IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETER HALLORAN,	)	C.A. NO. 07-16412
	)	
Petitioner-Appellant,	)	
	)	
	)	D.C. NO. CV-04-00577-DAE
vs.	)	District of Hawai`i, Honolulu
	)	
MARK J. BENNETT; et al.,	)	
	)	
Respondent-Appellees.	)	
	)	

PETITIONER-APPELLANT'S OPENING BRIEF.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI`I,

The Honorable David A. Ezra,
United States District Judge

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JURISDICTIONAL STATEMENT

The petitioner-appellant Peter Halloran ("Halloran") has spent 12 years in prison for a crime he did not commit, Attempted Sexual Assault in the First Degree, stemming from an incident that occurred on July 1, 1996, in Honolulu.

Failing to achieve post-conviction relief in the Hawai`i State courts, in 2005 Halloran turned to the United States District Court Hawai`i ("district court" or "court") filing an Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (the "§ 2254 Petition"). [Excerpts of Record[1] Volume IV ("ERIV") 842-861]. On February 1, 2007, the district court entered an Order Denying Petitioner's Motion for Relief from Judgment stemming from his § 2254 Petition ("Order Denying Relief"). [ERI 22-32]. On March 8, 2007, Halloran filed a Notice of Appeal. [ERI 19]. The district court denied his requests for a certificate of appealability ("COA"). [ERI 3-18].

On August 27, 2008, this Court granted the COA. [ERI 1]. "[O]nce a COA has been issued without objection by this court, the procedural threshold for

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[1] As used here in this opening brief "ERI", "ERII", "ERIII" and "ERIV" refer to Volumes I, II, III and IV, respectively, of Halloran's Excerpts of Record; "CR, USDC" refers to the Clerk's Record from the United States District Court Hawai`i in this matter, attached to the back of ERIV; "CR, Ninth Circuit" refers to the Clerk's Record from the Ninth Circuit in this matter, attached to the back of ERIV.

appellate jurisdiction has been passed and we need not revisit the validity of the certificate in order to reach the merits." Gatlin v. Madding, 189 F.3d 882, 887 (9th Cir. 1999), *cert. denied*, 528 U.S. 1087 (2000). Since the COA has been issued without objection, this Court has jurisdiction under 28 U.S.C. § 2253(a).[2]

STATEMENT OF ISSUE PRESENTED

Whether Halloran procedurally defaulted his claim that he was denied due process when the state trial court denied his motion for a new trial grounded on the alleged discovery of new evidence, and if not, whether Halloran is entitled to habeas relief on this claim.

STATEMENT OF THE CASE

A. Hawai`i State Court Proceedings.[3]

As a result of a trial in the Circuit Court of the First Circuit State of Hawai`i

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[2] "In a habeas corpus proceeding . . . before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held." 28 U.S.C. § 2253(a).

[3] In support of its "Answer to Petition for Writ of Habeas Corpus" filed in the U.S. District Court on May 19, 2005, the Respondent-Appellee State of Hawai`i submitted an extensive Appendix, which included the Hawai`i State court trial and post-trial transcripts, relevant filings from the direct appeal and from the post-conviction proceedings. Halloran includes in his ER the State's entire Appendix, in the order that material was presented to the U.S. district court on May 19, 2005. *See* ERII 257 to ERIV 839.

("circuit court"), on March 31, 1997, a jury returned a guilty verdict against Halloran on Count 1 of the one-count indictment, Attempted Sexual Assault in the First Degree, in violation of Hawai`i Revised Statutes ("HRS") § 705-500 and § 707-730(1)(a)(1993 Replacement). [ERI 105].

With new legal counsel, on July 28, 1997, Halloran filed a motion for new trial arguing, among other grounds, that he had discovered an new eyewitness to the incident between himself and the alleged victim, Honey Lloyd ("Lloyd"). [ERII 260-271]. At a hearing on September 1, 1997, the newly discovered witness, Domingo Ruiz ("Ruiz"), provided testimony that was exculpatory to Halloran. [ERIV 766-775]. The circuit court denied the motion for a new trial pursuant to Rules 33 and Rule 45(b) of the Hawai`i Rules of Penal Procedure ("HRPP") on the ground that the motion was untimely and the court did not have jurisdiction. [ERI 104; ERIV 781-782]. The circuit court sentenced Halloran to 20 years incarceration with a mandatory minimum term of six years and eight months, to run concurrently with a five-year term for an earlier conviction for terroristic threatening. [ERIV 800-802]. On October 1, 1997, the circuit court entered the judgment in the case. [ERI 105].

Halloran appealed, raising three points of error: 1) his trial counsel did not provide effective assistance of counsel; 2) his motion for new trial should have

been granted; 3) the State's motion for sentencing of repeat offenders should have been denied. [ERII 274-305]. The Intermediate Court of Appeals of the State of Hawai`i ("ICA") affirmed Halloran's conviction by Summary Disposition Order. [ERII 341]. On November 27, 1998, the Hawai`i Supreme Court denied Halloran's emergency motion for an enlargement of time to file a writ of certiorari, and later denied his motion for reconsideration of that order. [ERII 346-347].

Proceeding pro se, Halloran filed a petition for post-conviction relief pursuant to HRPP 40 on April 14, 1999, arguing: (1) newly discovered evidence demonstrated his innocence; (2) his conviction was obtained unconstitutionally because he was deprived of an unbiased jury; (3) his conviction was obtained unconstitutionally because he received ineffective assistance of counsel. [ERII 348-374]. The Respondent-Appellee the State of Hawai`i (the "State") responded that the issues had already been ruled upon, that Halloran was not deprived of an unbiased jury and that he received effective assistance of counsel. [ERII 375-386]. On May 5, 2000, the circuit court entered an order denying the petition on the grounds that "[Halloran's] claim is patently frivolous and without trace of support either in the record or from other evidence submitted by the petitioner". [ERII 387-388].

Halloran appealed, arguing: 1) the circuit court erred in denying post-

conviction relief where a newly-discovered witness possessed evidence of appellant's innocence; 2) he was denied a constitutionally fair trial by trial counsel who failed to voir dire the juror selected as jury foreman; 3) he received ineffective assistance of trial counsel and appellate counsel. [ERII 389-420].

On March 22, 2004, the Hawai`i Supreme Court affirmed, holding that Halloran's claims: 1) for a new trial based on evidence provided by the "newly discovered" witness, Ruiz, and 2) based on trial counsel's failure to properly voir dire jurors, were both procedurally barred by HRPP 40(a)(3). [ERI 92-94]. The Court also denied Halloran's claim of ineffective assistance of counsel because he "failed to (a) further develop claims he brought on direct appeal, see State v. Silva, 75 Haw. 419, 864 P.2d 583 (1993), or (b) meet the two-part test required to establish ineffective assistance of counsel [.]" [ERI 93]. The Notice and Judgment on Appeal was entered on April 7, 2004. [ERI 89-90].

B. U.S. District Court Hawai`i Proceedings.

On February 2, 2005, Halloran filed in district court his § 2254 Petition raising two grounds: 1) the circuit court "deprived Petitioner of his U.S. Constitutional rights to a fair trial where a newly-discovered key witness possessed evidence of Petitioner's actual innocence"; and 2) "Petitioner received ineffective assistance of counsel". [ERIV 842-861, 844].

After the State filed its answer on May 19, 2005, the magistrate judge entered Findings and Recommendations to Deny Petition for Writ of Habeas Corpus. [ERI 52-88]. On July 6, 2005, the district court, Judge David A. Ezra, issued an Order Adopting Magistrate's Findings and Recommendation [ERI 51], before receiving Halloran's objections and appeal filed on July 5, 2005. [ERII 245-256]. Because Halloran's appeal was timely, the court suspended its Order to review Halloran's objections. On March 10, 2006, the court issued an Order Compelling Production of Evidence to resolve the factual dispute regarding when Halloran first became aware of Ruiz, the newly discovered witness. [ERII 242-244]. After reviewing the parties' responses, on June 30, 2006, the district court entered an Order Denying Appeal From Magistrate's Findings and Recommendation ("Order Denying Appeal"). [ERI 33-50].

On July 20, 2006, Halloran filed Petitioner's Motion for Relief from Judgment. [ERII 173-224]. On February 1, 2007, the court issued the Order Denying Relief [ERI 22-32], from which Halloran filed a Notice of Appeal on March 8, 2007. [ERI 19]. On July 5, 2007 and October 11, 2007, respectively, the district court issued orders denying Halloran's request for a COA, and Halloran's request for reconsideration of the order denying a COA. [ERI 3-18].

On August 9, 2007, and July 11, 2008, Halloran sought a COA with this

Court. [*See* CR, Ninth Circuit]. On August 27, 2008, this Court granted the COA as to the following two issues:

> (1) "whether appellant procedurally defaulted his claim that he was denied due process when the state trial court denied his motion for a new trial grounded on the alleged discovery of new evidence, and if not, whether appellant is entitled to habeas relief on this claim, and;
>
> (2) whether appellant procedurally defaulted his claim that trial counsel rendered ineffective assistance by failing to timely locate and call witness Ruiz to testify at trial and/or in support of the new trial motion, and if not, whether appellant is entitled to habeas relief on this claim."

[ERI 1].

On March 20, 2009, this Court granted Halloran's request for a 14-day extension on the opening brief, with the new due date on it before April 6, 2009. [CR, Ninth Circuit]. In this opening brief Halloran pursues only the first certified question.

BAIL STATUS

Halloran is incarcerated at the Saguaro Correctional Facility, located in Eloy, Arizona. His mailing address is: Peter Halloran, A0259579; SCF - SAGUARO CORRECTIONAL FACILITY; 1250 E. Arica Road; Eloy, AZ 85231. His projected date of release is unknown at this time.

STATEMENT OF RELEVANT FACTS

This case concerns an incident between Halloran and Lloyd on July 1, 1996, at around 2:00 a.m., outside Lloyd's Honolulu apartment building. To understand this incident we first review events that occurred earlier in the evening at the Honolulu tavern called the Harbor Pub (the "Pub").

A. June 30, 1996, at the Pub.

Honey Lloyd. Direct Examination. Lloyd testified for the State at the trial that she was 38-years-old and lived in an apartment building located at 2509 Ala Wai Boulevard. [ERIII 487]. On June 30, 1996 she set out on bicycle from her apartment, arriving at the Pub at around 5:30 p.m. where she met Halloran for the first time. [ERIII 488]. She invited Halloran and another man at the bar to play ultrazone, a laser tag game, at a nearby establishment, with Lloyd purchasing the tickets. [ERIII 489]. After playing ultrazone Lloyd and Halloran returned to the Pub. [ERIII 489].

Halloran never asked Lloyd for a date or her phone number, and he never expressed a sexual interest in her. [ERIII 490]. However, he asked Lloyd for her address and when she would not provide it he became "forceful, rude", so Lloyd gave him a fake address that she wrote on a napkin. [ERIII 490-491]. She insisted that she did not invite Halloran to her home or ask him to photograph her. [ERIII

493].

Cross Examination. Lloyd testified that she had lived at 2509 Ala Wai since September 1975 or 1974, while also stating that she had lived there for only "a year and a half". [ERIII 506]. She had worked for 16 years as a "freelance art model", "most of it is nude", and she didn't do photography modeling. [ERIII 508-510].

On June 30, 1996, she went to the Pub wearing a one-piece bathing suit and blue denim dress, "specifically to have something to eat and have a drink. Not to meet anyone." [ERIII 510, 511]. While sitting at the bar next to Halloran, she learned that he was a photographer. [ERIII 518].

She drank four vodkas and denied drinking beer because, "I don't drink beer". [ERIII 513]. Shown the transcript of her police statement made after the incident (Defendant's Exhibit I), in which she reported that she had consumed two glasses of beer, Lloyd explained that she "picked" a number: "I probably said two glasses of beer because he asked if I had been drinking. So I picked a number. I know that I had drunk some beer. * * * I don't know how much I drank." [ERIII 515-516]. Lloyd usually counted her drinks, but "I wasn't counting beer because I wasn't drinking beer really." [ERIII 517].

After playing ultrazone Lloyd returning to the Pub and sat next to Halloran

again. [ERIII 524-525]. She denied:

- putting her arms around him and hugging him [ERIII 526];
- inviting him to dinner and to her home [ERIII 526];
- that she recounted to him prior sexual encounters in a limousine and on a catamaran with two different people in one day [ERIII 526];
- that she invited him to photograph her in outfits to build her portfolio [ERIII 527;
- that she invited him to photograph her nude. [ERIII 527].

She testified, "we were totally just talking at the bar like any normal people." [ERIII 544].

Halloran was "very much a gentleman" while at the Pub and the ultrazone game. [ERIII 525, 538, 544]. "[H]e was never not a gentleman and never said rude things to me or anything in a sexual way". [ERIII 538].

She told Halloran that she lived off of Liliuokalani Street. [ERIII 529]. She gave him a napkin on which she had written a fake address (State's Exhibit 1) because Halloran became "belligerent", and "I just wrote an address so he would quit bugging me". [ERIII 530-531].

Peter Halloran. Direct Examination. Testifying on his own behalf at the trial, Halloran stated that he was 39 years old on July 1, 1996, worked in Honolulu photographing tourists with exotic birds, and was known as the Birdman. [ERIV

662-665]. On June 30, 1997, he went to the Pub, ordered a sandwich, a pitcher of beer and sat at the bar. [ERIV 664-665]. Half an hour later Lloyd entered the Pub and sat next to him. [ERIV 665]. He'd briefly met Lloyd one month before when she was with one of his friends. [ERIV 665].

Lloyd asked Halloran if he would photograph her because "she has a portfolio and that she needed it redone." [ERIV 665-666]. Further, "she also needed some nude photos of herself. . . . I mean, there's a lot of paper work that goes into stuff like that. * * * You have to sign release forms and . . . make sure that everything is above board." [ERIV 667].

Halloran told Lloyd he didn't want to take picture that night, but she pestered him. [ERIV 668]. She offered to take him to dinner for the photographs, and she offered to take another man to dinner who was sitting nearby at the bar. [ERIV 668]. As well, Lloyd invited Halloran and another man to play ultrazone, to which they both agreed. [ERIV 669]. Halloran enjoyed the 20-minute game then returned to the Pub, while Lloyd remained and played another set with the other man. [ERIV 672-673].

Lloyd returned to the Pub later and sat next to Halloran. [ERIV 674]. At this time Halloran's friend Laurie Keefe came into the bar and sat near them. [ERIV 674]. Then another friend asked Halloran to take her picture outside the

Pub. [ERIV 674]. While Halloran was outside he heard Lloyd arguing with someone at the bar. [ERIV 674-676].

Lloyd continued to pester Halloran about photographing her nude; Halloran agreed on condition that she keep her clothes on. [ERIV 677]. He testified that Lloyd spoke of "weird things" to him, including that: she'd been married three times but divorced only once; in one day she'd had sexual encounters with two different people, one in a limousine and one on a catamaran. [ERIV 680-683].

Halloran continued having reservations about the photographs and suggested doing them tomorrow, but Lloyd protested and Halloran relented. [ERIV 684]. Lloyd said she lived "on the corner of Liliuokalani and the Ala Wai." [ERIV 684]. Halloran asked the bartender to call him a cab, while Lloyd wrote an address on a bar napkin and gave it to Halloran. [ERIV 684]. Halloran tucked the napkin in his pocket without looking at it and accompanied Lloyd to her bicycle, on which she departed while he waited for a cab. [ERIV 684-685].

Cross Examination. Halloran believed Lloyd was serious about the photographs, and that "she needed to change her clothes and put on her makeup and all the rest of that thing women do." [ERIV 709]. He acknowledged that he

was "a little drunk"[4], and that Lloyd "was interested in ... more than just the pictures". [ERIV 709]. He stated, however, that his intention was only to photograph Lloyd, "that's what I told her before I even left." [ERIV 709].

Laurie Keefe. Direct Examination. Laurie Keefe ("Keefe") testified for the defense that on June 30, 1996, she arrived at the Pub between 9:30 and 10 p.m. and sat near Halloran and Lloyd at the bar. [ERIII 603-604, 612]. Keefe and Halloran were acquaintances. [ERIII 605].

After 28 years as a bartender, Keefe testified, "I know when someone is inebriated", and Lloyd was "drinking a lot" and inebriated, "alternating between supreme happiness and anger." [ERIII 606]. This meant, Keefe explained, that Lloyd was "very friendly to me", Halloran and others at the bar, but that she got into an argument with another man sitting nearby. [ERIII 605, 606]. Keefe believed that Halloran was also inebriated. [ERIII 610].

Lloyd 'came-on' to Keefe and others, telling Keefe that "I was beautiful. That she really liked me, kept touching me." [ERIII 606-607]. Lloyd's behavior toward Halloran, was "very sexual", "[s]he was sitting on his lap. She had her arms around him. She was drinking his beer. She was very friendly with him.

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[4] The parties stipulated at trial that the results of an intoxilyzer test administered to Halloran after the incident showed that he had a blood-alcohol content of 0.225. [*See* ERIII 585, 596-597].

And discussing photographs". [ERIII 603-604, 607]. Halloran and Lloyd kissed on the lips. [ERIII 609-610].

When a man near the bar made a joke, Lloyd raised her voice and became so angry with him that, Keefe testified, "I spent about five minutes trying to calm her down", until Keefe moved away "because I didn't like what I was watching" and didn't want to be near Lloyd. [ERIII 608].

Lloyd came-on to the bartender, Jeff Adomi, flirting with him, "trying to get him to give her drinks". [ERIII 609]. Keefe believed "Jeff was at a point of cutting her off", given the amount Lloyd had already consumed. [ERIII 611].

Keefe overheard Lloyd ask Halloran to photograph her nude: "[s]he was going to be nude." [ERIII 614]. The request, "was from her. That's what she asked for." [ERIII 614].

Cross Examination. When Keefe learned that Halloran had been "arrested and charged with rape" three or four days later she was surprised because Halloran and Lloyd were "very inebriated", and, "[i]t just seemed unbelievable to me that anybody could accomplish that act in that state." [ERIII 616-617]. Keefe watched the two leave the Pub together, "[a]nd struggle up the steps." [ERIII 618-619]. Lloyd "stumbl[ed], definitely" and "there was an effort getting up the stairs." [ERIII 619].

Concerning Lloyd's dispute with the man at the bar, Keefe testified that the man told a funny joke that was "not derogatory at all", but Lloyd misinterpreted the remark, got "very angry and yell[ed] at him" and "pushed her hands out toward him", touching him, while "[h]e kept backing away from her." [ERIII 619-621]. Keefe, "tried to explain to her relax, sit down, this man is not a threat to you", but Lloyd, "[s]he just went off." [ERIII 621]. "She would calm down momentarily and then get all angry at him all over again." [ERIII 622].

Michelle Goebert. Direct Examination. Michelle Goebert ("Goebert") testified for the defense that on June 30, 1996, she was employed as a waitress at the Pub, where she had work for a year. [ERIII 628, 636]. Halloran was a regular customer. [ERIII 629]. She began work at 6:30 p.m. that night, finding Halloran already at the bar; ten minutes later Lloyd entered and sat next to Halloran at the bar. [ERIII 630, 631]. Goebert's waitress station was right beside them, "[s]o she was right beside me." [ERIII 631].

Lloyd "seemed intoxicated when she came in" because she appeared "giddy": "laughing a lot and swinging around in her chair", "getting up, sitting back down, talking to a lot of people", and she had trouble completing her sentences. [ERIII 635-636].

Lloyd asked Halloran to buy her a drink; he gave her a glass of beer from

his pitcher. [ERIII 634]. Lloyd saw Halloran's camera case and "she asked him at that point if he would take some nude photos of her" [ERIII 634], within ten minutes of sitting next to Halloran. [ERIII 635]. Goebert was "positive" she heard Lloyd ask for nude photographs because it wasn't something she normally heard [ERIII 643] and she was standing by Lloyd when she said it.

Goebert estimated that Lloyd had at least five glasses of beer because Halloran ordered two pitchers of beer, two pitchers held a total of 11 eight-ounce glasses of beer and they shared the two pitchers. [ERIII 638-639].

Halloran and Lloyd were engaged in physical contact: they kissed; Lloyd put her arms around him; Lloyd sat on Halloran's lap "numerous times during the evening". [ERIII 640-641]. When asked whether Halloran was fighting Lloyd off, Goebert laughed and said, "no". [ERIII 642].

Cross Examination. Goebert heard Halloran and Lloyd's conversation because they were right next to her, when she wasn't waiting on her tables. [ERIII 643]. Lloyd's behavior stood out to Goebert and others in the Pub because she was so intoxicated, and she was right next to Goebert. [ERIII 645-646]. Halloran was intoxicated too. [ERIII 647]. Lloyd's nude photograph request stood out because when she asked Halloran, it was still relatively quiet in the Pub, and because Lloyd made this request after just meeting Halloran. [ERIII 647-648].

B. July 1, 1996, outside Lloyd's Apartment Building.

Honey Lloyd. Direct Examination. From the Pub, Lloyd rode her bicycle to her apartment building, into the building's garage and up to a bike cage. [ERIII 493]. While at the bike cage she suddenly found Halloran "hovering over me that I got so scared that I left the lock unlocked and decided to take my bike to my home." [ERIII 494]. Leaving the garage, she walked along the sidewalk fronting her building then up some stairs to the secured front door. [ERIII 494]. "I was so scared I didn't realize I had my keys in my pocket", and she used the intercom to call her landlord to let her in. [ERIII 495]. She asked Halloran, "why are you here, would you go away", and that he "took it, I would say, really personally." [ERIII 495-496]. She testified:

> "[T]he next thing I remember my knees were scooped up, out from underneath me, and I was lying on my back, and my head was being pounded on the ground. And Peter was lying on top of me. He had, he was lying, sitting, on top of me. So I was on the ground. His knees were between my legs. He had taken my skirt and from his direction he had pushed it up, and I had a bathing suit on. He had pulled my bathing suit to one side and he was holding that with his right hand, banging my head with his left hand. When I tried to release his grip on my head, I pushed away, his hands came down around my throat. That's when he started to choke me."

[ERIII 496]. All the while, Lloyd screamed "as loud as I could." [ERIII 496]. The portion of her bathing suit Halloran allegedly pulled aside was the crotch area,

exposing Lloyd's vagina. [ERIII 497].

Lloyd identified State's Exhibits 4 through 10, as photographs of injuries she received that night from Halloran. [ERIII 499]. She testified that she suffered a two-inch cut on the back of her head, as well as a bruising and scratching on her arms. [ERIII 502-503]. She estimated that the incident occurred "around midnight." [ERIII 505]. She denied giving Halloran permission to touch her, expose her vagina, or have sex with her. [ERIII 505-506].

Cross Examination. During the incident Lloyd neither saw Halloran's shorts pulled down, nor his penis exposed; she did not feel him touch her breasts; she did not feel anything penetrate her vagina. [ERIII 533, 545]. "I never felt his penis. I never felt any penetration." [ERIII 545].

"When he first laid over me, coming from my feet he lifted up my skirt with his ***right hand***. When my skirt was up, he pulled my crotch over and with his ***left hand*** he was hitting my head while he held my crotch open to my bathing suit on the side." [ERIII 534, emphasis added]. Defense counsel Yee reminded Lloyd that three days after the incident on July 3, 1996, she testified under oath before the grand jury that Halloran "used his ***left hand*** to flip my skirt and his ***right hand*** to flip my bathing suit." [ERIII 535-536](Emphasis added).

Lloyd explained, "I used the wrong left-right, and today I'm having a hard

time with that, you know. I am going to say that no, he used his right hand to lift up my skirt and his right hand to move my bathing suit bottom over." [ERIII 536].

Lloyd testified that Halloran hit her head against the cement "four times". [ERIII 533]. When reminded that she told the grand jury on July 3, 1996, that it was three times, Lloyd stated "I can tell you I was a lot more nervous then than I was today." [ERIII 537]. Lloyd testified that after the incident she was in bed for four days with a concussion and "a little dazed, confused, shocked and scared." [ERIII 537-538]. During the incident she denied grabbing and tearing Halloran's shirt with her fingernails. [ERIII 545].

Lloyd testified that she left the Pub "around eleven". [ERIII 542]. When Yee pointed out that she had told police officers she left at midnight she said, "I don't know what time I left there. Okay. It was around eleven, twelve." [ERIII 543]. She also said, "I don't know what time I went there", and she now stated that she was 36 years old. [ERIII 543].

Lloyd reiterated that Halloran was never rude or lewd to her, and that "he was never not a gentleman", but that, "all of a sudden . . . I'm in the garage of my apartment building and he's there", and "I don't even know how he got there. I don't even know how he knew where I live except on the Ala Wai by Liliuokalani". [ERIII 538-539]. Lloyd denied ever seeking sex or photographs

from Halloran. [ERIII 544]. She denied ever "get[ting] turned on to him", testifying, "no, we were totally just talking at the bar like any normal people." [ERIII 544].

Orlando Wilson. Direct Examination. Orlando Wilson ("Wilson") testified for the State that on July 1, 1996, he lived at 2303 Ala Wai, in a building next to Lloyd's building. [ERIII 547]. He did not know Lloyd other than "[w]e just bump into each other now and then..." [ERIII 550].

At approximately 2:20 a.m. he heard a woman screaming outside his apartment. [ERIII 548]. "I went outside, took a look, then ran back in. * * * Throwed on my pants and shoes. Ran back out. Jumped over the railing, and went to the building." [ERIII 548].

At the scene of the incident, "I seen a male on top of a female just getting up off her. * * * He was punching her in the face, grabbing her neck, and pounding her head against the pavement. * * * [T]he female was on her back. . . . And the male was on top of her. . . * * * [H]e yelled at her, told her to shut the fuck up, bitch, loud." [ERIII 548-549].

The "male" Wilson saw was Halloran, whose penis was "[s]ticking out the right-hand side of his shorts. [ERIII 549-550]. After Halloran got off Lloyd, "he walked toward the stairs to go down. That's when the officers came. And I

pointed out to the officers that he was the one that was attacking the lady." [ERIII 550].

Cross Examination. From Wilson's second-floor apartment he initially testified that he had a "bird's eye view" of the entrance/walkway of Lloyd's building. [ERIII 552]. Wilson said that from his second-floor apartment, "I seen what happened", "[w]hen I was looking from my railing". [ERIII 563]. He acknowledged, however, a parking lot and a wall between his building and Lloyd's building. [*See* ERIII 556-557, 560-561]. He admitted under cross that the wall was high enough that he could not see the incident. [ERIII 563, 564].

While his fiancée called the police, Wilson put on pants and shoes, which took "about two seconds." [ERIII 561]. He "went over the railing" from his second-floor apartment. [ERIII 561]. Apparently uninjured from the fall, he walked along his parking lot, then up the stairs of Lloyd's building to the scene of the incident. [ERIII 562].

Wilson signed a police statement right after the incident, wherein he attested:

> "I have read this statement prepared by Officer Paul Ledesma which consists of two handwritten pages and have been given the opportunity to make corrections thereon and I attest that this statement is true and correct to the best of my knowledge."

[ERIII 566-567].

Dictated by Wilson and handwritten Officer Ledesma, Wilson reported in his statement that he saw Halloran "sitting, dash, laying on top of the female". [ERIII 564-565]. On cross, Wilson insisted that Halloran was only laying on Lloyd, not sitting on her. [ERIII 564-565]. He explained that, "What I told him [Ledesma] and what he wrote is two different things." [ERIII 566]. Wilson also explained that it was "dark", that he only "read part of it [his statement]". [ERIII 567, *and see* 569]. He also attested to the statement's veracity: "[w]hat it is is the truth. So I signed it." [ERIII 567].

Wilson reported in his police statement, "I notice this male's shorts off down to his knees and noticed his penis was out." [ERIII 569]. Yet his trial testimony was that Halloran's penis was exposed from beneath his shorts leg. [ERIII 549]. On cross Wilson refuted his police statement, "I didn't tell the officer that his shorts was down to his knees", concluding that Officer Ledesma must have made that part up. [ERIII 569].

Asked to describe the extent to which Halloran's penis was exposed "below his pants leg, shorts, on the right side", Wilson replied "his penis was hard. How am I supposed to know?" [ERIII 570]. When asked to explain why he did not report seeing Halloran's penis exposed below his shorts leg in the police

statement, Wilson explained that Officer Ledesma "[h]e didn't ask me. [ERIII 571].

When Yee pointed out that Wilson did not report in his statement that Halloran was "punching the female", Wilson testified that he had told the police, but, "like I said, I'm not the one that wrote it." [ERIII 575]. On redirect examination, Wilson claimed that he had trouble reading Officer Ledesma's handwriting. [ERIII 575].

Peter Halloran. Direct Examination. Halloran took a cab from the Pub to the corner of Liliuokalani Street and Ala Wai Boulevard. [ERIV 685]. There, he found Lloyd who knocked on the cab window while he was still inside and told him, "[h]urry up". [ERIV 686]. At the entrance of her building, Halloran questioned Lloyd about the photographs. [ERIV 688-689]. Lloyd informed him that they were not there to take pictures. [ERIV 689]. Halloran protested that he only came to take photographs, then he turned to leave. [ERIV 689].

The two traded insults [ERIV 689-690], until Lloyd physically lashed out at Halloran. "Her bicycle went one way and her coat went another way, and she was on my shirt. I mean, she grabbed right onto my t-shirt." [ERIV 690]. Referring to State's Exhibit 17, the shirt he wore that night, Halloran testified that the tears in it were the result of Lloyd's attack. [ERIV 690-691, 705]. He:

> "tr[ied] to smack her arms, trying to get them off of me... I pushed her this way first. And I pushed her that way. And I just gave it everything I could. And the shirt started to give. And I went sort of down like this. I could hear the shirt ripping. And I just pushed her down to the ground. And she had let go of my shirt."

[ERIV 691]. He yelled "what the hell are you doing?", and testified that he was "pissed", "scared", and "this woman attacked me. I didn't attack her." [ERIV 692].

He pushed Lloyd "down onto her butt" and she let go of his shirt, but while he was standing up Lloyd, "latched onto my shorts." [ERIV 693]. He was "trying to back up as [Lloyd] was pulling down" on his shorts, at which point she "wrapped her legs right around mine" and Halloran fell back and on his butt. [ERIV 695].

Now Lloyd "looked at me with a nasty little smile and just started screaming at the top of her lungs" and "she was starting to lie backwards." [ERIV 697]. "I panicked. Reached over, grabbed her by the head. Slammed her on the ground. I told her, 'let go of me and get the fuck off'." [ERIV 697]. At that point, "she let go of [Halloran]", but when he got up to leave Lloyd reached out and grabbed his leg, causing Halloran to fall, hitting his left knee onto the concrete. [ERIV 697-698].

Again, Halloran got up and tried to leave, walking toward the stairs leading

to the street, when "[a]ll of a sudden she grabbed hold of my [right] leg." [ERIV 700]. "I hauled off and slapped her right across the head. I told her, 'Let go'". [ERIV 700]. But Lloyd "latched herself onto my leg", "you know how when a little kid ... doesn't want mommy to go to work", "scream[ing] the whole time." [ERIV 700-701].

Now he began dragging Lloyd along as he tried to reach the stairs leading to the street, "[s]he was holding my leg the whole way". [ERIV 701]. "I was slapping on her arms." [ERIV 701]. "And that's where the first officer came up. He had come up the staircase and met me right there. With her still latching onto my leg." [ERIV 701].

Halloran refuted Wilson's testimony that his penis was exposed below his shorts leg. [ERIV 702]. At the trial he removed the shorts he wore that night from an evidence bag for the jury, demonstrating their length. Halloran testified that his penis would have to be about two feet in length to extend out of his shorts. [ERIV 702-703]. When asked if his penis was that long, Halloran replied, "[n]o. I mean, if it were that long I'm on the wrong side of the camera". [ERIV 702].

Halloran denied that he lifted Lloyd's dress and pulled aside the crotch of her bathing suit. [ERIV 704]. He denied attempting to rape Lloyd. [ERIV 704]. He admitted punching Lloyd on her arms and that he slapped her head, but in self-

defense because she was "grabbing at me, and I wanted her to stop." [ERIV 704].

He admitted that after the police arrived and he learned that Lloyd had accused him of sexual assault, he denied the same to the police and "probably" called Lloyd a "lying bitch". [ERIV 706]. He admitted stating that the arrest would "fuck me up", explaining that he said this "[b]ecause this arrest has fucked me up." [ERIV 706].

Cross Examination. Halloran recalled his statement shortly after the incident to police Officer Kim, "I slapped her; I probably punched her a couple times", "[p]robably [in] the head". [ERIV 710-711]. He recalled slapping Lloyd's head once, "forcing her head into the ground" "twice, three times at the most". [ERIV 711]. He testified that as a result of falling on his knee, his knee was sore for about six months, and that he went to the hospital to have his knee examined. [ERIV 711-712].

C. September 1, 1997, Hearing on the Motion for a New Trial.

On March 31, 1997, the jury returned a verdict of guilty. With new counsel, on July 28, 2997, Halloran filed a motion for a new trial based in part on newly discovered evidence, an eyewitness to the incident, Domingo Ruiz. [ERII 260-271].

Prior to Ruiz's testimony, the parties stipulated that if Halloran were called

he would testify that: 1) he asked defense counsel Yee within 10 days following the jury verdict to move for a new trial; 2) he personally wrote to the circuit court within 10 days following the jury verdict seeking a new trial; 3) prior to the incident on July 1, 1996, he was taking the drug Tegretol; 4) one of the side effects experienced by Halloran as a result of taking Tegretol was impotence; 5) and that he was impotent at the time of the incident. [ERIV 765-766].

Domingo Ruiz. Direct Examination. Ruiz did not know Halloran. [ERIV 774]. On July 1, 1996, he was in a ground floor apartment in the building next to Lloyd's with a friend Rojelio when he heard a woman screaming. [ERIV 767]. Ruiz and Rojelio immediately ran to the scene of the incident, arriving within "one minute". [ERIV 768]. There, Ruiz saw Halloran trying to walk away while Lloyd was on the ground grabbing his leg to prevent him from leaving. [ERIV 768]. They both cursed at each other, and Halloran was trying to hit Lloyd's hands off him. [ERIV 768]. His shorts did not come down, and his penis was never exposed. [ERIV 770]. They both appeared to be intoxicated. [ERIV 771].

Ruiz did not intervene because Lloyd didn't ask for help, wasn't trying to get away, and didn't appear frightened by Halloran, and "Halloran wasn't hitting her or nothing" but trying to leave. [ERIV 770, 771].

Ruiz watched the incident from a distance of seven to 10 feet, for 1 to 1 ½

minutes until the police arrived, when he and Rojelio left. [ERIV 770, 773]. He left because he didn't want to be involved, he felt the police could handle it and, as well, "[h]e was trying to walk away. She was grabbing him, so I didn't see nothing happen." [ERIV 773]. When asked if he saw anyone else standing nearby and observing the incident, Ruiz replied, "I don't even know." [ERIV 773].

Ruiz didn't know the police arrested Halloran. [ERIV 774]. He learned of the arrest "about four months later" when he "went to jail for two days for a domestic dispute". [ERIV 774]. There, Ruiz recognized Halloran, spoke with him, and learned of the arrest, "for attempted rape or something like that." [ERIV 775].

Cross Examination. As to his incarceration where he met Halloran, Ruiz explained that he was held for two days at "OCCC", an acronym for the Oahu Community Correctional Facility. [ERIV 775].

SUMMARY OF THE ARGUMENT

A. Halloran Is Excused from Procedural Default Because He Can Demonstrate Cause for the Default and Actual Prejudice.

Halloran acknowledges that he procedurally defaulted his claim that he was denied due process under the Fifth and Fourteenth Amendments when the circuit

court denied his motion for a new trial based on newly discovered evidence. HRPP Rules 33 and 45(b) require that a motion for a new trial be filed within 10 days after the guilty verdict, with no extensions of time permitted. Notwithstanding, federal habeas review may continue if Halloran can demonstrate cause for the default and actual prejudice as a result of the violation of federal law, or "demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565 (1991).

In the Order Denying Relief from which Halloran appealed, the district court reiterated and relied its prior decision (Order Denying Appeal from Magistrates's Findings and Recommendation), which found that Halloran had shown cause for the procedural bar, but not prejudice. [ERI 22-32, 33-50]. Examination of the district court's decision as to prejudice shows that the court was wrong and must be reversed.

The district court found that while Halloran could show cause, he could not demonstrate actual prejudice by the procedural bar because the evidence provided by Ruiz's testimony could not satisfy the requirements for granting a new trial. [ERI 43]. "To prevail on a motion for new trial based upon newly discovered evidence, the defendant must show (1) the evidence is newly discovered; (2)

failure to discover the evidence sooner was not due to lack of diligence; (3) the evidence was material to trial issues; (4) the evidence was not cumulative or merely impeaching; and (5) a new trial, if granted, would probably result in acquittal." United States v. George, 420 F.3d 991, 1000 (9th Cir. 2005); *and see* ERI 43(the district court's recitation of the exact same five criteria).

The district court found that "petitioner may arguably satisfy the first three prongs of this test" [ERI 44]; however, he could not satisfy the fourth and fifth criteria. Concerning the fourth criteria, as fully argued below, a comparison of Wilson and Ruiz's testimony clearly shows that Ruiz's testimony was not cumulative to Wilson's, and, moreover, it was material and exculpatory. The probative value in Ruiz's testimony in order to assist the jury in arriving at the truth would outweigh any extension of the trial and potential for confusion. Goodwin v. MTD Product, 232 F.3d 600, 609 (7th Cir. 2000).

Concerning the fifth criteria, Halloran argues that a new trial will likely result in acquittal. Under the State's theory of the offense, Attempted Sexual Assault in the First Degree, the attempted penetration was via Halloran's penis. The chief evidence supporting this theory was Wilson's testimony that he saw Halloran's exposed penis.

Under the fifth criteria Ruiz's testimony serves the purpose of impeaching

Wilson's testimony. Newly discovered impeachment evidence is material only if the new evidence renders "totally incredible" the testimony of a witness, and that witness's testimony at trial was "uncorroborated" and "provided the only evidence of an essential element of the government's case." United States v. Davis, 960 F.2d 820, 825 (9th Cir.) *cert. denied*, 506 U.S. 873 (1992). As set forth below, Wilson's testimony was "totally incredible", "uncorroborated", and provided the only evidence of an essential element of the State's case. Lloyd's testimony is also examined and shown to be incredible and uncorroborated. Ruiz's credible testimony supported Halloran's defense, was probative of his innocence, and a new trial with his testimony would likely result in acquittal.

B. Federal Review is Necessary to Prevent a Fundamental Miscarriage of Justice.

Halloran argues that the procedural default may also be excused if he can demonstrate that failure by the federal courts to consider the claim will result in a fundamental miscarriage of justice. *See* Coleman, 501 U.S. at 750; Majoy v. Roe, 296 F.3d 770, 775 (9th Cir. 2002). A miscarriage of justice occurs when a constitutional violation has probably resulted in the conviction of one who is actually innocent. Murray v. Carrier, 477 U.S. 478, 496 (1986); Schlup v. Delo, 513 U.S. 298, 327 (1995).

Halloran must show that, "in light of all the evidence, including evidence not introduced at trial, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. A petitioner need not show that he is actually innocent of the crime he was convicted of committing; instead, he must show that a court cannot have confidence in the outcome of the trial." Majoy, 296 F.3d at 775 -776(internal quotation marks and citations omitted).

As set forth below, Halloran shows that given the trial record and the evidence, including evidence not introduced during his circuit court trial, it is more likely than not that no reasonable juror would have found him guilty of the attempted sexual assault of Lloyd on July 1, 1996. This Court cannot have confidence in the outcome of the trial. Majoy, 296 F.3d at 775-776. The matter should be remanded to the district court for further proceedings.

ARGUMENT

A. Halloran Is Excused from Procedural Default Because He Can Demonstrate Cause for the Default and Actual Prejudice.

1. Standard of Review.

The district court's decision to grant or deny a prisoner's petition for habeas

corpus is reviewed de novo. Benn v. Lambert, 283 F.3d 1040, 1051 (9th Cir.2002). Dismissal of a habeas corpus petition filed pursuant to 28 U.S.C. § 2254 based on state procedural default presents issues of law reviewed de novo. Jaramillo v. Stewart, 340 F.3d 877, 880 (9th Cir.2003). The Court reviews a decision denying a motion for a new trial based on newly discovered evidence for an abuse of discretion. United States v. Jackson, 209 F.3d 1103, 1106 (9th Cir.2000); United States v. Kulczyk, 931 F.2d 542, 548 (9th Cir.1991).

2. Discussion.

Halloran acknowledges that he procedurally defaulted his claim that he was denied due process under the Fifth and Fourteenth Amendments when the circuit court denied his motion for a new trial based on newly discovered evidence. Together, HRPP Rules 33 and 45(b) require that a motion for a new trial be filed within 10 days after the guilty verdict, and no extensions of time therefore are permitted.[5] Hawai`i law holds that HRPP 33's 10-day limitation is jurisdictional

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[5] HRPP, Rule 33 states: "The court on motion of a defendant may grant a new trial to him if required in the interest of justice. . . . A motion for a new trial shall be made within 10 days after verdict or finding of guilty or within such further time as the court may fix during the 10-day period."

HRPP, Rule 45(b) states: "(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of

and must be strictly complied with. State v. Meafou, 67 Haw. 41, 44-45, 677 P.2d 459, 462 (1984). Similarly, federal law holds that a motion for new trial that fails to comply with the filing deadline is untimely and jurisdictional must be barred as well. United States v. McKinney, 952 F.2d 333, 336 (9th Cir. 1991).

The jury found Halloran guilty as charged on March 31, 1997. [ERI 105]. On July 28, 1997, Halloran's newly appointed counsel filed a motion for a new trial under HRPP 33, far beyond the 10-day limitation. [ERII 260]. Halloran's motion for new trial was untimely pursuant to HRPP 33.

Notwithstanding, federal habeas review may continue if Halloran can demonstrate cause for the default and actual prejudice as a result of the violation of federal law:

> "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate ***cause for the default and actual prejudice as a result of the alleged violation of federal law***, or ***demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice***."

Coleman, 501 U.S. at 750(Emphasis added).

In the Order Denying Relief from which Halloran appealed, the district

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excusable neglect; but the court may not extend the time for taking any action under Rules 29, 33, 34 and 35 of these rules and Rule 4(b) of the Hawai`i Rules of Appellate Procedure, except to the extent and under the conditions stated in them."

court reiterated and relied its prior decision (Order Denying Appeal from Magistrates's Findings and Recommendation), which found that Halloran had shown cause for the procedural bar, but not prejudice. [ERI 22-32, 33-50]. We now analyze that decision.

a. Cause for the Default.

In Murray the Supreme Court defined the notion of 'cause':

> "we think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable, would constitute cause under this standard."

Murray, 477 U.S. at 488, 106 S.Ct. at 2645(internal citations and quotation marks omitted).

Throughout his post-conviction proceedings, Halloran represented that he met Ruiz at OCCC after the trial, and that "because of his intoxicated state" during the incident he was not aware that Ruiz was an eyewitness. [ERII 262-263]. Ruiz testified at the September 1, 1997 hearing that he met Halloran "about four months" after the incident when he was incarcerated at OCCC. [ERIV 774-775]. Initially, the district court relied upon Ruiz's four-month estimation to conclude

that Halloran knew of Ruiz in advance of his March 1997 trial because the two had met four months after the incident or around October/November 1996. [ERI 68, Magistrate's Findings and Recommendation].

On March 10, 2006, the district court, Judge Ezra, ordered the parties to produce documents identifying the dates and locations of Ruiz and Halloran's incarceration. [ERII 242-244]. The documents showed that Halloran was incarcerated at OCCC from the time of his arrest in early July 1996. [ERII 236-238, 226]. And they showed that the only time Ruiz was incarcerated at OCCC was for two days beginning on April 28, 1997 [ERII 239-240], after the jury had convicted Halloran on March 31, 1997 and well past the 10-day time period for filing a HRPP 33 Motion in circuit court. Based upon these documents, the district court found that Halloran showed cause for the procedural bar: "Thus Petitioner has shown that an 'objective external factor' impeded his ability to comply with the procedural rule. See Murray v. Carrier, 477 U.S. 488 (1986)." [ERI 43].

The district court's analysis is correct in this regard. Ruiz left the scene of the incident as the police arrived. [ERIV 773]. Halloran did not know that Ruiz had been an eyewitness to the incident. [ERII 262-263]. Halloran only learned that Ruiz was an eyewitness when the two happened to meet while both were

incarcerated at OCCC in late April 1997. [*See* ERII 236-241].

The existence of Ruiz as an eyewitness was a fact not reasonably available or known to Halloran. Murray, 477 U.S. at 488. Indeed, at the hearing for a new trial Halloran personally pleading with the circuit court: "I didn't even know who he [Ruiz] was.... I mean, how can I file within 10 days of something that I didn't even know about?" [ERIV 791].

b. Actual Prejudice as a Result of the Violation of Federal Law.

The district court found that while Halloran could show cause, he could not demonstrate actual prejudice by the procedural bar because the evidence provided by Ruiz's testimony could not satisfy the requirements for granting a new trial. [ERI 43].

> "To prevail on a motion for new trial based upon newly discovered evidence, the defendant must show (1) the evidence is newly discovered; (2) failure to discover the evidence sooner was not due to lack of diligence; (3) the evidence was material to trial issues; (4) the evidence was not cumulative or merely impeaching; and (5) a new trial, if granted, would probably result in acquittal."

George, 420 F.3d at 1000; *and see* ERI 43(the district court's recitation of the exact same five criteria).

Criteria (1): Ruiz was Newly Discovered.

The district court found that, "petitioner may arguably satisfy the first three

prongs of this test", including this first criteria. [ERI 44]. Halloran does not dispute this conclusion. For all the reasons set forth immediately above this criteria is satisfied: Ruiz's testimony as an eyewitness represented newly discovered evidence.

Criteria (2): Failure to Discover Ruiz Sooner Was Not Due to Lack of Diligence.

The district court found that Halloran satisfied this second criteria. [ERI 44]. Halloran does not dispute this conclusion. He was not aware that Ruiz observed the incident. [ERII 263]. Ruiz left the scene of the incident when the police arrived, without making himself known to the police as a material witness. [ERIV 773]. Neither Halloran nor the State had any reason to suspect that another eyewitness to the incident existed.

Criteria (3): The Evidence Was Material to the Trial Issues.

The district court found that Halloran satisfied this third criteria. [ERI 44]. Halloran does not dispute this conclusion. Ruiz's testimony was material to the trial because, as discussed fully below: Ruiz provided an eyewitness account of the incident that was exculpatory to Halloran and probative of his innocence; Ruiz's version contrasted sharply with the version provided by the State's eyewitness Wilson; and had Ruiz's version been heard by the jury, it could have

resulted in an acquittal.

Criteria (4): the Evidence must Not Be Cumulative or Merely Impeaching.

Testimony is cumulative if its probative value is so slight that its assistance to the jury in arriving at the truth would be outweighed by extension of the trial and the potential for confusion. Goodwin, 232 F.3d at 609. [*See* ERI 13]. The district court concluded that Ruiz's testimony was merely cumulative to that of the State's eyewitness Wilson. [*See* ERI 28, 44]. Therefore we turn to a comparison of the testimony of Ruiz and Wilson.

Ruiz's Testimony. When Ruiz and his friend Rojelio heard screaming on July 1, 1996, they immediately rushed from a ground-floor apartment in a next-door building to the incident, arriving in "one minute". [ERIV 766-768]. There they found Halloran and Lloyd, and observed from a close distance: "He was standing up. He was trying to walk away. The lady was laying down, and she was pulling his pants down. She was grabbing onto his leg, and he was trying to get away from her." [ERIV 768-769]. Lloyd was "cursing him out", and Halloran said "something to the effect, get off me bitch, or you know get the fuck away from me or something like that." [ERIV 769-770]. Ruiz observed that Halloran's shorts remained up and his penis was never exposed. [ERIV 770]. Ruiz did not

intervene because Lloyd didn't ask for help, she didn't appear afraid, and Halloran was not "hitting her or nothing" but trying to get away. [ERIV 770-771, 773].

Ruiz watched the incident for 1 to 1 ½ half minutes[6] until the police arrived. [ERIV 770, 772]. Ruiz recalled no other person observing the incident or standing nearby. [ERIV 772-773, *and see* ERII 263].

Wilson's Testimony. When Wilson heard the screaming he "went outside, took a look, then ran back in" his second-floor apartment, "[t]hrowed on my pants and shoes. Ran back out. Jumped over the railing, and went to the building." [ERIII 548]. There, he testified to observing a dramatically different incident: Halloran on top of Lloyd, "punching her in the face, grabbing her neck, and pounding her head against pavement", yelling at Lloyd, "shut the fuck up, bitch", with Halloran's penis "[s]ticking out of the right-hand side of his shorts." [ERIII 549].

In the June 30, 2006 Order Denying Appeal, the district court wrote that Ruiz's testimony was cumulative to Wilson's because: "Wilson [] was the first eyewitness at the scene"; "Ruiz testified that he was present at the scene only for the final one and one-half minutes before the police arrived"; "Ruiz's testimony

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[6] In her Declaration in support of the Motion for a New Trial filed in circuit court, attorney Sarah Courageous represented that Ruiz watched the incident "for about five minutes". [ERII 262].

merely confirms Wilson's testimony that in the final moments of the altercation, Petitioner was attempting to leave." [ERI 44].

In the Order Denying Relief from which the appeal was taken, the district court elaborated:

> "Wilson testified that he dressed in approximately two seconds, jumped off his lanai, and ran up the stairs leading to the building next door to his, where the incident was occurring. [Citation to record omitted.] Based on Wilson's testimony, it is entirely possible that Wilson arrived at the stairs in less than one minute, before Ruiz arrived. . . [I]t was not clear error for the Court to rule that Wilson arrived at the scene of the incident before Ruiz, nor were the conclusions flowing from this ruling clearly erroneous."

[ER I 27].

The court's conclusions do not withstand scrutiny. The record shows that Ruiz was "next door" to Lloyd's building when he heard screaming and went to the scene, arriving within "one minute". [ERIV 768]. Wilson was also next door, but in contrast to Ruiz he took four intervening steps: 1) he went outside; 2) "took at look"; 3) went back in his apartment; 4) dressed, and then he went to the incident. [ERIII 548]. Further, Ruiz was in a first-floor unit [ERIV 768], while Wilson was in a second-floor unit [ERIII 552] and had to reach to the ground level before going to the scene. A comparison of the circumstances and response behavior of both Ruiz and Wilson clearly indicates that Ruiz was likely the first eyewitness. The district court's finding that Wilson was the first eyewitness is

unsupported by the record, as are the conclusions flowing from that determination.

The court's second conclusion that Ruiz was present for "only for the final one and one-half minutes before the police arrived" flows from the first conclusion and, as well, flies in the face of the record. The record indicates that Ruiz was the first eyewitness to the incident and that the incident lasted only for 1 to 1 ½ minutes until the police arrived. [ERIV 770, 773].

The court found that Ruiz's testimony was cumulative of Wilson's and would not have assisted the jury in arriving at the truth because "what he saw (Petitioner attempting to leave) was basically the same as what Wilson saw." [ER I 29]. The court is wrong. Ruiz and Wilson's accounts stand in dramatic opposition to each other. Wilson testified that Halloran was laying on top of Lloyd, punching her, "grabbing her neck", yelling "shut the fuck up, bitch" and – critical in this case of attempted sexual assault – that he saw Halloran's erect penis sticking out of his shorts. [ERIII 549, 570]. Ruiz was first on the scene and testified that he saw Halloran trying to walk away from Lloyd, who was hanging on to his leg, cursing at him and refusing to release him. [ERIV 770-771]. Halloran hit Lloyd on her hands in effort to get away, "but not her face." [ERIV 769-770]. Ruiz never saw Halloran's shorts pulled down and he never saw Halloran's penis exposed. [ERIV 770].

Not only is Ruiz's testimony noncumulative, it is, moreover, material and exculpatory: it contradicted Wilson's version of events; and it created reasonable doubt that Halloran attempted to sexually assault Lloyd – as discussed below. Given these dramatically differing accounts, the jury had everything to gain from hearing Ruiz's testimony to arrive at the truth. The probative value in Ruiz's testimony in order to assist the jury in arriving at the truth would outweigh any extension of the trial and potential for confusion. Goodwin, 232 F.3d at 609.

Criteria (5): a New Trial Will Likely Result in Acquittal.

The State charged Halloran with Attempted Sexual Assault in the First Degree, in violation of HRS § 705-500 (Criminal Attempt)[7] and § 707-730 (Sexual Assault in the First Degree). Under the latter, "(1) A person commits the offense

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[7] "(1) A person is guilty of an attempt to commit a crime if the person: (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as the person believes them to be; or (b) Intentionally engages in conduct which, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the person's commission of the crime.

(2) When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, the person intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent." HRS § 705-500

of sexual assault in the first degree if: (a) The person knowingly subjects another person to an act of sexual penetration by strong compulsion". HRS § 707-730. "Sexual penetration" is defined, in part, as , "[v]aginal intercourse, anal intercourse, fellatio, deviate sexual intercourse, or any intrusion of any part of a person's body or of any object into the genital or anal opening of another person's body; it occurs upon any penetration, however slight". HRS § 707-700.

Under the State's theory of the offense, the attempted penetration was via Halloran's penis. The State told the jury in closing arguments that one of the substantial steps Halloran took on July 1, 1996, was exposing his penis:

> "it doesn't take much for a man who was going to commit sex assault, in a quick amount of time to simply lift up his pant leg and pull his erect penis out of his shorts. ***That's what happened. That's how his penis got out of his shorts.***
>
> So when Mr. Orlando Wilson came over in response to the screams, he sees defendant getting up from being on top of her, which of course is another step in a course of conduct intended to commit rape. ***He stood up, and his penis was sticking out of his shorts.*** What does Mr. Halloran do? Simply adjusts it back inside his pant leg. Mr. Orlando Wilson is not suggesting that his penis is hanging out of his pant leg down to his knee or something. But it does not take much just to tuck up the shorts."

[ERIV 723-724](Emphasis added). The State also argued at closing that Halloran: "lift up that dress a little, slide the skirt, pulls his penis out of his shorts. He's in, he's on her." [ERIV 743].

Wilson's testimony was critical to the State's theory of the attempted sexual

penetration because only Wilson testified that he saw Halloran's penis exposed. Ruiz's testimony impeaches Wilson's testimony. Newly discovered impeachment evidence is material only if the new evidence renders "totally incredible" the testimony of a witness, and that witness's testimony at trial was "uncorroborated" and "provided the only evidence of an essential element of the government's case." Davis, 960 F.2d at 825.

When we examine Wilson's testimony we see that it was self-contradictory and incredulous from the beginning. Initially he testified that after hearing a scream on July 1, 1996, he ran out of his second-floor apartment and saw the assault: "I seen what happened", "[w]hen I was looking from my railing". [ERIII 563]. The district court's finding in the Order Denying Relief that "Wilson never asserted that he saw 'everything'" is clearly wrong. [ERI 31]. That is precisely what Wilson stated on direct.

On cross, Wilson admitted that the wall between his building and Lloyd's was high enough that "you could not see what happened; right? Because it's kind of hidden by that wall, even if you're on the second-floor railing of your apartment building; right?", to which Wilson answered, "[r]ight." [ERIII 563]. When asked, "you really did not see everything; right?", Wilson answered "[n]ot quite." [ERIII 563]. When Yee confirmed, "[s]o before you came out you did not see what

happened; right?", to which Wilson answered "[n]o." [ERIII 564]. This was an admission to lying. The district court's determination that, "Petitioner's argument that Wilson lied on the stand is utterly unconvincing" represents another error. [ERI 31].

Wilson testified to two remarkable feats which the district court accepted at face value: he dressed in "two seconds"; he jumped over the railing of his second-floor apartment and landed in the parking lot, apparently uninjured, before going next-door to the incident.[8] [ERIII 561-562]. The district court wrote: "[b]ased on Wilson's testimony, it is entirely possible that Wilson arrived at the stairs in less than one minute". [ERI 27]. The court's failure to question these two statements of highly improbable physical feats represents another error.

As to the alleged assault, Wilson's trial testimony was contradictory. On direct, he said he saw Halloran "on top of a female just getting up off her" [ERIII 548], but on cross he said he saw Halloran "laying on top of her". [ERIII 566]. In his police statement he reported that Halloran was "sitting, dash, laying" on Lloyd. [ERIII 565]. But at trial Wilson insisted that Halloran was "laying on top of her",

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[8] Rather than take the stairs to the ground level from his second-floor apartment, Wilson testified, "I went over the railing". Defense counsel clarified, "you jumped over the railing from your second-floor apartment up here like you said"; Wilson answered, "[y]es." [ERIII 562].

and he blamed the police officer: "what I told him and what I wrote is two different things". [ERII 566]. Thus, Wilson called into question the veracity of his police statement provided right after the incident. Yet shortly thereafter, Wilson did an about-face and testified to the veracity of his police statement: "What it is is the truth. So I signed it" [ERIII 567], and "I know what I told the police officer and I know what he wrote down, so I signed it." [ERIII 568].

As to Wilson's testimony that he saw Halloran's penis exposed, his police statement reported that Halloran's shorts were around his knees and his penis exposed. [ERIII 569]. At trial Wilson claimed that this was incorrect and he again blamed the police officer who must have made that up. [ERIII 569]. Wilson now claimed that Halloran's shorts remained up, and that he saw Halloran's penis "[s]ticking out the right-hand side of his shorts". [ERIII 549-550]. When asked to describe the extent of the exposure Wilson could not, and replied, "his penis was hard. How am I supposed to know?" [ERIII 570]. When asked why he didn't report in his police statement that he saw Halloran's penis sticking out of his shorts, Wilson again blamed the police officer, who "didn't ask me." [ERIII 571].

While Wilson testified that he saw Halloran punching Lloyd, he did not report this in his police statement. [ERIII 575]. He again blamed the police officer, "Like I said, I'm not the one that wrote it." [ERIII 575]. While Wilson

testified at trial that he heard Halloran yell at Lloyd, "shut the fuck up, bitch" [ERIII 549], out of the presence of the jury, defense counsel Yee pointed out to the circuit court that this statement was never set forth in Wilson's police statement or the police reports, and never provided to Halloran in discovery.[9] [ERIII 599].

Wilson's testimony was incredible from the start and his improbable leap over a second-story apartment railing, and it just got worse after that, resulting in one self-contradictory statement after another. Had the jury heard Ruiz's testimony it would have confirmed that Wilson was "totally incredible". Davis, 960 F.2d at 825.

Further, no other testimony corroborates Wilson's claim that Halloran's penis was exposed. Lloyd herself testified that she never saw Halloran's short's pulled down or his penis exposed, and, "I never felt his penis. I never felt any penetration." [ERIII 545]. Halloran testified that his shorts remained up and his penis remained in his shorts. He demonstrated for the jury that his penis would have to be two feet in length to have protruded from the bottom of his shorts leg, and that his penis was not two feet in length. [ERIV 702].

The district court's conclusion that, "Wilson's testimony is buttressed by

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[9] Yee did not ask that the statement be stricken, on the ground that he did not want to call the jury's attention to it. [ERIII 600].

both the victim's injuries and testimony, and by Petitioner's own testimony admitting he punched, slapped, and forced the victim's head to the ground" [ERI 45, 31-32] is correct in the sense that Lloyd testified to injuries, and Halloran testified to defending himself. But it is irrelevant with respect to the charge of Attempted Sexual Assault in the First Degree, and the State's theory that Halloran intended to penetrate with his penis. Wilson provided the only evidence supporting of this essential element of the State's case. But his testimony was "totally incredible" and "uncorroborated". Davis, 960 F.2d at 825.

The question then becomes, was there sufficient evidence apart from Wilson's testimony to permit a reasonable jury to find Halloran guilty as charge beyond a reasonable doubt? The only other evidence supporting a finding that Halloran took a substantial step intended to sexual assault Lloyd, was Lloyd's uncorroborated testimony that Halloran lifted her dress and pulled aside her bathing suit crotch.

Generally, Lloyd's testimony was replete with self-contradiction and did not withstand cross examination. She failed to credibly testify about basic aspects of her life: first she said she was 38-years-old, but later said she was 36 [ERIII 487-488]; first she said she lived at 2309 Ala Wai since 1974/75, then said she'd lived there for only 1 ½ years. [ERIII 506].

Her testimony concerning her behavior at the Pub was either self-contradicted or contradicted by other credible witnesses: Lloyd testified that she went to the Pub on June 30, 1996 at around 5:30 p.m., but later said "I don't know what time I went there" [ERIII 543]; she claimed that she didn't drink beer, but Keefe and Goebert testified that she did and that she was highly intoxicated; she testified that she did not hug, kiss, or sit in Halloran's lap, or come-on to him, while Keefe and Goebert said she did all these things; she testified that she did not ask Halloran to take nude photographs of her, while Keefe and Goebert said she did.

Her testimony concerning the alleged assault was riddled with self-contradiction:

- she testified that Halloran had been a gentleman all night, then suddenly attacked her;
- she testified before the grand jury that Halloran used his left hand to lift her skirt and right hand to pull aside her crotch; but at the trial she said he used his left hand to hit her head [ERIII 534] and his right hand to lift her dress and to pull aside her bathing suit crotch [ERIII 536];
- she testified to the grand jury that Halloran hit her head three times [ERIII 537], but at trial said it was four times [ERIII 533];
- she testified before the grand jury three days after the incident [ERIII 535], but testified at the trial that she remained in bed with a concussion for four days after the incident [ERIII 537];

- she testified at the trial that she left the Pub “around eleven", but she told police officers she left at midnight. [ERIII 543].

Further, Lloyd testified that she never saw or felt Halloran’s penis, and she never felt any penetration. The condition of her clothing from that night was neither torn nor damaged (State’s Exhibits 2 and 3; ERIII 496, 498); Lloyd’s alleged injuries to her arms and to her head are consistent with Halloran’s admission that he hit her head, arms and hands defensively, but not in an attempt to commit sexual assault.

Ruiz’s testimony carries none of the credibility problems seen with Wilson and Lloyd’s testimonies. Ruiz corroborated Halloran’s testimony concerning the alleged sexual assault – there was none. There was clearly an altercation between the two, but as Ruiz testified Halloran was trying to get away from Lloyd, who was holding onto his leg trying to prevent him from leaving. Ruiz saw Halloran hit Lloyd and Halloran admitted to striking Lloyd, but in an effort to get away. While Lloyd claimed overwhelming fear – “I was so scared you would not believe it” [ERIII 545], and “I was petrified out of my mind because I was being beat up my skirt was up and I didn’t know whether I was going to be killed or raped” [ERIII 545] – Ruiz testified that Lloyd displayed no fear, sought no help, and was hanging on to Halloran and cursing. “She wasn’t trying to get away”. [ERIV

771]. Nothing in her behavior led Ruiz to believe that he needed to intervene and help Lloyd, or remain when the police came as a material witness to a crime.

Halloran's testimony and the evidence, including his torn shirt [ERIV 690-691, 705], showed that he was intoxicated, made the regrettable decision at the Pub to go to Lloyd's apartment, and when he realized that she didn't want photographs and he tried to leave, a dispute arose, insults were traded, then Lloyd physically struck out against Halloran. This was the second person the record showed her physically striking that night, with Keefe testifying that Lloyd didn't just argue with the man at the Pub, but pushed him as he was trying to get away from her. [ERIII 619-621].

Ruiz's testimony supported Halloran's defense, was probative of his innocence and a new trial with his testimony would likely result in acquittal.

B. Federal Review is Necessary to Prevent a Fundamental Miscarriage of Justice.

1. Standard of Review.

The district court's decision to grant or deny a prisoner's petition for habeas corpus is reviewed de novo. Benn, 283 F.3d at 1051. Dismissal of a habeas corpus petition filed pursuant to 28 U.S.C. § 2254 based on state procedural default

presents issues of law reviewed de novo. Jaramillo, 340 F.3d at 880.

2. Discussion.

A procedural default may also be excused if Halloran can demonstrate that failure by the federal courts to consider the claim will result in a fundamental miscarriage of justice. *See* Coleman, 501US at 750; Majoy, 296 F.3d at 775. A miscarriage of justice occurs when a constitutional violation has probably resulted in the conviction of one who is actually innocent. Murray, 477 U.S. at 496 (1986); Schlup, 513 U.S. at 327.

"Under Schlup, a petitioner's "otherwise-barred claims [may be] considered on the merits ... if his claim of actual innocence is sufficient to bring him within the 'narrow class of cases ... implicating a fundamental miscarriage of justice.' " Carriger v. Stewart, 132 F.3d 463, 477 (9th Cir.1997) (en banc) (*quoting* Schlup, 513 U.S. at 315).

> "In order to pass through Schlup's gateway, and have an otherwise barred constitutional claim heard on the merits, a petitioner must show that, in light of all the evidence, including evidence not introduced at trial, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. A petitioner need not show that he is actually innocent of the crime he was convicted of committing; instead, he must show that a court cannot have confidence in the outcome of the trial."

Majoy, 296 F.3d at 775 -776(internal quotation marks and citations omitted).

The record indicates that throughout the evening at the Pub, Halloran and

Lloyd became intoxicated, friendly, and it showed that Halloran displayed no aggressive, hostile impulses toward Lloyd, who herself testified that he "was never not a gentleman". [ERIII 538]. In contrast, Keefe testified that Lloyd didn't just argue with another man at the bar, but pushed him as he was trying to get away from her. [ERIII 619-621].

As to the scene in front of Lloyd's apartment building, the record indicates that Ruiz was the first eyewitness to the incident wherein he saw Halloran and Lloyd engaged in an altercation – but not an Attempted Sexual Assault in the First Degree. Ruiz's credible testimony was exculpatory: Halloran was trying to walk away; Lloyd hung onto his leg to prevent him from leaving; she didn't appear frightened of him; she didn't call for help, but instead cursed at him; Halloran's penis was not exposed. Lloyd herself never saw or felt Halloran's penis, or felt any penetration.

In addition to Ruiz's testimony, the fact-finder did not hear evidence that in 1996 Halloran was taking the drug Tegretol for a seizure disorder, that one of Tegretol's side effects was impotence, and that he was impotent at the time of the incident. [ERII 265-266; ERIV 765-766]. This evidence would have further caste doubt as to Wilson's testimony that he saw Halloran's erect penis exposed. [ERIII 570]. Together with Ruiz's testimony, the Tegretol evidence would have created

reasonable doubt that Halloran intended to sexually assault Lloyd.

The fact-finder did not hear evidence that Halloran had an injury to his left wrist, hand and thumb, making it "impossible ... to punch anything with that hand without breaking my wrist". [ERII 266]. The fact-finder did not hear evidence indicating minimal injury to Lloyd's head ("reddened abrasion"), and no injury to her neck ("[n]othing visible"). [ERII 169]. This evidence would have created further doubt as to the credibility of Lloyd's testimony that Halloran physically attacked her, and her uncorroborated testimony that he used his right hand to pull aside her bathing suit crotch to expose her vagina, while punching, choking and hitting her head on the cement with his left hand.

This body of evidence not introduced at trial, including Ruiz's testimony, indicates that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt" of the offense of Attempted Sexual Assault in the First Degree on July 1, 1996 during the incident in front of Lloyd's Honolulu apartment building. Majoy, 296 F.3d at 775-776.

Further, Halloran takes the opportunity to point out two problems at the close of the circuit court trial left unpreserved, and never raised in the post-convictions proceedings. First, during closing arguments the State misstated portions of the evidence. While counsel are permitted a degree of latitude in their

closing summations, to strike "hard blows" based on the evidence and all fair inferences therefrom, courts may not permit "foul" blows. United States v. Potter, 616 F.2d 384, 392 (9th Cir.1979), *cert. denied*, 449 U.S. 832 (1980); United States v. Birges, 723 F.2d 666 (9th Cir.), *cert. denied*, 466 U.S. 943 (1984).

At closing the prosecutor told the jury: "[I]t doesn't take much for a man who was going to commit sex assault, in a quick amount of time to simply lift up his pant leg and pull his erect penis out of his shorts. That's what happened. That's how his penis got out of his shorts." [ERIV 724]. And, to cover his penis, the prosecutor argued that Halloran, [s]imply adjusts it back inside his pant leg. Mr. Orlando Wilson is not suggesting that his penis is hanging out of his pant leg down to his knee or something. But it does not take much just to tuck up the shorts." [ERIV 724]. However, no witness testified to seeing Halloran's shorts leg lifted or raised, or to seeing Halloran "adjust" or "tuck" his penis into his shorts. To the contrary, Wilson testified that Halloran's shorts leg was not pulled up. [ERIII 570].

The prosecutor also argued that Halloran, "pulls his penis out of his shorts. He's in, he's on her." [ERIV 743]. This inference of sexual penetration – "[h]e's in" – was a foul blow. Lloyd's testified that she never felt any form of sexual penetration: "I never felt his penis. I never felt any penetration." [ERIII 545].

Second, in its jury instructions concerning the charge Attempted Sexual Assault in the First Degree, the circuit court instructed the jury, in relevant part, that the State needed to prove beyond a reasonable doubt:

> "that the conduct under the circumstances as the defendant believe them to be was a substantial step in a course of conduct intended by the defendant to culminate in the commission of sexual assault in the first degree.
>
> A person commits the offense of sexual assault in the first degree if he knowingly subjects another person to an act of sexual penetration by strong compulsion. Conduct shall not be considered a substantial step unless it is strongly corroborative of the defendant's intent to commit sexual assault in the first degree.
>
> Sexual penetration means vaginal intercourse, anal intercourse, fellatio, cunnilingus, anilingus, deviate sexual intercourse, or any intrusion of any part of a person's body ***or any object into the genital or anal opening of another person's body***. It occurs upon any penetration, however slight, but emission is not required."

[ERIV 752-753](Emphasis added.)

A "trial court must instruct the jury as to what specific facts it must find in order for it to find the defendant guilty of a particular count.... Otherwise, the instructions will not accomplish their purpose and will be prejudicially insufficient." State v. Correa, 5 Haw.App. 644, 646-47, 706 P.2d 1321, 1323 (1985) (Citations omitted). Where the charge is Attempted Sexual Assault in the First Degree, the trial court must instruct the jury as to what specific facts it must find before it decides whether Defendant is guilty. State v. Iosefa, 77 Hawai'i 177,

185-186, 880 P.2d 1224, 1232-1233 (Hawai`i App.,1994).

Here, the instructions failed to instruct the jury as to what specific substantial steps Halloran took in the course of conduct intended to culminate in the commission of Sexual Assault in the First Degree, including the act of sexual penetration. Was it his alleged exposure of his penis, as Wilson testified? Was it his alleged exposure of Lloyd's vagina by pulling aside her bathing suit crotch? Halloran was entitled to a unanimous verdict on all elements of the charge, but without proper guidance it is impossible to say that the jury's verdict was unanimous.

Under the fundamental miscarriage of justice standard, Halloran need not show that he is actually innocent of the crime he was convicted of committing; "instead, he must show that "a court cannot have confidence in the outcome of the trial." Majoy, 296 F.3d at 775. The trial record, the evidence introduced at trial, and the evidence not introduced at trial – including Ruiz's testimony – show that this Court cannot have confidence in the jury's guilty verdict.

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CONCLUSION

Examination of the record demonstrates both cause for the default of the procedural rule and actual prejudice as a result of the violation of federal law and, as well, that failure to consider Halloran's claim will result in a fundamental miscarriage of justice. Coleman, 501 U.S. 750. Therefore, this Court should remand to the district court for further proceedings in Halloran's § 2254 Petition.

DATED: Wailuku Maui, Hawai`i, April 6, 2009.

s/ Georgia K. McMillen
GEORGIA K. MCMILLEN
Attorney for Petitioner-Appellant

C.A. NO. 07-16412

CERTIFICATE OF COMPLIANCE

I certify that:

Pursuant to Fed. R. App. P. 32 (a) (7) (C) and 9th Cir. R. 32-1, the attached opening brief is:

☒ Proportionately spaced, has a typeface of 14 points or more and contains 13,791 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7000 words), or is:

☐ Monospaced, has 10.5 or fewer characters per inch and contains_____words or_____lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

DATE: Wailuku Maui, Hawai`i, April 6, 2009.

/s/ Georgia K. McMillen
GEORGIA K. MCMILLEN
Attorney for the Defendant Appellant

C.A. NO. 07-16412

STATEMENT OF RELATED CASES

Upon information and belief, there are no other cases in this Circuit, or elsewhere, relating to the Petitioner-Appellant and the matters discussed herein.

DATED: Wailuku Maui, Hawai`i, April 6, 2009.

s/ Georgia K. McMillen
GEORGIA K. MCMILLEN
Attorney for Petitioner-Appellant

C.A. NO. 07-16412

CERTIFICATE OF SERVICE
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I hereby certify that on (date) April 6, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Signature: s/ Georgia K. McMillen

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I hereby certify that on (date) _____, I electronically filed the forgoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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