

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

IN RE TARYN CHRISTIAN

Petitioner,

On Petition for Writ of Mandamus
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR A WRIT OF MANDAMUS

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QUESTIONS PRESENTED FOR REVIEW

(1) Should a writ of mandamus issue directing the Court of Appeals to decide the merits of a motion to recall its appellate mandate on the grounds of after-discovered fraud on the court, and to avoid a miscarriage of justice, pursuant to this Court's precedents?

(2) Did the Court of Appeals act properly when it subverted the rules of appellate procedure, foreclosing Petitioner's access to the court—which effectively avoided redress and insulated review of the government's fraud directed upon the Ninth Circuit, or did it so clearly abuse its discretion as to justify the drastic and extraordinary remedy of issuance of the writ of mandamus?

(3) Should this Court exercise its inherent authority to address the exceptional circumstances of after-discovered fraud perpetrated upon the United States Supreme Court—where, in 2010, in opposition to a petition for a writ of certiorari, the government's prosecutors intentionally created the false impression to the Court, that Petitioner's case was “materially” distinguishable from Chambers v. Mississippi, 410 U.S. 284 (1973), when in truth, Petitioner's case may arguably exceed the corroboration in Chambers? In these exceptional circumstances, should the Court act to purge the record of fraud to protect the integrity of its own process and that of the federal courts below?

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

(1) The Petitioner here and in the United States Court of Appeals for the Ninth Circuit is Taryn Christian.

(2) Clayton Frank, Director, State of Hawaii Department of Public Safety, was the named Respondent in the lower court proceedings.

(3) For purposes of this mandamus action, the United States Court of Appeals for the Ninth Circuit is the Respondent.

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PETITION FOR A WRIT OF MANDAMUS

Petitioner, Taryn Christian, *pro se*, respectfully petitions this Honorable Court, for a writ of mandamus directing the Respondent—the United States Court of Appeals for the Ninth Circuit, to render a decision on Petitioner’s Motion to Recall the Mandate in Christian v. Frank, 595 F. 3d 1076 (9th Cir. 2010), on the grounds of after-discovered fraud on the court—which undermined the integrity of the federal proceedings, and corrupted the Ninth Circuit’s application of the Supreme Court’s holding in Chambers v. Mississippi, 410 U.S. 284 (1973), to that, which the Panel believed, were the distinguishing material “facts” of the case.

In accordance with Supreme Court Rule 20.3(a), Petitioner states the relief sought is not available in any other court because only this Court has jurisdiction to issue a writ of mandamus directed to a United States Court of Appeals.

JUDICIAL ORDER BELOW

The September 15, 2011 Order—which the Circuit Court Judge, the Honorable Susan P. Graber, directed be re-entered into the docket on June 1, 2017, directly following the May 31, 2017 filing of Petitioner’s Motion to Recall the Mandate in Christian v. Frank 595 F. 3d 1076 (9th Cir. 2010), Due to Fraud on the Court—is attached as Appendix 20.

Where the lower court has failed to issue a decision upon which Petitioner could seek certiorari review, Petitioner has attached a Declaration of attorney, Gary A. Modafferi, with Attachment ‘A’—‘Excerpt of the Court’s Docket’ showing amended entries made in the court’s docket on November 14, 2017, as Appendix 25.¹

OPINIONS BELOW

The Ninth Circuit's 2010 published decision reversing the district court's granting of habeas relief on the grounds that Petitioner was deprived of his constitutional right to present a defense in violation of Chambers v. Mississippi, 410 U.S. 284 (1973), is reported at Christian v. Frank, 595 F.3d 1076 (9th Cir. 2010), and is attached as Appendix 1. The Hawaii Supreme Court's decision affirming Petitioner's conviction is reported at State v. Christian, 967 P.2d 239 (1998).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1651(a). Title 28 U.S.C. § 1651(a) describes the jurisdiction of this Court to issue extraordinary writs as necessary or appropriate to aid its appellate jurisdiction.

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

Title 28 U.S.C. §1651(a) provides:

Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Title 28 U.S.C. §1254 provides:

Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

¹ Petitioner has been represented by attorney, Gary A. Modafferi Esquire., in the district court and in the Ninth Circuit Court of Appeals since July 14, 2014. As Mr. Modafferi is not a member of the bar of the United States Supreme Court, Petitioner presently stands in *pro se* before the Court.

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
- (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Article V, United States Constitution in pertinent part provides:

No person shall be deprived of life, liberty, or property, without due process of law.

Article XIV, Section 1, United States Constitution in pertinent part provides:

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.

Title 28, U.S.C., Section 455(a) states:

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Title 28, U.S.C., Section 455(b)(1) in pertinent part states:

Subsection 455(b)(1) requires a judge to disqualify himself "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

This case involves U.S. Const. art. I sec. 9 (Suspension Clause); Federal Rule of Civil Procedure 60(b); the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996):

STATEMENT OF THE CASE

Taryn Christian is a Hawaii state prisoner serving life sentence for murder in the second degree. At his trial in 1997, the trial court excluded the testimony of three witnesses that would have testified that a third party, James Burkhart, had confessed to the murder for which Petitioner was tried. The trial court adopted the

State's argument that the witnesses were "unreliable" and "not trustworthy" because "no evidence" existed to corroborate Burkhart's confessions. Outside the presence of the jury, while prosecutors proffered Burkhart an alibi of two witnesses, they also argued that he was entitled to assert his Fifth Amendment privilege to remain silent. When Petitioner requested to testify prior to the commencement of closing argument, the trial judge agreed with prosecutors that it was "too late" to reopen the case. Petitioner appealed, raising constitutional claims pursuant to Chambers v. Mississippi, 410 U.S. 284 (1973) (Third Party Confession); Rock v. Arkansas, 483 U.S. 44 (1987) (Right to Testify); and Strickland v. Washington, 466 U.S. 668 (1984) (Ineffective Assistance of Counsel). The Hawaii Supreme Court affirmed, State v. Christian, 967 P.2d 239 (1998). Petitioner's post-judgment appeal was denied, and the state supreme court affirmed.

I. Petitioner's Habeas Corpus Proceedings in the District Court.

On December 22, 2004, Petitioner filed a timely petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his 1997 conviction. In opposition to ordered discovery by Magistrate Judge, Kobayashi, in May of 2006, Habeas Prosecutors, Peter Hanano, and Richard Minatoya, argued, in part: (Dkt. #32: p.11).

"Here, Petitioner's entire actual innocence claim is premised upon James Burkhart being the killer...However, Petitioner cannot point to any physical evidence remotely establishing that Burkhart was present at the crime scene on the morning of the murder."

On July 19, 2008, Petitioner's habeas counsel, Mark Barrett, presented argument in his Brief Regarding Evidentiary Issues that as the case progressed additional *new* evidence pointing toward Burkhart continued to emerge, indicating

the State's withholding of evidence of "prior identifications" by witnesses, Phillip Schmidt and Annie Leong. Counsel wrote: (Dkt. #122 at p.2-6)(emphasis supplied).

"...Presented contemporaneously with this brief is evidence that one of the eyewitnesses, Phillip Schmidt, believes James Hina Burkhardt to be the person who he saw running from the scene of the stabbing. In Exhibit B to the affidavits and exhibits filed on July 18, 2008, Schmidt states his belief that the person who had fled was in fact Burkhardt. New evidence regarding former Gas Express employee Annie Leong, especially when coupled with prior evidence regarding Schmidt, indicates that withholding of exculpatory evidence of prior identifications prejudiced Christian. Exhibit E to the July 18, 2008 affidavits and Exhibits indicates that Annie Leong identified a photograph of a person she saw come into the Gas Express with an injured hand. Since Leong would have been interviewed a time prior to Christian becoming a suspect, that person undoubtedly was not Christian and that information would have been exculpatory. Since neither the fact of these identifications of another person nor the identity or identities of the persons in the photographs was revealed to the defense, exculpatory evidence was unlawfully withheld to the prejudice of Christian...

...The evidence that Leong and Schmidt had previously identified a different person should have been revealed under the principles of Brady v. Maryland, 373 U.S. 83 (1963). Again, there appears to be no remedy still available for this issue in state court. Phillips v. Woodford, 267 f.3d 966, 974 (9th Cir. 2001)...The material in Schmidt's present affidavit (Exhibit B to July 18 affidavits and exhibits) and prior material regarding Schmidt by itself indicates both improper identification procedures and improper use of misleading techniques. See Miller v. Pate, 386 U.S. 1 (1967)(misleading evidence); Foster v. California, 394 U.S. 440 (1969) (unfair identification procedures prohibited)."

In July of 2008, prosecutors denied any Brady violations. (Dkt.#125:15-16).

"...In this second new claim, Petitioner argues that "evidence that Leong and Schmidt had previously identified a different person" constituted a violation of the principles under Brady v. Maryland, 373 U.S. 83 (1963)... Petitioner has not demonstrated actual prejudice as a result of this alleged withholding of exculpatory evidence...Petitioner has also failed to prove that this evidence existed prior to trial and that Respondents failed to disclose it to Petitioner..."

At the August 18, 2008 evidentiary hearing, Habeas Prosecutors' argued to the Magistrate Judge that the State's key prosecution witness, Phillip Schmidt's

2008 identification of Burkhart from a photo-graphic lineup, was nothing more than a “recantation” of his trial identification of Petitioner. Regarding Annie Leong, prosecutors introduced testimony from Leong that Petitioner’s attorney, Richard Icenogle, and investigator were also present when she was interviewed by police and identified the “suspect” that entered the Gas Express store on the morning of the murder. The Magistrate Judge did not address the Brady claims in her F&R. On September 30, 2008, the District Court entered judgment granting the petition as to ground one pursuant to Chambers and denying it as to all other grounds. The district court ordered Petitioner released. Both the State and Petitioner appealed.

II. Appellate Proceedings in the Ninth Circuit Court of Appeals.

On October 14, 2008, prosecutors, in their Urgent Motion to Stay District Court’s Order Releasing Petitioner, argued: (Dkt. #2-1:10-11) (emphasis supplied).

“...First, Chambers is highly distinguishable from the instant case... the excluded hearsay confessions in this case did not bear sufficient indicia of reliability. Indeed, all of the corroborating circumstances proffered by trial counsel constituted mere argument, and were remote, speculative, and lacked connection with Cabaccang’s murder. Moreover, there was no evidence that anyone observed Burkhart stab Cabaccang, or any evidence that anyone observed Burkhart at or near the crime scene on the night of the murder...”

On November 24, 2008, they argued: (Dkt. #12-1:p.29-30)(emphasis supplied).

“... Indeed, the only eyewitness to date, who was recently willing to provide any type of sworn statement that Burkhart was even at the crime scene, is Phillip Schmidt. At the trial in 1997, Schmidt identified Petitioner as the person Schmidt saw walking away from the crime scene. Now, over ten years later, Schmidt mysteriously changed his story and has now identified James Burkhart as the person he saw walking away from the scene... ...Thus, other than Petitioner’s unsubstantiated argument that Burkhart was somehow connected to the murder, there is no *credible* evidence which even places Burkhart at the murder scene...”

On March 10, 2009, Habeas Prosecutors argued in their Principal Brief to the Court of Appeals, in part: (Dkt.# 25: p.36) (emphasis supplied).

"... There was no corroborating evidence-Christian was identified by two eyewitnesses; ...the potential rebuttal witnesses placing Mr. Burkhart at another location..."

On October 15, 2009, Prosecutors argued to the Panel at oral argument:

"...In this case, the eyewitnesses identified the Petitioner, not anybody else. There's nothing to tie this third party, Mr. Burkhart to the location... There's no corroboration, and that's the main point."

On February 19, 2010, the Court of Appeals reversed the district court's judgment, finding that the "facts" determined the case was distinguishable from Chambers v. Mississippi, 410 U.S. 284 (1973). Christian v. Frank, 595 F.3d. 1076 (9th Cir. 2010). See Appendix 1. The Panel denied a certificate of appealability on Petitioners remaining claims. Christian v. Frank, 365 F. App. 'x 877 (9th Cir. 2010).

On November 1, 2010, the Supreme Court denied certiorari review. Christian v. Frank, 131 S. Ct. 511 (2010).

III. The District Court Denies Petitioner's Valid Rule 60(b)(3) Motion Raising 'Fraud on the Court' as an "Application" to File a "Second or Successive" §2254 Petition—Contrary to Gonzalez v. Crosby, 545 U.S.524 (2005).

On January 7, 2011, Petitioner *pro se*, filed a Motion to Reopen the Original Habeas Corpus Petition Due to Newly Discovered Evidence of Fraud on the Court, pursuant to Rule 60(b)(3)/Independent Action. On February 23, 2011, without addressing the merits of the arguments and disregarding precedent of Gonzalez v. Crosby, 545 U.S.524 (2005), which distinguished a valid Rule 60(b)(3) motion from that of a "second or successive" habeas petition, the district court denied the motion

and transferred the case to the Court of Appeals. See Appendix 2.

IV. After the State's Repeated Requests for Extensions to Respond, Petitioner Filed a Motion to Hold in Abeyance the Transferred Motion and a Motion Recall the Appellate Mandate Due to Evidence of Fraud on the Court.

On June 13, and 14, 2011, the Court of Appeals entered Petitioner's *pro se* Motion to Recall the Mandate on the grounds of newly discovered evidence of fraud on the court under Case No.08-17236, and, Petitioner's Motion to Stay or Hold in Abeyance the transferred motion by the district court under Case No.11-70561. The State opposed the motion without responding to the allegations of fraud directed at the Court of Appeals. On July 27, 2011, the Panel issued an Order which simply read: "Petitioner's motion to recall the mandate is DENIED." See Appendix 3.

(a) The Panel Disregarded Petitioner's Timely Petition for Rehearing *En Banc* and Entered the September 15, 2011 Order Disposing of the Case.

On August 10, 2011, Petitioner filed a timely petition for rehearing *en banc* which the court simply ignored. See Appendix 4. On September 15, 2011, the Panel issued an ORDER disposing of the case, which read: See Appendix 5.

The panel has voted to deny leave to file appellant's late petition for rehearing and petition for rehearing *en banc* in this closed case.

Compounding the Panel's erroneous order, the prison's warden and mail-room confirmed in writing that the Court of Appeal's 'legal mail' was never received at the facility, whereby, thwarting certiorari review.

(b) A Separate Panel of the Ninth Circuit Disregarded Gonzalez, and Denied the Motion as an "Application" to File Successive Petition.

On November 15, 2011, without consideration of Gonzalez v. Crosby, 545 U.S. 524 (2005), the Court of Appeals disposes of the case with an ORDER that reads in

part: “The application for authorization to file a second or successive 28 U.S.C. §2254 habeas corpus petition in the district court is denied.” See Appendix 6.

On January 14, 2013, the Supreme Court denied review. Christian v. Frank, __U.S.__, 133 S.Ct. 969 (2013).

V. Petitioner’s Underlying Rule 60(b)(d)(3) Proceeding in the District Court.

On April 17, 2013, Petitioner refiled his Rule 60(b)(d)(3) Motion to reopen his habeas petition due to after-discovered fraud on the court, presenting argument the district court had subject matter jurisdiction pursuant to Gonzalez v. Crosby, 545 U.S. 524 (2005). Petitioner moved the district court to reopen his habeas petition to allow amendment of his constitutional claims: that (1) the State had suppressed exculpatory evidence violating Brady v. Maryland, 373 U.S. 83 (1963); (2) violating his right to present a defense pursuant to Chambers v. Mississippi, 410 U.S. 284 (1973); (3) impacting the denial of his right to testify pursuant to Rock v. Arkansas, 483 U.S. 44 (1987); (4) resulting in the denial of effective assistance of counsel pursuant to Strickland v. Washington, 466 U.S. 668 (1984); and (5) undermined his claim of actual innocence pursuant to Schlup v. Delo, 513 U.S. 298 (1995).

On July 11, 2013, the district court issued an ORDER in which the court acknowledged that Petitioner had filed a valid Rule 60(b)(d)(3) motion over which the court had jurisdiction pursuant to Gonzalez and ordered the State to respond. The district court determined the record insufficient and ordered an evidentiary hearing to establish the precise value of the evidence withheld in violation of Brady which was central to the claim of fraud upon the habeas court. The court outlined

the claims to be addressed, citing Ninth Circuit authority of Pumphrey 62 F.3d 1128, 1130 (9th Cir. 1995). (Dkt. #286: p.10-11). See Appendix 7.

In the instant case, Petitioner asserts that officers of the court perpetrated a fraud upon this Court during the 2008 habeas corpus proceedings by engaging in the same behavior as the defendant in Pumphrey: (1) failing to disclose evidence favorable to Petitioner (such as the Gas Express video and the fact that eyewitnesses had identified Burkhardt shortly after the crime); (2) mischaracterizing other critical evidence (such as the “testimony” of the purported alibi witnesses and the contents of the 911 call) to deceive the Court; and (3) willfully eliciting false testimony or failing to correct the false impression created by a witness’s testimony (such as the testimony of Annie Leong). If true, Petitioner’s allegations may well establish that state prosecutors—those attorneys trusted to do justice on behalf of the State of Hawaii—did indeed perpetrate a fraud upon this Court that would justify reopening the 2008 habeas proceeding.

(a) The Court Orders the Production of Specific Brady Materials.

On January 31, 2014, and May 27, 2014, the district court entered orders for the Habeas Prosecutors to produce specific Brady materials and chain of custody documents, proven to exist. See Appendix 8. The district court denied Petitioner’s motion to hold the State in contempt of its orders to produce the Brady materials and specified documents as “premature.” Appendix 9.

VI. The Newly Developed Evidentiary Record of the Rule 60(b)(d)(3) Proceedings Related to Withheld Brady Identification Evidence.

The evidentiary hearing was held on July 15, 2014, and continued on March 16, and 17, of 2015. From the bench, the District Court stated unequivocally on the matter of the withheld identification reports and photographs regarding witnesses, Phillip Schmidt and Annie Leong: (Dkt. #359: p.102) & (Dkt. #386: p. 24-25).

THE COURT: ... If there was an identification of Mr. Burkhardt which the prosecutors were aware of that was not disclosed to the habeas court, that was not disclosed to the Ninth Circuit, that could be a fraud on the Court...

THE COURT:... So your suggestion that you looked through all of -- which I accept at face value -- all of the materials and you didn't see any photographs, in light of what Mr. Modafferri has represented about the sworn testimony, indicates to me that there were photographs and we need to know what happened to them... Well, either way it doesn't look good. One way -- I mean, if the prosecutor knew that these photographs didn't exist and let her testify and perjure herself in front of Judge Kobayashi, which then carried over to my hearing, that these photographs in fact did exist, then that would have constituted a fraud upon the court. Now, if the photographs do in fact exist, then where are they? So, I mean, either way it's not looking good.

* * *

On July 16, 2014, retired Investigator, Darryl Carlson, testified that the two witnesses whom the prosecutors had argued for two decades had provided Burkhart with an alibi, could not give Burkhart an alibi. Declarations from the witnesses were entered as evidence. (Dkt. #359: p.115-118). See Appendix 10.

Q: During the course of your investigation, did you have the opportunity to review Detective Funes' report regarding the alibi, the alibi provided by those two people?

A: Yes.

Q: And what did that report say? I'm not offering that for the truth of the matter asserted, but just to prove what where we're going with this --

A: Mr. Funes wrote that Helen Beatty was a witness, and Harry -- Harry Auwelo was a witness who could put Mr. Burkhart at their residence at the time of the murder. Mr. Funes wrote that. And as it turns out, it was a false report written by the police officer...

Q: And how did you make the determination that it was a false report?

A: ... She said, I didn't say this, I didn't say that. So she didn't say a lot of the things that were in the report, and if she had said them, they would be unqualified statements because she didn't know for a fact it was true. So right there, there's unqualified statements by her, and then a false report by a law enforcement officer...

* * *

Richard Icenogle, Petitioner's first attorney, testified to Annie Leong's false testimony at the 2008 habeas hearing: (Dkt. #386: p.27-31). See Appendix 11.

Q: I want to ask you about testimony that was proffered at the habeas proceeding before Judge Kobayashi... Ms. Leong testified that you were present with an investigator named Vickers during an identification process

in which she said she identified the person that was in the sketch that she helped develop; is that true?

A: No.

Q: How do you know that's not true?

A: Well, that would have been an extraordinary situation that I would have remembered. Under normal standard operating procedures, I would not have been present at any such event like that. And, again, if it had happened, I would remember it just because it would have been extraordinary...

Q: So her testimony that you were present with him at this supposed identification hearing where she identified the person that was in her store the night of the murder would be untrue?

A: Correct, it would be untrue.

* * *

Phillip Schmidt, testified to his initial identification; hearing the 911 audio; and being told Petitioner "confessed." (Dkt. #386: p.32-54;70-71). See Appendix 12.

Q: ...Is it Exhibit 73, the lineup that you were shown right after the murder sometime in July of 1995? ... And where were you shown this lineup?

A: This one I believe was in my home.

Q: And do you recall who was present? Who showed you the lineup? Was a police officer? A detective?

A: I believe it was two detectives.

Q: And at that time, when you were shown the lineup, did you positively identify anyone in that lineup?

A: Yes, sir.

Q: Who did you identify?

A: Number 5.

Q: You identified number 5 who has been subsequently described as James Burkhart. And how did you do that? Did you initial the lineup? How did you signify that was the person that you saw at the scene?

A: I just pointed him out. I pointed to the picture.

Q: Did you write on the picture? Did you put your initials on it?

A: I believe I did.

Q: And what would you have put, "PS"?

A: "PS," yes, sir.

Q: Now, how certain are you of that event?

A: Of picking him out?

Q: Yes.

A: As positive as I could be. I felt like I went with -- not with emotion or anything else, I just tried to clear my mind and think of that night and look at these pictures and look at the person walking away, and that's the one I gravitated to...

* * *

Q: ... At that specific time, the investigators were sitting down with you with the audio expert; is that correct?

A: Yes, sir.

Q: And they were playing the 911 call that they had received; is that correct?

A: Yes, sir.

Q: And you heard something for the first time?

A: Yes, sir.

Q: And what was it that you heard? Specifically, if you could look at it and tell the Court what you heard from that tape.

A: I heard Vilmar's voice lightly say "James Burkhart."

Q: James Burkhart, what? What were those words followed? If you could look specifically at the transcript and what you were asked.

A: If I could make out Vilmer saying that the name James Burkhart.

Q: And was that followed by, "Yeah, James Burkhart just walked away"?

A: Yes, sir.

Q: That's what you heard on that 911 tape?

A: Yes, sir.

Q: Was it clear to you that that was said?

A: Very clear.

Q: ...But it was clear to you as a layperson that you heard it on that 911 call?

A: Yes, sir.

* * *

Q: ... Specifically when they told you that Christian had confessed, did that solidify in your own mind that you had picked out the right person for trial purposes?

A: Yes. It made me feel much more comfortable about everything. I didn't feel comfortable, but when they did that, I was relieved. Okay, you've got it. I'm good.

* * *

On March 16, 2015, Habeas Prosecutor, Peter Hanano, testified to specific questions regarding Phillip Schmidt's undisclosed identification of Burkhart; and the undisclosed statements made by Burkhart to the authorities; and: (Dkt. #386: p.107-117). See Appendix 13.

Q: ...I'm specifically asking you about a photographic identification array that's never been provided ever to the defense. That's all I'm asking you about. Where is it and have you seen it?

A: Are you talking about the ones with the initials on it?

Q: Yes.

A: I don't know...

* * *

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

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

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

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

* * *

Q: ... But there is a sworn affidavit from an attorney representing James Burkhart that there were multiple interviews about the murder... I'm referring to every instance in which he swears under oath that his client was interviewed by the Maui Police Department about the murder... Where are those statements, do you know? They have never been given to the defense ... You've been told by the Court to provide those statements, and the lawyers are telling you that they exist under sworn affidavit. What efforts did you make to find and give them to the defense?

A: I wasn't aware of this at the time. And we did provide all of the police reports associated with the murder.

Q: Well, obviously not because those weren't provided...

* * *

On March 17, 2015, the prosecutors' retired chief investigator, Margo Rogers, testified that Burkhart's purported alibi witnesses were not interviewed by the prosecutors and herself prior to or after trial. (Dkt. #387: p.34-35). See Appendix 14.

Q: ... Were you also the trial investigator -- the prosecutor's investigator to assist a trial team in the prosecution of this case?

A: Yes.

Q: Was one of your duties in that capacity to assist when a witness needed to be interviewed?

A: Yes.

Q: You would be present so that the prosecutors wouldn't become witnesses if the witness said something that was different than what he had already said, right? That would be the standard protocol in law enforcement?

A: Yes, but I didn't interview in this case, in this case that I can recall, anyone.

Q: Do you recall whether or not the two alibi witnesses in this case were ever interviewed by an investigator or by the prosecutor's office?

A: I don't --

Q: The alibi witnesses I'm referring to are -- the alleged alibi witnesses would be Harry Auwelo and Helen Beatty.

A: I don't know.
Q: You don't recall that occurring?
A: I -- I did not. No.

Prosecutor, Richard Minatoya, testified that no prosecutor he knew of had interviewed the witnesses whom the State proffered had given Burkhart an alibi. (Dkt. #387: p.55-57). See Appendix 15.

Q: Okay. Now, you're talking about the alibi evidence that you just -- with Harry, I think his name is, and Helen?
A: I believe it was the Auweloas.
Q: Did you ever interview them?
A: No.
Q: Do you know of anybody who's ever interviewed them?
A: Personally, no.
Q: Do you know if they ever made a statement? Have you ever seen a statement that they made, a handwritten statement where they said, "I could provide alibi witness testimony for exactly the time when this murder occurred"?
A: No.
Q: The only thing that you've ever seen regarding that specific piece of evidence, the proffered alibi testimony that was mentioned to the Ninth Circuit, was the report that was generated by Detective Funes, correct?
A: That and the representation of the deputy prosecutor at trial.
Q: Which was based, we would assume, on the report of Detective Funes?
A: That's correct...

(a) The District Court Issued Third Order for Brady Materials.

On March 24, 2015, the district court entered its third ORDER detailing Brady materials and specific documents to be produced. Despite non-compliance with its Orders, the district court denied Petitioner's request to enter sanctions under Fed. R. Civ. P. 37(b)(2)(A)(i). See Appendix 16.

On June 11, 2015, long after the Habeas Prosecutors and their civil attorneys claimed ignorance to any interviews conducted by the authorities with Burkhart, Petitioner's attorney received notice of a FBI memo which reported on January 29,

2009—during the State’s appeal to the Ninth Circuit—Prosecutors, Hanano and Minatoya, Margo Rogers, and two agents of the FBI., met with Burkhart and his attorney and conducted an interview and "debriefed" Burkhart on the murder, prior to him being sentenced on federal gun charges. See Appendix 16 -A.

(b) The State’s Civil Attorneys—in Written Closing Argument—Enter a Judicial Binding Admission that Schmidt Initially Identified Burkhart.

Petitioner filed his Closing Argument on July 6, 2015. On July 20, 2015, in a binding judicial admission, the State's legal counsel wrote: (Dkt. # 391 at p.6).

"The fact that Schmidt had initially identified a photograph of Burkhart was well known to Petitioner at the time of his criminal trial...Petitioner was made aware of all information related to Schmidt’s identifications during his criminal trial ...Thus, despite full knowledge of Schmidt’s original identification... Schmidt’s original photo lineup identification was well known to Petitioner during his criminal trial..."

While conceding this material “fact” for the first time in two decades, the State’s attorneys went so far as to infer to the Rule 60 court that Petitioner’s defense attorney had possession of the evidence but chose to conceal it at trial.

On July 27, 2015, Petitioner in Rebuttal argued, in part: (Dkt. # 395).

“... Where in the record was it ever disclosed by the State that on July 17, 1995, days after the murder, Schmidt identified Burkhart? This evidence has been hidden – suppressed from the Petitioner until Mr. Schmidt had the opportunity to tell this Court the truth. This evidence is proof of duplicity of the highest magnitude....”

On Dec.1, 2015, at oral argument, the District Court stated: (Dkt. #412

MR: MODAFFERI: ...Mr. Funes wrote that Helen Beatty was a witness, and Harry, Auwelo was a witness who could put Mr. Burkhart at their residence at the time of the murder, Mr. Funes wrote that. And as it turns out, it was a false report by the police officer... And the constant string that runs through all of these courts rationales is that no one puts Burkhart at the scene and two witnesses put him out of the scene, and neither of those precepts upon which

Chambers has been misapplied is true...

THE COURT:...And if that's true, then the fraud was not only committed on the Ninth Circuit or on me but was also committed on the state trial judge and the state supreme court...

(c) **The District Court Denied Rule 60 Relief Without Ruling on the Brady Violations Underlying Fraud—and Without Factual-Findings and Conclusions of Law Required Under Rule 52 Supporting the Judgment.**

On December 28, 2015, the district court entered an Order which parroted the State attorneys' response in closing argument to the letter. In denying Rule 60(b) relief, the district court did not address the Brady violations central to the litigation of fraud, and instead, adopted all contrary positions argued by the State violating judicial estoppel. Compounding error, the court, failed all together to make factual-findings and separate conclusions of law as required by law under Rule 52 of the FRCP. The court wrote: (Dkt. #406; pp. 21-22) (emphasis supplied).

... And, while it is true, as Petitioner contends, that Respondents did not inform the habeas court or the Ninth Circuit that Schmidt previously identified Burkhart in the first photo lineup, Petitioner has not produced clear and convincing evidence that Respondent's counsel, at any stage of the proceedings, ever had knowledge of Schmidt's initial identification of Burkhart. Cf. Beggerly, 524 U.S. at 47 (holding that a party's failure to "thoroughly search its records and make full disclosure to the Court" is not fraud on the court). Without such evidence, Petitioner cannot meet his burden of demonstrating fraud on the habeas court...

... In any case, Petitioner also failed to disclose Schmidt's identification to the habeas court and the Ninth Circuit, despite evidence that Petitioner knew about Schmidt's initial identification of Burkhart in the photo lineup at least as far back as Petitioner's 1997 criminal trial...

On March 4, 2016, Petitioner filed a Rule 60(b)(1)(3)(6) motion to correct legal error, presenting argument that the court's failure to decide the Brady violations and failure to enter factual-findings and separate conclusions of law under Rule 52,

thwarted appellate review. The court denied the motion and Petitioner appealed.

(d) The Ninth Circuit Denied Mandamus Relief Despite District Court's Failure to Decide Brady and Failure to Make Factual-Findings.

On June 29, 2016, the district court denied Petitioner a COA. On November 21, 2016, a three-judge panel denied a request for remand to the district court to make the required factual-findings under Fed. R. Civil P., Rule 52 and to decide the Brady violations central to the Rule 60 litigation. See Appendix 17. (Dkt. #433).

VII. When New Developments Proved Attorneys Worked a Fraud on the Rule 60 Court—the State Reversed its Position While the District Court Stood Silent.

On December 27, 2016, after new developments proved that attorneys for the State had worked a fraud on the Rule 60 court—Petitioner moved the district court under Rule 60(b)(3)(6), to vacate its judgment and for disqualification pursuant to 28 U.S.C. §455(a) and §455(b)(1). The district court's prejudicial failure to hold the State to its 'burden of proof' on its unsubstantiated claims that Schmidt's original identification had been produced to the defense, violated Petitioner's right to due process. Challenging the State's fraudulent claim, attorney, Anthony Ranken, wrote in his Declaration: See Appendix 18. (Dkt. #436: p.3-4).

3. I am now aware that during Mr. Christian's Rule 60 proceeding in the District court for the District of Hawaii, the State's attorneys represented to the federal judge that "all information" of Phillip Schmidt's original identification of James Burkhart was disclosed to the defense during Taryn Christian's trial. That representation is categorically untrue;
4. The State's inference and the district court's perception that I chose not to use this exculpatory evidence in favor of Mr. Christian's defense, while having knowledge that Burkhart had been identified by the State's key prosecution witness, is patently false;

On February 15, 2017, the court denied the motion, without addressing the

merits requiring disqualification under 28 U.S.C. §455. Petitioner appealed and under established authority of the circuits, petitioned for a writ of mandamus. See Appendix 19. The appeal was docketed under Case No. 17-15460.²

VIII. Petitioner's Underlying Motion to Recall the Mandate.

On May 31, 2017, attorney, Gary A. Modafferi, filed a notice of appearance of counsel and Petitioner's Motion to Recall the Mandate in Christian v. Frank, Due to Fraud on the Court. The next morning on June 1, 2017, counsel received via pacer, a copy of an order issued by the panel on September 15, 2011. On June 3, 2017, Mr. Modafferi contacted the court to inquire as to the receipt of an order dated six years prior. A court staff attorney related that the ORDER was sent upon the directive of the judges to whom the motion was addressed. [The Hon. Judges, Robert R. Beezer; Susan P. Graber; and Raymond C. Fischer.] Where the judges' prejudicial action subverted the appellate rules and foreclosed Petitioner's access to the court in the face of a fraud directed to the court, Petitioner moved the Panel for Disqualification Pursuant to 28 U.S.C. § 455, on June 13, 2017.

On October 9, 2017, upon learning that the Hon. Judge Beezer had passed, and Judge Fischer was retired, leaving only the Hon. Judge Graber of the original panel, Petitioner filed an Urgent Amended Motion for Independent Consideration by the Court of Motion for Disqualification of the Hon. Judge Graber Pursuant to

² On June 12, 2017, a two-judge panel denied a COA. See Appendix 21. Petitioner filed a Motion for Clarification and Reconsideration. See Appendix 22. On July 26, 2017, a three-judge panel denied the petition without addressing the merits requiring disqualification under 28 U.S.C. 455. See Appendix 23. On August 2, 2017, a two-judge panel issued an order denying Petitioner's Motion for Clarification without addressing the question for clarification of whether a petition for mandamus satisfies the requirements for a COA. See Appendix 24. On Nov. 1, 2017, Petitioner filed a Petition for Writ of Mandamus in the Supreme Court under Case. No.17-6613. The petition was denied.

28 U.S.C. § 455, with declaration of counsel. On November 14, 2017, Mr. Modafferi received a pacer alert, noting that instead of the Court of Appeals issuing a ruling on the motion challenging the action of a single circuit court judge to dispose of a substantive motion properly before the court, a clerk had simply edited previous entries in the docket for #88; and #89; which read:

“UPDATE: Replaced PDF of exhibits (duplicate attachment removed).
— [Edited 11/14/2017 by SVG: No action will be taken on this filing, mandate issued in 2010 and no further filings to be accepted pursuant to [76]] (Modafferi, Gary)”

This amended petition as per the Court Clerk’s instruction follows.

REASONS FOR GRANTING THE PETITION

This case presents the kind of exceptional circumstances in which this Court exercises its discretionary authority to issue a writ of mandamus. The writ of mandamus should issue because the Ninth Circuit’s failure to act and render a decision upon a substantial showing that its decision in Christian v. Frank, 595 F. 3d 1076 (9th Cir. 2010), was procured through fraud, was manifestly wrong and operates to deprive the Court of its certiorari jurisdiction.

Petitioner recognizes that the writ of mandamus is an extraordinary remedy reserved for extraordinary circumstances. Those circumstances exist here, where a lower court has clearly abused its discretion and disregarded this Court’s precedents that require it to recall its mandate—either on the grounds of fraud upon the court, calling into question the very legitimacy of the judgment, or, to avoid a miscarriage of justice. Calderon v. Thompson, 523 U.S. 538 (1998). See also Hazel-Atlas Glass CO. v. Hartford-Empire Co., 322 U.S. 238, 249—250 (1944).

Where a lower court's failure to act obstructs litigants from having their claims adjudicated and ultimately brought before a higher court, this Court and the courts of appeals have consistently issued writs of mandamus so that the legal process can proceed. "By insisting that courts comply with the law, parties vindicate not only the rights they assert but also the law's own insistence on neutrality and fidelity to principle." Hollingsworth v. Perry, 558 U.S. 183, 196–97 (2010).

The systemic violation of procedural rules can "compromise the orderly, decorous, rational traditions that courts rely upon to ensure the integrity of their own judgments. These considerations, too, are part of the reasons leading to the decision to grant extraordinary relief." *Id.* at 197. A writ of mandamus or prohibition is appropriate where a lower court's action constitutes a "judicial usurpation of power" or amounts to a "clear abuse of discretion." Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380 (2004) (quotations omitted); see also, e.g., Mallard v. U.S. Dist. Ct. for S.D. of Iowa, 490 U.S. 296, 309 (1989).

In its seminal and historic opinion describing the contours of its judicial review powers and other jurisdictional authority, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), this Court recognized that the writ of mandamus is the appropriate tool to protect the Court's appellate jurisdiction. *Id.* at 175 ("[t]o enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable [the Court] to exercise appellate jurisdiction"). Since Marbury, "[r]epeated decisions of this court have established the rule that this court has power to issue a mandamus, in the exercise of its

appellate jurisdiction, and that the writ will lie in a proper case to direct a subordinate Federal court to decide a pending cause.” Knickerbocker Ins. Co. of Chicago v. Comstock, 83 U.S. (16 Wall.) 258, 270 (1872) (citations omitted). Over the years, this Court has continued to recognize the appropriate use of the writ of mandamus in aid of such prospective jurisdiction. In Will v. Calvert Fire Insurance Co., 437 U.S. 655, 661 (1978), this Court ruled that “[t]here can be no doubt that, where [an inferior] court persistently and without reason refuses to adjudicate a case properly before it, the [superior court] may issue the writ ‘in order that [it] may exercise the jurisdiction of review given by law’” (citations omitted). See also Roche v. Evaporated Milk Ass’n, 319 U.S. 21, 25 (1943). Such jurisdiction includes the Court’s prospective jurisdiction over cases in which it will ultimately have the authority under 28 U.S.C. § 1254 to grant review by certiorari. See, e.g., Ex parte United States, 287 U.S. at 245-46. Thus, by granting a writ of mandamus as requested by Petitioner in this case, this Court would be acting in aid of its certiorari jurisdiction.

The precedent supporting issuance of the writ to the Court of Appeals is unequivocal. And the relief requested is minimal—Petitioner requests no substantive holding on his underlying constitutional claims from this Court, but simply an order to the Court of Appeals to decide the merits of his Motion to Recall the Mandate in Christian v. Frank, 595 F.3d 1076 (9th Cir. 2010), on the grounds of after-discovered fraud on the court. The Court of Appeals could have denied the motion if it so chose. Had it done so, Petitioner could have applied to this Court for a

writ of certiorari so that the Court may consider the issues involved. Because it did not, Petitioner must file this request for extraordinary relief to preserve his right to the due judicial consideration of his constitutional claims underlying fraud which undermined the integrity of the panel's application of the Court's holding in Chambers v. Mississippi, 410 U.S. 284 (1973).

However, there are extraordinary circumstances presented here, that require this Honorable Court to exercise its inherent authority to consider that the State's Habeas Prosecutors in 2010, in their opposition to Petitioner's request for a writ of certiorari, knowingly and recklessly, submitted argument to this Court that was blatantly false on key issues going to the heart of their case, creating the deceptive impression that Petitioner's case was "materially" distinguishable from Chambers.

The prerequisites for a writ of mandamus have clearly been met in this case. Supreme Court Rule 20.1 requires that to obtain a writ of mandamus, a petitioner must demonstrate that (1) the writ "will be in aid of the Court's appellate jurisdiction," (2) "exceptional circumstances warrant the exercise of the Court's discretionary powers," and (3) adequate relief cannot otherwise be obtained.

ARGUMENT

I. THIS COURT'S PRECEDENTS REQUIRED THE COURT OF APPEALS TO ADDRESS A MOTION TO RECALL THE MANDATE UPON A SHOWING OF FRAUD ON THE COURT.

The Supreme Court's precedents provide that the federal courts address credible claims of fraud upon the court where the legitimacy of the judgment is called into question. The Supreme Court held that the Courts of Appeals are

recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion. Hawaii Housing Authority v. Midkiff, 463 U.S. 1323, 1324 (1983) (Rehnquist, J., in chambers); see also Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 249—250 (1944).

A court's inherent power to vacate a judgment procured by fraud "fulfill[s] a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence" to the rule that a final judgment is typically binding and final. Hazel - Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944), overruled on other grounds by Standard Oil of Cal. v. United States, 429 U.S. 17 (1976). A court may bring its own motion to set aside a judgment, and there is no time limit for bringing the motion, even the doctrine of laches will not prevent a hearing on the matter. See Root Refining Co. v. Universal Oil Prods. Co., 169 F.2d 514 (3rd Cir. 1948), cert. denied, 335 U.S. 912 (1949). The Supreme Court has described it as an authority "of last resort, to be held in reserve against grave, unforeseen contingencies." Calderon v. Thompson, 523 U.S. 538, 550 (1998).

Recognizing an Article III tribunal's broad equitable powers, Chief Justice John Marshall acknowledged that a court may grant relief from judgment where a new matter "clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself" before judgment. Marine Ins. Co. of Alexandria v. Hodgson, 11 U.S. (7 Cranch) 332, 336 (1813). He further emphasized that an Article III court can grant relief where the "equity of the

applicant [is] free from doubt,” and where a judgment “would be against conscience for the person who has obtained it to avail himself.” *Id.* at 337 (emphasis supplied). “From the beginning, there has existed along-side the term-rule a rule of equity to the effect that, under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry.” 11 U.S.7 Cranch 332; Marshall v. Holmes, 141 U. S. 589. The cases where such relief has been granted are those in which, by fraud or deception practiced on the unsuccessful party, he has been prevented from exhibiting fully his case, by reason of which there has never been a real contest before the court of the subject matter of the suit. United States v. Throckmorton, 98 U.S. 61 (1878). “Fraud vitiates every transaction and all contracts. Indeed, the principle is often stated, in broad and sweeping language, that fraud destroys the validity of everything into which it enters”—37 Am Jur 2d, Section 8. Courts of equity have been cautious in exercising their power over such judgments, “but where the occasion has demanded, where enforcement of the judgment is “manifestly unconscionable,” Pickford v. Talbott, 225 U. S. 651, 657, they have wielded the power without hesitation.”

A. Fraud on the Court Standard for Recall of the Appellate Mandate.

In Hazel-Atlas, the Supreme Court found a fraud on the court when the plaintiff in the underlying action, Hartford, presented manufactured evidence to the court in connection with a merits-based decision. 322 U.S. at 245. There, attorneys and officials for a patent holder, Hartford, schemed to overcome the rejection of a patent application by submitting a bogus article describing the invention as a

“remarkable advance in the art” and “revolutionary.” Id. at 240. Hartford submitted the article in support of its renewed patent application and overcame the rejection. Id. at 240-41. Quoting the fraudulent article at length, the appellate court reversed and found infringement. Id. at 241-42. Shortly before its deadline to appeal, Hazel settled after Hartford obtained a statement from the purported author, fraudulently confirming the article’s authenticity. Id. at 241-43.

Nine years later, Hazel sought to vacate the judgment for fraud on the court. Id. at 243. Without questioning whether the settlement barred relief, the Supreme Court stated: “Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments.” Id. at 245. “This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury.” Id. at 245. The Court also noted that even if it “consider[ed] nothing but Hartford’s sworn admissions,” Hartford’s conduct amounted to “a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals.” Id. “The total effect of all this fraud . . . calls for nothing less than a complete denial of relief to Hartford for the claimed infringement of the patent thereby procured and enforced.” Id. at 250 (emphasis added). The Court specifically acknowledged that while Hazel-Atlas had been aware of at least the possibility of Hartford’s fraud at the time of both the trial and appeal, “every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments.” Id. at 245. Hartford had

“tamper[ed] with the administration of justice,” and thus committed “a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.” Id. at 246. The Supreme Court reversed, directing the Court of Appeals to set aside its 1932 judgment, recall its 1932 mandate, dismiss Hartford's appeal, and to issue a mandate to the District Court directing it to set aside its judgment entered pursuant to the 1932 mandate, to reinstate its original judgment denying relief to Hartford, and to take such additional action as may be necessary and appropriate. The Court’s decision in Hazel-Atlas provides the foundation for assessing what constitutes a fraud on the court and confirms the intolerance the judiciary must have for misconduct which defiles the court.

B. As in Hazel-Atlas, Petitioner’s Case Involves Manufactured Evidence.

The fraud on the court in Petitioner’s case is similar to Hazel-Atlas, where the Maui Police Department and Maui County Prosecutors produced manufactured official reports of their investigation into the murder, while withholding the original reports from lead detectives that would have generated in the first six weeks after the murder, and prior to Petitioner being considered a suspect. For over two decades, the State argued its theory of the case based upon these manufactured reports, claiming “no evidence” existed to corroborate a third-party’s confessions to the murder. In their zeal to win, these same prosecutors manufactured fabricated confession evidence, telling the trial court and the jury that Petitioner had “confessed” to the murder, not once, but twice, all in a carefully executed scheme to

win Petitioner's conviction and defeat his direct appeal.

C. The Lower Court's Failure to address Fraud is in Square Conflict with Decisions of Other Circuits and its Own Circuit.

The Seventh Circuit held, "a decision produced by fraud upon the court is not in essence a decision at all, and never becomes final." Kenner v. C.I.R., 387 F.3d 689 (1968); 7 Moore's Federal Practice, 2d ed., p. 512, ¶ 60.23. Fraud is both a criminal and civil law concept. Unlike perjury, fraud does not depend upon an affirmative false statement; it may rest upon an omission to state a material fact that the actor is under a duty to disclose or that is necessary to make the facts stated not misleading. Bronston, 409 U.S. at 358 n.4 (criminal fraud, unlike perjury, "goes 'rather far in punishing intentional creation of false impressions by a selection of literally true representations, because the actor himself generally selects and arranges the representations'" (citation omitted); Kline v. First Western Gov't Sec., 24 F.3d 480, 491 (3d Cir. 1994); SEC v. Coffey, 493 F.2d 1304, 1314 (6th Cir. 1974).

The First Circuit described the requisite fraud on the court occurs where "it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989).

The Third Circuit stated: Fraud, is the intentional misstatement or omission of a material fact made with knowledge of its falsity or in reckless disregard for whether it is true or false. E.g., SEC v. Infinity Group Co., 212 F.3d 180, 191-92 (3d

Cir. 2000), cert. denied, 532 U.S. 905 (2001) (actionable securities fraud consists of knowing or reckless misstatements or omissions); McLean v. Alexander, 599 F.2d 1190, 1197 & n. 12 (3d Cir. 1979) (same, collecting cases). Fraud also does not require that the actor know his statements and omissions to be false; the actor may answer for fraud if he acts in reckless disregard for whether his statements and omissions are true or not. Infinity Group Co., 212 F.3d at 191-92; First Commodity Corp. v. Commodity Futures Trading Comm., 676 F.2d 1, 6-7 (1st Cir. 1982).

Of course, manufacturing evidence is not the only type of misconduct that can lead to a finding of fraud on the court. In United States v. Shaffer Equipment Company, 11 F.3d 450 (4th Cir. 1993), a government lawyer's failure to comply with his duty of candor was found to be sufficient. The Ninth Circuit confirms a fraud exists, when conduct harms "the integrity of the judicial process...and the fraud rises to the level of 'an unconscionable plan or scheme which is designed to improperly influence the court in its decisions,'" there has been a fraud on the court, and the court "not only can act, [but] should." Dixon, 316 F.3d 1046 (9th Cir. 2003) (quoting England v. Doyle, 281 F.2d 309 (9th Cir. 1960).

Ignoring their solemn obligation to seek justice, the Habeas Prosecutors instead did violence to their essential charter by permitting their investigators to obstruct justice, all in a misguided effort to obtain "a win" through improperly influencing this Court and the federal courts below. Uncomfortable as it is to recognize such conduct in individuals whose very purpose is to advance justice, it must be recognized here and publically dealt with in order to begin to repair the

tremendous damage these particular prosecutors have already done to this Court and to the integrity of our judicial system.

II. THIS COURT'S PRECEDENTS REQUIRED THE COURT OF APPEALS TO ADDRESS A MOTION TO RECALL THE MANDATE TO AVOID A MISCARRIAGE OF JUSTICE.

The Court of Appeals action in this case amounts to a “judicial usurpation of power” and a “clear abuse of discretion” by its disregard of the Supreme Court’s precedent that require it to recall its mandate—either on the grounds of fraud upon the court, calling into question the very legitimacy of the judgment, or, to avoid a miscarriage of justice. Calderon v. Thompson, 523 U.S. 538 (1998). The Supreme Court has stated that a mandate may be recalled when it is necessary to address new circumstances before the court which are “grave” and “unforeseen” or which are, in other words, unforeseeable circumstances which implicate the justice of the judgment previously rendered. Calderon v. Thompson, 523 U.S. 538, 549, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998).

A. Petitioner’s Case is Not an Ordinary Case Where He Meets Both Standards—Fraud on the Court and a Miscarriage of Justice—Demonstrating Actual Innocence.

Unlike the petitioner in Calderon v. Thompson, Petitioner’s case meets both standards where the “facts” support a showing of fraud upon the court and a miscarriage of justice, demonstrating actual innocence. Petitioner’s claim of actual innocence was successfully defeated by the prosecutors’ representations made in May 2006, where the Habeas Prosecutors argued: (Dkt. #32 at p. 11).

"Here, Petitioner's entire actual innocence claim is premised upon James Burkhart being the killer...However, Petitioner cannot point to any physical

evidence remotely establishing that Burkhart was present at the crime scene on the morning of the murder..."

During the recent Rule 60(b)(d)(3) proceedings, the State's attorneys in written response in closing argument, entered a 'judicially binding admission' that their key witness, Phillip Schmidt, had "initially" identified Burkhart after the murder—a material "fact" the State had denied for two decades. Upon this evidence, standing alone, Petitioner has sustained his burden with regard to his actual innocence claim under Schlup, where the identification of Burkhart corroborates his multiple confessions to the murder. With evidence pointing toward another perpetrator coming from what apparently was the only independent eye-witness at the scene of the crime, it appears that no reasonable juror would have convicted.

Courts examine petitions based on claims of actual innocence if a "miscarriage of justice" would occur absent review. Hubbard, 378 F.3d at 338; Cristin v. Brennan, 281 F.3d 404, 412 (3d Cir. 2002) ("To show a fundamental miscarriage of justice, a petitioner must demonstrate that he is actually innocent of the crime ... by presenting new evidence of innocence."). This was precisely the situation in Schlup in which the Supreme Court, having concluded that Schlup met the requirements for an actual innocence claim, remanded his case to allow him to argue his underlying constitutional claims.

III. EXCEPTIONAL CIRCUMSTANCES REQUIRE THE EXERCISE OF THIS COURT'S SUPERVISORY JURISDICTION—WHERE THE USE OF A SIX-YEAR-OLD ORDER TO INSULATE REVIEW OF FRAUD DIRECTED AT THE COURT OF APPEALS—CORRUPTS THE INTEGRITY OF THE JUDICIAL PROCESS AND OPERATES TO DEPRIVE THE COURT OF ITS CERTIORARI JURISDICTION.

A fraud directed squarely at the federal courts' decision-making, as happened here, should be confronted, not excused. In United States v. Payner, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980), the Court noted that "the supervisory power serves the 'twofold' purpose of deterring illegality and protecting judicial integrity." *Id.*, at 736, n. 8, 100 S.Ct., at 2446, n. 8. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted. Communist Party v. Subversive Activities Control Board, 351 U.S. 115, 124, 76 S.Ct. 663, 668. Mesarosh, 352 U.S. at 14 (1956).

A. The Action of a Single Circuit Judge to Insulate Review of Fraud on the Court—Which Impacted the § 2254 Proceedings and Independently Undermined the Integrity of a Decision of the Ninth Circuit—is Unprecedented and Legally Indefensible.

The action by Circuit Judge, the Honorable Susan P. Graber, to direct court staff to use a six-year-old order from September 15, 2011, as an instrument to dispose of a proper motion to recall the mandate due to fraud on the court, within hours of its filing, is unprecedented and respectfully, legally indefensible. Moreover, the September 2011 Order is completely unrelated to the current action which is supported by the newly developed record of the Rule 60(b)(d)(3) proceedings below—a record certainly not available to the panel in 2011.

B. The Habeas Prosecutors Produced Fraudulent Reports in Discovery During the § 2254 Proceedings, While Withholding Brady Evidence, Thereby Committing a Fraud Upon the Habeas Court.

While the government's disclosure obligation encompasses more than just exculpatory evidence, the failure to produce evidence "material either to guilt or

punishment” gives rise to constitutional violations. Brady v. Maryland, 373 U.S. 83, 87 (1947). A prosecutor who withholds such evidence violates not only his disclosure obligations but also the due process clause. *Id.* Due process is violated “irrespective of the good faith or bad faith of the prosecution.” *Id.* When Petitioner’s attorney, Mark Barrett, presented argument to the habeas court in 2008 that new developments revealed the State had failed to disclose exculpatory identifications of James Burkhart following the murder in violation of Brady v. Maryland, 373 U.S. 83 (1963), Habeas Prosecutors denied that any such violations had occurred.

It is now demonstrated upon the record, that prior to the conclusion of the habeas proceedings, Habeas Prosecutors were on notice that the official reports they produced in discovery had omitted critical key “facts” of the date; time; and place; where detectives had interviewed witnesses, and the circumstances of presenting them with photographic arrays and their subsequent corroborating identifications of Burkhart. The withheld identification evidence completely dismantles the State’s theory of the case as was argued to the federal courts and ultimately exposes the manufactured reports upon which the State relied in arguing that Burkhart had a corroborated alibi. The duty to act ‘is not discharged by attempting to finesse the problem by pressing ahead without a diligent and good faith attempt to resolve it. A prosecutor cannot avoid this obligation by refusing to search for the truth and remaining willfully ignorant of the facts.’” Morris v. Ylst, 447 F.3d 735, 744 (9th Cir. 2006) (quoting N. Mariana Islands v. Bowie, 243 F.3d 1109, 1118 (9th Cir. 2001)).

The Sixth Circuit found a government attorney’s “reckless disregard” for the

truth sufficient to establish a fraud on the court. See Demjanjuk, 10 F.3d at 354. In Demjanjuk, the court held that repeated failures to turn over exculpatory evidence was a fraud on the court, even though such conduct would not have constituted a fraud on the court if committed by a private attorney since a private attorney has no Brady obligations. *Id.* (finding the government attorneys “acted with reckless disregard for the truth and for the government’s obligation to take no steps that prevent an adversary from presenting his case fully and fairly.”

Given its focus on the integrity of the judicial process, the fraud-on-the-court inquiry here is informed by the unique role attorneys representing our government play in the judicial system. Prosecutors are “representative[s] not of an ordinary party to a controversy, but of a sovereignty” whose interest “is not that it shall win a case, but that justice shall be done.” Berger v. United States, 295 U.S. 78, 88 (1935). “[W]hile he may strike hard blows, [a prosecutor] is not at liberty to strike foul ones.” *Id.* at 78. In view of their unique role, prosecutors are “held to a higher standard of behavior,” United States v. Young, 470 U.S. 1, 25-26 (1985) (Brennan, J., concurring), in both criminal and civil cases, Cervantes v. United States, 330 F.3d 1186, 1187, 1189 (9th Cir. 2003). For purposes of this petition, these standards above serve as the measure of where the government attorneys conduct constitutes “a wrong against the institutions set up to protect and safeguard the public.” Pumphrey, 62 F.3d at 1133 (quoting Hazel-Atlas, 322 U.S. at 246).

- D. The Habeas Prosecutors Misrepresented Evidence to Wrongfully Claim Petitioner’s Case was “Materially” Distinguishable from Chambers v. Mississippi, While Withholding Evidence They Argued Did Not Exist, Thereby Committing Fraud on the Ninth Circuit.**

By arguing that Petitioner's case was "materially" distinguishable from Chambers, Habeas Prosecutors made misrepresentations to the court that critical eyewitnesses had "failed" to identify Burkhart from any photographic arrays and two witnesses placed him within their residence at the time of the crime. While the panel believed it was hearing a legitimate adversarial dispute (an understandable assumption in light of the assumption made about government prosecutors, as noted by the Supreme Court in Berger v. United States, 295 U.S. 78, 88 (1935)), the Court of Appeals was in reality, presiding over a charade, a case fraught with corruption, suppression and fabricated evidence, concealed motives and hidden agendas by State actors, too extensive to fully recount herein.

Just as the Hartford attorneys submitted the bogus article on their patent, government attorneys here, framed their arguments upon the fraudulent reports which omitted the corroborating evidence they claimed did "not exist". These official reports were not only a work of fiction with respect to its key findings, but they also included falsified interviews in the form of tampered witness statements. Under the higher standard to which government attorneys are held, their reckless disregard for the truth contributed to this sham litigation and fraud on the court. Demjanjuk v. Petrovsky, 10 F.3d 338, 354 (6th Cir. 1993).

E. During the 2009 Appeal, While Arguing That No Evidence Linked Burkhart to the Case, Habeas Prosecutors [Secretly] "Debriefed" Burkhart on the Murder, Thereby Committing a Fraud Upon the Court of Appeals.

Petitioner recently learned, that even after Habeas Prosecutors testified before the Rule 60(b) court, that all evidence of Burkhart being interviewed by the

authorities had been furnished to Petitioner, they advanced their deception into the jurisdiction of the Rule 60(b)(d)(3) proceeding by withholding evidence that in 2009, while on appeal, they travelled to Honolulu with their investigator, and along with agents of the FBI., [secretly] “debriefed” Burkhart on the murder while he awaited sentencing on federal gun charges. The State continues to withhold this material evidence where Burkhart reportedly was asked and answered questions pertaining to this case. Finally, even when viewed in isolation, there is no question that the prosecutors’ misrepresentations and nondisclosure were effective, and that they ‘significantly changed information’ available to the Court of Appeals. The fraud perpetrated here, is multi-faceted and pervasive, involving numerous, distinct types of misconduct, each one of which is sufficient to cause the Court of Appeals to vacate its 2010 judgment and to give the District Court appropriate directions.

IV. A REASONABLE MAN WOULD FIND THE APPEARANCE OF CONFLICT OF INTEREST, BIAS AND PREJUDICE SO THAT THE HON. JUDGE GRABER’S IMPARTIALITY MIGHT REASONABLY BE QUESTIONED.

A conflict of interest and appearance of bias is apparent in the Hon. Judge Graber’s treatment of extraordinary circumstances presented to the court. The consequence of the action to insulate the government’s fraud from judicial review, while turning a blind eye to a miscarriage of justice, proves, the risk of prejudice to Petitioner is both genuine and substantial. The action of the Hon. Judge Graber, gives rise to the appearance of impropriety in violation of 28 U.S.C. §455.

A. This Court’s Precedents Required the Court of Appeals to Decide the Merits of a Motion for Disqualification of a Circuit Court Judge Pursuant to 28 U.S.C. §455(a).

The Ninth Circuit has failed to rule on Petitioner's Urgent Amended Motion for Independent Consideration by the Court for the Disqualification of the Hon. Judge Susan Graber Pursuant to 28 U.S.C. § 455. In 1994, the Supreme Court held that "Disqualification is required if an objective observer would entertain reasonable questions about a judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified." Liteky v. U.S., 114 S.Ct. 1147, 1162 (1994). (Section 455(a) "is directed against the appearance of partiality, whether or not the judge is actually biased.") Due process requires recusal where a judge has a direct, personal, substantial, pecuniary interest in the case and where, as an objective matter, the probability of actual bias on the part of the judge is too high to be "constitutionally tolerable." Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2259 (2009). The Court has ruled and has reaffirmed the principle that "justice must satisfy the appearance of justice", Levine v. United States, 362 U.S. 610, 80 S.Ct. 1038 (1960). In the circumstances presented here, appeal is a clearly inadequate remedy, insofar as it is the appeal itself that is obstructed by the Court of Appeals' failure to rule. This manner of thwarting the Court's appellate jurisdiction raises substantial concerns in the mind of any well-informed observer.

V. THE FAILURE OF THE COURT OF APPEALS TO HEED THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE RAISES "GRAVE AND DOUBTFUL QUESTIONS" CONCERNING SUSPENSION OF THE GREAT WRIT AND DUE PROCESS.

The Ninth Circuit's categorical refusal to act to address fraud on the court and to avoid a miscarriage of justice, raises "grave and doubtful constitutional

questions” concerning suspension of the Great Writ in violation of U.S. Const. art. I sec. 9 and, in a separate context, denial of Due Process of Law in violation of the Fifth Amendment. To protect the continuing viability of the Great Writ, the Court cautioned in Lonchar v. Thomas, 517 U.S. at 324, lower courts are bound to follow the established law, and are “not authorize[d] . . . to ignore this body of statutes, rules and precedents.” The lower court’s failure to rule on a case properly before it, fails to heed this caution or the doctrine of constitutional avoidance.

VI. THE SUPREME COURT HAS THE DUTY AND INHERENT AUTHORITY TO ADDRESS FRAUD DIRECTED AT THE COURT’S DECISION-MAKING PROCESS DURING THE 2010 CERTIORARI PROCEEDING.

Here, the fraud perpetrated by the Habeas Prosecutors did not rest upon the steps of the Ninth Circuit Court of Appeals, but advanced into the jurisdiction of the United States Supreme Court—for the corrupt purpose of influencing the Court’s decision making, by creating the *false* impression that Petitioner’s case was “materially” distinguishable from Chambers v. Mississippi, 410 U.S. 284 (1973), on the grounds that “no evidence existed” to corroborate the multiple confessions of a third party to the murder for which Petitioner stood convicted.

A. In Opposing a Petition for a Writ of Certiorari, Habeas Prosecutors Displayed a Reckless Disregard for the Truth by Making Material Misrepresentations as to “Facts” They Knew were Contradicted by Evidence They Possessed but Concealed.

Here, the government’s scheme has spanned some twenty-two plus years, infecting the entire body of the government’s effort—taking hold during the corrupt investigation and, with the aid of prosecutors, spreading throughout the litigation in the State and Federal courts. The record had been falsely depicted and relevant

evidence had been knowingly withheld from the Court. As the newly developed record now demonstrates, Petitioner's case may arguably outweigh the factors identified by the Court in Chambers. It is now known, that at the time of Petitioner's trial, prosecutors knew of at least four [4] first-hand witnesses to Burkhart's confessions, and at least, five [5] second hand witnesses who reported Burkhart's "bragging" to the murder. Most notably, every witness reported to police that Burkhart had directly implicated the State's key prosecution witness, Serena Seidel, (who was dating the victim) as an accessory before and after the crime. Indeed, two corroborating witnesses identified Burkhart from photographic arrays, placing him at the scene and within a convenience store shortly after the crime—refuting any claim of alibi. Both witness's descriptions matched that of Burkhart, specifically with long stringy hair in the back, and, a 911 recording captures a dying declaration of the victim, naming his attacker by first and last name, as James Burkhart.

History reveals another example of fraud directed at the integrity of this Court's decision-making and accomplished through "literally truthful statements" by high government officials. It was discovered only decades after the event. But, it was rightly condemned as a fraud upon this Court because these "literally truthful statements" were intentionally dishonest and deceptive. In Korematsu v. United States, 323 U.S. 214 (1944), the Court affirmed the conviction and internment of Fred Korematsu, an American of Japanese ancestry. In 1983, Korematsu filed a petition for a writ of coram nobis to vacate this conviction based on government

misconduct. That misconduct included evidence that the government's brief in this Court had been deliberately misleading in setting out the facts upon which the government had relied in ordering the evacuation and internment of Japanese-Americans as a "military necessity." The record had been falsely depicted and relevant evidence had been knowingly withheld from the Court. This was sufficient for the Court to issue the writ and vacate Korematsu's conviction.

Not only was the misconduct shockingly egregious and pervasive in Petitioner's case, it was carried about by individuals sworn to protect the public and to preserve justice—by the law enforcement officers who produced after-the-fact sham investigation reports and by certain State prosecutors who co-prosecuted this action in a way that ultimately worked a colossal fraud on two federal courts below, including the United States Supreme Court.

CONCLUSION

If there was ever a case deserving of the full measure of this Court's powers to protect the integrity of our legal system and purge the record of fraud, it is the matter of Petitioner's case before this Court. Petitioner respectfully requests that this Court restore justice by terminating this action and setting aside the Ninth Circuit's decision denying Petitioner habeas corpus relief pursuant to Chambers, and permitting Petitioner to amend his constitutional claims raised in his §2254 Petition.

Respectfully submitted,


TARYN CHRISTIAN, *Pro Se*