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Amber L.M. Alexander
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Taryn Christian
(hand delivered)

Dear Mr. Christian:

This is to memorialize our recent conversations regarding my recommendations for the handling of your case, and your rejection of those recommendations. After carefully reviewing all of the evidence and pursuing the investigative leads which you, your mother and others have pointed out to me, I have come to the conclusion that it would be in the best interests of your defense if we did not contest identification and instead went with a self defense theory. I believe that there is considerable evidence to support a self-defense theory of the case, and that such a defense would provide you with your best hope for either an acquittal or a manslaughter verdict. By contrast, I find that the "third-man" defense which you have detailed to me has almost no support in the evidence (outside of your own testimony which the jury will probably reject as self-serving), is inconsistent with the overwhelming body of evidence the prosecutor will present, and provides very little hope of an acquittal. Moreover, the third man defense will make a manslaughter verdict less likely.

I have pointed out to you that we would gain several advantages by admitting identification and going with a self-defense theory from the start. One is that we could keep out various damaging pieces of evidence which could prejudice the jury against you emotionally, such as the notebook pages with the "fat dork" comments, and the accusatory statements that Lisa made during the taped phone call concerning unrelated issues. Another advantage is that we would retain more credibility with the jury if we admit to issues that we have no reasonable hope of successfully contesting. You understand that we will lose these advantages if we contest identification. Per your instructions today, you have decided that you still do wish to contest identification.

As I understand, you have reserved the option of testifying in your own defense. Therefore I cannot present to the jury in my opening statement a theory of the case that is inconsistent with the events as you have described them to me. Moreover, I cannot admit identification without your consent. Yet at the same time, I believe I must not entirely foreclose the option of arguing a self-defense theory. Depending on how the trial goes, that theory may turn out at the end of the case to be our best hope, with or without supporting testimony from you. In any case, you have agreed that we should

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bring out evidence of self defense through other witnesses, such as the testimony that Vilmar was seen immediately after the incident holding a kitchen knife in his hand.

As we discussed on Sunday, the trial strategy I will adopt is as follows:

(1) I will give a relatively brief opening statement, identifying for the jury some of the possible issues in the case, and asking them to keep an open mind until all the evidence is in. In opening statement, I will not commit us to any particular theory of the case;

(2) We will contest all aspects of the prosecution's case for which we have any contrary evidence at all;

(3) At the close of the prosecution's case, we will evaluate where we stand and decide together on what sort of a defense to put on; and

(4) At the end of all the evidence, we will once again evaluate the state of the evidence, and I will argue any and all theories of the case that are reasonably likely to lead to an acquittal or to a verdict on a lesser charge.

If there is anything in this letter that you do not think accurately reflects our conversations, please let me know. Otherwise, please sign the copy of this letter on the bottom, where indicated.

Very truly yours,

Anthony L. Ranken

I have read and understood the above letter, and I consent to the defense strategy outlined in the second-to-last paragraph of the letter.

Dated: Wailuku, Maui, Hawaii, February ____, 1997.

_____
TARYN CHRISTIAN

RANKEN'S OPENING STATEMENT

scene worn by the intruder like the one he always wore.

There will be a flannel jacket with blood dumped on the ground at a beach park close to Kulanihakoi Street. Plastic gloves would be found in the pocket of this flannel jacket, food service gloves. He was a food server.

At the end of this case, I will ask you to do three things. I will ask you to find this man guilty of using a deadly or dangerous weapon in a commission of a crime.

I'll ask you to find this man guilty of attempted theft, and I will ask you to find this man guilty of murder for stealing Vilmar's life.

THE COURT: Mr. Ranken, does the defense wish to make its opening statement at this time?

MR. RANKEN: Yes, your Honor.

THE COURT: You may proceed.

MR. RANKEN: The two-pronged knife that was found at the scene was not the only knife present that evening. You will hear the testimony of people who lived in this surrounding apartments who will tell you that they saw another knife there.

You'll hear the testimony of people who came along before the police even got there who will tell you they saw another knife, a kitchen knife, not a double bladed knife. But a knife also capable of causing very serious

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injury.

These independent eyewitnesses from the neighborhood will tell you that she saw this knife in the hand of the decedent Vilmar Cabaccang.

The residents of the area came upon the scene before the police did. We will put them on the stand, and we will prove through them that the decedent wheeled a knife in this incident.

The evidence will clearly show the defendant Taryn Christian was not out for a fight. He was not the aggressor. He did not want any trouble.

Ladies gentlemen of the jury, this is not a case about a brutal murder as the prosecution would have you believe. Far from it. Far from it. There's a lot more to this case than you've heard so far from the prosecutor. We intend to show you that there are reasonable doubts and more as to several aspects of this case.

Taryn Christian was there. He was there at the scene. But the evidence will also show that there was another man there who has not been mentioned by the prosecuting attorney. A third man besides Taryn Christian and the decedent.

The evidence will show that this third man was a person known to the decedent's girlfriend Serena Seidel. During the course of this case, you will hear

evidence that she knew the man who was the other man who was there, and that this man carried a knife and assaulted the victim in this case with a knife.

Serena Seidel told bystanders she knew who it was. She didn't know Taryn Christian, but she knew who it was that did this. And you will hear testimony as to exactly who that person was.

We will bring out a number of things both in cross-examination of the prosecutor's witnesses and also through our own witnesses. We will bring out a number of things that are not consistent with the prosecutor's theory of this case.

And then later on through our own witnesses and in final argument, we will help you put together the pieces of this puzzle. I don't think either the prosecution or the defense will probably be able to, at the end of this trial, answer every question.

We're going to do our best. We don't have the burden of proof. They have the burden of proof to show you beyond a reasonable doubt what they say is the way it happened.

When we piece together the puzzle for you in final argument after all the evidence is in, we will show you that Taryn Christian is not guilty of murder. I don't approach opening statements in quite the same way as my

colleague from the Prosecutor's office.

I don't give away everything. I want to discover the evidence as it comes out, and I will not go into a lot of details now of what we expect to evidence to prove in this case. And of course, again, we don't have to prove anything. It's the prosecutor that has the burden of proof.

But I will talk a little about some of the facts, and then I'd like to discuss some of the issues. The prosecutor mentioned Lisa Kimmey, Taryn's ex-girlfriend. And how she couldn't bear it anymore and came to the police.

The fact is, ladies and gentlemen, Taryn Christian broke up with Lisa Kimmey weeks -- about a week before she went to the police. He dumped her. She was jilted. She was very upset. And that is why she went to the police, and that is why she told them what she told them what she could have known from other sources including the newspapers.

Taryn broke up with her because he could no longer handle her incredibly jealous, possessive, angry behavior toward him. And this side of Lisa came out after he dumped her and she got her revenge.

The police officer in this case will tell you one very curious thing. They will tell you that the keys to the decedent's prized car were found two blocks away from his car at the scene of this fight.

And the prosecution will not be able to give you any logical explanation for that. Not only were the keys there, but the decedent himself made a comment indicating he could not understand why the keys to his car were there.

He had locked his car. He thought he had the keys. After he was injured he asked his girlfriend about the keys. And to this date that's a question that she cannot give a credible answer to. We believe that we can.

Opening statement is a time for us to outline for you some of the issues in the case, and this is so you can have a framework, sort of an idea of what to look for some of the issues that may come up.

It's hard to know exactly again what the issues that you will want to focus on when it comes time to deliberate. So I'm just going to give you an idea of some of the important issues to keep in mind that you will be asked to decide.

One of the issues is who stabbed the decedent. Was it Taryn Christian or was it someone else? You'll have to try to decide at the end of this case exactly what happened when the decedent and his girlfriend --

MS. TENGAN: Your Honor, excuse me. I'm going to object. I believe this is argument rather than statement of facts.

MR. RANKEN: Your Honor, the opening

statements are to give an idea of the issues for the jury as well as stating of facts.

THE COURT: I'll permit it. Maybe you can rephrase, Mr. Ranken.

MR. RANKEN: There will be a question and -- which I've given you some hints of as to what happened in that fight. And you'll look at that very carefully. We will present evidence that will cast serious doubt on whether it was Mr. Christian who was responsible for the knife wounds that Mr. Cabaccang received.

We will present evidence that the knife found at the scene did not belong to Taryn Christian, could not probably have belong to Taryn Christian because his knife was still up in his house in Kula after this incident, not in the custody of the police.

You may also have to look at the question of intent in this case. Prosecution will try to convince you that Taryn Christian had the desire to intent to kill Vilmar Cabaccang.

They will try to convince you of that because that's a necessary element of the murder charge, intent. But when we question the prosecution and defense witnesses and give you folks a much better idea of just how this fight happened and when we look at the things that were done and said before during and after by the people involved, that

evidence will show you that Taryn Christian never had any such intent to kill anyone.

Taryn never had any reason to want to kill the decedent Vilmar Cabaccang. And that is what the evidence will show. Let me also tell you what I'm not going to be issues in this case.

Things that are not going to be issues in this case are some of the things the prosecutor has brought up, like the fact that Vilmar had been working all day. The fact that he kissed Serena when he came to her house late at night. The fact that her child was asleep, or his love affair with his car.

These are things that affect us emotionally. Your job as jurors is to be -- to look at the facts, not the emotions of this case. To sort that out, to put those emotional things aside and decide this evidence based on the facts.

Give Mr. Christian the benefit of the doubt as the judge has instructed you to do. And this is not the time to go into a detailed discussion of the law that applies to this case.

But at the end of the case, Judge McConnell will instruct you on the law that you're to use to make your verdict, or verdicts since they're several charges to be considered.

And at that point you will see that the state of mind of a person is a very important factor that you have to take into account for making your decision. This is an issue on which the prosecutor has the burden of proof showing the state of mind, in this case intent.

MS. TENGAN: Your Honor, I will object.

THE COURT: This is argumentative. I'll sustain that.

MS. TENGAN: Thank you.

MR. RANKEN: Okay.. The evidence will show Taryn Christian did not have the necessary intent and cannot be guilty. There are a number of other issues that may be relevant in this case, and there are many facts that will come out over the next two weeks.

Please just keep your ears open and your mind open until we've completed the case and both sides have presented their summations to you. If you keep an open mind until then, you'll see that this case is very different and far more complex than the prosecutor would now have you believe.

They get to go first because they have the burden of proof. It's going to be a while again before we present our defense. Your job is to keep that open mind until then and to look at the facts that are really proven when all is said and done in this case.

So with that we'll let the testimony come out. There is much more that you will learn that I'm not even going to hint at right now.

In closing argument, we will review the evidence with you very carefully, and we'll have more time to do that at that point and we'll point out places where the elements are not proven.

So now it's time for the witnesses to testify, and I will not have the opportunity to talk with you again until the end of the case. So I just want to thank you all for agreeing to serve as jurors, for being willing. And I look forward to speaking with you again at the end of case. Thank you.

THE COURT: Thank you, Mr. Ranken.

Ladies and gentlemen of the jury, I know it's late. It's been a long day. I'm going to excuse you. Before you leave, however, I'm want to remind you not to discuss this case with anyone or permit anyone to discuss it with you.

Now, I know when you walk in the door this evening, your spouse, roommate, family member, may ask you about the case, and I'm not that naive. Please inform your family that you're instructed by the judge not to discuss it.

You will be able to discuss it after your verdict has been received and you've been discharged but not

RANKEN'S CLOSING ARGUMENT

THE COURT: For the record, counsel, the defendant, and the jury are all present.

Mr. Ranken, you may proceed, please.

MR. RANKEN: Thank you, your Honor.

The prosecution would have you believe -- and I'll settle in here I see people looking around.

The prosecution would have you believe that statements Taryn made on the tape when he was on the phone with Lisa Kimmey when he didn't know he was being taped that's when he was speaking the truth. That's the part you can really believe.

But let's be fair. Let's look at all that he said on that tape. "It didn't happen like that. He was the one who pulled the knife. But it didn't happen like that, and you know it." These are some of the statements that he made on that telephone call.

The first time he talked to Lisa, he told Lisa -- and she testified that the police and the newspapers were describing this all wrong that it didn't happen that way. And when he talks to her on the taped phone call that you heard in court, he again says the same thing. He says he, Vilmar, was the one who pulled the knife first.

When Lisa refers to Taryn stabbing Vilmar, he responds, "It didn't even happen like that." He keeps denying her version that she's saying on the tape, and that's

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only -- remember the judge instructed you her words on that tape are only to give you context for Taryn's responses. They are not to taken as testimony or as proving the truth. That anything that she says --

MS. TENGAN: I'm going to object. That's a misstatement. The Court's instruction -- the Court has instructed to jury as to giving context except as necessary to going to the evidence.

THE COURT: I'll overrule that. Let's go on.

MR. RANKEN: So don't take anything Lisa says on that tape as her testimony or as something that Taryn told her. She's trying to set him up, ladies and gentlemen, on that tape. She is being fed the lines by the police.

She's trying to trap him. Look at his responses. Look at what he does say and what he doesn't say on there. This is my last chance to speak to you.

The prosecution gets one more chance. Why? Because they have the burden of proof. I want to thank you. Since this is the only time I'll get to talk to you, I want to thank you. You've all been most attentive jurors in this case, and I do want to ask for your attention for about another hour because I do have some very important matters to cover. And I'll -- you'll have a perspective on this case by the time we're done.

I'm going to explore with you what really

happened that night, what's proven, what's not proven, what may have happened, reasonable possibility, the reasonable doubts.

But I have to admit to you I don't really know what happened. A lot of times the jury thinks that the lawyers know something they don't know, but the truth is you've got all the information I've got now.

You don't know. I don't know what happened any better than the prosecutor, Judge McConnell, the police detectives. And we've just got to try to figure this out together here.

So you may say well what right does -- Mr. Ranken, what right do you have to talk to us if you don't know what happened? Well, I did spend all weekend reviewing the evidence, very carefully reviewing all notes of witness's testimonies, thinking about the testimony and exhibits and what kind of conclusions we can draw, what kind of inferences we can draw from that, that aren't readily apparent first time through.

And that's what I want to talk to you about. And as I say, I think you'll learn some perspectives that you have not yet had on the case.

Now, the prosecution has the burden of proof as to all aspects of the case, all elements of each charge. They have to show -- they have to prove where when, who, and

how.

They have to prove that it was not in self-defense. They have to prove intent to kill or knowingly killing. They have to prove that the defendant was not under the influence of extreme emotional disturbance at the time.

And to convict a murder, they have to prove all these things, and they have to prove them beyond a reasonable doubt. If I get time later in the argument, we'll examine a little more closely what that means, beyond a reasonable doubt.

That's the highest standard in the land. I, on the other hand, don't have to prove anything. I just have to try to help you see where there's a reasonable doubt. One reasonable doubt and you cannot convict. One reasonable doubt and you have to acquit as to any element.

I'm going to explore with you three areas where you may find a reasonable doubt. One, whether there is another person involved. Whether it's legally proven that Taryn Christian was the one who administered these wounds.

If not -- if they have proven that to your satisfaction, then we'll explore whether Taryn Christian acted in self-defense. And if not, I'm going to cover all these basis because I don't know -- I can't ask you well how you are you thinking about it now.

Do you agree with me so far? So I have to go

through -- cover all the bases in this case. If there's people here who don't think it's self-defense, I have to move on to the next stage and explore whether he possessed intent to kill the decedent.

Now, closing argument, is undoubtedly the most important part of the trial. It's where we really begin to put your heads together and think hard about the case. What I've done to try to make it easier to organize it -- let me go over it with you.

I'll refer to it repeatedly throughout argument to guide you and this tracks the Judge's instructions as to the thinking that you have to go through to responsibly make a verdict in this case.

Let me review it with you quickly so you're able to follow the framework of my argument.

First question is: Is there a reasonable doubt as to who inflicted wounds? Is there a reasonable doubt that it was -- that it may have been someone else besides Taryn? If you answer yes, then of course you must vote for a not guilty verdict and the rest is irrelevant. Okay.

But if you answer no, you don't have a reasonable doubt on that point of the identity, then you move on to the next stage. And that's to consider whether the defense of self-defense applies in this case.

If you find that Taryn Christian -- if you've gotten to this stage, you've already found that he's the one who did it. From now on, you know, I'm assuming that you haven't gone this way and you're going this way. Okay.

If you go to this stage, then you ask whether he was acting to protect himself, and that's -- I put reasonable belief because the test is not whether he really needed to do it. He didn't know, for example, that Vilmar didn't where contact lenses and couldn't see as well as another person who had 20/20 vision. He didn't know things like that.

What you look at is his circumstances, his position at the time, being this 19-year-old terrified teenager in the state he was in. So we'll discuss that in more detail. So that's why I put reasonable belief from his point of view.

What is going on that he acted in self-protection. If you find that, then you vote not guilty. If you find beyond a reasonable doubt that the prosecution has proven this was not self-defense, then you go on to the next question.

And that is you need to look at Mr. Christian's state of mind at the time of this incident. In order to prove the murder charge, the prosecutor would have to convince you that it was intentional or knowing

beyond a reasonable doubt.

If you find probably intentionally, maybe not, you're not sure, but at least reckless beyond a reasonable doubt, then you can convict of manslaughter.

If you find some other state of mind, negligent, not rising to the level of reckless, then put that. Other than that, you would have to find him not guilty.

That's not the end of inquiry, though, even if you've agreed with everything the prosecutor says so far and find it was intentional, knowing, beyond a reasonable doubt; you have move on then to -- you have to evaluate if Mr. Christian acted under the influence of extreme emotional disturbance.

And we'll go over -- I hope you're not trying to make up your mind as we go because I haven't given you my arguments on any of these points. I'm just giving you an outline, but if we get to this point, extreme emotional disturbance, then if you find no, he was not extremely emotional disturbed beyond a reasonable doubt, you find that he was not, then you would convict of murder.

If you find that he was possibly in a state of extreme emotional disturbance, you have a reasonable doubt that maybe he was, then the proper verdict would be manslaughter.

Now, you may have noted as we run through, the prosecution has the burden of proof at every step of the way right along the way. That's why I continually put in "beyond a reasonable doubt."

We don't have to show you that he was extremely emotional disturbed. We don't have to show you that he acted recklessly, intentionally. They have to show you that he was not extremely emotionally disturbed. They have to show you that he acted intentionally and not recklessly.

Now, ladies and gentlemen, I acknowledge to you at the beginning of this case that Taryn Christian was there the night this happened. The question is -- and I'll acknowledge to you now it's clear from the evidence Taryn Christian was the one that was on the ground under Vilmar Cabaccang, the one that Vilmar tackled. We're not disputing that.

But what you need to look at first -- the first stage of this inquiry that's on the chart is was there someone else there also, a third man who was present. And there are a number of things that came out in the testimony that throw doubt on the question -- on Serena's story and throw doubt on whether maybe there was someone else, and we ask you to question if that was someone else that was known to Serena.

And I'll explain why I said that. Someone else who she did not want to implicate for some reason in this matter. Now, none of the neighbors had a clear view of what happened during the incident because of the tall bushes that were there.

You'll see them on the photo. I didn't get that one out, but you'll see the tall bushes that were there, and they admitted that. They could not see fully what was happening on the ground.

So no one had clear view except Serena, but afterwards both neighbors Judith Laury and Cynthia Warnock saw a man running from the scene, not walking but running. Now, why is that important. Because Phil Schmidt saw Taryn leaving the area. We don't dispute that he did see Taryn under street light there with the flannel jacket that Taryn wore.

He saw Taryn leave the area, but when Phil Schmidt saw him, he was walking not running. And yet two neighbors saw a man a man running in the same vicinity.

And Judith Laury said that person that she saw running had long hair. She could see flapping behind him. Now, Taryn Christian -- we've proved conclusively -- did not have long hair that night. Was there someone else?

Is that -- does that explain the car keys. Very interesting point. Quite a mystery. The keys were

found at the scene. The keys to Vilmar's car. They are presence. Hasn't been explained by anyone involved. Now the car was opened without any apparent force. The police officer told you that.

And before he lapsed into unconsciousness, Tesha heard Vilmar say to Serena, "Why did you give him the keys?" Was there something that comment? Had Serena given the car keys earlier to someone?

Remember Vilmar had dropped off the car hours before. Had she given them to someone that she had been with earlier that evening, someone known to Serena and maybe to Vilmar?

Serena didn't know Taryn, but there was evidence that Serena indeed knew the person who stabbed him, the person -- "When Phil Schmidt asked, did you know the guy? Did you know who did this?" She looked questioningly at Vilmar as if not sure whether to tell. And then she said they did know who did it.

Robert Perry heard her say this three times, "we know who did it." Those were the words. He quoted her. Could it be that at first she was ready to tell, but then she decided not to give the full story to protect her friend.

Look at Serena's strange behavior before and after the incident. Now, she says that she ran down the

street yelling help, and call 911. What do the witnesses say? By the way, those would have been the natural things to say, wouldn't you would yell for help, call 911 in that situation?

You wouldn't care who helped you, wouldn't you? You would just want the police there, notify it as soon as possible. You would want help from any neighbors who would come out of their house and help. But what the did the witnesses say that she really said "Tesha, Tesha, Tesha," repeatedly Tesha.

Cynthia Warnock said later on she said she heard someone ask for help. I don't believe she's clear whether that may have been Vilmar or Serena or a neighbor who had come along by that point.

But during this crucial times, the witnesses were clear, one after another, who heard -- Judith Laury who heard running down the street just Tesha, Tesha. No "911." No "help." No "Call the police." Why? Why did Serena just say "Tesha"? Maybe because Tesha knew the third man involved. Maybe because Tesha could intervene because Tesha was a friend. Maybe because Serena did not want the police. She wanted someone who knew the parties.

And Tesha said -- oh, by the way, Tesha and Serena knew each other a little better than she's admitting on the stand. Judith Laury remembers she saw Serena at Tesha

house she believed more than once before this incident.

And Tesha said that she was to meet someone else there that night, somebody whose name came up in conversations initially in the investigation of this case.

And next let's look at the descriptions that Serena gave of the man who she said was there. To Officer Holokai, what did she describe, someone with blond hair. I don't see any blond hair on this young man, ladies and gentlemen.

I have notes here of what she said to Detective Funes. Now, he couldn't remember everything, but he had a police report written shortly after near the beginning stages. Synopsis -- I questioned him about on the stand. Detective Funes --

And Detective Funes had in that police report, which he acknowledged, that the man they were looking for was a quote "local-looking male," unquote. Where did he get that? He talked to Serena initially. Where did he get a description of local looking male if not from her?

And she described someone also in terms of the race of the person, she describes someone who was possibly Portuguese or hapa haole. That's not Taryn either. He's not Taryn. Could it be that there was more than one man there and she didn't want to admit it? Could it be that she wasn't sure what to say about the appearance at first? She

didn't make up her mind, she wasn't sure if she wanted to -- who she wanted describe.

Could it be she was actually trying to lead the police astray a little? Remember she didn't want the police there in first place. She wasn't the one who called the police. She called Tesha.

And what about Serena's strange behavior after the incident. She distanced herself, seemed to want to avoid contact with the police. She appeared more concerned about the blood on her than Vilmar. When you look at that in conjunction with the fact that she never said call 911 or call the police, you must wonder whether she really wanted the police to be involved.

Whether there was something she didn't want them to discover. What about the threatening phone calls that witness Jennifer Santana, Tesha's mom, received about a week after the incident? She thought there were two calls. She remembered them being definitely from a local male. She could tell by the voice. That's not Taryn.

And she remembers that local male telling her that Tesha better keep her mouth shut about this incident. And that was before Taryn was in any way implicated. We know that it didn't happen until several weeks later.

There was someone else out there who was concerned about detection, concerned about Tesha as a witness

making statements.

Enough concern -- concerned enough that he was threatening a witness. What does that tell us? And speaking of a local male, what did Serena tell us the man said about being in the car.

Serena's testimony was -- she quoted what she said Taryn said, "I never know it was you guys car." Okay. That's what she quoted. You now -- you heard the tape. Taryn doesn't speak pigeon. Was there someone else there that did speak like that?

Serena testified that she never saw Taryn stab Vilmar, that much she had to admit. The question is: Did Taryn ever stab Vilmar or was there someone else there who at some point got his hand on that knife, someone who was not pinned to the ground face down under Vilmar, someone who would have been in a position to inflict those kinds of wounds.

And look at the physical evidence. Taryn's shirt and the gloves that he was allegedly wearing. Now, Taryn made no attempt to clean up those items. He just threw them away where he thought no one would find them behind a port-a-potty which was just by chance that a friend of Vilmar's the next day had a party there on that same place.

He pulled the gloves off turning them inside out in the process and discarded them along with the flannel

jacket. Here are the gloves. Let's look at these gloves. Except for the fingerprint powder, there's nothing on these gloves. There are no blood stains on these gloves.

Now, if Taryn had been wearing these gloves when Taryn had stabbed Vilmar Cabaccang nine times with these gloves on, would you expect to find maybe not only some blood but some damage. And this is the only damage which is -- you'll see that it's kind of a heat problem here. It's sort of been welded itself shut on this finger, no rips.

I -- oh, and I asked Officer Natividad who recovered these gloves, and he said these are as he found them except for the fingerprint powder. And I asked Officer Gapero who, then, got custody of the gloves next, and he said no blood on these gloves, never was.

It's not like Taryn would have cleaned them because he didn't bother cleaning the jacket or anything. The jacket was full of blood. And he didn't turn them inside out. He just pulled them as you would do with gloves. You pull them at the wrist and pull them off and they come inside out.

Do you -- you can find it out. Compare the first one here. Line up the thumbs, and you'll see the wrist is wider than one part on the other. If you'll line it up, you'll see it's inside out. The ones in evidence are just as the officer seized them. Whatever blood would have been on

them should still be on the other side. There was no blood.

Hard to believe if Taryn had been the one who stabbed Vilmar, with Vilmar bleeding profusely as those wounds would indicate, as Dr. Manoukian testified, hard to believe there wouldn't be some blood on these gloves.

Finally, last point, on this question of who did it. Listen to Taryn's own words on the tape. He admitted to Lisa that he was involved in this whole thing and the prosecutor would have to believe this is when Taryn was the telling truth.

He didn't know anyone was listening to this. He didn't know -- didn't know anyone was listening. He did not admit to Lisa -- he was -- he was involved in this whole thing, but he says, "I wasn't the one who stabbed him, and I know that for a fact."

I'll place this for -- it's a little hard to pick up. Let me just read it for you. What you're about to hear -- you'll hear Lisa say question: So you think it's okay? So you think that I should feel more sorry for you because you're the one who stabbed him and not me? And you'll hear Taryn's answer: I'm not asking that. I wasn't the one who stabbed him, and I know that for a fact.

By the way, if you use this, the left side works better I found. Okay. Let's listen for that question.

(Excerpt of tape played in open court.)

Did you didn't pick it up? There are headphones on this you will have in the jury room so you can try to hear better. Okay.

Now, I may not need to go any farther with you folks. But like I say, I don't know. I may not need to cover the rest of the chart. Maybe you're right with me. Yes, there's a reasonable doubt as to who inflicted the wounds, not guilty. Fine, you know.

If you're sure of that, then the rest of the jury is not going to sway you, you can ignore the rest of what I say, but I don't know. We should pay attention because you're to deliberate. You're to keep an open mind until the end of closing arguments and then deliberate and be prepared to discuss the case fully.

I've got to move on, and know it's -- this is the hardest thing for a lawyer to do because now you're going to say well, Mr. Ranken, you are contradicting yourself. You just told us that Taryn didn't do it, and now you're talking about well he did it, it self-defense, whatever.

There's no way around it, ladies and gentlemen, I'm -- I don't know what happened. Like I say, I'm leading you through the analysis that you must go through, and I'm helping you see the points that restore a reasonable doubt on all aspects of this case.

So, yes, I'm going to assume now for the sake of argument that Taryn was the one who inflicted these wounds despite everything I said because I have to go on and help you analyze the other portions of the case, the other possible defenses just in case you do get beyond that question that you don't find a reasonable doubt as to who did it and want to move on to the next step.

I don't want to leave you empty handed. I'm going to go through it with you and help you analyze that next step.

The next step is self-defense, the question of self-defense. Let's look at some of the things we know about Vilmar Cabaccang as of July 14, 1995. He's a boxer. He's a fighter who works out every day with his punching bag, who spars with his friends for fun.

And we know that he's accustom to using knives every day for four years he's been cutting meat at Azeka's and then fish at Sack and Save, spending eight hours a day wielding knives at work.

Now, the decedent, Vilmar Cabaccang, pulled a knife, ladies and gentlemen. He pulled a knife out of the drawer or the dish drainer as he ran through or --

MS. TENGAN: Objection, calls for speculation.

MR. RANKEN: The only logical inference, your

Honor.

THE COURT: I'll permit it. Let's go ahead.

MR. RANKEN: He pulled a knife. He had to go through the kitchen. You know the layout of the house. He pulled the knife out of a drawer or dish drainer as he left the house, easy enough, a kitchen knife, steak knife.

The witness says -- the two witnesses thought it was a steak knife. One thought it was a larger kitchen knife. I don't know. It's probably a larger steak knife, but in any case, three witnesses said that he had a knife.

And Taryn saw that kitchen knife and felt that kitchen knife on his flesh. We know Taryn saw that knife because he told Lisa. He was the one who pulled the knife. Vilmar pulled the knife.

And he told that to Lisa before he had an attorney, before he had investigators, before he knew what these witnesses would be testifying. And it's been corroborated by the witnesses who testified, Phil Schmidt, Rob Perry, Jr. and Robert Perry, Sr.

Let's try to reconstruct how this fight happened.: The testimony was that Vilmar and Taryn both had knives. And that after this fight, there was a cut on Taryn's belly four inches long and a cut across his hand, the palm of his hand and fingers, Lisa Kimmey's testified as to that. And there were much more severe wounds on Vilmar, of

course.

Taryn would wear his flannel shirt as a jacket. Here's a picture of him here that's in evidence showing he wears it untucked, and Phil Schmidt says Taryn had the jacket untucked just hanging loose.

And so Mr. Cabaccang chases and catches Taryn. And Mr. Cabaccang is a boxer, this fighter, who has for years been working with knives. He tackles Taryn Christian on the run on the sidewalk on the pavement of the sidewalk and possibly a little on the grass, in that area.

Presumably Taryn was still running on the sidewalk at that time. We'll look a little later at some of the blood evidence where exactly that blood was. I'll show you why the prosecutor is incorrect when they argue that their explanation for this blood on the sidewalk.

But anyway, Mr. Cabaccang tackles Taryn. His shirt -- Taryn's shirt comes up enough to expose his belly or Vilmar pushes the shirt up to get his knife hand under against Taryn's flesh. Taryn's lying face down on the pavement or in the grass right next to it with this larger, heavier, stronger man on top of him, on top of his back pinning him down and cutting him with a knife.

And this is a picture of Vilmar at that time. You can see the muscles. You can see the power that this man possessed, 190 pounds according to Dr. Manoukian,

looks like most of it is muscles.

In any of case, a lot heavier than Taryn, stronger. On his back and pinning him down and cutting him with a knife, cutting Taryn with a knife on his belly.

How did he get that cut? That's how he got this cut. Taryn is 19 years old at this time this happened. He's never been in trouble with the law before, and he's facing apprehensions. He's facing the shame of being caught for stealing.

He's facing the shame of having to face has mother and father. He is facing the fear of going to jail and beyond all that, has more immediate concerns there's a very heavy and very angry man on top of him with a knife against Taryn's skin.

Taryn is terrified, and this terrified teenager, Taryn, tries to struggle free. And Cabaccang cuts Taryn's belly with that kitchen knife. He draws first blood, and the cut was bad enough to form a four-inch scab which both Lisa Kimmey and Jennifer German said they both saw on Taryn at the end of July, one or two weeks later.

So when he feels himself being attacked with this knife and he gets cuts on his hand as well, which Lisa Kimmey saw as well -- sorry.

When he feels himself being attacked with this knife, what does he do? Somehow he gets a cut on his

hand. I suggest to you that he tried to grab that knife; that he tried to -- he felt that. He tried to get it away from Vilmar or grab it to deflect it and that's how his hand got cut.

The cuts, she testified, were on his right hand which was allegedly the hand that Taryn ways later seen holding the double-bladed knife in. And Lisa Kimmey says her explanation for that cuts -- what she remembers Taryn saying is that Vilmar got the double-bladed knife away from him.

And then Taryn was foolish enough to just grab the blade of it and jerk it out by the blade of the double-bladed knife. Does that make any sense?

First of all, there's no evidence that Vilmar ever got that knife away from Taryn. Serena says that Taryn had it the whole time until finally he was able to struggle free and just released it of his own and left.

So what? Lisa Kimmey is mistaken. She maybe misremembering or may have misunderstood Taryn in the first place.

So what knife did Taryn grab? Obviously he grabbed the blade of that steak knife, kitchen knife, being handled by Vilmar. And when he grabbed that, he felt the knife cut into flesh of his hand along with the cut he had already received on his stomach.

And he became scared, ladies and gentlemen.

He was being attacked with a knife that was cutting into his flesh and causing him to bleed. Now, at the time Taryn Christian grabbed on to Vilmar's knife, he obviously had nothing in his own hand.

There was after that -- after Taryn felt the pain of his own blood being drawn, after he felt the knife against his belly that he grabbed that knife only to again --

MS. TENGAN: I'm going to object. This is speculation.

MR. RANKEN: I'm finished with this part, your Honor. I think it's reasonable inferences in this case.

THE COURT: Let's move on.

MR. RANKEN: I submit to you it was then that Taryn, the terrified teenager, took his own knife out of its sheath to defend himself. At some point around there Serena came along too and she was punching and kicking Taryn as hard as she could to try to subdue him.

And by the way, where do you suppose she got the idea to punch Taryn in the head? That's an interesting question. Maybe because she saw someone else doing it too, like Vilmar. Vilmar was a boxer remember. He fought with his hands his friends said.

Now, Phil Schmidt testified that Vilmar was holding a kitchen knife, the steak knife, in his left hand but Vilmar was right-handed. Apparently at some point Vilmar

put the knife in his left hand. Why would he do that? So he had his right hand free.

Maybe to slug Taryn to try to subdue him. Remember Vilmar was mad. He's caught this guy in his prized car. That's his baby. He was mad.

He's so mad he didn't even call 911. He just ran out the door to catch this guy. You can't necessarily figure that well everything Vilmar Cabaccang did was clear headed on that night. He was mad, and he was acting -- he'd been trained as a boxer for a long time preparing for that time when he would need to use his fists in real-life situation and this was the time.

I suggest to you that with his free hand Vilmar tried to knock Taryn unconscious --

MS. TENGAN: Objection, calls for speculation.

THE COURT: I'll overrule that.

MR. RANKEN: And I suggest to you that he was probably coming pretty close. Testimony was that he was not only a good boxer, Vilmar was an athletic individual, worked out every day. You saw the picture. I suggest to you that he probably succeed in at least stunning Taryn, confusing him.

Remember Taryn was getting punched by Serena too. And he certainly succeed in scaring Taryn half to

death. Let's talk about this knife, Vilmar's knife. Prosecution has the burden of proof on the self-defense as well. All we have to do is show a reasonable doubt.

There's three independent witnesses, that's enough a to show a reasonable doubt to help you see that maybe, just maybe, there was a knife in Vilmar's that he was using. It's the sworn testimony of three neighbors with no motive to lie. Does that count for anything?

Well, maybe you think the others were imagining. Two neighbors -- well, it would be pretty -- for two people to hallucinate at the same time, but three neighbors, ladies and gentlemen. And they weren't collaborating on testimony.

I mean, Rob Perry, Sr. remembered a bigger knife, and Rob Perry, Jr. remembered a smaller steak knife, and they just both told you what they saw -- what they remembered they saw something in Vilmar's hand or right by it.

Phil Schmidt saw it in Vilmar's hand or right by and/or as if he just released it, and he saw the other knife there so we know it wasn't the other knife.

Now, these were the first three people to arrive on the scene. They were the ones who saw the scene before it had been tampered with, before anything was disturbed. They saw that knife and that's enough to raise a

reasonable possibility that maybe Taryn was defending himself.

I use this term a "reasonable possibility." I view -- that's kind of the opposite of beyond a reasonable doubt. If there's a reasonable doubt as to whether something happened, there's a reasonable possibility that the opposite happened. So there's a reasonable possibility that Vilmar had that knife, was using it.

If the prosecution wants you to convict of murder or manslaughter, they have to prove to you that Taryn Christian was not defending himself, and they have to prove that to you beyond a reasonable doubt.

And then I talked a little bit about reasonable belief. Let me go over the jury instruction on self-defense; okay? Self-defense: Justifiable use of force. This is what the judge will instruct you.

Justifiable use of force commonly known as self-defense is a defense to the charge of murder and the included offense of manslaughter. The burden is on the prosecution to prove beyond a reasonable doubt that the force used by the defendant was not justifiable. If the prosecution does not meet its burden, then you must find the defendant not guilty.

Now, it then defines how you make that determination. The use of deadly force upon or toward

another person is justified when a person using such force reasonably believes that deadly force is immediately necessary to protect himself on the present occasion against death or against serious bodily injury.

The reasonableness of the defendant's belief that the use of such protected force was necessary shall be determined from the viewpoint of a reasonable person in the defendant's position under the circumstances.

Let me read that last part again: Shall be -- the reasonableness of his belief is to be determined from the view point of a reasonable person in the defendant's position under the circumstances of which the defendant is aware, or as the defendant reasonably believed the circumstances to be.

So again this is just -- all this is saying, as I mentioned before, put yourself in his shoes. Don't stand back and then say -- well, from my point of view -- well, it doesn't reasonably look like, you know, that was the way it was happening.

But put yourself in his position of being assaulted by two people with a heavy man on top of him angrily doing whatever he was doing and this woman kicking and punching him. Being yelled at and feeling this knife on his flesh.

Put yourself in his position and that's how

you determine whether he had any reasonable belief that he might need to protect himself with his own knife.

The prosecution read to you another part of this that I think you may have to discuss because I'm afraid this can be a little misleading. It reads: The use of deadly force is not justifiable if the defendant, with intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter.

Now, what did you understand that to mean? Can't use self-defense if you've provoked the other person to use force against you. That's not all it means, though. It says you can't use self-defense if you've provoked that person with the intent of causing death or serious bodily injury.

At the time Taryn was in the car, if he was in car -- at the time he was running away, he was not doing anything with the intent of causing death or serious bodily injury. This is simply not applicable. You can read it carefully in the jury room if you get confused on this.

It's simply not applicable because they cannot show that Taryn prompted Vilmar to use force by doing something to injure -- to seriously injure Vilmar. It was only later that Taryn seriously injured Vilmar.

Also it says you can't use self-defense if the defendant knows he can avoid the necessity of using

self-defense by with complete safety by retreating.

Well, he tried to run. He tried to run, so this doesn't apply. He didn't make it away. He didn't make it. He was tackled.

And it's not -- it doesn't have -- have anything to do with this case whether or not he dropped a knife and stopped to pick it up. Because he was still trying to get away. I mean, that does not have anything to do with this case.

It's only because you'll see that at that point he intended no harm to Vilmar. And then finally the prosecution argued their very strained interpretation that if the defendant -- you can't use self-defense if the defendant knows he can avoid the necessity of using force which complying the demand to abstain from any action which he has no duty to take.

Now, somehow they want you to find that not letting go of the knife was abstaining from some action. Abstaining from an action is when you don't do something in the first place. It's not complying with an order that you drop a knife.

Besides at that point did he know that he was safe? No. There was a knife on him too. Okay. Self-defense -- a couple more points on self-defense and then we can move on here.

Be the way, even without that knife, even without Vilmar having the knife, suppose that he hadn't had a knife. I think we proved there's reasonable doubt that he did, but even if he hadn't, I submit to you there was enough there for Taryn to reasonably believe that he was in danger of serious bodily injury, being punched and kicked with a heavy man on top of him and another person attacking him from the side, angry people assaulting him. And we know that an ungloved fist and a well-placed kick can cause serious injuries.

Actually I'm not at all done with self-defense. I haven't talked yet about what I view as the key piece of physical evidence in this case.

A lot of times -- there is lots of times in a case there's one piece of physical evidence that holds secrets that do not come out in the testimony of the witnesses.

In this case I think there's a very significant piece of physical evidence that I want to look at with you. And that is this: This shirt Taryn Christian wore that night. The shirt that is drenched in blood. And it is, of course, Vilmar's blood. And which is not pleasant to look at and to contemplate but the significance of this -- let me explain to you.

The question is: Where is the blood on this

shirt? I'm -- and I'm going to hold it back facing you. Where is the blood on this shirt? The blood on this shirt is almost exclusively on the back and mostly on the left side of the back. Look at the front of the shirt.

JoAnne Furuya said she couldn't find anything on the right side that would indicate any blood. She didn't test the left side because she wasn't -- I mean, you can see yourself the right side is clean in front. She didn't test the left side because she wasn't sure if some stuff here was blood or not.

But the blood on this shirt is almost exclusively on the back, and then it wraps around some to the left side of the shirt, the armpit area and on down.

Now, what does that mean? What does that mean for our case? I submit to you what this shows that just as Serena Seidel testified, Vilmar did tackle Christian, and while all this was happening, Taryn Christian was lying face down on the ground with Vilmar on top of him.

Because look at the locations of the wounds. Vilmar had wounds in his chest area, and he had an especially large wound that was bleeding especially profusely in the left armpit because that's the one that Dr. Manoukian testified punctured a vein and resulted, in his words, in massive blood loss.

So to that extent, this shirt shows us the

positions of the parties after -- after Vilmar was -- had sustained his serious injuries. And what this shows is that Vilmar was on Taryn's back that whole time when he was bleeding.

He was on Taryn's back. He was not facing Taryn. He was on Taryn's back. And it shows that they were facing the same direction. Because the left side that's -- see where the armpit wound spilled blood on Taryn's left side right under Vilmar's left side. Okay.

You can picture it. Two people lying on top of each other both face down. Taryn's face was in the dirt and the grass. Vilmar on top of him. So then how did Vilmar get stabbed?

The way Vilmar got stabbed is obviously Taryn from that position, if Taryn was the one who did it, managed to get up his knife without seeing what he was doing, just thrust blindly behind him and up at where Vilmar was sitting on him and perhaps not laying completely on him but leaning over him.

And the wounds were directed upward. That's one thing Dr. Manoukian said. Of all the wounds, they were all directed upward and Dr. Manoukian, by the way, he's not a forensic expert. He's not -- he can't reconstruct for you what happened.

He didn't see the shirt. He didn't know

anything about the positions of the parties. All -- he's a physician. He can tell us which way the wounds point, which way the knife entered the body so -- what he told us is that the wounds pointed upwards, same kind from the sides more -- some came from one side or the other, but they were basically all going upwards and this is explained by those positions of those people that I just described to you, which is corroborated by the location of the blood on that flannel shirt.

If Taryn was ever facing Vilmar -- if Taryn was ever facing Vilmar, then there would have been blood here. Because that would have corresponded with Vilmar's left armpit that was bleeding so heavy.

Or if he'd had blood on front of his shirt from Vilmar's chest wounds, there is no blood at all in this area on the right side. Therefore, Taryn was not facing Vilmar. And, therefore, he was a least reckless and didn't know what he was doing.

And it looks like he was acting in self-defense, never really realizing the harm that he was -- would be inflicting because he could not see the harm he was inflicting.

He did not see where that knife was landing. He was lying face down on the ground trying to get this guy off him with the only means he had, trying to stop himself

from being hurt with the only means he had, which was that knife. Blindly, without being able to see, just stabbing behind his own back.

At some point he probably got twisted around enough that he inflicted a glancing side wards blow on the back, which Dr. Manoukian testified went in left to right on Vilmar to maybe -- probably what happened, I would suggest, is either that was Taryn inflict that wound, either got the knife in his left hand and stabbed.

Or more likely managed to twist around some and reach behind him still not -- how could he know were exactly it was landing?

The prosecution's whole case that says this wasn't self-defense, that's based on well his injuries were so severe and he didn't need to stab him that many times, but if Taryn was lying face down underneath Vilmar, then how could he really know whether he was connecting or the damage he was doing?

The interesting thing is that Vilmar didn't get up off him. I mean, Taryn was still being assaulted still lying face down on the ground here, and still had this guy on top of him who was not being defeated or budged and not letting go.

So what could a man in Taryn's position think? What could this terrified teenager think as he

connected? There's no evidence that Taryn had any experience using a knife, unlike Vilmar. Or that he would know the affect, would know the feel.

He got this for show. He got it for protection, yes, because he'd been mugged. And it's something he showed off, an insecure, scrawny teenager that would show this off to his friends, feel little more manly, perhaps, but he didn't know how to use it. He didn't know.

Dr. Manoukian told you -- Dr. Manoukian told you it didn't make much force to use this knife. It's not like it -- a weaker person could have definitely inflicted these wound against a stronger person. It's sharp.

And further proof that Taryn was face down. If you're running away from someone and they tackle you, what position do you end up in? If you're running, someone tackles you from behind, you just sprawl forward and they are on top of you.

Now, the interesting thing about Serena Seidel's testimony she said she told you folks that she stopped at Tesha Santana's on the way. So she didn't see Taryn get tackled but she assumed that's what had just happened from the look of it.

But that's not corroborated. Tesha Santana says there's only one time that Serena came to her door and pounded on the door and that was after it was all over when

she came for water.

And Serena Seidel admitted under cross-examination that she had made a different statement to the police. That she previously -- when her memory was fresh, she had stated that she saw Vilmar tackle. She saw Vilmar catch up with Taryn, and she saw Vilmar tackle Taryn when her memory was fresh.

There was no confrontation on the sidewalk with Taryn turning and fighting. Taryn's was running. He was out of there. He was tackled and Serena saw it, and that's what she said at first when he remembered what she saw.

She didn't go -- Serena -- I mean, she didn't go by Tesha's on the way. She went to Tesha's later. She saw what happened. He was tackled, and that's how he ended up face down. And there was a struggle. And at some point in the struggle, Vilmar was getting the best of Taryn. Taryn had the knife, and Taryn defended himself.

Okay. Just a minute. I covered a lot of this already. By the way, about the knife again, Vilmar's knife, it's true there was no second knife found at the scene. Does that really mean anything?

As far as we know, ladies and gentlemen, the police never did a thorough search of the area. They picked up the evidence that was in view. So what happened to that

other knife? There's several possibilities.

Could have been kicked in that bush nearby. It could have been lost in the scuffle somehow. Someone could have picked it up. Or what could have happened is it could have been even intentionally concealed.

And I would suggest that there was someone there with a motive to intentionally conceal that knife. There was a knife that belonged to Serena Seidel that came from her kitchen. Why would she take away that second knife?

Other than the fact that it belonged to her, perhaps she took away because she realize that knife would be evidence against her boyfriend, Vilmar. Perhaps she took it away because she didn't want Vilmar to be implicated in any way as being in the wrong in this fight.

Perhaps she took it away because she just wanted to see the man who stabbed Vilmar convicted and knew that the other knife would show self-defense. Interesting piece of evidence about this knife.

These are the shorts that Serena Seidel was wearing. This is the back of those shorts. These are in evidence. And this is the front of those shorts. Now, she had blood on her shins and on her knees from kneeling next to Vilmar when he was touching or and kissing his crotch area, why ever she did that, but according to her witnesses, she

had no other contact with Vilmar other than that after this incident.

Nothing that could explain this dense blood spot right on the front of her shorts where there's clean lines. You know what this looks? I suggest to you it looks like someone bunched up this material, took a knife and ran it through that material.

MS. TENGAN: I'm going to object, your Honor. This is speculation.

THE COURT: Sustained.

MS. TENGAN: Improper.

MR. RANKEN: Well, I suggest to you, ladies and gentlemen, that there's no other explanation for that, and you should consider that evidence. But you don't need to determine what happened to the knife.

We have witnesses that said there was a knife there. Let it remain a mystery if you like what happened to that knife.

Now, Phil Schmidt said that when he first saw Serena, she did not have -- he didn't see any blood on her shorts and yet she has the blood on her shorts. Take that for what it's worth too.

You know, it makes sense that Vilmar -- that -- I'm trying to explain the keys and tie that in with the knife here. Now, there's two explanation. One, that I

covered the idea that there's a third man that had those keys.

But if you don't believe that, then obviously it was Vilmar who got those keys and brought them to the scene. If you think Tesha imagined that he said that about, "Why did you give him the keys?" Well, Serena didn't bring those keys. It was obviously Vilmar. He stopped to grab them on the way out, wasn't thinking really clearly.

Why would he need -- but he did stop to grab something else he needed, a knife. If he stopped to grab one thing, why not two things.

And remember now Phil Schmidt and both of the Perrys and Tesha all testified that Serena was behaving strangely at the scene once the police arrived. Remember how she distanced herself seeming to avoid contact with the police.

How she's worried about the blood, how she pulled Tesha away from Vilmar. What accounts for that all strange behavior? Was she just upset because of the traumatic incident that she witnessed, or was she also trying to conceal something, not being fully honest with the police, not really wanting to talk to them about all the details because she had a hand in concealing this other knife?

The bottom line is three witnesses, independent, saw a second knife, and that's enough to create

a reasonable doubt.

Now, even after Mr. Cabaccang had been badly injured, he was still struggling on as though he had not been injured. His adrenaline no doubt kicked in big time. But this was very important to look at for self-defense because from the blood on the back of Taryn's shirt, it's obvious that Vilmar had not been slowed down by whatever wounds may have been initially been inflicted.

He didn't even notice most of his wounds, you know. He told Officer Holokai only that he'd been stabbed in the back with the screwdriver. Vilmar didn't even notice that he had been wounded that badly, and he fought on. Taryn didn't know that Vilmar had been wounded that badly. Taryn fought on.

This whole thing happened, by the way, at very close quarters between these two men. And that makes it harder -- for one thing Dr. Manoukian did notice the tail end wound, and I suggested to him, and he agreed it was possible that it was administered in very close quarters.

And when you're in that kind of situation, you don't have control. It's not like Miss Tengan showed with someone -- two people standing up. It's not like that. It's two men lying on the ground, scuffling, Taryn getting in whatever he can do to try to end this, to try to protect himself.

And that accounts for the tail off to the right side of Vilmar's chest. That accounts for that -- would be explained by Taryn reaching behind and getting the knife from very much at angle at close quarters.

She says he must have known that he was administering fatal blows that would kill Vilmar. How could he know that face down with Vilmar still fighting him as if nothing had happened and holding him down the whole time?

What this was, was a fight. And witnesses referred to it that way. Two people, Vilmar Cabaccang and Serena Seidel were trying to get the best of a third person, Taryn Christian, and they were basically succeeding.

Vilmar Cabaccang was on top of the whole time. He was in control. He was using all means available to him to subdue that man underneath him including a sharp kitchen knife, and he was hurting the man underneath him and he has a scar to show for it.

And man on the bottom fought back and that's how it happened. One side Vilmar and Serena was using fist kicks and a knife. The other side, a much lighter and weaker individual, fought back with all he had, a knife -- the knife he had bought to protect himself because he was just a scrawny teenager who felt insecure. A knife that all he ever had done was show off to his friends.

I put to you, ladies and gentlemen, is that

consistent with your notion of murder, or is that more consistent with your motion of self-defense?

Let's go back to the flow chart and move on to the next step of the analysis. I just discussed self-defense. If you find that self-protection that, Taryn reasonably believed to protect himself, not guilty.

If you find there's -- if you find there's no reasonable doubt, no possible -- no reason -- possibility of self-protection and vote no of self-defense beyond a reasonable doubt, then move on to the next step.

And that is what was Taryn's state of mind. Again if this was Taryn who did it, what was his state of mind at the time? Well, there's three choices I've offered you.

The prosecutor has to prove intentional or knowing beyond a reasonable doubt. If you find that they have proven at least reckless again beyond a reasonable doubt, they have proven the act of recklessly, then it's manslaughter, and if you find some other state of mind, then it's a not guilty verdict.

So let's talk about manslaughter. Again I hope that you'll agree with me as to one of the first two theories. Either they haven't shown beyond a reasonable doubt, Taryn did the stabbing. Or if they have, they haven't shown beyond a reasonable doubt he didn't act in

self-defense.

I hope you agree with that, but in the case you don't agree with that, I have to allow for that possibility and discuss other hurdles. The state of mind. What was the state of mind and again, I was -- sort of assume for purposes of argument that we're beyond that questions.

We're talking about the state of mind that Taryn was in. Okay. State of mind required for a person to be guilty of murder is intend or knowledge. In other words, you must intend or knowingly cause the death of another person. If you cause the death of another person without really intending to or without knowing what you're doing will cause that death, then you're not guilty of murder.

What was Taryn's intent that night? What did he want? What did he intend to happen. Well, we know the answer to that. All Taryn ever wanted to get was -- all Taryn ever wanted was to get away safe and sound and unhurt. All Taryn ever wanted was to get out of this terrible trouble that he was in. All Taryn ever wanted was to go home.

That was his intent. That was his intent. Taryn never intended to kill anyone. Taryn never knowingly killed anyone. Taryn never wanted to kill anyone that night or any time. He tried to run. He was tackled. He tried to break free. He was pinned down. He tried to go home and get out. He was punched and kicked and cut with a knife.

Taryn didn't want this fight to happen. He didn't intend this fight to happen, and he didn't intend for Vilmar to end up dead.

Remember what Taryn Christian said to Serena as he left the scene when finally got up and saw for the first time how badly Vilmar was wounded? He spoke of the need to get help, to call 911.

There was no evidence whether he followed through or, in fact -- I believe her testimony is unclear as to -- as I recall it, she was not clear as to if he said I'm going to do it or she said something about calling 911. She said her attention was not focused on him at that point.

In any case, whatever he said, it was something about calling -- getting help, calling 911. That was what came out of his heart, came out of his mouth at that time when he didn't think he was going to be discovered or, you know, implicated in this.

He wasn't running away. Is that a thought consistent with the thought of someone who wanted or intended to kill someone? Of course not, of course not. If Taryn intended to -- for Vilmar to die, why would he even think of the concept of getting help or calling 911?

A lot of the points I made in regard to self-defense are also applicable if you reject self-defense and move on to considering manslaughter. And you'll just --

I'm not going to reiterate or repeat things. I think I've done enough repeating of myself already here, and these ideas are in your mind.

Consider them, but please do think of all these points and you are -- when you are evaluating Taryn's state of mind, think of these experiences of him being -- lying down on ground not being able to see behind him, being beaten by others, and his state of mind whether he was trying to act intentionally or recklessly and also how it affected his emotional state.

He must have thought, you know -- as to his state of mind, he must of have thought he had not hurt Vilmar enough for Vilmar to even release him. Because Vilmar didn't. Taryn must have thought -- when he read the paper, when he talked to Lisa, how could I have inflicted those kind of wounds? Maybe that's why he said on those tape it didn't happen like that.

And if you feel Taryn was one -- when he stabbed -- when he was being honest with Lisa that why does he say, I didn't stab him. Maybe he feels like how could I have inflicted those wounds? I didn't know that was happening.

It was reckless. At best it was reckless. At best not intentional. He didn't know that he was doing that. He didn't know that he was inflicting wounds that

would cause someone's death. And that's what we have to prove, not only that he knew he was inflicting wounds -- that he was inflicting wounds, they have to prove beyond a reasonable doubt Taryn was knowingly not inflicting wounds that he knew were likely to cause death. They have not proved that damage.

Let's consider the other kind of manslaughter. And that is called manslaughter based on extreme emotional disturbance. If you find that despite everything I said so far, you're still with the prosecution all the way and think he did it intentionally, beyond a reasonable doubt, wanted to kill Vilmar, then you have to consider was Taryn at that time under the influence of extreme emotional disturbance for which there is reasonable explanation.

If you find no -- beyond a reasonable doubt, you can say no, then and only thing, can you finally get to that point. If you find possibly that there's at least a reasonable possibility that he was under the influence of extreme emotional disturbance, then your verdict is manslaughter.

Emotional disturbance manslaughter can be what's known as imperfect self-defense. That could apply if you feel that this -- that Taryn used this force in self-defense, but a reasonable person would not have believed

that he had to do so under the circumstances that it was unreasonable for him to use that much force.

And that he knew he was intentionally, knowingly administering -- administering fatal wounds, but he was doing it thinking -- well, he was thinking he was defending himself whether or not that's reasonable, that can create that state of extreme emotional disturbance in his mind.

That's all you have to look at, and in his mind if you find he was so disturbed by all the circumstances, then it's manslaughter.

If you -- just a minute. Let me start over here. I want you to again remember that Taryn was being assaulted by two people, not one but two. He was a terrified teenager facing all these -- well, facing physical harm most of all, facing the possibly of serious injury, facing apprehension and arrest and a jail sentence, criminal record, the same that would come with that, facing embarrassment, really destruction of his life as he knew it was all flashing before his life in that instant being apprehend and attacked in that way.

How could he help but be under the influence of extreme emotional disturbance in that situation? Put yourself back in teenaged years. Don't think with your grown-up-used-to-the-world, you know, of-hard-knocks and

all. We're talking about a terrified teenager who moved out of his home just a few months before for the first time.

Who had never been in this kind of trouble or any kind of trouble with the law before. Lying face down on the ground with the mercy of these people. How could he not be extremely disturbed in that situation? Taryn was a terrified teenager in trouble, and he was frightened. He was emotionally very upset, and he was emotionally disturbed.

And that is -- that must led you to reject the murder verdict and at best under those circumstances you can find manslaughter if the prosecution has proven everything else beyond a reasonable doubt.

The prosecution would have you believe that Taryn murdered Vilmar Cabaccang knowingly, intentionally in cold blood. They need to prove that to convict him of murder, and they are arguing it. They need to prove that if they want this murder, but the evidence has not revealed that. That's not what the evidence has shown. Speculate at best, and you cannot speculate when it's a matter of proving beyond a reasonable doubt.

If Taryn caused the death of the decedent -- if he did, he didn't do it knowingly or intentionally. At the time this happened his blood was not running cold as in cold blooded murder. His blood was rubbing hot and disturbed and in an extreme emotional state.

You have to be unanimous in whatever verdict you reach. If any one of you believes that Taryn did not intentionally or knowingly kill Vilmar, but did so only recklessly, then you can't convict of murder.

If any one of you, perhaps another one of you believes that he was acting under extreme emotional disturbance, then you can't convict of murder.

You have to be unanimous in any verdict. You have to all agree on the theory of manslaughter. If you can't agree on the single theory of manslaughter, then you have to acquit. You didn't resort back to murder. I hope that's clear. The instructions should make that clear.

Now, I'm not asking -- ladies and gentlemen, I am not asking you for a manslaughter verdict in this case. We've shown you that the facts of this case and reasonable inferences that can be drawn from those facts support an acquittal not a manslaughter verdict.

We've shown that you -- if Taryn Christian was one -- even if you believe he was the one that inflicted wounds and there was no third man who might have done it, then even there's a reasonable possibility that he did so in self-defense; therefore, there's a reasonable doubt. Therefore, he should be acquitted of murder and manslaughter. One reasonable doubt and you cannot convict. One reasonable doubt and you must acquit.

I'm going to respond now -- it's kind of the end of the organized part of my argument so forgive me. I want to respond now to some of the points the prosecutor made to from my various notes here.

Miss Tengan says that Mr. Cabaccang was stabbed nine times. That's fudging. One was a scratch on the left hand. He didn't even -- for the pictures they didn't even put a picture in evidence it was so immaterial so -- Dr. Manoukian couldn't identified that as being a wound from the double-bladed knife.

I anticipate Ms. Tengan will say how could Vilmar have had anything in his hands because he got cuts on his both of his hands. The truth is he got that cut on his right hand. The knife was in his left hand. Right hand was the one he was using to do something to Taryn.

And one was a glancing, extremely shallow cut on the side of his wrist. It was about an inch long but extremely shallow just along the surface and one was two -- like pin pricks on the hand. So now we're down to six real wounds is all.

She talked about Vilmar's identification allegedly of Taryn as he left. Two things curious about that. One she also made a point that Vilmar couldn't see anything. We don't know how bad his vision really was. She don't know how bad he really needed contacts, what he could

or couldn't see without the contacts.

And secondly when Phil Schmidt looked up, he couldn't see that man right after at the -- very carefully over Phil Schmidt on the stand. As soon as Vilmar said that, Phil Schmidt looked up again, but he couldn't see anything.

So whether Vilmar saw anything again that doesn't prove that Taryn was the only person there. If Vilmar was even able to identify anyone at that point from that distance if he was still in view of whatever.

Again, I'm sorry, I'm kind of random disorganized points here in order that she talked about them, but she mentioned Dr. Manoukian talked about the that arm -- armpit wound and how that would immediately disable the arm.

Well, I asked him. He based that on certain nerves being cut, and I asked him he said no he couldn't find those nerves. He didn't see those nerves, couldn't tell whether or not that they had been cut.

So it's not true that he necessarily would have been disabled by that wound to the armpit. In any case, we know that he was still right on top of Taryn after receiving that wound to the armpit, still not letting Taryn go.

How disabled could he have been? Because the blood came all over the left side of the Taryn's shirt as Taryn was pinned face down on the ground.

She said -- Ms. Tengan said that this was not reckless because -- I wrote down her words. This is very interesting. She said, "Reckless is random thrusting." This was not reckless. I submit to you that's what the evidence shows.

Random thrusting face down while Taryn was on the ground. She's admitted that it is no more than reckless at best.

She argued about blood drops on the sidewalk and what that means. Let's look at little more closely at that point. Hears a picture. This is the best one I can find. I'll show it to you as closely as I can. These are the blood drops on the sidewalk, but look at where the blood is on the grass.

It comes right up to the edge here. A lot of blood, such as to stain the grass. It comes right up to the edge right by the sidewalk. These are not isolated drops. The scuffle -- the fight was occurring all over this area.

There was one continuous area of blood all around there leading right to the sidewalk. And further proof look at where the items were that were found before they were again photographed by the police before they had been disturbed.

Again the blood coming right up next to sidewalk. These pieces of clothing which were given to

Vilmar to keep him warm and were left there presumably right where he was lying, so he went up right by that sidewalk.

The hat was actually partly on the sidewalk indicating the scuffle happened right by that sidewalk. So how did drops of blood get on the sidewalk. It's nothing sinister about that. It does not mean Taryn turned and confronted and stabbed him.

What it means is that Vilmar was moving around in that entire area. The scuffle was happening in that entire area right up to the edge of the walk.

And remember finally what Phil Schmidt said. Phil Schmidt told you that Vilmar was trying to get up. That Vilmar was moving around and getting up. First he got up to show Phil to look at Taryn -- and then -- the man he saw fleeing. And then he got up and was moving around trying to move and Phil had to stop him.

What does that mean? That means he had an opportunity to drop blood on the sidewalk. There -- there's nothing more than that means about that blood. Take me minute to make sure I covered all these points. Just a second.

Serena testified, you know, that they were always on the ground the whole time. She never said that the two men were standing. She never said that the two men were even kneeling. She said they were on the ground and Vilmar

was on top of Taryn, and she never saw Taryn on top of Vilmar. She never saw them in any other position that she could testify to.

Phil Schmidt and also one of the paramedics testified that the decedent's legs were on the sidewalk partially. The paramedic thought they we were possibly on the sidewalk. I believe it was Phil Schmidt, one of the witnesses, the eyewitnesses, neighbor, who said they we were on the sidewalk partially.

So if he sits up trying to move about, naturally that could drip blood on the sidewalk. Paul Richardson. They talked about Paul Richardson that's ridiculous. First of all, the judge has instructed you -- and again reaffirmed you cannot use that alleged statement that Taryn said to Paul as any evidence that was admitted.

Only so you could evaluate whether Paul Richardson was being honest with you but. Look at the circumstances since she raised this, which I objected to as improper, but she raised this I have to talk about it a little bit.

MS. TENGAN: Your Honor, I'm go to object since I was not permitted to go into that.

THE COURT: Yes.

MR. RANKEN: I think it's prejudicial, your Honor, because she had it up on chart.

THE COURT: All right. If you want to argue, come up here.

MR. RANKEN: Never mind because they are not allowed to consider it. But they shared a cell for four months, shared a cell for four months or so, and Taryn never said anything. And Paul Richardson testified Taryn never said anything to incriminate himself.

So I'm so sure that he's going to then when they see each other in passing suddenly give Paul a confession. What happened there was -- Paul admitted -- was that Paul was back in jail looking at jail time. He knew what the police were after and he went and gave them what they were after to try to get a break for himself. It didn't work. He decided to be honest when he came to court.

I I'm not going to spend a lot of time attacking Lisa Kimmey. You have to draw your own conclusions on that. She was -- there were a few things we know that we have to look at in terms of evaluating the testimony. Donna Piatkowski shared her experience of what happens when Lisa Kimmey gets jealous even without good cause. How severe her reaction can be.

And we know from the tape that Taryn was having a relationship with another girl and was trying to break up with Lisa at the time she went to the police at the time she told them all the things she said that Taryn said.

Her friend Megan admits that she can't be trusted. Before she was even 18 she been adjudicated guilty of theft, a crime involving dishonesty. She's the kind of person as you heard that lead Taryn along in the taped phone call lying to him right and left. Okay. I am keeping your secret, just leading him on, feeding him these questions just to entrap him and do with it a straight face and be credible.

The way she behaved on the stand she clearly showed what side she's on in this case, and it's not Taryn's side. So take it with a grain of salt what she says and what she doesn't tell you. She gave Taryn a lifetime guaranty, you know. She told him in this letter all you have to do is, honey, stay with me. Because if you ever leave me, I can put a lifetime guaranty on our relationship.

She's enforcing the guaranty now. Is she leaving out the other stuff that he told her? He didn't talk too much on the tape about the details. Why not? For one thing he already talked to Lisa. For another thing he didn't seem to want to talk much about the details of it anyway, uncomfortable for him. And finally his mom was there.

You hear on the tape he says, "I know, mom. I heard." His parents are in the room. He's not going to be talking too much with his parents coming in and out. We didn't have any evidence on that, but that would certainly

put a damper on someone wanting to talk too much about the specifics.

He did indicate repeatedly that she was not telling the whole story when she accused him of stabbing this guy; that there was more to it; that it wasn't like the police and the newspapers were saying.

I'm going to read to you one more jury instruction. The judge will tell that you the defendant has no duty or obligation to testify, and you must not draw any inference unfavorable to the defendant because he did not testify in this case.

And you're not to consider that in any way in your deliberations. Now, my client's asked me, Mr. Ranken, won't the jury hold it against me if I don't testify? My client's asked me, won't they think I'm hiding something?

But when I'm handling a case this serious, I ask myself if I do put my client on the stand, are you going to believe him anyway? If someone's facing a charge this serious, are you going to believe whatever he says, or are you going to figure that he'll say whatever he needs to say to try to be acquitted?

I figure there's not much point in putting my client on the stand. I'm -- it's not up to me anyway to convince you of anything, to prove anything. I'm not going to convince you there's reasonable doubt by putting a

defendant on the stand.

And that's why you shouldn't hold it against him. And if I'm going to convince you there's a reasonable doubt, I've got do it some other way than my client's testimony. And again the prosecution is one with the burden of proof.

They are the ones that need to put witnesses on the stand to tell you -- convince you beyond a reasonable doubt of the truth, of what happened.

Let's talk about the weapons charges. So far I've only discussed the murder count. The weapons charge that requires the prosecution to prove that a dagger was used. If you find that he's guilty of murder or manslaughter, that dagger was used -- it's specified a dangerous weapon, to wit a, dagger.

Now, have they proved this is a dagger? I don't know. . They have proved it's a double-bladed knife. That's what the witnesses were calling it. You can see it. I don't know that makes it a dagger. That's not how I envisioned a dagger.

So you -- first of all, if you acquit Taryn of murder and manslaughter then you must acquit him of this charge automatically. But even if you convict him of murder and manslaughter, this thing about the dagger -- this is a silly charge. It's -- they haven't proved it's a dagger, and

I ask you to follow the letter of the law.

If they haven't proved beyond a reasonable doubt what this weapon was, then you must acquit on that charge also.

There's some people on this jury -- and I'm not going to have time to go for all the -- I'm not going to have to time to go over the reasonable doubt in more detail. It's something I like to discuss a lot. There's so many standards of proof, you know, proof beyond a reasonable doubt and below that, you know, clear and convincing evidence. There's preponderance of the evidence. There's lots of -- reasonable suspicion, probable cause.

You've heard these legal terms, but the highest one of all just short of absolute certainty is the standard proof beyond a reasonable doubt. Keep that in mind at all stages of your deliberations.

Now, I know there's some people on this jury with strong voices and certainly will be able to express themselves very well, and there's others on the jury who perhaps are not as used to expressing yourself, as making your views heard.

Probably a majority in the latter category. I ask if you are in that category, please trust yourself, trust yourselves. Don't let yourself be cowed by better talker or louder person more than you. This system

depends -- the jury system depends and only works if each of the 12 people here speaks their mind and follows their instincts and doesn't go along with the crowd.

That's what the system is about, and we're depending on -- you know, we had a lot of challenges to affect the composition of the jury, and we ended up with you folks.

We both felt comfortable with you as a fair jury, but it depends on you all speaking your mind not yielding your beliefs to others because they come across stronger.

Now, there's one thing I'm afraid of most in this trial. The last thing I'm going to talk about with you. I'm afraid there's one thing that will sway your judgment against Taryn, cause to you want to acquit him of, at least, of manslaughter.

I'm not so worried about murder. I don't think they have proved all that intent and lack of emotional disturbance, but I'm worried that on the manslaughter you'll be tempted. You'll want to convict him.

And the reason that I'm worried about that has anything to do with the evidence in this case. The thing I am afraid of is this: I'm afraid your feelings about this tragedy will affect you emotionally in a way that you're mad at Taryn. You want to get him for that charge and at a

minimum make it hard for you to weigh the evidence fairly because of your strong feelings because who can help but having strong feelings about something like that.

I'm afraid that you'll demand eye for an eye regardless of the evidence and the law. I'm afraid that you will resent and dislike my client because of his role in this tragedy. I'm afraid that you'll have difficulty seeing beyond that.

I'm afraid that these feelings will affect your judgment, and I really don't know what to do about it. Other than just to implore you to weigh the evidence dispassionately, implore you to follow Judge McConnell's on law and let the chips fall where they may.

If you believe that Taryn Christian is guilty of attempted theft, then you should convict him of that. But if you're angry at him because of his involvement in this matter and how that's started all this happening, then you should not let your anger at his actions spill over into your consideration of the homicide charge.

You must treat these matters separately. And the judge will instruct you that you're to consider the counts separately. And he will also order you not to yourself be influenced by sympathy or passion, and that includes sympathy for Mr. Cabaccang.

Given the chance, each and every one of us in

this room would like to restore Mr. Cabaccang's li...
sure my client would like to restore Mr. Cabaccang's life. Yet none of us have the power to do that. We must take things as we find them.

We must move on, and the duty of a jury is to render justice according to the laws of our society. In this case, follow the law. It means to acquit Mr. Christian of murder and manslaughter. And while it may lack symmetry, and may not be easy emotionally to do, it's the right thing. It's your duty.

Thank you, ladies and gentlemen. God bless you all.

THE COURT: We'll take a short recess.

THE CLERK: All rise. Court will stand in recess.

(At which time a recess was taken.)

THE CLERK: All rise. Court is reconvened for its jury trial. Please be seated.

THE COURT: Let the record reflect the presence of the jury, Counsel, and the defendant.

Ms. Tengan, you may rebut, please.

MS. TENGAN: Thank you, your Honor.

Ladies and gentlemen of the jury, when you review Mr. Ranken's argument, do one thing. Do not review the facts in light of his argument. But review his argument

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

TARYN CHRISTIAN, Petitioner, vs. CLAYTON FRANK, Director, State of Hawaii, Department of Public Safety, Respondent.	CIVIL NO. 04-00743 DAE-LEK

FINDINGS AND RECOMMENDATION TO GRANT IN PART AND DENY IN PART PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Taryn Christian ("Petitioner") filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 ("Petition") on December 22, 2004. Respondents Richard Bissen, Acting Director,[1] and the State of Hawaii Department of Public Safety (collectively "Respondents") filed their Answer to the Petition on September 30, 2005. Petitioner filed a Reply on December 15, 2005. United States District Judge David Alan Ezra referred the Petition to this Court pursuant to 28 U.S.C. § 636(b) and Rule LR72.5 of the Local Rules of Practice of the United States District Court for the District of Hawaii ("Local Rules"). This Court conducted an evidentiary hearing pursuant to Rule 8 of the Rules Governing Section 2254 Cases, 28 U.S.C. foll.

[1] Mr. Bissen was replaced with Respondent Iwalani D. White, Interim Director, pursuant to Fed. R. Civ. P. 25(a)(1). Ms. White has since been replaced by Respondent Clayton Frank, Director.

APPENDIX "D"

had conducted forensic testing, the result of the trial would have been different. See Strickland, 466 U.S. at 694.

Thus, even assuming, *arguendo*, that trial counsel's failure to conduct forensic testing fell below the objective standard of reasonableness, Petitioner's ineffective assistance of counsel claim would still fail because he cannot establish prejudice. This Court FINDS that the denial of Petitioner's ineffective assistance of counsel claim regarding forensic testing was not contrary to or an unreasonable application of clearly established federal law. The Court therefore RECOMMENDS that the district judge DENY Ground Three with regard to this claim.

4. Change in Defense Theory

In his opening statement, trial counsel argued that Petitioner did not kill Cabaccang. In his closing argument, counsel asked the jury to decide whether there was a reasonable doubt that Petitioner inflicted Cabaccang's wounds. Counsel also argued that, if the jury determined that Petitioner did inflict the wounds, it had to decide whether Petitioner acted in self-defense and whether he acted under extreme emotional disturbance. [Mem. in Supp. of Petition at 33, 37-38.] Trial counsel also stated that the defense did not contest the fact that Cabaccang tackled Petitioner and that Petitioner was on the ground under him. [Id. at 38.] Counsel stated that both Petitioner and

Cabaccang had knives in the struggle and that Petitioner had cuts on his stomach and hand after the struggle. Petitioner argues that counsel's argument ignored evidence at trial which established that Petitioner did not have cuts on his hand or body after the incident. [Id. at 39-40.] Counsel also argued that the presence of Cabaccang's blood on the back of Petitioner's shirt showed that Cabaccang, who was already bleeding, attacked Petitioner, who was face down on the ground. Counsel argued that Petitioner fought back to defend himself. [Id. at 42-43.] Counsel, however, acknowledged that, had Petitioner testified, he would have denied committing the offense. [Id. at 33.]

Petitioner argues that counsel's strategy during closing argument was against Petitioner's wishes and gave the jury the impression that the defense "was being less than candid." [Id. at 33-34.] Trial counsel also stated during closing argument that he did not know what happened on the night in question, a statement Petitioner argues was against his best interests. [Id. at 34.] Further, trial counsel's closing argument presented a theory of the case that was similar to the prosecution's. [Id. at 41.]

Trial counsel also told the jury that Petitioner asked him if the jury would think he was hiding something if he did not testify. Counsel stated that he believed there was no point in putting Petitioner on the stand because the jurors likely would

not believe Petitioner. They might think that, because of the serious charges against him, Petitioner would say whatever he thought was necessary to be acquitted. Petitioner argues that counsel's closing argument exacerbated the fact that he was not allowed to testify. [Id. at 44-45.]

The Petition argues that counsel's closing argument was "profoundly prejudicial". [Id. at 46.] Petitioner maintains that counsel's argument lessened the prosecution's burden of proof by conceding critical factual issues. Petitioner argues that trial counsel failed to subject the prosecution's case to meaningful adversarial challenge, in violation of his Sixth Amendment rights. [Id. at 46-47.] In connection with the defense's motion for a new trial, trial counsel submitted an affidavit stating that, if the court had allowed Petitioner to testify, he would have denied stabbing Cabaccang and would have described a third man at the scene. Petitioner argues that this is contrary to counsel's strategy during closing argument and illustrates that counsel's closing argument seriously prejudiced him. [Id. at 49.] He contends that there is a reasonable probability that the outcome of the trial would have been different were it not for counsel's errors during closing argument. [Id. at 50.]

At the outset of trial, the defense's strategy was to establish that Petitioner did not kill Cabaccang. By the time of

closing arguments, however, trial counsel apparently altered the defense's strategy and presented self-defense and extreme emotional disturbance as alternative arguments. This Court finds that, under the circumstances of the trial, this decision was within "the wide range of professionally competent assistance." See Strickland, 466 U.S. at 690. As discussed, *supra*, Burkhart invoked the Fifth Amendment when called as a defense witness and the trial court excluded the witnesses who would have testified that Burkhart confessed to killing Cabaccang. These events certainly hurt the defense's ability to establish that another person, namely Burkhart, killed Cabaccang. Trial counsel's strategic decision to also argue self-defense and extreme emotional disturbance was objectively reasonable under the circumstances.

Similarly, counsel's discussion of why counsel did not want Petitioner to testify and that Petitioner would have testified as to his version of the events at issue was apparently in response to the trial court's ruling about Petitioner's request to testify. While trial counsel's statement that the jury would likely have disbelieved Petitioner's testimony may have been ill advised, the Court cannot say that it rose to the level of constitutionally deficient performance.

This Court FINDS that the denial of Petitioner's ineffective assistance of counsel claim regarding the change of

the defense theory was not contrary to or an unreasonable application of clearly established federal law. The Court therefore RECOMMENDS that the district judge DENY Ground Three with regard to this claim.

5. Other allegations

In addition, Petitioner asks the court to consider seven other instances of trial counsel's alleged ineffective assistance[18] that Petitioner raised in his Rule 40 Petition. Petitioner alleges that trial counsel was ineffective in failing to: a) present a forensic pathologist to disprove the prosecution's theory of how the incident occurred; b) discredit a lay witness's identification of Petitioner's handwriting; c) introduce available evidence that Petitioner did not have stolen stereo equipment in his possession; d) make offers of proof regarding additional witnesses who would have given testimony about Burkhart confessions; e) call witnesses to contradict Burkhart's alibi; and f) present evidence that Seidel and Burkhart knew each other. [Mem. in Supp. of Petition at 23-24.] The Petition does not contain any substantive analysis of these claims, apparently incorporating the arguments in the Rule 40 Petition by reference.

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[18] Petitioner lists eleven arguments, but two are evidentiary issues which the Court identified as Ground Nine, two were addressed in Ground Three or in Ground Eight, and the final argument was ruled unexhausted by the district judge.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

TARYN CHRISTIAN, Petitioner, vs. IWALANI WHITE, Director, State of Hawaii Department of Public Safety, Respondent.	)	CV. NO. 04-00743 DAE-LEK

ORDER ADOPTING IN PART AND MODIFYING IN PART THE MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATION TO GRANT IN PART AND DENY IN PART THE PETITION FOR WRIT OF HABEAS CORPUS; AND ORDER DENYING RESPONDENT'S AND PETITIONER'S OBJECTIONS TO PORTIONS OF MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS

Pursuant to Local Rule 7.2(d), the Court finds this matter suitable for disposition without a hearing. After reviewing Respondent's and Petitioner's Objections, and the supporting and opposing memoranda, the Court DENIES Respondent's Objections (Doc. # 148) to the Magistrate Judge's Findings and Recommendation to Grant in Part and Deny in Part Petition for Writ of Habeas Corpus, filed on August 29, 2008 (hereinafter "F&R", Doc. # 146) and DENIES Petitioner's Objection to Portions of Magistrate Judge's F&R. (Doc. # 149).

whether it was with the range of competent assistance not to order an enhanced version of the tape. This Court agrees with the Magistrate Judge and independently finds that it was not below an objective standard of reasonableness not to do so because Mitchell testified that enhancement was unnecessary, and Smith testified that the statement was unintelligible.

Accordingly, this Court DENIES this objection to the F&R.

4. Change in Defense Theory

Petitioner asserts that presenting alternate theories of defense at closing that Petitioner did not commit the crime, but that if he did, it was in self-defense, had no chance of convincing a jury to find in Petitioner's favor, and thus fell below the Strickland standard.

The Magistrate Judge found the decision was within "the wide range of professionally competent assistance" because the trial court excluded the witnesses who would have testified that Burkhart confessed to killing Cabaccang, and therefore, the main theory of defense was not very strong.

This Court also finds on a de novo review that a change of the theory of defense did not fall below an objective standard of reasonableness. As the main theory of defense that Burkhart committed the killing was not supported by strong evidence, it was within the wide range of competence and trial strategy to argue

that in the event the jury believed the prosecution, it should consider that the stabbing was in self-defense. Accordingly, this Court DENIES this objection to the F&R.

5. Handwriting Identification and Stereo Equipment

Petitioner alleges that his trial counsel was ineffective for failing to discredit a lay witness's identification of his handwriting by showing that a handwriting expert hired by the prosecution had been unable to identify the writing in question as Petitioner's handwriting. Petitioner also asserts that his counsel was ineffective for failing to introduce available evidence that Petitioner had purchased the stereo equipment in his possession, and it was not stolen.

The Magistrate Judge noted that Petitioner did not elaborate on these arguments in any of the briefing on the instant motion. The Magistrate Judge found that these two claims pertained to Petitioner's conviction of attempted theft in the third degree. The Magistrate Judge therefore, found that this Court did not have habeas jurisdiction over such claims because Plaintiff has served his sentence for the theft by the time he filed the Petition.

Petitioner objects to this finding and asserts that these issues relate to the alleged motive for the homicide because the prosecution had claimed that

U.S. District Court

District of Hawaii

Notice of Electronic Filing

The following transaction was entered by Modafferi, Gary on 10/19/2018 at 10:34 AM HST and filed on 10/19/2018
Case Name: Christian v. Bissen, et al
Case Number: 1:04-cv-00743-DAE-KSC
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Document Number: 453

Docket Text:
MOTION Petitioner's Independent Action for Equitable Relief from Judgment Under Federal Rule 60(d)(1) Pursuant to Intervening Supreme Court Precedent in McCoy v. Louisiana, (2018) Gary A. Modafferi appearing for Petitioner Taryn Christian (Attachments: # (1) Appendix A-E)(Modafferi, Gary)

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

TARYN CHRISTIAN, Petitioner, vs. IWALANI WHITE, Director, State of Hawaii Department of Public Safety, Respondent.	)	CV. NO. 04-00743 DAE-LEK

ORDER ADOPTING IN PART AND MODIFYING IN PART THE MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATION TO GRANT IN PART AND DENY IN PART THE PETITION FOR WRIT OF HABEAS CORPUS; AND ORDER DENYING RESPONDENT'S AND PETITIONER'S OBJECTIONS TO PORTIONS OF MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS

Pursuant to Local Rule 7.2(d), the Court finds this matter suitable for disposition without a hearing. After reviewing Respondent's and Petitioner's Objections, and the supporting and opposing memoranda, the Court DENIES Respondent's Objections (Doc. # 148) to the Magistrate Judge's Findings and Recommendation to Grant in Part and Deny in Part Petition for Writ of Habeas Corpus, filed on August 29, 2008 (hereinafter "F&R", Doc. # 146) and DENIES Petitioner's Objection to Portions of Magistrate Judge's F&R. (Doc. # 149).

This Court previously ADOPTED the F&R with respect to allowing Petitioner to choose between dismissal of the entire petition or amending the petition to delete two unexhausted claims. (Doc. # 151.) Petitioner amended the petition by deleting the unexhausted claims. (Doc. # 152.) This Court now ADOPTS in PART and MODIFIES in PART the remainder of the F&R. The F&R is modified only with respect to the basis for denying the portion of Ground Three that was based on handwriting and stereo equipment claims. This Court MODIFIES that portion as set forth below, which in general holds that the handwriting and stereo equipment claims were based upon both the theft conviction and the murder conviction. As such, this Court has habeas jurisdiction to consider such claims. Nevertheless, these claims fail because Petitioner has not met his burden of providing evidence that his counsel's assistance fell below the objective standard of reasonableness or that he suffered prejudice.

BACKGROUND

This Court repeats only the background facts necessary for a decision on the objections to the F&R in the discussion section below. The facts set forth herein were those found by the Magistrate Judge after an evidentiary hearing. Additional background facts are contained in the F&R.

In 1997, Petitioner was convicted of one count of murder in the first degree, one count of use of a deadly or dangerous weapon in the commission of the crime, and one count of theft in the third degree in connection with the stabbing death of Vilmar Cabaccang. Petitioner was sentenced to concurrent sentences of life imprisonment with the possibility of parole, five years imprisonment, and one year imprisonment, respectively.

Petitioner filed an Amended Petition pursuant to 28 U.S.C. § 2254 on September 29, 2008. The Amended Petition alleges, inter alia, the following grounds for habeas relief which are at issue in the objections filed: 1) deprivation of Petitioner's right to testify on his own behalf ("Ground One"); 2) improper exclusion of testimony by three witnesses that James Burkhart confessed to killing Cabaccang (the "Burkhart confessions") ("Ground Two"); 3) ineffective assistance of trial counsel based on various actions and omissions by counsel ("Ground Three"); and 4) actual innocence ("Ground Four").

Although the original petition was a mixed petition, the Magistrate Judge considered the arguments on the exhausted claims, assuming that Petitioner would file an Amended Petition. The Magistrate Judge recommended that the Petition be granted with respect to Ground Two because the exclusion of the

Burkhart confessions was contrary to clearly established federal law. (Doc. # 146). The Magistrate Judge denied the Petition with respect to all other grounds.

Both parties filed objections on September 9, 2008. (Docs. #148, 149.) Petitioner filed a response to Respondent's objections on September 22, 2008. Petitioner filed an amended petition on September 29, 2008, deleting the unexhausted claims.

STANDARD OF REVIEW

Any party may serve and file written objections to proposed findings and recommendations. See 28 U.S.C. § 636(b). Pursuant to Local Rule 74.2, when a party objects to a magistrate judge's dispositive order, findings, or recommendations, the district court must make a de novo determination. A de novo review means "the court must consider the matter anew, the same as if it had not been heard before and as if no decision previously had been rendered." U.S. Pac. Builders v. Mitsui Trust & Banking Co., 57 F. Supp. 2d 1018, 1024 (D. Haw. 1999) (citation omitted).

"The court may 'accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.' The court also may receive further evidence or recommit the matter to the magistrate with instructions."

McDonnell Douglas Corp. v. Commodore Bus. Machs., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981) (citation omitted); LR 74.2.

DISCUSSION

Because Petitioner filed an amended petition deleting the unexhausted claims, this Court will now address the objections on the merits by both parties.

I. Respondent's Objections

Petitioner sought to admit at trial the testimony of three persons, William Auld, Patricia Mullins, and Robert Boisey Pimentel, who would state that Burkhart confessed to killing Cabaccang. Trial counsel made an offer of proof as to testimony of William Auld and Patricia Mullins. Auld shared a jail cell with Burkhart in 1995 (the same year as the June 1995 murder of Cabaccang) and Auld would testify that Burkhart admitted to stabbing Cabaccang. Burkhart also told Auld that he liked the feel of Cabaccang's blood running down his hands and arms.

Mullins was a friend of Burkhart's and she had known the victim Cabaccang for a long time. She would testify, inter alia, that she had a conversation with Burkhart about two days after the murder, and he confessed to her that he was the one who killed Cabaccang. Burkhart told her that he would get away with it because Cabaccang's girlfriend, Serena Seidel, would not identify him

as the killer.[1] Subsequently, Mullins saw Burkhart and he told her "you better keep your mouth shut" and "you better not rat on me."

Trial counsel argued to the trial court that the following evidence constituted corroborating circumstances, indicating that the Burkhart confessions were reliable under Hawaii Rule of Evidence 804(b)(3):

-Tesha Santana, Cabaccang's neighbor, was a friend of Burkhart's and he was supposed to come to her house on the night in question, thus showing that he was expected to be in the neighborhood;

-Cabaccang's car was opened with his keys and Petitioner did not have access to the keys because he did not know either Cabaccang or his girlfriend, Serena Seidel;

-Robert Boisey Pimentel would testify that Burkhart had an unusual knife that matched descriptions of the knife used in the attack on Cabaccang;

-Judith Laury would testify that Seidel did not call for help, but repeatedly yelled Tesha, which trial counsel argued showed she wanted Burkhart's friend Tesha Santana there because Burkhart was at the scene;

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[1] There was apparently evidence that Seidel had a relationship with Burkhart.

-Jennifer Santana would also testify that, within a couple of weeks after the stabbing, they received two calls warning Tesha to keep her mouth shut because Tesha had made comments suggesting that Burkhart was involved in the stabbing;

-Auld's and Mullins' statements corroborate each other.

The prosecutor argued that the defense had not established corroboration or the trustworthiness of the statements. The prosecutor's arguments included: Burkhart had a motive to lie to try to impress Auld and Mullins; both Auld's and Mullins' credibility was questionable because both were incarcerated at one point in time; Seidel testified that she did not know Burkhart; and none of the witnesses picked Burkhart's picture out of the photographic line-ups. Further, Burkhart gave a statement to a detective denying involvement in the stabbing. The prosecutor also represented that Helen Beatty Auweloa could testify that Burkhart was someplace else on the night of the stabbing. Finally, the prosecutor argued that the fact that Cabaccang's keys were at the scene did not prove anything and the defense's witness could not recall sufficient information about Burkhart's knife to identify it as the one at the scene.

In excluding the testimony of the various witnesses, the trial court found that the requirements for Hawaii Rule of Evidence 804(b)(3) were not met

because the trustworthiness of the statements was not clearly demonstrated. The Hawaii Supreme Court affirmed. After holding an evidentiary hearing on the instant Petition, the Magistrate Judge held that the Petition should be granted with respect to Ground Two because the exclusion of the proposed testimony about the Burkhart confessions was contrary to clearly established federal law.

Respondent objects to this finding. Respondent first argues that the Magistrate Judge erred because she focused on the trial court's decision to exclude the confessions, but did not closely examine the Hawaii Supreme Court's judgment, which was the last reasoned state judgment. Respondent next argues that the Magistrate Judge erred in finding that the Hawaii Supreme Court's decision was contrary to clearly established federal law because the Hawaii Supreme Court identified the correct legal rule set forth in Chambers v. Mississippi, 410 U.S. 284 (1973) and applied the rule correctly. Respondent further avers that the exclusion of the Burkhart confessions did not have an injurious effect or influence on the jury's verdict. Finally, Respondent argues that the Magistrate Judge erred in making a factual finding that there was testimony at trial that Burkhart was somewhere else at the time of the incident. Therefore, Respondent asserts that the F&R to grant the petition on this ground should be rejected and the petition should be denied.

A. Unreasonable Application Finding

Respondent contends that the Magistrate Judge did not properly consider the Hawaii Supreme Court's affirmance of the trial court's exclusion of the Burkhart confessions. Respondent does not further flesh out this particular argument. It is clear to this Court that the Magistrate Judge did consider the Hawaii Supreme Court's decision. Indeed, that decision is cited numerous times and referred to throughout the F&R. (See F&R at 3-4, 41-42, 45.) Nevertheless, as acknowledged by Respondent, the trial court's reasoning is relevant. Accordingly, this objection does not provide a basis for finding in Respondent's favor.

Respondent avers that that the Hawaii Supreme Court's affirmance of the trial court's decision to exclude the Burkhart confessions was not an unreasonable application of the federal law established in Chambers v. Mississippi, 410 U.S. 284 (1973) because the Burkhart confessions were hearsay that did contain a sufficient indicia of reliability. Instead, Respondent asserts that the corroborating circumstances presented by Petitioner's trial counsel constituted mere argument, were speculative and lacked connection with the murder, and therefore, it was appropriate to exclude the evidence. In addition, Respondent avers, there was no evidence that Burkhart was observed at the crime scene, his

confessions were not written or recorded, there was no corroboration of Pimentel's potential testimony, Mullins' and Auld's testimony would have been diminished because the prosecution had two witnesses that could have testified that Burkhart was somewhere else, and Burkhart was unavailable and did not testify.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (internal quotation marks and citations omitted). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations [and the] rights to confront and cross-examine witnesses in one's own behalf have long been recognized as essential to due process." Chambers, 410 U.S. at 294.

However, "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials[,]" including evidence that someone else committed the crime, as long as those rules serve a legitimate purpose or are not "disproportionate to the ends that they are asserted to promote[.]" Holmes, 547 U.S. at 324-25.

In Chambers, the state's evidentiary rules barred parties from impeaching their own witnesses, and did not include an exception to the hearsay rule for statements against penal interest. The Supreme Court held that the defendant's due process rights were violated because these two evidentiary rules worked to bar the defendant from introducing evidence that another person, McDonald, had made self-incriminating statements to three other persons, and prevented the defendant from cross-examining McDonald. Chambers, 410 U.S. at 302.

At issue here is the State court's application of Hawaii Rule of Evidence 804(b)(3), which provides that hearsay statements are inadmissible but that statements against interest are not excluded if the declarant is unavailable as a witness. The rule defines a statement against interest as follows:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true.

Haw. R. Evid. 804(b)(3). The rule further provides that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not

admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." Id.

In excluding the testimony of the various witnesses to the Burkhart confessions, the trial court found that the requirements for Hawaii Rule of Evidence 804(b)(3) were not met because the trustworthiness of the statements was not clearly demonstrated. The trial court did not consider Chambers or whether the exclusion of the testimony violated Petitioner's constitutional rights. In affirming the trial court's exclusion of the evidence, however, the Hawaii Supreme Court considered Chambers. See State v. Christian, 967 P.2d 239, 262 (Haw. 1998). The Hawaii Supreme Court found Chambers was distinguishable from the instant case because "corroborating circumstances of the type noted by the Chambers court [we]re not present in the instant case[,]" and the corroboration presented by Petitioner was "too weak clearly to indicate the trustworthiness of Burkhart's confessions to Auld and Mullins[.]" Id. at 262, 263. Specifically, the Hawaii Supreme Court noted that

> no eyewitness linked Burkhart to the stabbing of Cabaccang. On the contrary, the two individuals who had an opportunity to observe Cabaccang's assailant failed to identify Burkhart in a photo lineup, and instead, both

> identified Christian as the attacker.[2] Moreover, the prosecution offered two witnesses who placed Burkhart at another location at the time of the stabbing.[3] Second, neither of the two confessions allegedly made by Burkhart were sworn, as was McDonald's confession to Chambers's attorneys. Finally, while there is evidence that Burkhart owned an unusual "butterfly" knife, Christian himself conceded that the split blade knife found at the crime scene was not a "butterfly" knife.

Id. at 262-63. Therefore, the Hawaii Supreme Court found that

> [t]he only arguably corroborating evidence offered by Christian did not link Burkhart to the crime, but rather, in a rather tenuous manner, to the neighborhood in which the crime took place, by indicating that Burkhart had failed to appear at the nearby home of his friends, who had been expecting his visit that evening.

Id. at 263.

The Magistrate Judge noted the Hawaii Supreme Court's ruling, but found that were significant similarities between the Chambers case and the instant

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[2] Since the Supreme Court's ruling, and as part of the evidentiary hearing in this case, one of these witnesses, Phillip Schmidt, has recanted his identification of Petitioner and has identified Burkhart as the person he saw leaving the crime scene.

[3] Although not admitted into evidence at the instant evidentiary hearing due to timeliness concerns, Petitioner presented a declaration by one of these witnesses, Helen Betbeatty-Auweloa, who recanted her previous statement regarding Burkhart being present in her home near the time of the murder, and now states that she cannot be certain that Burkhart was in her home because she was sleeping and he could have left.

case. Specifically, as in Chambers, Burkhart made spontaneous confessions to at least three persons after the murder occurred, and urged one of them not to turn him in.[4] In addition, the Magistrate Judge cited to Chia v. Cambra, 360 F.3d 997, 1004-05 (9th Cir. 2004), which in turn cited to a Supreme Court case for the proposition that "[s]elf-inculpatory statements have long been recognized as bearing strong indicia of reliability." (citing Williamson v. United States, 512 U.S. 594, 599 (1994)). Finally, the Magistrate Judge noted in a footnote that although the Burkhart confessions did not have all of the corroborating evidence that the McDonald confessions had, nothing in Chambers dictated that the same level of corroborating evidence is required. (Doc. # 146 at 46 n.16.) The Magistrate Judge found that "[t]he trial court appeared to weigh Petitioner's supporting evidence against the prosecution's evidence in determining whether there was corroboration for the confessions. The trial court should have left that process for the jury and should only have made a basic determination whether there was sufficient corroboration to render the confessions admissible." (Id. at 48-49.) The Magistrate Judge therefore found that "the trial court's exclusion of the proposed

[4] One of these confessions was made to Patricia Mullins only two days after the murder.

testimony about the Burkhart confessions was contrary to clearly established federal law, as set forth in Chambers."

This Court agrees with the Magistrate Judge and after a de novo review independently finds that with respect to the ruling by the Hawaii Supreme Court, it was an unreasonable application of Chambers because it did not consider the strong indicia of reliability of self-inculpatory statements, it did not consider the fact that Burkhart had confessed to at least three persons, each of which provides corroboration for the other, and it did not recognize that the Chambers case does not require the same level of corroboration that was present in Chambers for all cases. Moreover, some of the evidence cited by the Hawaii Supreme Court, such as the failure of a connection between Burkhart and the crime scene, and the identification of Petitioner at the crime scene, goes beyond whether the three confessions have an indicia of reliability and crosses-over into the realm of the weight of the evidence against Petitioner.

Accordingly, this Court finds that the exclusion of the Burkhart confessions was contrary to clearly established federal law, as set forth in Chambers.

B. Injurious Effect and Evidence of Burkhart's Whereabouts

Respondent argues that Petitioner has not shown that the exclusion the Burkhart confessions had a substantial and injurious effect or influence in the jury's verdict. Respondent also avers that the Magistrate Judge erred by finding that Petitioner was injured by the exclusion of the Burkhart confessions because he was unable to rebut the evidence presented by the prosecution that Burkhart was somewhere else at the time of the stabbing. Respondent states this was an error because the prosecution never presented any evidence of Burkhart's whereabouts at the time of the murder. Respondent argues that the exclusion of the Burkhart confessions did not have an injurious effect because they did not have an indicia of reliability, Petitioner presented alternate defenses at closing, which diminished the value of the confessions, and the other evidence overwhelmingly implicated Petitioner.

Habeas petitioners are not entitled to relief based on trial error unless the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993). This harmless error standard applies to "non-constitutional error in cases on direct review and to constitutional error in cases on collateral review." Arnold v. Runnels, 421 F.3d 859, 867 (9th Cir. 2005). "[E]rror is harmless if [the court] can say with fair

assurance that it did not have a substantial effect, injurious to the defendant, on the jury's decision-making process." Id.

Respondent argues that the only injury to Petitioner was an inability to allegedly rebut the prosecution's evidence of Burkhart's whereabouts, however, the prosecution never presented such evidence. This argument lacks merit. It is irrelevant whether or not the prosecution presented evidence because Petitioner's due process rights were violated because he was unable to present a theory of defense, not just because he could not rebut the prosecution's evidence regarding Burkhart.

Moreover, as set forth above, the Burkhart confessions had sufficient indicia of trustworthiness because they were self-inculpatory statements made to three separate people, all of which corroborate each other.

Respondent's argument that the presentation at closing of a self-defense theory and extreme emotional disturbance diminished the value of the Burkhart confessions is also an irrelevant consideration because those alternative defense theories likely would not have been presented had Petitioner been able to introduce into evidence the Burkhart confessions.

Finally, the allegedly overwhelming evidence implicating Petitioner is not relevant. As noted by the Ninth Circuit, the question "is not whether the

evidence was sufficient or whether the jury would have decided the same way even in the absence of the error. The question is whether the error influenced the jury." Id. at 869.

This Court cannot say with fair assurance that the exclusions of the Burkhart confessions did not have a substantial effect on the jury's guilty verdict.

For these reasons, this Court DENIES Respondent's objections and ADOPTS the Magistrate Judge's F&R. This Court GRANTS the Petition on Ground Two. The Court ORDERS Respondent to release Petitioner within seven days after the judgment in the instant case is filed, subject to appropriate release conditions, unless the State elects to retry Petitioner; and ORDERS Respondent to report to this Court, within ten days after the judgment in the instant case is filed, whether Petitioner was released or will be retried.

II. Petitioner's Objections

A. Ground One, Denial of Right to Testify

After the presentation of evidence, but before closing arguments, Petitioner informed the trial court that he wanted to testify. Petitioner had twice previously been informed about his right to testify in his own defense and he waived his right. In a conference in chambers after his last minute request to testify, the trial judge asked Petitioner if there was anything he wanted to say and

Petitioner responded that there was "a tape of a witness that was in the presence of [Burkhart] and [Seidel] on more than one occasion and shows that [Seidel] committed perjury" when she testified for the prosecution. The trial court asked Petitioner if he had anything else to say and he said that he did not. A discussion ensued about reopening the case and discovery about the tape. The trial court refused to allow the defense to reopen its case to allow Petitioner to testify. In addition, Petitioner's counsel and the trial court cautioned Petitioner that "if he makes any further outbursts in front of the jury – first, not only is his counsel correct it only hurts his case. Secondly, if he continues that, the Court will have no choice but to exclude him from the courtroom."

Petitioner later filed a motion for a new trial, arguing that the trial court should have allowed the defense to reopen its case to allow Petitioner to testify. The trial court reaffirmed the denial of Petitioner's request to testify on the ground that Petitioner had previously declined to testify after the trial court's colloquy and Petitioner waited until just before closing arguments to try to change his mind.

Upon reviewing the trial court's decision, the Hawaii Supreme Court found that Petitioner had made a knowing and voluntary waiver of his right to testify, which was not being challenged. The Hawaii Supreme Court determined

that "the trial court must pass on a defendant's attempted withdrawal of the prior waiver of his or her right to testify, tendered before the commencement of closing arguments, pursuant to the 'liberal approach,' whereas such an attempted withdrawal tendered thereafter is subject to the 'manifest injustice' standard." Christian, 967 P.2d at 257. The stricter standard applies after the close of evidence because the "post-evidentiary phase of the trial, i.e., the parties' closing arguments . . . is, after all, . . . [the] point in the proceedings that the defendant has taken the 'decisive, irrevocable step' of placing his or her fate regarding the charged offenses in the jury's hands, based on the evidence presented." Id.

Applying the liberal approach to Petitioner's first request to withdraw his waiver of his right to testify, the Hawaii Supreme Court found that the trial court did not abuse its discretion in denying Petitioner's request because, after giving Petitioner a full opportunity to explain his reasons for withdrawing his waiver, Petitioner's "sole offer of proof in support and explanation of his newly expressed desire to testify was that 'there's a tape of a witness that was in the presence of Hina [Burkhart] and Serena [Seidel] on more than one occasion [that] shows that Serena's committed perjury in . . . court." Id. at 426 (brackets and ellipses in original).

With respect to the motion for new trial, the Hawaii Supreme Court found that it was the first time that the trial court was made aware that Petitioner wanted to testify to his version of events. Id. Applying the manifest injustice standard, the Hawaii Supreme Court found that the denial of the motion for a new trial was not an abuse of discretion because Petitioner had made a knowing and voluntary waiver of his right to testify, there was no substantive denial of due process, and Petitioner was given an opportunity to be heard. Id. at 427.

In the F&R, the Magistrate Judge stated that

> [i]f Petitioner, during the conference in chambers before closing argument, expressed a desire to testify about his version of events, this Court would likely find that any inconvenience to the trial court or prejudice to the prosecution from reopening the defense's case was minimal in comparison to Petitioner's interest in testifying. Petitioner, however, did not do so. During the conference in chambers, when the trial court addressed Petitioner about his request to testify, Petitioner responded only that there was a tape of a witness who could establish that Seidel perjured herself at trial. Trial counsel addressed the issue of the tape and then the trial court asked Petitioner if there was anything else. Petitioner said that there was not. During the conference in chambers, Petitioner never said that he wanted to testify about his version of the events at issue. While this may have been his subjective intent, the trial court did not consider it because Petitioner did not express this intent. Based on the record, this Court finds that Petitioner's request to reopen his case to testify was based upon his desire to offer the purported perjury tape.

(F&R at 34-35.)

Petitioner objects to the Magistrate Judge's finding that his request to reopen his case to testify was based upon his desire to offer the purported perjury tape. Petitioner claims that the finding contradicts trial counsel's statement made in connection with the motion for new trial. In addition, Petitioner claims that he knew he would not have been allowed to testify about the tape recording and therefore, his request could only have been a request to present his version of the facts. Finally, Petitioner asserts that the Magistrate Jude gave undue weight to what Petitioner did not say in the chamber's conference. In sum, Petitioner argues that he wanted to testify about his own version of events, that the trial judge should have known that that was his desire, and therefore, the trial court's decision to not reopen the case was contrary to clearly established federal law.

Petitioner's arguments fail. First, Petitioner fails to cite to anything in the record to support his objections. Second, the Magistrate Judge's finding with respect to what Petitioner made known to the trial judge during the chambers' conference was correct. Petitioner has pointed to no evidence establishing that he informed the trial judge during that conference that he intended to testify to his version of the events, or that he wanted to testify to anything other than the existence of the tape recording. Indeed, Petitioner concedes that he did not

explicitly state that he wanted to testify about his version of events. (Pet.'s obj. at 4.) Instead, it is clear that the trial judge gave Petitioner two opportunities to say anything he wanted to say, and Petitioner only raised the issue of the tape recording, which is also the finding made by the Hawaii Supreme Court. Third, that Petitioner's counsel made a new argument at the time of the motion for new trial and stated that Petitioner wanted to testify to his version of events, does not change the fact that such desire was not made known to the trial judge during the chambers' conference. Moreover, Petitioner does not challenge the standard of manifest injustice, which is applied on the motion for new trial.

Accordingly, Petitioner's objections to the F&R as to Ground One are DENIED and this Court ADOPTS the F&R.

B. Ground Three, Ineffective Assistance of Counsel

1. Forensic Evidence

Petitioner argues that with respect to his trial counsel's failure to conduct forensic testing of the physical evidence, the Magistrate Judge should have considered it as a failure to investigate, which does not deserve a presumption of effectiveness, rather than applying the standard of presumption of sound trial strategy.

This argument fails because, as the Magistrate Judge found, "even assuming, arguendo, that trial counsel's failure to conduct forensic testing fell below the objective standard of reasonableness, Petitioner's ineffective assistance of counsel claim would still fail because he cannot establish prejudice." (F&R at 58); see also Strickland v. Washington, 466 U.S. 668, 687 (1984) (to establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his defense was so prejudiced by his counsel's errors that there is a reasonable probability that, but for his counsel's deficient representation, the result of the proceedings would have been different); see also Hensley v. Christ, 67 F.3d 181, 184-85 (9th Cir. 1995) (a petitioner must show that "the deficient performance prejudiced the defense and made the trial results unreliable").

Petitioner does not contest this finding that he cannot establish prejudice because none of the physical evidence tested contained DNA from Burkhart. Accordingly, this Court DENIES this objection to the F&R.

2. Christian-Kimmey Tape

At trial, the prosecution characterized the tape recording of a conversation between Petitioner and Lisa Kimmey (the "Christian-Kimmey tape") as representing a confession by Petitioner because on the tape Lisa says, "Taryn, I'm not going to tell them you killed that guy. Okay. Okay." Lisa says, "Every

time I see a car that says 'In loving memory of Vilmar,' I want to puke. Petitioner says, "Do you think I feel good? How do you think I feel? You're not the one who did it."

Petitioner, however, presented evidence at the instant evidentiary hearing that if the volume of the recording is increased at two points in the recording, the jury could have heard Petitioner say "I'm not the one who did it" and that he also said "I wasn't the one who stabbed him." Petitioner next argues that the Magistrate Judge's finding that that his trial counsel acted reasonably with respect to the investigation into the Christian-Kimmey Tape and provided competent assistance is faulty because the jury was not made aware that they needed to adjust the volume of the recording up and down to hear Petitioner's denials of killing Cabaccang. Therefore, Petitioner asserts, that merely being informed to listen carefully was insufficient because there is no way of knowing that the jury made the correct volume adjustments when listening to the tape.

Petitioner's arguments are meritless. As noted by the Magistrate Judge, and uncontested by Petitioner,

> [t]rial counsel was aware of Petitioner's statement "I wasn't the one who stabbed him, and I know that for a fact." Counsel read the statement to the jury from the transcript of the recording during closing argument and played that portion of the tape for them. [Answer, Exh. T

> (Trans. 3/10/97) at 54-55.] Counsel even warned them that the statement was "a little hard to pick up." [Id. at 54.] He also told the jurors that there would be headphones in the jury room that they could "try to hear better." [Id. at 55.] Thus, trial counsel knew about one of the denials on the tape and knew that it was difficult to hear the statement. Counsel pointed these facts out to the jury in closing argument.

(F &R at 54.)

Accordingly, trial counsel certainly conducted a reasonable investigation into the contents of the tape recording, because he realized that at least one denial was on the tape. Further, counsel acted competently because he informed the jury of the denial, and warned them that it was difficult to hear. Finally, because the jury was made aware of the denial and informed that it was difficult to hear, Petitioner cannot show that he was prejudiced by a failure to explicitly tell the jury to turn the volume up a two specific points in the recording. Accordingly, this Court DENIES this objection to the F&R.

3. 911 Tape

Petitioner contends that his trial counsel was ineffective for failing to obtain and present an enhanced copy of the 911 tape of the call made by Robert Perry, Jr. from the crime scene. At the instant evidentiary hearing, Petitioner presented an audio engineer, John Mitchell, who testified that an unidentified male

said "James Burkhardt [sic] just walked off" on the 911 recording. Mitchell testified that "James Burkhart" can be heard without enhancing the tape, although the statement is at a very low level, and a person may need to listen to that portion a number of times in order to hear it.

Respondent also presented an audio engineer, David Smith, who stated that he could not verify Mitchell's opinion that an unidentified male said "James Burkhardt just walked off". In Smith's opinion, the statement is unintelligible. Further, the first word could not be the name 'James,' because it consists of two syllables.

The Magistrate Judge found that because reasonable audio experts could differ about whether the name 'James Burkhart' can be heard on the Perry 911 tape and because Mitchell testified that the name can be heard without enhancing the tape, trial counsel's decision not to retain an audio expert to enhance the Perry 911 tape was within "the wide range of professionally competent assistance." See Strickland, 466 U.S. at 690.

Petitioner contends that this finding was in error because the jury should have been made aware of the audio engineers' opinions and made their own determination as to which opinion was more compelling. This argument misses the point because the first analysis under an ineffective assistance of counsel claim is

whether it was with the range of competent assistance not to order an enhanced version of the tape. This Court agrees with the Magistrate Judge and independently finds that it was not below an objective standard of reasonableness not to do so because Mitchell testified that enhancement was unnecessary, and Smith testified that the statement was unintelligible.

Accordingly, this Court DENIES this objection to the F&R.

4. Change in Defense Theory

Petitioner asserts that presenting alternate theories of defense at closing that Petitioner did not commit the crime, but that if he did, it was in self-defense, had no chance of convincing a jury to find in Petitioner's favor, and thus fell below the Strickland standard.

The Magistrate Judge found the decision was within "the wide range of professionally competent assistance" because the trial court excluded the witnesses who would have testified that Burkhart confessed to killing Cabaccang, and therefore, the main theory of defense was not very strong.

This Court also finds on a de novo review that a change of the theory of defense did not fall below an objective standard of reasonableness. As the main theory of defense that Burkhart committed the killing was not supported by strong evidence, it was within the wide range of competence and trial strategy to argue

that in the event the jury believed the prosecution, it should consider that the stabbing was in self-defense. Accordingly, this Court DENIES this objection to the F&R.

5. Handwriting Identification and Stereo Equipment

Petitioner alleges that his trial counsel was ineffective for failing to discredit a lay witness's identification of his handwriting by showing that a handwriting expert hired by the prosecution had been unable to identify the writing in question as Petitioner's handwriting. Petitioner also asserts that his counsel was ineffective for failing to introduce available evidence that Petitioner had purchased the stereo equipment in his possession, and it was not stolen.

The Magistrate Judge noted that Petitioner did not elaborate on these arguments in any of the briefing on the instant motion. The Magistrate Judge found that these two claims pertained to Petitioner's conviction of attempted theft in the third degree. The Magistrate Judge therefore, found that this Court did not have habeas jurisdiction over such claims because Plaintiff has served his sentence for the theft by the time he filed the Petition.

Petitioner objects to this finding and asserts that these issues relate to the alleged motive for the homicide because the prosecution had claimed that

Petitioner was attempting to steal stereo equipment from the victim's car and killed the victim to avoid being identified as the thief.

Although it is true that this evidence relates in part to the murder conviction, Petitioner's arguments fail because Petitioner has failed to point this Court to any evidence in the record to establish that Respondent had a handwriting expert or that Petitioner had receipts for his stereo equipment. Accordingly, there is nothing upon which this Court could base a finding that counsel's assistance fell below the objective standard of reasonableness. Moreover, Petitioner has made nothing more than a conclusory statement that such failure prejudiced his defense. Therefore, this objection to the F&R is DENIED.

6. Evidence of Seidel-Burkhart Relationship

Petitioner contends that his trial counsel was ineffective because he failed to present evidence that Seidel and Burkhart knew each other, which could have discredited Seidel's assertion that Petitioner was the perpetrator.

The Magistrate Judge found that Petitioner presented only unsubstantiated argument and did not identify the witness who could testify to the Seidel-Burkhart relationship.

In his objections, Petitioner asserts that he identified James Shin in his Rule 40 Petition in State court as the witness who could testify about the

relationship. However, merely identifying this witness to this Court does not provide this Court with evidence that Petitioner's trial counsel was made aware of this witness and the relationship, and yet failed to investigate further. Therefore, this Court cannot evaluate whether trial counsel's failure to investigate this witness was constitutionally deficient.

For these reasons, Petitioner's objections to the recommendation that Ground Three be denied are DENIED. This Court, therefore, ADOPTS the F&R with respect to Ground Three and MODIFIES it in PART only to the extent that the handwriting and stereo equipment claims were based upon both the theft conviction and the murder conviction. As such, this Court has habeas jurisdiction to consider such claims. Nevertheless, these claims fail because Petitioner has not met his burden of providing evidence that his counsel's assistance fell below the objective standard of reasonableness or that he suffered prejudice.

C. Ground Four, Actual Innocence

Petitioner asserts that he sustained his burden under an actual innocence claim because Schmidt has now changed his testimony to state that he believes Burkhart, rather than Petitioner, was the man that he saw leave the crime scene.

A habeas petitioner can establish an actual innocence argument if "new facts raised sufficient doubt about his guilt to justify the conclusion that his [sentence] would be a miscarriage of justice unless his conviction was the product of a fair trial." Schlup v. Delo, 513 U.S. 298, 316 (1995). The court must conclude that in light of the new evidence, no reasonable juror would have convicted Petitioner. Id. Where the court conducts an evidentiary hearing on the new evidence the court should consider "how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence." Id. at 332.

The Magistrate Judge found that

> Schmidt admits that his recollection of the events was clearer at the time of the incident and at the time of Petitioner's 1997 trial than it is today. Further, Schmidt testified at the evidentiary hearing that, when he saw Petitioner's picture in the photographic line-up during the police investigation, he experienced a frightened feeling. See also Answer, Exh. L (Trans. 3/3/97 AM) at 42-43 ("The third one I came across, it frightened me. The hair on the back of my neck stood up . . . ."). It seems unlikely to the Court that Petitioner's picture would have caused such a feeling if Schmidt only saw him in passing at a restaurant. [Id. at 44 (Schmidt testified at trial "I don't have any idea why I would have reacted that way to someone just because I'd seen them at work.").] Schmidt also testified that at least six months had passed between the last time he saw Petitioner at the restaurant and the police photographic line-up. [Id. at 44-45.] In addition,

> although Schmidt explains the reason for his allegedly erroneous identification of Petitioner, Schmidt offers no explanation why he was unable to identify Burkhart at the time of the incident and trial. Thus, this Court finds Schmidt's trial testimony to be more reliable than his testimony in connection with the evidentiary hearing.

(F&R at 78.) Petitioner does not explain why this finding is inaccurate. This Court agrees with the Magistrate Judge that Schmidt's trial testimony is more reliable than his new testimony for the reasons set forth above. With that in mind, Petitioner has not raised sufficient doubt about his guilt based upon Schmidt's change in testimony.

Therefore, this objection is DENIED and this Court ADOPTS the F&R.

CONCLUSION

The Court DENIES Respondent's Objections (Doc. # 148) to the Magistrate Judge's Findings and Recommendation to Grant in Part and Deny in Part Petition for Writ of Habeas Corpus, filed on August 29, 2008 ("F&R", Doc. # 146) and DENIES Petitioner's Objection to Portions of Magistrate Judge's F&R. (Doc. # 149).

This Court previously ADOPTED the F&R with respect to allowing Petitioner to choose between dismissal of the entire petition or amending the

petition to delete two unexhausted claims. (Doc. # 151.) Petitioner amended the petition. This Court now ADOPTS in PART the remainder of the F&R and MODIFIES it in PART. The F&R is modified only with respect to the basis for denying the portion of Ground Three that was based on handwriting and stereo equipment claims. This Court MODIFIES that portion to hold that the handwriting and stereo equipment claims were based upon both the theft conviction and the murder conviction. As such, this Court has habeas jurisdiction to consider such claims. Nevertheless, these claims fail because Petitioner has not met his burden of providing evidence that his counsel's assistance fell below the objective standard of reasonableness or that he suffered prejudice.

This Court therefore, DENIES the Petition with respect to Grounds One, Three, Four, Five, Six, Seven, and Nine. This Court GRANTS the Petition on Ground Two. This Court ORDERS Respondent to release Petitioner within seven days after the judgment in the instant case is filed, subject to appropriate release conditions, unless the State elects to retry Petitioner; and ORDERS Respondent to report to this Court, within ten days after the judgment in the instant case is filed, whether Petitioner was released or will be retried. Clerk to enter judgment.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, September 30, 2008.

David Alan Ezra
United States District Judge

Taryn Christian vs. Clayton Frank, et al., Civil No. 04-00743 DAE-LEK; ORDER ADOPTING IN PART AND MODIFYING IN PART THE MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATION TO GRANT IN PART AND DENY IN PART THE PETITION FOR WRIT OF HABEAS CORPUS; AND ORDER DENYING RESPONDENT'S AND PETITIONER'S OBJECTIONS TO PORTIONS OF MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions presented implicate the Fifth Amendment to the United States Constitution, which provides in pertinent part that "[n]o person...shall be deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V.

The questions also implicate the Sixth Amendment right to counsel: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

This case also involves the Eighth Amendment to the United States Constitution, which precludes the infliction of "cruel and unusual punishments..." U.S. CONST. amend. VIII.

The case also involves the Fourteenth Amendment to the United States Constitution which applies the Fifth Amendment to the states and which provides, in pertinent part that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV

Article I, Section 9, Clause 2, United States Constitution.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

* * *

28 U.S.C. § 2254.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement 6 or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resided in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.