CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I concur in the result only, inasmuch as in this case there was an absolute failure of proof as to what test was employed to assess the accuracy of the speedometer and as to the reliability of that test, both fundamental tenets of scientific evidence. Because such failure of proof is determinative, in my view it is unwise to decide issues beyond that determination, as the majority does; rather we should await cases in which such issues must actually be decided.

Petitioner/Defendant-Appellant Zachariah I. Fitzwater (Petitioner) was convicted of excessive speeding in violation of Hawaiʻi Revised Statutes (HRS) § 291C-105(a)(1) (2007 Repl.).[1] At Petitioner's trial, the District Court of the First Circuit (the court) allowed the Honolulu Police Department (the HPD or HPD) Police Officer Neil Ah Yat to testify that his speedometer was accurate on the day that Petitioner was cited. A "speed check card,"[2] which purported to verify the accuracy of the

[1] HRS § 291C-105 states in relevant part:

> **Excessive speeding.** (a) No person shall drive a motor vehicle at a speed exceeding:
> (1) The applicable state or county speed limit by thirty miles per hour or more;

[2] The speed check card contained printed and handwritten text. The speed check card, with the handwritten portions indicated in quotes, read:

(continued...)

speedometer in the officer's vehicle, was admitted into evidence by the court over Petitioner's objection. The Intermediate Court of Appeals (ICA) affirmed Petitioner's conviction. State v. Fitzwater, No. 28584, 2009 WL 1112602, at *2 (Haw. App. Apr. 27, 2009)) (SDO). The four questions raised in Petitioner's Application for Writ of Certiorari are whether the ICA gravely erred in (1) holding that Respondent/Plaintiff-Appellee State of Hawaiʻi (Respondent) adduced sufficient foundation to admit the speed check card as a business record; (2) holding that the speed check card qualified as a business record; (3) holding that the admission of the speed check card was not a violation of Petitioner's right to confrontation under either the Hawaiʻi or United States Constitutions, and (4) failing to address, as a matter of plain error, that Officer Ah Yat's testimony constituted improper expert testimony.

The crux of this case, essentially posed in the first question, is whether a proper foundation was laid for the admission of the speed check card into evidence. The speed check

[2](...continued)

JACK'S SPEEDO SHOP
Honolulu, Hawaiʻi, "8-9-06"
"Exp. 8-9-07"

To Whom It May Concern:
THIS IS TO CERTIFY THAT THE

Speedometer of "Ford" No. "HPD 1040"
Was tested and found to be registering 25 Miles at 25 M.P.H.
35 Miles at 35 M.P.H. 45 Miles at 45 M.P.H.
55 Miles at 55 M.P.H. 65 Miles at 65 M.P.H.
75 " " 75 "
Correction (illegible) [Signature]

card was patently inadmissible because (1) there is no evidence in this case of what test was administered to determine the accuracy of Officer Ah Yat's speedometer, and (2) there is no evidence of the reliability of that test. "'[A] fundamental evidentiary rule is that before the result of a test made out of court may be introduced into evidence, a foundation must be laid showing that the test result can be relied on as a substantive fact.'" State v. Long, 98 Hawaiʻi 348, 354, 48 P.3d 595, 601 (2002) (emphasis in original) (quoting State v. Kemper, 80 Hawaiʻi 102, 105, 905 P.2d 77, 80 (App. 1995) (citation and internal quotation marks omitted)). In the absence of such evidence the ICA gravely erred in holding that a proper foundation was laid. Consequently, a discussion of the other questions undertaken by the majority is extraneous and advisory. Therefore, I concur only in the result reached by the majority.

I.

It is axiomatic that "[i]n Hawaiʻi, the admissibility of scientific or technical evidence is governed by Hawaiʻi Rules of Evidence (HRE) Rules 702 (1993) and 703 (1993)." State v. Werle, 121 Hawaiʻi 274, 282, 218 P.3d 762, 770 (2009). Hence, "a proper foundation for the introduction of a scientific [or technical] test result would necessarily include expert testimony regarding: (1) the qualifications of the expert; (2) whether the expert employed valid techniques to obtain the test result; and (3) whether the measuring instrument is 'in proper working

order.'" State v. Manewa, 115 Hawaiʻi 343, 350, 167 P.3d 336, 343 (2007) (quoting Long, 98 Hawaiʻi at 355, 48 P.3d at 601 (internal quotation marks and citation omitted)).

"[T]o be admissible, 'expert testimony must be both relevant and reliable.'" Long, 98 Hawaiʻi at 354, 48 P.3d at 601 (quoting State v. Maelega, 80 Hawaiʻi 172, 181, 907 P.2d 758, 767 (1995)). According to the majority, Officer Ah Yat, the only witness for Respondent, "did not testify about how the checks [of the speedometer] are done." Majority opinion at 5. Consequently, there is no evidence of how the "speed check" was conducted. It follows that no attempt could be made to qualify Officer Ah Yat as an expert on the test administered on his speedometer.

Additionally, "[t]he reliability requirement refers to evidentiary reliability -- that is trustworthiness. Under this prong, admission of expert evidence is premised on the assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his or her discipline." State v. Vliet, 95 Hawaiʻi 94, 106, 19 P.3d 42, 54 (2001) (citations, brackets, and internal quotation marks omitted) (emphasis in original)). No attempt was made by Respondent to establish, through Officer Ah Yat, that the speed test was based on "the proper application of valid techniques grounded in valid underlying principles." Long, 98 Hawaiʻi at 355, 48 P.3d at 602 (emphasis in original) (quoting State v. Montalbo, 73 Haw. 130,

136, 828 P.2d 1274, 1279 (1992)). Consequently, there is no evidence of the reliability of the test administered on the speedometer. Officer Ah Yat's testimony, then, was neither relevant nor reliable in establishing that the test result reflected on the speed card could be relied on as substantive fact.

Inasmuch as no evidence was introduced regarding the testing device, the further "'foundational prerequisite . . . [establishing] that the measuring instrument [was] in proper working order[]'" was not laid. Manewa, 115 Hawaiʻi at 350, 167 P.3d at 343 (quoting State v. Wallace, 80 Hawaiʻi 382, 407, 910 P.2d 695, 720 (1996) (internal quotation marks and citation omitted)). Whether the testing instrument was working properly may be established by the testimony of a person or through business records. Manewa, 115 Hawaiʻi at 355, 167 P.3d at 348 (indicating that prosecution could have "call[ed] the manufacturer's service representative to testify to calibration of the balance[,]" or "offer any business records of the manufacturer indicating a correct calibration of the balance"); Wallace, 80 Hawaiʻi at 412, 910 P.2d at 725 (indicating that the prosecution could have presented "reliable evidence showing that the balance was 'in proper working order'" (citation omitted), through the testimony of the service representative for the balance "regarding his calibration of the balance" or "through a

custodian of records, offer[ing] any business record of the manufacturer reflecting proper calibration of the balance").

Correlatively, there was no evidence that the device assumably used to test the speedometer was properly maintained, serviced, or calibrated. See State v. Assaye, 121 Hawaiʻi 204, 216 P.3d 1227, 1235 (2009) (holding that prosecution was required to prove that the tests conducted by a police officer on a laser gun to see if it was in proper working order "were procedures recommended by the manufacturer for the purpose of showing that the particular laser gun was in fact operating properly"); Manewa, 115 Hawaiʻi at 357, 167 P.3d at 350 (holding that proper foundation for weight of drugs was not established because prosecution "failed to produce evidence of any manufacturer's established procedure for such validation and verification" that scale used for measuring drugs was properly calibrated); Wallace, 80 Hawaiʻi at 412, 910 P.2d at 725 (holding that the failure of the prosecution to offer "through a custodian of records . . . any business record of the manufacturer reflecting proper calibration" of a scale used to weigh drugs meant that testimony of net weight of drugs was inadmissible because proper foundation of accuracy of the scale was not established). Because Officer Ah Yat did not conduct the test, he could not testify as to such matters. As a result, the evidence did not establish

> [(1)] that [whoever conducted the test] had any training or expertise in calibrating the [testing device], (2) that the [testing device] had been properly calibrated by the manufacturer's service representatives, (3) that there was an accepted manufacturer's established procedure for

> "verifying and validating" that the [testing device] was in proper working order and that if such a procedure existed, that [the operator] followed it, and (4) that [the testing device] was in proper working order at the time the [speedometer] was [checked].

Manewa, 115 Hawaiʻi at 354, 167 P.3d at 347 (brackets omitted). Obviously, then, there was no evidence that the speed check device "ha[d] been inspected and serviced as required by the manufacturer." Assaye, 121 Hawaiʻi at 217, 216 P.3d at 1240 (Acoba, J., concurring). Hence, the speed card result was inadmissible in evidence,[3] and the court should have granted Petitioner's motion for judgment of acquittal as to the HRS § 291C-105 excessive speeding charge.[4]

II.

Thus I cannot agree with the need for the discussion undertaken by the majority beyond the proposition that there was an absolute failure of proof by Respondent. Such a discussion is advisory and, thus, without the benefit of a concrete controversy to validate our opinion. See Kapuwai v. City & County of Honolulu, 121 Hawaiʻi 33, 41, 211 P.3d 750, 758 (2009)

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[3] I agree with the majority that State v. Ing, 53 Haw. 466, 497 P.2d 575 (1972), "does not specifically address many of the foundational requirements required for admission of a document under HRE Rule 803(b)(6)" as discussed above. Majority opinion at 39. In light of more recent authority cited supra, I concur with the majority that Ing has "limited precedential value in this context, and to the extent [that] it conflicts with the analysis set forth here, it is overruled." Id. at 39-40.

[4] I agree that there was sufficient evidence to support entry of judgment against Petitioner on the lesser included infraction of speeding in violation of HRS § 291C-102(a)(1). During trial, Petitioner admitted "going maybe 50 miles an hour or something like that" when the speed limit changed from 45 to 35 miles an hour. Therefore, there was sufficient evidence based on his testimony to establish that Petitioner was driving his vehicle "at a speed greater than the maximum speed limit" in violation of HRS § 291C-102(a)(1).

(concluding that "the ICA's issuance of an advisory opinion on an unripe issue implicates concerns about the proper--and properly limited--role of courts in a democratic society and contravenes the prudential rules of judicial self-governance") (internal quotation marks and citation omitted); Trustees of Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 171, 737 P.2d 446, 456 (1987) ("When confronted with an abstract or hypothetical question, we have addressed the problem in terms of a prohibition against rendering 'advisory opinions[.]'") (Citation omitted.); State v. Fields, 67 Haw. 268, 274, 686 P.2d 1379, 1385 (1984) (recognizing that "the prudential rules of judicial self-governance founded in concern about the proper--and properly limited--role of courts in a democratic society are always of relevant concern" and "even in the absence of constitutional restrictions, courts must still carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting") (internal quotation marks, footnote, and citation omitted).

The majority argues "the need to provide guidance on this issue in order to prevent 'serious judicial mistakes' in the future[.]" Majority opinion at 40-41 (quoting Kapuwai, 121 Hawaiʻi at 42, 211 P.3d at 759 (quoting Fields, 67 Haw. at 276, 686 P.2d at 1386)). This, however is an incomplete quotation from Kapuwai and Fields. The complete quote states, additionally, "in situations where resort to appeal may be

otherwise foreclosed." Kapuwai, 121 Hawaiʻi at 42, 211 P.3d at 759; Fields, 67 Haw. at 276, 686 P.2d at 1386. In fact, in Kapuwai, the plurality opinion rejected the invitation to provide guidance, holding that that portion of the ICA's opinion concerning "attorney's fees and costs was not ripe for decision and constitute[d] an advisory opinion akin to the issuance of an opinion where there is no subject matter jurisdiction." 121 Hawaiʻi at 43, 211 P.3d 760 (Moon, C.J., announcing the decision of the court) (citation omitted) (emphasis added). In Fields, a probation condition authorizing warrantless searches of probationers threatened the constitutional right against the invasion of privacy and was "neither mandated nor expressly sanctioned by . . . statutory provisions." 67 Haw. at 276, 686 P.2d at 1386. This court, exercising its power of "general superintendence" over inferior courts, id. (citing HRS § 602-4), concluded that it was appropriate "to act before there [was] an attempt to enforce the sentencing court's order, since [its] bounden duty include[d] the prevention of serious judicial mistakes in situations where resort to appeal may be otherwise foreclosed[,]'" id. (emphasis added).

Clearly, this case does not present the situation discussed by the plurality opinion in Kapuwai and in Fields "where resort to appeal may be otherwise foreclosed." 67 Haw. at 276, 686 P.2d at 1386. Here, the admissibility of the speed

check card is not unripe for discussion and in contesting that admissibility, Petitioner has not been foreclosed from bringing an appeal. As such, the "prevent[ion] of judicial mistakes where resort to appeal may otherwise be foreclosed" is simply not applicable here.

Accordingly, we should await those cases that are premised on facts for which our ruling will have a real consequence. For example, in oral argument, Respondent admits that "there was not very detailed testimony as to what the [speed check] tests composed of and what [the person who conducted the tests] did." MP3: Oral Argument, Hawaiʻi Supreme Court, at 0:41:31 (Nov. 5, 2009), available at http://www.courts.state.hi.us/courts/oral_arguments/archives/oasc28584.html. Respondent considered this "unfortunate" because at the time of oral argument, there was another "test case" currently on appeal "before the ICA" in which "[the person who conducted the tests] actually came in [to trial] and gave live testimony to what he did." Id. at 0:41:44 to 41:53. Hence, we should decide requirements of admissibility and constitutional implications where they directly bear on the merits.

III.

However, inasmuch as the majority's further exposition can be viewed as determinative of questions that may arise in future cases, it is necessary to address them. In my view, the

second question and fourth question regarding whether the speed check card qualified as a business record and whether Officer Ah Yat was a qualified expert witness should not be reached because, as noted supra, there was no foundation for the speed check evidence. Nevertheless, inasmuch as the majority discuses the "business record" exception to the hearsay rule, I believe the following analysis applies.

At trial, over the objection of Petitioner, the court admitted the speed check card into evidence as a record of regularly conducted activity of the HPD. Officer Ah Yat testified that "[a] speed check is verification which is taken care of by the [HPD's] vehicle maintenance section [(VMS)]" and that "[VMS] take[s] the vehicle to the shop to calibrate the actual speed of the car with the speedometer." The speed check card associated with the officer's vehicle was not a record originating with the HPD, but was seemingly created at "Jack's Speedo [Shop (Jack's)]." Officer Ah Yat testified that he did not know when the HPD "received the speed-check card," but apparently the speed check card was made part of the HPD's records and "it stay[ed] with the vehicle[.]" Thus, the speed check card, which originated at Jack's and became part of the HPD record, constitutes multiple hearsay.

There can be multiple levels of hearsay contained in a business record; and each of those levels must have a basis for being admissible. State v. Zukevich, 84 Hawaiʻi 203, 205-06, 932

P.2d 340, 342-43 (1997); Warshaw v. Rockresorts, 57 Haw. 645, 650, 562 P.2d 428, 433 (1977). "According to HRE Rule 805 [(1993)], however, '[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in the[] rules.'" Zukevich, 84 Hawaiʻi at 206, 932 P.2d 343. Furthermore, "multiple hearsay creates a multi-level requirement[,]" and only "if each level of hearsay independently meets the requirements for admissibility under an applicable hearsay exception, [is] the circumstantial guarantee of trustworthiness for such a statement [] as great as for single-level hearsay." Commentary to HRE Rule 805 (1993). In that regard, the "record," i.e., the speed check card, must satisfy the regularly conducted activity exception to the hearsay rule first, at Jack's, and second, at the HPD. With respect to each organization, then, the "records of regularly conducted activity" exception to the hearsay rule, HRE Rule 803(b)(6) (Supp. 2007) controls:

> Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made in the course of a regularly conducted activity, at or near the time of the acts, events, conditions, opinions, or diagnoses, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with rule 902(11) or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

(Emphases added.)

Under HRE Rule 803(b)(6) or its federal counterpart, Federal Rules of Evidence (FRE) Rule 803(6),[5] a qualified witness "need not have personal knowledge regarding the creation of the document offered, or personally participate in its creation, or even know who actually recorded the information." Resolution Trust Corp. v. Eason, 17 F.3d 1126, 1132 (8th Cir. 1994) (quoting United States v. Franks, 939 F.2d 600, 602 (8th Cir. 1991)). A qualified witness must, however "be familiar with the record-keeping procedures of the organization." United States v. Baker, 458 F.3d 513, 518 (6th Cir. 2006) ("'To be an "other qualified witness," it is not necessary that the person laying

[5] HRE Rule 803(b)(6) is similar to FRE Rule 803(6), with some variations that are not material here. The commentary to HRE Rule 803 states, in pertinent part:

> [HRE Rule 803(b)(6) is] based upon Fed. R. Evid. 803(6) . . . and a prior statute, [HRS §] 622-5 (1976) (repealed 1980) (originally enacted as L 1941, c 218, 1, 2, 3; am L 1972, c 104, 2(e)). However, [] the federal rule[] and the prior Hawaii statute limited admissibility to records of regularly conducted business activities, while the present rule has no such limitation. On the other hand, both the federal rule and the prior statute defined "business" very broadly as including businesses, professions, occupations, and even nonprofit institutions. See, e.g., State v. Torres, 60 H. 271, 589 P.2d 83 (1978) (hospital business). The modification is therefore not a substantial one. In any event, the hallmark of reliability in this area is not the nature of the business or activity but rather its "regularity and continuity which produce habits of precision, [the] actual experience of business in relying upon [the records], [and the] duty to make an accurate record as part of a continuing job or occupation." [FRE] 803(6), Advisory Committee's Note. A further safeguard is that preliminary determination of the trustworthiness of such records is discretionary with the court.

(Emphases added.) Cases interpreting provisions of the Federal Rules of Evidence are not binding on this court; however, this court may refer to them for persuasive authority in interpreting similar provisions of the Hawaiʻi Rules of Evidence. State v. Jhun, 83 Hawaiʻi 472, 478, 927 P.2d 1335, 1361 (1996).

the foundation for the introduction of the business record have personal knowledge of their preparation. . . . All that is required of the witness is that he or she be familiar with the record-keeping procedures of the organization.'" (Quoting Dyno Constr. Co. v. McWane, Inc., 198 F.3d 567, 575-76 (6th Cir. 1999).)). See also United States v. Box, 50 F.3d 345, 356 (5th Cir. 1995) ("A qualified witness is one who can explain the system of record keeping and vouch that the requirements of Rule 803(6) are met; the witness need not have personal knowledge of the record keeping practice or the circumstances under which the objected to records were kept.") (Emphasis added.) (Citation omitted.); United States v. Iredia, 866 F.2d 114, 120 (5th Cir. 1995) ("A qualified witness is one who can explain the record keeping system of the organization and vouch that the requirement of [FRE] 803(6) are met." (Emphasis added.)) (Citation omitted.); 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 803(6)[02], at 803-178 (1984) ("The phrase 'other qualified witness' should be given the broadest interpretation; he need not be an employee of the entity so long as he understands the system.") (Footnote omitted.)

A.

As to the first level of hearsay, that is, whether the speed check card is a record of a regularly conducted activity of Jack's, there is no evidence that the speed card information was "made in the course of [Jack's] regularly conducted activity," or

testimony by Jack's custodian, "or other qualified witness" that the speed check card was made as part of the regularly conducted activity of Jack's. HRE Rule 803(b)(6). Office Ah Yat was not a qualified witness of Jack's because he was not sufficiently "familiar with the record-keeping procedures of [that] organization." Baker, 458 F.3d at 518. Other than Officer Ah Yat's conclusory statement that "someone takes accurate records[,]" there is no evidence of how the test was conducted, or who at Jack's recorded the information on the card. Furthermore, there is no evidence that whoever made the entry at Jack's was under any duty to test the speedometer and accurately record the result. In the absence of such evidence, the speed card is not admissible under HRE Rule 803(b)(6).

B.

As to the second level of hearsay, Respondent must prove that the speed check card was a record of a regularly conducted activity of the HPD. HRE 803(b)(6), stated supra, requires foundational evidence that the record be "made in the course of regularly conducted activity," "at or near the time of the act[,]" as "shown by the testimony of the custodian or other qualified witness."

1.

As stated before, a qualified witness "need not have personal knowledge regarding the creation of the document offered, or personally participate in its creation, or even know

who actually recorded the information." Resolution Trust Corp., 17 F.3d at 1132. However, the witness must "be familiar with the record-keeping procedures of the organization[,]" Baker, 458 F.3d at 518, "understand the system," Weinstein & Berger, supra, ¶ 803(6)[02], at 803-178 (footnote omitted), and "explain the system of record keeping and vouch that the requirements of [the business exception] are met," Box, 50 F.3d at 356; accord Iredia, 866 F.2d at 120.

The majority asserts that "Ah Yat's testimony was sufficient to satisfy several of the requirements of HRE Rule 803(b)(6) in order to admit the card as a business record of [the] HPD."[6] Majority opinion at 33. However, Officer Ah Yat's testimony did not establish that he was a "custodian or other qualified witness." Both the majority and the ICA acknowledged that "Ah Yat's testimony was not a 'model of clarity.'" Id. (quoting Fitzwater, No. 28584, 2009 WL 1112602, at *1). Officer Ah Yat's testimony indicates that he was unfamiliar with HPD's record-keeping procedure for speed check cards because he had no knowledge of (1) whether it was VMS or Jack's who actually

[6] First, the majority asserts that "the speed check card is a 'record' documenting the 'act[]' or 'event[]' of calibrating Ah Yat's vehicle's speedometer." Majority opinion at 33-34 (quoting HRE Rule 803(b)(6)). Second, the majority asserts that "there is sufficient evidence that the card was created 'at or near the time' of the speed check" because Officer Ah Yat "testified that the check was 'good' for a year," that "it was performed in August 2006[,]" and that "[t]he card [] contain[ed a] handwritten notation '8-9-06,' beneath which was written 'Exp. 8-9-07'." Id. at 34. Third, the majority asserts that with regard to whether the speed check card was "'made in the course of a regularly conducted activity[,]'" (quoting HRE Rule 803(b)(6)), "the State established that HPD incorporated the speed check card into its records and relied on it," majority opinion at 34-35, but "did not [] establish that there were other indicia of reliability[,]" id. at 35.

performed the test, (2) whether it was VMS or Jack's who normally recorded the results, (3) when the test was recorded, or (4) the methodology used to conduct the checks.

In its opinion, the majority maintains that from "the most plausible interpretation of [Officer Ah Yat's] testimony," it had to "assume for purposes of argument" that "someone at [Jack's], which is apparently a private shop, performed a test, created the card to document the results of that test, and then gave that record to someone from HPD's VMS." Majority opinion at 33 (emphases added). The majority concedes that "Ah Yat's testimony leaves open the possibility that someone from HPD's VMS actually performed the test using equipment located at [Jack's], and/or documented the results of the test[.]" Id. at 33 n.7. The very fact that the majority had to "assume for purposes of argument" (emphasis added) that the speed tests were conducted and its records created and kept in a particular way, is an obvious indication that Officer Ah Yat's testimony did not sufficiently "explain the record keeping system of the organization." Iredia, 866 F.2d at 120; accord Box, 50 F.3d at 356.

Thus, the testimony of Officer Ah Yat did not demonstrate that he was "familiar with the record-keeping procedures of the organization[,]" Baker, 458 F.3d at 518, "underst[ood] the system[,]" Weinstein & Berger, supra, ¶ 803(6)[02], at 803-178 (footnote omitted), or that he could

"explain the record keeping system of the organization[,]" Iredia, 866 F.2d at 120; accord Box, 50 F.3d at 357. In light of the inadequacy of Officer Ah Yat's testimony, Respondent failed to prove that Officer Ah Yat was a "qualified witness" who could "explain the system of record keeping and vouch that the requirements of Rule 803(6) are met." Box, 5 F.3d at 356; accord Iredia, 866 F.2d at 120. Therefore, Officer Ah Yat was not qualified to testify that the speed check card was a record of a regularly conducted activity of the HPD in this case.

2.

As to proof that the speed check card was made in the course of a regularly conducted activity of the police department, HRE Rule 803(b)(6) does allow records prepared by one entity to be introduced as business records of another entity but only in some circumstances. However, the "mere possession or 'custody' of records" of another is not sufficient to "qualify employees of the possessing party to lay the requisite foundation." 2 Kenneth S. Broun, et al., McCormick on Evidence § 292 (6th ed. 2006). See Belber v. Lipson, 905 F.2d 549, 552 (1st Cir. 1990) (holding that records were inadmissible as a business record of Dr. Conway because "the mere custody by [Dr.] Conway of the medical records of another doctor d[id] not incorporate them into [Dr.] Conway's business records."); Zundel v. Bommarito, 778 S.W.2d 954, 958 (Mo. App. 1989) (determining that records produced by another and received and held by the bank did not

render them business records of the bank). Additionally, mere reliance upon the record is also not enough to qualify employees of the possessing party to lay the requisite foundation. McCormick on Evidence § 292 (citing State v. Radley, 804 A.2d 1127, 1132 (Me. 2002) (stating that to permit admission of records of one company through the testimony of a witness employed by an entirely different organization "simply because her employer relied on [the other] organization's records in its own business dealing, is wholly unsupported by rule or law").

The preferable approach is to allow the possessing party of documents prepared by another to introduce the documents as its own business records, provided that the "other requirements of [FRE] Rule 803(6) are met and the circumstances indicate the records are trustworthy." United States v. Childs, 5 F.3d 1328, 1333 (9th Cir. 1993).[7] For example, the custodian

[7] The majority cites Air Land Forwarders, Inc. v. United States, 172 F.3d 1338 (Fed. Cir. 1999), as a test that the United States Court of Appeals for the Federal Circuit uses to determine "whether a document created by one business and incorporated into the records of another can be admitted as a business record of the incorporating business." Majority opinion at 28. According to the majority, the Federal Circuit in Air Land "surveyed cases from other circuits, and concluded that when an organization incorporates records of another entity into its own records, those records are admissible when the incorporating entity 'relied upon those records in its day-to-day operations, and where there are other strong indicia of reliability.'" Id. at 29 (quoting 172 F.3d at 1344).

However, the majority agrees that the test set forth in Air Land is wanting inasmuch as Air Land allows hearsay statements made by third parties to be admitted under HRE 803(b)(6) as long as they are "incorporated" into another's business records and that person relied on the incorporation, even though those third party statements contain none of the requirements for admission set forth in HRE 803(b)(6). See majority opinion at 29-30 ("Air Land did not specifically indicate . . . whether the other foundational requirements outlined by the rule must also be satisfied.").

As set forth in the analysis above, in order for the possessing party of documents prepared by another to introduce the documents as its own business records, the other requirements of HRE Rule 803(b)(6) must be met and the circumstances must indicate that the records are trustworthy. This case

(continued...)

company can make "an independent check of the records" or "can establish accuracy by other means." Id. See, e.g., Phoenix Assocs., III v. Stone, 60 F.3d 95, 101 (2d Cir. 1995) (determining that if a witness "can supply a sufficient foundation[,]" then the "source of employment is irrelevant," and concluding that a wire transfer was admissible as a business record where the partnership's accountant was "sufficiently familiar with the business practice" to establish that the records were made as part of that practice); Munoz v. Straham Farms, Inc., 69 F.3d 501, 504 (Fed. Cir. 1995) (concluding that the district court did not abuse its discretion in admitting into evidence slides dated by Kodak as business records of photographer where photographer testified that it was regular practice for him to send film to Kodak for processing and to

[7](...continued)
is factually distinguishable from Air Land. In that case, the appellants, various carriers who transported household goods for military service members, appealed the district court's admission of third party estimates of goods lost or damaged during the shipping. 172 F.3d at 1340. In holding that the district court properly admitted these third party reports as business records of the military, Air Land noted that (1) the "repair estimates at issue were clearly relied upon by the military during the claims adjudication process[,]" id. at 1343, (2) "[m]ilitary service members could be fined and/or imprisoned for submitting a false claim[,]" id., and (3) "the Military Claims Office personnel were responsible for becoming familiar with the competency of estimators in the local area and with the estimating process in general," id. at 1344.

Unlike the military service members who could be fined or imprisoned if they submitted false claims to the Military Claims Office, in the instant case, there is no evidence of an adverse consequence if Jack's conducted its testing improperly. There is no fine or punishment if Jack's tests are inaccurate. Second, unlike Air Land, the government in this case has not established that police personnel were responsible for becoming "familiar with the competency of [the companies conducting the tests]." Nor did the government establish that the police were responsible for becoming familiar with the speed check test in general.

check the dates on the slides after receiving them from Kodak); Childs, 5 F.3d at 1333-34 (admitting automotive records from Department of Motor Vehicles as business records of a car dealership where the car dealership confirmed the accuracy of the results by using it to keep track of their inventory).

In this case, the HPD has not established that it had conducted an "independent check" of Jack's records or established their accuracy by other means when it incorporated Jack's records into its own business records. As discussed in Part III.A. supra, Officer Ah Yat was not "sufficiently familiar" with the business practices of Jack's, and Officer Ah Yat's testimony did not establish that the records were made as part of Jack's business practice. Phoenix Assocs., 60 F.3d at 101. In the absence of evidence of an independent check or of accuracy established by other means, the speed check card was not admissible "as a record of regularly conducted activity" of the HPD under HRE Rule 803(b)(6).

C.

The majority opinion contains an extended discussion suggesting that "the existence of a contractual relationship between HPD and Jack's for the performance and documentation of the tests would be a significant factor in establishing the necessary indicia of trustworthiness" in order for Respondents to establish sufficient foundation for the admission of the speed check card under HRE 803(b)(6). Majority opinion at 36-38

(emphasis added). This discussion is superfluous, as neither Petitioner nor Respondent has raised this issue. Nor does any factual basis exist in the record for application of a contractual relationship in this case.

The majority's analysis here constitutes an advisory opinion to the prosecution on how future cases such as these should be tried. See, e.g., State v. Domingues, 106 Hawaiʻi 480, 499, 107 P.3d 409, 428 (2005) (Acoba, J., dissenting, joined by Nakayama, J.) (stating that because "the proposition advanced by the majority was not argued or briefed by the parties[] or decided by the court[,]" and "[n]o factual basis exists in the record . . . [, t]he majority's holding . . . constitutes an advisory opinion to one side on how future cases under the new statute may be saved from motions for dismissal"). I respectfully cannot agree with such an approach.

D.

Respondent has failed to establish that the speed check card satisfied the regularly conducted activity exception to the hearsay rule on both levels - first, as a regularly conducted activity of Jack's, and second, as a regularly conducted activity of the HPD. In light of these facts, I would hold that the speed check card could not be properly offered into evidence because Officer Ah Yat was not a qualified witness and his testimony was not sufficient to establish that the speed check card was a

record of a regularly conducted activity under HRE Rule 803(b)(6).

IV.

Although the majority decides that the speed check evidence was inadmissible, it nevertheless goes on to decide the confrontation issue posed as the third question as if the speed check evidence was admissible, thereby deciding an issue no longer properly before this court and rendering an advisory opinion. See Kapuwai, 121 Hawaiʻi at 41, 211 P.3d at 758, Yamasaki, 69 Haw. at 171, 737 P.2d at 456, Fields, 67 Haw. at 274, 686 P.2d at 1385.

The majority concludes that "[Petitioner's] right to confrontation under the Sixth Amendment was not violated by the admission of the speed check evidence[,]" majority opinion at 50, because the speed check card is a "document[] prepared in the regular course of equipment maintenance," id. at 49 (quoting Melendez-Diaz v. Massachusetts, 557 U.S. --, -- n.1, 129 S.Ct. 2527, 2532 n.1 (2009)), and "[a]ccordingly [] is nontestimonial in nature[,]" id. I respectfully disagree for two reasons. First, Hawaiʻi case law controls and this case, on its facts, does not implicate the confrontation clauses of the United States or Hawaiʻi constitutions. Second, Officer Ah Yat's testimony was insufficient in establishing that the speed check cards were prepared in the regular course of equipment maintenance as opposed to providing evidence in speeding cases.

A.

In Melendez-Diaz, the U.S. Supreme Court said:

> [W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. . . . Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.

557 U.S. at -- n.1, 129 S.Ct. at 2532 n.1 (emphases added). As noted before, in order to lay a foundation for the result of an out of court test, there must be expert testimony that the test was based on the "proper application of valid techniques grounded in valid underlying principles." Long, 98 Hawaiʻi at 601-02, 48 P.3d at 354-55. Such expert must appear in person. Hence, insofar as the "accuracy of the testing device" in Melendez-Diaz involves evidence that the test employed was reliable, see, e.g., Werle, 121 Hawaiʻi at 286, 218 P.3d 762, such evidence must be presented through an expert witness.

As to whether the testing device is accurate, we have held that such proof may be afforded through a witness. Werle, 121 Hawaiʻi at 286, 218 P.3d at 774 (holding there was insufficient evidence "to establish the foundational reliability of [Petitioner's] blood alcohol test results under" Montalbo because testimony of a technician who "was qualified to describe the procedures he followed to obtain [the petitioner's] blood alcohol test results, and state the test results as shown by the testing instrument" was not qualified to testify as to the "general reliability and acceptance of the [radiative energy

attenuation] chemical testing procedure"); Assaye, 121 Hawaiʻi at 213, 216 P.3d at 1236 (2009) (holding that no proper foundation was laid for admission of laser gun speed reading because the record did not indicate that "tests the [officer] testified to conducting [on the laser gun] were recommended procedures by the manufacturer for the purpose of showing that the laser gun was in fact operating properly"); Manewa 115 Hawaiʻi at 354, 167 P.3d at 347 (holding there was no proper foundation laid for the admission of drug weight because prosecution failed to establish that technician had any expertise in calibrating balance of drug scale or "that the balance had been properly calibrated by the manufacturer's service representatives" or "that there was an accepted manufacturer's established procedure for 'verify[ing] and validat[ing]' that the balance was in proper working order" and the technician followed the procedure); Wallace, 80 Hawaiʻi at 353-54, 910 P.2d at 346-47 (stating that "an expert's assumption regarding the correct calibration of his measuring device" constitutes inadmissible hearsay and prosecution did not call the "manufacturer's service representative to testify to calibration of the balance").

We have indicated, as to maintenance records, that the accuracy of the testing device may be established under the business records exception to the hearsay rule. Assaye, 121 Hawaiʻi at 214 n.8, 216 P.3d at 1237 n.8 (noting the absence of the speed check laser gun calibration logs and testimony by

officer that such logs would be kept in department files, but were not submitted into evidence); Manewa, 115 Hawaiʻi at 357, 167 P.3d at 350 (holding that no proper foundation was laid showing that a drug scale was properly calibrated because the lab technician "did not know how to calibrate or service the balance, no service representative testified as to his or her calibration of the balance, and no business record was introduced into evidence in lieu of such testimony") (emphasis added); Wallace, 80 Hawaiʻi at 412 n.28, 910 P.2d at 725 n.28 ("[A] document provided by the calibrating agency showing the name of the person calibrating the balance, that he was qualified, and that the balance was calibrated on a certain date may well have fallen under the hearsay exceptions relating to business records, but this was not offered into evidence.") (Brackets omitted.). These precedents, if necessary to apply, would control under our case law and I do not discern any material basis for an extended discussion of Melendez-Diaz under the facts of the case. The accuracy of the testing device and the maintenance records are not implicated in this case inasmuch as, as indicated supra, the test result concerning the speedometer was inadmissible and, consequently, questions concerning the accuracy of so-called maintenance records would not be reached.

B.

Second, while Melendez-Diaz stated that "documents prepared in the regular course of equipment maintenance may well

qualify as nontestimonial records[,]" -- U.S. at -- n.1, 129 S.Ct at 2532 n.1 (emphasis added), I do not agree with the majority's conclusion that "[t]he speed check card at issue here was created in a non-adversarial setting in the regular course of maintaining [Officer] Ah Yat's police vehicle, five months prior to the alleged speeding incident[and a]ccordingly, it is non-testimonial in nature." Majority opinion at 49.

The majority's assumption that "the speed check card at issue here . . . is non-testimonial in nature," is not warranted inasmuch as the facts in the record are ambiguous. A review of Officer Ah Yat's testimony at trial is inconclusive as to whether the purpose of the speed check was part of the regular maintenance of the police department vehicles, or for the purpose of providing reliable evidence in speeding cases. See, e.g., People v. Carreira, 2010 WL 254901, at *5 (N.Y.City Ct. Jan. 12, 2010) (holding that certificates of analysis of breath alcohol simulator solution and of the inspection, maintenance, and calibration of a breath test instrument could not be considered typical business records and therefore non-testimonial under Melendez-Diaz, in part because "the entire purpose of calibration and solution testing is to provide reliable evidence for prosecuting [driving while intoxicated offenses]" and, "[b]ut for the need to prove [driving while intoxicated] in court, these procedures and records would not exist"). The relevant portion of Officer Ah Yat's testimony during direct examination to this

issue is as follows:

> Q And describe to the Court what is a speed check?
> A A speed check is verification which is taken care of by the vehicle maintenance section. They take the vehicle to the shop to calibrate the actual speed of the car with the speedometer.
> Q And (indiscernible)?
> A <u>It's done so that we can, we know that our speedometers are accurate, and when we pace vehicles at a certain speed, we know for sure that the vehicle is going that speed.</u>
> Q Okay. And how often are these [speed checks] done?
> A Once a year.
> Q And how long are they good for?
> A One year.
> Q <u>And is the speed check conducted in the regular course of maintaining HPD vehicles</u>?
> A: Yes, ma'am.

(Emphases added.) Officer Ah Yat testified that the speed checks were specifically done so that "[police officers] know that [their] speedometers are accurate, and when we pace vehicles at a certain speed, we know for sure that that vehicle is going that speed." Officer Ah Yat agreed that the speed checks "are done and are made so that officers . . . can use them in prosecuting speeding cases, or [] use them in court." Based on the record, this court cannot reasonably conclude that Officer Ah Yat's testimony established that the speed check card was made in a "non-adversarial setting in the regular course of maintaining [Officer] Ah Yat's police vehicle[.]" Majority opinion at 49. This question, significant to the application of our constitutions, should be resolved in a case clearly establishing the pivotal facts; not in a case, such as this one, where the record is unclear.