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Supreme Court
SCPW-15-0000236
27-MAR-2015
11:56 AM

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

KAIULA KALAWE ENGLISH and ROBIN WAINUHEA DUDOIT, Petitioners, vs. THE HONORABLE JOSEPH E. CARDOZA, CIRCUIT JUDGE, SECOND JUDICIAL CIRCUIT Respondent. ______________________________________	))))))))))))))	PETITION FOR WRIT OF MANDAMUS TO THE SECOND CIRCUIT, COUNTY OF MAUI, STATE OF HAWAIʻI

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PETITION FOR WRIT OF MANDAMUS TO SECOND JUDICIAL CIRCUIT, COUNTY OF MAUI, STATE OF HAWAIʻI

The Petitioners Kaiula Kalawe English and Robin Wainuhea Dudoit, by and through their counsel, respectfully petitions the Court to issue a writ of mandamus directing the Honorable Joseph E. Cardoza of the Circuit Court of the Second Judicial Circuit to immediately grant the motions to dismiss criminal complaint CR 14-1-0819, *State v. English*, and criminal complaint CR 14-1-0820, *State v. Dudoit*, filed on February 6, 2015 with an evidentiary hearing held March 5, 2015.

This motion is made pursuant to Hawaiʻi Rules of Appellate Procedure Rules 21 and 27.

I. STATEMENT OF FACTS:

1. On November 17, 2014 an indictment and bench warrant was issued against Petitioners Kaiula Kalawe English and Robin Wainuhea Dudoit for two counts of robbery in the second degree, one count of unauthorized entry into a motor vehicle in the first degree, one count of terroristic threatening in the first degree, and one count of harassment.
2. On December 18, 2015, Petitioners were arraigned and both pleaded not guilty to all counts.

3. On February 10, 2015 Petitioner English filed a motion to dismiss criminal complaint pursuant to HRPP 12(b)(1); memorandum in support of motion; declaration of David Keanu Sai, Ph.D.; Exhibits "1-8"; motion for hearing motion; certificate of service (filed ex officio in 1st Circuit on 02/06/15). For the purposes of this petition for mandamus, attached herein as Exhibit "1" is Petitioner English's motion to dismiss, memorandum in support of motion, and Dr. Sai's declaration with exhibits "1-2," excluding exhibits "3-8."
4. On February 10, 2015 Petitioner Dudoit filed a joinder in defendant English's motion to dismiss criminal complaint (CR 14-1-0819) pursuant to HRPP 12(b)(1), filed February 6, 2015; certificate of service (filed ex officio in 1st Circuit on 02/06/15). Attached herein as Exhibit "2" is Petitioner Dudoit's joinder.
5. On February 27, 2015, Petitioner English filed a supplemental declaration of counsel in support of defendant English's motion to dismiss criminal pursuant to HRPP 12(b)(1) filed February 6, 2015; Exhibit "A"; certificate of service (filed ex officio in 1st Circuit on 02/27/15).
6. On March 2, 2015, the prosecution filed two identical memorandums in opposition to Petitioners' motion to dismiss criminal complaint pursuant to HRPP 12(b)(1); certificate of service. Attached herein as Exhibit "3" is the prosecution's memorandum in opposition to Petitioner English's motion to dismiss.
7. In rebuttal to the prosecution's claim in its memorandum in opposition, Petitioners are not claiming immunity from prosecution, but rather challenging the subject matter jurisdiction of the court.
8. An evidentiary hearing was held on Petitioners' motion to dismiss on March 5, 2015. Attached herein as Exhibit "4" is the transcript of the evidentiary hearing.
9. At the evidentiary hearing, David Keanu Sai, Ph.D., a Hawai'i political scientist, was received as an expert witness for the defense in support of Petitioners' motion to dismiss (Exhibit "4," p. 13, ll. 24-25; p. 14, ll. 1). The

Court recognized Dr. Sai as an expert on "the continuity of the Hawaiian State under international law." (*Id*., p. 13, ll. 7-8).

10. At no time did the prosecution object to the expert testimony of Dr. Sai who opined, "the Court would not have subject matter jurisdiction as a result of international law (*Id*., p. 14, ll. 14-15);" and "the Hawaiian state continues to exist under international law (*Id*., p. 24, ll. 14-15)."
11. When asked by the Court if there are any questions, the prosecution responded, "Your Honor, the State has no questions of Dr. Sai. Thank you for his testimony. One Army officer to another, I appreciate your testimony (*Id*., p. 33, ll. 15-17)." In his testimony, Dr. Sai stated he was a retired Army captain.
12. Defense counsel summed up Petitioners' argument by stating, "We have provided the courts now with a factual and legal basis to conclude that the Hawaiian Kingdom continues to exist. Because we've met that burden under Lorenzo, we respectfully submit that the State has failed to meet its burden that this Court has jurisdiction under Nishitani versus Baker (*Id*., p. 34, ll. 9-14)."
13. Instead of providing an evidential basis for concluding that the court has subject matter jurisdiction by objecting to the opinion of Dr. Sai or otherwise, the prosecution stated, "…the case law is fairly clear on this, your Honor. This isn't a new argument. This isn't a novel argument. Courts have ruled that basically regardless of the legality of the overthrow of the Hawaiian Kingdom, Hawaii, as it is now, is a lawful, lawful state with a lawful court system and a lawful set of laws (*Id*., p. 37, ll. 19-25)." Case law is not evidence and cannot be used to prove the court has jurisdiction beyond a reasonable doubt.
14. Defense counsel responded, "Lorenzo is still the prevailing case. So it still requires us to present…relevant factual and legal evidence for the Court to conclude that the Hawaiian Kingdom continues to exist. We've done that now (*Id*., p. 40, ll. 10-16)."
15. In its pleading and at the evidentiary hearing, defense counsel requested judicial notice of adjudicative facts and laws pursuant to Hawai'i Rules of Evidence Rules 201 and 202 as stipulated in Petitioners' memorandum in

support of motion to dismiss (*Id*., p. 42, ll. 15-20). Included in the list of international treaties and case law to be judicially noticed was Dr. Sai's expert memorandum. Defense counsel stated, "Finally, I did ask the Court to take judicial notice of Dr. Sai's expert memorandum, which was attached as an exhibit." (*Id*., p. 44, ll. 1-6)." Defense counsel's reference to an exhibit is exhibit "2" of Dr. Sai's declaration "The Continuity of the Hawaiian State and the Legitimacy of the *acting* Government of the Hawaiian Kingdom."

16. When the court asked, "What's the prosecution's position? (*Id*., p. 44, ll. 13-14)." The prosecution responded, "No objection, your Honor (*Id*., p. 44, ll. 15)." The court then stated, "there being no objection, the Court will take judicial notice as requested (*Id*., p. 44, ll. 16-21)."
17. After the taking of judicial notice of all evidence requested in Petitioners' memorandum in support of the motion to dismiss, the Court stated, "And having considered all of that, the Court at this time is going to deny the motion and joinder to dismiss the criminal complaint in these cases (*Id*., p. 44, ll. 22-24)."

II. ISSUES PRESENTED AND RELIEF SOUGHT

A. Issues Presented

1. Judge Cardoza's refusal to grant Petitioners' motion to dismiss after the Court took judicial notice of the evidence—without objection by the prosecution, that the Hawaiian Kingdom continues to exist as a state stands in violation of common law. The controlling precedent cases for defendants who challenge the Court's jurisdiction—whether personal or subject matter, are *State v. Lorenzo*, 77 Haw. 219 (1994) and *Nishitani v. Baker*, 82 Haw. 281 (1996). The prosecution acknowledges these precedent cases in its memorandum in opposition filed with the Court on March 2, 2015.
2. Judge Cardoza's refusal to grant Petitioners' motion to dismiss also stands in violation of Hawai'i's plain error doctrine. The Hawai'i Supreme Court has held that it "will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of

fundamental rights." See *State v. Miller*, 122 Haw. 92, 100, 223 P.3d 157, 165 (2010) (citing *State v. Sawyer*, 88 Haw. 325, 330, 966 P.2d 637, 642 (1998)). "The due process guarantee of the…Hawaii constitution[] serves to protect the right of an accused in a criminal case to a fundamentally fair trial." See *State v. Matafeo*, 71 Haw. 183, 185, 787 P.2d 671, 672 (1990).

3. In *Lorenzo*, the Hawai'i Intermediate Court of Appeals (ICA) responded to Defendant's claim that the First Circuit Court in criminal proceedings lacked jurisdiction, by stating "it was incumbent on Defendant to present evidence supporting his claim [citation omitted]. Lorenzo has presented no factual (or legal) basis for concluding that the Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature." In *Baker*, the ICA clarified the standard for invoking a defense that the court's lack of jurisdiction, by stating, "Because the defendant had 'presented no factual (or legal) basis for concluding that the Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature,' we determined that the defendant had failed to meet his burden under HRS ß 701-115(2) (1993) [HRS ß 701-115(2) (1993) provides in relevant part: 'No defense may be considered by the trier of fact unless evidence of the specified fact or facts has been presented.'] of proving his defense of lack of jurisdiction [citation omitted]." Furthermore, the ICA clarified that the defendant's "burden of proving his or her defense of lack of jurisdiction may have generated some confusion. HRS ß 701-114(1) (c) (1993) specifically provides that in a criminal case, a defendant may not be convicted unless the State proves beyond a reasonable doubt 'facts establishing jurisdiction.' The burden of proving jurisdiction thus clearly rests with the prosecution [citation omitted]."
4. Ten years since *Lorenzo*, the ICA explicitly affirmed "the relevant precedent stated in *Nishitani v. Baker* [citation omitted], and *State v. Lorenzo* [citation omitted]." See *State v. Fergerstrom*, 106 Haw. 43, 55; 101 P.3d 652, 664 (2004). Since *Lorenzo* and *Baker*, the defenses that the court lacks jurisdiction were consistently denied because defendants "presented no factual (or legal) basis for concluding that the Kingdom exists as a state." See *State v. Lorenzo*,

77 Haw. 219, 883 P.2d 641 (App. 1994); *State v. French*, 77 Haw. 222, 883 P.2d 644 (App. 1994); *Nishitani v. Baker*, 82 Haw. 281, 921 P.2d 1182 (App. 1996); *State v. Lee*, 90 Haw. 130, 976 P.2d 444 (1999); and *State v. Fergerstrom*, 106 Haw. 43, 55, 101 P.3d 652, 664 (App. 2004), aff'd, 106 Haw. 41, 101 P.3d 225 (2004).

5. The prosecution's reliance on *State v. Kaulia*, 128 Haw. 479, 291 P.3d 377 (2013) as a precedent case is in error. See *Memo in Opp.*, p. 11. In *Kaulia*, the Supreme Court merely reiterated the State's criminal jurisdiction pursuant to HRS ß 701-106 (1993) and did not change the precedent cases of *Lorenzo* and *Baker*. In fact, the Court restated the precedent cases in its decision, thereby acknowledging that the defendant did not provide any "factual (or legal) basis for concluding that the Kingdom exists as a state." See *id.* 487, and 385.
6. "Precedent is '[a]n adjudged case or decision of a court, considered as furnishing an example of authority for an identical or similar case afterwards arising or a similar question of law.' *Black's Law Dictionary* 1176 (6th ed.1990). The '[p]olicy of courts to stand by precedent and not to disturb settled point[s]' is referred to as the doctrine of *stare decisis*, (citation omitted), and operates 'as a principle of self-restraint…with respect to the overruling of prior decisions.' (citation omitted). The benefit of stare decisis is that it 'furnish[es] a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; …eliminat[es] the need to relitigate every relevant proposition in every case; and…maintain[s] public faith in the judiciary as a source of impersonal and reasoned judgments.'" See *State v. Kekuewa*, 114 Haw. 411, 419; 163 P.3d 1148, 1156 (2007). Throughout its pleadings, Petitioners relied on the controlling precedents of *Lorenzo* and *Baker* "as a clear guide for the conduct of [their defense], to enable them to plan their affairs with assurance against untoward surprise."
7. The trial court's taking judicial notice of Dr. Sai's legal brief, "The Continuity of the Hawaiian State and the Legitimacy of the *acting* Government of the Hawaiian Kingdom," during the evidentiary hearing is an evidentiary ruling.

Where a party does not make a timely request to be heard on the issue of the court's taking judicial notice, that party has waived its right to appeal the propriety of taking judicial notice or the tenor of the matter noticed. See *In re Hertzel*, 329 B.R. 221, 2005 FED App. 0006P (B.A.P. 6th Cir. 2005). The prosecution is estopped from denying what was judicially noticed, because it made no objection to the Court's taking judicial notice after the Court clearly announced its intention on the record and provided an opportunity for the prosecution to respond. "[T]he effect of judicial notice is that facts are taken to be true unless rebutted." See *Application of Pioneer Mill Co*., 53 Haw. 496, 497, 497 P.2d 549, 550 (1972).

8. Judicial notice of Dr. Sai's legal brief was the Court taking notice of adjudicative facts pursuant to HRE Rule 201(b)(2), whereby a "judicially noticed fact must be one not subject to reasonable dispute in that it is…capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." "A fact is a proper subject for judicial notice if it is…easily verifiable. See *Almeida v. Correa*, 51 Haw. 594, 572, 464 P.2d 564, 605 (1970). Verification was obtained through expert testimony given by Dr. Sai under oath and unopposed by the prosecution "as to (1) the witness's qualification, (2) the subject to which the witness' expert testimony relates, and (3) the matter upon which the witness' opinion is based and the reasons for the witness' opinion (HRE Rule 702.1(a)).
9. Judicial notice of Dr. Sai's legal brief also has the effect of concluding the following salient facts, which are drawn from Dr. Sai's brief and expert testimony, to be indisputable, and therefore Petitioners have met their burden of providing a "factual (or legal) basis for concluding that the Kingdom exists as a state" pursuant to *Lorenzo* and *Baker*.
    a. The Hawaiian Kingdom existed in the nineteenth century as an internationally recognized independent and sovereign state. See Exhibit "1" (exhibit "2," Declaration of Dr. Sai), para. 3.1, quoting the dictum of the Permanent Court of Arbitration, *Larsen v. Hawaiian Kingdom*, 119 Int'l L. Rep. 566, 581 (2001).

b. The United States admitted to illegally aiding a small group of insurgents in the seizure of the Hawaiian Kingdom government, and entered into an executive agreement with Queen Liliʻuokalani, through *exchange of notes*, to reinstate the Hawaiian government on December 18, 1893. See *id*., para. 3.5-3.6.

c. There is a presumption of continuity of an internationally recognized independent and sovereign state despite the absence of its government. See *id*., para. 2.4, quoting J. Crawford, *The Creation of States in International Law* 34 (2d. ed. 2006).

d. The United States did not comply with the executive agreement of reinstating the Hawaiian government and allowed its puppet government, which was neither *de facto* nor *de jure*, but self-declared, to continue in power. See *id*., para. 3.7.

e. Sole-executive agreements bind the President of the United States under international law for its faithful execution and also bind the President's successors in office. See *id*., quoting Q. Wright, *The Control of Foreign Relations*, 235 (1922).

f. The puppet government called the provisional government was re-named to the Republic of Hawaiʻi on July 4, 1894, which remained self-declared. See *id*., para. 6.4, quoting *Joint Resolution To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaiʻi* (107 U.S. Stat. 1510).

g. In 1898, the United States Congress attempted and failed to annex the Hawaiian Islands by a *Joint Resolution to provide for annexing the Hawaiian Islands to the United States* (30 U.S. Stat. 750). See *id*., para. 3.11.

h. In 1900, the United States Congress attempted and failed to change the name of the so-called Republic of Hawaiʻi to the Territory of Hawaiʻi by *An Act To provide a government for the Territory of Hawaiʻi* (31 U.S. Stat. 141). See *id*., para. 3.12.

i. In 1959, the United States Congress attempted and failed to change the name of the Territory of Hawai'i to the State of Hawai'i by *An Act To provide for the admission of the State of Hawai'i into the Union* (73 U.S. Stat. 4). See *id*.

j. Congressional legislation has no force and effect beyond the territorial borders of the United States, except by virtue of personal supremacy over its citizens abroad and criminal acts committed abroad under the *effects doctrine*. See *id*., para. 3.11, citing *United States v. Curtiss Wright Export Corp*., 299 U.S. 304, 318 (1936), and quoting Congressman T. Ball, 31 Cong. Rec. 5975 (1898), and G. Born, *International Civil Litigation in United States Courts* 493 (3rd. ed. 1996).

k. There is no evidence rebutting the presumption of continuity of the Hawaiian Kingdom as an independent and sovereign state under international law, and therefore the Hawaiian Kingdom continues to exist "as a state in accordance with recognized attributes of a state's sovereign nature." See *id*., in its entirety, citing *State v. Lorenzo*, 77 Haw. 219, 221; 883 P.2d 641, 643 (1994); see also expert testimony of Dr. Sai, *Transcripts*, p. 23, ll. 22-23.

l. The United States belligerently occupied the Hawaiian Islands on August 12, 1898 during the Spanish-American War, which did not transfer the sovereignty of the Hawaiian Kingdom to the United States. See *id*., para. 3.12, citing *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. 191 (1815); *United States v. Rice*, 17 U.S. 246 (1819); *and Flemming v. Page*, 50 U.S. 603 (1850); and quoting from United States Army Field Manual 27-10, section 358—*Occupation Does Not Transfer Sovereignty*.

m. According to customary international law, which was codified in 1899 and 1907 by the Hague Conventions, the occupying State, being the United States, is mandated to administer the laws of the occupied State, being the Hawaiian Kingdom. See *id*., para. 8.13, quoting E.

Feilchenfeld, *The International Economic Law of Belligerent Occupation* 8 (1942); and P. Dumberry, *The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom's Claim to Continue as an Independent State under International Law*, in 2(1) Chinese J. of Int'l L. 655, 682 (2002).

n. Failure to administer the laws of the occupied State is a violation Article 43 of the 1907 Hague Convention, IV. See *id*., para. 8.14.

o. Failure to provide a fair and regular trial is a grave breach of Article 147 of the 1949 Geneva Convention, IV, and a war crime. See *id*., para. 10.5, citing A. Marschik, *The Politics of Prosecution: European National Approaches to War Crimes* in the Law of War Crimes: National and International Approaches 72, note 33 (1997), and quoting 18 U.S. Code §2441(c)(1); see also expert testimony of Dr. Sai, *Transcripts*, p. 29, ll. 11-17.

p. The United States ratified the 1907 Hague Conventions, and the 1949 Geneva Conventions. See *id*., p. 50, fn. 199, citing 36 U.S. Stat. 2277, and *Treaties and Other International Acts Series*, 3365.

10. By judicial notice the prosecution waived all arguments claiming the Court has subject matter jurisdiction, and furthermore has failed in its burden of proving "beyond a reasonable doubt 'facts establishing jurisdiction,'" pursuant to *Nishitani v. Baker,* 82 Haw. 281, 289, 921 P.2d 1182, 1190 (1996). "If a court lacks jurisdiction over the subject matter of a proceeding, any judgment rendered in that proceeding is invalid," *Bush v. Hawaiian Homes Comm'n*, 76 Haw. 128, 133, 870 P.2d 1272, 1277 (1994) (citation, internal quotation marks and brackets omitted).

11. The Petitioners have prevailed in its argument and the prosecution, on behalf of the State of Hawai'i, "cannot claim relief from the Circuit Court of the Second Circuit because the appropriate court with subject matter jurisdiction in the Hawaiian Islands is an Article II Court established under and by virtue of Article II of the U.S. Constitution in compliance with Article 43, 1907 Hague Convention IV (36 U.S. Stat. 2277). Article II Courts are Military

Courts established by authority of the President, being Federal Courts, which were established as 'the product of military occupation.' Military Courts are generally based upon the occupant's customary and conventional duty to govern occupied territory and to maintain law and order." See *Memo in Support of Motion to Dismiss*, p. 1; see also Exhibit "1" (exhibit "2," Declaration of Dr. Sai), para. 10.2; and Exhibit "4," p. 30, ll. 20-22, and p. 31, ll. 21-22.

B. Relief Sought

1. The Petitioners request that this Honorable Court grant it's request for a Writ of Mandamus directing Judge Joseph E. Cardoza to immediately dismiss criminal complaint CR 14-1-0819 against Petitioner Kaiula Kalawe English and criminal complaint CR 14-1-0820 against Petitioner Robin Wainuhea Dudoit with prejudice.

DATED: Honolulu, Hawai'i, March 27, 2015.

/s/ Dexter K. Kaiama
DEXTER K. KAIAMA
Attorney for Petitioners