

**Electronically Filed
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NO. SCPW-24-0000537

IN THE SUPREME COURT OF THE STATE OF HAWAII

HAWAII POLICE DEPARTMENT, COUNTY OF HAWAII,)	ORIGINAL PROCEEDINGS
)	CASE NOS. 3CSP-23-0000003; 3CSP-23-0000017
Petitioner.)	
)	PETITION FOR WRIT OF MANDAMUS
vs.)	
)	THIRD CIRCUIT COURT
THE HONORABLE PETER K. KUBOTA, Judge of the Circuit Court of Third Circuit, State of Hawaii,)	HONORABLE PETER K. KUBOTA JUDGE
)	
Respondent Judge.)	
)	
and)	
)	
ALBERT IAN SCHWEITZER; SHAWN SCHWEITZER; STATE OF HAWAII,)	
)	
Respondents.)	
_____)	

RESPONDENT SHAWN SCHWEITZER'S AND
RESPONDENT ALBERT IAN SCHWEITZER'S JOINT SUPPLEMENTAL BRIEFING

and

CERTIFICATE OF SERVICE

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IN THE SUPREME COURT OF THE STATE OF HAWAII

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COUNTY OF HAWAII,)	3CSP-23-0000017
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Judge of the Circuit Court of)	HONORABLE PETER K. KUBOTA
Third Circuit, State of Hawaii,)	JUDGE
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Respondent Judge.)	
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SCHWEITZER; STATE OF HAWAII)	
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I

FACTS

On May 20, 1999 Albert Ian Schweitzer (Ian) and Shawn Schweitzer (Shawn) were indicted in State of Hawaii vs. Albert Ian Schweitzer and Shawn Schweitzer, Case No. 3PC99000147 and charged in Count I: Murder in the Second Degree, Count II: Kidnapping and Count III: Sexual Assault in the First Degree. The case dealt with the December 24, 1991 incident concerning Dana Ireland. On April 17, 2000, pursuant to a plea agreement, Shawn pled guilty in Count I, to Manslaughter (by omission) and in Count II, to Kidnapping (class B felony, by omission). On April 24, 2000, after being found guilty as charged by a jury, Ian was sentenced in Count I, to life imprisonment with the possibility of parole, in Count II, to 20 years in prison and in

Count III, to 20 years in prison, all terms to be served consecutively. Mittimus was issued forthwith. On May 9, 2000, Shawn was sentenced to five years probation with a term and condition of probation that he serve a year in prison. Due to his pre-trial confinement, Shawn served more than one year in prison.

On January 23, 2023, Ian filed Petition to Vacate Judgment and Release Albert Ian Schweitzer from Custody, in part, on the grounds of newly discovered evidence (in 3CSP-23-0000003). After being orally granted, on October 20, 2023, Findings of Fact, Conclusions of Law Granting Petition to Vacate, Set Aside and to Release Albert Ian Schweitzer from Custody was filed.

On April 6, 2023, Shawn Schweitzer filed Petition to Vacate Judgment seeking to Vacate the Judgment in Case No. 3PC99000147 on the grounds of newly discovered evidence or in the alternative to allow him to withdraw his plea (in 3CSP-23-0000017). On October 24, 2023, the State and Shawn entered into and filed Stipulation to Allow Withdrawal of Guilty Plea and to Vacate Judgment. On October 25, 2023, the State's Motion for Nolle Prosequi Without Prejudice as to All Counts was granted.

Both Schweitzers filed a Joint Petition for Relief Pursuant to HRS Chapter 661B, seeking a finding of "actual innocence."

The Hawaii Supreme Court has requested supplemental briefing on Hawaii Rules of Penal Procedure, Rule 40(c)(3); Hawaii Revised Statute Section 661B-2(a)-(b), Hawaii Rules of Civil Procedure, Rule 26 and Hawaii Rules of Evidence, Rule 501.

II

ARGUMENT

A. Rule 40, Hawaii Rules of Penal Procedure.

Ian filed his Petition to Vacate, Set Aside, and to Release Albert Ian Schweitzer from Custody pursuant to Rule 40, Hawaii Rules of Penal Procedure (HRPP). Shawn filed his Petition to

Vacate Judgment pursuant to Rule 40, HRPP. Rule 40, HRPP states, in relevant part:

(a) Proceedings and grounds. The post-conviction proceeding established by this rule shall encompass all common law and statutory procedures for the same purpose, including habeas corpus and coram nobis, provided that the foregoing shall not be construed to limit the availability of remedies in the trial court or on direct appeal. Said proceeding shall be applicable to judgments of conviction and to custody based on judgments of conviction, as follows:

(1) From judgment. At any time but not prior to final judgment, any person may seek relief under the procedure set forth in this rule from the judgment of conviction, on the following grounds: . . .

(iv) that there is newly discovered evidence;

or

(v) any ground which is a basis for collateral attack on the judgment; . . .

Ian's Petition sought to vacate his conviction, in part, on newly discovered evidence. Shawn's Petition sought to vacate his conviction in Case No. 3PC99000147 based on newly discovered evidence or in the alternative to withdraw his guilty plea. Rule 32(d), HRPP, provides:

A motion to withdraw a plea of guilty or nolo contendere may be made before sentenced is imposed or imposition of sentence is suspended; provided that, to correct manifest injustice the court, upon a party's motion submitted no later than ten (10) days after imposition of sentence, shall set aside the judgment of conviction and permit the defendant to withdraw the plea. At any later time, a defendant seeking to withdraw a plea of guilty or nolo contendere may do so only by petition pursuant to Rule 40 of these rules and the court shall not set aside such a plea unless doing so is necessary to correct manifest injustice.

The only means for Ian to seek to vacate his conviction was to file a petition pursuant to Rule 40, HRPP. The only means for Shawn to seek to vacate his conviction or to withdraw his guilty plea was to file a petition pursuant to Rule 40, HRPP. Ian's and Shawn's Petitions were properly filed pursuant to Rule 40, HRPP.

B. Section 661B, Hawaii Revised Statutes.

1. Rule 40, HRPP, proceeding is the appropriate court to determine "actual innocence."

Section 661B-1, Hawaii Revised Statutes (HRS) states:

(a) Any person convicted of a crime in a court of the State and imprisoned for one or more crimes of which the person was actually innocent may file a petition for relief pursuant to this chapter for an award of damages against the State; provided that the requirements of subsection (b) are met.

(b) To present an actionable claim against the State for wrongful conviction and imprisonment, the petitioner shall allege that the petitioner was convicted of one or more crimes under the laws of the State, was subsequently sentenced to a term of imprisonment, and has served all or any part of the sentence and either that:

(1) The judgment of conviction was reversed or vacated because the petitioner was actually innocent of the crimes for which the petitioner was convicted and the court decision so states; . . .

Based on the plain reading of Section 661B-1(b)(1), HRS, in order for a person to file a petition for relief, a person must meet the following requirements: 1. The person must have been convicted of one or more crimes in Hawaii; 2. The person was sentenced to prison; 3. The person served all or part of the prison sentence; 4. The person's judgment of conviction was reversed or vacated; and 5. A court decision must declare that the person was "actually innocent" for the crimes for which the person was convicted. Unless a petitioner can establish that the petitioner met all of the requirements, a petitioner is not entitled to file a petition for relief.

For purposes of comparison, Section 4900 of the California Code provides Indemnity for Persons Erroneously Convicted and Pardoned. Under Section 4900(a):

Any person who, having been convicted of a crime against the state amounting to a felony and imprisoned in the state prison or incarcerated in county jail pursuant to subdivision (h) of Section 1170 for that conviction, is granted a pardon by the Governor for the reason that the crime for which they were charged was

either not committed at all, or, if committed, was not committed by that person, or who, being innocent of the crime with which they were charged for either of those reasons, has served the term or any part thereof for which they were imprisoned in state prison, incarcerated in county jail, on parole, or under supervised release, may, under the conditions provided under this chapter, present a claim against the California Victim Compensation Board for the injury sustained by the person through the erroneous conviction and imprisonment or incarceration.

This subsection is analagous to Section 661B-1, HRS. Section 4900(b), California Code states:

If a state or federal court has granted a writ of habeas corpus, or if a state court has granted a motion to vacate pursuant to Section 1473.6 or paragraph (2) of subdivision (a) of Section 1473.7 and the charges are subsequently dismissed, or the person was acquitted of the charges on a retrial, the California Victim Compensation Board shall, upon application by the person, and without a hearing, approve payment to the claimant if sufficient funds are available, upon appropriation by the Legislature, pursuant to Section 4904, unless the Attorney General establishes pursuant to subdivision (d) of Section 4902, that the claimant is not entitled to compensation.

Under California's statutory scheme, Ian and Shawn, by virtue of the vacating of their convictions and the dismissals of their charges, would be entitled to compensation without a hearing. Under Section 661B, HRS, there must be finding of "actual innocence" by the Governor or by the court which vacated the conviction before relief may be requested.

The Joint Petition filed by Ian and Shawn seeks a finding by the court in Case Nos. 3CSP-23-0000003 and 3CSP-23-0000017 that Ian and Shawn are "actually innocent," as required by Section 661B-1(b)(1), HRS. The Joint Petition is not a petition filed pursuant to Section 661B, HRS to receive relief or compensation for their wrongful convictions. The Joint Petition merely seeks a finding by the Honorable Peter K. Kubota, the judge who heard

the evidence and vacated Ian's and Shawn's convictions, to find them "actually innocent" to meet the requirements of Section 661B-1(b)(1), HRS. Should Judge Kubota find Ian and Shawn "actually innocent" then and only then may they file a petition requesting relief pursuant to Section 661B, HRS.

Section 661B-2, HRS, establishes the procedure after a petition for relief pursuant to Section 661, HRS, is filed. Because Ian and Shawn's Joint Petition is not a petition for relief pursuant to Section 661B, HRS, the procedures have not been triggered and are inapplicable.

The current Rule 40, HRPP, proceeding is the appropriate court to make the finding of whether Ian and Shawn are "actually innocent." The court has heard the newly discovered evidence and arguments and vacated Ian and Shawn's convictions in Case No. 3PC99000147. It should be noted that the State stipulated to Shawn being allowed to withdraw his guilty plea (which required a showing of manifest injustice) and then dismissed all charges against Shawn by its own motion. The current Rule 40, HRPP, proceeding is the appropriate court to make the finding of "actual innocence."

2. Rule 40(c)(3), HRPP.

Rule 40(c)(3), HRPP states:

Separate cause of action. If a post-conviction petition alleges neither illegality of judgment nor illegal post-conviction "custody" or "restraint" but instead alleges a cause of action based on a civil rights statute or other separate cause of action based on a civil rights statute or other separate cause of action, the court shall treat the pleading as a civil complaint not governed by this rule. However, where a petition seeks relief of the nature provided by this rule and simultaneously pleads a separate claim or claims under a civil rights statute or other separate cause of action, the latter claim or claims shall be ordered transferred by the court for disposition under the civil rules.

Ian and Shawn's Joint Petition relate to their challenge to their convictions in Case No. 3PC99000147. The Joint Petition does not allege a separate cause of action. The Joint Petition does not request relief or compensation as a result of a separate cause of action. The Joint Petition requests a finding, based on the records and files of Case No. 3PC990001477 (which includes trial transcripts) and the evidentiary hearing during which new discovered evidence and newly presented evidence were admitted, that Ian and Shawn are "actually innocent". It should be further noted that the State did not appeal the judgments/orders in Case Nos. 3CSP-23-0000003, 3CSP-23-0000017 and 3PC99000147. All judgments/orders are final judgments/orders.

Because the Joint Petition does not allege a separate cause of action apart from the challenge to Ian and Shawn's convictions, Rule 40(c)(3), HRPP, is inapplicable.

3. Rule 26, Hawaii Rules of Civil Procedure.

Rule 26 of the Hawaii Rules of Civil Procedure (HRCP), pertains to general provisions governing discovery in civil cases. As previously discussed, the Joint Petition does not allege a separate cause of action, thus the "actual innocence" determination should not be transferred by the court for disposition under civil rules.

HRPP Rule 40 petitions do not constitute "civil actions or proceedings." Penalfor v. Mossman, 141 Hawaii 358, 409 P.3d 762 (Haw.Ct.App. 2017). Because HRPP Rule 40 petitions challenge the validity of a criminal defendant's conviction or confinement, they are basically criminal, and not civil in nature. Id. Thus, the provisions of Rule 26, HRCP, are inapplicable.

C. Rule 501, Hawaii Rules of Evidence.

Rule 501, Hawaii Rules of Evidence (HRE), states:

Except as otherwise required by the Constitution of the United States, the Constitution of the State of Hawaii, or provided by Act of Congress or Hawaii statute, and except as provided in these rules or in

other rules adopted by the Supreme Court of the State of Hawaii, no person has a privilege to

- (1) Refuse to be a witness; or
- (2) Refuse to disclose any matter; or
- (3) Refuse to produce any object or writing; or
- (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

Rule 501, HRE, sets forth the general rule that no person can refuse to disclose any matter or refuse to produce an object or writing, unless a privilege can be shown.

In Tighe v. City and County, 55 Haw. 420, 520 P.2d 1345 (1974), the Court explained there is no absolute privilege that insulates police records from discovery in civil or criminal cases. Id. at 422-23, 429 citing McCormick, Evidence (2d ed. 1972) Section 112 8 Wigmore, Evidence (McNaughton rev. 1961) Section 2378, especially n. 7. The documents requested in the Subpoena Duces Tecum (SDT) were for the purposes of investigating Shawn and Ian Schweitzers' Joint Petition for findings of "actual innocence" following their Hawaii Rules of Penal Procedure Rule 40 petitions which resulted in Ian and Shawn's convictions being vacated and all charges being dismissed. Thus, the rule against absolute privilege applies.

Since the rule against absolute privilege applies, it is incumbent on the Hawaii Police Department (HCPD) to specify an exception to the rule against absolute privilege. HCPD has relied upon Sections 92F-13 and 92F-22, Hawaii Revised Statutes as exceptions to the rule against absolute privilege. Ian filed Respondent Albert Ian Schweitzer's Answer to Hawaii County Police Department's Writ of Mandamus and Shawn filed Respondent Shawn Schweitzer's Answer to Petition which discussed the inapplicability of those statutes and will not repeat those arguments here.

At the August 5, 2024, hearing, the deputy corporation

counsel representing the Hawaii Police Department argued:

We ask that your Honor quash the August 1, 2024 subpoena duces tecum and allow Hawaii Police Department to conduct and complete their investigation. In the alternative and so stated in our motion, we ask that this Court conduct an in camera review of the available subpoenaed documents to determine what information may be relevant to the petitioners' claim of innocence, recognizing, of course, that many of the subpoenaed documents are at this time incomplete and/or do not yet exist.

If such documents exist at this time, we request this Court issue a protective order regarding the confidential materials subject to HRS - excuse me - 92F-13 and 92F-22 precluding their use for any other purpose other than litigating in the instance (sic) proceeding and barring petitioners, their attorneys, representatives, agents, experts, and all persons, entities, parties acting by, through or under or in concert with them from disclosing the confidential and/or statutorily protected documents and their substantive comment to any other persons, offices, or other entities including the media.

(SCPW-24-0000537, Dkt. 26, Exhibit "H" at 13-14).

At the August 5, 2024, hearing, the Court stated:

. . . [T]he Court understands that there are certain protections required in an ongoing criminal investigation especially if the investigation is related to anyone other than Albert Lauro, Jr., then certainly that is a defendant that can still be prosecuted. But, however, with regard to Albert Lauro, Jr., himself as Unknown Male No. 1, it seems that the investigation is almost over, so I will order that the Hawaii County Police Department turn over the materials that are in its possession as of today and will have a continuing duty to supplement every Wednesday at 10:00 a (sic) other materials, and they're to be submitted in camera for this Court's review.

I'll make a determination of what shall be released to the defendants and/or to the public by this Wednesday, August 7th at 10:00 a.(sic) So we'll come back and on that date, whatever documents that I order to be produced to defense counsel subject to any protective orders that you may propose shall be turned over to them on Wednesday, August 7th, 10:00 a. (sic)

If there are any documents that need to be

redacted that the Court orders shall be redacted for protection of sensitive personal information or unrelated parties whose identities should not be released, I'll order the redactions and the Hawaii County Police Department shall produce them by 4:00 p.m. on Wednesday, August 7th. . . .

(SCPW-24-0000537, Dkt 26, Exhibit "H" at 19-20).

The alternative proposed by the Hawaii Police Department was precisely what the trial court orally ordered. The Court Order Denying Hawaii Police Department's Motion to Quash Subpoena Duces Tecum, Filed on August 2, 2024 stated, in part:

Accordingly, IT IS HEREBY ORDERED that the Motion to Quash is DENIED. Any and all such information relevant to this case now in possession of the Hawaii County Police Department has been provided to the court for *in camera* review and inspection in August 5, 2024. The court will review and order redaction of any necessary information, and will order the Hawaii County Police Department, through their attorneys to disclose the redacted copies to the parties. The Court will make an individualized determination as to whether any evidence shall be subject to a protective order, and which evidence shall be filed unsealed for public review.

(SCPW-24-0000537, Dkt. 16).

The trial court, orally and in writing, adopted the alternative proposal of HCPD. The trial court properly recognized that HCPD had no absolute privilege to refuse to disclose any matter or to refuse to produce an object or writing. The trial court agreed to conduct an in camera review, taking into account HCPD's concerns, and to disclose the relevant materials, subject to redaction and a protective order. The trial court acted properly. The Petition for Writ of Mandamus should be rejected.

III

CONCLUSION

For the foregoing reasons and authorities cited, Respondents

Albert Ian Schweitzer and Shawn Schweitzer jointly request that this Honorable Court deny the Petition for Writ of Mandamus in the above-entitled matter.

DATED: Honolulu, Hawaii, September 4, 2024.

/s/ Keith S. Shigetomi

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RAQUEL BARRILA

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ATTORNEYS FOR RESPONDENT
ALBERT IAN SCHWEITZER

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SCHWEITZER; STATE OF HAWAII)	
)
Respondents.)	
_____)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document was electronically served on the following party on September 5, 2024:

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