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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

TARYN CHRISTIAN, Petitioner, vs. CLAYTON FRANK, Respondent.	CIV. NO. 04-00743 DAE-KSC **CLOSING ARGUMENT OF PETITIONER IN SUPPORT OF PETITIONER'S MOTION TO REOPEN HABEAS CORPUS PROCEEDINGS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b)**

COMES NOW, Taryn Christian, Petitioner herein, by and through his counsel, Gary A. Modafferi, Esq., of the Law Offices of Gary A. Modafferi, LLC, and respectfully tenders the following Closing Argument of Petitioner in Support of Petitioner's Motion to Reopen Habeas Corpus Proceedings Pursuant to Federal Rule of Civil Procedure 60(b).

This Closing Argument is offered in addition to, and incorporates by reference, testimonial evidence received by this Honorable Court on July 16, 2014 (Dkt.# 359), March 16, 2015 (Dkt.# 386), and March 17, 2015 (Dkt.# 387). It is also supported by the Exhibits received in this matter currently numbered 1 through 115.

DATED this 6th day of July, 2015.

/s/ Gary A. Modafferi
GARY A. MODAFFERI, ESQ.
Hawaii Bar No. 3379
Attorney for Petitioner

Introduction

The Petitioner has proven that through the suppression, non-disclosure, and mischaracterization of evidence and events during the habeas proceedings the State has created a fraud upon this Court which warrants the granting of the requested relief. Philip Schmidt swore to this Court that he was absolutely certain he identified Burkhart's photograph and designated that photograph with a P.S. days after the murder. This single fact has been hidden for nearly two decades. This evidence proves that Schmidt did not recant initial identification. His initial undisclosed photographic identification of Burkhart has torn his identification process from the truth. The suppression of this evidence alone has created a fraud upon the court which has undermined the integrity of the habeas proceedings. However, this was simply a piece of the mosaic of proof that supports Petitioner's motion.

The Petitioner has proven that there was no alibi evidence for Burkhart. Through a series of lies in Detective Funes' report and the failure to produce truthful statements, whether recorded or written, about Helen Beatty and Harry Auweloa's ability to swear to Burkhart's whereabouts at the time of the murder, the habeas court and the Ninth Circuit were misled into believing such evidence existed. The incorrect conclusion that the State could prove Burkhart was somewhere else at the time of the murder was constructed on assumption and deception.

The Petitioner has proven that the 911 tape placed Burkhart at the scene of the crime by the victim's dying declaration. Multiple lay witnesses, including the victim's cousin, have sworn that they heard the victim say "James Burkhart just walked off." Testimony by the State's expert at the habeas proceeding created the false impression that this crucial statement was unintelligible. The State can no longer hide behind the voodoo science presented to the habeas

court to create a false impression, where the victim himself placed James Burkhart at the scene of the murder.

The Petitioner has proven that the a chain of custody log that was supposed to protect the integrity of Serena Seidel's bloodied shorts was altered and forged to make it appear that the Department of the Prosecuting Attorney did not have trial exhibits and to prevent the logical conclusion that they were in possession of this key piece of evidence when it was destroyed. The evidence showed that the cover-up often is as explosive as the original offense. Prosecuting Attorney Investigator Margo Evans admitted that their office should not have trial exhibits in their possession. However, the chain of custody logs for other items, including a screwdriver and blood swabs, made it was clear that this protocol was violated. The Department of the Prosecuting Attorney then set out to mislead the habeas court further by producing memoranda and inapplicable court orders to shield blame for the missing evidence. These "blanket destruction orders" were a purposeful miscue to shift blame for the failure to produce the shorts back to the court clerk. Those orders had no relevance to this evidence and there was testimony that the clerk had never destroyed or lost evidence that had been previously ordered "withheld."

The Petitioner proved through a high probability that the same court clerk lied about the incriminating writing on the court chain of custody log that the district court used to protect the integrity of the trial exhibit evidence. The missing shorts were part of that grouping of "withheld" evidence covered by this altered document. Coincidentally, the police chain of custody log, a separate report, protecting the evidentiary integrity of those same shorts, could not be produced by the State for these habeas proceedings, even though the Respondent was ordered to do so on many occasions. Mr. Hanano gave this Court the illogical excuse that the historical record protecting the integrity of this crucial evidence was probably destroyed with the shorts.

The Petitioner has proven that the testimony of Annie Leong at the habeas proceeding was infected with lies and pocked by the suppression of critical evidence. Ms. Leong testified to an identification process of two 4x6 photographs ostensibly retrieved by police from a Crime Stoppers tip. Ms. Leong identified the "stringy" haired murder suspect that came into her Gas Express store minutes after the murder. Ms. Leong produced an artist's rendition or sketch of the suspect. When she was shown the photograph she identified the person with the stringy hair in her store on the morning of the murder. The photographs were never given to the Petitioner. The police report that would necessarily have been generated by the identification of a murder suspect was never given to the Petitioner. The surveillance tape – Tape 11, that depicted the same suspect coming into the store minutes after the murder was never given to the Petitioner. Instead, Ms. Leong told the habeas court that Petitioner's lawyer and investigator were present during the two 4x6 photograph identification procedure. She specifically named Richard Icenogle as the lawyer. This was a lie and a factual impossibility. It was outlandish testimony that should never have been allowed to stand uncorrected at the 2008 habeas evidentiary hearing. Its impact was wide ranging. Petitioner was not arrested until August 17, 1995 weeks after this event. Mr. Icenogle testified to the common knowledge that defense counsel are never allowed to be present during such police investigative interactions. Out of State counsel for Petitioner at the habeas proceeding ceased follow-up questioning when he was falsely told by Leong that Petitioner's legal interests were protected at this identification process by both Petitioner's lawyer and Petitioner's investigator. This pattern of suppression and deception has revealed a scheme to defraud the habeas court of core facts necessary to decide adjudicate the true merits of Petitioner's constitutional claims including the Chambers issue, actual innocence, ineffective assistance of counsel and the right to testify on one's own behalf.. The end result of this scheme

was to undermine the judicial process, which amounts to a fraud on the court worthy of relief pursuant to Rule 60 (b)(d)(3).

There are a multitude of other examples of suppression and deception infused into the habeas proceedings detailed in Petitioner's argument. For example, several witnesses saw a steak knife in the victim's hand when they arrived one the scene. Phil Schmidt would not administer first aid until the knife was removed from the victim's grasp. Rob Perry Sr. also saw the knife. The knife disappeared as soon as Officer Holokai, the victim's high school friend, arrived on the scene. It was never produced at trial nor was it mentioned in Holokai's police report. At the habeas proceeding, the State argued that Philip Schmidt had motive to lie because of an outrageous event involving a bicycle arrest by Officer Holokai in 1999.

Holokai arrested Schmidt and confiscated his bicycle for no apparent reason. Schmidt did not even recognize Holokai as the officer who first responded to the scene of the murder until the 2008 habeas proceeding when Holokai apologized for his outlandish abuse of power. The State's argument that this bicycle incident provided motive to lie was pure deception. Holokai was obviously disciplined for tampering with evidence for suppressing the steak knife seen by Schmidt and Rob Perry Sr. in his friend's hand before any other police officers were able to arrive on the scene. Instead of portraying this incident truthfully, it morphed into a misguided attempt at childhood loyalty gone astray. It was twisted to make it appear to the habeas court that Schmidt, who had never been arrested before, had reason for retribution and false testimony was that retribution. The Respondent argued that Schmidt had reason to lie about the identification because of his bicycle arrest. This was not true.

Throughout the habeas proceedings the Petitioner has consistently asked for the multiple statements of James Burkhart given to Maui Police and prosecutors about this murder. The State

has failed to comply with this most basic order. In an affidavit filed by Richard Priest, multiple statements by Burkhart about this very subject were documented by date and time. The Respondent has failed to produce those statements. At hearing on this matter, Mr. Hanano testified that even though his office was ordered to contact federal authorities to determine if they had Burkhart statements about this murder investigation, he could not recall asking if federal authorities had Burkhart statements about the murder of Cabaccang. Several days ago Petitioner learned for the first time that Burkhart was debriefed in January, 2009 about this murder. Not only did the prosecutor not tell this Court about this event, he testified as if he could not recall its occurrence even though he was present at the debriefing.

Recent Procedural History

Petitioner Taryn Christian is a Hawaii State prisoner serving a life sentence with a forty-year minimum period of incarceration for murder in the second degree (Dkt. #267 at p. 3) On December 22, 2004 Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his 1997 conviction and sentence (prior petition) (Dkt. #1). On September 30, 2008 the Court issued an order granting the prior petition as to ground one and denying it as to all other grounds. (Dkt. #153) This Honorable Court ordered that Petitioner be released within seven days of the entry of judgment unless the State elected to retry Petitioner. Both Petitioner and Respondent filed notices of appeal. (Dkt. #'s 157, 165)

On February 19, 2010 the Ninth Circuit reversed finding that the Hawaii Supreme Court did not unreasonably apply Chambers v. Mississippi, 410 U.S. 284 (1973), by affirming the exclusion of testimony about James Burkhart's (Burkhart's) confessions at Christian's trial, 595 F.3d. 1076 (9th Cir. 2010). That Court did not order remand and declined to issue a certificate of appealability. Christian v. Frank, 365 F. App.'x 877 (9th Cir. 2010).

On March 11, 2010, Petitioner filed a petition for rehearing and a petition for rehearing en banc. The Ninth Circuit denied both petitions on May 19, 2010 (Dkt. #221), issuing its mandate on May 27, 2010 (Dkt. #222). Petitioner filed a petition for writ of certiorari with the Supreme Court on August 17, 2010, which that Court denied on November 1, 2010. Christian v. Frank, 131 S.Ct. 511 (2010).

On April 17, 2013, Petitioner filed a second Motion to Reopen Habeas Corpus Proceedings pursuant to Federal Rule of Civil Procedure 60(b)/Independent Action Due to Newly Discovered Evidence of Fraud on the court (Dkt. #267). In this Motion, Petitioner claimed that evidence had come to light that Respondents perpetrated a fraud on the court that corrupted the integrity of Petitioner's original habeas corpus proceedings (Id. at 11). Because the record before this Honorable Court was determined to be insufficient to establish the precise value of the evidence at issue, the Court held evidentiary hearings on July 16, 2014 (Dkt. #359). Because the Court was unable to hear all of the relevant evidence and also because Petitioner had obtained current counsel only shortly before the first hearing, the hearing was continued until March 16, 2015 (Dkt. #362) and ended on March 17, 2015. (Dkt.#387).

At the hearings conducted on those three days, the Court heard testimony from Reed Hayes, Kathleen K. Moniz, Susan Gushiken (Fukuda), Richard Smith and Darryl D. Carlson on July 16, 2014. (Dkt. #359) On March 16, 2015, the Court received testimony from Richard Icenogle, Philip Schmidt, Reed Hayes, and Peter Hanano (Dkt. #386) On March 17, 2015; the Court received testimony from Margo Evans and Richard Minatoya (Dkt. #387).The Court initially set Petitioner's Closing argument Brief for filing in writing on June22, 2015 (Dkt. #385). The Court changed that date to July 6, 2015 after The United States Attorney for the District of Hawaii disclosed further reports. (Dkt# 388) Also, of critical importance were the

filing and determinations of Petitioner's Motion to Compel Compliance with the Court's Orders for Sanctions and a Supplemental Motion to Compel Compliance with the Court's Orders and for sanctions filed by Petitioner Taryn Christian on February 20, 2015 and March 3, 2015 respectively (Dkts.# 364,367). The Court heard oral argument by Counsel for Petitioner and Counsel for Respondent on March 16, 2015 (Dkt. #376).

Continued requests for the court ordered discovery were made throughout these proceedings, of particular importance was a request for the production of the photographic array presented to Phil Schmidt by Maui Police Detectives on or around July 17, 1995 where he conclusively identified James Burkhart, in position 5, as the person he saw at the scene of the murder and marked that photograph with his initials PS. (Dkt. #386 at pp. 5-6). Similarly, the two photographs shown by Maui Police to Annie Leong in which she identified the suspect were also requested but never produced (Dkt. #386 at pp. 7-8) These examples are two of multiple instances where items, such as, reports, photographs and chain of custody logs, were ordered to be provided to the Petitioner but Respondent failed to comply with the court's orders.

On March 24, 2015, this Honorable Court issued order granting in part (1) Motion to Compel Compliance with Court's orders and for sanctions: (2) Supplemental Motion to Compel Compliance with court's orders and for sanctions. (Dkt. #382). Of particular note was the recognition that on January 31, 2014, this Honorable Court required Respondent to turn over all Brady material including but not limited to multiple items specifically listed by the Court. Several items were of critical importance during the prosecution of Petitioner's Motion to Reopen Habeas Corpus Proceedings pursuant to Federal Rule of Civil Procedure 60(b) Motion/Independent Action Due to Newly Discovered Evidence of Fraud on the court. These included: (1) Philip Schmidt's ("Schmidt") identification of Burkhart from a photographic line-

up on July 17, 1995 with Detective Kaya; (2) Annie Leong's (Leong) identification of Burkhart from one of two colored photographs within days of the murder with Detectives Funes and Kaya; (7) Seidel's shorts that were used as a trial exhibit; (10) Complete chain of custody/property reports for all evidence introduced as trial exhibits; (11) All prepared inventory lists made by the Maui Prosecutor's Office and Maui Police Department ("MPD") evidence concerning the exhibits." (Dkt. #382 at pp. 4-5).

The Court also specifically granted Petitioner's request for, among many other items; (7) Reports for all photographic line-ups displayed and separate photographic line-ups created; (8) Report for the photographic line-up presented to Schmidt on 7/17/1995 by Detective Kaya; (10) Report of 4x6 colored photographs presented to Leong prior to 8/21/1995; (12) All internal court and prosecutor's inventory reports for trial evidence in the Second Circuit between 2/22/1997 and 10/30/2007; and (13) Identity of court clerk related to trial exhibit index card, dated 7/16/2006." (Dkt. #382 at pp. 10-11) It will be argued that both the separate and cumulative impact by the Respondent to either produce or preserve these and other crucial items weigh heavily in favor of Petitioner's proof that multiple frauds have been committed upon the habeas court.

Applicable Law

As this Honorable Court noted in its Order (1) Requiring Respondent to respond to Petitioner's Rule 60(b) Motion and to Petitioner's Motions to Compel: (2) Denying Petitioner's Application for Release (Dkt. #286 at p.7), "When a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits but some defect in the integrity of the federal habeas proceedings" courts should not treat the Rule 60 action as a second or successive

habeas petition. (citing Gonzalez v. Crosby, 545 U.S. 524 at 532 (2005)(emphasis supplied by the court in its order).

In Gonzalez, the Supreme Court specifically identified "fraud on the federal habeas court" as an example of a permissible Rule 60 claim – one that attacks a "defect in the integrity of the federal habeas proceedings." Id at 532 N.5. (citing Rodriguez v. Mitchell, 252 F.3d. 191, 199 (2nd Cir. 2001)(Explaining that a witness's allegedly fraudulent basis for refusing to appear at a federal habeas hearing, related to the integrity of the federal habeas proceeding, not to the integrity of the State criminal trial")) This Honorable Court noted that the Supreme Court has explained, such actions can "be ruled upon by the District Court without precertification. Id at 538 (Emphasis supplied by this court Dkt. #286 at p.7.)

The Petitioner respectfully submits that he has proven that this Court's judgment was wrongfully procured as a result of police and prosecutorial misconduct that constituted fraud upon the court. (Dkt. #267 at p.2) Through the evidence presented at the three days of hearings and 115 exhibits tendered to this Court, it was shown that police and prosecutors carefully, deliberately, and intentionally throughout the habeas proceedings withheld exculpatory evidence and presented false evidence to the Court creating a false impression about the core operative "facts" of the case in an attempt to influence this Court in its decision making process.

The Court determined that an evidentiary hearing on Petitioner's Rule 60(b) claims was necessary because "Petitioner's Motion and Respondent's Response demonstrate that there are factual issues that cannot be resolved on the papers alone." (Dkt. #294 at p.14) (citing Sheng v. Starkey Laboratories, Inc., 53 F.3d. 192, 194-195)(8th Cir. 1995) It is respectfully submitted that the Court was correct in ordering a hearing on Petitioner's claims as multiple instances of fraud

and deceit were proven and that these events had a profound effect on the integrity of the findings of the habeas court.

A Rule 60(b) motion to vacate a federal judgment may be based on "(3) fraud …, misrepresentation or other misconduct of an adverse party." Fed. R. Civ. P. 60(b)(d). As will be argued, Petitioner has met this burden. The civil corollary to the disclosure provisions encompassed by the access to evidence doctrine is principally embodied in Rule 37 of the Federal Rules of Civil Procedure, which gives trial courts broad authority to impose a wide range of sanctions for discovery violations, including dismissal. FED. R. Civ. P. 37. When discoverable evidence has been destroyed in civil cases (also referred to as "spoliation of evidence"), courts have a flexible, discretionary sanctioning scheme to redress the discovery violations.[1]

Prosecutors are ultimately responsible for ensuring that this discoverable evidence is properly preserved and can be produced in court. *E.g.*, United States v. Mannarino, 850 F. Supp. 57, 72 (D. Mass. 1994) (citing United States v. Osorio, 929 F.2d 753, 762 (1st Cir. 1991)) (noting that the ultimate responsibility for disclosure of discoverable material rests with the prosecutor and any failure to preserve evidence for disclosure will fall squarely on the shoulders of the prosecuting attorney); *see also* United States v. Bryant *(Bryant 1)*, 439 F.2d 642, 650 (D.C. Cir.), *aff'd*, 448 F.2d 1182 (D.C. Cir. 1971) (per curiam). Notwithstanding the pervasive problems with the proper storage and retention of evidence, a series of constitutional mandates, court rules, and state and federal statutes give courts the power to enforce the government's evidence disclosure obligations. These laws are collectively referred to as the "access to

[1] *See* GORELICK ET AL., *supra* note 23, at 5; MARGARET M. KOESEL & TRACEY L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION *passim* (Daniel F. Gourash ed., 2d ed. 2006); J. D. Page & Doug Sigel, *The Inherent and*

evidence" doctrine. Arizona v. Youngblood, 488 U.S. 51, 55 (1988); California v. Trombetta, 467 U.S. 479, 485 (1984); United States v. Valenzuela-Bernal**,** 458 U.S. 858, 867 (1982) (discussing "constitutionally guaranteed access to evidence" under the due process clause); United States v. Bryant *(Bryant **1),*** 439 F.2d 642, 647 (D.C. Cir.), *affd,* 448 F.2d 1182 (D.C. Cir. 1971) (per curiam) (stating that "[a]ccess by defense counsel to certain evidence gathered by the Government is protected by both constitutional and statutory safeguards," including Brady v. Maryland, Rule 16 of the Federal Rules of Criminal Procedure, and the Jencks Act).

The prosecutor is charged with constructive knowledge of information collected by all those acting on behalf of the government. Moreover, nondisclosure of material exculpatory evidence violates Brady even if the prosecutor has acted negligently or inadvertently and not in bad faith in suppressing the evidence. Agurs, 427 U.S. at 110. The prosecutor plays a very expansive role in determining whether evidence falls within the scope of Brady and, if so, when the evidence will be disclosed to the defense. Agurs, 427 U.S. at 107 (Stevens, **J.)** (Noting that if evidence clearly supports a claim of innocence, the prosecutor's duty to disclose the evidence should "equally arise even if no request is made" by defense counsel).The Court has stated that "[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.'" The Court has recognized that the *Brady* doctrine places the prosecutor in the dual (and conflicting) role of being both an advocate on behalf of the government as well as a guardian of justice responsible for protecting the truth-seeking function of the trial process by disclosing information which helps the defense and undermines the government's case. Berger v. United States, 295 U.S. 78, 88 (1935) (stating that the interest of a U.S. Attorney is not to win a case, but to see "that justice shall be done"); *see*

Express Powers of Courts to Sanction, 31 S. TEX. L. REv. 43 (1990); *see also* Solum & Marzen, *supra* note 23, at

also Janet C. Hoeffel, Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady, 109 PENN ST. L. Rev. 1133, 1140-41 (2005) (arguing that it is perhaps unrealistic to expect prosecutors to be both zealous advocates in an intensely adversarial criminal justice system and to "do justice" by turning over exculpatory information in their possession).The Court, however, reconciles this conflict with its command that prosecutors seek justice and not just convictions. Berger, 295 U.S. at 88.

While the prosecutor retains discretion over the disclosure of *Brady* evidence, if the court finds that material, exculpatory evidence has been suppressed or destroyed, the court has broad discretion to impose sanctions on the government to remedy the violation. Thus, in order to determine the appropriate sanction for intentional destruction of evidence, courts are first required to conduct a hearing to inquire into the circumstances surrounding the loss/destruction of evidence. *See* United States v. Wables, 731 F.2d 440, 447 (7th Cir. 1984) (inquiring into the circumstances surrounding the government's nonproduction of a Jencks statement and finding that such an inquiry is critical to determining whether the government has "flouted the purpose of the Jencks Act"); United States v. Johnson, 521 F.2d 1318, 1319-20 (9th Cir.1975) (noting that the trial court has the duty to inquire into the circumstances surrounding nondisclosure in order to determine the appropriate sanction to redress the violation).

The Supreme Court has held that in order to establish that nondisclosure of exculpatory evidence was material, the defense must demonstrate that there is a "reasonable probability" that had the suppressed evidence been disclosed to the defendant, the result of the proceeding would have been different. United States v. Bagley, 473 U.S. 667, 668 (1985). The linchpin of this

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inquiry is whether suppression of the evidence denied the defendant a fair trial and undermined confidence in the verdict. Kyles v. Whitley, 514 U.S. 419, 434 (1995).

The evidence preservation and disclosure requirements imposed on the government by innocence protection laws fall squarely within the scope of the access to evidence doctrine. Innocence protection laws add biological material to the list of evidence already subject to disclosure by the government under Rule 16, the Jencks Act, and the Brady doctrine. Thus, the wrongful destruction of biological evidence needed for post-conviction DNA testing is as much an affront to the integrity of the judicial process as other access to evidence violations. This is why the production of the Seidel shorts is so critical. Accordingly, the well-worn, flexible analysis developed by courts to adjudicate other evidence destruction violations should be used by courts when adjudicating violations of innocence protection laws. Specifically, when DNA evidence has been wrongly destroyed, courts should take into account (1) the circumstances surrounding the loss or destruction of evidence (or the degree of government culpability); (2) the prejudice to the defense (or the importance of the evidence); and (3) the strength of the government's evidence of guilt adduced at trial.

The first prong of the access to evidence sanctions analysis focuses on the facts and circumstances that caused the destruction of evidence and the extent to which the government was at fault. One preliminary issue that frequently arises in post conviction litigation under innocence protection statutes is whether the biological evidence needed for DNA testing has *actually* been destroyed or whether it is simply lost in an overcrowded, mismanaged property room. Increasingly, however, before petitions for post-conviction testing are dismissed, courts have placed the burden on the government to prove that all testable evidence has, in fact, been destroyed. See, People v. Pitts, 828 N.E.2d 67, 72 (N.Y. 2005) ("[T]he People, and not

defendant, had the burden of establishing with sufficient specificity whether the evidence existed and could be tested. The mere assertion that the evidence no longer exists based on a phone call to a police Property Clerk's office is insufficient as a matter of law…").[2] In People v. Pitts**,** the court then remanded the case with specific directions:

> [The] Supreme Court should take steps to obtain from the People reliable information as to whether or not the evidence sought exists and the source of such information. Adequate information from the People might include, for example, an affidavit from an individual with direct knowledge of the status of the evidence or an official record indicating its existence or nonexistence. Pitts, 828 N.E.2d at 72. 155. (N.Y. 2005)

In Blake v. State, 909 A.2d 1020 (Md. 2006), the Maryland Court of Appeals found that before a petition for testing can be denied on the grounds that the evidence no longer exists, the government, as the custodian of the evidence, bears the burden of proving the evidence has been destroyed. *Id.* at 1031 ("It is only logical that this burden is upon the State, as the State gathered the evidence and was the custodian of the evidence. The information as to the location of the evidence and the manner of its destruction would not be within the knowledge of an inmate.").

The court held that the government cannot meet this burden with an "unsworn, unverified memorandum" stating that the police department's evidence storage facility was searched and the evidence was not found. The court explained in great detail that the government is required to perform a thorough and exhaustive search for the evidence throughout the criminal justice system in each place where the evidence could have been stored. *Id.* at 508 ("[T]he State needs to check any place the evidence could reasonably be found, unless there is a written record that the evidence had been destroyed in accordance with then existing protocol.").

The court also mandated that **the government identify the protocols that were in place for destruction of evidence at each location to determine whether proper procedures were followed in destroying the evidence and whether the destruction was documented.** *Id.* at

508. After the trial court is sufficiently satisfied that all testable biological evidence has been destroyed, the court should then determine whether the evidence was destroyed after preservation was mandated by the innocence protection statute. *see also* Tyler v. Purkett, 413 F.3d 696, 698 (8th Cir. 2005) (summarizing the court's prior en banc decision in a case directing the lower court "to order the evidence tested" if it still exists, and "to enter findings regarding the circumstances **...** of destruction" if the court finds that the evidence no longer exists).

In deciding whether the facts surrounding the destruction of evidence support the imposition of sanctions, courts have been more forgiving when the discovery violation was caused **by** an inadvertent error **by** an evidence custodian or an isolated act of negligence **by** a property clerk who, in "good faith," destroyed evidence as part of the routine housekeeping of the property storage facility.

Conversely, courts have found the government's actions are subject to sanctions when the circumstances surrounding the destruction of evidence suggest bad faith, a flagrant pattern of noncompliance with mandated disclosure duties, or a failure to take necessary steps to ensure that evidence is properly preserved. United States v. Bryant *(Bryant **1),*** 439 F.2d 642, 653 (D.C. Cir.), *affd,* 448 F.2d 1182 (D.C. Cir. 1971**)** (per curiam).(emphasis supplied).

The second prong of the sanctions analysis is an assessment of the degree of prejudice caused by the wrongful destruction of discoverable evidence. In making this determination, the court considers, among other things, how important or relevant the evidence is to the guilt determination. As discussed above, when evidence cannot be disclosed because it has been completely destroyed, the government bears the "heavy burden" of demonstrating the defendant was not prejudiced and sanctions are not warranted. *See* United States v. Carrasco, 537 F.2d 372, 377-78 (9th Cir. 1976); *supra* notes 116-20 and accompanying text. Thus, when the government

cannot comply with the disclosure obligations imposed by innocence protection laws due to the destruction of **DNA** evidence, the heightened level of prejudice should militate in favor of the imposition of sanctions.

The third prong of the access to evidence sanctions analysis is the assessment of the strength of the government's case. While the prejudice prong of the analysis focuses on the import of the destroyed evidence, the evaluation of the strength of the government's case seeks to determine whether, in light of the other evidence of guilt, the destroyed evidence would have made a difference in the ultimate verdict. *See* United States v. Mannarino, 850 F. Supp. 57, 69 (D. Mass. 1994) (stating that the loss of evidence "undermines [the court's] confidence in the outcome of the trial"). If the conviction was based solely or largely on the uncorroborated testimony of a single witness who was thoroughly impeached at trial, the weakness of the government's proof of guilt could tilt the balance toward the imposition of sanctions.

The access to evidence sanctions analysis provides a useful and effective paradigm for the judicial determination of whether to impose sanctions for the wrongful destruction of DNA evidence. The same concerns about the presentation of all relevant evidence to enhance the truth-seeking function of the court that justify imposing sanctions for other evidence destruction violations likewise support sanctions when DNA evidence is wrongly destroyed. The flexible three-prong test allows the court to take into account all relevant considerations when determining whether to impose sanctions. While negligent or inadvertent loss of evidence might not warrant sanctions in every case, the government's failure to take any steps to ensure that discoverable evidence is properly preserved, as well as the government's failure to impose and enforce regulations for evidence handlers on how to maintain and preserve DNA evidence, tilts the balance toward imposing sanctions. Further, given the extremely probative value of DNA

evidence, the destruction of all testable biological evidence will usually result in extreme prejudice to prisoners who seek testing under innocence protection statutes. Finally, the proper assessment of the strength of the government's case cannot be divorced from the collective wisdom gained from over 200 DNA exonerations. If the government's evidence was based largely or exclusively on the types of evidence that have been a major factor in past wrongful convictions, the court must carefully scrutinize this evidence to determine its reliability. The application of the access to evidence sanctions analysis guides the court to a just and fair determination of whether sanctions should be imposed when DNA evidence is wrongly destroyed by the government. The destroyed DNA evidence was a small fraction of critical evidence kept from the Petitioner.

Argument

Petitioner has proven multiple instances where crucial evidence was withheld, destroyed, or mischaracterized to the habeas court. The arguments presented in this document provide overwhelming proof either when considered separately and or when taken in their totality. They are all important and their sequence in this argument does not necessarily correlate to their importance in reaching a decision about whether this Rule 60 (b) motion should be granted.

To begin with, critical percipient witness Phillip Schmidt testified to this Court that he identified James Burkhart to Maui Police days after the murder.[2] This evidence was kept from the habeas court and would have, standing alone, supported sufficient corroboration required under Chambers to sustain the habeas court's finding that Burkhart's confessions should have been admitted at trial.[3] Schmidt testified that he was "as positive as I could be" about his

[2] Dkt.# 386 at p.43. Approximately July 17,1995.

[3] Prosecutor Minatoya testified that had he been aware of the Schmidt identification he necessarily would have had to tell the Ninth Circuit about it's existence. Dkt. # 387 at pp. 56-57

identification of photograph # 5 from the photographic array identification.[4] He placed his initials PS on the photograph to signify his choice. This evidence has been kept from the Petitioner for two decades. On March 16, 2015 Mr. Schmidt told this Honorable Court that there was no doubt in his mind that he put his initials PS on photograph #5-the photograph of James Burkhart.[5] The habeas court was denied access to this critical fact and the Petitioner's defense team was denied access to this fact during the litigation of the entire habeas petition. As far back as March 5, 1997, the State argued in suppressing Burkhart's multiple confessions that, "…no one picked out Mr. Burkhart. That's a significant fact."[6]

Within Schmidt's testimony multiple other issues were raised including the fact that as a lay person he clearly heard the words "James Burkhart just walked away" when listening to the 911 recording. Schmidt testified to this Court that this statement, placing Burkhart at the scene of the murder, was "very clear."[7] Retired investigator Richard Smith heard the same statement that Burkhart walked away.[8] Petitioner's audio expert John Mitchell presented the same 911 call to the decedent's cousin Rudy Cabating. Former United States Border Patrol Agent, Darryl Carlson interviewed Cabating in 2008 regarding the same 911 call to the decedent's cousin Rudy Cabanting and when the victim's cousin heard the words "James Burkhart just walked off" he recognized his dying cousin's voice on the 911 tape and became enraged, ostensibly because the wrong person stands convicted before this Court. In an affidavit submitted to this Court, the victim's cousin Rudy Cabanting swears "It was Cabaccang's voice which can be heard making

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[4] Dkt# 386 at 44. At oral argument before the Ninth Circuit a female judge interjected "but the eyewitness did not identify him (Burkhart) in the photo line-up, rather they identified the Defendant here." Dkt. #268-6 at p.18.
[5] Dkt #386 at p. 70.
[6] Exhibit 45 at p.12- See e.g. Prosecutor Jenkins arguing in chambers to the trial judge and bolstering that false claim with another false claim that Helen Beatty was waiting to provide an alibi for Burkhart. Exhibit 45 at p. 13.
[7] Dkt.# 386 at p.38.
[8] Dkt. #359 at pp. 81-82.

the statement that James Burkhart had walked off."[9] The victim's cousin in the same affidavit stated, I am well acquainted with my cousin's voice." [10] The habeas court was deceived by the State's expert into believing that the 911 tape was a wash- a coin toss to which reasonable experts could disagree. The habeas court was deceived on this point. The 911 tape placed Burkhart at the scene.[11]

The suppression of the two 4x6 photographs shown to Annie Leong by police, as well as the suppression of the identification report that should have and must have been generated by that identification, will be detailed in length during this argument. Again, the sequence of these arguments is not intended to be a comment on their correlative importance. Aside from not producing the photographs or the report from Annie Leong's identification of the murder suspect, Leong was allowed to testify without interruption by the prosecution that Richard Icenogle and Investigator Vickers were present during her identification procedure involving the two 4x6 photographs. This testimony was both untrue and critical to the defense.[12] Mr. Hanano admitted to the Court that, "…when the Petitioner decided to call her as a witness, we spoke to her." [13]The Respondent knew before hand that this testimony was going to be presented to the habeas court. At hearing Mr. Hanano was asked whether defense attorneys and their investigators ever accompany police on such interviews. His first almost flippant response was, I don't know. Maybe they do maybe they don't." [14] The Court then interjected and specifically asked whether in his seventeen year experience as a prosecutor he had heard of such a scenario

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[9] Dkt. #359 at pp. 123-124. See Affidavit of Rudy Cabanting at Exhibit 9.
[10] Exhibit 9.
[11] Exhibit 14 at p.7 of 8 of 911 call at 5:06.8.
[12] The Petitioner was not even arrested until August 17, 1995at 5:45 p.m. See Exhibit 90.
[13]Dkt. # 386 at p. 105.
[14] Dkt. # 386 at p.104.

and Mr. Hanano told the Court, "No, not that I can remember."[15] The same response was given by long time public defender Richard Icenogle who testified that he "never" had the opportunity to be present when police were conducting an identification process with a witness.[16] The Court inquired at the hearing, "Did anyone ever double check this woman's—the veracity of this woman's statements before she was questioned?" and Mr. Hanano's eventual answer was "No".[17] This statement was incorrect. Mr. Hanano spoke to Leong right before she took the stand. However, no one from the State would check out the veracity of the statements contained in Detective Funes' report about what the two proposed alibi witnesses Helen Beatty and Harry Auweloa would say.

As will be further explained, the false testimony that Petitioner's lawyer and investigator were present would have a wide ranging impact on other aspects of Leong's testimony and the failure to produce critical Brady evidence. The Maui Police Department had received a Crime Stoppers tip suggesting pictures of Burkhart were made available to police on July 17, 1995 immediately preceding Leong's identification procedure.[18] Again, no report about how or when the police came into possession of these two photographs was ever given to the Petitioner. It was Leong who provided the initial publicized sketch of the stringy hair suspect.[19] The sketch provided by Leong is the same sketch published in a Maui newspaper and the same sketch that Burkhart's alleged alibi witness stated "that she felt (Burkhart) looked like the person depicted in one of the composites."[20] At the habeas hearing before Magistrate Kobayashi, it was testified that

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[15] Id.
[16] Dkt. # 386 at p. 29.
[17] Dkt. # 386 at pp.106-107.
[18] Exhibit 75 at p.3, entry # 27. Dkt. #147 at pp. 67-68.
[19] Exhibit 1 attachment B, also Exhibit 64. Ms. Leong described this man as the person that entered the Gas Express store shortly after the crime. Exhibit 5 at paragraph 8.
[20] Exhibit 78 at p. 10. Phil Schmidt testified that he too thought the sketch looked like Burkhart Dkt. #147 at p. 54.

Leong "picked out somebody out of one of the photographs."[21] The prosecutor elicited testimony that, ""so when you identified the person in – in one of those four by six photos Mr. Icenogle [ck], petitioner's attorney was there as well as an investigator for the petitioner – right?" A. Yes."[22] This testimony was not only false, but it had the practical effect of neutralizing these critically undisclosed photographs. Habeas counsel for Petitioner did not pursue further questioning linking these photographs to Burkhart after hearing the false sworn testimony that Petitioner's legal interests were protected not only by defense counsel's presence but by Petitioner's investigator.

Former attorney Richard Icenogle testified that this testimony proffered before the habeas court was untrue.[23] He was not present with an investigator named Vickers during an identification process in which Leong said she identified the person in the sketch she developed.[24] Beyond being untrue, the circumstance itself was patently incredible. Neither Mr. Icenogle nor any of his colleagues in the defense bar, that he could recall had ever been given the opportunity to be present when police were conducting an identification process with a witness.[25] Upon court's questioning, the prosecutor himself admitted that in his 17 year experience he could not remember a single circumstance where a defense lawyer and his or her investigator were invited to join police during an identification array of suspected individuals.[26]The mere fact that Leong proffered the names Icenogle and Vickers is suggestive of witness manipulation. The fact that the prosecutor permitted the habeas court to believe Petitioner's counsel and Petitioner's

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[21] Exhibit 114 at p. 67; Dkt. #147 at 67.
[22] Exhibit 114 at p.70.
[23] Dkt. #386 at p.29.
[24] Dkt. #386 at p.29.
[25] Dkt. #386 at pp. 29-30.
[26] Dkt. #386 at p. 104.

investigator were present when such procedure never occurs constituted a fraud on the habeas court.

Testimony surrounding the destruction of the bloodied Serena Seidel shorts provided a plethora of incredible and fraudulent excuses intending to make the Petitioner and the habeas court believe that the shorts had been kept and later destroyed by the Maui Circuit courts. The presentation of Petitioner's evidence began with the presentation of Reed Hayes "a certified court qualified handwriting and document examiner."[27]

Mr. Hayes, who has been examining altered documents for nearly twenty-five years, was provided two exhibits to compare. Exhibit 21 was a copy of the evidence log card that controlled the trial exhibits used and withheld by a Second Circuit Court Order Inventory of Property in state's custody.[28] Exhibit 22 was a photograph taken by Reed Hayes using ultraviolet light which allowed him to see that information had been erased.[29] Mr. Hayes superimposed a red box where the erasure occurred on the evidence control card and was able to determine that the wording erased was "to pros."[30] Retired court clerk Kathleen Moniz testified that she recognized Exhibit's 21 (the unaltered exhibit) and 22 (the altered exhibit) to be used "to log exhibits that are in our vault at that time."

The vault is not accessible to either the defense or prosecution.[31] The card at issue is created for the clerks to "keep track of where the evidence is."[32] Court clerk Moniz admitted the

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[27] Dkt. #359 at p. 11.

[28] Exhibit 19, filed April 6, 1999 by the Department of the Prosecuting Attorney, County of Maui. Serena Seidel's shorts are specifically mentioned on the last page of the inventory. Exhibit 104 was produced by defense subpoena and even though it tracks the shorts further into time than the incomplete report given by the Respondent, it does not reflect how this crucial piece of evidence was handled after February 15, 1996. No other record of this specific document has been disclosed by the Respondent even after multiple court orders. This response is unacceptable and must be considered fraudulent when viewed in context with the forgery of the court chain of custody log allegedly protecting the integrity of the same piece of destroyed DNA evidence.

[29] Dkt. #359 at p.13.

[30] Dkt. #359 at p. 15.

[31] Dkt. # 359 at p.22.

exhibit log was altered in examining exhibits 21 and 22.[33] She testified that the erasure "to pros" would be a reference to the prosecutors.[34] Ms. Moniz testified that she did not alter the card and that the word "Returned" preceding the alteration was not her handwriting.[35] Mr. Reed would later testify that there was a high probability that this was in fact her handwriting. Ms. Moniz testified that on Exhibit 22 "6/16/06 KM" was her handwriting. Ms. Moniz testified that "located above shelf. Gave to Susan for Review" was not her handwriting.[36] Ms. Moniz said that upon her review of Exhibit 21 she stated that she did not write "6/16/06 returned to pros," and she did not know who did.[37] She testified there is no distinction made by the court in the manner in which defendant and prosecutor's exhibits are preserved by the court. Ms. Moniz testified that she thought the notation "gave to Susan for review," referred to then Susan Fukuda, now married and known as Susan Gushiken.[38] Finally, Ms. Moniz testified **"it would be against all protocol and procedure to change the information on that card."**[39]

Susan Gushiken (Fukuda) also testified that release of this evidence to the prosecutor's office would be a breach of protocol. Specifically, if the card stated returned to prosecutors and the evidence was returned to the prosecutors, that would have been a breach of protocol. Eight months later, on March 17, 2015, former Maui Prosecuting Attorney Investigator Margo Evans testified that trial exhibits should remain with the court clerk. The missing bloodied shorts were a trial exhibits and as Ms. Evans testified to this Honorable Court there were other crucial trial

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[32] Dkt. #359 at p. 23.
[33] Dkt. # 359 at p.24.
[34] Dkt. # 359 at p.25.
[35] Dkt. #359 at p.25.
[36] Dkt. #359 at p.30.
[37] Dkt. #359 at p.31.
[38] Dkt. # 359 at p.32.
[39] Dkt. #359 at p.33.

exhibits that did not remain with the court clerk but rather were in the possession of the Maui Prosecuting Attorney's office. This was not supposed to happen.

Petitioner's counsel pointed out that the police chain of custody log indicated that the metal Phillips-head screwdriver taken from the scene of the murder was taken into the possession of the Maui Prosecuting Attorney's office on February 21, 1997 where it remained for ten years until October 21, 2007.[40] Similarly, cotton swabs of blood-like samples taken from the ground area of the crime scene were documented in Exhibit 36 was taken into possession by Ms. Evans of the Maui Prosecuting Attorney's office on February 22, 1997 where they maintained possession of that evidence until October 1, 2007, when she transferred custody of the swabs to the Maui Police Department on the same day.[41]

Amazingly, the police chain of custody log detailing the disposition of the Serena Seidel shorts is also "missing.' Ms. Evans constructed a declaration filed with this court to explain the circumstances of how the evidence in Petitioner's case was handled by law enforcement."[42] She failed to mention in her declaration that the Maui Prosecuting Attorney's office had been in possession of trial exhibits for ten years – since the trial had been completed. Again, this should never have happened. The police chain of custody log regarding the shorts that were simultaneously documented by the altered Circuit Court custody log is provided at Exhibit 114. Entries to ensure the preservation of this evidence's integrity cease on February 15, 1996 on this incomplete particular copy.[43] There should be a complete document that tracks this evidence until its ultimate disposition.

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[40] Dkt. #387 at p.28.
[41] Dkt. #387 at p.30.
[42] Exhibit 33 at p.1, Dkt. #102.
[43] Exhibit 114.

At hearing before this Honorable Court, Prosecutor Hanano testified that he could not find either the shorts or the chain of custody that controlled the shorts.[44] When asked why he could not find the chain of custody or property log for the shorts, typified by such Exhibits as 27 and 33, he opined that this historical record was destroyed because "it's probably with the shorts."[45] This explanation is both absurd and misleading. Margo Evans, the Prosecuting Attorney's own investigator agreed that it would not make sense to destroy both the evidence and the historical record held separately to determine who, how and when the evidence was actually destroyed.[46] If that were the case there would never be proof that all of the drugs seized and destroyed by law enforcement in this country were actually destroyed. According to Mr. Hanano' logic, the chain of custody log proving their destruction would have been destroyed with the evidence.

Mr. Hanano testified that when in 2006 when Magistrate Kobayashi issued her discovery order he and Ms.Tengan made an appointment to see the circuit court clerk to review the trial exhibits.[47] He testified that he never had any of the trial evidence in his possession.[48] Mr. Hanano testified that his office should not be in possession of trial exhibits pending appeal.[49] Counsel for Petitioner then showed Mr. Hanano the chain of custody logs for both the Phillips head screwdriver found at the scene of the murder and the cotton blood swabs taken from the crime scene. The screwdriver ' property report or chain of custody log was represented by Exhibit 27 and the swabs by Exhibit 28.

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[44] Dkt. #386 at p. 93.
[45] Dkt. #386 at p. 93. He stated "it is with the evidence. The chain of custody follows the evidence" at p. 94.
[46] Dkt. #387 at p. 31.
[47] Dkt. # 386 at p.86.
[48] Dkt. #386 at p.87.
[49] Dkt. #386 at p.95.

While readily agreeing that these items should not be in the prosecutor's possession, Mr. Hanano also testified that the chain of custody logs for both items proving that they were in the custody of the Maui Prosecuting Attorney's office "was a mistake."[50] When the Court asked if he had any evidence to support this speculation Mr. Hanano testified that he did not.[51] Mr. Hanano admitted that the chain of custody logs reflect that his office had possession of these items for ten years.[52]

On March 16, 2015, questioned documents examiner Reed Hayes was recalled by the Petitioner. Mr. Hayes presented the Court with a demonstrative exhibit marked as 115 to explain his conclusions in re-analyzing the Second Circuit custody log used to document the missing Serena Seidel shorts. Specifically, he "looked at it again with the purpose of determining whether or not all the handwriting on the card may have been written by the same person." (Dkt. #386 at p.76) Previously, Court Clerk Kathleen Moniz denied that the written portion indicating that the trial exhibits had been "returned to pros" and later forged to simply say "returned" was in fact her writing.[53] After Mr. Hayes prepared exhibit 115 with 200 percent enlargements he determined that "there are a number of significant similarities between the KM writing and the rest of the writing on the card…" (Dkt. #386 at p. 78) Mr. Hayes concluded that there was a **high probability** that Moniz wrote all the entries on the card. (Dkt. #386 at p.78) This conclusion is commensurate with a fraudulent cover up to deflect the fact that the trial exhibits were in the possession of the Maui Department of the Prosecuting Attorney for the ten year period after trial and during the destruction of Seidel's shorts. This destruction was attempted to

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[50] Dkt. #386 at p.96 (emphasis supplied)
[51] Dkt. #386 at p.96.
[52] Dkt. #386 at p.97.
[53] Ms. Moniz' denial is found at Dkt. #359 at p.31.

be justified by a blanket court order regarding other court exhibits. The prosecutor's asked that this irrelevant and inapplicable order be attached to a memo written by Ms. Moniz.

Ms. Moniz testified that she never, in her entire and lengthy experience as a clerk, had an occasion where a court ordered evidence withheld and that evidence was subsequently destroyed in defiance of the court's order.[54] Ms. Moniz testified that withheld exhibits being kept in her custody should not normally be given to the prosecuting attorney's office without a court order.[55] In keeping with the inexplicable manner in which the missing evidence in this case was handled, Court Clerk Susan Gushiken testified that in June, 2006 prosecutors asked her to create a memo attaching an order of disposal.[56] Clerk Gushiken testified that she had never created such a memo before and that this was "an unusual occurrence."[57] Even though she was directed to create the memo by prosecutors Tengan and Hanano,[58] she did not know why she created the memo.[59] The disappearance of the blood covered shorts, the missing custody log, and the forged custody log combine to create another fraud worthy of the remedy requested.

The habeas court and the Ninth Circuit have been misled by the continued fraudulent misrepresentations that "none of the witnesses picked Burkhart's picture out of the photographic line-ups,"[60] and that, "the prosecutor also represented that Helen Beatty Auweloa could testify that Burkhart was someplace else on the night of the stabbing."[61] Investigator Darryl D. Carlson testified before this Honorable Court on July 16, 2014.[62] Investigator Carlson continues to work

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[54] Dkt. #359 at pp. 36-37.
[55] Dkt. #359 at p. 38.
[56] Exhibit 23.
[57] Dkt. #359 at p.57.
[58] Dkt. #359 at p. 57.
[59] Dkt. #359 at p. 59.
[60] Dkt. #146 at p. 41.
[61] Dkt. #146 at p. 41.
[62] Dkt. #359 at p. 94.

on this case on a *pro bono* basis, a decade after originally being retained by Petitioner's family.[63] He was a policeman, a United States Border Patrol Agent for over a decade , and also a private investigator.[64] He has dedicated his time to this case because he believes in Taryn Christian's innocence.[65]

In his post-habeas investigation he learned of a photographic identification; through photo array, by Phil Schmidt to Maui Police, on July 17, 1995.[66] Investigator Carlson, on July 7, 2010, showed Phil Schmidt the same line-up that police showed Schmidt on July 17, 1995. Mr. Schmidt selected photograph number 5 as the person he saw at the scene of the murder – just as he had done by marking a PS on that same photograph fifteen years earlier. When counsel asked investigator Carlson what he thought of this event, he responded**, "well I thought it was explosive. I thought it was tremendous that he had picked – Mr. Schmidt pointed to Mr. Burkhart, and it was never reported or disclosed. That I know of."**[67] When Phil Schmidt initially identified Burkhart by placing his initials on photograph #5 he did not know the name of the person he selected. This evidence and the circumstances surrounding this evidence would be kept from the Petitioner for nearly two decades. This fact alone justifies the requested relief.

When investigator Carlson was asked about the position taken by the state "throughout this case up until the argument in the Ninth Circuit regarding Mr. Burkhart's presence at the scene of the crime," Mr. Carlson testified, "the police and prosecution had a consistent role in hiding evidence - ."[68] When investigator Carlson was asked whether he ever saw, a photo line-up

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[63] Dkt. #359 at p. 98.
[64] Dkt. #359 at p. 98.
[65] Dkt. #359 at p. 98.
[66] Dkt. #395 at pp. 102-105.
[67] Dkt. #359 at p. 105.
[68] Dkt. #359 at p. 106.

where Phil Schmidt identified Burkhart, or a standard police report that would document the circumstances of this identification, Mr. Carlson testified "No."[69]

Mr. Carlson had previously testified that he was familiar with this file, that he read the reports, that he knew the evidence, and had interviewed key witnesses. Neither the line-up shown to Schmidt nor the necessary reports documenting his identification of Burkhart were ever disclosed to the habeas court. Investigator Carlson's testimony before this Honorable Court was also compelling in debunking the fraudulent argument that the State had two witnesses waiting in the wings to provide James Burkhart with an alibi for the time of the murder.

The Ninth Circuit's must important quote in revisiting the Hawaii Supreme Court's application of Chambers was the following:

> The Hawaii Supreme Court noted that unlike in Chambers, no eyewitnesses linked Burkhart with the scene of the crime. Id at 262. On the contrary, the Hawaii Supreme Court noted that the only two eyewitnesses present at the murder, Seidel and Schmidt, had both failed to identify Burkhart in photo line-ups and instead had individually identified Christian as the culprit. And two witnesses actually placed Burkhart at a completely different location at the time of the stabbing.[70]

It has now been proven that Phil Schmidt did identify Burkhart in a photo line-up immediately after the murder and that this identification was suppressed and kept from the defense, the trial court, the habeas court, and the Ninth Circuit.[71] It has now also been proven that the victim's own voice places Burkhart at the scene in a dying declaration readily audible by

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[69] Dkt. #359 at p. 106.

[70] Christian v. Frank, 595 F.3d. 1076 at 1084-1085 (9th Cir. 2010) quoting State v. Christian, 88 Hawaii 407, 967 P.2d. 239 at 262-263 (1988)

[71] The Ninth Circuit emphasized the importance of this point by stating in Fn. 11 of their decision that Schmidt's "recantation is especially unreliable given that it was made more than a decade after his failure to identify Burkhart as the perpetrator and positive identification of Christian as the perpetrator." But see Exhibit 80 Affidavit of Phil Schmidt made on March 6, 1996, before he testified at trial wherein he swore "I feel it necessary to include that fact that I have played golf at the Pukalani Golf Course where the suspect worked and there is a possibility that I recognized his photo in the line-up because of previous encounters at the golf course. (emphasis in original)

lay people, such as the victim's cousin and Phil Schmidt. The State's expert testimony regarding the 911 tape before Magistrate Kobayashi was misleading and deceptive.

The two witnesses that supposedly could place Burkhart on the other side of the island, as suggested during oral argument before the Ninth Circuit, could do no such thing. The notion that Helen Beatty and Harry Auweloa could provide such evidence was first documented in a police report written by Detective Funes after he interviewed these witnesses on July 23, 1995. Recorded or handwritten statements were not taken of these alleged alibi witnesses.[72] It is inconceivable that these two critical alibi witnesses did not provide a handwritten or recorded statement. Again, none were produced to the Petitioner if they did exist. Everyone from the trial prosecutors, who did not interviewed them[73], to the Ninth Circuit Court of Appeals, accepted Funes' false characterization that Beatty and Auweloa could swear Burkhart was with them at the time of the murder. This is simply untrue.

Margo Evans, the Maui Prosecuting Attorney's investigator did not interview these witnesses before trial and she could not recall any of the trial prosecutors interviewing these witnesses before trial even though her presence at such an interview would be standard law enforcement protocol and she was charged with assisting in this case.[74] Maui prosecutor Richard Minatoya testified to this Honorable Court that he never interviewed these alleged alibi witnesses and that he has never seen a handwritten statement indicating that they could provide alibi testimony for Burkhart at the time of the murder.[75] He did not know of anybody who's ever interviewed the witnesses.

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[72] Exhibit 78 at pp. 8-10. See the testimony of Deputy Prosecuting Attorney Peter Minatoya showing that he knew of no written or recorded statements from either alleged alibi witness. None have ever been produced.
[73] Dkt. #387 at p. 56.
[74] Dkt. #387 at pp. 34-35.
[75] Dkt. #387 at p. 56.

Mr. Minatoya testified that the representation made by Maui trial prosecutors that these witnesses were available and able to provide specific alibi testimony about Burkhart's presence at the time of the murder was based upon the extrapolations contained in Detective Funes' report.[76] Investigator Carlson's testimonial response to this was, "Mr. Funes wrote that Helen Beatty was a witness, and Harry – Harry Auweloa was a witness who could put Mr. Burkhart at their residence at the time of the murder. Mr. Funes wrote that. And as it turns out, it was a false report written by the police officer."[77] Funes stated in his report that "Beatty stated she gets up every morning between 0100 and 0300 hours to feed her baby and on 7/14/95 she saw Burkhart asleep in the spare bedroom when she got up."[78] This was a lie. This lie has been a lynchpin in the reasoning denying Petitioner's requested relief.

In a handwritten statement given to investigator Carlson Ms. Beatty wrote, "to my best recollection he was in my home when I fell asleep. I have no knowledge of him leaving after that later in the evening because I was sleeping. I would not know if he was there."[79] The statement in Detective Funes' report that Ms. Beatty had the opportunity to see Burkhart sleeping in the early morning hours on the day the murder was committed because she had to feed her baby was false. This fraud has permeated these proceedings throughout the habeas hearings.

Investigator Carlson testified that when he interviewed Ms. Beatty she told him, "and so for her to get up and – and feed the baby, she would have no reason to go back and look and see anything about Mr. Burkhart. Her attention was – her attention and intention was to take care of the baby. So she didn't really go back there and see if Burkhart was asleep."[80] Detective Carlson underscored her inability to provide Burkhart with an alibi with the point that Ms. Beatty

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[76] Dkt. #387 at p. 57.
[77] Dkt. #359 at p. 115.
[78] Exhibit 78 at p. 10.

confronted Burkhart with the sketch that appeared in the Maui News that day.[81] Why would Helen Beatty ask Burkhart if the sketch of the suspected killer was in fact Burkhart if she knew and could testify that Burkhart was with her at the time of the murder?

Even though the police told Schmidt that Petitioner had confessed, the Respondent told the Ninth Circuit at oral argument that there was no confession by Petitioner in this case.[82] The continued misrepresentations that the Petitioner confessed has infected every level of this prosecution, forever tainting the jury and ultimately proving Petitioner's arrest and conviction was obtained with the use of fabricated confession evidence. Telling an uncertain eyewitness that the police suspect confessed is a gross deviance from proper police procedure.[83] Prosecuting Attorney Investigator Margo Evans agreed with this point.[84] Mr. Minatoya also agreed with this point.[85] Police should never cement or vouch for eyewitness identifications with comments suggesting the identification is correct because the man you picked has already confessed. This makes for a certain recipe for wrongful conviction.

The Respondent made the habeas courts believe that Phil Schmidt "recanted" his testimony because of an absurd bicycle arrest made by Maui Police Officer Clyde Holokai. This argument is factually incorrect and extremely misleading.[86] As early as March 6, 1996, long before trial started, Phil Schmidt swore there was a possibility that he identified Petitioner because he had known him as a server at the golf club he attended.[87] The one consistency in Phil

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[79] Exhibit 6.
[80] Dkt. #359 at p. 116.
[81] The sketch is found at Exhibit 64.
[82] Exhibit 11 at p. 19.
[83] Dkt. #387 at p. 36.
[84] Dkt.387 at p. 36.
[85] Dkt.# 387 at p.60.
[86] Officer Holokai apologized to Mr. Schmidt outside the habeas hearing for his outlandish behavior. Dkt#386 at p. 69.This was part of the proof that Schmidt did not even equate Holokai as the same person who first responded to the murder with the Officer who wrongfully arrested him in a violent and inexplicably irrational manner.
[87] Exhibit 80 at p.2, paragraph 4.

Schmidt's identification was that the person he saw had "shoulder length hair in back and "stringy."[88] The mug shot of the Petitioner shows short hair.[89] The photographs of Petitioner with his family days before the murder confirm that he had short hair.[90] Short hair is not the hair seen by either Schmidt or Leong. This point has been a constant from the very beginning.

At the 2008 habeas hearing the State presented the testimony of Officer Clyde Holokai the first police officer to arrive on the scene.[91] Holokai's actions and subsequent arrest of Phil Schmidt must be detailed because the State would eventually argue before the habeas court that Schmidt "recanted" his identification because Holokai arrested him in 1999 for "disobeying a lawful order of a police officer."[92] The Ninth Circuit would also eventually mischaracterize Mr. Schmidt's identification process as a recantation in footnote 11 of their decision. This was not a recantation. Mr. Hanano told Magistrate Kobayashi that this arrest provided motive for Schmidt to change his testimony.[93] Mr. Schmidt, who had never been arrested or in trouble in his life,[94] told this Honorable Court all the circumstances of his 1999 arrest by Officer Holokai. Mr. Schmidt was riding his bicycle down Lipoa Street in the bicycle lane when Officer Holokai passed him driving in the opposite direction. All of a sudden Holokai peeled out of the intersection and got out of his car screaming obscenities at Phil Schmidt. The Officer took his bicycle, handcuffed Mr. Schmidt and took him to the Maui Police Department where he was roughed up, thrown in a cell for ten minutes then released.[95] Holokai wrote five citations against

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[88] Exhibit 88 at p. 1.
[89] Exhibit 92.
[90] Exhibit 1. Attachment A – photographs taken on 12/5/95.
[91] Exhibit 114 at p. 109.
[92] Exhibit 114 at p. 40.
[93] Exhibit 114 at p. 41.
[94] Dkt. #386 at p. 53.
[95] Dkt. #386 at p.52. At the habeas proceeding, Mr. Hanano suggested Mr. Schmidt received 30 days in jail. Exhibit 114 at p.44. There was no good faith basis for suggesting this punishment through questioning at the habeas proceeding.

Mr. Schmidt and confiscated his bicycle.[96] The local judge dismissed all the charges and ordered the return of Mr. Schmidt's bicycle.[97] When asked if this treatment by Officer Holokai was motive for his testimony supporting Burkhart's presence at the scene of the crime, Mr. Schmidt testified that that was a "ridiculous" suggestion.[98] Mr. Schmidt did not even know that the officer that arrested him was the same officer that first responded to the murder.

Officer Holokai and the decedent Vilmar Cabaccang were high school classmates. The officer considered Mr. Cabaccang a friend.[99] Officer Holokai was the first to arrive on the scene.[100] When he arrived on the scene two independent witnesses saw a steak knife in Vilmar Cabaccang's hand.[101] Exhibits 80 and 81 are affidavits from Phil Schmidt and Rob Perry Sr. and they prove that they told Detective Kaya that Cabaccang had a steak knife in his hands. Officer Holokai's report makes no mention of the knife in Vilmar's hand.[102] Detective Kaya and Funes's reports omit all statements from the Perrys and Schmidt about seeing the steak knife in Vilmar's hand. Instead, Detective Kaya wrote a report that when he later interviewed Schmidt that morning, Schmidt told him that Cabaccang was holding a double bladed in his right hand. Schmidt told Investigator Carlson that Kaya's report was factually impossible and untrue the only Schmidt saw was the steak knife in Cabaccang's hand.[103] That knife was never recovered. It simply disappeared.[104]

That knife could have provided a suspect with a self-defense argument. The murder weapon according to the State would be a double edge knife found on the ground further from

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[96] Dkt. #386 at pp. 52-53.
[97] *Id.*
[98] Dkt. # 386 at p. 53.
[99] Exhibit 114 at p. 110.
[100] Exhibit 114 at p. 110.
[101] They included Phil Schmidt. Dkt. #386 at p. 48 and Exhibit 80, Rob Perry Sr. Exhibit 81.
[102] Exhibit 77.
[103] Exhibit 79 at p.8.

the struggle area. Mr. Perry Sr., commented about this second knife saying, "It was a double eyed knife with a black handle and there was nothing on there at all. No blood or nothing on it."[105] Against all rational police protocol or procedure, Officer Holokai ordered Phil Schmidt from the murder scene without taking his identifying data or a statement. Phil Schmidt testified that Holokai seemed agitated and panicked at the murder scene.[106] He cursed at Schmidt and told him "to get the F' out of here."[107] Schmidt responded "I'm a witness, don't you want my name?"[108] The detectives had to later track Phil Schmidt down through the 911 tape. When they did, later that morning, Phil Schmidt explained that they were "irate" for not leaving his name with the responding officers.[109] Schmidt explained the circumstances of his treatment by Holokai. It is patently obvious that Holokai made the steak knife in Cabaccang's hand disappear and he followed that action up with making a key eyewitness who saw the steak knife in his hand disappear as well. The Perry's told defense investigators that they did not understand why the police considered them hostile witnesses.

Holokai was in all probability informally disciplined by someone at the Maui Police Department with some sense of justice. However, neither that discipline nor the knife in Vilmar Cabaccang's hand was ever disclosed to the defense or to the habeas court. Instead, the prosecution manipulated this inexplicable and retributive bicycle incident into motive for Phil Schmidt to lie. This mosaic of facts provides certain proof of how the integrity of the fact finding process of the habeas court has been manipulated and distorted.

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[104] Exhibit 98 at p. 141. Statement of Rob Perry Sr., after police arrived the knife in the victim's hand "disappeared."
[105] Exhibit 98 at p. 141. See also transcript of autopsy tape at Exhibit 105 attempting to explain the absence of blood on the alleged murder weapon.
[106] Dkt. #386 at pp. 48-49.
[107] Dkt. #386 at p. 49.
[108] Dkt. #386 at p. 49.
[109] Dkt. #386 at p. 50.

The suppression of the tape 11 is in keeping with this continuum of evidentiary distortion. As the Court noted in its order setting an evidentiary hearing in this matter, Petitioner alleged that respondent withheld a tape from the internal surveillance system operating on the morning of the murder at a nearby Gas Express.[110] The Gas Express at issue is where Annie Leong was working on the morning of the murder. Officer Uedoi interviewed Ms. Leong at the Gas Express that morning minutes after the police response to the murder.[111] She said the suspect had an injured hand and that he appeared to be out of breath and on some sort of drugs. He appeared to be in shock and that when he paid for the Snapple's, she noticed a blue back pack with plenty of money in it.[112]

Leong said the store had twenty-four hour surveillance which would show the time the male entered the store and provide a visual of his face. Leong told Officer Uedoi "that the video will be saved on Tape 11 and that she could not release the tape without the consent of Gas Express management."[113] Officer Uedoi wrote in his report that the Criminal Investigation Division should follow up in obtaining the tape.[114] This tape has never been provided. The police would later give the Petitioner Tape 13- from the next day. Even though the tape was irrelevant because it was for the wrong day, it did prove that Gas Express had a working surveillance system capable of producing quality images from the morning of the murder that the Petitioner would never see.

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[110] Dkt. #294 at pp. 7-8.
[111] Exhibit 62.
[112] Exhibit 62.
[113] Exhibit 62 at p. 2.
[114] Exhibit 62.

Attached to the report was the sketch that Phil Schmidt thought was developed from his description of the person he saw in his interview with Detectives.[115] This comment is stark proof that the man that Schmidt saw at the murder scene was the same man Leong saw moments later at her store- an image that would have been on Tape 11. Mr. Schmidt testified that he has been consistent with police from his first statement that the person he saw at the murder scene had long stringy hair in the back.[116] This was not and could not have been Taryn Christian and Tape 11 would have been essential in proving that fact. However, Tape 11 is gone. This video would have captured Burkhart's image within the store minutes after the murder.

It was not until 2008 when Magistrate Judge Kobayashi ordered the State to produce the original surveillance video from the Gas Express store for the day of the murder that prosecutors and they produced Tape 13. Tape 13 had never been produced to the defense until the original habeas proceeding. Unfortunately, Tape 13 was a video record of July 15 through July 17, 1995. It did not include the day of the murder. John Mitchell, the audio visual expert retained by the Petitioner at the 2008 habeas hearing, wrote that the Tape 13 images were clear and without distortion. The store's surveillance displayed six (6) separate cameras located within the store and one outside the store. One camera centered on the entire entrance area of the store which included the cash registers. Mitchell determined from the timing of the cameras in the Gas Express, the cameras would have captured everyone entering and shopping within the store. The property report entered into evidence in this hearing is for Tape 13. It shows Detective Kaya took possession of this tape from Donald Bailes the Gas Express General Division Manager for all

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[115] The sketch is found at Exhibit 64. See Mr. Schmidt's testimony regarding how the sketch developed by Annie Leong mirrored his memory of the man he saw at the crime scene. Dkt. #386 at pp. 70-71 and Exhibit 114 at pp. 53-55.

[116] Exhibit 114 at p. 53. See also Exhibit 80 affidavit taken on March 6, 1996.

Gas Express stores on July 17, 1995.[117] Detective Kaya does not sign the tape into evidence for seven months until February 20, 1996. Maui Prosecuting Investigator Margo Evans takes custody of the tape on February 11, 1997 and retains possession of the tape for the next ten years until it is ordered by the habeas court to be released to defense expert Mitchell for review.

When Mitchell tells Petitioner's counsel that the tape is for the wrong day, Petitioner's counsel contacts Prosecutor Hanano and no explanation is offered as to the whereabouts of Tape 11. Based on the clarity of Tape 13, Tape 11 would have shown a vivid and clear image of the stringy haired suspect described by Leong through sketch and confirmed by Philip Schmidt and suspected by alleged alibi witness Helen Beatty. This image was Burkhart. Officer Uedoi's report documenting the recovery of Tape 11 also states "refer to other Officer's report," however; no other "Officer's report" was ever produced by the State.

This unprovided other "officer's report" presumably would have included a statement and description of the stringy haired suspect by the second Gas Express employee present when the suspect came into the store. Letha Alexander was the second Gas Express employee present during the creation of Tape 11 but there are no interviews, statements, or reports detailing Letha Alexander's observations of the injured stringy haired suspect.

In an article appearing in the Maui news dated July 18, 1995 Lt. Wayne Ribao stated that the descriptions of the man wanted for questioning in Friday's stabbing in Kihei was also the suspect in an incident earlier in the week in which shots were fired at four teenagers riding in a pick-up truck in Wailea.[118] This person was James Burkhart. Compounding the duplicity surrounding the suppression of Tape 11, was the failure to provide the two 4x6 photographs wherein Annie Leong identified the person purportedly on Tape 11. This was further

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[117] Exhibit 88 at p. 5.

compounded by the failure to document that identification with a police report. This was further compounded by the false representation that Petitioner's Counsel Richard Icenogle was present to witness this undocumented identification with Investigator Vickers. This testimony exemplifies the type of chicanery that strikes at the very heart of the judicial fact finding process.

The journey of the First Hawaiian Bank surveillance tape provides further proof of how evidence was manipulated. This tape is tracked by Petitioner's Exhibit 113. This tape was recovered by Detective Funes on July 14, 1995 from Sandra Kobayashi[119] a representative of First Hawaiian Bank. The tape is distorted and essentially unintelligible. This is proven by examining the images presented in Exhibit 65. The top image is clear and discernible. That image came from Tape 13 the tape representing surveillance on July 15, 1995 the day after the murder. The distorted bank tape image misrepresented to be Tape 11 is shown at the bottom image of Exhibit 65.

The chain of custody log again shows that this evidence was mishandled. Detective Funes took it from the bank representative on July 14 at 4:53p.m. and held it in his personal custody. It was not signed into the Maui Police evidence room as required by proper police protocol. Instead the original bank surveillance tape is signed over directly to Maui Investigator Margo Evans. Apparently, it was kept at the Maui Prosecutor's office with the other trial exhibits including the screwdriver and blood swabs until October 3, 2007. There is a notation in the middle of Exhibit 113 documenting the distorted bank surveillance tape noting that it was given to either M.P.D. on October 3, 2007. [120]

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[118] Burkhart would later admit guilt to shooting at the teenagers. See also Exhibit 86.
[119] Exhibit 113.
[120] Exhibit 113.

The several trial exhibits, that were supposed to be in the Second Circuit District Court vault, including Serena Seidel's bloody shorts, were signed over from Margo Evans of the Maui Department of the Prosecuting Attorney on October 1, 2007.[121] Prosecutor Hanano classified the chain of custody logs that placed these trial exhibits in the Prosecutor's custody as a "mistake."[122] Mr. Hanano readily admitted though that his office should not be in possession of this evidence.[123] When Mr. Hanano told the Court that these two separate discreet documents were mistakes, the Court asked if he had any evidence to support his supposition that the two chain of custody logs were "a mistake," and Mr. Hanano said "no."[124]

These responses lead to questioning into the chain of custody logs that tracked the missing shorts. There are two custody logs at issue. The first is the District Court custody log that Reed Hayes said had been altered by the erasure of "To Pros."[125] The words before this erasure are " 6/16/06 Returned." Clerk Moniz said she did not write those words Expert Reed Hayes testified that there was a high probability that she did.

The second chain of custody log is represented by Exhibit 104. The shorts are described in this Maui County Police Department Property Report as "Item worn by victim's girlfriend, Seidel, who struggled with responsible."[126] The document itself has a signature place for the person responsible for the "final dispositions of property."[127] The property report given to the Petitioner is obviously incomplete. It does not even track the shorts to trial. The last person taking possession of the shorts on the incomplete property log did so on February 15, 1996.[128]

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[121] See Exhibits 27 and 28.
[122] Dkt. #386 at p. 96.
[123] Dkt. #386 at p. 96.
[124] Dkt. #386 at pp. 96-97.
[125] Dkt. #359 at p. 15.
[126] Exhibit 104.
[127] Exhibit 104.
[128] Exhibit 104.

When Prosecutor Hanano was examined about the Maui Police Department chain of custody log or Property Report for the missing shorts he testified, "It's probably with the shorts."[129] That answer is absurd and borders upon arrogant indifference.

There would be no logical reason to destroy the chain of custody log that tracks a critical piece of evidence in a murder case along with the evidence itself. The property report or chain of custody log would be the only historical record of how and when the physical evidence was destroyed. Even Mr. Hanano's former investigator testified before this Honorable Court that it would not make sense to destroy both the exhibit and the record that tracked the integrity of that exhibit.[130] Neither Ms. Evans nor Mr. Hanano, even after their commissioned investigation about how and when the shorts were destroyed, could come to any conclusions about who last possessed this critical piece of evidence.[131]The chain of custody log that also disappeared would have provided that proof.

After the habeas court ordered that the Seidel shorts be produced to the defense, Prosecutors Tengan and Hanano went to the District Court vault to view the evidence in June of 2006.[132] The shorts could not be found at the court – probably because they were never at the court. A chain of events was set in motion that was described in detailed proof during the Rule 60(b) hearings.

At the same point, the court custody log that would have tracked the integrity of the shorts was altered or forged.[133] Specifically, the words "To Pros" were erased.[134] Those erased

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[129] Dkt. #386 at. P. 97.
[130] Dkt. #387 at p.31.
[131] Dkt. #387 at p.31. (Evans); Dkt. #386 at p. 99 (Hanano).
[132] Dkt. #359 at pp. 51-52.
[133] Dkt. #359 at. P. 15.
[134] Dkt. #359 at p.15.

words were preceded by the word "returned."[135] Thereafter, the prosecutors requested the court clerk to create a memo with attached with a blanket Order of Disposal to attempt to explain the disappearance of this evidence.[136] The clerk had never created such a memo attempting to explain the loss or destruction of evidence.[137] The clerk denied knowing or admitting that the handwriting on Exhibit 21 indicated by both the 6/15 and 6/16 dates was not her handwriting.[138] Questioned document expert Reed Hayes testified to this court during the Rule 60(b) proceeding that there was a highly probable that in fact the writing at issue was the clerk's handwriting.[139] She denied this under oath before this court. This alteration or forgery's importance became clearer when Ms. Evans testified to the fact that she had signed onto chain of custody logs proving the possession of other trial exhibits that should never have been in the possession of the prosecution.[140]

Approximately, seven years after the bloodied Seidel shorts were determined to be lost or destroyed, Prosecutor Hanano asked an investigator from the Maui Department of the Prosecuting Attorney to investigate both disappearance of the shorts and the failure to provide appropriate chain of custody logs regarding the shorts.[141] After an extensive review Kalaokona Akana of the Maui Police Department Evidence Section stated "that no document exists to show the shorts were ever taken into the custody of the Maui Police Evidence Section."[142] In summary, a critical piece of trial evidence disappears after the habeas court orders its production.[143] The

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[135] Exhibit 21.
[136] Dkt. #359 at p. 57.
[137] Dkt. #359 at p. 57.
[138] Dkt. #359 at p. 48.
[139] Dkt. #386 at p. 78, See also Exhibit 115 a demonstrative aid used to explain Mr. Reed's conclusions.
[140] Dkt. #387 at pp. 27-32.
[141] Exhibit 26.
[142] Exhibit 26 at p.2.
[143] Police describe the shorts as "Item worn by victim's girlfriend, Seidel who struggled with the responsible." Exhibit 104.

District Court should have possession of the shorts but their log is altered or forged and the words "To Pros" are erased. Those erased words are preceded by the word "Returned."[144] The police deny they ever had the shorts and their property report tracking those shorts has also disappeared. The clerk denies that it is her handwriting on the critical portion of the log that precedes the erasure; however, a handwriting expert testifies that it is highly probable that it was the clerk's handwriting. During that same period of time, the Prosecuting Attorney's Office is in possession of other trial exhibits that should, by all standards of evidence integrity protocol, have remained with the clerk. Simultaneously, the Maui Police Property Report that would independently track the location and/or destruction of the shorts has also disappeared. The prosecutor claims it was probably destroyed with the shorts.

One important fact that cannot be overlooked is that court clerk Moniz in September 1997 drafted the Record on Appeal for the Hawaii Supreme Court in this case. Specifically, she documents that all bulk items of trial exhibits that were crime scene evidence – had been retained/withheld due to their unusual content and weight. The shorts are documented as one of the items that was "withheld." See Exhibit 18. The trial exhibit list also marked the shorts as "withheld" evidence. At this stage in the case, we know that the bulk items were separated from all of the paper exhibits introduced at trial that were later destroyed. We know from the court's log that "only withheld" exhibits were placed within two banker boxes. Interestingly, the State can account for every "withheld" trial exhibit with the exception of the shorts.

These events come to light along with the destruction and/or suppression of Philip Schmidt's identification of James Burkhart several days after the murder. The habeas court had been made to believe Schmidt recanted when in fact he had identified the stringy haired killer

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[144] Exhibit 21.

from the very start. Philip Schmidt testified that he was absolutely positive that he identified photograph #5 from Exhibit 56. He told this Court there was **"no doubt in his mind."**[145] Philip Schmidt did not know this picture was a picture of Burkhart.[146] This sworn testimony is in direct contradiction to the sworn trial testimony of Detective Funes who told the jury that Schmidt never selected Burkhart from a photographic array.[147] That lie has festered and infected every proceeding including the habeas court's decision making process.

Similarly, the lie that the State had two alibi witnesses waiting in the wings at trial has had the same corrosive effect on the integrity of the court's order. The two most important misconceptions developed by the Respondent to prevent Chambers from being correctly applied were the alleged failure of Schmidt to identify Burkhart and the State's ability to provide an alibi for Burkhart. Neither of these assertions is true.

Investigator Carlson testified before this Court that after interviewing the two alibi witnesses, he concluded that the report Detective Funes wrote "was a false report written by the police officer." Mr. Carlson testified that the witness extrapolations he wrote in his report contained "unqualified statements" that could not have been sworn to by either Ms. Beatty or Mr. Auweloa. Neither could swear that Burkhart was at their house at the time of the murder.

Interestingly, at trial, Prosecutor Tengan made multiple attempts to elicit this alleged alibi testimony through Detective Funes over the successful objections of trial counsel.[148] Again, neither Ms. Beatty nor Mr. Auweloa ever gave written or recorded statements to Detective Funes. This fact is striking considering the State was attempting to rely on these two people to take Burkhart from the murder scene. Instead, the prosecutor made multiple attempts to get this

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[145] Dkt. #386 at p. 70.
[146] A concise sequencing of these events is found at Exhibit 1 p. 2.
[147] Exhibit 51 at p. 75.

critical evidence to the jury over predictable and patently obvious hearsay objections. When those objections were sustained by the trial court the State did not call either Ms. Beatty or Mr. Auweloa.[149]

When Mr. Minatoya appeared before the Ninth Circuit for oral argument on the review of Petitioner's habeas corpus application, he told the court that, "There was proffered testimony of the State that said that he (Burkhart) was at relatives' house far away in upcountry Maui, not anywhere near Kihei, where the murder occurred."[150] This misstatement was heavily relied upon by the Ninth Circuit Court of appeals in reaching the conclusion that Chambers had been properly applied.

The suppression of the Annie Leong two 4x6 photographs combined with the failure to report the identification process in writing is inexcusable. Leong chose the suspect she saw on the morning of the murder. This was the same suspect that she developed in a composite sketch on the morning of the murder.[151] The "stringy" hair is the same "stringy" hair described consistently by Phil Schmidt.[152]

Not only did the State fail to produce the photographs, the police report about her identification using those photographs, and Tape 11, the State did nothing when Leong testified to the habeas court that Petitioner's lawyer Mr. Icenogle was present during the identification even though they spoke with her before she took the stand. This complete fabrication had a

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[148] Exhibit 51 at pp. 70-74.

[149] In her argument to the trial court, Ms. Tengan said**, "That's what your entire direct was about Burkhart as a suspect, and how their investigation showed or didn't show, or what they looked at and didn't look at, and you're precluding me from bringing the other side of the picture in …"** Exhibit 51 at p. 71. Even considering the importance Ms. Tengan attributed to this evidence the habeas record shows no one from the Prosecuting Attorney Office interviewed these witnesses nor were they called to testify. This underscores the evidence produced at these hearings that the State and police specifically lied about the ability to provide an alibi for Burkhart.

[150] Exhibit 11 at p. 5.

[151] Exhibit 54.

[152] Exhibit 80.

ripple effect on the development of the core facts presented to the habeas court. To begin with, if Petitioner's counsel was there, as Mr. Barrett was made to believe, then the Leong identification had to have been contrary to Petitioner's interests. If Leong had identified someone other than Petitioner surely this would have been hammered at every level of the adversarial process. What is truly disturbing is the common knowledge that police do not invite defense attorneys to participate in investigatory identification processes.[153] Mr. Hanano knew this but said nothing. Furthermore, how is it possible that Leong could have possibly come up with the names of Icenogle and Vickers? Mr. Icenogle testified that his brief appointment as Petitioner's attorney did not come until weeks after this incident. Why or how could Leong have chosen these names?

The Petitioner was not arrested until August 17, 1995. The false testimony that Petitioner's counsel was present had the practical effect of making the production of the two 4x6 photographs, the identification report that necessarily would have been generated by a display of those photographs, and Tape 11 not as important. Exactly the opposite is true.[154] The State's response to the court's multiple orders demanding that Brady material be produced to prosecute this habeas motion, as well as the Rule 60(b) motion, has been obstructive and unnerving. In counsel's opinion the suppression of Phil Schmidt's photographic array identification, where he placed his initials of Burkhart's photograph #5 days after the murder, is borders upon criminal. This though is only one of many instances where specifically ordered Brady materials have not been produced.[155] For example, during the Rule 60(b) hearing the Court once again ordered that the two 4x6 Leong identification photographs be produced. The Court stated "There is no dispute

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[153] Dkt. #386 at p. 22.
[154] Counsel for Petitioner codified these arguments for the Court at the hearing. Dkt. #386 at pp. 22-25.
[155] Petition has filed emergency motions to compel production of Brady materials through motion (Dkts. #269, 275) and argument of counsel (Dkt. #386 at pp. 13-26.)

that they existed at some point."[156] The habeas court heard extended testimony from Annie Leong about her identification from those photographs.[157] The Petitioner received no photographs, the Petitioner received no reports about the identification, and the habeas court was lied to about the circumstances of the identification itself.[158] The continuing point of these Brady violations is not only that critical material is not being produced but in many of the circumstances, such as the Seidel shorts, Tape 11, and the Burkhart alibi – the surrounding events of the existence of these items have been falsely portrayed to the Court.

The behavior of the police and prosecutors in this case well eclipses that presented to the court in Pumphrey.[159] Through the use of misleading, inaccurate, and incomplete responses to discovery requests, the presentation of fraudulent evidence, and the failure to correct false impressions, the judicial process and the integrity of the habeas court's decision was undermined. This amounts to a fraud upon the court under Pumphrey and it has been proven in this motion. Annie Leong's testimony about Richard Icenogle's presence should never have been allowed to stand uncorrected. The chain of custody logs that followed the destroyed shorts in the district court could not both have been simultaneously forged in one instance while the chain of custody log generated by police is lost or destroyed with the evidence in the next instance. These circumstances stretch the bounds of reason and portray a stark picture of fraud and deceit.

The prosecution made the habeas court and Petitioner believe that the shorts were in the hands of the court clerk but the erased returned "To Pros" evidence shows that they were improperly in the custody of the Department of the Prosecuting Attorney along with the screwdriver and cotton swabs blood evidence. A tape from the morning of the murder is

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[156] Dkt. #386 at p. 25.
[157] Dkt. #147 at p. 70 – Also admitted as Exhibit 114 at p. 10.
[158] Ms. Leong claimed that Petitioner's counsel and investigators were present when this was simply untrue.

acknowledged by Leong to contain the clear image of the murder suspect sketched for public distribution. The tape – Tape 11 is not produced. The protocol to protect its evidentiary value is not followed. Instead, the Petitioner is given another tape, which is clear and discernible, but for the wrong day.

The Ninth Circuit is told that the State had proffered alibi testimony. No such testimony ever existed. Evidence produced during these hearings show that not a single prosecutor or prosecutor's investigator bothered to speak or "pretrial" these witnesses. Instead, the trial prosecutor attempts to backdoor the alibi evidence through Detective Funes at trial and when that fails she does not even bother to call them to the stand. The Court heard testimony during this hearing that Funes' report was false and that there has been an ongoing deception about the ability of the State to produce evidence relied upon in reversing the habeas court. The Court has repeatedly demanded that the statements of Burkhart to police be produced to the Petitioner. They have not.

The Court most recently ordered that, "all materials, evidence, notes, interview memoranda, latent prints, audio and video recordings and any other communications in possession of the MPD, HPD, OFP, and FBI related to the MPD's investigation of Burkhart in connection with the murder of Cabaccang, including evidence related to MPD Detective Gapero's 1996 statements that police had arrested the wrong person for the murder of Cabaccang. The court hereby orders the MPD, HPD, OFP, and FBI to search for and produce said items."[160] This order was largely ignored by the State.

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[159] Pumphrey v. K.W. Thompson Tool Co., 62 F.3d. 1128 (9th Cir. 1995).
[160] Dkt. #382 at p. 11.

MPD was in possession of multiple statements made by Burkhart about the murder of Cabaccang as documented by attorney Richard Priest's affidavit.[161] The State has not given those statements to the Petitioner. The Court ordered that the respondent contact various law enforcement agencies to produce the materials, notes, and recordings surrounding statements given by Burkhart about the Cabaccang murder. Until recently, they did nothing. At hearing, the prosecutor was asked about these subjects.[162] These were the questions and these were his responses:

Q. Are you aware that Mr. Burkhart was arrested by the federal authorities for a gun charge?

A. Yes, I kind of remember that.

Q. Did you ever make inquiry from federal authorities, including the U.S. Attorney's Office of the FBI, about whether or not he made statements regarding this murder?

A. No, I'm not sure. I don't think so.

Q. Can you recall if anyone from your office did?

A. I'm not sure.

Q. You would know that though, wouldn't you?

A. I would know that?

Q. You should know that. I mean, you're the person in charge of writing the appeal on this case, you're the go-to guy in this case. Wouldn't you know if there were information inquiries from the federal authorities about Burkhart talking about this murder case?

A. No, not unless they were willing to share. I don't know what they know.

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[161] Exhibit 41.
[162] Dkt. #386 at pp. 108-111.

Q. But before – before it's known where they're willing to share, you have to ask them about it?

A. Right.

Q. And that wasn't done?

A. I'm not sure.

Q. You're not sure if you did it?

A. I'm not sure if we asked them.

Q. But for sure you didn't do it?

A. I don't think I did.[163]

At no time during this recent testimony did the Prosecutor tell the Court or Petitioner that he was actually in Honolulu at the FBI office debriefing Burkhart about the murder. Present at the debriefing were Investigator Margo E.R. Evans, Deputy Prosecuting, Attorney Richard K. Minatoya, and Peter A. Hanano. The report indicates in very certain terms that, "The interview was documented by the Maui Department of the Prosecuting Attorney …"[164]

Again, no reports, no notes, no statements were ever produced to the Petitioner. During the construction of Petitioner's closing arguments, counsel received a response from the United States Attorney for the District of Hawaii regarding their search for relevant information about Burkhart..[165] In a declaration by a supervisory Special Agent for the FBI it was determined that on January 29, 2009 a debriefing of James Hina Burkhart was conducted by the Maui County Prosecuting Attorney's Office.[166] According to the FBI, two prosecutors and an investigator traveled from Maui to Honolulu to debrief Burkhart. According to the State, nothing tangible

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[163] Dkt. #386 at pp. 108-109.
[164] Exhibit A at p.3.
[165] Attached as Exhibit A – having previously been filed with the court.

from that debriefing was produced. When questioned about the subject at the hearing on this motion, Mr. Hanano did not even divulge the fact that he had been present. This scenario typifies the manner in which historical facts and evidence have been presented or not presented to the habeas court.

CONCLUSION

Petitioner respectfully prays that this motion be granted, that this Honorable Court find that a fraud within the meaning of FRCP 60 has been committed, that the Petitioner's Motion to Reopen Habeas Corpus Proceedings pursuant to FRCP 60 (b) be granted, and that the Petitioner be granted release pending further proceedings on the matter.

DATED this 6th day of July, 2015.

/s/ Gary A. Modafferi

GARY A. MODAFFERI, ESQ.
Hawaii Bar No. 3379
Attorney for Petitioner

[166] Exhibit A – at p. 2.

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of July, 2015, the foregoing was filed with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

John D. Kim
Prosecuting Attorney
County of Maui

Counsel for Respondent
Theodore I. Sakai
Director, State of Hawaii
Department of Public Safety

Moana M. Lutey
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/s/ Erika W. Magana
_____
Erika W. Magana,
An Employee of the Law Office of Gary A. Modafferi