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Court-appointed Attorney for DAYNE HENRY ALEKA GONSALVES

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAI`I

STATE OF HAWAI`I	)	Cr. Nos. <u>08-1-0036</u> , <u>08-1-0037</u> ,
	)	<u>08-1-0270</u> , <u>08-1-0271</u>
vs.	)	
	)	DEFENDANT DAYNE HENRY
DAYNE HENRY ALEKA	)	ALEKA GONSALVES`
GONSALVES, et. al.,	)	MOTION TO STRIKE
	)	ILLEGAL CONDITION IN
Defendants.	)	PLEA OFFER AND THEN
	)	ENFORCE PLEA OFFER;
	)	DECLARATION OF
	)	COUNSEL; NOTICE OF
	)	MOTION; EXHIBITS A - C;
	)	CERTIFICATE OF SERVICE
_____	)	
_____	)	

Trial Week: May 9, 2011  
Time: 9:00 a.m.  
Judge: Hon. Kathleen N.A.  
Watanabe

**DEFENDANT DAYNE HENRY ALEKA GONSALVES` MOTION TO  
STRIKE ILLEGAL CONDITION IN PLEA OFFER AND THEN ENFORCE  
PLEA OFFER**

COMES NOW defendant DAYNE HENRY ALEKA GONSALVES, by and through his Court-appointed counsel Daniel G. Hempey, and hereby moves this Honorable Court for an order striking as illegal, a condition in the State of Hawaii's most-recent plea offer and enforcing the remainder of the agreement.

This motion is made pursuant to Hawai'i Rules of Penal Procedure Rules 12 and the United Nations Declaration on the Rights of Indigenous Peoples, United States Public Law 103-105, Act 359 and the authority cited herein and is based on the records and files herein, any evidence or arguments adduced at a hearing on this matter, as well as the Declaration of Counsel attached hereto and incorporated herein by reference.

DATED: Lihu'e, Hawai'i, May 2, 2011.

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DANIEL HEMPEY  
Court-appointed Attorney for  
DAYNE HENRY ALEKA GONSALVES

MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION TO DISMISS

STATEMENT OF FACTS

Defendant, Mr. Gonsalves, is politically active in the Native Hawaiian Sovereignty Movement. Mr. Gonsalves is a “Native Hawaiian” within the meaning of Hawaiian Homes Commission Act Article 2 § 201. He believes that, under international law, the overthrow of the Kingdom of Hawai`i was illegal.

As a part of the defendant’s exercise of his indigenous people’s right to self determination, he has been forming an indigenous government, called Atooi. Defendant, along with several other Native hawaian Kauai residents, holds himself to be a citizen of the “Kingdon of Atooi.” Mr. Gonsalves is recognized by the citizens of the Kingdon of Atooi as an Ali’i Nui or “King.”

As a part of the Kingdom of Attoi’s efforts to assert their rights under International, State and Federal law, Mr. Gonsalves has made numerous travels to meet with representatives from other nations of indigenous peoples. Indigenous governments that reside in Rapanui, Tahiti, Canada and Alturoa, among others, have recognized the Kingdon of Atooi as a legitimate indigenous nation and have entered into treatys with the Kingdom of Atooi in this regard. The Kingdom of Atooi has even entered into a cross-treaty called the United Nations of Turtle Islands, which consists of numerous other indigenous governments in Polynesia.

Defendant asks the Court to take judicial notice of the prevalence in the local Courts of defendants asserting that that are citizens of the Kingdom of Atooi. He also asks he court to consider the numerous pro-se filings he has made in this case, which demonstrate his efforts on behalf of and his affiliation with the Kingdom of Atooi.

As a part of the internal workings of the fledgling indigenous government, defendant has been awarded with a badge. The badge bears his family's coat of arms and reads "Hawaii Federal Marshall – Kingdom of Atooi". A true and correct copy of the badge at issue is attached hereto as "exhibit A".

The police seized the defendant's badge from him when he was arrested. The State did not thereafter file any sort of forfeiture petition. Until approximately one week ago, the Prosecutor had given no notice to the defendant (after nearly four years) that the prosecutor would ever seek forfeiture of the subject Atooi badge.

In recent plea negotiations in these cases, the State has offered to settle this case by accepting a plea to a reduced petty misdemeanor charge of obstructing and asking the Court to dismiss all remaining charges against the defendant with prejudice. The State sought a \$250 fine, only. The Court has indicated that it would follow such an agreement.

However, the State also added an additional term to its proposed offer. It demanded that the defendant agree to surrender his Federal Marshall – Kingdom of Atooi badge to the Kauai Police Department as a condition of the plea. The defense has indicated in open court that it accepted the offer, but for the condition that the defendant "surrender" his badge to the county police. The plea offer is attached as "Exhibit B".

The charge of impersonating a law enforcement officer in this case involves the rights of indigenous Native Hawaiian people, granted by the State constitution, state statutes, and international law, as set forth in the memorandum accompanying this motion. Defendant was not pretending to be a State of Hawaii law enforcement officer; rather he is a law enforcement officer in the Kingdom of Attooi, as he is legally entitled to be.

## **I. THE REQUIREMENT IN THE PLEA OFFER THAT THE DEFENDANT SURRENDER HIS BADGE TO THE GOVERNMENT IS ILLEGAL.**

### **A. REQUIRING SURRENDER OF BADGES AS A CONDITION OF THE PLEA OFFER VIOLATES THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES.**

The United Nations Declaration on the Rights of Indigenous Peoples was adopted by the United Nations General Assembly during its 62nd session at UN Headquarters in New York City on 13 September 2007.

The U.N. describes the declaration as setting "an important standard for the treatment of indigenous peoples that will undoubtedly be a significant tool towards eliminating human rights violations against the planet's 370 million indigenous people and assisting them in combating discrimination and marginalisation."

On 16 December 2010, President Obama declared that the United States would sign the declaration, and it was signed shortly thereafter. The decision was announced during the second White House Tribal Conference, where he said he is "working hard to live up to" the name that was given to him by the Crow Nation: "One Who Helps People Throughout the Land." The declaration is attached as "Exhibit C".

Various articles to this U.N. declaration to which the United State's is now a signatory and party are directly relevant to whether defendant and the other citizens of Atooi have the right to their nation, the right to identification cards, and the right to form their own legal and political institutions including but not limited to a group of federal marshals who use badges for their internal government purposes.

The United Nations Declaration on the Rights of Indigenous Peoples commands, inter alia:

### Article 3

**Indigenous peoples have the right to self-determination.** By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

### Article 4

Indigenous peoples, in exercising their right to self-determination, have the **right to autonomy or self-government** in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

### Article 5

Indigenous peoples have the right to maintain and strengthen **their distinct political, legal, economic, social and cultural institutions**, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

### Article 6

Every indigenous individual has the right to a nationality.

### Article 9

“Indigenous peoples and individuals **have the right to belong to an indigenous community or nation**, in accordance with the traditions and customs of the community or nation concerned. **No discrimination of any kind may arise from the exercise of such a right.**”

### Article 20

Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.”

Article 33

1. Indigenous peoples have the **right to determine their own identity or membership** in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples **have the right to determine the structures and to select the membership of their institutions** in accordance with their own procedures.

Id. (bolding added for emphasis).

It has been barely four months since the United States of America signed the declaration. This new treaty represents a shift in United State's policy as to the rights on indigenous peoples. The declaration provides this Court with direct guidance as to the impropriety of the "deal-killer" term the prosecutor has insisted on, as a condition of offering the defendant an otherwise fair plea.

Defendant contends that this United Nations declaration clearly obliges the United States and its political subdivisions to recognize, at a minimum: 1) Defendant's right to a position in government in his Atooi nation; 2) Defendant's right to possess an identification card identifying him as a citizen of his Atooi nation; and 3) Defendant's right to possess a badge, identifying him as a Federal Marshall in the Kingdom of Atooi.

The U.N.declaration speaks directly to basic human rights of indigenous peoples. Defendant contends that the Kauai Office of the Prosecuting Attorney violates his human rights by demanding, as a condition of a plea bargain in a criminal case involving misdemeanors and petty misdemeanors, that he surrender any of his human rights to self

determination as an indigenous person of these islands – including his right to be identified within his Kingdom by his title and badge.

**B. REQUIRING SURRENDER OF THE BADGE AS A CONDITION OF THE PLEA OFFER VIOLATES STATE LAW.**

In passing Hawaii Revised Statutes §201.5 the Hawaii State legislature has already recognized the continuing and inherent sovereign authority of the indigenous Native Hawaiian people:

...The United States and State of Hawaii hereby reaffirm and recognize that:

(1) The native Hawaiian people are a distinct native, indigenous people who have maintained their own language, culture, and traditions [ ].

(2) The United States has a unique trust responsibility to promote the welfare of the aboriginal, indigenous people of the State, and the federal government has delegated broad authority to the State to act for their betterment; and

(3) The aboriginal, indigenous people of the State retain their inherent sovereign authority and their right to organize for their common welfare.

H.R.S. §201.5 (emphasis added).

In Office of Hawaiian Affairs v. Housing and Community Development Corp. of Hawaii (HCDCH), 117 Hawai'i 174, 177 P.3d 884 (2008), the Hawaii Supreme Court held that

“Many native Hawaiians and others view the overthrow of 1893 and subsequent actions by the United States,

such as supporting establishment of the provisional government and later the Republic of Hawai‘i, the designation of the crown and government lands as public lands, annexation, and the ceding of the public lands to the federal government without the consent of native Hawaiians, as illegal. Because the actions taken by the United States were viewed as illegal and done without the consent of native Hawaiians, many native Hawaiians feel there is a valid legal claim for reparations. Many native Hawaiians believe that the lands taken without their consent should be returned and if not, monetary reparations made, and that they should have the right to sovereignty, or the right to self-determination and self-government...

The legislature has also acknowledged that the actions by the United States were illegal and immoral, and pledges its continued support to the native Hawaiian community by taking steps to promote the restoration of the rights and dignity of native Hawaiians.

1993 Haw. Sess. L. Act 354, § 1 at 999-1000 (emphases added). In Act 359, also entitled “A Bill for an Act Relating to Hawaiian Sovereignty,” the legislature made findings similar to those expressed in the Apology Resolution. 1993 Haw. Sess. L. Act 359, §§ 1-2 at 1009-11. The stated purpose of Act 359 was to “facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing.” 1993 Haw. Sess. L. Act 359, § 2 at 1010.

“The Apology Resolution was adopted by both the House and the Senate, signed by then-President Clinton on November 23, 1993, and designated as Public Law No. 103-150. Generally, when a joint resolution-such as the one at issue in this case-has emerged from legislative deliberations and proceedings, it is treated as law.”

O.H.A. v. Housing and Community Development Corp. of Hawaii, (HCDCH), 117 Hawai'i 174, 191 177 P.3d 884, 901 (2008)..."

Here, especially given the recent U.N. Declaration on Indigenous Rights, the rights to self determination that have been given to Native Hawaiians must be given effect. One way to give such effect would be to strike clauses from otherwise valid plea offers, which if enforced, would result in the surrender of important rights of indigenous Hawaiian people.

Moreover, no one else who was arrested or prosecuted for Superferry-related protests was required to surrender their rights to maintain an indigenous Nation or surrender any property at all for that matter.

Selectivity in the enforcement of criminal laws is subject to constitutional constraints<sup>1</sup>, and an individual may not be convicted if there is unconstitutional discrimination in the administration of a penal statute. *U.S. v. Christopher*, 700 F.2d 1253 (9th Cir. 1983).

What these appellants communicated were their beliefs and opinions concerning domestic measures and trends in national and world affairs. Under our decisions criminal sanctions cannot be imposed for such communication.

Taylor v. State of Mississippi, 319 U.S. 583, 590, 63 S.Ct. 1200, 1204 (U.S. 1943)(footnotes omitted).

In *Taylor*, the defendant was essentially charged with disseminating literature reasonably tending to create an attitude of stubborn refusal to salute, honor, or respect the national and state flag and government – in violation of a statute that required citizens to make such a salute. The Court held that the conviction denied the defendants “the liberty guaranteed by the Fourteenth Amendment.” The convictions for advocating and teaching refusal to salute the flag, were reversed.

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<sup>1</sup> Wayte v. U.S., 470 U.S. 598, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985).

Taylor v. State of Mississippi, 319 U.S. 583, 589, 63 S.Ct.1200, 1204 (U.S. 1943).

Similarly here, while the notion that the defendant is lawfully entitled to carry a badge of his Nation may understandably make law enforcement uncomfortable, the law regarding the rights of indigenous people clearly has changed – and now allows, even guarantees defendant his indigenous human rights, including the right to hold office in his nation. Defendant’s exercise of these rights should not be prospectively surrendered as a condition of a no contest plea to a petty misdemeanor.

This case has been settled, but for a single illegal term in a plea agreement. Plea bargaining is the norm in this jurisdiction and it should not be denied to a defendant purely because he refuses to surrender important human rights that were confirmed on him by the State of Hawaii and reaffirmed by the United States in an international declaration, just four months ago.

#### CONCLUSION

For all of the above reasons, defendant requests that the court strike the illegal provisions in the State’s plea offer and then enforce the plea agreement between the parties.

Dated: Lihue, Hawai`i, May 2, 2011, \_\_\_\_\_  
DANIEL G. HEMPEY  
Court-appointed Attorney for  
DAYNE HENRY ALEKA GONSALVES



3. This case involves the rights of indigenous Native Hawaiian people, granted by the State constitution, state statutes, and international law, as set forth in the memorandum accompanying this motion.
4. In recent plea negotiations in these cases, the State has offered to settle this case by accepting a plea to a reduced petty misdemeanor charge of obstructing and asking the Court to dismiss all remaining charges against the defendant with prejudice. The State sought a \$250 fine, only. The Court has indicated that it would follow such an agreement.
5. However, the State also added an additional term to its proposed offer. It demanded that the defendant agree to surrender his Federal Marshall – Kingdom of Atooi badge to the Kauai Police Department as a condition of the plea. The defense has indicated in open court that it accepted the offer, but for the condition that the defendant “surrender” his badge to the county police.
6. Defendant maintains that he has rights under State, International, and United State’s law, including the recently signed United Nations Declaration on the Rights of Indigenous Peoples to possess his badge. There is nothing inherently illegal about defendant carrying such a badge. There is no lawful reason for the State to demand its uncompensated return. Defendant contends that (absent the need for

the badge as evidence) the possession of an Atooi badge and/or an Atooi Identification card by an indigenous Native Hawaiian is protected by law and that the prosecution violates the rights granted to Native Hawaiians in State and Federal law by imposing the an illegal condition of the surrender of a badge as a condition of a plea offer in a criminal case. Moreover, requiring the defendant to surrender the subject badge as a condition of a plea in this case would specifically violate the recently-signed United Nations Declaration on Human Rights of Indigenous people – and thus should not be enforced by the Court.

7. I am requesting that the Court strike the illegal condition set forth in the State's plea offer (attached as "Exhibit A") and enforce the remaining terms.
8. This motion is not brought for the purpose of delay or for any other improper purpose.

FURTHER DECLARANT SAYETH NAUGHT.

DATED: Lihu'e, Hawai'i, May 1, 2011.

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DANIEL HEMPEY  
Court-appointed Attorney for  
DAYNE HENRY ALEKA GONSALVES





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DANIEL HEMPEY  
Court-appointed Attorney for  
DAYNE HENRY ALEKA GONSALVES



*Court-appointed Attorney for Robert Pauole Pa*

DATED: Lihu`e, Hawai`i, May 2, 2011.

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DANIEL HEMPEY