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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 **REBUTTAL 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 Rebuttal Argument of Petitioner in Support of Petitioner's Motion to Reopen Habeas Corpus Proceedings Pursuant to Federal Rule of Civil Procedure 60(b).

This Rebuttal 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 and Petitioner's Supplemental Exhibits #116-124 filed on July 24, 2015. (Dkt. #392)

DATED this 27th day of July, 2015.

/s/ Gary A. Modafferi
GARY A. MODAFFERI, ESQ.

INTRODUCTION

In Petitioner's initial closing, Counsel wrote in the introduction that Philip Schmidt swore to this Court that he was absolutely certain he identified Burkhart's photograph with a PS designation on photograph five days after the murder. Petitioner argued that this initial and undisclosed photographic identification has torn Schmidt's testimony and the entire identification process from the truth.

Petitioner argued that the suppression of this evidence alone from the habeas court undermined the integrity of the habeas proceedings. Shock, amazement, disbelief, and a healthy dose of outrage are the words that best describe Petitioner's reaction to Respondent's binding judicial admission that, "The fact that Schmidt had initially identified a photograph of Burkhart was well known to Petitioner at the time of his criminal trial."[1] This statement is untrue.

For twenty years the Respondent has failed to acknowledge that their key witness initially identified Burkhart as the killer and not the Petitioner. The habeas record is replete with previous denials of the existence of this newly recognized evidence. On September 9, 2008, the Respondent wrote, "Moreover, there was no evidence that anyone observed Burkhart stab Cabaccang or any evidence that anyone observed Burkhart at or near the crime scene on the night of the murder."[2]

Earlier the Respondent argued on May 4, 2006, "Here, Petitioner's entire actual innocence claim is premised upon James Burkhart being the killer. Indeed, Petitioner concedes that he was at the crime scene, but that someone else killed Cabaccang. However, **Petitioner cannot point to any physical evidence remotely establishing that Burkhart was present at**

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[1] Dkt. #391 at p. 6 of 27.
[2] Dkt. #148 at p. 10.

the crime scene on the morning of the murder."[3] Given these absolute and unqualified statements to the Habeas Courts for years, the Respondent just as of July 20, 2015 writes, "Petitioner was made aware of all information related to Schmidt's identifications during his criminal trial."[4] With unabashed, unapologetic arrogance, the Respondent concludes "Schmidt's original photo line-up identification was well known to Petitioner during his criminal trial."[5]

Where is the proof that this critical original identification by Phil Schmidt was ever given to the Petitioner? For twenty years the courts that have presided over this prosecution have been made to believe that the original identification by Phil Schmidt was of Taryn Christian.

The Ninth Circuit, based upon this false premise, characterized Phil Schmidt's testimony as a recantation. Unfortunately, the same unacceptable response was offered to this court regarding the undisclosed two 4x6 photographs used by the Maui Police Department to identify the murder suspect with Annie Leong. Ms. Lutey attempted to justify their non-production by telling this court, "I went through personally every piece of evidence in this case. It took me days to go through it to make sure that we produced everything that this court ordered from us. I have never seen the two 4x6's that Mr. Modafferi is referring to."[6]

The Court responded, in part, to Ms. Lutey's representations about those missing photographs and the testimony generated about those photographs sting:

> I'm not accusing you of lying to the court. I'm telling you somebody might have it in a way that wasn't - - you say I've looked at all the evidence in the case. Maybe you haven't. Maybe you thought you looked at all of the evidence in the case. I've had that happen before where people are presented by the police department with a file, and they're told this is all that there is. And then months later, sometime longer than that, Oops, there actually was more, but we misplaced it. Here it is. So your suggestion that

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[3] Dkt. #32 at p. 11 (emphasis from original document).
[4] Dkt. #391 at p. 7 of 27.
[5] Dkt. #391 at p. 9 of 27.
[6] Dkt. #386 at p. 24.

> you looked through all of - - which I accept at face value - - all of the materials and you didn't see any photographs, in light of what Mr. Modafferi has represented about the sworn testimony, indicates to me that there were photographs and we need to know what happened to them.[7]

The Court went on to conclude:

> Well, either way it doesn't look good. One way - - I mean, if the prosecutor knew that these photographs didn't exist and let her testify and perjure herself in front of Judge Kobayashi, which then carried over to my hearing, that these photographs in fact did exist, then that would have constituted a fraud upon the court. Now, if the photographs do in fact exist, then where are they? So, I mean, either way it's not looking good.[8]

The destruction of the bloodied Serena Seidel shorts is another part of this stunning mosaic of fraud and mishandled evidence. This hearing began with the Respondent arguing that some irrelevant and frankly manufactured court order and memorandum supported Respondent's version that the court clerk inadvertently destroyed previously ordered withheld trial exhibits in their custody. On June 2, 2000, Deputy Prosecuting Attorney Tengan wrote to Mary Wagner, Custodian of Evidence, Maui Police Department that, "The court has entered an order requiring the State, including the Maui Police Department, to hold and preserve all evidence in its possession. This office is returning to MPD all evidence we presently hold pending final disposition of all outstanding issues in this case."[9]

During the course of this hearing, it has been proven that this statement was untrue. The Department of the Prosecuting Attorney did not return the evidence it had to the police or to the court clerk, where it should have always have been. Instead, property logs that had to be independently obtained from sources other than the Respondent have shown that for over a decade, the Department of the Prosecuting Attorney was in possession of multiple withheld trial

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[7] Dkt. #386 at p. 25.
[8] Dkt. #386 at p. 26.
[9] Exhibit 20.

exhibits – many containing DNA and probably the missing bloodied shorts worn by Serna Seidell.[10] The erasure on the court clerk's custody card is proof that there was intent to hide the fact that these exhibits were in the possession of the Department of the Prosecuting Attorney when they should have been in the possession of the court clerk.[11]

There was no alibi for James Burkhart at the time of this murder. The report written by Detective Funes' was a false report written by the officer."[12] Again, the failure to construct or disclose a written or recorded statement from either Harry Auweloa or Helen Beatty is indicative of the fact that they could not say what the Respondent has insisted they could say for twenty years.[13] Instead, Petitioner has obtained written statements disputing the unsupported claim that they could in fact provide such an alibi. The Respondent has done nothing to rebut that evidence.

In Banks v. Dretke, 540 U.S. 668 (2004), the Court provided that "[w]hen police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." Banks, 540 U.S. at 675-76. A rule thus declaring "prosecutor may hide, and a defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process. Ordinarily, we presume that public officials have properly discharged their official duties." Bracy v. Gramley, 520 U.S. 899, 909 (1997). "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed Brady material when the prosecution represents that all such material has been disclosed."

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[10] Exhibits 27, 28, Supplemental Exhibits 116-124.
[11] The cover-up regarding this fact is underscored not only by Reed Hayes' testimony , the creation of Exhibit 23 and clerk Fukuda's testimony about that document.
[12] Dkt. #359 at p. 115.
[13] Exhibit 6 – Ms. Beatty stated, "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." This admission should have been told to the Petitioner by the Respondent.

To demonstrate that a fraud has been committed upon the Court warranting post-judgment relief under Rule 60(b)(3) or Rule 60(d)(3), Petitioner must show conduct (1) on the part of an officer of the court, (2) that is directed to the "judicial machinery," (3) that is intentionally false, willfully blind to the truth, or in reckless disregard for the truth, (4) that is a positive averment or concealment when one is under a duty to disclose, and (5) that deceives the court. Workman v. Bell, 10 F.3d 849, 852 (6th Cir. 2001).

The Ninth Circuit has faithfully followed the Supreme Court's mandate that misconduct resulting in a fraud on the court shall not be tolerated. It has recognized that such fraud "corrupt[s] the legitimacy of the truth-seeking process" and "defile[s] the sanctity of the court and the confidence of all future litigants." Dixon v. C.I.R., 316 F.3d 1041, 1046-47 (9th Cir. 2003) (finding a fraud on the court based on the actions of two IRS attorneys in covering up relevant evidence, including sitting by silently as witnesses presented testimony the attorneys knew to be false).

A party can be found to have engaged in a scheme to defraud the court and "improperly influence" its decisions through "the use of misleading, inaccurate, and incomplete responses to discovery requests, the presentation of fraudulent evidence, and the failure to correct false impression[s] created by [witness] testimony." Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1132 (9th Cir. 1995) (finding that defendant committed a fraud on the court by failing to disclose the existence of favorable evidence to the plaintiff and other violations of the rules of discovery and professional responsibility). In re Levander, 180 F.3d 1114 (9th Cir. 1999) (finding that perjury and nondisclosure that defiled the bankruptcy court amounted to a fraud on the court) (quoting 7 James Wm. Moore et al., Moore's Federal Practice ¶ 60.33, at 515 (2d ed. 1978)).

In Demjanjuk v. Petrovsky**,** a Sixth Circuit case examining whether the government committed fraud upon the court in civil extradition proceedings, the court stated that "Brady should be extended to cover … cases where the government seeks [remedies] based on proof of alleged criminal activities of the party proceeded against." Demjanjuk v. Petrovsky, 10 F.3d 338; 353 (6th Cir. 1993).

> . . . Although there are cases holding that a "plan or scheme" must exist in order to find fraud on the court, we agree with Judge Wiseman that a scheme, based on a subjective intent to commit fraud, is not required in a case such as this. *Reckless disregard for the truth is sufficient.*

The circumstances presented by this motion provide separate layers of support for finding a fraud upon this Court: **(1)** pervasive and egregious corruption at the core of the underlying investigation and prosecution of Petitioner; **(2)** the repeated suppression or omission of key facts by prosecutors in a manner which seriously altered this Court's ability to properly adjudicate this matter during the habeas proceedings; **(3)** flagrant disregard for the Court's specific orders to produce evidence and documents proven to be within the prosecutors possession; and (4) the knowing introduction of false and misleading testimony at the habeas evidentiary hearing and which continued throughout the present Rule 60(b) proceedings.

On their own, each of these circumstances have caused grave damage to the integrity of our judicial process, each layer has been laminated into fraud that goes well beyond what is required for this Court to exercise its inherent powers so as to effectuate justice and preserve the public's confidence in our judicial system.

The State's prosecutors turned a blind eye to a thoroughly corrupt investigation and prosecution of Petitioner and transported that corruption into the jurisdiction of this Court, and then permitted pervasive dishonesty by its investigators, key witnesses and its audio expert on issues going to the core of Petitioner's constitutional claims. These prosecutors recklessly

withheld critical exculpatory evidence favorable to Petitioner that they knew eviscerated the state's case proving Petitioner had committed no crime and intentionally deceived the Court. This egregious conduct demonstrates, among other things, a willingness to manufacture evidence harmful to an innocent party and an effort to deflect attention away from someone who has repeatedly confessed to the murder and inculpated the State's key prosecution witness as an accessory to the crime.

The habeas prosecutors' "unconscionable plan or scheme . . . designed to improperly influence the court in its decisions," is further evidenced by their spoliation of critical evidence that goes to the heart of the case. This includes their suppression of Schmidt's eye-witness identification placing Burkhart at the scene and the suppression of Tape 11 placing Burkhart within the Gas Express store refuting Respondent's false claim of alibi and the suppression of the Leong identification photographs and her statements accompanying that identification. The fraud worked upon this Court was comprised of numerous acts of misconduct. Although recklessness is all that need be shown to establish a fraud on the Court under controlling authorities, the vast majority of the conduct at issue here was clear, intentional, and willful. Together, the acts amounted to a pervasive fraud driven by the goal of prevailing at whatever the cost.

Importantly, this motion is about "far more than an injury to a single litigant," it is about "a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." Hazel-Atlas Glass Co. v. Hartford-Empire Co**.,** 322 U.S. 238, 245 (1944).

This motion is focused on a particular "species of fraud" perpetrated upon two federal courts, "an effort by the government to prevent the judicial process from functioning 'in the usual manner'" and a fraud that "involved perjury or nondisclosure so fundamental that it

undermined the workings of the adversary process itself." United States v. Estate of Stonehill, 660 F.3d 415, 445 (9th Cir. 2011).

The evidence in support of this motion is substantial and necessarily detailed. This is not uncommon when highly factual inquiries associated with a fraud upon the Court need to be proven. For instance, the Ninth Circuit's published decision in Stonehill and the Sixth Circuit's published decision in Demjanjuk, involve lengthy factual analyses resulting in lengthy decisions. During the present Rule 60(b) evidentiary proceedings, counsel for the State and the County of Maui were on notice that the prosecutors, the prosecutor's investigator and two clerks of the Second Circuit court had committed perjury regarding the location and custody of the trial exhibits introduced in this prosecution. The evidence is beyond clear and convincing. Despite their efforts to cover up what they actually did, knowing all along that the prosecutor's office had illegal possession of the trial exhibits from the time of trial, and despite that Respondent flagrantly ignored the Court's specific orders to produce the chain of custody reports for the exhibits, Petitioner recently acquired documents from SERI Laboratories which prove these points.

When judges allow police, prosecutors and other litigants to get away with such behavior, it "erodes the public's trust in our justice system, and chips away at the foundational premises of the rule of law." *Id.* at 632. "When such transgressions are acknowledged yet forgiven by the courts, we endorse and invite their repetition." *Id.* at 632.5

The conduct addressed in this motion is focused on governmental actors, who are required to operate under a higher standard of care in light of the power they hold in our society. When they fail to do so, it puts everyone at risk. A party can be found to have engaged in a scheme to defraud the court and "improperly influence" its decisions through "the use of

misleading, inaccurate, and incomplete responses to discovery requests, the presentation of fraudulent evidence, and the failure to correct false impression[s] created by [witness] testimony." Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1132 (9th Cir. 1995) (finding that defendant committed a fraud on the court by failing to disclose the existence of favorable evidence to the plaintiff and other violations of the rules of discovery and professional responsibility).

The Ninth Circuit has clearly defined the responsibilities of [federal] prosecutors when confronted with such conduct: When a prosecutor suspects perjury, the prosecutor must at least investigate. The duty to act "is not discharged by attempting to finesse the problem by pressing ahead without a diligent and good faith attempt to resolve it. A prosecutor cannot avoid this obligation by refusing to search for the truth and remaining willfully ignorant of the facts." Northern Mariana Islands v. Bowie, 243 F.3d 1109, 1118 (9th Cir. 2001)….The Court has emphasized that the presentation of false evidence involves "a corruption of the truth-seeking function of the trial process." Agurs, 427 U.S. at 103, 96 S.Ct. 2392.

Government attorneys have a responsibility to do justice and seek the truth. Their responsibility to do so is not only imposed through Brady, but also through the Rules of Professional Conduct, as well as compliance with the rules of discovery. *See, e.g.*, Morris v. Yilst, 447 F.3d 735, 744 (9th Cir. 2006) (stating the obligations of the state to "collect potentially exculpatory evidence, to prevent fraud upon the court, and to elicit the truth."). Counsel for Respondent had the absolute responsibility to disclose information such as this newly admitted initial photographic identification by Schmidt identifying Burkhart. See e.g. Brady, 373 U.S. at 87; Berger, 295 U.S. at 88.

Importantly, fraud upon the court may be found in an entire course of conduct by a party, rather than a single act of fraud directed at the court. For example, in Stonehill, the Ninth Circuit analyzed seven categories of evidence cited as fraud upon the court. *See* 660 F.3d at 446-51. The Ninth Circuit first examined each category of evidence in isolation to determine whether it constituted fraud upon the court, and determined that each category, on its own, did not qualify. *Id.* Importantly, the Ninth Circuit then proceeded to examine the allegations of fraud on the court as a whole, analyzing whether, taken together, the misrepresentations and nondisclosures "change[d] the story . . . presented to the district court." *Id.* at 452. While the Ninth Circuit ultimately found that the conduct, considered in its totality, did not constitute fraud upon the court because it did not go to the central issues of the case, Stonehill makes clear that a court is not limited to analyzing each alleged instance of misconduct in a vacuum, but must also consider whether a party's entire course of conduct rises to the level of undermining the judicial process sufficient to constitute fraud upon the court. *Id.* at 454; see also Pumphrey (analyzing whether the defendant's course of conduct throughout the case constituted fraud on the court).

Because the fraud on the Court here was so pervasive, and encompassed many of the most critical issues in the case, particularly the Chambers analysis, the fraud permeated the Court's entry of judgment, and threatened the sanctity of the judicial process. This combination made it nearly impossible for the Petitioner to succeed.

This Court has the power to act when our legal process has been corrupted, and it is difficult to imagine a case more deserving of a decision by this Court to exercise the full measure of its power. The Chief Judge of the Ninth Circuit has poignantly acknowledged that there is currently an "epidemic of Brady violations" and other examples of prosecutorial misconduct "abroad in the land" and that "[o]nly judges can put a stop to it." U.S. v. Olsen, 737 F.3d 625,

625 (9th Cir. 2013) (Chief Judge Kozinski dissenting) ("failing to disclose evidence casting serious doubt on the reliability of the only dispositive piece of evidence in the case" should have amounted to a Brady violation). When judges allow prosecutors and other litigants to get away with such behavior, it "erodes the public's trust in our justice system, and chips away at the foundational premises of the rule of law." *Id.* at 632. "When such transgressions are acknowledged yet forgiven by the courts, we endorse and invite their repetition." *Id.* at 632.

The nondisclosure of a substantial collection of tips, leads, and witness statements relating to Burkhart having confessed to committing the crime and implicating Seidel as an accessory in the crime—is an egregious breach of the State's Brady obligations. Prosecutors are not necessarily required to disclose every stray lead and anonymous tip, but they must disclose the existence of "legitimate suspect[s]," D'Ambrosio v. Bagley**,** 527 F.3d 489, 498-99 (6th Cir. 2008), especially when such information has been specifically requested by the defendant, as it was in this case. Withholding knowledge of a second suspect conflicts with the Supreme Court's directive that "the criminal trial, as distinct from the prosecutor's private deliberations, [be preserved] as the chosen forum for ascertaining the truth about criminal accusations." Kyles, 514 U.S. at 440, 115 S.Ct. 1555. By suppressing this evidence, the prosecution arrogated to itself a central function belonging to the criminal jury and pursued its role as adversary to the exclusion of its role as architect of a just trial. Cf. Brady, 373 U.S. at 87-88, 83 S.Ct. 1194 & n. 2. In Banks v. Dretke**,** 540 U.S. 668 (2004), the Court provided that "[w]hen police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." Banks, 540 U.S. at 675-76.

The Petitioner respectfully submits that the circumstances surrounding the suppression of police reports documenting Phillip Schmidt and Annie Leong's identifications of James Burkhart, along with the photographic evidence used during the identification process does not lend themselves to an innocent explanation. Schmidt's original identification of Burkhart could not have been more clearly and facially exculpatory; it directly contradicts and unhinges the State's theory of the case, directly exculpating Petitioner and casting direct and substantial doubt on the candor of the State's cooperating witnesses, who had every incentive to provide the State with the information it wants and to withhold unfavorable facts. This is particularly true of the version of events given by Serena Seidell.

Petitioner respectfully submits that the circumstances surrounding the suppression of Gas Express "Tape 11" surveillance video that would have captured images of *all* patrons entering and within the store and substitution of that tape with Tape 13, does not speak to an innocent explanation.

Petitioner respectfully submits that the circumstances surrounding the suppression of at least six documented interviews/ interrogations and a debriefing of James Burkhart conducted by police and prosecutors, along with agents of the F.B.I., as recent as 2009, does not speak to an innocent explanation.

Petitioner respectfully submits that the circumstances surrounding the suppression of the identities of MCCC inmates who reportedly contacted police prior to Petitioner's trial regarding Burkhart's confessions to the murder, including Jonn Iona, does not speak to an innocent explanation.

Petitioner respectfully submits that the circumstances surrounding the suppression of Petitioner's statements of denial to the stabbing of Cabaccang in the recorded conversation with

Lisa Kimmey and the production of a falsified and inaccurate transcript of Petitioner's statements and representations to the jury and every court, except the Ninth Circuit Court of Appeals at oral argument, that Petitioner had "confessed" not once but twice, to the murder of Cabaccang, does not speak to an innocent explanation.

Petitioner respectfully submits that the circumstances surrounding the withholding of Property Reports for crime scene evidence introduced as trial exhibits documenting the signed chain of custody for each item of evidence, does not speak an innocent explanation. This is particularly true when Respondent offers no explanation for its failure to produce the ordered documents.

Petitioner respectfully submits that the circumstances surrounding the failure to properly document and interview witnesses, Helen Beatty and Harry Auweloa, when prosecutors proffered them as Burkhart's alibi witnesses, does not lend speak to innocent explanation

Respondent's representation to the habeas court that Schmidt had a "motive to lie" because of his arrest while riding his bicycle, is a transparent rationalization of the plain fact that Schmidt's identification of Burkhart as the man he saw walking away and whom Cabaccang identified was his attacker, did not support the government's theory of guilt, *i.e.* that his information was exculpatory. At the habeas evidentiary hearing Schmidt was providing new evidence of his identification that conflicted with Government's theory of the case and continued questioning would only have led to additional Brady statements. Knowing this, Respondent's attack on Schmidt's credibility was duplicitous particularly in light of the evidence produced at this hearing that Officer Holokai took the steak knife from the decedent's hand and hid it from

the Defense.[14]. This strategy reflects a conscious knowledge of the exculpatory nature that refutes any notion that the Government's nondisclosure was the product of mere negligence.

The law is clear that when evaluating Brady claims, courts are required to consider not just the evidence actually presented at trial, but also the evidence, theories, and arguments that would have been presented had the exculpatory evidence been available. In other words, courts must examine the ***derivative effects*** of the new evidence. *See, e.g.*, United States v. Bagley**,** 473 U.S. 667, 683 (1985) (courts should consider "any adverse effect that the prosecutor's failure . . . might have had on the preparation or presentation of the defendant's case" and "the course that the defense and the trial would have taken had the defense not been misled by the" ***Brady*** violation). *See also* House v. Bell**,** 547 U.S. 518, 554 (2006) (reversing denial of habeas petition, noting that forensic proof connecting petitioner to crime was called into question and that petitioner put forth "substantial evidence pointing to a different suspect").

REBUTTAL

I. Schmidt Photographic Identification of Burkhart

The Respondent's response to Phil Schmidt's testimony before this Honorable Court that he was "absolutely positive" he identified Burkhart's photograph and marked it with a "PS" to signify his choice is absolutely shocking.[15] The Respondent's newly formed answer to this testimony truly underscores the fact that truth as currency has had little value throughout these proceedings.

In their closing argument to this court the State wrote, "The fact that Schmidt had initially identified a photograph of Burkhart was well known to Petitioner at the time of his criminal

[14] See for example the testimony of Prosecutor Minatoya recalling that 2 knives were recovered from the scene. Dkt. # 387 at p.59. See also Affidavit of Rob Perry verifying existence of a second knife. Exhibit 81 p. 2. See also

trial."[16] Petitioner did not know that Burkhart had been identified through a photographic array at the time of his criminal trial. To say otherwise is a fraud of enormous proportion. This fraud strikes to the very heart of the reasoning that the Ninth Circuit Court of Appeals misapplied Chambers in reversing the decision to grant Petitioner's habeas bid. At the United States Court of Appeals for the Ninth Circuit the Respondent's legal representative told the court, **"In this case, the eyewitnesses at the location identified the Petitioner, not anybody else. There's nothing to tie this third party, Mr. Burkhart to the location."[17]**

At the Rule 60 hearing before this Honorable Court, Counsel for Petitioner specifically asked Mr. Minatoya, "Did you ever inform the Ninth Circuit, or did you have knowledge, prior to going into that argument with the Ninth Circuit, that Phil Schmidt had identified Burkhart?"[18] Mr. Minatoya's sworn response was "I was not aware of that."[19] Counsel for Petitioner asked, "If you were aware of that, that would be something that you should of told them?"[20] Mr. Minatoya's response to this court was, "If I was, yes."[21]

Now two decades later the State's position on this seminal issue has morphed and they argue, "The fact that Schmidt had initially identified a photograph of Burkhart was well known to Petitioner at the time of trial."[22] Where in the record was it ever disclosed by the State that on July 17, 1995, days after the murder, Schmidt identified Burkhart? This evidence has been hidden – suppressed from the Petitioner until Mr. Schmidt had the opportunity to tell this Court

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statement of Rob Perry describing how the second knife just disappeared. Exhibit 98 at p. 142.See also testimony of Phil Schmidt stating he was 100 percent certain that Vilmar had a steak knife in his hand.

[15] Dkt. #386 at pp. 43 and 70.

[16] Dkt. #391 at p. 6 of 27.

[17] Exhibit 11 at p. 5, Statement of Deputy Prosecuting Attorney Richard Minatoya.

[18] Dkt. #387 at pp. 55-56.

[19] Dkt. #387 at p. 56.

[20] Dkt. #387 at p. 56.

[21] Dkt. #387 at p. 56.

[22] Dkt. #391 at p. 6 of 27.

the truth. This evidence is proof of duplicity of the highest magnitude. Philip Schmidt was asked about the photographic identification days after the murder and the manner in which he put "PS" on photograph #5 of what would eventually be a redacted State's trial Exhibit 56.

Counsel asked "And would you have put, "PS"?" (on photograph #5) [23] Mr. Schmidt testified, "PS" yes, sir." Counsel asked, "Now, how certain are you of that event?"[24] Mr. Schmidt asked, "Of picking him out?"[25] Counsel responded, "yes."[26] And Mr. Schmidt stated, "As positive as I could be."[27] Now Respondent argues that Petitioner knew this fact all along. If Petitioner knew this fact all along then the State must have known this fact all it all along. Where are the reports? Where are the statements of Mr. Schmidt? Where is the line-up with a "PS" on photograph #5? The suppression of this evidence combined with trial counsel's failure to follow up with Mr. Schmidt's testimony that he identified some other unknown person has poisoned Petitioner's bid for justice.[28] This failure to comply with Brady has created the false and fraudulent impression that Phil Schmidt recanted his identification of the Petitioner when in fact, as the Respondent now admits … "Schmidt had initially identified a photograph of Burkhart…"[29]

The habeas court and the Ninth Circuit have been grossly misled by these fraudulent representations that created the lie that "none of the witnesses picked Burkhart's picture out of

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[23] Dkt. #386 at p. 43.
[24] Dkt. #386 at p. 43.
[25] Dkt. #386 at p. 44.
[26] Dkt. #386 at p. 44.
[27] Dkt. #386 at p. 44.
[28] Mr. Schmidt truthfully testified that he did identify someone else but nobody followed up on the Burkhart identification because neither the police nor the prosecutors produced that line-up where "PS" signified his identification of Burkhart.
[29] Dkt. #391 at p. 3. Given the recent admission that "Schmidt had initially identified a photograph of Burkhart," the Ninth Circuit's analysis of construing Mr. Schmidt's habeas testimony as a recantation becomes inapplicable. If Schmidt initially identified Burkart, even if that identification was illegal, suppressed, then his habeas testimony should not be viewed as unreliable. Christian v. Frank, 595 F. 3D. 1076 at Fn. 11 (9th Cir. 2010)

the photographic line-ups."[30] The Ninth Circuit incorrectly concluded that Mr. Schmidt's … "recantation is especially unreliable given that it was made more than a decade after his original failure to identify Burkhart as the perpetrator …"[31] Now the Respondent argues to this Court that, "The fact that Schmidt had initially identified a photograph of Burkhart was well known to Petitioner at the time of his criminal trial."[32] This statement defies all logic and reason. It also changes the nature of this event from a recantation to an original identification.

II. The Destruction and Cover-up of the Seidel shorts.

The Respondent argues to this Court that the bloodied shorts worn by Serena Seidel during the murderous struggle show "nothing to indicate that (the) shorts would actually be exculpatory."[33] The blood on those shorts would most likely have proven the actual killer. This point was described in the truncated property report of the Maui County Police Department property report which aptly describes the importance of these shorts as, "Item worn by victim's girlfriend Seidel, who struggled with the responsible."[34] The Respondent's closing fails to address the reason why the report detailing the evidentiary integrity of these shorts ends in 1996.[35] The Respondent ignores the fact that they have been ordered to produce a current chain of custody log for these missing shorts but they have not complied with this court order and offer no rational excuse for their failure.

The Respondent begins their argument about this destroyed DNA evidence by repeatedly mentioning that the "shorts were a defense exhibit during Petitioner's criminal trial." Court clerk Moniz testified that there is no distinction in the manner in which defendant's exhibits and

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[30] Dkt. #146 at p. 41.
[31] Christian v. Frank, 595 F.3d. 1076 at Fn. 11 (9th Cir. 2010)
[32] Dkt. #391 at p. 6 of 27.
[33] Dkt. #391 at p. 17 of 27.
[34] Exhibit 104.
[35] Id. at 104.

prosecutor's exhibits are handled. They are both to be preserved and maintained with the same evidentiary integrity. They are supposed to be kept together.[36] The evidence presented to this Court showed that this fundamental precept was violated when a former Maui Prosecuting Attorney Investigator testified that actual trial exhibits which should have been in the exclusive control of the court clerk were instead in the physical custody of the Department of the Prosecuting Attorney.[37]

These items included the screwdriver found under the decedent and DNA blood swabs collected at the scene of the murder.[38] The trial exhibits that should have been in the court clerk's vault instead were taken into possession by the Office of the Prosecuting Attorney on February 21, 1996 and held for over a decade until their release on October 1, 2007.[39] It was during this time that Magistrate Kobayashi ordered the shorts, which should have been kept together with the screwdriver and blood swabs at the court clerk's vault, be turned over to the Petitioner for DNA testing. It was during this time that the shorts could not be found. It was during this time that the court clerk's custody log was altered or erased to delete the words "to pros." These words were followed on the unaltered card by the "6/16/06 Returned."[40]

Even though the evidence produced at hearing in this matter proved that the Department of the Prosecution Attorney was wrongfully in possession of trial exhibits such as the cotton swabs, that should have been kept together with defense exhibits such as the missing shorts, the Respondent makes the factually incorrect argument that, "It was the court legal documents section, not the prosecutor's office, that had possession of the documents. Therefore, the documents could not be "returned" to the prosecutor's office, since the office had never been in

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[36] Dkt. #359 at pp. 31-32.
[37] Dkt. #387 at pp. 28-30.
[38] They also include exhibits detailed in Supplemental Exhibits 116-124.

possession of the evidence in the first place."[41] This argument is completely refuted by the State's own witnesses. The chain of custody logs admitted to by Margo Evans about the screwdriver and the blood swabs directly contradicts this argument. These arguments are also refuted by the newly obtained property reports from SERI Laboratories.

When this contradiction is augmented by the failure to produce the Maui Police Department chain of custody log for the missing shorts the shifting blame underscores the fact that someone caused the shorts to go missing and Ms. Moniz was made to develop a paper trail to explain the disappearance of yet another grouping of Brady material. Multiple facts support the fact that Ms. Moniz provided cover for the Office of the Prosecuting Attorney. To begin with this type of destruction had never occurred before in her lengthy experience as a clerk. Evidence that had been ordered withheld by a court had never been subsequently destroyed in defiance of that court order.[42]

Withheld trial exhibits should not be in the custody of the prosecutor but it was proven that at in this case they were in their possession. The Respondent appears to be purposefully confusing the word "documents" with the concept of court ordered withheld trial exhibits. For example, they argue the "Returned to Pros" forgery is implausible because … "the documents could not be returned to the Prosecutor's Office, since the office had not been in possession of the evidence in the first place."[43] This audacious statement ignores the signed chain of custody logs for the screwdriver and blood swabs taken into the prosecutor's possession on February 21, 1997 and maintained in their possession until Margo Evans signed them over to Susan Fukuda on October 1, 2007. The same was true of the plaid jacket and other DNA swabs recently

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[39] Dkt. #387 at p. 30.
[40] Exhibits 21 and 22.
[41] Dkt. #391 at p. 20 of 27.

discovered by property reports that had to be obtained outside of the respondent's sphere of non-compliance.

When prosecutor Hanano was asked about this inexplicable breach of evidentiary protocol, he told this Court it was a **"mistake."**[44] When the Court asked if he had any evidence to support this speculation that multiple chain of custody logs were a **"mistake"** he said that he had no evidence to support his speculation.[45] Petitioner has recently come into possession of chain of custody logs of other trial exhibits such as a blood stained baseball cap, a bluish/black and grey flannel jacket, clear plastic gloves, and other cotton swabs containing blood recovered from the scene of the murder that were also, according to the Maui County Police Department Property Report, all maintained by the Department of the Prosecuting Attorney when they all should have been maintained by the court clerk.

Mr. Hanano speculated that his investigator simply signed off in the wrong place on the log on two separate occasions.[46] The supplemental exhibits show three more occasions where the prosecutor's investigator would have signed off and improperly taken custody of withheld trial exhibits on three more occasions. The court previously ordered these reports to be produced, as with all property reports for trial exhibits, these reports were not produced by the State in defiance of this court's order.[47] These recent developments must be viewed in context of the absurd suggestion that the destruction of the Maui County Police Department Property Report governing the missing shorts was probably destroyed with the shorts.[48]

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[42] Dkt. #359 at pp. 36-37.
[43] Dkt. #391 at p. 20 of 27.
[44] Dkt. #386 at p. 96.
[45] Dkt. #386 at p. 96.
[46] Dkt. #386 at p. 96. See also Exhibits 27 and 28.
[47] Petitioner was able to recover these documents from the SERI Laboratory.
[48] This argument was addressed in Petitioner's Closing Argument at p. 26.

The Respondent's closing completely ignores relevant law that 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.[49] Gonzalez defines an example of a permissible Rule 60 claim as one that attacks "a defect in the integrity of the federal habeas proceedings."[50] How can these two legal precepts be reconciled with the suppression of Phil Schmidt's photographs "PS" identification of Burkhart on July 17, 1995? The suppression or the identification report that had to have been filed with that identification, the destruction of the shorts, the destruction of the property reports for the shorts and all the other withheld trial exhibits ordered to be turned over but never received by the defense?

The list is seemingly endless. It includes the two 4x6 photographs that Annie Leong used to identify the suspect who entered the Gas Express minutes after the murder, it includes the report that must have been filed to document such an identification, it includes the bait and switch done with Tapes 11 and Tape 13. The Defense did not even know about Tape 13 until 2007 and when they received it. After receiving Tape 13 after Magistrate Kobayashi's order two things became certain: 1) It was for the wrong day and; 2) It was very clear and intelligible. The Petitioner still has not received Tape 11. While recognizing their shameless failure to produce such critical Brady material, the Respondent argues "fraud … must consist of more than garden-variety non-disclosure."[51]

Is it truly their argument that this "garden variety" evidence? Their behavior has been willful and contemptuous. The Respondent allegedly commissioned an investigation into the missing shorts to determine who at the court clerk's office is responsible. All reason and all the

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[49] United States v. Carrasco, 537 F.2d. 372, 377-78 (9th Cir. 1976).
[50] Gonzalez v. Crosby, 545 U.S. 524 at 536.
[51] Dkt. #391 at p. 16 of 27. Citing Pizzuto 783 F.3d. at 1181.

evidence received at these hearings point to the fact that they were in the possession of the Department of the Prosecuting Attorney along with the other withheld trial exhibits.[52] The investigation is detailed in a two page report authored by Jeanna Kerr. While Ms. Kerr interviews and inquires about the court clerk's evidence vault and the Maui Police Department vault, she does not investigate her own agency where multiple property reports indicate withheld trial exhibits are being inappropriately housed. While the Respondent cannot or will not produce the relevant property reports to the Petitioner, the report indicates that on August 1, 2013 Ms. Kerr interviewed Susan Gushiken, Judicial Assistant to Judge Cahill. Ms. Kerr wrote in her report, "Gushiken stated that she knows she turned the case evidence over to Maui Prosecutor's Investigator Margo Evans, from a review of her copy of the signed chain of custody log."[53] How is it possible that Ms. Gushiken can have such a log but the Respondent cannot produce it to the Petitioner? The investigation was an apparent sham.

III. <u>The Alleged Confession.</u>

The Ninth Circuit was told by the Respondent that there was no confession in this case. In a remarkable reversal the Respondent now claims that Petitioner's statements during the tape Kimmey calls "clearly demonstrate that Petitioner confessed to Kimmey."[54] This reversal is almost as stunning as the latest reversal that, "The fact that Schmidt had initially identified a photograph of Burkhart was well known to Petitioner at the time of his criminal trial."[55] Both statements are astoundingly false yet the Respondent has argued to various courts the exact opposite of what is now being argued in their Rule 60 closing argument. The Respondent uses a

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[52] See Exhibit 26.
[53] Exhibit 26 at p. 1 last paragraph.
[54] Dkt. #391 at p. 20 pf 27.
[55] Dkt. #391 at p. 6 of 27.

snippets from the Kimmey tape to reverse the argument that Mr. Minatoya made to the Ninth Circuit Court of Appeals during oral argument.

The snippets are taken out of context and the Petitioner later in the conversation clearly and unequivocally denied that he murdered the victim.[56] Magistrate Kobayashi noted in her findings "At trial, the prosecution characterized the Christian-Kimmey tape as representing an unequivocal confession"[57] Mr. Minatoya said exactly the opposite. Unfortunately, the most fraudulent and damaging aspect of the use of the word confession came from the Detectives when they vouched for Mr. Schmidt's uncertain identification of the Petitioner by telling him Petitioner had confessed. Mr. Schmidt told this Court:

> I actually went to the police station to do that, and I was very concerned at this point because I realized that I probably had seen Mr. Christian probably multiple times at the Pukalani golf course where I would play golf and then eat in the restaurant afterwards. So I was concerned, and I let them know, hey, I really feel like I may have just – just because I recognize that face from somewhere else but not necessarily from that evening. And they assured me that my testimony was not that important, **that they had already had a confession, and they had the weapon, and that I didn't need to worry about that. It was not that big of a deal.**[58]

The use of the word confession by police in this context amounted to an unforgiveable abuse of police power that would seal Petitioner's fate with a false identification.[59] Prosecuting Attorney Investigator Margo Evans said that such a procedure would be completely improper.[60] Prosecutor Minatoya agreed that this procedure should never happen.[61] Even though Mr. Minatoya unequivocally told the

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[56] These unequivocal denials were not heard by the jury because of the quality of tape that was submitted into evidence. However, the denials were chronicled at length in Magistrate Kobayashi's Findings and Recommendation. Dkt. # 146 at pp. 51-54.
[57] Dkt. #146 at p. 51.
[58] Dkt. # 386 at pp. 45-46.(Emphasis supplied).
[59] Counsel made these arguments at the hearing on March 16, 2015. Dkt. #386 at pp. 5-6.
[60] Dkt. #387 at p. 36.
[61] Dkt. #387 at p. 60.

Ninth Circuit Panel that there was no confession in this case, Respondent wrote whether Petitioner "confessed" is a matter of semantics. No confession, as told to the panel is "no confession". There is no nuance to the word no.

IV. The Failure to Produce Court Ordered Evidence.

The Respondent has the audacity to argue to this court that, "In fact, the evidence shows that Respondent produced everything in its possession to Petitioner."[62] As argued earlier, the first and most shocking response to this assertion is their first time response that, "The fact that Schmidt had initially identified a photograph of Burkhart was well known to Petitioner at the time of his original trial."[63] If this were true why that fact was was never argued to the jury, the Hawaii Supreme Court, the Habeas Court or to the Ninth Circuit Court of Appeals? Did every single lawyer Petitioner had to assist him just miss this fact? It was the lack of a proven identification by Schmidt of Burkhart that tilted the Chambers argument to the Respondent.

Equally important, how would Petitioner know that Schmidt had initially identified a photograph of Burkhart at the time of his criminal trial unless that information was given to him by the Respondent. There is no proof that this information was ever given to the Petitioner. The "PS" line-up was hidden. The report that accompanied the circumstances of the "PS" identification has been hidden.

The two photographs shown to Annie Leong have been hidden. The report of Annie Leong's identification of the suspect has been hidden.[64] Tape 11 showing the suspect and providing the event that would yield the sketch from Annie Leong's observations has been

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[62] Dkt. #391 at p. 4 of 27.
[63] Dkt. #391 at p. 6 of 27.
[64] Interestingly, Respondent describes the false and patently unbelievable testimony of Leong at the Habeas hearing, specifically regarding the alleged presence of Icenogle and Vickers as "completely tertiary." Dkt. #391 at p. 15 of 27. This scheme, confused the court and defense counsel into believing Petitioner's legal interests were well represented. Accordingly, had she picked out Burkhart then the defense must have known.

hidden – instead Petitioner was given an irrelevant tape documenting surveillance several days after the murder. The bloodied shorts of Serena Seidel have been hidden. An orchestrated legal masquerade was presented to the habeas court intimating that this withheld exhibit was in the possession of the court clerk when in fact – in all probability, it was improperly being held by the Office of the Prosecuting Attorney along with the other withheld exhibits detailed in Petitioner's Supplemental Exhibits #116 through #124. Everything used at trial, that was ordered withheld was apparently and inappropriately held by the Office of the Prosecuting Attorney.

In Rodriguez, the court explained the importance and purpose of motion under Rule 60 (b) and the concomitant importance of the discovery motions necessary to prove "some defect in the integrity of the federal habeas proceedings."[65] There the court held:

> A motion under Rule 60(b) and a petition for habeas have different objectives. The habeas motion under 28 U.S.C. § 2254 seeks to invalidate the state court's judgment of conviction. As to the motion under Rule 60(b), while it is undoubtedly a step on the road to the ultimate objective of invalidating the judgment of conviction, it does not seek that relief. It seeks only to vacate the federal court judgment dismissing the habeas petition. The grant of such a motion would not have the effect of invalidating the state conviction. It would merely reinstate the previously dismissed petition for habeas, opening the way for further proceedings seeking ultimately to vacate the conviction. The fact that the Rule 60(b) motion contemplates ultimately the vacating of the conviction is shared with every motion the petitioner might make in the course of pursuing his habeas — motions to compel disclosure or quash the respondent's discovery demands, motions for extension of time to answer the adversary's motion, motions to be provided with legal assistance, motions for summary rejection of the respondent's contentions. All such motions, like the motion under Rule 60(b), seek to advance the ultimate objective of vacating the criminal conviction. But each seeks relief that is merely a step along the way. In our view, neither these motions, nor the motion under Rule 60(b) that seeks to vacate the dismissal of the habeas petition, should be deemed a second or successive petition within the meaning of 28 U.S.C. § 2244(b).[66]

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[65] Rodriguez v. Mitchell, 252 F.3d. 191, 198-199 (2nd Cir. 2001). The quote "some defect in the proceedings is derived from Gonzalez v Crosby, 545 U.S. 524, 532, 534 (2005).
[66] Rodriguez, supra, at 198-199.

It is through this prism that all the hidden evidence and all the misconduct that surrounded the cover-up of hiding this evidence from which this Rule 60 motion must be judged. For example, the Petitioner has asked for twenty years that the statements given to police by Burkhart about this murder be provided. They certainly qualify as Brady material. Even if there were no specific admissions of guilt there may have been multiple leads to undercut the Respondent's false claim that he had an alibi. Attorney Richard Priest detailed the existence of these earlier interviews in an affidavit. These statements were never provided to Petitioner – not for trial, not for appeal, not for purposes of prosecuting either the habeas petition or this Rule 60 (b) motion.

The arrogance of non-production was brought painfully to this Court's attention during counsel's recent examination of Mr. Hanano about whether he had complied with this court's directive to inquire and obtain Burkhart 's statements from federal authorities. On March 16, 2015 counsel for Petitioner asked Mr. Hanano "Did you ever make inquiry from federal authorities, including the U.S. Attorney's Office or the F.B.I. about whether or not he made statements regarding this murder?" His response was "No, I'm not sure. I don't think so." Counsel asked "Can you recall if anyone from your office did?" Mr. Hanano testified, "I'm not sure."[67] Mr. Hanano went on to tell this court "I don't know what they know."[68]

On June 11, 2015, the United States Department of Justice wrote counsel and produced in compliance with this Court's order a document that proved Mr. Hanano, Mr. Minatoya, and Ms. Evans had travelled to Honolulu to participate "in an interview to assist Maui County Prosecutors with the homicide investigation of Vilmar Cabaccang which occurred in 1995."[69]

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[67] Dkt. #386 at p. 108.
[68] Dkt. #386 at p. 109.
[69] Dkt. #390 at p. 4.

Even though the FBI report specifically states "The interview was documented by the Maui Department of the Prosecuting Attorney and will not be documented in the above files,"[70] the Petitioner did not receive any information about the substance or even existence of this debriefing until several weeks ago. The debriefing date was January 29, 2009. Given the questions asked by counsel of Mr. Hanano about this specific subject it seems apparent that he should have told the court about this debriefing so that counsel could have inquired about the substance of Burkhart's statements. Respectfully, this is not the manner in which justice is obtained.

V. The 911 Call.

The habeas court was deceived into believing that the decedent Vilmar Cabaccang did not place Burkhart at the scene through a dying declaration. The Respondent writes that "Petitioner places bizarre significance on Schmidt's recent interpretation of the background noise on the recording of the 911 call placed on the night of the murder."[71] The so called background noise Petitioner places "bizarre significance" on is the dying declaration of the victim telling those attempting to save his life that, "James Burkhart just walked off." It was not until 13 years had passed since his misidentification of Petitioner that Mr. Schmidt was allowed to hear the tape in the presence of an audio expert and a defense investigator. His realization that this was his misidentification had contributed to the wrongful conviction of the Petitioner.

At the hearing before this court Mr. Schmidt swore under oath "I'm absolutely 100 percent convinced that Taryn Christian was not the person I saw that night."[72] His identification of this statement from the decedent corroborates his testimony that it was Burkhart not Christian

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[70] Id.
[71] Dkt. #391 at p. 9 of 27.
[72] Dkt. #386 at p. 34.

he saw that night. This same conclusion was reached by the victim's cousin. The Respondent responds that, "The alleged opinion of the victim's cousin (who is also deceased) that the victim can be heard saying "James Burkhart had walked off" is equally irrelevant."[73] This is a remarkable position considering the entire crux of the Chambers analysis in this case revolved around whether Burkhart could be placed at the scene of the murder.

If there had been a disclosed photo identification of Burkhart by Schmidt then the confessions to the murder by Burkhart would have been sustained by a Chambers analysis. Burkhart's multiples confessions to the murder would have been heard by the jury. Equally important, this evidence would have provided ample reliability to have changed the analysis by both the habeas court and the Ninth Circuit. The same is true had the 911 tape been truthfully presented as the intelligible and compelling evidence it represents.

The Respondent argues that the victim's cousin's declarations are inadmissible hearsay. The testimony offered to this Court by former United States Border Patrol Agent Daryl Carlson about these events was not inadmissible hearsay. His observations of the victim's cousin Rudy Cabanting, upon hearing the tape, speak volumes to the fact that the habeas court was incorrectly made to believe that the words "James Burkhart just walked off," were unintelligible. Former Agent Carlson testified that Cabanting became enraged. The actual testimony received from Mr. Carlson about this reaction was "… he said he was really – I'll say the word mad," so as not to say a stronger word in the court here, but he was really mad because when he heard that tape and he heard his cousin, who was laying on the ground dying, say "James Burkhart just walked off" and he recognized his cousin's voice … he went bananas…"[74] Retired investigator Richard

[73] Dkt. #391 at p. 11 of 27.
[74] Dkt. #359 at pp. 123-124.

Smith heard the same statement that Burkhart walked away.[75] Petitioner's audio expert John Mitchell heard the same statement.[76] Phil Schmidt testified to this Court that this statement placing Burkhart at the scene "was very clear."[77] The Respondent's expert finally agreed at the 2008 habeas hearing that he could hear the last portion of the phrase **"just walked off"** but would not concede that the words "James Burkhart" preceded this phrase.[78] Several witnesses, with no reason to lie, have placed Burkhart at the scene through a taped dying declaration. Failure to recognize this fact constitutes a continuing fraud upon the habeas court and a perversion of the appropriate Chambers analysis.

CONCLUSION

On July 31, 2008, in response to the question of whether the failure to present Phil Schmidt's identification of Burkhart constituted a Brady violation, the Respondent wrote, **"Third, Petitioner has failed to proven that this evidence existed prior to trial and that Respondents failed to disclose it to Petitioner … Thus, there is no Brady violation here."**[79] Seven years later Respondent wrote, "**The fact that Schmidt had initially identified a photograph of Burkhart was well known to Petitioner at the time of his criminal trial."**[80] At the hearing on this matter this Court stated unequivocally:

> **If there was an identification of Mr. Burkhart which the prosecutors were aware of that was not disclosed to the habeas court, that was not disclosed to the Ninth Circuit, that could be a fraud on the Court. So the objection is overruled**.[81]

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[75] Dkt. #386 at p. 38.
[76] Dkt. #147 at p. 17.
[77] Dkt. #386 at p. 38.
[78] Dkt. #147 at p. 98.
[79] Dkt. #125 at p.23.
[80] Dkt. #391 at p. 6 of 27.
[81] Dkt. #359 at p. 102.

The proof presented to this Court is compelling and it is respectfully prayed 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 Petitioner be granted release pending further proceedings on this matter.

DATED this 27th day of July, 2015.

/s/ Gary A. Modafferi

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th 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:

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_____
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