

DISSENT BY ACOBA, J.

I would grant certiorari in this case on several grounds.

First, I believe it was reversible error to admit evidence exhibit number 4 offered by Respondent/Plaintiff-Appellee State of Hawai'i (Respondent), "the sworn statement of Sylvia Dawson, the [intoxilyzer] supervisor, noting that . . . the machine used in the case at hand[] had been calibrated and tested for accuracy on October 4th of 2005[] and October 24th of 2005[,] . . . pursuant to the public records exception to [Hawai'i Rules of Evidence (HRE) Rule] 803(b)(8)[.]" Although not raised, apparently the intoxilyzer test was administered to Petitioner/Defendant-Appellant Thomas W. Marshall (Petitioner) on August 6, 2005, before the calibration dates of October 4 and 24, 2005. As stated before, "a fundamental evidentiary rule is that before the result of a test made out of court may be introduced into evidence, a foundation must be laid showing that the test result can be relied on as a substantive fact." State v. Wallace, 80 Hawai'i 382, 407, 910 P.2d 695, 720 (1996) (internal quotation marks, citation, and brackets omitted).

Furthermore, "[p]art of the foundational prerequisite for the reliability of a test result is a showing that the measuring instrument is in proper working order." Id. (internal quotation marks and citation omitted). As in Wallace, the testing apparatus "'was calibrated on a certain date'" and the

calibrations could have been admitted “under the hearsay exceptions relating to business records[.]” State v. Manewa, 115 Hawai‘i 343, 356, 167 P.3d 336, 349 (2007) (quoting Wallace, 80 Hawai‘i at 412 n.28, 910 P.2d at 725 n. 28) (brackets omitted). But here, as in Wallace, “[Respondent] did not offer such records into evidence.” Id.

Second, admission of the written statement plainly violated Petitioner’s right of confrontation under the Hawai‘i Constitution. Even were a hearsay exception applicable, this court has held 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.

State v. Fields, 115 Hawai‘i 503, 550, 168 P.3d 955, 1002 (2007) (Acoba, J., dissenting) (quoting State v. Sua, 92 Hawai‘i 61, 71, 987 P.2d 959, 969 (1999)) (quoting State v. Ortiz, 74 Haw. 343, 361, 845 P.2d 547, 555-56 (1993)) (citing Ohio v. Roberts, 448 U.S. 56, 65 (1980)) (other citations omitted) (emphasis in original). Petitioner argues that

[Respondent] did not call the purported declarant of the sworn statements to testify at trial. There was also no showing that the intoxilyzer supervisor was “unavailable” to be called as a witness. Instead, [Respondent] offered the sworn statements into evidence pursuant to the “public records exception to [HRE Rule] 803(b)(8).”

It is not enough that there may be indicia of reliability with respect to the hearsay involved. Sua 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.'" Sua, 92 Hawai'i at 71, 987 P.2d at 969 (quoting State v. Lee, 83 Hawai'i 267, 276, 925 P.2d 1091, 1100 (1996) (other citations and brackets omitted).

Thus, while HRE Rule 803 states that the exceptions set forth therein "are not excluded by the hearsay rule, even though the declarant is available as a witness[,] " "[t]he Hawai'i Constitution requires [a] declarant['s] unavailability for most rule 803 hearsay admitted against [the] accused. . . . As a condition of admissibility, the prosecution must attempt to produce the declarant as a witness for face-to-face confrontation and cross-examination." Addison M. Bowman, Hawai'i Rules of Evidence Manual § 803-1[2][A] at 8-21 (3d ed. 2006).

Third, even were the written statement considered "nontestimonial" evidence, under Fields this court must require adherence to the unavailability requirement in Sua. See Fields, 115 Hawai'i at 512-16, 168 P.3d at 964-68. That Respondent failed to establish the unavailability of the declarant is not contested. In that regard, the 1992 case of State v. Ofa, 9 Haw. App. 130, 828 P.2d 813 (1992), is inconsistent with both Wallace (Ofa holding a log of intoxilyzer calibrations admissible under "public records and reports exception to the hearsay rule set

forth in [HRE] Rule 803(b)(8)(B)"', id. at 135, 828 P.2d at 816, and with Sua (Ofa adopting view that "unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding"), id. at 138, 828 P.2d at 818.

Based on the foregoing I believe this case merits further review.

A handwritten signature in black ink, appearing to read "Grant", is written in a cursive style.