the

instant case. An issue in Canady was whether a prior inconsistent hearsay statement was admissible as substantive evidence under the precondition in HRE Rule 802.1 that "the declarant is subject to cross-examination concerning the subject matter of the [declarant's] statement." 80 Hawai'i at 477, 911 P.2d at 112 (quoting HRE Rule 802.1(1)). As noted by the ICA, Owens had construed similar language in Federal Rules of Evidence (FRE) Rule 801(d)(1)(C). Id. at 478, 911 P.2d at 113.

> The Court reasoned that, under a "natural reading" of the phrase "subject to cross-examination concerning the statement" in FRE Rule 801(d)(1), all that is required is that the witness "is placed on the stand, under oath, and responds willingly to questions," even if the witness was unable to testify about any of the events set forth in the prior statement. [Owens, 484 U.S.] at 561, 108 S.Ct. at 844.

Id. (citing FRE Rule 801(d) (emphasis added) (brackets and internal quotations omitted). The court however, compared the language of FRE Rule 801(d)(1) to FRE Rule 804(a)(3) "which defined an unavailable witness as a person who 'testifies to a lack of memory of the subject matter of the declarant's statement[,]'" id. at 479, 911 P.2d at 114 (brackets and footnote omitted) (emphasis added) (citing Owens, 484 U.S. at 562, 108 S.Ct. at 844 (quoting FRE Rule 804(a)(3)), opining that the "difference was . . . that 'Congress . . . chose not to make witness forgetfulness an exception to the admissibility of a out-of-court identification under FRE Rule 801(d)(1)(C)[,]'" id. (citing Owens, 484 U.S. at 562, 108 S.Ct. at 844 (quoting FRE Rule 804)(a)(3)) (brackets omitted).

In Canady the ICA noted that HRE Rule 804(a)(3) employs the same "subject matter" language, stating that:

> HRE Rule 804 provides:
>
> > Rule 804. Hearsay exceptions; declarant unavailable. (a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:
> >
> > . . . .
> >
> > (3) Testifies to a lack of memory of the subject matter of the declarant's statement.

80 Hawai'i at 479-80 n.13, 911 P.2d at 114-15 n.13. However, in contrast to the U.S. Supreme Court's stance in Owens, Canady explained that the HRE drafters decided that prior inconsistent statements might be used as substantive evidence, unless the witness could no longer recollect the events in the statement.

> The commentary to HRE Rule 802.1 explains that under the common law, prior inconsistent statements were considered hearsay and could not be used to impeach a witness. Commentary to HRE Rule 802.1 (1993). The FRE modified the common-law rule and allowed prior inconsistent statements to be used as substantive proof of the matters asserted in the statement, if the statement was "'given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.'" Id. (quoting FRE Rule 801(d)(1)(A)). HRE Rule 802.1 adopted this federal exception to the common law, and went further by adding two more exceptions to the hearsay objection for signed or adopted statements and recorded statements. Id.

Id. at 480, 911 P.2d at 115 (brackets omitted) (emphases added).

Sua II corroborated this precept.

> Sua relies on [Canady] for the assertion that "a witness that is unable to recall the events allegedly described in the prior statement does not satisfy the requirements of HRE Rule 802.1[,] and therefore the prior statement would not be admissible." In Canady, the complaining witness "testified that she could not recall the events that she allegedly described in the statement." 80 Hawai'i at 481, 911 P.2d at 116. In the present matter, [the witnesses,] Kaowili and Puahi[,] denied ever having made the relevant statements to the detective. Therefore, unlike the witness in Canady, who was rendered "unavailable" by virtue of her memory loss, Kaowili and Puahi were both "available" for cross-

> examination. Accordingly, while we agree with Sua's reading of Canady, it is inapposite to the present matter.

92 Hawai'i at 77, 987 P.2d at 975 (emphasis added).

In Eastman, this court held that the complainant's prior inconsistent statement contained in a "Victim's Voluntary Statement Form" (VVSF) which she gave to a police officer "met all the requirements under HRE Rule 802.1(1)(B) for admissibility as substantive evidence of [the defendant's] guilt." 81 Hawai'i at 137, 913 P.2d at 63. Like Canady, Eastman confirmed that HRE Rule 802.1(1)(B) required, as a precondition of admissibility, that "a witness must testify about the subject matter of his or her prior statements so that the witness is subject to cross-examination concerning the subject matter of those prior statements[.]" Id. (emphasis added).[33] Subsequently, Eastman further concluded that the cross-examination of the complainant "satisfied constitutional and trustworthiness concerns over admitting [the complainant's] prior inconsistent statements in the VVSF into evidence, because the cross-examination gave [the defendant] the opportunity to have [the complainant] fully explain to the trier of fact why her in-court and out-of-court statements were inconsistent, which, in turn, enabled the trier

[33] As to this requirement, Eastman concluded that because "the prosecution directly examined [the complainant] as a witness and elicited testimony from her about her argument with [the defendant] on September 30, 1994, the events that caused her to suffer a swollen left eyebrow, and her prior statements in the VVSF alleging that [the defendant] had slapped her . . . , the prosecution made [the complainant] subject to opposing counsel's cross examination concerning the subject matter of [the complainant's] prior statements in the VVSF." 81 Hawai'i at 137, 913 P.2d at 63.

of fact to determine where the truth lay." Id. at 139, 913 P.2d at 65 (emphases added).

Subsequently in Clark, this court reaffirmed that the justification for allowing the use of hearsay statements as substantive evidence was the opponent's ability to cross-examine the witness about the events contained in the hearsay statement, citing Eastman.[34] Clark reiterated that fulfilling the cross-examination requirement under HRE Rule 802.1 also satisfies the right to confrontation in criminal cases. See Clark, 83 Hawai'i at 294, 926 P.2d at 199 (stating that "[b]ecause the witness is subject to cross-examination, the substantive use of his [or her] prior inconsistent statements does not infringe the sixth amendment confrontation rights of accused in criminal cases" (quoting Eastman, 81 Hawai'i at 136, 913 P.2d at 62 (citing Commentary to HRE Rule 802.1 (citing Green, 399 U.S. 149)) (emphasis added). Clark explained that "at [the defendant's] trial, the prosecution directly examined [the declarant] as a witness and elicited testimony from her regarding the

---

[34] Clark stated:

> The situation envisioned is one where the witness has testified about an event and his or her prior written statement also describes that event but is inconsistent with his or her testimony. Since the witness can be cross-examined about the event and the statement, the trier of fact is free to credit his or her present testimony or his or her prior statement in determining where the truth lies. . . .

Eastman, 81 Hawai'i at 136, 913 P.2d at 62 (citing to the Commentary to HRE Rule 802.1.).

83 Hawai'i at 294, 926 P.2d at 199 (emphasis added) (brackets omitted) (ellipsis points in original).

circumstances surrounding the September 6, 1993 incident and her prior statement to [the detective] wherein she had stated that [the defendant] stabbed her in the chest" and, thus, the declarant was "subject to cross-examination concerning the subject matter of her prior statement to [the detective]." Id. at 295, 926 P.2d at 200.

In Clark it was ultimately held that the declarant's "cross-examination satisfied constitutional and trustworthiness concerns over admitting into evidence her prior inconsistent statements to [the detective] because it afforded [the defendant] the opportunity to have [the declarant] fully explain to the trier of fact why her in-court and out-of-court statements were inconsistent, which, in turn, enabled the trier of fact to determine where the truth lay." Id. (citing Eastman, 81 Hawai'i at 139, 913 P.2d at 65) (emphases added). Eastman and Clark indicate that, consistent with the Sua II paradigm, the requirement under HRE Rule 802.1 that the declarant be "subject to cross-examination concerning the subject matter of the statement" will satisfy the confrontation clause requirement as well.

Our jurisprudence has confirmed on evidentiary and constitutional grounds, the proposition that a witness who cannot recall the events related in the hearsay statement is to that extent not subject to cross-examination so as to allow the "trier of fact . . . to determine[] where the truth lies." Sua II, 92

Hawai'i at 77, 987 P.2d at 975 (citations omitted); see also Clark, 83 Hawai'i at 295, 926 P.2d at 200; Eastman, 81 Hawai'i at 139, 913 P.2d at 65; Canady, 80 Hawai'i at 481, 911 P.2d at 116. The majority's reliance on Owens thus is misplaced. The majority misapprehends our case law. Sua II is inapposite. Owens was disavowed by virtue of Canady, Eastman, and Clark. Carey was only used as confirmation of the result in Sua II that had already been reached under Hawaii's version of Roberts. In adopting its position, the majority has in effect overruled sub silento Eastman and Clark.

XXIX.

A review of the transcribed proceeding is necessary to properly assess the majority's contrary assertion that a "meaningful opportunity to cross-examine," majority opinion at 42, was afforded in this case.

Regarding the events of April 13, 2002, Officer Ke testified that Staggs recounted the following:

> She said she and Reggie got into a argument. Reggie was upset. I guess her mom brought some friends over earlier in the evening and the police had to come by. They were upset so they were arguing. And she said she was laying down on the couch watching TV, and I guess Reggie came up behind her and started holding her down, pressing her neck with both of his hands, like, kind of holding her down on the couch. And then she also said he punched her in the face, left side of her face.

When Staggs testified on direct, she claimed a loss of memory as to all relevant questions pertaining to the events in the hearsay statement:

> Q. Do you know Reginald Fields?
> A. Yes.
> . . . .

Q. Can you describe your relationship with Mr. Fields?
A. He's my boyfriend.
Q. And on April 13 were you living together?
A. Yes.
Q. The night of April 13th where were you?
A. I can't recollect, actually.
Q. Do you recall an evening where Reggie got arrested?
A. No.
Q. How long have you and Reggie been together?
A. We've been friends for at least four years.
Q. And are you still boyfriend/girlfriend?
A. We're still friends.
Q. Are you still living at the same place
A. No.
Q And you don't recall an incident that happened back in April where the police came over two times?
A. I have a hard time remembering
Q. So if something had happened back in April, your memory would have been better back then than today?
A. Not necessarily.
Q. Do you recall talking to a police officer on April 13th just before midnight at where you were living?
A. No
Q. Do you recall a police officer asking you what had happened?
A. (No audible response.)
Q. Do you recall telling a police officer that on April 13th around 11:40 you and your boyfriend got into an argument?
A. No, I don't remember.
Q. Do you recall telling a police officer that you were lying chest down on the sofa in your living room?
A. No, I don't remember that.
Q. Do you recall telling a police officer that Reggie came in behind you and started to push down your neck with both of his hands?
A. No.
Q. Do you recall telling a police officer that this caused pain to your neck?
A. Nope.
Q. Do you recall telling a police officer that you could not breathe while he was holding you down?
A. No, I don't recall that.
Q. Do you recall - - telling a police officer that Reggie punched you once in the face causing pain to your face?
A. No audible response.

(Emphases added.) On cross-examination, Staggs confirmed her lack of memory as to the charged event.

Q. Do you recall, Ms. Staggs, on this particular night, April 13th we're talking, David Richards being present?
A. I believe - - yes, I believe he was
Q. You know who David Richards is then?
A. Yes.
Q. Who is David Richards?
A. A friend of mine.

Q. Friend of yours. Okay. And do you recall whether on this night you were drinking anything?
A. Yes, I was.
Q. What were you drinking?
A. Beer.
Q. Okay. Did you have a lot to drink?
A. Yes.
Q. Is that perhaps why you have no recollection?
A. Perhaps.
Q. Do you -- do you under- -- do you recall, perhaps, any incident involving Mr. Fields' surfboards -- board?
A. Um-hmm.
Q. And might that involve a threat to Mr. Fields that if he left that you were going to break his surfboard?
A. I think that may have occurred.
Q. Okay. Do you recall laying on his board in such a way, I guess maybe it was between the table and the chair, and then threatening to sit on it that -- something like that?
A. Yeah, I do remember that.
Q. Okay. Do you recall perhaps Mr. Richards trying to hold your wrists to keep you from slapping him, et cetera? Do you recall that at all?
A. No, I don't remember that.

(Emphasis added.) From the foregoing it is a mischaracterization of Staggs' testimony to claim that "she willingly and informatively responded to virtually all of the questions posed by [Petitioner's] counsel." Majority opinion at 40 (emphasis added).

Nothing in Staggs' testimony, either on direct or cross-examination, corresponds to Officer Ke's testimony about Staggs' accusatory hearsay statement. The actual record controverts the majority assertion that "[t]he point here is that the protections guaranteed by Hawaii's confrontation clause have been fully afforded to an accused where the hearsay declarant attends trial and is cross-examined about the prior hearsay statement." Majority opinion at 42. Obviously, as the transcript demonstrates, trial attendance does not equate to an opportunity for meaningful cross-examination because Staggs could

not testify with respect to a statement of which she had no remembrance. Any "meaningful opportunity" to cross-examine Staggs would necessarily include a "willing[] and informative[]," response, majority opinion at 40, as to the hearsay statement. However, no such testimony was forthcoming because of Staggs' claimed loss of memory.

Therefore, in ruling that the admission of Staggs' hearsay statement did not violate Hawaii's confrontation clause, the majority strips any significance from the phrase "meaningful opportunity to cross-examine." Staggs claimed memory loss as to every question regarding any circumstance of physical altercation between herself and Petitioner that constituted the gravamen of the charge of abuse of a family or household member, HRS § 709-906(1) (Supp. 2003),[35] and rendered cross-examination on the hearsay statement meaningless, rather than meaningful.

XXX.

The majority also maintains that "given the foregoing, we do not think Fields' opportunity for cross-examination was insufficient" because

> [t]he trier of fact was provided with adequate information to test the credibility and veracity of Staggs' prior statement insofar as it could have reasonably inferred that (1) Staggs' drunken state rendered her prior statement inaccurate or unreliable, and/or (2) Staggs was not an innocent victim but an aggressive participant in the incident who, while angry at Fields, gave a false statement to the police.

[35] HRS § 709-906(1) provides, in pertinent part that "[i]t shall be unlawful for any person, singly or in concert, to physically abuse a family member . . . . For the purposes of this section, 'family or household member' means . . . persons jointly residing or formerly residing in the same dwelling unit."

Majority opinion at 40-41. First, Staggs' testimony as to what she recalled was not related to the substance of Staggs' hearsay statement. Staggs discussed three matters during her cross-examination. First, she recalled believing that Richards was present at her home on the evening of April 13. Second, she testified that she had a lot to drink which "perhaps" led to her lack of memory. Finally, she possibly remembered an incident involving a threat to break Fields' surfboard. Placing emphasis on these three points, the majority asserts that "Fields certainly had the opportunity to develop those theories and cast doubt on Staggs' earlier out-of-court statement, but voluntarily declined to do so by terminating the cross-examination." Majority opinion at 41.

Assuming, arguendo, their relevance, the theories the majority proposes, with all due respect, rest at best on gross speculation.[36] Officer Ke did not corroborate any of the three matters. Officer Ke did not testify about Richards' presence in the home, he did not testify to the extent of Staggs'

[36] In characterizing Staggs as being in a "drunken state," the majority overreaches. Staggs responded "Yes" when asked whether or not she had had a lot to drink and Officer Ke testified that Staggs "appeared to be intoxicated." Officer Ke gave no indication that Staggs' drunkenness led him to question the veracity of her statement. At no point do any of the witnesses state Staggs was in a "drunken state." On the other hand, because it was Officer Ke who related Staggs' statement, that version of the incident was presented in a coherent, rational, and detailed manner. See State v. Machado, 109 Hawai'i 445, 452, 127 P.3d 941, 948 (2006) (concluding that the trial court erred in admitting the complainant's statement as related by the officer under the excited utterance exception to the hearsay rule when the statement related was "detailed, logical, and coherent").

Additionally, as to the majority's theory that "Staggs was not an innocent victim but an aggressive participant in the incident who, while angry at Fields, gave a false statement to the police," majority opinion at 40-41, there was no indication from any witness that Staggs was the initial aggressor.

intoxication, and he did not testify regarding Staggs' supposed threat to break Petitioner's surfboard. None of these matters are incorporated in Staggs' hearsay statement. Thus, there was no connection between Staggs' testimony and Officer Ke's rendition of the hearsay statement. Before cross-examination Staggs had already explicitly claimed a loss of memory as to the events on the evening of April 13 at least ten times (a number of responses were inaudible and were not recorded in the transcript) on direct examination. Thus, with all due respect, the term "meaningful" as it is employed by the majority in this context becomes nonsensical.

XXXI.

Second, and significantly, as before noted, Staggs' alleged statement was admitted as substantive evidence and not for impeachment purposes. The effect, even if not recognized or acknowledged by the majority, is that its decision means that hearsay statements are admissible as substantive evidence even if the declarant cannot be cross-examined about events in the statement. In this regard, the majority argues that the foundational interests of the confrontation clause "are preserved where an accused is afforded the opportunity to cross-examine, and thereby challenge the credibility and veracity of, a hearsay declarant regarding his or her prior out-of-court statement."

Majority opinion at 43 (citations omitted).[37] But the majority's allusion to impeachment of Staggs' statement is irrelevant because the determination of whether the hearsay statement was admissible as substantive evidence must be decided before the statement itself may be placed in evidence and, therefore, subjected to impeachment. For the fact that Staggs could answer questions about other matters did not make her available as to the hearsay statement. Like HRE Rule 804(a)(3), as noted by Professor Graham,

> FRE Rule 804(a)(3) provides that a witness who testifies to a lack of memory of the subject matter of his or her statement is unavailable. A witness may either truly lack recollection or for a variety of reasons, including concern of a possible perjury prosecution, feign lack of recollection. In either event, the witness is unavailable to the extent that he or she asserts lack of recollection of the subject matter of the prior statement, even if the witness recalls other events.
>
> M. Graham, Federal Practice and Procedure: Evidence § 6792, at 764 (interim ed. 1992).

Canady, 80 Hawai'i at 479 n.10, 911 P.2d at 119 n.10 (brackets omitted) (emphasis added). Thus, the reason that Staggs lacked memory, whether by reason of a "drunken state," as the majority submits, or some other reason, is irrelevant to a finding of

---

[37] Wigmore, cited to by the majority, see majority opinion at 41, is not contradictory. As set forth by Wigmore, "The main and essential purpose of confrontation is to secure for the opponent the opportunity for cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." 5 J. Wigmore, on Evidence § 1395, at 150 (Chadbourn rev. 1974) (some emphasis in original and some added). Wigmore also recognizes a secondary, albeit dispensable, purpose of confrontation. Id. at 153. Wigmore states, "There is, however, a secondary advantage to be obtained by the personal appearance of the witness; the judge and the jury are enabled to obtain the elusive and incommunicable evidence of a witness' deportment while testifying, and a certain subjective moral effect is produced upon the witness." Id. Both factors are satisfied by the positions of this dissent.

unavailability and, thus, to the question of whether the hearsay statement is admissible as substantive evidence. The effect of Staggs' claimed lack of memory is that "the trier of fact" is not afforded the opportunity to determine where the truth lies, despite her recollection of "other events." M. Graham, supra, § 6792, at 764. For that reason the statement would not be admissible at all.[38] See Canady, Eastman, and Clark.

From another similar point of view, because "[t]here is no inherent contradiction between a recitation of an event and a subsequent memory failure . . . , the potential to impair [Staggs'] credibility is wanting, and the only legitimate thrust of the prior account is as independent proof of the matters asserted." A. Bowman, Hawai'i Rules of Evidence Manual 391 (2d. ed. 1998). Thus, using Staggs' statement as proof of the matters asserted squarely presents "[t]he hearsay problem . . . , and [HRE R]ule 802.1 comes into play." Id. Staggs. who "lack[ed] present memory of the events related in a prior statement is not 'subject to cross-examination concerning the subject matter' of

---

[38] This puts to rest the majority's assertion that "the fact of Staggs' memory loss further permitted the trier of fact to test the truth of her prior out-of-court statement." Majority opinion at 41 (citing Owens, 484 U.S. at 559 ("It is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his [or her] lack of care and attentiveness, his [or her] poor eyesight, and even (what is often a prime objective of cross-examination, 3A J. Wigmore, Evidence § 995, pp. 931-32 (J. Chadbourn rev. 1970)) the very fact that he [or she] has a bad memory."). Majority opinion at 41.

These inquiries all speak to impeaching the credibility of a witness and presupposes the admissibility of the statement. The instant case involves the question of whether Petitioner was able to "meaningfully cross-examine" the declarant, a question which must be resolved before the statement is admitted. Owens, of course, has been disavowed in this jurisdiction. See discussion supra and infra.

the statement," as required by HRE Rule 802.1. Id. (citing Canady, supra). Therefore, "the statement cannot be admitted substantively under that rule." Id. (citation omitted) (emphasis added). Furthermore, there is not "any room for impeachment under [HRE R]ule 613(b) in the absence of contradiction." Id. at 392. Therefore, contrary to the majority's assertion, "the credibility and veracity" of Staggs' prior statement cannot be tested. Majority opinion at 43. As made abundantly clear, a witness who cannot testify as to the hearsay matter she is being questioned about, must be considered "unavailable" in a confrontation sense.

It may also be observed that HRE 802.1 requires that as a prerequisite to admissibility, the prior statement must be "given under oath" or "reduced to writing and signed or otherwise adopted or approved by the declarant" or "recorded in substantially verbatim fashion by stenographic, mechanical, electrical, or other means contemporaneously with the making of the statement." HRE 802.1(1)(A)-(C). The rationale that bars admissibility when the witness is unable to testify about the events in the hearsay statement, see Canady, Eastman, and Clark, supra, is even more compelling here. Staggs' statement bears even less indicia of reliability inasmuch as, in addition to not recalling what was said, Staggs never swore to, signed, or adopted the hearsay statement allegedly made.

XXXII.

The majority claims "[t]his concept is not a novel one[,]" and maintains that "even under this jurisdiction's version of the Robert's analysis, sufficient cross-examination of the hearsay declarant at trial terminated the inquiry." Majority opinion at 39 (emphasis added). This statement does not advance, but merely assumes the matter in issue, for what is a "sufficient" (or rather a meaningful) opportunity for cross examination is the question posed by this case. The majority refers to Clark, Eastman, and Owens as support for this proposition.

As stated before, Owens is inimical to the broad construction given the Hawai'i Constitution's confrontation clause in prior decisions of this court. See Sua II, 92 Hawai'i at 73 n.8, 987 P.2d at 971 n.8 ("Although Roberts, 448 U.S. at 66, 100 S.Ct. 2531, suggests that the existence of a 'firmly rooted hearsay exception' alone is sufficient to satisfy the 'adequate indicia of reliability' test, this court will not hesitate to extend the protections of the Hawai'i Constitution beyond federal standards." (Citing Richie, 88 Hawai'i at 42, 960 P.2d at 1250; State v. Quitog, 85 Hawai'i 128, 130 n.3, 938 P.2d 559, 561 n.3 (1997); State v. Arceo, 84 Hawai'i 1, 28, 928 P.2d 843, 870 (1996); State v. Lessary, 75 Haw. 446, 453-54, 865 P.2d 150, 154 (1994); Aplaca, 74 Haw. at 67 n.2, 837 P.2d at 1305 n.2.). Owens plainly does not support "this jurisdiction's

version of the Roberts analysis[,]" majority opinion at 39, which was explicated in Sua II.

As to Eastman and Clark, the majority maintains that "[b]ecause the witness is subject to cross-examination, the substantive use of his [or her] prior inconsistent statement does not infringe the sixth amendment confrontation rights of accused in criminal cases." Majority opinion at 39 (quoting Clark, 83 Hawai'i at 294, 926 P.2d at 199) (emphasis added). However, the foregoing quotation is misleading. The quote from Clark is from the commentary to HRE 802.1, which requires not only that to be admissible a statement must bear certain indicia of reliability by way of affirmation by the declarant (i.e., under oath, recorded, or reduced into writing), but the additional assurance that the declarant be "subject to cross-examination concerning the subject matter of the statement." Clark, 83 Hawai'i at 294, 926 P.2d at 199 (citing to the Commentary to HRE Rule 802.1) (citation omitted) (emphasis added). Staggs' statement was not given under oath, reduced to writing, or recorded in any fashion and Staggs could not be subjected to cross examination regarding the "subject matter of the statement" because she had no memory of the statement. Thus, neither Eastman nor Clark validates the majority's assertion that "sufficient" opportunity for cross-examination existed in the present case.

XXXIII.

As a result, and for the reasons discussed before, the majority is wrong in declaring "that the protections guaranteed

by Hawaii's confrontation clause have been fully afforded . . . where the hearsay declarant attends trial and is cross-examined[.]" Majority opinion at 42. This view contravenes the rationale reaffirmed in our case law, as observed supra, that where the declarant lacks memory, the "credibility and veracity of[] a hearsay declarant regarding his or her prior out-of-court statement[,]" majority opinion at 43, cannot be tested by way of cross-examination.

The assertion, then, that "foundational interests are preserved[,]" id., by way of impeachment is erroneous as stated supra because when substantive use of the statement is at stake, a determination as to admissibility would precede any impeachment procedure. The majority's claim that following the Sua II paradigm of unavailability in testimonial situations "expand[s] the protections of" the clause "beyond its purpose," id. at 26 n.9, is simply untrue because doing so merely adheres to the approach heretofore followed in our jurisdiction. On the other hand, the majority's adoption of the federal approach significantly diminishes the protections presently afforded in our state constitution and invites inconsistent and unjust consequences from the uneven application of the law. See McGriff, 76 Hawai'i at 156, 871 P.2d at 790; Sua I, 92 Hawai'i at 92, 987 P.2d at 990.

Despite its protestation to the contrary, in holding that a hearsay statement is admissible even if the declarant has

no memory of the statement or the events described in the statement, the majority directly contradicts Sua II. Such a holding is inherently inconsistent with the majority's claim that it adheres to the "'unavailability' paradigm embedded within this jurisdiction's version of the Crawford analysis . . . [that] must be interpreted to include a witness' lack of memory, pursuant to greater protection afforded by the Hawai'i [C]onstitution as recognized by this court in Sua[II]." Majority opinion at 51 n.14, (emphasis added). For despite the witness's absence of memory, the majority decides that there was a meaningful opportunity to cross-examine in this case.

XXXIV.

In an attempt to deflect the effect of its ruling, the majority contends that the dissent "attempt[s] to conjure disparity[,]" majority opinion at 48, and "the appropriate principle gleaned [from Crawford] is that the confrontation clause analysis does not apply to exclude a prior out-of-court statement where a declarant is present at trial to 'defend or explain it[,]' not that a hearsay declarant's presence at trial mandates the conclusion that the declarant is constitutionally 'available' (i.e. not 'unavailable')[,]" majority opinion at 49. (emphasis added).

First, there is no need to "conjure disparity" because there is an actual conflict between how the majority applies the availability requirement and this court's confrontation clause

jurisprudence. As stated before, pursuant to Crawford, a declarant is "unavailable" for confrontation clause purposes only if he or she never takes the stand. The majority reiterates this point by repeated references to Crawford's footnote nine and summations of cases from other jurisdictions. See, e.g., Gomez, 183 S.W.3d at 91 (stating "[t]he fact that Perez testified and was available for Appellant to cross examine her makes Crawford inapplicable here" (emphasis added)).

Second, statements that the majority seems to attribute to the dissent were never posited. It is not the dissent's position that "a hearsay declarant's presence at trial mandates the conclusion that the declarant is constitutionally available," majority opinion at 49; rather, it is the majority's own analysis that leads to the conclusion that the majority viewed Staggs as available for the purposes of confrontation. Because the majority finds that Staggs' hearsay statement is admissible and that a Crawford analysis is unnecessary, it must follow that the majority has concluded Staggs was "available" for purposes of the confrontation clause under footnote nine. It is the majority's own approach that mandates that a hearsay declarant who appears on the stand and denies memory of the relevant subject matter, is considered "available" for confrontation purposes.

The majority also appears to agree with this dissent when it states that "the 'unavailability' paradigm embedded within this jurisdiction's version of the Crawford analysis . . .

must be interpreted to include a witness' lack of memory, pursuant to the greater protection afforded by the Hawai'i Constitution as recognized by this court in Sua [II]." Majority opinion at 51, n.14. But, having concluded that a witness is unavailable when he or she claims loss of memory at trial, the majority mystifyingly contradicts itself and, although it refuses to acknowledge it as such, decides instead that Staggs was available for confrontation purposes despite her claimed loss of memory as to the matters in the hearsay statement.

XXXV.

I reiterate that we need not reach the Crawford issue because admission of Staggs' alleged hearsay statement constituted plain error. With all due respect, the majority contorts the language and substance of our case law in an effort to comport its result with this jurisdiction's precedent but instead only aligns our confrontation clause with the less protective federal standard. The ramifications of this approach bodes ill for the vitality of the confrontation clause guarantee and our prior insistence that the opportunity to cross-examine a witness on the subject matter of his or her prior statement be meaningful.

XXXVI.

In line with the foregoing, I would reverse the ICA's May 31, 2005 published opinion and the court's October 11, 2002 judgment.