DISSENTING OPINION BY ACOBA, J.

I respectfully dissent.[1]

The solitary service of one subpoena on a social worker without physical custody of the subpoenaed witness only eleven days before trial, and three days after Respondent/Plaintiff-Appellee State of Hawaiʻi (Respondent or the prosecution) had already represented to the circuit court of the fifth circuit (the court) in a motion to sever that the subpoenaed witness's presence was "doubtful" for a trial involving an offense

[1] Inasmuch as this court has never held that the efforts of a social worker subpoenaed by the government suffices to satisfy the government's required good faith effort to obtain a witness's presence at trial, I respectfully believe this opinion should be published.

> It is in the nature of stare decisis that, when this court in effect decides matters of first impression, we in fact establish precedent and, therefore, should publish our opinion. When we fail to publish, we depart from the established procedure which lends legitimacy to our decision-making process and also neglect our responsibility to provide guidance to courts, attorneys, and parties. The import of such an act is to make law for one case only, singling it out from all others, a process that can only be described as arbitrary. When there are fundamental reasons for publishing and we are given the opportunity to do so but fail to, we also compel our trial courts and counsel to rely on and employ the precedent established in other jurisdictions when trying cases in our own state.
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> . . .
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> Unless we publish questions presented to us, they will continue to go unaddressed in any authoritative manner, and error may compound in other, similar cases leaving counsel and the trial courts to guess at the law to apply. Therefore, the fact that a majority of the court votes not to publish should not be determinative of the publication question. It is in the order of case law development that discourse on issues not covered in any existing published opinion should be disseminated and made available for examination, consideration, and citation by those similarly affected or interested. Only in the light of open debate [in a published opinion] can the dialectic process take place, subject to the critique of the parties, the bar, the other branches of government, legal scholars, and future courts. The resulting process of analysis and critique hones legal theory, concept, and rule.

State v. Uyesugi, 100 Hawaiʻi 442, 473-74, 60 P.3d 843, 874-75 (2002), app. A (Acoba, J., concurring, joined by Ramil, J.).

punishable by a prison term of twenty years, was a meaningless exercise not reasonably calculated to obtain the complaining witness's presence at trial and, thus, was violative of the defendant's Sixth Amendment right to confrontation under the United States Constitution. The federal constitution violation here is so fundamental and egregious, as to fall below the minimum standard that Respondent "ma[ke] a good-faith effort to obtain [the witness's] presence at trial" as set forth in Barber v. Page, 390 U.S. 719, 725 (1968), and Ohio v. Roberts, 448 U.S. 56, 74 (1980), overruled on other grounds by Crawford v. Washington, 541 U.S. 36, 60-61 (2004). With all due respect, a request for further review by the United States Supreme Court may be warranted. Furthermore, under article I, section 14, the parallel confrontation clause of the Hawaiʻi Constitution,[2] Respondent has not established that the witness was unavailable under this jurisdiction's standard, which "requires a search equally as vigorous as that which the government would undertake to find a critical witness if it ha[d] no prior testimony to rely upon in the event of unavailability[.]" State v. Lee, 83 Hawaiʻi 267, 278, 925 P.2d 1091, 1102 (1996) (internal quotation marks, citation, and brackets omitted).

I.

The following essential matters, some verbatim, are from the record and the submissions of the parties.

[2] Article I, section 14 of the Hawaiʻi Constitution states, in relevant part, that "[i]n criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against the accused[.]"

A.

On July 6, 2006, Respondent filed a Petition against Petitioner/Defendant-Appellant Arthur Vinhaca (Petitioner) alleging seventeen counts. At a preliminary hearing held on July 25, 2007 (the preliminary hearing), Petitioner's two daughters, Daughter 1 and Daughter 2,[3] testified and were subjected to cross-examination. Subsequently, the Petition was amended twice, with the Second Amended Petition being filed on August 11, 2006.[4]

B.

1.

At the preliminary hearing, Daughter 2 testified first. Daughter 2 stated, in essence, that Petitioner had sexually touched her inappropriately and struck her. Daughter 1 testified second. Daughter 1 also stated that Petitioner had sexually touched her inappropriately. She also testified that Petitioner touched her breasts as part of a "whistle game." On cross-examination, a deputy public defender, an attorney different from Petitioner's trial counsel, asked Daughter 1 to whom she had reported Petitioner's alleged actions. Daughter 1 was also asked how old she was when the "whistle game" first started, with whom

[3] The daughters are identified as "Daughter 1" and "Daughter 2," consistent with the Summary Disposition Order (SDO) of the Intermediate Court of Appeals (the ICA). State v. Vinhaca, No. 28571, 2009 WL 1144934, at *1 (App. Apr. 29, 2009) (SDO).

[4] Count 1 alleged that between December 2002 and December 2003, Petitioner committed the offense of Sexual Assault in the Third Degree. No probable cause was found for count 1. Despite the lack of probable cause as to count 1, it continued to be listed in the Second Amended Petition, which contained seventeen counts. At a hearing for jury selection held on February 5, 2007, the petition was renumbered to exclude count 1, over Petitioner's objection.

it was started, and how long she had been playing it before Petitioner played it with her.

2.

Daughter 2 testified at trial but, in essence, recanted the testimony that she had provided at the preliminary hearing. At the close of direct examination, the deputy prosecuting Attorney (DPA), "[p]ursuant to [Hawaiʻi Rules of Evidence (HRE)] Rule 802.1,"[5] requested that a tape of the testimony given by Daughter 2 at the preliminary hearing be admitted. Over Petitioner's objection, the tape was played for the jury.

Daughter 1 did not testify at trial.

Over Petitioner's objection, Karla Huerta (Huerta), a social worker for the Department of Human Services (DHS), testified that she was "served with a subpoena to bring [Daughter

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[5] HRE Rule 802.1 (1993) provides in relevant part as follows:

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

HRE Rule 613(b) (1993) provides that "[e]xtrinsic 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."

In this case, the testimony of Daughter 2 at the preliminary hearing was admissible as substantive evidence of Petitioner's guilt. Under the HRE, "prior inconsistent statements [can] 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[.]" State v. Canady, 80 Hawaiʻi 469, 480, 911 P.2d 104, 115 (App. 1996) (internal quotation marks and citation omitted).

1] to court for [the] trial." Huerta stated that she had been unable to locate Daughter 1 because Daughter 1 was "on the run." According to Huerta, "[i]n the last several days" prior to trial, "numerous things" had been done to try to "get [Daughter 1] to court[.]" Huerta listed these attempts as follows:

> Yes, we've done numerous things. We've contacted the juvenile – the juvenile justice – or juvenile delinquent program to help see if they've heard of anything, to see if they can put her in the newspaper. They have printed something in the newspaper. We have given them pictures of her to put in the newspaper.
>
> We've gone out to the mother's home, where we've heard she's resided on numerous occasions. We have contacted the schools. We've talked – we've asked many people in the community. We've talked to police officers. We've phoned them to see if they've seen or heard of her recently because of this court hearing.

On cross-examination, Huerta stated, "I tried to locate [Daughter 1], but I couldn't."

At the close of Huerta's examination, the DPA requested that the preliminary hearing testimony of Daughter 1 be played for the jury, to which Petitioner objected. However, the court stated that "[b]asically, it's just that the witness is unavailable, and there really is nothing to secure the witness'[s] attendance (inaudible). I don't know what more [Respondent] could have done, and the fact that she was a runaway prior to the issue (inaudible). So, objection . . . overruled." At Petitioner's request, the cross-examination portion of the tape was not played.

Petitioner chose not to testify at trial.

After Respondent rested its case, Petitioner orally moved for a judgment of acquittal on all counts. Respondent agreed to the dismissal of counts 5, 6, 7, 15, and 16, and the

court dismissed those counts. The court denied Petitioner's motion as to the remaining counts.

The jury found Petitioner guilty as charged on the remaining counts.[6] In regard to Daughter 1, Petitioner was convicted of one count of Sexual Assault in the First Degree (count 14) in violation of HRS § 707-730(1)(b) (Supp. 2005),[7] one count of Attempted Sexual Assault in the First Degree (count 13) in violation of HRS § 705-500 (1993)[8] and 707-730(1)(b), and five counts of Sexual Assault in the Third Degree (counts 8-12) in violation of HRS § 707-732(1)(b) (Supp. 2005).[9]

II.

Petitioner lists the following questions in his Application for writ of certiorari:

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[6] In regard to Daughter 2, Petitioner was convicted of three counts of Sexual Assault in the Third Degree (counts 1-3) in violation of Hawaiʻi Revised Statutes (HRS) § 707-732(1)(c) (Supp. 2005), and one count of Assault in the Second Degree (count 4) in violation of HRS § 707-711(1)(d) (Supp. 2005).

[7] HRS § 707-730(1)(b) states in relevant part that "[a] person commits the offense of sexual assault in the first degree if . . . [t]he person knowingly engages in sexual penetration with another person who is less than fourteen years old[.]"

[8] HRS § 705-500 provides in relevant part that:

> (1) A person is guilty of an attempt to commit a crime if the person:
> . . . .
> (b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.
> . . . .
> (3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

[9] HRS § 707-732(1)(b) states in relevant part that "[a] person commits the offense of sexual assault in the third degree if . . . [t]he person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person[.]"

> Whether the ICA erred in concluding that
>
> (1) the admission of [Daughter 1's] preliminary hearing testimony did not violate [Petitioner's] right of confrontation where [Daughter 1] did not appear at trial;
> (2) [the court] did not err in finding that [Daughter 1] was unavailable;
> (3) [Petitioner] had an adequate opportunity to cross-examine [Daughter 1] at the preliminary hearing, thus satisfying the requirements of the confrontation clause; and
> (4) the [DPA] did not commit misconduct during closing argument when she argued that [Daughter 2] sounded like the defense attorney in his opening statement.

(Emphasis added.)

Respondent did not file a memorandum in opposition.

Because I find no reversible error with respect to questions 3 and 4, I do not discuss them. I would affirm Petitioner's convictions as to Daughter 2.

III.

A.

As to Petitioner's first question, he contends in his Application that "'[t]he confrontation clause provides two types of protection for a criminal defendant; first, the right to physically face those who testify against him or her[,] and [second,] the right to conduct cross-examination.'" (Quoting State v. Moore, 82 Hawaiʻi 202, 222, 921 P.2d 122, 142 (1996).) (Brackets omitted.) According to Petitioner, Crawford, and State v. Grace, 107 Hawaiʻi 133, 111 P.3d 799 (2002), held that "hearsay statements are admissible . . . only after the prosecution shows that the declarant is truly 'unavailable' to testify and that there has been a prior opportunity to subject the declarant to cross-examination."

B.

The United States Supreme Court held in Crawford 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." 541 U.S. at 68. The Supreme Court explicitly acknowledged that "prior testimony at a preliminary hearing" was testimonial evidence. Id. As such, in order to admit Daughter 1's preliminary hearing testimony into evidence, Respondent in this case had the burden of proving that Daughter 1 was unavailable and that Petitioner had a prior opportunity for cross-examination. Thus, the answer to Petitioner's first question depends on the resolution of his second question in this case.

IV.

A.

As to Petitioner's second question, he argues in his Application that "[i]n order to show unavailability, [Respondent] must make a 'good faith' effort to procure the attendance of the declarant for trial." According to Petitioner, in the approximately eleven days before trial, "[a]lthough Huerta testified to the efforts her office had made to contact [Daughter 1], [Huerta's] testimony was unclear in that she repeatedly referred to 'we'; it is unclear as to what she herself did." (Emphasis added.) Petitioner asserts that "[t]he 'we' could consist of hearsay testimony of other social workers and investigators. Thus, no proper foundation was laid to show that [Respondent] made good faith efforts to establish the

unavailability of [Daughter 1]." On the other hand, Respondent argued in its Answering Brief that "[b]ased upon [Huerta's] testimony [and case law with similar facts to the instant case], this court should conclude that [Respondent] showed a reasonable good faith effort to secure [Daughter 1's] attendance at trial[.]" The ICA concluded that based on Huerta's efforts, the prosecution "established that Daughter 1 was unavailable and that it had made a good faith effort to secure her presence at trial." Vinhaca, 2009 WL 1144934, at *2.

B.

In Barber, the Supreme Court set forth the prosecution's burden of showing that a witness is unavailable. Barber stated that "a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." 390 U.S. at 724-25 (emphasis added). Refining this good-faith standard, the Supreme Court has noted that

> [t]he law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), "good faith" demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.

Roberts, 448 U.S. at 74 (quoting California v. Green, 399 U.S. 149, 189 n.22 (1970) (Burger, C.J., concurring) (citing Barber,

390 U.S. 719)) (internal quotation marks omitted) (emphases added).[10]

In the present case, Respondent did not meet its burden of establishing Daughter 1's unavailability under the good faith standard. I would hold that (1) the ICA gravely erred in treating the actions of Huerta as that of the prosecution, (2) the only evidence provided at trial of Respondent's effort of producing Daughter 1 was a single subpoena issued to her legal guardian eleven days before trial, and (3) considering the severity of the crime charged and Respondent's lack of effort, Respondent did not undertake any reasonable efforts to find Daughter 1, a critical witness, prior to trial despite the fact that it knew Daughter 1's availability was "doubtful" before it even served the subpoena on Huerta. Therefore, the court erred in allowing the preliminary hearing testimony of Daughter 1 into evidence.

V.

A.

First, the fact that Huerta apparently made attempts to locate Daughter 1, in her capacity as a DHS social worker with "legal responsibility," does not show that Respondent made a good faith effort to locate her. In determining good faith efforts, a court looks at the prosecution's efforts and not the efforts of others, in determining good faith. See Roberts, 448 U.S. at 75 (holding that "the prosecution did not breach its duty of

[10] "Crawford did not change the definition of 'unavailability' for Confrontation Clause purposes; pre-Crawford cases on this point remain good law." United States v. Tirado-Tirado, 563 F.3d 117, 123 n.3 (5th Cir. 2009).

good-faith effort" when "the evidence of record demonstrate[d] that the prosecutor issued a subpoena to [witness] at her parents' home[]" not only once, but on five separate occasions over a period of several months) (emphasis added); Barber, 390 U.S. at 724-25 (holding that a witness was not unavailable because the "prosecutorial authorities" had not met their burden of "ma[king] a good-faith effort to obtain [witness's] presence at trial" when "no effort to avail themselves of either of . . . alternative means of seeking to secure [witness's] presence at petitioner's trial" was made) (emphasis added).

Huerta was not an investigator for Respondent, or a detective or police officer. Rather, she "was the case worker for [Daughter 1]." (Emphasis added.) When asked if DHS "ha[d] custody over [Daughter 1]," Huerta replied that, "[i]n fact, [DHS] has permanency[11] over [Daughter 1]." Huerta testified that she was "served with a subpoena on January 25th, 2007, to bring [Daughter 1] to court for [Petitioner's] trial[.]" Huerta explained on direct examination that she was "unable" to bring Daughter 1 to court because Daughter 1 was on "runaway status."

> [Huerta]: A. [Daughter 1] is on the run. She was put in Hale Opio Girl's Group Home Program . . . , but has continued to run away from the program.
> [DPA]: Q. If she's on the – she's on runaway status?
> A. Runaway status, yes.
> Q. Okay. Does runaway status mean that if she's located that police can detain her?
> A. That – she could be detained. She has been detained on one occasion and released back into my custody, but each time she's been released to [DHS] we return her back to the girl's group home, and she runs away within an hour of placement.

(Emphases added.) As noted, the police could have detained

[11] "Permanency" is not explained in the testimony.

Daughter 1 if she was located, and the police had detained her previously. However, there is no evidence that the police were called to locate Daughter 1. Petitioner asserted that "[t]here [was] no definitive showing by an investigator or detective as to . . . efforts" made to locate Daughter 1. (Emphasis added.) Rather, according to Petitioner, "[Respondent] had served the guardian who knew [Daughter 1] could not be located."

Huerta was employed by DHS, an agency distinct from the County of Kauai's Office of the Prosecuting Attorney. As Respondent states, "Huerta testified that she had been served a subpoena, as [Daughter 1's] legal guardian, for [Daughter 1]." (Emphasis added.) In the part of the subpoena for Daughter 1 entitled "name and address of witness," the subpoena lists "P/G [Daughter 1] c/o Carla Huerta @ CPS[.]" Presumably, the letters "P/G" refer to "parent" or "guardian" and "CPS" refers to "Child Protective Services." According to the subpoena for Daughter 1, "service was made at" the "Kauai Judiciary Complex, Lihue, HI[,]" not at Daughter 1's last known address. A "guardian" is "[o]ne who has the legal authority and duty to care for another's person or property[.]" Black's Law Dictionary 774 (9th ed. 2009).

Unlike an investigator, detective, or police officer, Huerta lacked the training, experience, authority and resources that such a law enforcement officer would have had in conducting an investigation as to the whereabouts of a complaining witness. At oral argument, Respondent admitted that it utilizes investigators and detectives to find witnesses and offered no explanation as to why they were not employed in this case.

Respondent also admitted that it was very likely, if not certain, that Huerta, as an employee for DHS, had legal responsibilities over other children during this time. It is reasonable to believe that Daughter 1's friends, family, or people of the community would be less likely to disclose the whereabouts of Daughter 1 or provide crucial information to a social worker than they would have been, had they been questioned by an investigator, detective, or police officer with law enforcement powers.

As the legal guardian of Daughter 1, Huerta was not a part of the prosecution. While her efforts within the short span of eleven days was information available to Respondent, it did not represent the efforts of Respondent itself. See Barber, 390 U.S. at 724-25 ("[A] witness is not 'unavailable' . . . unless the prosecutorial authorities have made a good faith effort to obtain [the witness's] presence at trial.") (Emphasis added.) Although legal guardians have the "duty to care" for children under their guardianship, they are not like investigators, detectives, or police officers, whose job it is to locate a witness on behalf of the prosecution, as cases have indicated.

B.

Second, from all that appears in the record, Respondent's total verifiable effort to secure Daughter 1's attendance at Petitioner's trial was a single subpoena served on Huerta, only eleven days before trial. In connection with the charges involving Daughter 1, Petitioner was convicted of one count of Sexual Assault in the First Degree, one count of

Attempted Sexual Assault in the First Degree, and five counts of Sexual Assault in the Third Degree. Sexual Assault in the First Degree is a class A felony, HRS § 707-730(1)(b), with a maximum sentence of twenty years' imprisonment without the possibility of suspension of sentence or probation, HRS § 706-659 (Supp. 2005). The only evidence Respondent presented to support these counts was the preliminary hearing testimony of Daughter 1.

Considering the severity of the punishment and the fact that Daughter 1 was plainly the "crucial" witness in Respondent's case, "Confrontation Clause concerns are heightened and courts insist on more diligent efforts by the prosecution where a 'key' or 'crucial' witness' testimony is involved." McCandless v. Vaughn, 172 F.3d 255, 266 (3d Cir. 1999). See also, United States v. Foster, 986 F.2d 541, 543 (D.C. Cir. 1993) ("The more important the witness to the government's case, the more important the defendant's right, derived from the Confrontation Clause of the Sixth Amendment"); United States v. A & S Council Oil Co., 947 F.2d 1128, 1133 (4th Cir. 1991) ("Where [a case] involves the government's most crucial witness, the [Confrontation Clause] concerns are especially heightened.") (Citation omitted.); United States v. Quinn, 901 F.2d 522, 529 (6th Cir. 1990) (same); Dorsey v. Parke, 872 F.2d 163, 166 (6th Cir. 1989) ("Where the trial court has curtailed a defendant's cross-examination of a 'star' government witness--as it has done in this case--its ruling must be more carefully scrutinized.") (Citation omitted.); United States v. Lynch, 499 F.2d 1011, 1022-23 (D.C. Cir. 1974) (stating that Confrontation Clause

considerations "are especially cogent when the testimony of a witness is critical to the prosecution's case against the defendant").

1.

Respondent was aware that Huerta did not have physical custody of Daughter 1 because Daughter 1 had run away, yet Respondent did nothing else to locate Daughter 1. On cross-examination, Huerta testified as follows in regard to the subpoena:

> [Petitioner's counsel]: Q. So would you agree that basically the subpoena served on you was never presented to [Daughter 1]?
> [Huerta]: A. Correct.
> Q. And would you agree that you never had an opportunity to confer with [Daughter 1] about the subpoena?
> A. That's correct.
> . . . .
> Q. [When you were served with the subpoena, d]id you tell the process server or sheriff that [Daughter 1] was not with you?
> A. Yes.
> Q. And you got served anyway?
> A. Yeah.

(Emphases added.) In this case, there is no evidence that the prosecution did any more to locate Daughter 1 than make one attempt to serve a subpoena on her through Huerta. The single subpoena in this case can hardly qualify as a "good-faith effort" on the part of Respondent, especially since it was known that Huerta had no physical custody of Daughter 1. See United States v. Harbin, 112 F.3d 974, 976-77 (8th Cir. 1997) (concluding that the government failed to prove that it made good faith effort to locate witness prior to trial, as required for witness's grand jury testimony to be admissible under unavailable declarant exception to hearsay rule when prosecutor stated at preliminary hearing that local police had made unsuccessful attempts to serve

witness with subpoena at her mother's home); Wilson v. Bowie, 408 F.2d 1105, 1107 (9th Cir. 1969) (concluding that witness was not shown to be unavailable when the "only explanation given by the [prosecution] . . . for [the witness's] absence was the prosecution's statement that it had attempted to subpoena [that witness], but that [the witness] was not in court that morning").

2.

Additionally, the fact that Respondent waited until eleven days before the start of trial to serve Huerta, even though it knew that Daughter 1 was on runaway status, was unreasonable under the circumstances. At oral argument, Respondent argued that it did not serve a subpoena earlier because it believed that the court was going to sever the trial. This argument is far from persuasive. Respondent filed its Motion to Sever Trial for Counts 1 Through 8 From Trial From Counts 9 Through 15 (motion to sever) on January 22, 2009. Respondent's declaration stated, in relevant part:

> 7. In preparing for this trial, Counsel learned that [Daughter 1] is on runaway status.
> 8. As of now, it is doubtful that [Daughter 1] will be available for trial on February 5, 2007.
> 9. [Daughter 2], however, is available for trial.
> 10. The State would be obviously severely prejudiced as to Counts 9 through 15 as that victim is currently unavailable to testify.
> 11. However, the State is able and ready to proceed with Counts 1 through 8.
> 12. Therefore, the State asks to sever the trial for Counts 1 through 8 from the trial for Counts 9 through 15 and commence with the trial for Counts 1 though 8 as scheduled.

(Emphases added.) Respondent's subpoena, apparently its only effort to obtain Daughter 1's presence, was served on Huerta on January 25, 2007. Petitioner filed his objection to Respondent's motion to sever on January 26, 2009. The hearing on the motion

to sever was held on February 1, 2007. It is questionable as to why Respondent served Daughter 1's first and only subpoena on Huerta after its motion to sever had already been filed and the prosecution had already represented to the court that Daughter 1 would be "doubtful" for trial as a basis for the motion. Thus, Respondent moved to sever on the ground that Daughter 1 would not be present at trial, before it even attempted to subpoena her. Service of the subpoena on Heurta, only after the prosecution already knew Daughter 1 was doubtful for trial, was truly a meaningless exercise, bereft of any good faith basis.[12]

3.

As noted above, Daughter 1 had run away before, but had been subsequently detained and could have been detained by the police. But the prosecution did not make the reasonable effort of requesting that the police conduct a search for Daughter 1 or

[12] The majority cites State v. Ortiz, 74 Haw. 343, 363, 845 P.2d 547, 557 (1993), overruled on other grounds by State v. Moore, 82 Hawaiʻi 202, 221, 921 P.2d 122, 141 (1996), apparently for the proposition that serving a subpoena satisfies Respondent's "continuing legal obligation to produce Daughter 1 for trial[.]" Majority opinion at 17 n.10. However, the majority's citation to Ortiz is inapposite inasmuch as that case stated that "the prosecution must confirm on the record at the time of trial both the declarant's unavailability and that vigorous and appropriate steps were taken to procure the declarant's presence at trial." 74 Haw. at 363, 845 P.2d at 557 (emphasis added).

It cannot reasonably be said that Respondent's service of a single subpoena to Huerta satisfied its continuing obligation. In the instant case, Respondent did nothing prior to trial to ascertain Daughter 1's availability, except serve a single subpoena on her legal guardian eleven days before trial. As will be discussed infra, the efforts taken by the prosecution in Roberts is an example of the continuous effort necessary to procure a witness's presence at trial. In that case, the prosecution established that it was in contact with the witness's parents four months before trial and served five subpoenas to the witness at her parents' home, which was the witness's last known address, over a period of approximately four months. 448 U.S. at 75. In contrast, Respondent's actions here were not "continuous" inasmuch as it made a single attempt to serve Daughter 1. Manifestly, Respondent's efforts fell woefully short of satisfying a "continuing legal obligation" in this case. Additionally, Respondent's steps in procuring Daughter 1 were anything but "vigorous." Its service of one subpoena most decidedly did not satisfy its continuing obligation to take "vigorous and appropriate" action, as Ortiz required. 74 Haw. at 363, 845 P.2d at 557. Ortiz supports this dissent, not the majority.

that they detain or arrest her despite her past history. Rather, the prosecution apparently relied on a social worker's efforts over a few days before trial.

VI.

A.

The majority repeatedly emphasizes that Respondent did "assign[] an investigator to locate Daughter 1." Majority opinion at 16, 18 n.10. In support, the majority cites to the February 1, 2007 hearing transcript on Respondent's motion to sever, which stated in pertinent part as follows:

> [DPA:] . . . We have actually served the guardian with a subpoena to bring that minor to court. However, we have been informed that she is not being [sic] able to be located right now.
>
> We have an understanding where she is, but it appears that she's kind of in hiding. We have had our investigator go out and try to find her himself, but for your Honor's knowledge, we have actually served the person we needed to serve, which is the CWS –- ah, CSW -- wait CWS worker.

The prosecution's single statement made during this pre-trial hearing, concerning an investigator, is nowhere else repeated, supported, or asserted in this case.

The prosecution did not present any evidence to establish this statement at trial. No investigator was called to testify by the prosecution. The record does not reflect who the investigator was or what steps the investigator undertook. Nor did the prosecution attempt to establish who the investigator spoke to, if anyone. Thus, Respondent's reference to an investigator is completely devoid of any support in the record. Consequently, the reference is not entitled to any weight in determining whether Respondent carried its burden of establishing that its efforts were reasonable.

In his opening brief Petitioner asserted that Respondent's efforts to locate Daughter 1 were insufficient. In its answering brief Respondent did not counter Petitioner's assertion that Huerta was not assisted by a detective or investigator. Rather, Respondent argued that Huerta "and others" made attempts to find Daughter 1. Thus, Respondent did not argue in its answering brief that it had assigned an investigator to locate Daughter 1.

It is also relevant to note that at oral argument on appeal, Respondent took the position that it did not send out investigators to locate Daughter 1. When asked if it was true that the "only thing the [] State did was to serve a subpoena on a social worker who had legal custody but who had said [that Daughter 1] was not in her custody and was a runaway," Respondent replied, "That is correct." MP3: Oral Argument, Hawaiʻi Supreme Court, at 00:32:56 (November 19, 2009), available at http://www.courts.state.hi.us/courts/oral_arguments/archive/oasc28571.html (emphasis added). Also, when asked whether the record reflected why "the prosecutor's office evidently chose to work through the social worker as opposed as through an investigator or police officer," Respondent conceded that "[i]t doesn't." Id. at 00:35:00. Respondent at no point in oral argument took the position that an investigator was "sent out" or attempted to establish that an investigator's actions constituted reasonable efforts.

The record is devoid of any evidence of what an investigator did, and Respondent did not make the assertion at

trial, in its brief, or at oral argument. Given this, the bare statement that the prosecution had its "investigator go out and try to find her himself" is manifestly insufficient to establish that the prosecution "made a good faith effort to obtain [Daughter 1's] presence at trial," Barber, 300 U.S. at 725, or that "[t]he lengths to which the prosecution [underwent] to produce [the] witness" were reasonable, Roberts, 448 U.S. at 74; cf. People v. Starr, 280 N.W.2d 519, 522 (Mich. App. 1979) ("[A] trial judge should require the prosecutor to recite on the record all efforts made to reach the missing witnesses. Such a procedure will not only aid in a trial judge's efforts to make a sound discretionary choice, but prevent uninformed second guessing on the part of appellate courts."). Ultimately, what the majority asserts as to an investigator is neither supported by the evidence, the record, or the prosecution itself, nor even asserted by the prosecution.

Hence, Respondent's bare statement that it had an "investigator go out and try to find her," at the motion to sever hearing has no bearing on weighing the reasonableness of the prosecution's efforts. Contrary to the majority's assertion, then, this, without more, would not amount to more effort than the prosecution undertook in Roberts. See majority opinion at 17-18 n.10. The majority cites to two cases for the proposition that "this court can rely upon an undisputed representation by the prosecutor at a hearing to bolster its conclusion that the prosecution made good faith efforts to locate Daughter 1." Id. at 16 n.9 (citing Hiler v. State, 796 P.2d 346, 349 (Okla. Crim.

App. 1990); Munson v. State, 758 P.2d 324, 333 (Okla. Crim. App. 1988)). These cases are plainly inapposite.

In Hiler, the appellant contended, inter alia, that the admission of a witness's preliminary testimony "deprived him of his right to confrontation" and that "no evidence was introduced to prove that [the witness] was unavailable[.]" 796 P.2d at 349. There, 1) "[the prosecution] sought to admit [the witness's] testimony at trial via transcript, alleging that [the witness] was living in California, was pregnant, and had been instructed by her doctor not to travel[,]" 2) "defense counsel did not object to [the witness's] testimony as being inadmissible per se, but merely asserted that the defense, not the State should have been allowed to introduce such evidence in its case-in-chief[,]" and 3) "the trial court overruled appellant's objection and [the witness's] testimony was read to the jury." Id. (emphases added).

In rejecting the appellant's contentions, Hiler first concluded that the appellant waived the issues for review because "[d]efense counsel . . . failed to specifically object to the admissibility of [the witness's] testimony[.]" Id. Second, that court held that "[n]othwithstanding appellant's waiver . . . , the prosecution's uncontroverted assertion was sufficient to show that [the witness] was unavailable to testify." Id. According to Hiler, the defense counsel did not challenge the admissibility of the witness's testimony because the defense intended to "introduce[] the same [testimony] on behalf of the appellant." Id.

Plainly, this case is inapposite from Hiler because Petitioner preserved his right to challenge the admissibility of Daughter 1's preliminary hearing testimony. Unlike Hiler, Petitioner's counsel did not "fail[] to specifically object to the admissibility of [the witness's] testimony," id., but instead, clearly objected to the introduction of Daughter 1's preliminary testimony at trial. Accordingly, Petitioner did not waive his objection to the admissibility of Daughter 1's testimony.

Second, contrary to the majority's assertions, majority opinion at 16 n.9, Respondent's efforts here, did not go "uncontroverted" as they did in Hiler. In Hiler, the prosecution's efforts to find the witness were not challenged because the appellant sought to use the same preliminary hearing testimony in its case. Rather, the defense "was permitted to reoffer the . . . testimony on behalf of the [appellant] at the close of its own case-in-chief." 796 P.2d at 349. In the instant case, however, Petitioner's counsel clearly objected to the introduction of Daughter 1's preliminary hearing testimony. Petitioner did not seek to, or in fact, introduce the preliminary hearing testimony in its case. Indeed as distinguished from Hiler, Petitioner disputed that Respondent made a good faith effort to obtain Daughter 1's presence at trial.

Similarly, Munson is also distinguishable from the instant case. In Munson, the prosecution was allowed to introduce a witness's preliminary hearing testimony when (1) the prosecution called a court clerk to "testif[y] that she issued a

subpoena on behalf of the prosecution . . . to [the witness]'s last known address in Omaha, Nebraska," (2) the prosecution moved the trial court to issue "a material witness certificate . . . to secure [the witness]'s attendance at trial," (3) a judge "issued a summons compelling [the witness]'s appearance[,]" which "was 'returned without service, as after diligent search and inquiry, the within named . . . [witness] . . . [was] NOT FOUND[,]'" and 4) the prosecution "informed the trial court that the Chief Prosecutor in Omaha, Nebraska, stated that [the witness]'s father told Nebraska authorities that his son had got[ten] married, moved away, and that he had not heard from him." 758 P.2d at 333 (capitalization in original).

Munson did not refer to an "undisputed representation[.]" Majority opinion at 16 n.9. The prosecution's representation in Munson was not merely a bare assertion that an investigator was sent out. In contrast to Munson, Respondent in this case did not move the court to name Daughter 1 as a material witness, ask the court to issue a summons compelling Daughter 1 to testify at trial, or submit evidence as to what Daughter 1's mother had said, if anything. Obviously Munson did not rely on an "undisputed representation."[13]

[13] The majority states that "although the dissent correctly observes that Munson is distinct, the Oklahoma Criminal Court of Appeals [in Hiler] interpreted Munson as supporting the proposition we use it for." Majority opinion at 17 n.9. However, because Hiler is inapposite to this case, so is Hiler's reference to Munson.

B.

Contrary to the majority's argument, this opinion does not advocate any "bright-line" rule regarding the number of days prior to trial a subpoena must be served in order to be reasonable. On the one hand, the majority asserts that a good faith effort is "context-specific[,]" majority opinion at 11 (internal quotation marks and citation omitted), and "determined on a case-by-case basis[,]" id. (citation omitted), but when it infers that Respondent's service of a single subpoena eleven days before trial was reasonable, it inconsistently argues that "[other] courts have held that the prosecution's efforts were reasonable when attempting to serve the witness at a similar time before trial[,]" id. at 17 n.10 (citations omitted). The two cases that the majority cites, Pillette v. Berghuis, 630 F. Supp. 2d 791, 804 (E.D. Mich. 2009) and State v. Black, 621 N.E.2d 484, 487 (Ohio App. 1993), are obviously distinguishable from the instant case and only underscore the prosecution's lack of effort in the instant case.

In Pillette, approximately two weeks before trial, the prosecution, in order to serve the subpoena on the witness, (1) "visited the apartment where she lived at the time of the incident, but discovered that she had moved away without leaving a forwarding address[,]" (2) "spoke to other witnesses, who were her friends, and found out that [the witness] had moved [to another location,]" (3) conducted a "LEIN check" which revealed another address, (4) "went to the address, but discovered that it no longer existed because it was a trailer that had moved[,]"

(5) "spoke with a postmaster who gave a post office box, but no physical address[,]" (6) "conducted [] computer searches through . . . a reporting system, to see if any police contact had been made with her[,]" and "called and left a message" with the witness's father. 630 F. Supp. 2d at 804. In light of these efforts, that court held "that the prosecution . . . made a good faith effort to locate [the witness] and present her at trial" when "the [prosecution] attempted to subpoena [the witness] at her last address, pursued leads concerning forwarding addresses, spoke to her friends and family members, and attempted to determine whether she had any contact with law enforcement[.]" Id. The prosecution in this case clearly did not undertake the several efforts to find Daughter 1 as the prosecution did in Pillette.

Similarly, in Black, that court held that the trial judge had sufficient evidence to find a witness unavailable after the prosecution presented four witnesses, including the witness's mother, to testify that 1) the witness had been "missing for a period of [at least] six months[,]" (2) the witness had not been seen by her mother for several months and her mother "had no idea where [the witness] was currently staying[,]" (3) "[the witness's] dental records had been given to the police[,]" and (4) "a warrant had been issued for [the witness's] arrest, but the police had been unable to locate her." 621 N.E.2d at 487. Unlike in Black, there is no evidence in the record of this case that Respondent contacted the police to conduct the search or had a warrant issued for Daughter 1's arrest as a material witness,

despite the police having been able to apparently pick her up on her prior runaways and to detain her. In light of the circumstances presented above, a single subpoena served eleven days prior to trial was not reasonable in this case.

VII.

Although the Supreme Court in Crawford overruled Roberts, Crawford did not alter the definition of unavailability defined in Roberts, see supra note 10, and therefore, Roberts is relevant. In Roberts, the prosecution admitted into evidence the preliminary hearing testimony of Anita Isaacs (Anita) under the former testimony hearsay exception. To show unavailability, the prosecution called Anita's mother, Amy Isaacs (Mother), as a witness. Mother testified that Anita

> left home for Tucson, Ariz., soon after the preliminary hearing. About a year before the trial, a San Francisco social worker was in communication with [Mother] about a welfare application Anita had filed there. Through the social worker, [Mother] reached [her] daughter once by telephone. Since then, however, Anita had called her parents only one other time and had not been in touch with her two sisters. When Anita called, some seven or eight months before trial, she told her parents that she was traveling outside Ohio, but did not reveal the place from which she called. Mrs. Isaacs stated that she knew of no way to reach Anita in case of an emergency. Nor did she know of anybody who knows where she is.

448 U.S. at 59-60 (internal quotation marks omitted).

The Ohio Court of Appeals reversed the trial court, concluding that "the prosecution failed to make a showing of a 'good-faith effort' to secure the absent witness' attendance, as required by [Barber], 390 U.S. [at] 722-25[.]" Roberts, 448 U.S. at 60. The Ohio Supreme Court affirmed the court of appeals but on other grounds. The Ohio Supreme Court held that the court of appeals erred because "the mere opportunity to cross-examine at a

preliminary hearing did not afford constitutional confrontation for purposes of trial." Id. at 61.

The Supreme Court held the prosecution did not breach its duty of good faith effort where

> the prosecutor issued a subpoena to Anita at her parents' home, not only once, but on five separate occasions over a period of several months. In addition, at the voir dire argument, the prosecutor stated to the court that [defendant] "witnessed that I have attempted to locate, I have subpoenaed, there has been a voir dire of the witness' parents, and they have not been able to locate her for over a year."

Id. at 75 (emphases added). The Supreme Court reasoned that "the prosecution did not breach its duty of good-faith effort[,]" id., because "the service and ineffectiveness of the five subpoenas and the conversation with Anita's mother were far more than mere reluctance to face the possibility of a refusal. It was investigation at the last-known real address, and it was conversation with a parent who was concerned about her daughter's whereabouts." Id. at 76 (emphasis added).

The majority asserts that "[t]he voir dire of Anita's mother is analogous to calling Huerta at trial[,]" majority opinion at 14 n.8, "[Respondent's] efforts before trial exceeded the efforts the prosecutors took in Roberts[,]" id. at 17, and that "[w]hen compared to Roberts, [Respondent's] efforts in this case were reasonable," id. at 18 n.10. In contradiction to these assertions, the record patently establishes that Respondent's efforts were not analogous to Roberts and fell below the standard of reasonableness established in Roberts.

First, the majority's recitation of the facts in Roberts only emphasizes Respondent's lack of diligence in this

case. In Roberts, the prosecution demonstrated through the voir dire of Anita's mother that the prosecutor began speaking with Anita's parents four months before trial, and through its discussions, the prosecution learned that Anita "had left home soon after the preliminary hearing[,] that about a year before the trial" the parents received information that their daughter was in San Francisco, 448 U.S. at 56, and that Anita's parents had "undertaken affirmative efforts to reach their daughter," but "the [parents] and their other children knew of no way to reach Anita even in an emergency[,]" id. at 75. The prosecution also issued a subpoena to the witness's parents' home not only once, but on five separate occasions over a period of several months, and stated to the court that "the [defendant] witnessed that I have attempted to locate, I have subpoenaed, there has been a voir dire of the witness's parents, and they have not been able to locate her for over a year[,]" id.

In contrast, here, Respondent's only attempt to serve Daughter 1 was by way of a single subpoena on Daughter 1's legal guardian eleven days prior to trial. Unlike in Roberts, there is no evidence that Respondent ever had a "conversation with" or a "voir dire" of Daughter 1's parents. Id. at 76, 75. Unlike in Roberts where contact was made with the witness's parents, Respondent relied only on a social worker. Unlike in Roberts, there is no indication that anyone from Respondent's office attempted to make contact with someone close to Daughter 1 within a reasonable time before trial. Finally, as discussed supra, Respondent's action in serving a single subpoena was a

meaningless exercise in light of Respondent's representation to the court that it was "doubtful" Daughter 1 would be available for trial, some three days before it even served the subpoena on Huerta.

Second, the majority's attempt to diminish the importance of the prosecution's service of five subpoenas in Roberts is unpersuasive. The majority states that "the prosecution served three of these subpoenas after it knew Anita did not reside at her mother's residence . . . [and] the remaining two subpoenas were made on November 3 and November 4, 1975." Majority opinion at 17 n.10 (citing Roberts, 448 U.S. at 79-80 & n.3 (Brennan, J., dissenting, joined by Marshall, J. and Stevens, J.)). Serving five subpoenas over a span of several months is evidence that the prosecution remained in contact with Anita's parents and made periodic checks[14] with them to determine if they had any new information on Anita's whereabouts.[15]

[14] In light of the actions taken by the prosecution, the majority's assertion that "the Supreme Court did not establish that the prosecutor made 'periodic checks' with Anita's parents outside of sending subpoenas to their residence[,]" majority opinion at 14 n.8, is incorrect. As discussed supra, the prosecution in Roberts established that (1) "four months prior to the trial the prosecutor was in touch with [Mother] and discussed with her Anita's whereabouts[,]" 448 U.S. at 75, (2) within this four-month period before trial, the prosecution "issued a subpoena to Anita at her parents' home," which was Anita's last known residence, "not only once, but on five separate occasions[,]" id. at 76, and (3) through the discussion with Anita's mother, the prosecution discovered that Anita "had left home soon after the preliminary hearing[,] that about a year before the trial" the parents received information that their daughter was in San Francisco, id. at 56, and that Anita's parents had "undertaken affirmative efforts to reach their daughter[,]" id. at 76. Compared to the prosecution's total efforts in Roberts, Respondent's single subpoena to Huerta in this case was patently insufficient to establish that the prosecution's efforts were reasonable.

[15] Contrary to the majority's assertion, majority opinion at 17-18 n.10, this view is consistent with both the majority and dissenting opinions in Roberts. To reiterate, the majority opinion in Roberts stated that "[t]he evidence of record demonstrates that the prosecutor issued a subpoena to Anita at her parents' home, not only once, but on five separate occasions over a period of several months[,]" 448 U.S. at 76 (emphasis added) and "the

(continued...)

Therefore, the fact that the prosecution subpoenaed Anita's parent five times over the span of several months is relevant, regardless of the fact that the prosecution had learned Anita was not with her mother during the times the last three subpoenas were issued.

Unlike in Roberts, Respondent made a single attempt to subpoena Daughter 1 through Huerta only eleven days before trial. There is no evidence that the prosecution maintained contact with Daughter 1 or her parents, or a case worker, before trial at all. There is no evidence that the prosecution followed up with Daughter 1's parents or verified the efforts that Huerta took after receiving the subpoena.

Third, the majority wrongly asserts that the prosecution "[had] Huerta make numerous efforts to locate Daughter 1[.]" Majority opinion at 16 n.9 (emphasis added); see also id. at 15 ("[T]he service of the subpoena . . . prompted Huerta to take additional efforts to locate Daughter 1.") (Emphases added.); id. at 17 n.10 ("[T]he prosecution served Huerta to prompt her to take additional efforts to locate Daughter 1."); id. at 21 ("[T]he prosecution's subpoena to Huerta prompted Huerta to take additional efforts to locate Daughter

[15](...continued)
prosecutor stated to the court that [the defendant] 'witnessed that I have attempted to locate, I have subpoenaed, there has been a voir dire of the witness' parents, and they have not been able to locate her for over a year," id. Justice Brennan's dissenting opinion stated that "the [prosecution's] total effort to secure Anita's attendance at respondent's trial consisted of the delivery of five subpoenas in her name to her parents' residence, and three of those were issued after the authorities had learned that she was no longer living there." Id. at 79 (Brennan, J., dissenting, joined by Marshall, J. and Stevens, J.) (first emphasis in original, second emphasis added). As both the majority's and the dissent's recitation of the facts suggests, the prosecution in Roberts made periodic contacts with Anita's parents' residence over a span of several months to deliver the subpoena.

1."). There is no evidence that the efforts Huerta took to find Daughter 1 were at the direction of the prosecution. Furthermore, the majority's assertion implies that Respondent was in contact with Huerta prior to the issuance of the subpoena and that the issuance of the subpoena "prompted[,]" id. at 15, 21; see also id. at 17 n.10, Huerta to make "additional efforts[,]" id. at 15, 17 n.10, 21. Again, there is no evidence that Respondent had made any contact with Huerta prior to issuing her the subpoena with respect to obtaining Daughter 1's presence. Thus, there is no evidence that the subpoena represented the "direction" to make "efforts" that were in "addition" to prior ones. The majority's statements in this regard are at best questionable.

Fourth, the majority erroneously likens Huerta to Anita's mother in Roberts, id. at 15, whom the Supreme Court determined was "a parent who was concerned about her daughter's whereabouts." Roberts, 448 U.S. at 76. The majority states that Huerta's testimony that "prior to being served, she was unable to locate Daughter 1 after she ran away from her placement at the [girls home,]" is evidence that Huerta was a concerned person. Majority opinion at 15. But examination of Huerta's testimony bears little support for this assertion. Although Huerta was Daughter 1's case worker, the extent of her prior contacts, her relationship, or her responsibility for Daughter 1 is not established in the record. Huerta testified that Daughter 1 had run away from the girls group home on four separate occasions between October 21, 2006, and February 6, 2007. She also related

that Daughter 1 was last picked up on January 16, 2007, and that she had "run away within [the] hour." Although Huerta made efforts to find Daughter 1 after being subpoenaed, these efforts were made only a few days before trial, after Daughter 1 had already been missing for several weeks. Huerta did not testify to making any efforts to locate Daughter 1 after Daughter 1 ran away on January 16, 2007, prior to being served with the subpoena. This is inconsistent with the majority's assertion that Huerta was as "concerned about Daughter 1's whereabouts," as the parents in Roberts were about Anita.

Moreover, the majority's opinion that Huerta was concerned with "Daughter 1's whereabouts" contradicts the majority's argument that the service of the subpoena was to "prompt[] Huerta to take additional efforts to locate Daughter 1." Majority opinion at 15; See also id. at 17 n.10 (arguing that Respondent "served Huerta to prompt her to take additional efforts to locate Daughter 1"). A person truly "concerned with Daughter 1's whereabouts" would not need to be "prompted" or "instructed" to conduct a search to locate Daughter 1 via a subpoena. A concerned parent would have begun searching for Daughter 1 as soon as she was found missing on January 16, 2007. Huerta's connection with Daughter 1 was because of her job as a DHS social worker and as Respondent admitted at oral argument, Huerta likely had many children under her "legal responsibility" at this time. Although Huerta may have had "legal responsibility" for Daughter 1, plainly, Huerta was not like the "concerned parent" in Roberts. Thus, the majority's assertion

that "Huerta was a concerned parent" similar to Anita's mother in Roberts is incorrect.

VIII.

In sum, serving one subpoena on Daughter 1 through Huerta, the "legal guardian" of a witness who Respondent was ostensibly attempting to locate eleven days before trial, after Respondent had already indicated Daughter 1 was "doubtful" for trial, does not demonstrate that "the prosecutorial authorities [] made a good-faith effort to obtain [her] presence at trial[,]" Barber, 390 U.S. at 724-25; and was plainly not reasonable, Roberts, 448 U.S. at 74; Green, 399 U.S. at 189 n.22 (Burger, C.J., concurring). It is difficult to believe that Respondent would have been so delinquent in its attempts to find Daughter 1, had her favorable preliminary hearing testimony not been available to it. If Respondent did not have the preliminary hearing transcript, it is highly unlikely that Respondent would have simply left it up to a social worker to find Daughter 1 in eleven days in a prosecution for an offense punishable by twenty years' imprisonment. Manifestly, Respondent did not undertake efforts to locate Daughter 1, the critical witness, as it reasonably would have, had it not already had the preliminary hearing transcript.

IX.

Additionally, federal courts have "treat[ed] the Confrontation Clause unavailability inquiry as identical to the unavailability inquiry under Rule 804(a)(5) of the Federal Rules of Evidence (FRE), which defines a witness as being unavailable

when he is absent from the hearing and the proponent of [his] statement has been unable to procure [his] presence by process or other reasonable means." Tirado-Tirado, 563 F.3d at 123 n.4 (emphasis added) (internal quotation marks and citation omitted). See also, United States v. Aguilar-Tamayo, 300 F.3d 562, 565 (5th Cir. 2002) ("Unavailability must ordinarily also be established to satisfy the requirements of the Confrontation Clause."). FRE Rule 804(a) states, in part, "'Unavailability as a witness' includes situations in which the declarant . . . (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means." Thus, "[t]he language of [FRE] Rule 804 (a)(5) suggests that 'other reasonable means' besides subpoenas must be tried before a witness can be found unavailable." United States v. Mann, 590 F.2d 361, 367 (1978). In this case, Respondent points to no evidence that any "other reasonable means" were attempted by Respondent in order to locate Daughter 1. Thus, Respondent has not satisfied its burden of proving unavailability.

X.

A.

Because the prosecution has failed to meet the minimum burden of showing that a witness is unavailable under the United States Constitution, an analysis under the Hawaiʻi Constitution would be unnecessary. However, inasmuch as the majority

determines that Respondent satisfied the unavailability test adopted by this court, majority opinion at 18-25, I address this issue.

This court has held that in "determining the admissibility at trial of former testimony as an exception to the rule against hearsay, as constrained by the constitutional right of confrontation, . . . the declarant must be presently unavailable despite the good faith efforts of the prosecution to obtain his or her presence." Lee, 83 Hawaiʻi at 276, 925 P.2d at 1100 (emphasis added). Lee "expressly adopted" the standard set forth in Lynch that "establishment of the prosecution's reasonable efforts to secure the presence of the declarant 'require[s] a search equally as vigorous as that which the government would undertake to find a critical witness if it has no prior testimony to rely upon in the event of unavailablity[.]'" Id. at 278, 925 P.2d at 1102 (quoting Moore, 82 Hawaiʻi at 224, 921 P.2d at 144 (quoting Lynch, 499 F.2d at 1023)) (some brackets in original). In Moore, this court further clarified the definition of a good faith attempt, stating that, "to establish this good faith attempt, the prosecution must confirm on the record at the time of trial both the declarant's unavailability and that vigorous and appropriate steps were taken to procure the declarant's presence at trial." 82 Hawaiʻi at 223, 921 P.2d at 143 (citations omitted).

In Lee, the issue was whether the trial court erred in admitting the former testimony of the state's two key witnesses - Kyon Minn (Kyon) and Jae Kuen Lee (Jae Kuen). In attempting to

prove the unavailability of the witnesses, the State presented an affidavit from an investigator employed by the Office of the Prosecuting Attorney and testimony from a police detective. Lee, 83 Hawaiʻi at 271, 925 P.2d 1095.

In regard to Kyon, the investigator stated that he was informed by Kwi Ha, another witness, that Kwi Ha had recieved a long distance phone call from Kyon a month earlier and Kwi Ha believed that Kyon was not in Hawaiʻi. A police detective testified that he believed Kyon was in Korea. In regard to Jae Kuen, the investigator stated that he checked Jae Keun's last known address and learned that Jae Keun had moved out two months prior. The prosecution failed to show that the investigator conducted any follow-up, however; "not even a simple inquiry as to a possible forwarding address." Id. at 279, 925 P.2d at 1103. The detective testified that he had no leads to Jae Keun's whereabouts.

The court in Lee held that "the prosecution [had] failed to satisfy its burden of demonstrating an adequate good faith effort to obtain the presence of Kyon and Jae Keun at [] trial." Id. at 278, 925 P.2d at 1102. Lee noted that the prosecution "made no claim . . . that it attempted at any time to issue--much less serve--trial subpoenas on Kyon or Jae Keun." Id. at 279, 925 P.2d at 1103. The Lee court also criticized the difference in the efforts the prosecution took to secure its material witness, Kwi Ha, as opposed to the efforts it took to locate and secure the availability of Kyon and Jae Keun. In guaranteeing Kwi Ha's presence at trial, the prosecution moved

for the trial court to "declare Kwi Ha a material witness." Id. As a result, a bench warrant was issued, Kwi Ha was taken into custody, and bail was set at $20,000 "to prevent . . . Kwi Ha's absconding the country." Id.

In Lee, this court looked to other cases in which it had been determined that the prosecution's efforts to secure an unavailable witness satisfied the good faith standard. For example,

> [i]n State v. White, 65 Haw. 286, 651 P.2d 470 (1982), we held that where (1) a police detective had secured a witness's presence at a defendant's first trial, (2) the same detective was reassigned to locate the witness for the defendant's retrial, (3) the detective [engaged in various efforts to locate the witness], and (4) none of these efforts produced any leads, the prosecution had made a good faith effort to secure the presence of the witness.

Id. at 277, 925 P.2d at 1101 (emphasis added) (internal quotation marks, citation, and brackets omitted). In White, 1) the prosecution assigned the detective to locate the witness, 2) the prosecution proved that "[the witness] had no known job, address, or telephone number[,]" 3) the detective "contacted the [witness]'s mother[,]" and 4) the detective "had other officers check various locations of Hawaii--Waikiki, Waimanalo, and the Island of Lanai--where [the witness] was thought to have once resided." White, 65 Haw. at 288, 651 P.2d at 472.

Lee also considered State v. Bates, 70 Haw. 343, 771 P.2d 509 (1989), wherein this court found a good faith effort on the part of the prosecution to locate a witness. This court noted that "(1) a subpoena had been issued to compel the witness's attendance, (2) there had been four unsuccessful attempts to serve the subpoena, (3) the prosecution assigned an

investigator to locate the witness, and (4) the investigator had" attempted several different methods of locating the witness. Lee, 83 Hawaiʻi at 277, 925 P.2d at 1101 (citing Bates, 70 Haw. at 346-47, 771 P.2d at 511) (emphasis added). The investigator checked the witness's driver's license number and motor vehicle registration, ran checks on voter registration records and phone listings, contacted the witness's last known residence and work place, and interviewed his former neighbors, who indicated that the witness may have moved to Alaska. Bates, 70 Haw. at 346, 771 P.2d at 511.

In Moore, this court held that the prosecution had shown a good faith effort to secure the presence of an unavailable witness. 82 Hawaiʻi at 224, 921 P.2d at 144. This court observed that (1) the prosecution had placed the witness under subpoena prior to trial and obtained the witness's assurances that she would testify, (2) the "prosecution investigator testified that he had attempted to serve [the witness] with a new subpoena at her home seven times in two days and had made two telephone calls, leaving his pager number for [the witness] to contact[,]" id. at 208, 921 P.2d at 128 (emphasis added), (3) "[a]fter the investigator was informed . . . that [the witness] had left the state, the prosecutor began calling names from the defense's witness list in an attempt to locate her[,]" id. at 224, 921 P.2d at 144 (emphasis added), (4) "[t]he prosecutor called [the witness]'s brother-in-law in California" and was told that the witness "had been there and that her children were still there, but [the witness] had left

earlier that day without disclosing her destination[,]" id. at 208, 921 P.2d at 128 (emphasis added), and (5) the prosecution's motion for a continuance to locate the witness was denied[,] id. at 224, 921 P.2d at 144.

As Lee, White, Bates, and Moore indicate, the State, either through the prosecution itself, or a police detective or an investigator for the prosecution, made various efforts to locate the witness in order for the government to satisfy its burden of showing a good faith effort for purposes of unavailability. Respondent failed to prove it had done so in this case. For example, Respondent should have, but did not, declare Daughter 1 a material witness or issue a warrant for her arrest. Lee, 83 Hawaiʻi at 279, 925 P.2d at 1103. Respondent did not contact Daughter 1's family members, Moore, 82 Hawaiʻi at 208, 921 P.2d at 128, White, 65 Haw. at 288, 651 P.2d at 472, or run checks against various computer databases and other listings, Bates, 70 Haw. at 346, 771 P.2d at 511. Nor did Respondent request a continuance of trial. Moore, 82 Hawaiʻi at 224, 921 P.2d at 144; Lynch, 499 F.2d at 1024. Under HRE Rule 804(a)(5), this court said that "other reasonable means besides subpoenas must be tried before a witness can be found unavailable." Lee, 83 Hawaiʻi at 278, 925 P.2d at 1102 (emphasis added) (internal quotation marks omitted).

B.

The majority believes that the prosecution satisfied the Lee standard. It argues that (1) "nothing suggests the prosecution intended to rely on the preliminary hearing

testimony" because "a person within the prosecutor's office attempted to locate Daughter 1[]" and "[the prosecution] moved to sever the trial to avoid relying on Daughter 1's preliminary hearing testimony[,]" majority opinion at 18-19, (2) the efforts of Huerta should be included in determining whether the prosecution made a good faith effort to locate a witness, id. at 16, 23, and (3) "although [the State] could have taken additional efforts to locate Daughter 1, . . . these efforts would have been futile[,]" id. at 23.

1.

With respect to the majority's first argument, not even Respondent cites any evidence that "a person within the prosecutor's office attempted to locate Daughter 1," or even asserts this to us. The single statement that Respondent "had our investigator go out and try to find her himself," lacks any supporting evidence and was insufficient to establish that "[t]he lengths to which the prosecution [went] to produce [the] witness" was reasonable. Roberts, 448 U.S. at 74; Moore, 82 Hawaiʻi at 223, 921 P.2d at 143 (stating that "[t]he prosecution must confirm on the record" at trial that the witness was unavailable and that "vigorous and appropriate steps were taken" to obtain the witness's presence).

In addition, because the prosecution did not move to continue trial, as the court itself noted, the prosecution obviously intended to rely on the preliminary hearing transcript of Daughter 1, despite its motion to sever. The majority incorrectly equates the prosecution's motion to sever to a motion

for a continuance, see majority opinion at 19-20, 20 n.11, for at least three reasons. First, Respondent informed the court that its motion to sever was not a motion for a continuance. During the hearing on the motion to sever, Respondent explicitly made clear to the court, "We're not asking for a continuance. That is correct. We're not objecting to a continuance. We're not asking for it." (Emphases added.) Hence, the record reflects that Respondent only moved to sever the trial.

Second, because there was a sound independent basis to deny the motion to sever, the majority's contention that the severance motion was "the functional equivalent of a motion to continue" the trial of Daughter 1, id. at 20 n.11, is wrong. The motion to continue, as understood by the parties and as posed by the court, referenced both Daughter 1 and Daughter 2. Indeed, Petitioner's response to Respondent's motion to sever stated that "[Petitioner] would be subject to successive or multiple prosecutions for conduct or charges that are currently charged within the same Petition" in "violation of HRS [§] 701-109(2)."[16] To treat the case otherwise, as the court realized, would inappropriately subject the Petitioner to defending two separate

[16] HRS § 701-109 states in relevant part:

> (2) Except as provided in subsection (3) of this section, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.
>
> (3) When a defendant is charged with two or more offenses based on the same conduct or arising from the same episode, the court, on application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires.

prosecutions. Thus, the court, "[b]ased on the pleadings, evidence and arguments presented at the hearing," denied Respondent's motion to sever. Petitioner did not object to Respondent continuing the trial, which "would not subject [Petitioner] to multiple trials[.]" The court stated that "[b]ecause neither [Respondent] or [sic] [Petitioner] requested a continuance, trial in this matter shall proceed as scheduled[.]" (Emphasis added.) Thus, as the parties and the court realized, the motion to sever was not the equivalent -- functional or otherwise -- of a motion to continue the trial.

Third, with all due respect, it is disingenuous for the majority to argue that Respondent's motion to sever was equivalent to a motion for continuance. As noted, after the denial of Respondent's motion to sever, Respondent did not move to continue, even though the court indicated that it would likely grant such a motion had either party requested it. Additionally, the record reflects that Respondent could have asked for a continuance on its own, but did not. "It is difficult to believe that if the preliminary hearing testimony of this crucial witness were not available, the prosecution would have abandoned its efforts at this point[.]" Lynch, 499 F.2d at 1024. As indicated, Petitioner would not have objected to such an action. Thus, Respondent's failure to seek a continuance weighs against its assertion that its actions were reasonable. See id. (noting that the trial was recessed early and the case was continued so that the government could continue its efforts to locate the missing witness); Moore, 82 Hawaiʻi at 224, 921 P.2d at 144

(noting that the prosecution moved for a continuance of trial to locate the witness but the motion was denied). In light of the fact that the court did not grant Respondent's motion to sever but would have likely granted a motion to continue, it is erroneous to assert that Respondent's "motion to sever was the functional equivalent of a motion to continue" and "undercut[s] the inference of good faith[.]" Majority opinion at 20 n.11. Because Respondent had the preliminary hearing transcript, it could proceed to trial without the presence of Daughter 1, who would otherwise be subject to cross examination. It would seem obvious that this underlay Respondent's decision not to request a continuance.

In sum, (1) if Respondent truly wanted to move for a continuance, it clearly could have done so, but did not, (2) the prosecution clearly represented to the court at the motion to sever hearing that it was "not asking for a continuance[,]" (3) the prosecution was aware that a motion to sever would subject the defendant to defending two prosecutions, and (4) after the court denied the motion to sever, the prosecution could have, but did not, move to continue the trial, even though the court had made it clear that a continuance was available to it. Given these facts, it is evident that Respondent moved to sever rather than to continue, because it knew that Daughter 1's preliminary hearing testimony was available as a "back-up," should its motion to sever be denied. For these reasons, Respondent's motion was not "neutral[] with regard to continuing the entire trial[,]" and did not "demonstrate[] that it attempted

to avoid using Daughter 1's preliminary hearing testimony," as the majority maintains. Majority opinion at 20 n.11. Instead, Respondent rejected the continuance of trial, which meant it would employ, rather than "avoid," the preliminary hearing testimony.

2.

With respect to the second argument, respectfully, the majority misconceives the obligation of the prosecution to conduct good faith efforts to obtain a witness's presence at trial. The majority mistakenly maintains that Black, State v. Sanchez, 592 A.2d 413, 415 (Conn. App. 1991), United States v. Thorton, 16 M.J. 1011 (A.C.M.R. 1983), and United States v. Rundle, 298 F. Supp. 392, 395 (D. Penn. 1969), support its assertion that "courts have included the efforts of social service workers in determining whether the prosecution made a good faith effort to locate a witness[,]" majority opinion at 21, and thus, that "[t]he efforts of a social worker . . . can establish" the "good faith effort[,]" id. at 16, of "prosecutorial authorities[,]" Roberts, 448 U.S. at 74. None of the cases cited by the majority relied solely on the efforts of a social worker to establish good faith efforts, as in the instant case, but involved an array of measures taken by the government to locate a witness.

a.

First, as discussed supra, the Supreme Court has established that "[t]he basic litmus of Sixth Amendment unavailability" is that "'a witness is not "unavailable" for

purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.'" Roberts, 448 U.S. at 74 (quoting Barber, 390 U.S., at 724-25) (emphasis and brackets omitted) (emphasis added). Additionally, Roberts established that "the ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness[] . . . [and a]s with other evidentiary proponents, the prosecution bears the burden of establishing this predicate." Id. at 74-75.

Further, this court has "expressly relied on . . . Roberts . . . , subject to the caveat that, '[w]ith respect to the "rule of necessity," . . . we have 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.'" Lee, 83 Hawaiʻi at 275-76, 925 P.2d at 1099-1100 (quoting State v. Apilando, 79 Hawaiʻi 128, 132-33, 900 P.2d 135, 139-40 (1995) (other citation omitted)) (brackets and ellipsis in original). Moreover, this court has emphasized that "'the burden of establishing the declarant's "unavailability" . . . rests with the prosecution.'" Id. (quoting Apilando 79 Hawaiʻi at 140, 900 P.2d at 147) (other citation omitted). As the Supreme Court and this court have instructed, the obligation to locate the witness and the burden in establishing unavailability rests with the prosecution, and, thus, these

matters cannot be imputed to Huerta or other social service workers.

b.

Second, Black, Sanchez, Thorton, and Rundle do not support the majority view. In Black, an Ohio appellate court held that a witness was unavailable after "the prosecution presented four witnesses to testify with respect to their efforts to locate the [unavailable witness]." 621 N.E.2d at 487. The prosecution's own investigation in Black produced four witnesses who were "a supervisor in the Children's Division of the Hamilton County Department of Human Services, a supervisor in the special-placement unit of the Montgomery County Children's Services, a case worker at Montgomery County Children's Services, and [the unavailable witness's] mother." Id. Through its investigation as evidenced by these four witnesses' testimony, the prosecution established:

> [The unavailable witness] had been discharged from the United Methodist Children's Home in 1990 and had been returned to the custody of the Montgomery County Children's Board. The Montgomery County Children's Board returned custody of [the unavailable witness] to her mother in January 1992, after she had been missing for a period of six months. [The unavailable witness's] mother testified that she had not seen her daughter since 1991 and that she had no idea where [the unavailable witness] was currently staying. [The unavailable witness's] dental records had been given to the police and a warrant had been issued for her arrest, but the police had been unable to locate her.

Id. Unlike Black, the prosecution in this case evidently did not conduct its own investigation as to Daughter 1's whereabouts. The evidence presented at trial demonstrated that Respondent only delivered a single subpoena to Huerta. In fact, Respondent did not present evidence of an investigation by its own investigator. As noted before, although the police had apparently picked up and

detained Daughter 1 before, the police were not contacted to locate and detain her, nor was a warrant issued for Daughter 1's arrest, as had been the case in Black. Black, 621 N.E.2d at 487; Rundle, 298 F. Supp. at 395; see also Lee, 83 Hawaiʻi at 279, 925 P.2d at 1103 (recognizing that the prosecution, in guaranteeing a material witness's presence at trial, issued a bench warrant for the witness's arrest, took the witness into custody, and set bail at $20,000 "to prevent . . . [the witness from] absconding the country").

Similarly, in Sanchez, the State conducted its own investigation and consulted with other trained investigators. In Sanchez, "the [S]tate presented evidence of the . . . unsuccessful efforts to locate [the witness] in order to demonstrate that [the witness] was not available. 592 A.2d at 415. The State "contacted an investigator . . . from the public defender's office and also a juvenile probation officer." Id. The investigator had been "unsuccessful in . . . contact[ing the missing witness's] grandmother . . . by telephone and through the welfare office." Id. The State also conducted an "investigation stemming from the information presented by the defendant to the [S]tate as to the [witness's] whereabouts[.]" Id. at 416. Unlike Sanchez, Respondent did not present evidence of an investigator's unsuccessful attempts to locate Daughter 1, or that law enforcement resources were employed. Nor is there any evidence that an investigator attempted to contact Daughter 1's family. See also Moore, 82 Hawaiʻi at 208, 921 P.2d at 128;

Bates, 70 Haw. at 346, 771 P.2d at 511. Respondent relies solely on the efforts of the social worker.

In Thorton, the U.S. Army Court of Military Review held that the "declarant's unavailability was established under the Sixth Amendment and under Military Rule of Evidence 804(a)(5)." 16 M.J. at 1013. That court noted that the prosecution "tried to procure the declarant's presence by subpoena, . . . sought assistance from [the declarant's] mother, her friends, and the German police[] . . . [and that t]he declarant could not be found at her legal German residence or at her various 'hangouts.'" Id. Thus, that court recognized that "[i]n the present case, an active search for the declarant concomitant with the issuance of a subpoena is also sufficient" and, therefore, "f[ound] that the declarant was indeed unavailable[.]" Id. (emphasis added). Unlike Thorton, Respondent did not seek assistance from Daughter 1's mother or friends. See id.; see also Moore, 82 Hawaiʻi at 224, 921 P.2d at 144; White 65 Haw. at 288, 651 P.2d at 472. Nor did Respondent contact the police in effort to locate Daughter 1. See Thorton, 16 M.J. at 1013; see also Black, 621 N.E.2d at 487; Lee, 83 Hawaiʻi at 279, 925 P.2d at 1103. Rather, Respondent did not conduct an "active search," but relied only on the social worker to conduct the search.

In Rundle, a federal district court determined that the "[S]tate showed considerable efforts to find [the witness]." 298 F. Supp. at 395. The State presented (1) "[a]n Administrative Assistant from the Fort Mifflin Youth Development Center [who] testified that his institution had been unable to locate [the

witness] since March 8, 1967, when he took flight[,]" (2) "[the witness's] mother [who] testified that she had not heard from or seen her son since his disappearance from Fort Mifflin[,]" and (3) "[a]n investigator from the District Attorney's office, who had extensive experience in looking for lost persons, [and] testified to his efforts to find [the witness] for approximately two months prior to trial." Id. The investigator for the State testified that "he had questioned between thirty and forty people in the neighborhood where [the witness] had lived prior to his commitment and flight, ten or twelve of whom were boys or girls about [the witness's] age," and "stated that he had contacted officials of the County Court Program and the Juvenile Court Program, and that he had checked the listings for the electric company, the gas company, and motor registration." Id. Additionally it was noted that the "[c]ourt was dismissed to allow him to check the listings of the telephone company, and no listing was found." Id. Unlike Rundle, Respondent did not present any evidence that an investigator made the expected and appropriate efforts to find Daughter 1 before trial, as had been made by the Rundle investigator. See id.; see also Bates, 70 Haw. at 346, 771 P.2d at 511.

Clearly the cases that the majority cites do not support the majority's conclusion that the prosecution in effect can pass on its legal duty and obligation to make good faith efforts in finding witnesses, to a social worker. On the contrary, these cases demonstrate that the prosecution can fulfill its burden by producing appropriate witnesses that the

prosecution had contacted during its investigation. Unlike Black, Sanchez, Thorton, and Rundle, the prosecution in this case evidently did not conduct its own investigation or explore "other means" of locating Daughter 1, except service of the subpoena on Huerta.

3.

With respect to the third argument, the majority's assertion that efforts aside from the subpoena would have been futile, is wrong. Lee, 83 Hawaiʻi at 278, 925 P.2d at 1102 (recognizing that HRE Rule 804(a)(5) indicates that subpoenas are insufficient to establish that witness is unavailable in the absence of "other reasonable" means of locating the witness). As discussed supra, Huerta lacked the training, experience, authority, and resources that a law enforcement officer would have had in searching for Daughter 1. As noted before, it is reasonable to believe that Daughter 1's friends, family, or people of the community would be less likely to disclose the whereabouts of Daughter 1 or to provide crucial information to a social worker, than they would to a person with law enforcement powers. It is also reasonable to believe that, through the use of their resources, law enforcement officials would have conducted a more appropriate search. Moreover, the fact that Daughter 1 had been returned to the girls' home each time after she ran away, and apparently been picked up by the police and detained by them, belies the majority's position. In the instant case, no police were assigned to find Daughter 1 and to detain her, as seemingly had been done in the past. The possibility of

producing Daughter 1 here was far greater than "remote" if Respondent had simply followed the appropriate and standard approaches exemplified in the cases. See Roberts, 484 U.S. at 74 ("[I]f there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation.") (Emphasis omitted.)

XI.

Respondent did not make a good faith effort to locate Daughter 1 and, therefore, has not carried its burden of demonstrating that Daughter 1 was unavailable, in the constitutional sense, for Petitioner's trial. Petitioner was thereby denied his Sixth Amendment constitutional right to confront Daughter 1. For similar reasons, Petitioner was denied his right of confrontation under article I, section 14 of the Hawaiʻi Constitution. The court thus erred in admitting Daughter 1's preliminary hearing testimony at trial and the ICA gravely erred in affirming Petitioner's judgment of conviction as to Daughter 1.[17] Consequently, I would reverse the ICA's judgment with respect to the counts related to Daughter 1, vacate the court's judgment with respect to those counts, and remand such counts for a new trial. I would affirm Petitioner's convictions as to Daughter 2.

[17] Because Respondent failed to demonstrate that Daughter 1 was constitutionally unavailable, it is unnecessary to reach Petitioner's third question as to whether Petitioner had an adequate opportunity to cross-examine Daughter 1 at the preliminary hearing.