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Electronically Filed
THIRD CIRCUIT
3CSP-23-0000003
28-JUL-2024
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Dkt. 133 MTCD

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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
HILO DIVISION
STATE OF HAWAI`I

ALBERT IAN SCHWEITZER, SHAWN SCHWEITZER, Petitioners, vs. STATE OF HAWAI'I, Respondent.	Case No. 3CSP-23-0000003; 3CSP-23-0000017 (Prior Case no: 3PC-99-0000147) MOTION TO PRESERVE EVIDENCE AND COMPEL DISCOVERY RE: JOINT PETITION FOR RELIEF PURSUANT TO H.R.S. CHAPTER 661B; MEMORANDUM IN SUPPORT; DECLARATION OF COUNSEL; EXHIBITS "1"-"11"; NOTICE OF HEARING; CERTIFICATE OF SERVICE MOTION HEARING Date: July 30, 2024 Time: 8:30 AM Judge: Honorable Peter K. Kubota

MOTION TO PRESERVE EVIDENCE AND COMPEL DISCOVERY RE: JOINT PETITION FOR RELIEF PURSUANT TO HRS CHAPTER 661B

Petitioners ALBERT IAN SCHWEITZER ("Ian Schweitzer") by and through his attorneys, JENNIFER BROWN and WILLIAM HARRISON of the Hawai'i Innocence Project and BARRY SCHECK of the Innocence Project (admitted *pro hac vice*), and SHAWN SCHWEITZER by and through his attorneys KEITH SHIGATOMI, and RAQUEL BARILLA of The Innocence Center (admitted *pro hac vice*) hereby moves this Court for an Order to compel the HAWAI'I COUNTY PROSECUTING ATTORNEY and the HAWAI'I COUNTY POLICE DEPARTMENT to preserve all evidence obtained in its investigation of the Dana Ireland murder and Case no. 3PC-99-0000147 and any and all evidence obtained post-conviction in relation to Case nos. 3PC-99-0000147, 3CSP-23-0000003, and 3CSP-23-0000017 from the time of the Dana Ireland murder on December 24, 1991, through the present, as well as any evidence that may be

obtained in the future in relation to the Dana Ireland murder and Case nos. 3PC-99-0000147, 3CSP-23-0000003, and 3CSP-23-0000017 after a hearing on this Motion scheduled for July 30, 2024.

Furthermore, Petitioners hereby moves this Court for an Order to compel the HAWAIʻI COUNTY PROSECUTING ATTORNEY and the HAWAIʻI COUNTY POLICE DEPARTMENT to produce all evidence in their possession in relation to the Dana Ireland murder investigation and Case nos. 3PC-99-0000147, 3CSP-23-0000003, and 3CSP-23-0000017 from the time of the Dana Ireland murder on December 24, 1991, through the present, as well as any evidence that may be obtained in the future in relation to the Dana Ireland murder and Case nos. 3PC-99-0000147, 3CSP-23-0000003, and 3CSP-23-0000017 after a hearing on this Motion scheduled for July 30, 2024.

This Motion is made pursuant to H.R.S. §844D-126, H.R.P.P. Rule 40(g), H.R.C.P. 37(a) and is supported by all of the records and files before this court, the attached Memorandum in Support of this Motion, the Declaration of Counsel, the attached Exhibits "1"-"11", and any other evidence to be produced for the Motion hearing scheduled to be heard on July 30, 2024.

RELEVANT PROCEDURAL BACKGROUND IN SUPPORT OF THIS MOTION

1. On December 24, 1991, someone (referred to as "Unknown Male #1")[1] kidnapped and sexually assaulted Dana Ireland ("Ms. Ireland") and left her badly injured on a fishing trail.

[1] ***The identity of Unknown Male #1 is no longer "unknown."*** The post-conviction investigative efforts of the Petitioners have led to the parties identification of Unknown Male #1's, which was confirmed first through abandoned DNA collection tested with results provided to the parties on on July 1, 2024 and then further confirmed through the DNA testing of a buccal swab of Unknown Male #1's DNA on July 24, 2024. Petitioners will continue to refer to him as Unknown Male #1 in this Motion where applicable and now "Known Male #1" thereafter were applicable. *See* attached Exhibits "5" and "11".

Due to her injuries, Ms. Ireland died on December 25, 1991. Dkt. 3, Joint Stipulated Facts ("JSF")[2] filed January 23, 2023, at ¶ 2.

2. Years later, on October 9, 1997, Albert Ian Schweitzer ("Ian") and Shawn Schweitzer ("Shawn") were indicted for Ms. Ireland's rape, kidnap, and murder.[3] However, based on DNA results, the Hawai'i County Prosecutor's Office dismissed all charges against Ian and Shawn on October 20, 1998. JSF at ¶ 8.

3. In May of 1999, the Prosecution secured a reindictment of Ian and Shawn, based on the false and incentivized statements of a jailhouse informant. JSF at ¶ 9.

4. On February 16, 2000, a jury found Ian guilty of Second-Degree Murder, Kidnapping, and Sexual Assault in the First Degree. Ian was sentenced to a term of: (l) life imprisonment with the possibility of parole for the Second-Degree Murder, (2) 20 years in prison for Kidnapping, and (3) 20 years in prison for Sexual Assault in the First Degree, all terms to run consecutively. JSF at ¶ 13. On May 9, 2000, Shawn pled guilty to manslaughter and kidnapping (by omission) related to Dana Ireland and was sentenced to one year in jail with credit for time served and five years of probation. JSF at ¶ 14.

5. The Hawai'i Supreme Court affirmed Ian's conviction. *State v. Schweitzer*, 103 Hawaii 400 (2004).

6. Ian filed an initial Petition to Vacate, Set Aside or Correct Judgment or to Release Petition pursuant to Hawai'i Rule Penal Procedure Rule 40 on February 3, 2017, and filed

[2] The statement of facts comes from the parties agreed upon Joint Stipulated Facts filed on January 23, 2023. All internal citations in the Joint Stipulate Facts have been omitted in this document.

amended petitions on February 7, 2017, and January 16, 2018. (Case no. 3PRl71-000002). JSF at ¶ 15.

7. In May 2019, Hawai‘i Innocence Project and the Innocence Project entered into a cooperation agreement with the Hawai‘i County Prosecutors to reinvestigate the Dana Ireland murder based on Ian’s claim of being innocent and wrongfully convicted of Ms. Ireland’s murder.

8. On January 23, 2023, Ian filed another H.R.P.P. Rule 40 Petition asserting his actual innocence and pointing to new DNA evidence implicating Unknown Male #1 whose DNA was found on all relevant tested physical evidence, new bite mark evidence, and newly presented tire tread evidence.

9. Hawai‘i County Prosecutors did not dispute this new evidence and at an evidentiary hearing on January 24, 2023, the Court vacated Ian’s convictions based on this new evidence and dismissed the charges against him under 3PC-99-0000147.

10. On April 6, 2023, Shawn filed a H.R.P.P. Rule 40 Petition for Post-Conviction Relief.

11. On October 20, 2023, this Court issued its Finding of Facts and Conclusion of Law vacating Ian’s in 3CSP-23-0000003, pursuant to H.R.P.P. Rule 40 (d), finding that the evidence presented post-conviction that “[t]his Court further concludes that the new DNA and bitemark evidence, newly discovered tire tread evidence, and the recent recantation of Shawn conclusively proves that in a new trial a jury would likely reach a verdict of acquittal.” FOFCL ¶ 6.

12. After further briefing, the Hawai‘i County Prosecutor’s Office dismissed all charges against Shawn on October 23, 2023, for the same reasons it vacated Ian’s convictions on January 24, 2023.

13. Since both Ian and Shawn’s convictions have been vacated, both parties have brought a Petition for Relief and Compensation pursuant to HRS § 661B-1, which is currently before this Court. (Dkt. 127) and scheduled for a hearing on July 30, 2024.

RELEVANT FACTUAL BACKGROUND IN SUPPORT OF THIS MOTION

Post-conviction Investigation Conducted by the Petitioners Led to the Identity of Unknown Male #1 Whose DNA was Found on All Relevant Evidence is Ms. Ireland’s Murder

14. On or about February 7, 2024, Petitioners’ counsel, Barry Scheck, contacted Steve Kramer (“Kramer”) from Indago Solutions[4] to assist Petitioners in identifying Unknown Male #1, whose DNA was recovered on all relevant crime scene evidence collected by the Hawai‘i County Police Department on or around December 24, 1991, the date of Ms. Ireland’s murder.

15. Kramer is a retired FBI attorney and federal prosecutor who led the genetic genealogy team that solved the Golden State Killer case in 2018. Kramer co-founded the FBI Forensic Genetic Genealogy (“FGG”) team which now has over 200 FBI members nationwide and his efforts have helped to solve hundreds of FGG cases. Kramer started Indago Solutions using software that allowed them to automate the FGG method to quickly solve criminal cases with DNA. Kramer agreed to assist Petitioners in the investigation of Unknown Male #1 who was responsible for Ms. Ireland’s murder.

16. On or about February 26, 2024, Kramer notified Petitioners’ Counsel that Indago Solutions had identified a person who they believed could be Unknown Male #1 in Ms. Ireland’s

[4] https://www.indago.ai/

case. Kramer advised that the suspected person was likely Unknown Male #1 based on his genetics, ancestry, age, and address history, among other factors.

17. Specifically, Kramer advised Petitioners' Counsel that in 1991, the suspect he believed was Unknown Male #1, lived less than two miles from where Ms. Ireland's body was located on the Wa'a Wa'a fishing trail. Furthermore, the Facebook social media accounts of the suspect he believed was Unknown Male #1, suggested that he was an avid shore fisherman and likely familiar with the fishing trail in Wa'a Wa'a where Ms. Ireland's body was found. Additionally, the suspect he believed was Unknown Male #1, would have been in his mid-20s at the time of the crime with a small stature and build that would make it likely that the Jimmy-Z's t-shirt would have been an appropriate size.[5]

18. The suspect he believed was Unknown Male #1's Facebook page also showed that he likely owned or had access to a pickup truck in the early 1990s, which was consistent with what witnesses reported seeing at the bicycle collision site and the Wa'a Wa'a fishing trail. As this Court has already determined in vacating Petitioners' convictions for Ms. Ireland's murder, Ian's Volkswagen Bug did not leave the tire tread tracks at the bicycle collision site or the Wa'a Wa'a fishing trail, as previously argued by the State during their trials. It was most likely that a

[5] The Jimmy-Z's t-shirt was found at the fishing trail in Wa'a Wa'a fishing trail. At the time that Petitioners' were charged with Ms. Ireland's murder, the State presented trial testimony that Co-Defendant Frank Pauline had worn this t-shirt when he committed Ms. Ireland's murder. JSF at ¶ 10. However, because this t-shirt was soaked in Ms. Ireland's blood, DNA testing at the time of the trials was not advanced enough to elicit DNA results of who owned and wore the t-shirt at the time of Ms. Ireland's murder. JSF at ¶ 12. Post-conviction DNA testing conducted FACL on behalf of the Petitioners, which was presented as new evidence in Petitioners' H.R.P.P. Rule 40 Petitions, showed that Unknown Male #1 had left his semen on the t-shirt as well as was the habitual wearer of the t-shirt. JSF at ¶ 16. This new DNA evidence on the t-shirt was one of reasons that this Court vacated the Petitioners' convictions for Ms. Ireland's murder, demonstrates their actual innocence, and implicates Unknown Male #1 as being responsible for Ms. Ireland's murder. FOF at ¶ 37, Dkt. 117.

truck or van was involved in Ms. Ireland's murder, a vehicle that the suspect Kramer identified as likely Unknown Male #1 appears to have owned at the time of Ms. Ireland's murder and further evidenced by the fact that the suspect identified as Unknown Male #1 likely lived at or near and likely frequented to fish. *See* JSF at ¶¶ 24-30.

19. In addition, Kramer advised that the DNA retrieved from semen found on Ms. Ireland and other crime scene evidence indicated that Unknown Male #1 was likely to be a male with 80% Filipino ancestry, which was consistent with the suspect that Kramer identified as Unknown Male #1, because his ancestry indicates that he had three Filipino grandparents.

20. Upon learning of this critical investigatory lead, Petitioners' Counsel informed Kramer that he should advise the FBI of his findings, and Kramer contacted the FBI's genetic genealogy team to follow up on the FGG information and independently review Indago's results.

21. A few weeks later, Kramer advised Petitioners' Counsel that the FBI had confirmed Indago's results (the suspect that Kramer had identified as likely being Unknown Male #1) and that they would be working with the Hawai‘i County Police Department ("HCPD") to obtain an abandoned DNA sample from suspected Unknown Male #1, who still resided on Hawai‘i Island and still lived in an area in proximity to the crime scenes. This suspected Unknown Male #1's abandoned DNA sample would be compared against the DNA found on the crime scene evidence in Ms. Ireland's murder to confirm whether or not he was Unknown Male #1.

22. The Forensic Analytical Crime Lab (FACL) had been retained by the Innocence Project to do post-conviction DNA testing in this case. Their work led to the convictions being vacated. When the Hawai‘i County Prosecuting Attorney's Office ("HCPA") informed the Petitioners' Counsel that the HCPD wanted the evidence returned to them, Scheck informed

prosecutors and the court that petitioners would do so but wanted notice and opportunity to be heard on any additional DNA testing on the evidence. The HCPA subsequently gave notice that they were no longer going abide by the Discovery and Cooperation Agreement between the parties because they wanted the continuing investigation to be "cleaner." *See* Petitioners' Exhibit "1", Discovery and Cooperation Agreement between Petitioners Counsel and HCPA; *see also* Petitioners' Exhibit "2", Letter from HCPA requesting to dissolve Discovery and Cooperation Agreement between Petitioners Counsel and HCPA and Exhibit

23. The Hilo police department then asked FACL to do additional DNA testing on the Ireland case. On April 16, 2024, Petitioner told FACL they could not do so because Petitioners believed the Hilo Police department had a conflict of interest and did not trust them. FACL agreed not to do testing on the case. Prosecutors finally agreed to a proposal that the results of any testing performed by FACL in the Ireland case had to be communicated at the same time to petitioners and the prosecution. *See* Petitioners' Exhibit "3", Email from FACL regarding evidence; *see also* Petitioners' Exhibit "4", Email to FACL regarding preservation of evidence.

24. On July 1, 2024, Forensic Analytical Crime Lab ("FACL") notified Petitioners' Counsel that the abandoned DNA from the suspected Unknown Male #1 matched the Unknown Male #1's DNA from relevant evidence collected from the crime scene. FACL also sent this information to the HCPA. Exhibit "5", email from FACL to parties regarding results of the abandoned DNA collection of suspected Unknown Male #1.

25. At a July 2, 2024, confidential status conference with this Court, Petitioners' Counsel, over the objection of HCPAs Shannon Kagawa and Michael Kagami, requested the Court order that the HCPD and the HCPA follow best practices when investigating suspected Unknown Male #1's involvement in Ms. Ireland's murder. Specifically, Petitioners' Counsel

requested that the HCPD and the HCPA record any search or interrogation of now identified Unknown Male #1, that any warrant go through this Court, and also requested that the Hawai‘i FBI assist in the investigation. The HCPA Michael Kagami, although he agreed recording everything is the best practice, denied having the ability to instruct the HCPD on how to conduct their investigation. *See* Exhibit “6”, email to HCPA regarding best practices to adhere to regarding suspected Unknown Male #1.

26. During the July 2, 2024, confidential status conference, Petitioners’ Counsel informed this Court that the Petitioners’ legal team had intentionally shielded themselves from knowing the name of suspected Unknown Male #1.

27. At a July 2, 2024, confidential status conference with this Court, Schweitzers’ Counsel informed the Court of the developments regarding the identity of suspected Unknown Male #1 and asked HCPAs Shannon Kagawa and Mike Kagami to assure us best practices that would be followed in the arrest of Unknown Male #1, the search of his home, and any interviews conducted by law enforcement. We specifically asked that the search and arrest be led by the Hawai‘i FBI agent who had assisted Detective Morimoto in doing the covert collection, or at the very least that she would be consulted and present. We specifically emphasized that we thought the HCPD had a conflict of interest and that in addition to the assistance of the Hawai‘i FBI agent the Attorney General’s office should be involved to assure the fairness and independence of the final stage of the investigation of Unknown Male #1. We requested that the search and any interview be videotaped, and no leading questions be asked on inducements offered to Unknown Male #1 to incriminate petitioners. We explicitly warned, based on advice from Stephen Kramer and Petitioners’ Counsel, Mr. Scheck’s personal knowledge of how arrests and searches are done in these situations that all efforts be made to isolate Unknown Male #1 from close associates so

that they could be separately interviewed, and measures be taken to prevent him from fleeing, destroying evidence, or committing suicide.

28. HCPA Mike Kagami said that he thought our suggestions were "good ideas," but the prosecutors had no authority to tell HCPD what to do. HCPA Shannon Kagawa agreed. Petitioners counsel expressed frustration and astonishment at that answer, given the conflict-of-interest issues, and told them they were leaving us no choice and we would have to reach out to the United States Attorney's office and/or the Attorney General's office if they would not stipulate to getting the police department to abide by best practices. We also told the prosecutors and the court that we had honored HCPA Shannon Kagawa's request not to tell our clients that Unknown Male #1 had been identified or his name. Indeed, we told everyone that as of that date we deliberately had asked Kramer not to provide the name of Unknown Male #1. *See* Petitioners' Exhibit "7", email to HCPA regarding Stipulation.

29. On July 8, 2024, Petitioners' Counsel learned someone leaked to the media information that that Unknown Male #1 had been identified. We immediately notified HCPA Shannon Kagawa about the leak, and she confirmed that she had also been approached by the media to confirm that rumor. Petitioners' Counsel became increasingly concerned that the identity of Unknown Male #1 could be released to the public before the HCPD and or the Hawai‘i FBI could obtain a warrant for Unknown Male #1's arrest. *See* Petitioners' Exhibit "8", letter to HCPA regarding the leak to the media.

30. On July 9, 2024, Petitioners' Counsel Keith Shigetomi talked to HCPA Kagami about our concerns about the leak. HCPA Kagami said he would follow up on this. On this same day, Hawai‘i Innocence Project Co-Directors Rick Fried and Kenneth Lawson, concerned about the conflict of interest, reached out to United States Attorney Clare Connors to request that the

federal government take over the investigation. She responded via e-mail saying her first Assistant, Larry Tong, would be in touch.

31. On July 10, 2024, Kenneth Lawson called Assistant US Attorney Larry Tong. Tong was aware a Hawai‘i FBI agent had been assisting HCPD in their investigation into suspected Unknown Male #1 and were confident that Hawai‘i FBI agent’s participation would prevent any improprieties from occurring and would report any misconduct by HCPD. Tong told Lawson, because of this, his office will not get involved in the investigation at this time. He recommended we call the Attorney General’s Office to discuss our concerns.

32. On July 11, 2024, Schweitzers’ legal team sent a detailed letter to prosecutors Kagawa and Kagami memorializing what happened in the July 2, 2024, conference with the Court. Exhibit “8”. At that conference, we reiterated the guidelines we wanted the HCPA’s office to follow since Unknown Male #1 had been identified. Specifically, we noted:

a. Preserve all police reports, notes, and any other documentary evidence (including audio and visual evidence) generated at any point in time during the Dana Ireland murder investigation in the past or moving forward;

b. Preserve all physical evidence, forensic evidence, evidence testing results, documentary evidence regarding the same generated at any point in time during the investigation in the past or moving forward;

c. Preserve all physical evidence, forensic evidence, evidence testing results, documentary evidence regarding Unknown Male #1 including any evidence obtained prior to and during the process of identifying Unknown Male #1 during the Dana Ireland murder investigation in the past or moving forward;

d. Video tape the execution of any search warrant on the home or other property of Unknown Male #1, use body cam video at his arrest, and videotape any interrogation from Miranda warnings to the end of interview and videotape any subsequent interviews;

e. Preserve a chain of custody for all evidence; and,

f. Document and preserve all communications of any kind between members of law enforcement, communications with witnesses, potential suspects, and anyone contacted as part of the investigation.

See Exhibit "8".

33. In that letter, we also outlined very specifically why we thought the HCPD and the HCPA office had an actual or apparent conflict of interest in conducting the investigation of suspected Unknown Male #1. Exhibit "8". Specifically, we made the following points:

a. First, since the hearings that resulted in the convictions of Petitioners being vacated, HCPD issued statements reflecting their belief that Unknown Male #1 was a "fourth perpetrator" in Ms. Ireland's murder along with the Schweitzer brothers and Frank Pauline. This statement demonstrates that despite the Petitioners' exonerations, which were reached during our Discovery and Cooperation Agreement (Ex. "1") with HCPA, HCPD is in stark disagreement with HCPA and holding fast to the unproven belief that not only were Petitioners' and Defendant Frank Pauline involved in Ms. Ireland's murder, that there was also another "fourth perpetrator" (presumably Unknown Male #1) responsible for the crime. HCPD held steadfast to this mistaken belief and going as far as to make public statements to the press continuing to incriminate the Schweitzers and Frank

Pauline and support their "fourth person" theory despite our clients' their exonerations.

b. Second, Lincoln Ashida, who was one of the HCPAs in the Petitioners' criminal trials decades ago, recently told Hawai'i News Now that despite Ian's exoneration "'another trial, prosecution and conviction is possible' against Schweitzer based upon other admissible and incriminating evidence." In response to Shawn's exoneration, Ashida gave a statement to Honolulu Civil Beat, that "we stand by every fact that is already in the record, that has not been altered or changed for the past 23 years." Ashida further doubled down on the correctness of the convictions stating "[t]here" is no evidence to substantiate allegations against any of the prosecutors or investigators who worked on these cases."

c. Third, based on the evidence gathered in our Discovery and Cooperation Agreement (Ex. "1") and the documents provided by the HCPA indicate there is substantial evidence that Ashida made a materially false representation to the court and the public at the allocution to buttress a weak case based on jailhouse informant testimony and undermined by rounds DNA testing excluding the Petitioners. Mr. Ashida had close working relationships with a number of former colleagues in HCPA as well as HCPD. As we all know, Petitioner Shawn ultimately passed a polygraph administered by a respected polygrapher during our reinvestigation, which was recorded and contains a full set of charts. COL, Dkt. 117 at ¶ 6.

d. Lastly, given the undisputed DNA results and the fact that suspected Unknown Male #1 has been identified, there is good reason to believe that HCPD gave

> Pauline information to convict the Petitioners, a fact that Pauline testified to at his trial. Similarly, there is reason to believe that HCPD, Mr. Ashida, or others gave jailhouse informants John Gonsalves and Michael Ortiz information in an effort to convict the Petitioners. The circumstances leading to their involvement in the Petitioners' convictions could reveal serious constitutional and civil rights violations as well as potential criminal conduct. Our goal in relaying the information to HCPA was not to make any accusations against their current office, but to highlight the fact that there is indeed a past and very present threat of more false information getting leaked or fed to suspected Unknown Male #1 in HCPD's investigation, especially if influenced by any parties that had prior involvement in the wrongful convictions of Petitioners. *See* Exhibit "8".

34. On July 15, 2024, at 10:00 a.m., Petitioners' Counsel and HCPA's Kagawa and Kagami had a video conference to meet and confer on the issues outlined in the July 11, 2024, letter. Exhibit "8". Petitioners' Counsel reiterated our concerns and requested the Hawai‘i FBI agent lead the investigation into suspected Unknown Male #1 and that they work with the Attorney General's Office. HCPA Kagami said he would call the Attorney General's office to discuss our request and concerns.

35. In an effort to protect the integrity of the investigation, on July 15, 2024, Petitioners' Counsel sent an email to Attorney General Lopez and Criminal Justice Division Administrator Goto, expressing a desire to have them involved in the investigation to ensure the investigators followed best practices. We copied prosecutors HCPA Kagawa and Kagami on the email. *See* Exhibit "9", email to the Attorney General.

36. On July 19, 2024, in response to our July 15, 2024, e-mail, Anne Lopez sent Petitioner's counsel a letter stating:

> "I share the Hawaii Innocence Project's desire to see that the collection and preservation of statements and evidence in furtherance of the investigation of Unknown Male #1, be handled with all possible diligence and fairness. Pursuant to your request that the Department of the Attorney General intervene in the investigation into Unknown Male #1, I have contacted Hawaii County Police to make sure they are aware of your specific concerns and proposals. Based on my discussions, I am assured that the Hawaii County Police Department is capable of handling the investigation of Unknown Male #1, and that they are committed to doing so in a thorough and impartial manner." *See* Exhibit "10".

37. On July 19, 2024, on the same day the Attorney General's office sent the above letter (referenced as Exhibit "10"), unbeknownst to Petitioners' Counsel at the time, HCPD collected DNA via buccal swabs from suspected Unknown Male #1 and sent it to FACL to be compared to the abandoned DNA sample of the suspected Unknown Male #1 that had already been collected and submitted for DNA testing on July 1, 2024. The FACL received the reference sample of suspected Unknown Male #1 on the buccal swabs on July 23, 2024, and conducted DNA testing on this sample.

38. On July 24, 2024, FACL sent Petitioners' Counsel a report confirming that suspected Unknown Male #1's DNA matches the prior surreptitious sample, and all DNA evidence collected and tested from the crime scene evidence for Ms. Ireland's murder. *See* Exhibit "11", original filed under seal and redacted report filed publicly. Petitioners' counsel was deeply disturbed that it appears from this report that when HCPD Detective Moromoto took the swab, suspected Unknown Male #1 was not in the custody of HCPD nor were his premises searched.

39. Upon learning of these DNA results that now identified Unknown Male #1 as being responsible for Ms. Ireland's murder, Petitioners' Counsel requested an immediate

confidential chambers conference with this Court which was held on July 25, 2024. Petitioners' Counsel again asked the HCPA's Shannon Kagawa and Michael Kagami to notify us and this Court if Unknown Male #1 (hereafter referred to as "Known Male #1) was arrested and in custody of the HCPD, and HCPA's Kagawa and Kagami refused to answer Petitioners' Counsels questions, stating that it was an ongoing investigation.

Now Known Male #1 is Presumed Dead by Suicide After his DNA Sample was Taken by HCPD and Before he was Brought to Justice for Ms. Ireland's Murder

40. On July 26, 2024, Kenneth Lawson, Co-Director of the Hawai'i Innocence Project, contacted the Honolulu Medical Examiner's office to determine if Known Male #1 was still alive, as there was no record of Known Male #1's arrest in any public database. Lawson was referred to the Medical Examiner's office in Hilo, which then confirmed that Known Male #1 was in their morgue and had died by an apparent suicide on July 23, 2024.

41. On July 26, 2024, Petitioners' Counsel requested an emergency chambers conference to inform this Court that now Known Male #1 had apparently committed suicide. Petitioners' Counsel asked the HCPA's Shannon Kagawa and Michael Kagami (the latter of whom appeared by phone), if they were aware that now Known Male #1 had committed suicide and when they were informed of this information. Prosecutors Kagawa and Kagami did not appear shocked or surprised by this information and stated that they could not confirm or deny any information about now Known Male #1 and his apparent suicide, saying that it was an ongoing investigation. When asked what is the "ongoing investigation" that they were referring to because both Ms. Ireland and now Known Male #1 are both deceased, they again refused to answer.

42. This Court then instructed Petitioners' Counsel to file a Motion to Compel Discovery to HCPA and HCPD, requiring them to produce any relevant information regarding

Ms. Ireland's murder, especially the facts and circumstances surrounding their actions in the investigation of now Known Male #1 and his subsequent suicide.

Any Exculpatory Statements Made by Known Male #1 Are Highly Relevant to Petitioners' Actual Innocence Petition And Refutes the Theory that Petitioners Acted as Co-Conspirators

43. Petitioners have been excluded as sources of the DNA recovered from all probative items collected from the crime scene of Ms. Ireland's murder. JSF at ¶ 19. This Court vacated Petitioners' convictions given the overwhelming proof of actual innocence. *See* COL, Dkt. 117.

44. After Petitioners were exonerated, former and current individuals at the HCPA's Office and the HCPD have made public statements to the media regarding their false and unfounded belief and contending that Petitioners and Pauline were guilty, that nothing improper was done in the investigation, and that an unapprehended fourth perpetrator, now Known Male #1, committed the kidnapping, rape, and murder with Petitioners. Inducing now Known Male #1 to flee, destroy evidence, or commit suicide would impede an investigation of police and prosecutorial misconduct in this case. But now Known Male #1 is still the *only* person whose DNA conclusively establishes his presence at the crime scenes of Ms. Ireland's murder. Any exculpatory statements or other evidence provided to the HCPA and HCPD would refute the theory that Petitioners were involved with now Known Male #1 in Ms. Ireland's murder as co-conspirators. The HCPA and HCPD are entitled to their theory of the case, but justice requires an impartial and proper investigation where best practices are utilized.

45. Petitioner's shared their investigative leads which resulted in the identification of now Known Male #1 with the understanding that the HCPA and HCPD were dedicated to pursuing a cooperative effort towards uncovering the truth about Ms. Ireland's murder and seeking justice for Petitioners and the Ireland family. But their handling of the investigation into

now Known Male #1 reflects a complete abandonment of best practices and basic fundamental principles of justice.

46. Counsel for Petitioners did everything in their power to find now Known Male #1 and investigate that case fairly and impartially with the assistance of the FBI and the leading experts in Forensic Genetic Genealogy cases. We urged them repeatedly to get arrest and search warrants to prevent now Known Male #1 from fleeing, destroying evidence, or killing himself. Frankly, any experience homicide investigator with the DNA evidence provided to the prosecutors and police in this matter, even if it were not provided by genetic genealogy but a conventional CODIS hit, would have sought an arrest and search warrant before getting a swab to confirm the STR DNA profile that was covertly collected. Their failure to do so is deeply disturbing.

47. Specifically, the HCPA refused to confirm if the HCPD had executed a search and arrest warrant for now Known Male #1 so that he could not flee, destroy evidence, or take his own life his after DNA was collected, stating that their definition of best practices differed but would not confirm or deny what procedures were followed.

48. If now Known Male #1 had been taken into custody and put on suicide watch after his DNA was collected, he would still be alive. If now Known Male #1 was still alive, the circumstances surrounding Ms. Ireland's murder could have been further investigated and revealed. His apparent suicide has irreparably hampered all interest in Petitioners' ability to uncover the truth and receive closure after the decades that they served wrongfully convicted of Ms. Ireland's murder.

49. The HCPA and the HCPD should not be permitted to conceal their egregious disregard for best practices and common sense under the guise of protecting an "ongoing investigation."

50. Petitioners, Ms. Ireland's family, and the public have every right to know all of the circumstances surrounding the collection of now Known Male #1's DNA on July 19, 2024, his subsequent suicide on July 24, 2024, and whether he provided any information regarding his involvement Ms. Ireland's murder and the wrongful conviction of the Petitioners.

51. Petitioners' hereby move to compel disclosure of documents, tapes (audio and video), photographs, emails, digital information, or any other physical evidence obtained by HCPD or the Hawai'i FBI that have been gathered since February 7, 2024 when Stephen Kramer, of Indago Solutions, forwarded information from his genetic genealogy investigation identifying suspected Unknown Male #1 that tend to show that now Known Male #1 committed the assault, kidnapping, sexual assault, and murder of Dana Ireland on December 24, 1991. This request for this Court to compel the production of documents and things includes, but is not limited to the following:

a. Any tapes (video or oral), emails, or written communications concerning the taking of a swab now Known Male #1 on July 19, 2024, including everything said by anyone to now Known Male #1 before, during, and after the swabbing; what he said before, during and after the swabbing; where the swabbing took place, surveillance of now Known Male #1 before the swabbing took place and afterwards.

b. All plans and communications, written and oral, about the decision to not to follow the proposed best practices petitioners suggested to prosecutors that police

seek an arrest warrant and search warrant apprehend now Known Male #1 after it was confirmed by the covert collection of his DNA from a fork that he was the contributor of incriminating biology from the crime scene, including who made the decision not to arrest now Known Male #1 or execute a search warrant before or after the swabbing;

c. Any and all information gathered that shows a relationship between now Known Male #1 and either Ian Schweitzer, Shawn Schweitzer, or Frank Pauline;

d. All surveillance (reports, photos, videos, over hearings of voice communications, or digital communications) of now Known Male #1;

e. All interviews of family members, friends, or others concerning now Known Male #1 before or after February 7, 2024;

f. Any and all information apart from DNA testing tending to show now Known Male #1 committed the assault, rape, and murder of Dana Ireland by himself or acting in concert with individuals other than Petitioners;

g. When and how did Hilo police or Hilo prosecutors learn about the death of now Known Male #;

h. Whether or now Known Male #1's home, place of work, or vehicles ever searched or impounded and the results of this search;

i. Whether now Known Male #1"s phones, computers, or other devices recovered or searched and the results of this search;

j. All communications, written, digital, oral between HCPA and Lincoln Ashida concerning the re-investigation of Petitioners' convictions or the court's decision to vacate that convictions;

k. The autopsy report on the death of now Known Male #1 and all investigative reports concerning whether the manner of death was suicide or homicide;

l. Any and all other information discovered during the investigation of now Known Male #1 that tends to exculpate petitioners.

m. Preservation of all police reports, notes, and any other documentary evidence (including audio and visual evidence) generated at any point in time during the Dana Ireland murder investigation in the past or moving forward;

n. Preservation of all physical evidence, forensic evidence, evidence testing results, documentary evidence regarding the same generated at any point in time during the investigation in the past or moving forward;

o. Preservation of all physical evidence, forensic evidence, evidence testing results, documentary evidence regarding now Known Male #1 including any evidence obtained prior to and during the process of identifying now Known Male #1 during the Dana Ireland murder investigation in the past or moving forward;

p. Preserve a chain of custody for all evidence; and,

q. Document and preserve all communications of any kind between members of law enforcement, communications with witnesses, potential suspects, and anyone contacted as part of the investigation.

r. Any statements made by now Known Male #1 that incriminate himself are highly relevant to Petitioners' Actual Innocence Petition.

s. Any statements by now Known Male #1 about the guilt or innocence of Petitioners, or the absence of any statements about the guilt or innocence of Petitioners is relevant to Petitioners' Actual Innocence petition.

t. Any evidence that HCPD and HCPA knowingly, recklessly, or negligently allowed now Known Male #1 to remain at large after swabbing him for DNA so that he could flee, destroy evidence, or commit suicide is relevant to Petitioners' Actual Innocence claim.

DATED: Honolulu, Hawai‘i, July, 28, 2024,

/s/ Jennifer L. Brown
JENNIFER BROWN, #10885
WILLIAM A. HARRISON, #2948
BARRY SCHECK, #1634765 (New York)*

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ALBERT IAN SCHWEITZER
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/s/ Keith Shigetomi
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Attorneys for Petitioner
SHAWN SCHWEITZER
**Admitted Pro Hac Vice*

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
HILO DIVISION
STATE OF HAWAI`I

ALBERT IAN SCHWEITZER, SHAWN SCHWEITZER, Petitioners, vs. STATE OF HAWAI'I, Respondent.	Case No. 3CSP-23-0000003; 3CSP-23-0000017 (Prior Case no: 3PC-99-0000147) MEMORANDUM IN SUPPORT OF MOTION TO PRESERVE EVIDENCE AND COMPEL DISCOVERY RE: JOINT PETITION FOR RELIEF PURSUANT TO H.R.S. CHAPTER 661B MOTION HEARING Date: July 30, 2024 Time: 8:30 AM Judge: Honorable Peter K. Kubota

MEMORANDUM IN SUPPORT OF MOTION TO PRESERVE EVIDENCE AND COMPEL DISCOVERY RE: JOINT PETITION FOR RELIEF PURSUANT TO HRS CHAPTER 661B

Under the landmark case *Brady v. Maryland* (1963) 373 U.S. 83, the United States Supreme Court held that the suppression by the prosecution of evidence favorable to the accused violates due process where the evidence is *material to guilt* or punishment, regardless of the good faith or bad faith of the prosecution. *Domingo v. State*, 76 Haw. 237, *State v. Mark*, 120 Haw. 499, *State v. Diaz*, 100 Haw. 210, *State v. Alkire*, 148 Haw. 73. In *United Staes v. Bagley*, the United States Supreme Court explained evidence is "material only if there is a reasonable probability that, had the evidence been disclosed to the defense, *the result of the proceeding* would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

The Hawai‘i Rules of Penal Procedure (H.RP.P.) Rule 16 also outlines the specific materials that must be disclosed by the prosecutor once the case is in the trial phase. *State v. Moses*, 107, Haw. 282, *State v. Kwak*, 80 Haw. 291. The primary focus of *Brady* and related jurisprudence is on ensuring a fair trial and due process for the defendant, not on pre-charge investigations. Although at first glance it may appear that in Hawai‘i, the duty to disclose *Brady* evidence is primarily tied to the trial process, the Hawai‘i Rule of Professional Conduct (H.R.P.C.) 3.8 extends this obligation. Under these rules, the prosecutor or other government lawyer is required to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to *negate the guilt* of the accused" except when the prosecutor seeks a protective order from a court. H.R.P.C. 3.8(b). Further, section 3.8, subsection (c) states that when "a prosecutor knows of new credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted" the prosecutor shall disclose the evidenced to the court or to the defense." 3.8(b)(1)-(2). Indeed, "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the convictions of innocent persons." H.R.P.C, Rule 3.8, Comment 1.

Although these rules do not explicitly mandate the disclosure of *Brady* evidence during the investigative phase before charges are filed, this procedural posture of this case does require the government disclose potentially exculpatory evidence to Petitioners' counsel. First, the investigative phase of this case is occurring against a suspect who we now know to be deceased. Since Petitioners were once convicted of Ms. Ireland's murder, their convictions have been

vacated, but this vacatur was made without prejudice, leaving the possibility that the prosecution may seek to recharge them. Indeed, as discussed in more detail *supra* in the Petitioners' Motion, both current and former prosecutors from the Hawai‘i County Prosecuting Attorney's Office have made statements implying they believe Petitioners were involved in Ms. Ireland's murder and the mistaken belief that Unknown Male #1 was the fourth perpetrator. Any information, especially information that is required to be disclosed under *Brady* and the H.R.P.C. ethical rules must be turned over to Petitioners because the Hawai‘i County Prosecuting Attorneys seek to use this evidentiary hearing to contest actual innocence, as evidenced by their opposition to Petitioners' Petition for a finding of actual innocence and compensation under H.R.S. 661B. *See* Prosecutor Kagawa's Memorandum in Opposition filed July 26, 2024, Dkt. 130.

In conclusion, not granting Petitioners' Motion to Preserve and Compel Discovery and requiring the Hawai‘i County Prosecuting Attorney's Office and the Hawai‘i County Police Department to turn over the discovery that Petitioners request, may change the results and outcome of this proceeding, as well as any future proceeding as it relates compensation under H.R.S. 661B, depending on how this Court rules on their Petition. Thus, the Hawai‘i County Prosecuting Attorney's Office have a duty to disclose favorable evidence as the posture of this case is one that well beyond the investigative phase. The upcoming hearing on July 30, 2024, is a proceeding involving an assessment of the Petitioners' actual innocence and a potential hearing on what compensation the Petitioners may be entitled to under H.R.S. 661B, and without the requested discovery, the outcome of this proceeding may be severely and unfairly impacted.

DATED: Honolulu, Hawai‘i, July, 28, 2024,

/s/ Jennifer L. Brown
JENNIFER BROWN, #10885
WILLIAM A. HARRISON, #2948
BARRY SCHECK, #1634765 (New York)*

Attorneys for Petitioner
ALBERT IAN SCHWEITZER
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/s/ Keith Shigetomi
KEITH S. SHIGETOMI, #3380
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Attorneys for Petitioner
SHAWN SCHWEITZER
**Admitted Pro Hac Vice*

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
HILO DIVISION
STATE OF HAWAI`I

ALBERT IAN SCHWEITZER, SHAWN SCHWEITZER, Petitioners, vs. STATE OF HAWAI'I, Respondent.	Case No. 3CSP-23-0000003; 3CSP-23-0000017 (Prior Case no: 3PC-99-0000147) DECLARATION OF COUNSEL MOTION HEARING Date: July 30, 2024 Time: 8:30 AM Judge: Honorable Peter K. Kubota

DECLARATION OF COUNSEL

I, Jennifer Brown, declare as follows:

1. I am one of the attorneys representing Petitioners in this case.

2. I can testify to the following based on my own personal knowledge, except otherwise indicated, in which case my testimony is based on information and belief.

3. Attached hereto as Exhibit "1" is a true and correct copy of the Discovery and Cooperation Agreement between Petitioners' Counsel and HCPA.

4. Attached hereto as Exhibit "2" is a true and correct copy of the letter from HCPA requesting to dissolved the Discovery and Cooperation Agreement between Petitioners' Counsel and HCPA.

5. Attached hereto as Exhibit "3" is a true and correct copy of an email from FACL regarding preservation of DNA evidence.

6. Attached hereto as Exhibit "4" is a true and correct copy of to FACL regarding Petitioners' request that this Court intervene regarding the preservation of DNA evidence.

7. Attached hereto as Exhibit "5" is a true and correct copy of the email from FACL that the abandoned DNA collected from suspected Unknown Male #1 was a match to the DNA profile in Ms. Ireland's murder.

8. Attached hereto as Exhibit "6" is a true and correct copy of Petitioners' Counsel's email to HCPA regarding best practices.

9. Attached hereto as Exhibit "7" is a true and correct copy of Petitioners' Counsel's email to HCPA regarding stipulating to best practices.

10. Attached hereto as Exhibit "8" is a true and correct copy of Petitioners' Counsel's email to HCPA regarding the media leak and best practices.

11. Attached hereto as Exhibit "9" is a true and correct copy of Petitioners' Counsel's email to the Hawai‘i Attorney General.

12. Attached hereto as Exhibit "10" is a true and correct copy of the letter received by Petitioners' Counsel's from the Hawai‘i Attorney General.

13. Attached hereto as Exhibit "11" is a true and correct copy of FACL's lab report confirming the identity of now Known Male #1.

I declare under penalty of perjury of the laws of the United States and the State of Hawai‘i that the foregoing is true and correct.

DATED: Honolulu, Hawai‘i, July, 28, 2024,

/s/ Jennifer L. Brown
JENNIFER BROWN, #10885
WILLIAM A. HARRISON, #2948
BARRY SCHECK, #1634765 (New York)*

Attorneys for Petitioner

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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
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STATE OF HAWAI`I

ALBERT IAN SCHWEITZER, SHAWN SCHWEITZER, Petitioners, vs. STATE OF HAWAI'I, Respondent.	Case No. 3CSP-23-0000003; 3CSP-23-0000017 (Prior Case no: 3PC-99-0000147) NOTICE OF HEARING MOTION HEARING Date: July 30, 2024 Time: 8:30 AM Judge: Honorable Peter K. Kubota

NOTICE OF HEARING

To: KELDEN WALTJEN
SHANNON KAGAWA
MICHAEL KAGAMI
Office of the Hawai'i County Prosecuting Attorney
655 Kilauea Ave
Hilo, HI 96720

Attorneys for Respondent
STATE OF HAWAI'I

NOTICE IS HEREBY GIVEN that Petitioners' "Motion to Preserve Evidence and Compel Discovery Re: Joint Petition for Relief Pursuant to H.R.S. Chapter 661B" shall come for a hearing before the Honorable Peter K. Kubota, Judge of the above-entitled Court, in his courtroom in the Hale Kaulike 777 Kilauea Avenue Hilo, Hawai'i 96720-4212, on July 30, 2024 at 8:30 A.M., as previously scheduled by this court.

DATED: Honolulu, Hawai'i, July, 28, 2024,

/s/ Jennifer L. Brown
JENNIFER BROWN, #10885

WILLIAM A. HARRISON, #2948
BARRY SCHECK, #1634765 (New York)*

Attorneys for Petitioner
ALBERT IAN SCHWEITZER
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/s/ Keith Shigetomi
KEITH S. SHIGETOMI, #3380
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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
HILO DIVISION
STATE OF HAWAI`I

ALBERT IAN SCHWEITZER, SHAWN SCHWEITZER, Petitioners, vs. STATE OF HAWAI'I, Respondent.	Case No. 3CSP-23-0000003; 3CSP-23-0000017 (Prior Case no: 3PC-99-0000147) CERTIFICATE OF SERVICE MOTION HEARING Date: July 30, 2024 Time: 8:30 AM Judge: Honorable Peter K. Kubota

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached "Motion to Preserve Evidence and Compel Discovery Re: Joint Petition for Relief Pursuant to H.R.S. Chapter 661B, Memorandum in Support of Motion, Declaration of Counsel, Exhibits '"1"-"11", and Notice of Hearing" was duly served upon the following parties listed below via electronic filing:

KELDEN WALTJEN
SHANNON KAGAWA
MICHAEL KAGAMI
Office of the Hawai'i County Prosecuting Attorney
655 Kilauea Ave
Hilo, HI 96720

Attorneys for Respondent
STATE OF HAWAI'I

DATED: Honolulu, Hawai'i, July, 28, 2024,

/s/ Jennifer L. Brown
JENNIFER BROWN, #10885
WILLIAM A. HARRISON, #2948

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