CONCURRING OPINION BY ACOBA, J.

I would hold that (1) the confrontation clause of the Hawaiʻi Constitution, article I, sections 5 and 14, is implicated where a witness appears at trial for cross-examination, but is unable to remember the subject matter of his or her out-of-court statement; (2) in this case, the statement, "My boyfriend beat me up," is non-testimonial hearsay, and, thus, the confrontation clause of the Hawaiʻi Constitution requires a showing of the "unavailability" of the declarant[1] and that the statement "'bear[s] adequate indicia of reliability[,]'" Sua II, 92 Hawaiʻi at 71, 987 P.2d at 969 (quoting State v. Moore, 82 Hawaiʻi 202, 223, 921 P.2d 122, 143 (1996) (quoting State v Ortiz, 74 Haw. 343, 361, 845 P.2d 547, 555-56 (1993) (citing Roberts, 448 U.S. at 65))); and (3) the admission of that statement does not violate the confrontation clause because both parts of the test are satisfied in the instant case.

Accordingly, I concur in the result only.[2]

[1] Although the Supreme Court has held subsequent to Ohio v. Roberts, 448 U.S. 56 (1980), that a showing of unavailability is not required for certain hearsay exceptions, inasmuch as this court may extend the protections of the Hawaiʻi Constitution beyond federal standards, State v. Sua, 92 Hawaiʻi 61, 73, 987 P.2d 959, 971 (1999) (Sua II), "this court has remained resolute that, under the confrontation clause of the Hawaiʻi 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." Id. at 71, 987 P.2d at 969 (internal quotation marks, brackets, and citations omitted).

[2] I agree with the majority, insofar as it concludes that (1) the initial statement made by the complainant, "[M]y boyfriend beat me up," is admissible as an excited utterance; (2) the more detailed statement made by the complainant was not an excited utterance; and (3) ultimately, the admission of the complainant's initial statement did not violate the confrontation clause of the Hawaiʻi Constitution. Majority opinion at 13-14.

I.

On March 27, 2010, Respondent/Defendant-Appellant Kenneth Delos Santos (Respondent) was charged by complaint with abuse of a family or household member, Hawaiʻi Revised Statutes (HRS) § 709-906 (Supp. 2008).[3] The charge arose from an incident occurring on March 26, 2008. Prior to trial, the Family Court of the First Circuit (the court) held a Hawaiʻi Rules of Evidence (HRE) Rule 104 hearing.

At the hearing, the complainant testified that Respondent was her boyfriend and that they were living together in a hotel on March 26, 2008. The complainant further testified that she did not remember anything that happened on that night, including calling the police or filing a written statement. Officer Jason Kubo (Officer Kubo) testified on behalf of Petitioner/Plaintiff-Appellee State of Hawaiʻi (the prosecution). According to Officer Kubo, on March 26, 2008, at approximately 1:07 in the morning, he responded to an "argument type call" "[s]hortly after the call came in." Upon arriving at the hotel room, he found that the complainant was "clearly in a state of fear and crying." Officer Kubo testified that he spoke with the complainant "immediately" upon arriving and she "said that her

[3] HRS § 709-906 provides in relevant part:

> (1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member[.] . . .
>
> For the purposes of this section, "family or household member" means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit.

boyfriend beat her up." When asked if that was specifically what she said, Officer Kubo answered:

> A. Yes -- well, after speaking with [the complainant] and getting the full facts and circumstances, . . . she said she was arguing with [Respondent] about some other matters and while in the room he struck her once in her face hitting her in the jaw with enough force to cause her to fall.
>
> While on the ground, [the complainant] actually said that while lying on the ground[,] . . . he had stomped on her right thigh several times causing pain.

As to the foregoing oral statements, the court preliminarily determined at the hearing that the prosecution had laid the proper foundation for the excited utterance exception to hearsay.

At trial, the prosecution called the complainant as a witness. The complainant again testified that she did not remember anything that happened on that night, including calling the police or filing a written statement. When the complainant was asked on cross-examination, why she was unable to remember the night of the alleged incident, she stated that "[she] drink[s] a lot." She testified that, on that night, she did not remember how much she drank, but that she had "started off at the hotel and then [drank] at a bar." The last thing she remembered was being at the bar.

Officer Kubo's testimony at trial differed somewhat from his testimony at the hearing. Officer Kubo testified that he arrived at the hotel after responding to an "argument-type call" at approximately 1:05 a.m. According to Officer Kubo, when he arrived at the room, he met the complainant and "immediately noticed that [the complainant] was really shaken, crying and appeared to be in a lot of pain" because "[s]he was limping."

The prosecution then asked Officer Kubo, "Upon your first initial contact with [the complainant], what if anything did she say to you?" Defense counsel objected on the grounds that Officer Kubo's testimony constituted hearsay and that the prosecution had failed to lay the proper foundation for the excited utterance exception. Defense counsel further contended "that even if the [c]ourt allow[ed] the witness to testify [as] to excited utterance, it will be a violation of [Respondent's] right to confront the witness[.]" Defense counsel stated that because the complaining witness "doesn't remember anything[,] . . . essentially, she's not available for cross-examination even though she's physically present." The court permitted voir dire and direct examination resumed. According to Officer Kubo, he had asked her "what happened" and the complainant responded, "[M]y boyfriend beat me up." Officer Kubo explained that he had asked her that question because of "the apparent pain that she was in and also for officer safety reasons[.]"

II.

Because I agree that the initial statement made by the complainant, "[M]y boyfriend beat me up," is admissible as an excited utterance,[4] I discuss further whether the admission of that statement violates Respondent's right to confrontation under the Hawaiʻi Constitution.

Prior to the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004), the determination of whether the

[4] As stated, I agree with the majority that the more detailed statement provided to Officer Kubo was not admissible.

admission of a hearsay statement of an unavailable declarant violated the confrontation clause of the Hawaiʻi Constitution was governed by a two-prong test set forth in Roberts, 448 U.S. at 65. In Roberts, the Supreme Court held that "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.'" Id. According to Roberts, "reliability [could] be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." Id.

As explained by this court, subsequent to Roberts, however, the Supreme Court held in several cases that a showing of unavailability is not required for certain hearsay exceptions. See State v. McGriff, 76 Hawaiʻi 148, 156, 871 P.2d 782, 790 (1994) (explaining that the "Supreme Court [] has held that the sixth amendment confrontation clause does not necessitate a showing of unavailability for evidence falling within certain hearsay exceptions") (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). But 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." McGriff, 76 Hawaiʻi at 156, 871 P.2d at 790 (citations omitted). Thus, under our confrontation clause jurisprudence, this court has "remained resolute that under the confrontation clause of the Hawaiʻi 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 II, 92 Hawaiʻi at 71, 987 P.2d at 969 (brackets omitted).

Accordingly, this court's adaptation of the Roberts test has been explained as follows:

> [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. (quoting Moore, 82 Hawaiʻi at 223, 921 P.2d at 143 (quoting Ortiz, 74 Haw. at 361, 845 P.2d at 555-56 (citing Roberts, 448 U.S. at 65))). This court has acknowledged that "'[u]navailability may be demonstrated by a showing of loss of memory.'" Id. (quoting State v. Apilando, 79 Hawaiʻi 128, 137, 900 P.2d 135, 144 (1995) (citing Tsuruda v. Farm, 18 Haw. 434, 438 (Haw. Terr. 1907))) (emphasis, ellipsis, and brackets omitted). Additionally, "reliability" can be demonstrated 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. (brackets, internal quotation marks, and citation omitted).

Then, in Crawford, 541 U.S. at 68, the Supreme Court overruled Roberts, insofar as it applied to testimonial hearsay. According to Crawford, the history behind the Sixth Amendment supported two important inferences. "First, the 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." Id. at 50. Crawford stated that the history of the Sixth Amendment led to the second proposition "that the Framers would not have allowed 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." Id. at 53-54. Crawford noted that Supreme Court cases have "remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Id. at 59 (footnote omitted).

Crawford ruled that, "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Id. at 68. With regard to nontestimonial hearsay, Crawford explained that it would be "wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law-as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." Id.

In State v. Fields, 115 Hawaiʻi 503, 516, 168 P.3d 955, 968 (2007), this court held that, "[t]o the extent that our cases have predicated the admissibility of testimonial hearsay on conformance with the now-abandoned 'reliability' test set forth in Roberts, Crawford invalidates them." (Emphasis omitted.) Fields adopted the test for the admissibility of testimonial hearsay, to the effect that, "where a hearsay declarant's unavailability has been shown, the testimonial statement is admissible for the truth of the matter asserted only if the defendant was afforded a prior opportunity to cross-examine the absent declarant about the statement." Id. (citing Crawford, 541 U.S. at 68). With respect to non-testimonial hearsay, however, this court acknowledged that Davis v. Washington, 547 U.S. 813, 821 (2006), placed non-testimonial hearsay "beyond the reach of the federal confrontation clause." Fields, 115 Hawaiʻi at 516, 168 P.3d at 968. However, because Crawford afforded the states flexibility with respect to non-testimonial hearsay, see supra, Fields expressly "reaffirm[ed] Roberts' continued viability with respect to nontestimonial hearsay." Id.

The foregoing indicates that our versions of Roberts and Crawford apply in instances where the declarant is unavailable at trial for cross-examination. In my view, under this court's confrontation clause jurisprudence, a declarant who is physically present at trial but unable to recall the subject matter of his or her hearsay statement must be deemed unavailable for cross-examination at trial, at least as to that statement. If a declarant is unavailable for cross-examination, then we must

next determine whether the hearsay statement sought to be admitted is testimonial or non-testimonial in nature. Where the statement is testimonial, the statement may not be admitted unless the "hearsay declarant's unavailability has been shown," and even then, "only if the defendant was afforded a prior opportunity to cross-examine the absent declarant about the statement." Id. (citing Crawford, 541 U.S. at 68). On the other hand, if the statement is non-testimonial, the statement may not be admitted unless the prosecution "demonstrate[s] the unavailability of[the] declarant[,]" and that the statement "bear[s] adequate indicia of reliability." Sua II, 82 Hawaiʻi at 71, 987 P.2d at 969 (internal quotation marks and citations omitted). In this case, the complainant was unable to recall the subject matter of her statement. Thus, I go on to consider whether the statement, "[M]y boyfriend beat me up," was testimonial or non-testimonial in nature.[5]

III.

A.

In Davis, the Supreme Court consolidated Davis v. Washington, No. 05-5224, and Hammon v. Indiana, No. 05-5705. The Court determined whether statements made to law enforcement personnel during a 911 call or at the scene were "testimonial" and therefore, subject to the requirements of the confrontation clause of the Sixth Amendment. Davis, 547 U.S. at 817. In Davis

[5] The majority, on the other hand, maintains that a declarant is available for cross-examination, even if he or she is unable to recall the subject matter of his or her out-of-court statement. See discussion infra. Thus, according to the majority, the confrontation clause is not implicated in the instant case inasmuch as the majority maintains that the declarant was available for cross-examination notwithstanding her memory loss.

v. Washington, No. 05-5224, the relevant statements were made to a 911 emergency operator. When the operator asked the caller, Michelle McCottry (McCottry), what was going on, McCottry replied, "He's here jumpin' on me again." Id. She stated that he was "usin' his fists." Id. During the call, the operator learned that Davis had "run out the door" after he had hit her. Id. at 818 (brackets omitted). The operator informed McCottry that the police would first check the area for Davis, and then come and talk to her. Id.

The police arrived within four minutes of the 911 call and observed McCottry in a shaken state as she frantically gathered her belongings and children so that they could leave the residence. Id. The police also noticed "fresh injuries on her forearm and her face[.]" Id. (internal quotation marks and citations omitted). "The State charged Davis with felony violation of a domestic no-contact order." Id. At trial, the State's only two witnesses were the police officers who had responded to the 911 call. Id. Although the police officers were able to testify that McCottry's injuries appeared to be recent, they were unable to testify as to the cause of those injuries. Id. at 18-19. McCottry did not appear to testify at the trial and a recording of McCottry's conversation with the 911 operator was admitted over Davis' objection based on the confrontation clause of the Sixth Amendment. Id. at 19.

In Hammon v. Indiana, No. 05-5705, the police responded to a reported domestic disturbance. Id. When the police arrived at the residence of Amy and Hershel Hammon, they found Amy on the

front porch, "appearing 'somewhat frightened,' but she told them that 'nothing was the matter[.]'" Id. (some internal quotation marks and citation omitted). Amy gave the police permission to enter the home where they observed a gas heater emitting flames and pieces of broken glass on the ground in front of the unit. Meanwhile, Hershel "told the police that he and his wife had 'been in an argument' but 'everything was fine now' and [that] the argument 'never became physical.'" Id. (some internal quotation marks and citation omitted). While one of the officers remained with Hershel, the other officer spoke with Amy in the living room. Id.

After providing her account, Amy filled out a "battery affidavit" in which she handwrote the following: "Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter." Id. at 820 (internal quotation marks and citation omitted). Hershel was subsequently charged with domestic battery and with violating his probation. Id. Amy did not appear at Hershel's bench trial. Id. "The State called the officer who had questioned Amy, and asked him to recount what Amy told him and to authenticate the affidavit." Id. "Hershel's counsel repeatedly objected to the admission of this evidence." Id. "Nonetheless, the trial court admitted the affidavit as a present sense impression, and Amy's statements as excited utterances[.]" Id. (internal quotation marks and citations omitted).

In assessing whether the statements admitted in Davis, No. 05-5224, and Hammon, No. 05-5705, violated the defendants' right to confrontation under the Sixth Amendment, the Court stated that "[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." Id. at 821. The Court held that "[s]tatements 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." Id. at 822. On the other hand, statements "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." Id.

With respect to McCottry's statements in Davis, No. 05-5224, the Court concluded "that the circumstances of McCottry's interrogation objectively indicate[d] its primary purpose was to enable police assistance to meet an ongoing emergency." Id. at 828. The Court reasoned that (1) McCottry had spoken about the events as they were actually happening as opposed to describing past events, id. at 827 (brackets, emphasis and citation omitted), (2) "McCottry's call was plainly a call for help against bona fide physical threat[,]" id., (3) "the nature of what was asked and answered[,] . . . viewed objectively, was such that the elicited statements were necessary

to be able to resolve the present emergency, rather than simply to learn . . . what had happened in the past[,]" id. (emphasis omitted), and (4) a certain lack of formality was evidenced by the fact that "McCottry's frantic answers were provided . . . in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe[,]" id.

The Court noted however, that "a conversation which begins as an interrogation to determine the need for emergency assistance" could "evolve into testimonial statements[.]" Id. at 828 (internal quotation marks and citation omitted). According to the Court, in Davis, No. 05-5224, for example, the emergency appears to have ended once "the operator gained the information needed to address the exigency of the moment . . . (when Davis drove away from the premises)." Id. When the 911 "operator then told McCottry to be quiet, and proceeded to pose a battery of questions[, i]t could readily be maintained that, from that point on, McCottry's statements were testimonial[.]" Id. at 828-29. However, the Court made clear that it was "asked to classify only McCottry's early statements identifying Davis as her assailant," and not the later statements. Id. at 829.

With respect to the statements in Hammon, No. 05-5705, the Court reached the opposite conclusion. The Court determined that the statements were testimonial in nature because "[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime-which is, of course, precisely what the officer should have done." Id. at 830 (emphasis omitted). According to the Court,

the testimonial nature of the statements was clear because (1) "the interrogation was part of an investigation into possibly criminal past conduct[,]" id. at 829; (2) "[t]here was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything," and in fact, "[w]hen the officers first arrived, Amy told them that things were fine, and there was no immediate threat to her person[,]" id. at 829-30 (citations omitted); and (3) "[w]hen the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in Davis) 'what is happening,' but rather, 'what happened[,]'" id. at 830.

B.

The statement in the instant case, "[M]y boyfriend beat me up," is non-testimonial in nature because it was "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation [was] to enable police assistance to meet an ongoing emergency." Id. at 822. Conversely, the circumstances did not objectively indicate that the question, "[W]hat happened?" was asked for the "primary purpose of . . . establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution." Id. At the hearing, Officer Kubo testified that he spoke with the complainant "immediately" and she said "that her boyfriend beat her up." According to Officer Kubo's testimony, he asked the complainant "what happened" because of "the apparent pain that she was in and also for officer safety reasons[.]" Having been

confronted by the complainant who was in a state of fear, crying, and seemingly in pain, his initial question was necessary to resolve a present emergency situation.

As in Davis, No. 05-5224, "the nature of what was asked and answered[,] . . . viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn . . . what had happened in the past[,]" for the purposes of prosecution. Id. at 827. Furthermore, like Davis, No. 05-5224, the complainant's emotional state indicated a lack of formality in the question which elicited the response, "[M]y boyfriend beat me up." See id. (noting the lack of formality as evidenced by the fact that "McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe").

Unlike the facts from Hammon, No. 05-5705, here it is not evident from "the circumstances that the [initial question] was part of an investigation into possibly criminal past conduct[.]" Id. at 829. The complainant did not tell the police "that things were fine[.]" Id. at 829-30 (citation omitted). To the contrary, according to Officer Kubo, the complainant was crying and in a state of fear. Therefore, the officers had reason to believe that there was an "immediate threat to her person." Id. at 830. Based on the foregoing, the circumstances objectively indicate that the initial question asked by Officer Kubo was to "enable police assistance to meet an ongoing

emergency." Id. at 822. Thus, that statement was non-testimonial hearsay.

IV.

Having determined that the complainant's initial statement in the instant case is non-testimonial hearsay, the confrontation clause of the Hawaiʻi Constitution requires a showing that the complainant was both unavailable and that the statement bore adequate indicia of reliability. See supra. Here, "[a]lthough [the complainant] was present at trial, [she] was unable to recollect any substantive elements of [her prior statement] and, therefore, was 'unavailable' by virtue of [her] loss of memory." Sua II, 92 Hawaiʻi at 73, 987 P.2d at 971 (citation omitted). At the HRE Rule 104 hearing, the complainant testified that she was unable to remember the specific statements admitted in the instant case. According to the complainant, (1) she did not "remember calling the police" on March 26, 2008, and (2) she did not remember "writing a statement for the police." More importantly, at trial, when asked on direct examination what happened on March 26, 2008, the complainant responded "I don't remember." When asked whether she "remember[ed] writing a statement for the police[,]" she responded, "I don't remember." When defense counsel had the opportunity to cross-examine the witness, the complainant testified that she did not remember because she "drink[s] a lot." She testified that she remembered drinking "at the hotel and then at the bar," but the last thing she remembered was being at the bar. When defense counsel asked the complainant if that was all

she could remember, the complainant responded, "That's all I remember." Based on the foregoing, the witness was unavailable.

Turning to the second part of our adaptation of the Roberts test, the statement, "[M]y boyfriend beat me up," bore adequate indicia of reliability inasmuch as "reliability may be inferred without more" by the fact that the statement "falls within a firmly rooted hearsay exception[,]" id. at 71, 987 P.2d at 969, here, the excited utterance exception. Having met both parts of the Roberts test, the admissibility of the statement, "[M]y boyfriend beat me up," did not violate Respondent's right to confrontation under the Hawaiʻi Constitution.

V.

In Fields, the majority held that "a trial court's admission of a prior out-of-court statement does not violate the Hawaiʻi Constitution's confrontation clause where the declarant appears at trial and the accused is afforded a meaningful opportunity to cross-examine the declarant about the subject matter of that statement." Fields, 115 Hawaiʻi at 528, 168 P.3d at 980 (emphasis added). Accordingly, in the instant case, Respondent argued on appeal that under Fields, he did not have a "'meaningful' opportunity to cross-examine the [c]omplainant because . . . the [c]omplainant could not remember anything about the incident."

The majority acknowledges that "[n]either this court nor the United States Supreme Court has specifically determined whether a witness who . . . testifies that she cannot remember the subject matter of her out-of-court statements or making her

prior statements 'appears for cross-examination' under Crawford or affords the accused 'a meaningful opportunity' to cross-examine the declarant under Fields." Majority opinion at 37-38. The majority then holds that a declarant who is merely physically present at trial for cross-examination satisfies the confrontation clause even if he or she cannot remember the subject matter of his or her statements. See id. at 39.

In support of its holding, the majority argues that (1) its holding is supported by "United States Supreme Court precedent, which this court relied on to interpret the Hawaii Constitution's confrontation clause in Fields," id. at 40, (2) "courts in other jurisdictions applying Crawford have held that a testifying witness is available for cross-examination despite a nearly total lapse in memory[,]" id. at 45, and (3) "the policies outlined in Fields are not undermined in this case[,]" id. at 49. Hence, in the instant case, the majority extends Fields further and ignores Fields' reference to a "meaningful opportunity to cross examine the declarant about the subject matter of the statement." Fields, 115 Hawaiʻi at 528, 168 P.3d at 980.

According to the majority, "[u]nder Fields, the relevant inquiry is whether the [c]omplainant 'appeared at trial and was cross-examined about her statement.'" Majority opinion at 37 (quoting Fields, 115 Hawaiʻi at 517, 168 P.3d at 969 (brackets omitted) (emphasis added). I respectfully disagree with what, in my view, is an unwarranted extension of Fields and a failure to adhere to precedent regarding the confrontation

clause of the Hawaiʻi Constitution. I would hold that the confrontation clause of the Hawaiʻi Constitution is implicated where a hearsay declarant is physically present at trial, but unable to remember the subject matter of his or her out-of-court statement.

VI.

A.

Preliminarily, in support of its holding, the majority cites to several Supreme Court cases which, as in Fields, are immaterial insofar as they do not implicate the established jurisprudence construing our state constitution's confrontation clause. Moreover, the assertion that other jurisdictions have reached similar conclusions is wholly irrelevant to Respondent's confrontation claim, which is premised on Hawaiʻi's constitution. The majority states that, "in Fields, this court adopted Crawford as this jurisdiction's test for whether a witness appears for cross-examination at trial," and that, "[t]herefore, case law of the United States Supreme Court and other jurisdictions applying Crawford is not 'wholly irrelevant[.]'" Majority opinion at 40 n.14 (quoting concurring opinion at 18).

However, this case is concerned with the federal constitution only insofar as it establishes the minimal protection which must be afforded under our own confrontation clause. State v. Quino, 74 Haw. 161, 170, 840 P.2d 358, 362 (1992) (stating that "'as long as we afford defendants the minimum protection required by federal interpretations of the Fourteenth Amendment to the Federal Constitution, we are

unrestricted in interpreting the constitution of this state to afford greater protection'" (quoting State v. Texeira, 50 Haw. 138, 142 n.2, 433 P.2d 593, 597 n.2 (1967) (brackets omitted))). In fact, "this court [has] not hesitate[d] to extend the protections of the Hawaiʻi Constitution beyond federal standards." Sua II, 92 Hawaiʻi at 73 n.8, 987 P.2d at 971 n.8. Notably, for example, although the Supreme Court has held subsequent to Roberts that a showing of unavailability is not required for certain hearsay exceptions, it bears repeating that "this court has remained resolute that under the confrontation clause of the Hawaiʻi 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." Id. at 71, 987 P.2d at 969 (brackets, internal quotation marks, and citations omitted).

Furthermore, under this court's precedent interpreting the Hawaiʻi Constitution, the proposition that the mere physical presence of a hearsay declarant at trial does not take the defendant out of the realm of protection afforded him or her by the confrontation clause has been established. In Sua II, the prosecution offered the grand jury transcript of a witness after the witness stated that he could not remember the testimony that he provided to the grand jury. Id. at 65, 987 P.2d at 963. The defendant objected to its admission on the ground that the defendant had not been afforded an opportunity to cross-examine the witness regarding the substance of his grand jury testimony. Id. at 65-66, 987 P.2d at 963-64. The circuit court allowed the witness' grand jury testimony to be read to the jury, pursuant to

the hearsay exception for prior statements made by witnesses. Id. at 66, 987 P.2d at 964.

Although the defendant was physically present at trial, this court did not hold that by virtue of such presence, the confrontation clause of the Hawaiʻi Constitution was not implicated. Contrarily, this court went on to apply the two-prong test from Roberts. It was determined that "[t]he first prong of the Roberts test was satisfied" because "[a]lthough [the hearsay declarant] was present at trial, [he] was unable to recollect any substantive elements of his grand jury testimony and, therefore, was 'unavailable' by virtue of his loss of memory." Id. at 73, 987 P.2d at 971 (emphases added) (citation omitted).

In analyzing the second prong of Roberts, Sua II determined that the "grand jury testimony [fell] within a 'firmly rooted hearsay exception,' as 'past recollection recorded,' and therefore [bore] an adequate indicia of reliability[.]" Id. (citation omitted). Accordingly, Sua II concluded that "the testimony should satisfy the confrontation clause." Id. As a means of "ensur[ing] the highest standard of protection of [the defendant's] constitutional right of confrontation," this court went on to decide "whether [the hearsay declarant's] grand jury testimony bore 'particularized guarantees of trustworthiness[,]'" even though under Roberts, the confrontation clause is satisfied where the declarant is deemed unavailable and the statement bears sufficient indicia of reliability. Id. (emphasis added).

The majority argues that although Sua II applied our version of Roberts, even though the witness was present at trial for cross-examination, "Fields established that a 'fair reading of Sua [II] indicates that this court rejected [the defendant's] confrontation clause argument on two independent and dispositive, but coequal grounds: (1) both prongs of the Roberts test were met; and (2) [the defendant] had a sufficient opportunity for cross-examination." Majority opinion at 51 n.16 (emphasis added). In Fields, the majority argued that Sua II, 92 Hawaiʻi at 75, 987 P.2d at 973, held that "'[i]nasmuch as [the hearsay declarant's] grand jury testimony met both requirements of the Roberts test, and [the defendant] was able to cross-examine [the declarant] regarding his failure to remember the alleged incident, we cannot say that the admission of [the declarant's] grand jury testimony violated [the defendant's] right to confrontation.'" Fields, 115 Hawaiʻi at 526, 168 P.3d at 978. Notably, United States v. Carey, 647 A.2d 56 (D.C. 1994), which Sua II cited to in support of the proposition that the defendant had a sufficient opportunity to cross-examine the declarant, would be contradictory to Sua II's formulation of our version of the Roberts test, under which the unavailability prong could be satisfied by a showing of the declarant's loss of memory. The same facts which would make the declarant "unavailable" under Sua II's interpretation of the Roberts test would also make the declarant available for cross-examination under Carey. The two grounds on which the majority purports Sua II was decided cannot co-exist. If the facts of Carey were dispositive in Sua II, the

first prong of this court's version of the Roberts test could not have been satisfied. In my view, the conclusion in Sua II, that the "unavailability" prong of our version of Roberts applied, must be viewed as paramount to the observation that the declarant in that case was present and subject to cross-examination at trial. It is apparent that Sua II's statement that the defendant in that case had a sufficient opportunity for cross-examination did not vitiate the fact that Sua II's discussion in that regard was employed to confirm this court's holding that both prongs of the test adapted from Roberts were satisfied; not to supplant that holding.

Moreover, Sua II did not state that a hearsay declarant's mere physical presence at trial satisfied the confrontation clause in and of itself. In fact, Sua II did not treat the hearsay declarant as "available for cross-examination" as argued in Fields and contended to by the majority today. In Sua II, this court explained that "[w]e have recognized that the hearsay rule and the confrontation clause are 'generally designed to avoid similar evils; however, it is not correct to surmise that the overlap of the two doctrines of law is so complete that the confrontation clause is nothing more than a codification of the hearsay rules of evidence.'" 92 Hawaiʻi at 70-71, 987 P.2d at 968-69 (quoting Apilando, 79 Hawaiʻi at 131-32, 900 P.2d at 138-39 (quoting State v. Faafiti, 54 Haw. 637, 639, 513 P.2d 697, 700 (1973))). This court noted that "'[c]ommentators have recognized that the confrontation clause encompasses a greater right than an evidentiary rule of exclusion or inclusion and that satisfaction

of one does not necessarily result in compliance with the other. Id. at 71, 987 P.2d at 969 (quoting Apilando, 79 Hawai i at 131-32, 900 P.2d at 138-39). But Sua II explained, while [this court] ha[s] repeatedly recognized the importance of the right of confrontation, we have nonetheless held that a declarant's hearsay may be admitted at trial even though the declarant is unavailable for cross-examination. Id. (citations omitted). Sua II thus stated that in resolving the foregoing issue, [t]his court has repeatedly followed the test established in Roberts, 448 U.S. at 65[.] Id.

This court next proceeded to undertake a lengthy discussion regarding the two-prong test, ultimately concluding that both prongs of that test were satisfied. See id. at 72-74, 987 P.2d at 971-73. If the defendant s mere physical presence at trial was dispositive, as the majority holds in the instant case, Sua II s analysis regarding the two-prong test is a lengthy and preliminary discussion amounting to dicta -- Roberts should not have been addressed. Likewise, if, as the majority contends, Fields held that the hearsay declarant s physical appearance at trial renders the confrontation clause irrelevant, Fields would not have engaged in a lengthy discussion as to whether the defendant s cross-examination was meaningful or sufficient. See infra.

It is apparent that to read Sua II s reference to the defendant s sufficient opportunity to cross-examine the hearsay declarant as more than a circumstantial fact[,] would render Sua II internally inconsistent. Fields, 115 Hawai i at 554, 168 P.3d

at 1007 (Acoba J., dissenting). As indicated, Sua II applied both the two-prong test stemming from Roberts and treated that declarant as if he were "unavailable" for cross-examination. 92 Hawaiʻi at 71, 987 P.2d at 969 (stating that this court "ha[s] nonetheless held that a declarant's hearsay may be admitted at trial even though the declarant is unavailable for cross-examination"). The foregoing cannot be reconciled with an interpretation of Sua II as holding as equally dispositive, the fact that the defendant in that case had the opportunity to cross-examine the hearsay declarant.

If, as the majority suggests in the instant case, the confrontation clause is not implicated where a declarant is present at trial for cross-examination, a demonstration of the declarant's loss of memory would not satisfy the unavailability prong; rather, "unavailability" under our versions of Roberts or Crawford would be irrelevant in such instances. In sum, this court's confrontation clause jurisprudence necessarily contemplates reaching the two-pronged tests stemming from Roberts and Crawford, where the hearsay declarant is physically present at trial but suffers from a loss of memory. Clearly, nothing in Sua II suggests that the confrontation clause of the Hawaiʻi Constitution is not implicated where the hearsay declarant is merely physically present at trial for cross-examination, as the majority holds in the instant case.

Additionally, the majority's assertion that the mere presence of the hearsay declarant in Sua II satisfied the confrontation clause of the Hawaiʻi Constitution ignores Sua II's

express acknowledgment that although a witness may be physically present, "'[u]navailability[, under our version of Roberts,] may be demonstrated by a showing of loss of memory.'" Sua II, 92 Hawaiʻi at 73, 987 P.2d at 971 (quoting Apilando, 79 Hawaiʻi at 137, 900 P.2d at 144 (citing Tsuruda, 18 Haw. at 438 (ellipsis and brackets omitted) (emphasis in original))).

In Fields, the majority attempted to resolve this by stating that it was concluding only that the hearsay declarant in Fields "was available for cross-examination" notwithstanding her loss of memory. Fields, 115 Hawaiʻi at 524, 168 P.3d at 976 (citing id. at 548, 168 P.3d at 1000 (Acoba, J., dissenting)). The Fields majority "emphasize[d], however, that [it was] not conclud[ing] that [the hearsay declarant] was constitutionally 'available'" under our versions of the two-pronged test derived from Roberts and Crawford, "because that finding is precluded by her claimed loss of memory, in accordance with Sua [II]." Id. (emphasis omitted). Fields undeniably reaffirmed that under Sua II, a hearsay declarant's loss of memory renders him or her "unavailable" for the prosecution as a witness under our versions of the Roberts and Crawford tests.

Notwithstanding the foregoing, under the majority's holding today, a declarant is deemed unavailable at trial for cross-examination only if he or she is not physically present at trial. However, under Sua II and under Apilando and Tsuruda, discussed supra, a declarant is deemed "unavailable" where he or she is present at trial to testify but lacks memory as to the subject matter of the hearsay statement. Moreover, despite the

majority's disagreement, Sua II necessarily requires that the confrontation clause inquiry not end with the hearsay declarant's mere physical presence at trial for cross-examination, and Fields confirmed this view.

In any event, even assuming arguendo, that Sua II "rejected [the defendant's] confrontation clause argument on two independent and dispositive, but coequal grounds[,]" majority opinion at 51 n.16, this court has held in other cases that the unavailability prong of Roberts may be satisfied by a showing of the declarant's loss of memory. See e.g. Apilando, 79 Hawaiʻi at 137, 900 P.2d at 144 (stating that "[u]navailability may be demonstrated by a showing of a declarant's . . . loss of memory" (emphasis and citations omitted)); Tsuruda, 18 Haw. at 438 (stating that "[t]he unavailability of a witness may result from his . . . loss of memory).

As discussed, this court's precedent that the "unavailability" prong of our adaptation of Roberts applies where a hearsay declarant is physically present at trial but suffers from a loss of memory should control in the instant case, as opposed to the majority's now expressed view that the confrontation clause is automatically satisfied in such instances. The majority's view, then, that the confrontation clause is not implicated in such instances, thereby rendering the "unavailability" prong entirely irrelevant, clashes with this court's established interpretation of the confrontation clause of the Hawaiʻi Constitution.

Additionally, it must be noted that, if Sua II was decided on two equally dispositive grounds, see majority opinion DD3 at 51 n.16, the majority does not explain why only one ground was sufficient in Fields and is affirmed as sufficient in this case. With all due respect, the majority's approach in the instant case, as in Fields, is arbitrary. The majority does not answer why the defendant in Fields did not, or the defendant in this case does not, have the benefit of the protection afforded by the other "coequal[ly]" dispositive ground in Sua II, i.e., that our version of the two-pronged test which stems from Roberts was satisfied. The majority here, as in Fields, simply ignores the dispositive ground in Sua II, which was that the two-pronged test stemming from Roberts was satisfied; not that the confrontation clause was not implicated by virtue of the hearsay declarant's mere physical presence on the stand for cross-examination.

B.

In accordance with the foregoing position, the majority maintains that the position taken in this concurrence was "rejected in Fields[,]" asserting that "this court held that Hawaiʻi's confrontation clause 'is not implicated where . . . the hearsay declarant attends trial and is cross-examined about his or her prior out-of-court statement.'"[6] Id. at 51 n.16 (quoting

[6] Notwithstanding the majority's assertion that Fields rejected some of the foregoing arguments, including the proposition that Fields itself was inconsistent with Sua II and the confrontation clause jurisprudence of this court, positions contained in a concurring or dissenting opinion do not necessarily remain so. Compare State v. Maugaotega, 107 Hawaiʻi 399, 114 P.3d 905 (2005), vacated and remanded by Maugaotega v. Hawaii, 549 U.S. 1191 (2007), with State v. Maugaotega, 107 Hawaiʻi at 411, 114 P.3d at 917 (Acoba, J., dissenting, joined by Duffy, J.) (stating that the extended terms of (continued...)

Fields, 115 Hawaiʻi at 517, 168 P.3d at 969). However, the majority incorrectly suggests that Fields resolves the issue in this case. Fields did not resolve the question of whether admission of a hearsay statement as substantive evidence violates the confrontation clause where the declarant is physically present at trial, but suffers from a complete memory loss as to (1) the night the statement was allegedly made, (2) having made the statement, and (3) the subject matter of the statement. In other words, Fields does not stand for the proposition that a hearsay declarant's mere physical presence at trial, notwithstanding his or her loss of memory, satisfies the confrontation clause in and of itself.

First, Fields acknowledged that "[t]he 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.'" 115 Hawaiʻi at 512, 168 P.3d at 964 (quoting Ortiz, 74 Haw. at 360, 845 P.2d at 555 (citing State v. Rodrigues, 7 Haw. App. 80, 84, 742 P.2d 986, 989 (1987))). "For this reason," Fields explained, "the admission of a hearsay statement as substantive evidence of its truth raises special

[6](...continued)
imprisonment should be vacated and the case remanded for resentencing).

Moreover, there is no dispute that judges may adhere to a position set forth in a previous concurring or dissenting opinion. See, e.g., United States v. Ross, 456 U.S. 798, 825 (1982) (Blackmun, J., concurring) (stating that "[m]y dissents in prior cases have indicated my continuing dissatisfaction and discomfort with the Court's vacillation" with respect to the Court's jurisprudence on vehicle searches); Cioffi v. United States, 419 U.S. 917, 918 n.2 (1974) (Douglas, J., dissenting, joined by Brennan, J.) ("In my dissent from Osborn[v. United States, 385 U.S. 323 (1966),] and elsewhere, I have set forth my view that even prior judicial approval cannot validate intrusions into constitutionally protected zones of privacy for the seizure of mere evidentiary material[.]") (Citation omitted.)

problems whenever the hearsay declarant is unavailable for meaningful cross-examination on the witness stand." Id. (internal quotation marks and citations omitted) (emphasis added). The Fields majority stated that, "[a]s is intuitively obvious, the present matter turns on whether, given the circumstances, [the defendant] was afforded a meaningful opportunity to cross-examine [the hearsay declarant] about her prior out-of-court statement." Id. at 524, 168 P.3d at 976 (emphases added).

Fields was not inconsistent with this court's acknowledgment in other Hawaiʻi confrontation clause cases that "chief among the interests secured by the confrontation clause is the right to cross-examine one's accuser." McGriff, 76 Hawaiʻi at 155, 871 P.2d at 789 (citing Roberts, 448 U.S. at 63); accord Sua II, 92 Hawaiʻi at 70, 987 P.2d at 968. Moreover, this court has explained that cross-examination is the defendant's primary means of confronting witnesses against him. See, e.g., State v. Peseti, 101 Hawaiʻi 172, 180, 65 P.3d 119, 127 (2003) (stating 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)). In other words, "[t]he main and essential purpose of the confrontation is to secure for the opponent the opportunity for cross-examination." 5 J. Wigmore, Evidence in Trials at Common Law § 1395, at 150 (3d ed. Chadbourn rev. 1974) (emphasis omitted). It is not surprising, then, that Respondent asserts he was denied a "meaningful opportunity" to cross-examine the

complainant, in violation of his right to confrontation under the Hawaiʻi Constitution. See supra.

Indeed, Fields indicates it is "intuitively obvious[,]" under our confrontation clause jurisprudence, that where a hearsay declarant is physically present at trial for cross-examination, but suffers from a loss of memory, whether or not the confrontation clause is satisfied "turns on whether . . . [the defendant] was afforded a meaningful opportunity to cross-examine [the hearsay declarant] about her prior out-of-court statement." 115 Hawaiʻi at 524, 168 P.3d at 976. In that connection, Fields engaged in a lengthy analysis of the hearsay declarant's cross-examination, stating that "[o]n cross-examination, however, [the hearsay declarant] willingly and informatively responded to virtually all of the questions posed by Fields' counsel." Id. at 523, 168 P.3d at 975. In Fields, the majority asserted that although the complaining witness claimed memory loss as to her prior statement,

> [she] was able to recall that (1) [the defendant's friend] was present during the incident, and (2) during the incident she was "laying on [the defendant's] surfboard" while it was positioned "between the table and the chair" and that she threatened to sit on it and break it if [the defendant] left the premises. She further testified, on cross-examination, that her memory loss as to other portions of the incident could have been caused by the fact that she drank "a lot" of beer on the evening of the incident in question.

Id. Following the foregoing recitation of the complaining witness' cross-examination testimony, the Fields majority stated that, "we hold that the admission of [the complaining witness'] out-of-court statement did not violate Hawaiʻi's confrontation clause inasmuch as [the defendant] was afforded a sufficient opportunity to cross-examine [the complaining witness] about her

prior statement at trial."[7] Id. at 523-24, 168 P.3d at 975-76 (emphasis added). The majority reasoned that "[t]he trier of fact was provided with adequate information to test the credibility and veracity of [the complaining witness'] prior statement" because the jury could have "reasonably inferred that (1) [the complaining witness'] drunken state rendered her prior statement inaccurate or unreliable, and/or (2) [the complaining witness] was not an innocent victim but an aggressive participant in the incident who, while angry at [the defendant], gave a false statement to the police." Id. at 523, 168 P.3d at 975.

If, under Fields, the confrontation clause is not implicated where the hearsay declarant is physically present at trial for cross-examination, the Fields majority would not have, and should not have, engaged in the foregoing analysis of the cross-examination of the hearsay declarant. Thus, Fields requires a determination as to whether the cross-examination was "meaningful," or at least "sufficient" to satisfy the confrontation clause. If the cross-examination in Fields was merely "sufficient," the cross-examination in the instant case surely was not. The only testimony pertaining to the complainant's hearsay statement in this case was as follows:

> Q [DEFENSE COUNSEL]. Now, . . . I'd like to turn your attention to March 26th, 2008.
> What happens at approximately 1 a.m. in the morning? What, if anything, happens on that date?
> A. I don't remember.
> Q. Do you remember calling the police on that date?
> A. I don't remember.

[7] In my view, in Fields, the cross-examination was neither sufficient nor meaningful inasmuch as "[n]othing in [the declarant's] testimony, either on direct or cross-examination, correspond[ed] to [the officer's] testimony about [the] accusatory hearsay statement." Fields, 115 Hawaiʻi at 560, 168 P.3d at 1012 (Acoba J., dissenting).

> Q. Do you remember writing a statement for the police?
> A. I don't remember.
> . . . .
> Q. Now, I'd like to turn your attention to March 26th, 2008. You just testified that you don't remember as to what happened?
> A. No. Correct.

In relevant part, the cross-examination of the complainant was as follows:

> Q. [Complaint], you say you don't remember. Why don't you remember?
> A. I drink a lot. I've had this happen to me before. . . .
> Q. Okay. So you drank a lot. Do you have any idea how much you drank that night?
> A. I don't remember.
> Q. But you do remember beginning the night drinking?
> A. Yes.
> . . . .
> Q. Okay. Where were you drinking?
> A. It started off at the hotel and then at the bar. And the last thing I remember, we were at the bar.
> Q. That's all you remember?
> A. That's all I remember.

Unlike the complaining witness in Fields, who was able to remember parts of the incident, including the presence of the defendant's friend during the incident, and having threatened to break the defendant's surfboard, the complainant in the instant case was unable to remember anything that occurred on the night in question. The trier of fact was not provided with any "information to test the credibility and veracity of [the complainant's] prior statement." Id. In fact, the trier of fact was not provided with any information even remotely related to the subject matter of the statement.

C.

In my view, "[t]he question is not whether a defendant is guaranteed a 'successful cross-examination,' Sua II, 92 Hawaiʻi at 75, 987 P.2d at 973, but whether the opportunity afforded to

cross-examine a witness is a real one or not[,]" Fields, 115 Hawaiʻi at 548, 168 P.3d at 1000 (Acoba J., dissenting). Where a hearsay declarant is unable to remember (1) any of the events which occurred on the night the alleged statement was made, (2) the subject matter of the alleged hearsay statement, and (3) having made such a statement, there is no "real" or "sufficient," much less "meaningful" opportunity for cross-examination. Accordingly, in the instant case, the majority further "strips any significance from the phrase 'meaningful opportunity to cross-examine[,]'" thereby "render[ing] cross-examination on the hearsay statement meaningless, rather than meaningful." Id. at 560, 168 P.3d at 1012 (Acoba J., dissenting).

Finally, assuming arguendo, that Fields does not require "meaningful cross-examination," Fields indicates at the very least that cross-examination sufficient to satisfy the confrontation clause requires that the declarant be able to recall the subject matter of his or her statement. See id. at 526 n.13, 168 P.3d at 978 n.13 (stating that "the dispositive question becomes whether the witness can nevertheless recall the subject matter of the statement, notwithstanding the loss of memory as to the statement itself") (emphasis added). Because the complainant in this case was unable to recall the subject matter of her out-of-court statement, she cannot be deemed to have appeared for cross-examination such that the confrontation clause was not implicated.

VII.

A.

The majority in fact concedes that "Fields is ambiguous regarding whether a witness must recall the subject matter of her statement[.]" Majority opinion at 39. According to the majority, however, "[this court's] adoption [in Fields] of Crawford[,] as the test for whether a witness 'appears at trial for cross-examination'" "resolves this ambiguity." Id. (citation omitted). The majority maintains that Respondent's argument that Fields indicates that "'the dispositive question becomes whether the witness can nevertheless recall the subject matter of the statement, notwithstanding the loss of memory as to the statement itself'" "is not persuasive because language in Fields also supports concluding that a witness need not recall the subject matter of her statements to appear for cross-examination at trial[.]" Id. at 38 (quoting Fields 115 Hawaiʻi at 526 n.13, 168 P.3d at 978 n.13).

Preliminarily, this court did not "adopt" Crawford in Fields. Rather, this court was required to follow the test set forth in Crawford regarding the admissibility of testimonial statements of an unavailable declarant. In Fields, the majority explained that "Crawford fundamentally alters our own analysis of article I, section 14 of the Hawaiʻi Constitution[.]" 115 Hawaiʻi at 516, 168 P.3d at 968. The Fields majority read Crawford to

> unequivocally require that the admissibility of testimonial hearsay be governed by the following standard: where a hearsay declarant's unavailability has been shown, the testimonial statement is admissible for the truth of the matter asserted only if the defendant was afforded a prior

> opportunity to cross-examine the absent declarant about the statement.

Id. (citing Crawford, 541 U.S. at 68) (emphasis added).

Fields determination that the Hawai i confrontation clause is not implicated where. . . the hearsay declarant attends trial and is cross-examined about his or her prior out-of-court statement[,] was based onthis court s interpretation of Crawford. See id. at 517, 168 P.3d at 969. According to the Fields majority, Crawford le[ft] no room for doubt 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 about that statement. Id. Fields based that conclusion on a footnote in Crawford which stated 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. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. Id. (quoting Crawford, 541 U.S. at 59 n.9). But, as discussed supra, Fields indicates that such appear[ance] for cross-examination, id. sufficient to satisfy the confrontation clause requires cross-examination that is meaningful, and that the defendant be able to recall the subject matter of his or her statement. Here, neither is satisfied. Moreover, with respect to footnote 9 in Crawford, a declarant who suffers from a loss of memory at trial cannot defend or explain his or her prior out-of-court statement.

B.

The foregoing indicates that Fields is ambiguous precisely because, on the one hand, Fields indicated that "Hawaiʻi's confrontation clause . . . is not implicated where . . . the hearsay declarant attends trial and is cross-examined about his or her prior out-of-court statement." Id. Yet, on the other hand, Fields also indicated that "cross-examination" requires "a meaningful opportunity to cross-examine the declarant about the subject matter of that statement[.]" Id. at 528, 168 P.3d at 980; see also id. at 526 n.13, 168 P.3d at 980 n.13. Simply favoring one of the ambiguous statements does not, as the majority maintains, resolve Fields' ambiguity, or render Respondent's argument based on the other statement unpersuasive. See majority opinion at 38-39.

Notwithstanding its acknowledgment of the foregoing ambiguity, the majority states that it "reject[s]" an interpretation of Fields that requires that cross-examination sufficient to satisfy the confrontation clause be meaningful and about the subject matter of the statement. Id. at 39. In support of its rejection, the majority reasons that its "conclusion is supported by United States Supreme Court precedent, the precedent of other jurisdictions applying Crawford, and the policies espoused in Fields." Id. at 39-40. The majority maintains that because this court has "relied on Crawford in determining whether a witness appears for cross-examination at trial[,] . . . the Supreme Court's construction of the federal confrontation clause is persuasive[.]" Id. at 40.

To reiterate, this case is concerned with the federal constitution only insofar as it establishes the minimal protection which must be afforded under our own confrontation clause. Beyond that "this court [has] not hesitate[d] to extend the protections of the Hawaiʻi Constitution beyond federal standards." Sua II, 92 Hawaiʻi at 73 n.8, 987 P.2d at 971 n.8. We have departed from Supreme Court precedent in favor of affording the citizens of Hawaiʻi broader protection under the Hawaiʻi confrontation clause. See supra. The majority's adoption of the federal approach regarding the confrontation clause significantly diminishes the protections afforded under our state constitution and invites inconsistent and unjust consequences from the uneven application of the law. As discussed below, the majority's holding today creates two alternative and irreconcilable bases for "cross-examination," thereby further injecting arbitrariness into criminal trials.

VIII.

A.

It must be emphasized that in the instant case, the statement, "[M]y boyfriend beat me up," was admitted into evidence for its substantive truth. HRE Rule 802.1(1) (1993) similarly permits the admissibility of a prior inconsistent statement as substantive evidence. However, such admissibility requires, inter alia, that "[t]he declarant is subject to cross-examination concerning the subject matter of the declarant's statement." HRE 802.1(1).

The commentary notes that "[b]ecause the witness is subject to cross-examination, the substantive use of his prior inconsistent statements does not infringe the sixth amendment confrontation rights of the accused in criminal cases." Commentary to HRE 802.1 (1993). According to the commentary, one is "subject to cross-examination" where he or she "testifie[s] about [the] event and his [or her] prior written statement also describes th[at] event[.]" Id.

Likewise, in State v. Canady, 80 Hawaiʻi 469, 478, 911 P.2d 104, 113 (App. 1996), the ICA rejected United States v. Owens, 484 U.S. 554, 561 (1988), insofar as it concluded that under the federal counterpart to HRS 802.1(1), a witness is "subject to cross-examination" when he or she "'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." Canady stated:

> 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 [Federal Rules of Evidence (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.

80 Hawaiʻi at 480, 911 P.2d at 115.

Canady further concluded that "HRE Rule 802.1(1) requires more of the witness than just that he or she be 'placed on the stand, under oath and respond willingly to questions.'" Id. (quoting Owens, 484 U.S. at 561) (brackets omitted).

Accordingly, the ICA held that in order for a hearsay statement to be admissible as substantive evidence, HRE Rule 802.1(1) requires "that the witness be subject to cross-examination about the subject matter of the prior statement, that is, 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[.]" Id. at 480-81, 911 P.2d at 115-16. State v. Eastman, 81 Hawaiʻi 131, 137, 913 P.2d 57, 63 (1996), confirmed that HRE 802.1(1) "requires . . . 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[.]"

"Canady and Eastman reveal the flaw in Owens. A witness without memory is the virtual equivalent of an absent witness." Addison M. Bowman, Hawaiʻi Rules of Evidence Manual § 802.1-2[1] (2006 ed.) (emphasis added). Thus, "the policy basis of the hearsay exception for prior statements of witnesses -- that they can be cross-examined about relevant events -- hardly extends to the admission of hearsay relating material they no longer remember." Id. As explained, where "the witness can be cross-examined about the event and the statement, the trier or fact is free to credit [the witness'] present testimony or his prior statement in determining where the truth lies." Id. (quoting commentary to HRE 802.1) (emphasis added).

The commentary to HRE 802.1 suggests that the same definition of the phrase "subject to cross-examination" should be

employed for purposes of the confrontation clause. Sua II corroborated this precept, as evidenced by the following language:

> "[The defendant] 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 Hawaiʻi at 481, 911 P.2d at 116. In the present matter, [the witnesses and hearsay declarants] denied ever having made the relevant statements . . . . Therefore, unlike the witness in *Canady*, who was rendered 'unavailable' by virtue of her memory loss, [the declarants] were both 'available' for cross-examination. Accordingly, while we agree with [the defendant's] reading of *Canady*, it is inapposite to the present matter."

Fields, 115 Hawaiʻi at 557-58, 168 P.3d at 1009-10 (Acoba, J., dissenting (quoting Sua II, 92 Hawaiʻi at 77, 987 P.2d at 975 (emphasis in original))). Similarly, immediately following the explanation of what is envisioned by the phrase "subject to cross-examination," the commentary to HRE 802.1 states that "[b]ecause the witness is subject to cross-examination, the substantive use of his prior inconsistent statements does not infringe the sixth amendment confrontation rights of accused in criminal cases."

In Eastman, this court likewise held that both "constitutional and trustworthiness concerns over admitting [a hearsay declarant's] prior inconsistent statements . . . into evidence" are satisfied where "the cross-examination [gives the defendant] the opportunity to have [the declarant] fully explain to the trier of fact why her in-court and out-of-court statements [are] inconsistent, which, in turn, enable[s] the trier of fact to determine where the truth [lies]." 81 Hawaiʻi at 139, 913 P.2d at 65 (emphasis added); see also State v. Clark, 83 Hawaiʻi 289,

294, 926 P.2d 194, 199 (1996) (stating that under HRE 802.1 "'the substantive use of [a hearsay declarant's] prior inconsistent statements does not infringe the sixth amendment confrontation rights of accused in criminal cases,'" because the "'witness can be cross-examined about the event and the statement'" (quoting Eastman, 81 Hawaiʻi at 136, 913 P.2d at 62)) (citations omitted). To reiterate, "[a] witness without memory is the virtual equivalent of an absent witness[,]" and thus, the precept underlying the admission of hearsay -- that witnesses can be "cross-examined about relevant events -- hardly extends to the admission of hearsay relating material they no longer remember." Addison M. Bowman, Hawaiʻi Rules of Evidence Manual § 802.1-2[1] (2006 ed.).

"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' . . . satisf[ies] the confrontation clause requirement as well." Fields, 115 Hawaiʻi at 558-59, 168 P.3d at 1010-11 (Acoba J., dissenting). Moreover, "[o]ur 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.'" Id. at 559, 168 P.3d at 1011 (Acoba J., dissenting) (quoting Sua II, 92 Hawaiʻi at 77, 987 P.2d at 975 (citation omitted (brackets and ellipsis in original))).

As discussed, in accordance with the foregoing, Fields likewise stated that in instances where a hearsay declarant suffers from a loss of memory, "the dispositive question becomes whether the witness can nevertheless recall the subject matter of the statement, notwithstanding the loss of memory as to the statement itself." Id. at 526 n.13, 168 P.3d at 978 n.13 (emphasis added). Fields further declared that where "the accused has the opportunity to elicit the witness' testimony as to the subject matter of the statement on cross-examination at trial, the accused's right of confrontation has been satisfied." Id. (emphasis added). According to Fields, then, the Hawaiʻi Constitution requires that the declarant must be able to at least recall the subject matter of the statement itself. Thus, in my view, the majority's holding that the confrontation is satisfied even in instances where the "declarant cannot remember either making the statements or the content of the statements," majority opinion at 46 (citation omitted) (emphasis added), is an unwarranted disregard of the precedent of this court. In justifying its departure from precedent, the majority points only to cases from the Supreme Court and other jurisdictions, all of which, to reiterate, do not control the confrontation clause jurisprudence of the Hawaiʻi Constitution.[8]

[8] The majority states that "the commentary to HRE Rule 802.1, on its own, cannot bind this court's construction of a constitutional provision." Majority opinion at 52 (footnote omitted). The majority plainly ignores that Fields, Clark, and Eastman confirm the commentary.

B.

Ironically, notwithstanding the fact that this jurisdiction has rejected Owens' conclusion that "cross-examination" requires only that the declarant be "'placed on the stand, under oath, and respond[] willingly to questions'" for purposes of HRE Rule 802.1, see Canady, 80 Hawaiʻi at 478, 911 P.2d at 113 (quoting Owens, 484 U.S. at 561), the majority adopts that very definition of "cross-examination" for purposes of the confrontation clause. The majority in fact cites to Owens, in concluding that the confrontation clause is not implicated where the witness is physically present on the stand for cross-examination. See majority opinion at 43-44. Consequently, in this jurisdiction, Owens' interpretation of "cross-examination" has been rejected for purposes of the HRE but accepted for purposes of the Hawaiʻi confrontation clause.

This is plainly inconsistent with both Canady and Eastman, which make clear that "cross-examination" under HRE Rule 802.1 requires "that the witness be subject to cross-examination about the subject matter of the prior statement." Canady, 80 Hawaiʻi at 480-81, 911 P.2d at 115-16; accord Eastman, 81 Hawaiʻi at 137, 913 P.2d at 63. Fields likewise stated that with respect to cross-examination under the confrontation clause, "the dispositive question becomes whether the witness can nevertheless recall the subject matter of the statement, notwithstanding the loss of memory as to the statement itself." Fields, 115 Hawaiʻi at 526 n.13, 168 P.3d at 978 n.13 (emphasis added). Thus, Fields seemingly adopted at least a similar test for determining whether

a witness appears at trial for cross-examination. In the instant case, the majority simply holds that although Fields is ambiguous, "under Crawford, a witness who appears at trial and testifies satisfies the confrontation clause" in and of itself. Majority opinion at 39. Clearly, there is no rational basis for making this distinction in light of our established case law.

C.

The majority's holding establishes in this jurisdiction, two conflicting rules regarding cross-examination depending solely on whether the hearsay statement sought to be admitted amounts to a prior inconsistent statement. In other words, the protection afforded by cross-examination under the confrontation clause of the Hawaiʻi Constitution randomly rests on the hearsay exception advanced for the subject statement. In instances where the prosecution seeks to admit a hearsay statement as substantive evidence and such statement qualifies as a prior inconsistent statement under HRE Rule 802.1(1), the witness must "be subject to cross-examination about the subject matter of the prior statement, that is, 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[.]" Canady, 80 Hawaiʻi at 480-81, 911 P.2d at 115-16. On the other hand, where the prosecution seeks to admit a hearsay statement as substantive evidence which does not amount to a prior inconsistent statement, the defendant need not remember having made the statement or the subject matter of the statement; his or her mere presence on the

stand is sufficient as a basis for admitting the statement. The right to cross-examination, the hallmark of the confrontation clause, is now parceled out on an entirely arbitrary basis. See McGriff, 76 Hawaiʻi at 155, 871 P.2d at 789 (citing Roberts, 448 U.S. at 63).

According to the majority, in the instant case, the complainant was subject to cross-examination although the complainant could not be cross-examined about the subject matter of the statement. Had the complainant in this case made a prior inconsistent statement, the declarant would not be deemed to have been subject to cross-examination because of loss of memory. See Canady, 80 Hawaiʻi at 480-81, 911 P.2d at 115-16. Hence, the same loss of memory results in two conflicting results. The inability to cross-examine the declarant regarding the subject matter of the hearsay statement bars the admission of the statement in one hearsay situation, but the same inability to cross-examine is irrelevant to the admissibility of the statement in another hearsay situation. It is apparent, then, that the right to cross-examination hinges solely on the chance that the prior inconsistent statement exception to the hearsay rule applies.

The foregoing distinction cannot be rationally justified. Indeed, the confrontation clause is not a mere codification of the hearsay rules of evidence. See Apilando, 79 Hawaiʻi at 131, 900 P.2d at 138 (quoting Faafiti, 54 Haw. at 639, 513 P.2d at 700). As noted before, "[c]ommentators have recognized that the confrontation clause encompasses a greater right than an evidentiary rule of exclusion or inclusion[,] and

that satisfaction of one does not necessarily result in compliance with the other." Id. at 132, 900 P.2d at 139 (emphasis added). This court has thus acknowledged that "[t]he Confrontation Clause embodies notions of individual rights far broader than the technical hearsay rules." Id. Paradoxically, under the majority's decision today, the confrontation clause of the Hawaiʻi Constitution provides less protection than the HRE.

With all due respect, the majority contorts the language of our case law and ignores the precedent of this court in an effort to align our confrontation clause with its less protective federal counterpart. The ramifications, however, bode ill for the vitality of Hawaiʻi's confrontation clause and our prior insistence that the right to confrontation secures the defendant's right to an opportunity to cross-examine the declarant regarding the subject matter of his or her prior out-of-court statement.

IX.

The discussion above reveals that under our confrontation clause jurisprudence, a hearsay declarant is not available at trial for cross-examination where he or she is physically present at trial, but unable to remember the subject matter of his or her out-of-court statement. Accordingly, I would hold that the declarant in the instant case was not available for cross-examination. As previously discussed, where a declarant is deemed unavailable for cross-examination at trial, it must be determined whether the hearsay statement was testimonial or non-testimonial in nature. In the instant case,

the statement, "[M]y boyfriend beat me up," was non-testimonial. Additionally, the statement is an excited utterance that is a firmly rooted hearsay exception. Therefore, both prongs of our version of the two-prong test from Roberts are satisfied. Because both prongs were satisfied, the admission of that statement did not violate the confrontation clause of the Hawaiʻi Constitution. Thus, although I disagree with the majority's view of the confrontation clause, I nevertheless concur in the result.[9]

[9] While I reach the same outcome as the majority in the instant case, it is evident that the majority's holding is particularly troubling where the prosecution seeks to admit testimonial hearsay statements. Now, under the majority's position, where the declarant of a testimonial hearsay statement is physically present at trial but suffers from a loss of memory, the confrontation clause is automatically satisfied, without any regard as to whether the defendant had any meaningful, much less "real" opportunity to cross-examine the declarant. According to the majority, the confrontation clause is not even implicated in those instances. Thus, in such cases, the defendant will not be afforded the safeguard that the "defendant was afforded a prior opportunity to cross-examine the absent declarant about the statement." Fields, 115 Hawaiʻi at 516, 168 P.3d at 968 (citing Crawford, 541 U.S. at 68).