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SCWC-23-376

IN THE SUPREME COURT STATE OF HAWAI'I

STATE OF HAWAI'I,
Respondent/Plaintiff-Appellee,

vs.

CHARLES ZUFFANTE,
Petitioner/Defendant-Appellant.

CIRCUIT CASE NO. 3CPC-22-315

RESPONSE TO AMICI CURIAE BRIEF
FILED BY THE HAWAI'I INNOCENCE
PROJECT

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KELDEN B.A. WALTJEN 9686
Prosecuting Attorney

Frederick M. Macapinlac 10113
Deputy Prosecuting Attorney
74-675 Kealakehe Parkway
Kailua Kona, Hawai'i 96740
Tel. No. (808)322-2552
Attorney for State of Hawai'i
Plaintiff-The State

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The State of Hawaii, through the Office of the Prosecuting Attorney for the County of Hawaii, submits its response to the Amici Curiae brief filed by the Hawaii Innocence Project.

This is not a case about a false confession that was obtained by illegal coercion by the police during the interrogation of the petitioner. This is a case where the petitioner claims that he gave a false confession and had done so on his own will to protect his girlfriend.

Defense Counsel: Did you hear Officer Gaspar's testimony that you stated that everything in the car was yours?

Petitioner: Yes.

Defense Counsel: Did you state to Officer Gaspar that everything in the car was yours?

Petitioner: Yes, I did.

Defense Counsel: Did you hear Officer Gaspar ask you whether, um, did you hear Officer Gaspar's testimony where he said that you said "all the meth," in quotation marks, in the car was yours?

...
Petitioner: Oh, I heard him. Yes. Yes, ma'am.

Defense Counsel: Did you tell Officer Gaspar that all the meth in the – "all the meth" in the car was yours?

Petitioner: No, I did not.

Defense Counsel: Did you hear Officer Gaspar's testimony about, um, that you made a statement about having bought and sold methamphetamine?

Petitioner: Yes

Defense Counsel: Did you make that statement?

Petitioner: Yes, I did.

Defense Counsel: Did Officer Gaspar did – ask you about whether or not you had ever bought and sold methamphetamine?

...

Petitioner: Yes.

Defense Counsel: And you answered?

Petitioner: “Yes.”

Defense Counsel: And the reason you answered, “Yes”?

Petitioner: I didn’t want him to arrest Kimberly with – Kim – Kim with me so I just said everything was mine.

Defense Counsel: And did you—and did you hear Officer Gaspar’s testimony that said, um, that you said indeed that you did not want Miss Jackson getting charged with anything?

Petitioner: Right.

Charles Zuffante Direct Examination, Trial Transcript February 1, 2024, pp 134-35 Lines 5-25, Lines 1-21.

The only dispute the petitioner had during the trial about the content of Office Gaspar’s (“Gaspar”) testimony concerning petitioner’s confession was that the petitioner did not specifically say the words “all the meth was mine,” but instead only said that “everything in the car” was his. In front of the jury, the petitioner agreed he told Gaspar that petitioner dealt drugs in the past, that petitioner would buy a large quantify of methamphetamine, break the methamphetamine down into smaller units of 3.54 grams – also known as “eight (8) balls,” and that petitioner would sell the eight (8) balls for \$150 apiece. The petitioner himself corroborated Gaspar’s testimony. The petitioner said “you lie” three times during Officer Gaspar’s re-direct testimony, but only in response to Gaspar testifying that petitioner specifically said all the “meth” was his. The issue that petitioner had at trial was not the nature of the false confession, but the content in the use of specific wording, which is a credibility dispute. “Evidence surrounding the making of a confession bears on its credibility as well as its voluntariness. Because questions of credibility, whether of a witness or of a confession, are for the jury, the requirement that the court make a pretrial voluntariness determination does not undercut the

defendant's traditional prerogative to challenge the confession's reliability during the course of the trial. Thus, evidence about the manner in which a confession was secured will often be germane to its probative weight, a matter that is exclusively for the jury to assess." *State v. Kelekolio*, 74 Haw. 479, 482, 849 P.3d 58, 61 (1993).

There is no claim that coercion was used, no claim that threats were used, no claim of deceptive tactics, no claim that police deprived petitioner of sleep, used physical violence, or used any other abusive methods to overcome the will of the petitioner to extract a false confession. As such, petitioner's alleged "false confession" is not an issue of voluntariness, and by petitioner's own account, the "false" confession was to protect his girlfriend, so there is no dispute that statements were intentionally given. Petitioner claims he made a false confession because he wanted to ensure that his girlfriend would not get charged, he knew they were being investigated for drug possession, but now says he did not say "all the meth" was his, despite a search of his pocket revealing a pink, clear zip packet containing 3.54 grams of methamphetamine, that were packaged in the same manner as ten other pink, clear zip packets of 3.54 grams of methamphetamine with two further zip packets containing 14 grams each (28 grams total) more of methamphetamine located in a fanny pack resting in the vehicle in the rear passenger area with just behind the petitioner, not to mention the 11 grams of methamphetamine in a sun glasses case on the dashboard right in front of petitioner, for a combined total of twenty-two eight balls worth of methamphetamine, an amount well over personal use, *see* HRS § 712-1251. The petitioner simply wanted to have his cake and eat it too, and because the jury did not buy the goods petitioner was selling, the petitioner now claims a violation of his due process rights. A recording would not have unearthed a grave injustice, a recording would have confirmed the trial testimony of both Gaspar and the petitioner.

The underlying hypothesis of the Hawai‘i Innocence Project is that because a confession is interpreted by juries as powerfully persuasive evidence of the confessor’s guilt, an audio/electronic recording will allow juries to determine whether a confession was falsely given. The Hawai‘i Innocence Project supports the petitioner’s position that if no audio or electronic recording is available, a suspect’s own words should not be given to the fact finder for consideration. However, *[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false. Lisenba v. California*, 314 U.S. 219, 236, 62 S. Ct. 280, 290 (1941) (emphasis added). For a due process violation to exist, there must be a fundamental unfairness that fatally infects the trial. *Id*; *See also State v. Loher*, 140 Hawai‘i 205, 214, 398 P.3d 794, 803 (2017) (concluding that the trial court’s denial of continuance request, after the State rested its case early, so that the defendant could further prepare to testify, violated the defendant’s “due process right to a fair trial” because the procedure dictated where and when the defendant would testify and was therefore “fundamentally unfair.”)

Adopting the petitioner’s position is a drastic measure that ironically undermines the truth finding process that occurs at trial by preventing juries from receiving crucial, relevant information. To go along with the petitioner would represent the Court invading the province of the fact finder. The determination of admissibility should be left to the sound discretion of the trial court using the current standards, not a blanket prohibition, and the content of the confession, or whether the confession was said at all, is an issue of weight and credibility for the jury. What about situations where an officer believes the recording device is recording, but the machine itself never recorded? What about when the interrogation was recorded, but the data became corrupted or destroyed through no fault of law enforcement before the exchange of

discovery? What if the recording occurred, but the suspect's voice is so low the suspect's voice is inaudible? These are circumstances where recording is feasible, but through no fault of the government, the recording is not available. The facts and circumstances regarding the lack of a recording are issues that can and should be raised before the fact finder and the decision of whether the statements were or were not made should be left for the fact finder as well, not summarily deemed inadmissible.

Arguing that personal devices could be used to record can lead to unintended ramifications and also opens other potential claims of further due process "violations." If a personal device is used, does the officer's personal property get seized as evidence? If a personal device is used, does defense get to move to exclude on the ground that the officer could have tampered with the personal device or tampered with the recording? If a personal device is used, would it not be fair game to then argue "jury don't believe this recording, the officer should have used an official police device to record, not their own personal property?"

The content of a statement is an issue of evidentiary weight, not admissibility. Whether a confession was falsely given is for the fact finder to determine, and the jury instructions given in this case pointed to numerous opportunities that petitioner had available to call into the questions the veracity of an allegedly "false" confession on the ground that there was a lack of a recording of the interrogation. The response in *State v. Cabagbag*, 127 Haw. 302, 320, 277 P.3d 1027, 1045 (2012) was not to exclude eye-witness testimony, despite research indicating the inherent unreliability presented by cross-racial mis-identification, it was to create a new rule requiring the circuit court give a specific eyewitness identification instruction whenever identification evidence is a central issue. In this case, multiple instructions were given to the jury indicating that the jury was the exclusive fact finders, that the jury was to make the determination of

whether any out-of-court statements were made by the petitioner, if they decided statements were made, to look into the circumstances. They were also instructed on considering the means and opportunity of acquiring information, whether any discrepancies were the result of innocent errors or deliberate falsehood. Most importantly, they were also instructed to consider the lack of evidence as a factor in determining whether reasonable doubt existed.

As the sole and exclusive judges of the facts and of the credibility of the witnesses, **it is your exclusive right to determine whether and to what extent the Defendant's out-of-court statement to police is worthy of belief. In evaluating the reliability and trustworthiness of the out-of-court statement, you should consider all of the circumstances surrounding the making of the statement ... It is for you to decide whether or not the Defendant made the statement. In making this decision, you should consider all of the evidence about the statement, including the circumstances under which the Defendant may have made it.**

Trial Transcript February 2, 2024 ("Transcript") pp. 35-6, Lines 14-25, Lines 1-9, Hawai'i Jury Instruction Criminal ("HAWJIC") 4.07 (emphasis added).

It is your exclusive right to determine whether and to what extent a witness should be believed and to give weight to his or her testimony accordingly. **In evaluating the weight and credibility of a witness's testimony, you may consider ... the witness's means and opportunity of acquiring information; the probability or improbability of the witness's testimony; the extent to which the witness is supported or contradicted by other evidence ... In weighing the effect of inconsistencies or discrepancies, whether they occur within one witness's testimony or as between different witnesses, consider whether they concern matters of importance or only matters of unimportant detail, and whether they result from innocent error or deliberate falsehood.**

Transcript pp. 33-4 Lines 1-25, Lines 1-17. HAWJIC 19.2.9 (emphasis added).

If you find that a witness has deliberately testified falsely to any important fact or deliberately exaggerated or suppressed any important fact, then you may reject the testimony of that witness except for those parts which you nevertheless believe to be true.

Transcript p. 37, Lines 5-12. HAWJIC 19.2.10.

What is a reasonable doubt? **It is a doubt in your mind about the Defendant's guilty which arises from the evidence presented or from the lack of evidence and which is based upon reason and common sense.**

Transcript p. 29, Lines 14-19. HAWJIC 19.2.2 (emphasis added).

Although lack of evidence was argued, the lack of the interrogation being recorded was not highlighted to the jury.

...Detective Gaspar testified that he interrogated Mr. Zuffante which the State calls an interview. That he did not ask Mr. Zuffante whether Mr. Zuffante knew what the contents of any woman's handbag, leather coin purse, polka dot coin purse, sunglasses case and fanny pack were.

Both Detective Gaspar and Mr. Zuffante gave testimony that while under interrogation Mr. Zuffante stated that everything was his and that he did not want his girlfriend Kimberly Jackson to face any criminal charges.

When asked why he made the statement to Officer Gaspar about buying and selling drugs Mr. Zuffante testified because he wanted to make sure Miss Jackson would not be charged.

In the past two days State has not attempted to put before the jury any evidence that at the time of the offense Mr. Zuffante attempted to distribute any of the items alleged in Count 1 or 2 or that he negotiated for their sale or bartered for their exchange.

Even if you were to believe Mr. Zuffante's statement alleging his previous conduct in these regards it has no bearing on the question of Mr. Zuffante's conduct on or about October 20th, 2021. The indictment charges him with offenses occurring on or about October 20th, 2021 only.

Using common sense and logic the jury reasonably could find that Mr. Zuffante's remarks were mere puffery especially in light of the fact State did not adduce any evidence whatever Mr. Zuffante claimed about pricing and sales had any basis in fact in the local economy.

In sum this is the evidence including the lack of evidence that gives form and substance to the reasonable doubt that respectfully should compel you, the jury, to return verdicts of Not Guilty on the three remaining counts charged under the indictment.

Transcript p 87 lines 1-25, p 88 lines 1-13.

There was no motion to suppress statements, exclude statements, or dismiss the case for due process violation for failure to record the interrogation. Because of the failure to move for

any of the above, the record in this case lacks any evidence, and is therefore silent, about whether the lack of a recording in this case indicates an intention by the police to purposely not record statements, whether the confession in this case is indicative of a “false confession,” or any number of factors which might suggest that the implementation of a drastic change in this state’s admissibility jurisprudence is actually even warranted. The only evidence available on the record is that the recording machine was not functioning at the time of the interrogation. The petitioner raises the issue of “updating” Alaska’s *Stephan* rule. Yet, video and audio devices were commercially available in the 1990s when *Kekona* was decided, Petitioner did not even raise the issue of alternative methods of recording an interrogation before the trial court, the jury, or even the Intermediate Court of Appeals.

More importantly, on appeal, it is the burden of the petitioner to show that the lack of recording the interrogation rendered his trial fundamentally unfair. *Loher*, 140 Hawai‘i 205. Without having asked to exclude the interrogation before the trial, through motion, and during the trial itself, through an objection, the trial court was essentially robbed of the opportunity to consider any arguments, and without having attempted to argue the issue in front of the jury, the record on appeal is in itself lacking in an evidentiary record or showing of nexus to determine whether the petitioner was denied due process at the trial level and at the trial itself from the lack of recording the interrogation. In other words, without having asked to exclude the evidence and by not arguing to the jury there was no recording that was provided so Gaspar should not be believed, there is no showing that an allegedly “false” confession was improperly admitted and was subsequently given undue weight by the jury leading to the conviction of an innocent person. As such, the Petitioner and the Hawai‘i Innocence Project are asking this Court to conduct a fundamental change in the interpretation of the Hawai‘i State Constitution on

speculation of a due process violation, rather than any showing of an actual due process violation.

This petition appears to raise an issue after the fact to have a second bite of the apple because of an unfavorable credibility determination by the jury, the petitioner should not be allowed to fail to use the procedural safeguards given to him and then allege he was denied due process. Respondents appreciate the position of the Hawai‘i Innocence Project, however, based upon this record before the Court, there is no showing that the concerns of the Hawai‘i Innocence Project even apply to this case. Police did not use unjust, or unfair means to extract a false confession against an innocent person’s will, the petitioner simply claims the confession was false and was falsely given on his own will at that. This is not a case where coercive police conduct caused an innocent person to wrongfully confess. This is not a case where sloppy police work caused police to misdirect its attention, nor is this an example of police tunnel vision focusing on “the wrong guy,” in fact, the petitioner admittedly wanted the attention to focus on him to prevent his girlfriend from getting in trouble.

If the drastic measure of overruling *Kekona* ever becomes necessary, this would not be the case to do it. Petitioner was afforded a more than adequate opportunity to paint his confession as false, a more than an adequate opportunity to call into the question the veracity of Gaspar’s testimony, and the conviction that resulted in Petitioner’s trial did not occur because the Petitioner was asked to fight the case without having a recording of his confession, the jury properly weighed the evidence available as well as the lack of evidence and determined that evidence was not lacking and that there was no reasonable doubt.

This is no miscarriage of justice; the petitioner is not an innocent person. The petitioner ran a gambit, came up short, and is now asking to change the law so that he can have another roll of the dice, but this time, loaded in his favor.

Dated: Kailua Kona, Hawai‘i, March 21, 2025.

/s/ Frederick M. Macapinlac
FREDERICK M. MACAPINLAC
DEPUTY PROSECUTING ATTORNEY

CERTIFICATE OF SERVICE

I hereby certify that an e-filed copy of the foregoing document was served upon:

Law Office of Georgette A. Yaindl, LLC
PO Box 307
Kailua-Kona, Hawai'i 96745-0307

Jennifer Brown (HSBN: 010885)
Hawai'i Innocence
Dole Street, Suite 206
Honolulu, HI 96822
jenbrown@hawaiiinnocenceproject.org

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on March 21, 2025.

/s/ Frederick M. Macapinlac
OFFICE OF THE PROSECUTING ATTORNEY