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FILED

2012 MAR 27 PM 3:07  
5TH CIRCUIT COURT  
STATE OF HAWAII  
Doreena Olivas-Brun  
CLERK

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT

STATE OF HAWAII

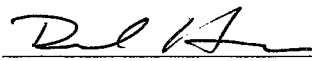
STATE OF HAWAII ) CR. NO. 12-1-0131  
)  
v. ) MOTION TO RECUSE PROSECUTING  
) ATTORNEY; MEMORANDUM OF  
TIMOTHY BYNUM, ) POINTS AND AUTHORITIES;  
Defendant. ) EXHIBITS A & B; DECLARATION OF  
) COUNSEL; DECLARATION OF TIM  
) BYNUM; NOTICE OF MOTION;  
) CERTIFICATE OF SERVICE.  
)  
) Hearing Date: APR - 5 2012, 2012  
) Hearing Time: 9:00 a.m.  
)  
) Judge: Hon. Kathleen N.A. Watanabe  
)  
Trial Date: April 23, 2012

MOTION TO RECUSE PROSECUTING ATTORNEY

Defendant TIMOTHY BYNUM, by and through his attorney, Daniel G. Hempey, and hereby moves the Honorable Judge for an Order recusing the Kauai Prosecuting Attorney and appointing a special prosecutor in the above-captioned matter.

This motion is based on the evidence, which may be adduced at a hearing on this motion, the memorandum in support of this motion, the declaration herein and the attachments thereto.

Dated: Lihue, Hawaii, March 27, 2012.

  
\_\_\_\_\_  
Daniel G. Hempey  
Attorney for DEFENDANT



He is, of course, presumed innocent until and unless proven guilty.

Attached hereto as Exhibit "A" is an email exchange between the prosecuting attorney and the planning director in which the prosecuting attorney refers to an "anonymous" complaint that Mr. Bynum was "renting out his house or a portion thereof" and offering that the Office of the Prosecuting Attorney had obtained "corroboration" of this anonymous complaint about a portion of the property being rented. Affidavit of Timothy Bynum at p. 21. This apparently gave rise to a search of the defendant's property, which is the basis of a pending Motion to Suppress.

In this April 7, 2010 email, the prosecuting attorney wrote to the Director: "Aloha Ian, We received information to corroborate an anonymous complaint dated March 26, 2010 that was sent to the Planning Department and our office, that Councilmember Tim Bynum was renting out his house, or a portion thereof. Can you let me know if renting out a portion of his residence is illegal given his land status, and what ordinance/statute would he be violating by doing so? Please advise." (Exhibit B, emphasis added).

Director Costa, replied: "The CZO really doesn't prohibit renting portions of structures. Even the issue of "lock-outs" is not addressed. The CZO does not dictate where locks are permitted and not permitted (thank goodness!). The issue would be whether the area, in question creates a "multi-family" dwelling. What was permitted is a "single-family" dwelling based on "one kitchen". If a second kitchen (area used for the preparation of food) is present, then a violation would exist for an illegal "multi-family" dwelling unit..." See Exhibit "A" (Email exchange between Shaylene Carvalho and Ian Costa, cc'ing Sheilah Miyake, dated 4/7/10 and 4/8/11).

The email from the Prosecuting Attorney failed to mention exactly what the "corroborating evidence" was, and such corroborating evidence has yet to be provided to the defendant in discovery. In this regard, the prosecuting attorney, so far, appears to be the only witness to this "corroboration" and defendant does not waive his right to cross-examine the witnesses against him. To the extent the prosecutor assisted in the investigation of this matter, or offered corroborating evidence, her involvement is the proper subject of cross-examination.

On January 19, 2012, the prosecuting attorney wrote a letter to the entire Kauai County Council demanding that defendant be recused from County Council meetings involving legislative oversight of the prosecutor's office, while the defendant's criminal case was pending.

A copy of that letter is attached hereto as exhibit "B". The prosecutor apparently initially stamped this letter as "confidential" but later released it to the public and the press. See Declaration of Tim Bynum. Local press and blogs have reposted the letter and reported on the same. The letter was disseminated through mass-media. Id.

The letter to the council makes various accusations against councilman Bynum and various arguments as to why the prosecutor contends that Mr. Bynum should be recused from legislative matters concerning her office. The letter contains numerous statements that are disparaging of Mr. Bynum's integrity. Among other things the prosecutor alleged in her public letter:

1) "[Councilman Bynum] has a clear financial interest in the operations of the OPA, as he would directly benefit if the OPA's operations were negatively impacted by any action of the Council. By virtue of being a criminal defendant, he has a vested interest in ensuring that the OPA not operate at peak efficiency."

...

2) "Bynum's paranoid belief that the actions taken by our office were calculated personal attacks against him is without any merit and is completely baseless

...

3) "The case initiated against Councilmember Bynum was investigated by the Planning Department and referred to our office for criminal prosecution."

Exhibit B, *infra*.

Defendant contends that these statements by the prosecuting attorney prevent him from receiving a fair trial by impugning his integrity and simultaneously vouching for the credibility of the prosecution. Due process requires that a defendant not be tried by a prosecutor who has publically labeled him as "paranoid" or, worse yet, accused him of placing financial motives above his sworn responsibilities as an elected councilman.

By publically alleging that Mr. Bynum "has a vested interest in ensuring that the OPA not operate at peak efficiency" the prosecuting attorney has essentially accused Mr. Bynum of being willing to subordinate the entire public administration of justice to an alleged personal interest that he is only prosecuted by a less than fully-funded Office of the Prosecuting Attorney.

Moreover, the defense has just (last week) been informed by an employee of the Kauai Planning Department, that that Department did not actually "refer" Mr. Bynum's case to the

prosecutor “for prosecution”. If proven true, this would directly contradict the public statement made by the public prosecutor to the Kauai County Council and the public in her letter that this matter had been “referred to our office “for criminal prosecution.” Upon information and belief, the Planning Department formerly previously had a policy of forwarding all zoning violations to the OPA, however, there was a separate and distinct process for “referring” cases “for prosecution” – which did not happen in this case. Thus, the prosecutor’s statement to the County Council, this case was not actually “referred” to the OPA “for prosecution” is disputed. The letter goes on to accuse councilman Bynum of harassing behavior and calls him “paranoid”.

If a potential juror has read the prosecutor’s allegations of improper motives and a “paranoid” defendant, and is convinced based on pre-trial public statements that Mr. Bynum’s case was indeed referred for prosecution, when none of those things may be true, there can be no fair trial – absent the ability to cross-examine the prosecuting attorney who made these statements.

Finally, throughout the prosecutor’s efforts in recent months to have councilman Bynum recused from exercising legislative oversight<sup>1</sup> over issues related to the OPA, the prosecutor has repeatedly cited the fact that Mr. Bynum is being “criminally prosecuted” as the primary basis for his recusal. These statements have been made numerous times, over the course of the last several months, while Mr. Bynum’s criminal case is pending a jury trial, and the statements have been broadcast of local television for all potential jurors to see. See Declaration of Tim Bynum. In all of these statements, the prosecuting attorney has failed to mention that the defendant is presumed innocent<sup>2</sup>.

### III. ARGUMENT

#### **A. THE RULES OF PROFESSIONAL RESPONSIBILITY ARE INSTRUCTIVE IN THIS MATTER.**

Hawaii Rule of Professional Conduct Rule 3.6 governs the ethical duty of public prosecutor regarding trial publicity. Ensuring that a defendant receives a fair trial is paramount.

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<sup>1</sup> The basic purpose of the January letter from the OPA to the County Council is to have Mr. Bynum recused, or even removed from the Council.

<sup>2</sup> Pursuant to HRPC Rule 3.6, 3.7, *infra*.

As discussed below, the likelihood of a fair trial has already been significantly impaired, and recusal of the Kauai OPA is the only measure that could ameliorate the damage.

Hawaii Rules of Professional Conduct, 3.6 Rule 3.6(a) provides: “A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”

As a starting point, it is fairly obvious that extra-judicial statements made by the prosecuting attorney to the Kauai County Council in a letter, that is a part of the public record, would be reasonably expected to be disseminated by means of public communication. Indeed the statements have been disseminated to the public. The question then turns to whether the statements have a substantial likelihood of materially prejudicing the proceeding. They do.

The commentary to rule 3.6 sets forth very simple guidelines for assessing what types of extrajudicial statements by a prosecutor have a substantial likelihood of materially prejudicing the proceeding.

Comment 5 first instructs that avoiding prejudice from extrajudicial statements is particularly important in criminal cases, and even more important as those cases near trial. The commentary states, inter alia:

“[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

...

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

...

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

When the various public statements by the prosecuting attorney are analyzed in the context of the commentary to Rules of Professional Conduct, 3.6, it is apparent that it is “more likely than not” that a fair trial is being materially prejudiced by the prosecuting attorney’s repeated and continuing extra-judicial statements in public forums.

First, this case involves a criminal matter, and pursuant to the plain language of comment 5, such matters are particularly vulnerable to being tainted by pretrial publicity.

Second, the extrajudicial statements at bar directly impugn the “character, credibility and reputation of a party in a criminal investigation” in violation of comment [5](1) above. Here the prosecutor has publically called the defendant “paranoid”. She has asked that the Council consider removing him from office due to “harassing” behavior. In doing so she implicitly vouches for the credibility of the State’s case and ridicules and undermines Mr. Bynum’s concerns that the prosecution may be politically motivated, publically labeling him as “paranoid”. This has created significant risk that any potential juror who believes the prosecutor’s extra-judicial statement that defendant’s concerns over a politically motivated prosecution are just “paranoid” will be pre-disposed to convict, without subjecting the statement to the scrutiny of cross-examination.

Third, the prosecutor has publically stated that councilman Bynum will use his position on the County Council to deliberately create a poorly functioning prosecutor’s office - based on some alleged motive to be prosecuted by an underfunded prosecutor. This is a direct attack on councilman Bynum’s character. Indeed, what juror would vote to acquit such a man?

Where the rules specifically warn of the particular dangers of extra-judicial statements in criminal cases, and specifically warn against prosecutors attacking a defendant’s character in the media, a blanket statement that the defendant would use his position as a councilman to submarine the efficient functioning of the entire Office of the Prosecuting Attorney, implying that this elected official would undermine law enforcement all over Kauai for alleged personal “financial interests” is plainly prejudicial to a fair trial.

Fourth, the prosecuting attorney has not, in her various televised missives to the County Council and the public made the required disclosure that “that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.” This is in direct contrast to the requirement of HPRC 3.8[5](6) that a reference to the criminal prosecution be accompanied by “a statement explaining that the charge is merely an accusation and that the

defendant is presumed innocent until and unless proven guilty". By the plain language of the commentary an unfair trial is "more likely than not".

The commentary goes on to state:

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

Rules of Prof. Conduct, Rule 3.6, supra.

As a criminal trial, this case is of the type most sensitive to pretrial publicity. By repeatedly asserting that councilman Bynum cannot fairly perform his duties as a councilman because he is being criminally prosecuted, without reminding the public that his is, in fact, presumed innocent of the charges as the case progresses, the prosecutor has materially undermined his credibility and character. A court ordered recusal would serve to lessen the impact of these inherently prejudicial statements.

Finally, based on the commentary to Rule 3.6's mandate that "A lawyer who is participating ... in ... litigation ... shall not make an extrajudicial statement ... if the lawyer ... reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter", it is apparent that the public statements recently made by the prosecuting attorney have created a "substantial likelihood of materially prejudicing an adjudicative proceeding" in violation of the rule.

Due process requires that a Defendant should be afforded a prosecution by an office headed by one who has not violated his right to a fair trial already.

Additionally HRPC 3.7(a) mandates that "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness..."

Here, the defense has obtained an email from the prosecutor to the Planning Director stating that *she* has obtained corroborating information of an allegedly anonymous tip" regarding the alleged zoning violation. Such corroboration, if any, still has not been provided to the defendant and defendant is thus entitled to confront his accuser at hearings on motions and at trial.

To the extent that the alleged "corroboration" of the anonymous tip may have a bearing on the outcome of this case, whatever such corroboration was relayed to the planning director



from the prosecuting attorney should be subject to the scrutiny of cross-examination. Where the prosecutor may be a witness in the matter, Rule 3.7 requires recusal from the criminal case.

**B. THE DEFENDANT HAS THE CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSER.**

Article 1, § 14 of the Hawaii Constitution promises:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, or of such other district to which the prosecution may be removed with the consent of the accused; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against the accused, provided that the legislature may provide by law for the inadmissibility of privileged confidential communications between an alleged crime victim and the alleged crime victim's physician, psychologist, counselor or licensed mental health professional; to have compulsory process for obtaining witnesses in the accused's favor...”

Const. Art. 1, § 14. The 5<sup>th</sup> amendment to the United States Constitution similarly guarantees the right to confront one's accuser in a criminal case.

Here, defendant disputes the accuracy of the prosecutor's extra-judicial statement to the County Council that this case was “referred” to the OPA “for prosecution”. Defendant intends to call witnesses who are expected to state that although the Planning Department does have a process by which cases actually are “referred” to the OPA for prosecution, that such a referral was not made in the case at bar. If indeed, this case was commenced by the OPA without it having been “referred for prosecution” yet the OPA publically states that it was referred for prosecution, questions of selective enforcement do come into play – and it becomes much less likely that the defendant is simply “paranoid” as the prosecutor has told the general public. Also, the issue of whether this case was or was not formally “referred” to the OPA “for prosecution” is material with respect to defendant's Motion to Suppress.

Accordingly, the prosecutor's representations that this case was referred for prosecution should be subject to cross-examination, especially since a determination to the contrary could be dispositive of the case. The defendant should be permitted the opportunity to confront and cross-examine all witnesses to this contested fact.

Defendant does not waive his State and Federal constitutional rights to confront his accuser(s).

**C. THE COURT HAS THE AUTHORITY TO ORDER THE APPOINTMENT OF A SPECIAL PROSECUTOR.**

“The court's authority to order a prosecutor's disqualification is clear. In Sapienza v. Hayashi, supra, this court pointed out that “(i)n the exercise of its supervisory powers over grand jury proceedings, the circuit court may order the disqualification of attorneys attending the grand jury where the integrity of the grand jury process and the proper administration of justice require it.” 57 Haw. at 292-93, 554 P.2d at 1134-35. And once this determination has been made, the order will not be set aside by this court unless a clear abuse of the circuit court's discretion has been shown. Id.” Amemiya v. Sapienza, 63 Haw. 424, 428, 629 P.2d 1126, 1130 (Hawaii, 1981).

Amemiya the court noted that “where, in the unusual case, it would be highly improper for the public prosecutor and his deputies to act, the attorney general may supersede the public prosecutor. In every such case, however, it must be clearly apparent that compelling public interests require the attorney general's intervention in the particular matter.”

Amemiya v. Sapienza, 63 Haw. 424, 428, 629 P.2d 1126, 1129 (Hawaii, 1981).

Thus, in seeking recusal defendant asks the Court to make the specific finding that, on the facts of this case, it is clearly apparent that compelling public interest requires the Attorney General's intervention. Such a finding is subject to the abuse of discretion standard of review.

In Amemiya, the City prosecutor, Sapienza intended to present evidence to the Grand Jury of regarding an investigation into malfeasance regarding a development project. However, the Mayor, who had appointed Mr. Sapienza to office, was a potential subject of that same investigation. Amemiya, who was also a subject of investigation, wanted the prosecutor recused, given the appearance that might be loyal to the Mayor in conducting the grand jury proceeding. The appellate court agreed with the trial court that recusal was proper.

“While personal and political associations will not necessarily disqualify a prosecutor from taking part in a prosecution, we think that considering the circumstances attending the [ ] controversy, the circuit court acted properly in ordering [the prosecutor's] disqualification.” Amemiya v. Sapienza, supra at 428, 1130. Although factually dissimilar, the holding and the

reasoning in Sapienza is instructive: “because public trust in the scrupulous administration of justice and in the integrity of the judicial process is paramount, **any serious doubt will be resolved in favor of disqualification.**”

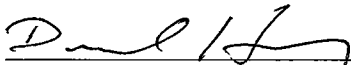
Id. at, 429, 1130. (emphasis added).

Here, defendant contends that compelling public interest requires recusal. He asks the Court to follow Amemiya and resolve any serious doubt about the integrity of this prosecution in favor of recusal.

### CONCLUSION

For all of the above reasons, this Honorable Court should grant the motion to recuse.

Dated: Lihue, Hawaii, March 25, 2012.

  
\_\_\_\_\_  
Daniel G. Hempey  
Attorney for DEFENDANT

**Sheilah Miyake**

---

**From:** Ian Costa  
**Sent:** Thursday, April 08, 2010 10:21 AM  
**To:** Shaylene Carvalho  
**Cc:** Sheilah Miyake  
**Subject:** RE: COMPLAINT RECEIVED 3/26/10 RE: TIM BYNUM

Sorry for delay Shaylene!.....

The CZO really doesn't prohibit renting portions of structures. Even the issue of "lock-outs" is not addressed. The CZO does not dictate where locks are permitted and not permitted (thank goodness!). The issue would be whether the area in question creates a "multi-family" dwelling. What was permitted is a "single-family" dwelling based on "one kitchen". If a second kitchen (area used for the preparation of food) is present, then a violation would exist for an illegal "multi-family" dwelling unit.

I understand Sheilah has been assisting and monitoring.....let me know if we can be of further assistance.

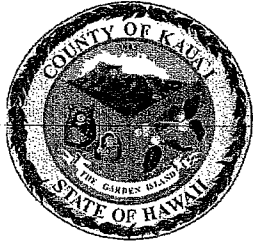
-----Original Message-----

**From:** Shaylene Carvalho  
**Sent:** Wednesday, April 07, 2010 7:54 PM  
**To:** Ian Costa  
**Subject:** COMPLAINT RECEIVED 3/26/10 RE: TIM BYNUM

Aloha Ian,

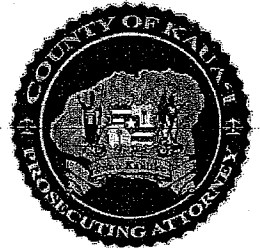
We received information to corroborate an anonymous complaint dated March 26, 2010 that was sent to the Planning Department and our office, that Councilmember Tim Bynum was renting out his house, or a portion thereof. Can you let me know if renting out a portion of his residence is illegal given his land status, and what ordinance/statute would he be violating by doing so? Please advise.

Much Mahalo,  
Shay



# OFFICE OF THE PROSECUTING ATTORNEY

COUNTY OF KAUAI, STATE OF HAWAII  
3990 KAANA STREET, SUITE 210, LIHU'E, HI 96766  
TEL: (808) 241-1888 FAX: (808) 241-1758  
prosecutor@kauai.gov



**Shaylene Iseri-Carvalho**  
Prosecuting Attorney

**Jake Delaplane**  
First Deputy Prosecuting Attorney

**Sam Jajich**  
Second Deputy Prosecuting Attorney

January 19, 2011

# CONFIDENTIAL

TO: Council Chair Jay Furfaro  
FR: Prosecuting Attorney Shaylene Iseri-Carvalho  
RE: Conflict Notice Regarding Councilmember Timothy Bynum

This communication serves as a notice to the Council regarding a conflict of interest between Councilmember Timothy Bynum and the Office of the Prosecuting Attorney. This conflict arises from several incidents involving Councilmember Bynum and employees in our office, as well as the pending criminal case filed by our Office against Councilmember Bynum in November 2011.

**1. Bynum's inappropriate confrontation of Deputy Prosecuting Attorney John Murphy**

On September 28, 2011, Councilmember Timothy Bynum attended a court proceeding with his son, David Bynum, at the 5th Judicial Circuit Courthouse in Lihu'e. After the hearing, Mr. Bynum stood outside the courtroom door in the public hallway and confronted Deputy Prosecuting Attorney John Murphy regarding David's case. As Mr. Murphy exited the courtroom, Mr. Bynum stated directly to Mr. Murphy "Do you think justice was done? This was because [expletive] Shaylene doesn't like me and is out to get me." Deputy Public Defender Christian Enright was standing nearby and also witnessed the confrontation.

According to the Kaua'i County Charter section 3.07(D)

*The council may, upon an affirmative vote of at least two-thirds of its entire membership, suspend without pay for not more than one month any member for disorderly or contemptuous behavior in its presence. The presiding officer or the council by a majority vote may expel any other person who is guilty of disorderly, contemptuous or improper conduct at any meeting.*

While this section deals with disorderly and contemptuous conduct that occurs in the presence of the Council, it is also instructive as to the appropriate conduct expected from Councilmembers in their dealings with county employees as well as the general public.

Additionally, Section 3.18 of the Kaua'i County Charter states:

**Deputy Prosecuting Attorneys:**

Lisa R. Arin  
Jared Auna  
Lance Kobashigawa

Melinda K. Mendes  
Tracy Murakami

John H. Murphy  
Ramsey Ross  
Rebecca A. Vogt

*Except for the purpose of investigative inquiries under Section 3.17, the council or its members, in dealing with county employees, or with county officers who are subjected to the direction and supervision of the mayor, shall deal solely through the mayor. and neither the council nor its members shall give orders to any such employee or officer either publicly or privately. Any willful violation of the provisions of this section by a member of the council shall be sufficient grounds for an action for his removal from office.*

Clearly, Councilmember Bynum did not handle this situation appropriately. If Mr. Bynum had questions or concerns about the case, the appropriate course of action would have been to communicate those to the elected Department Head, which is me, rather than confronting one of our Deputies, who, in fact, was not assigned to handling the case. This confrontation clearly illustrates the undue bias Mr. Bynum harbors toward both me personally, as well as the Office of the Prosecuting Attorney. As such, Mr. Bynum must recuse himself from any matter before the Council involving the Office of the Prosecuting Attorney.

## **2. Bynum's inappropriate confrontation of Lianne Parongao**

Before coming to work at the OPA, Program Assistant Lianne Parongao was employed by Kaua'i Council Services as a legislative analyst. She applied to the OPA as a Victim Witness Counselor, and was offered the job in March 20011. After accepting the position, Ms. Parongao, who had turned in her 2 week notice to Council Services, was confronted by Councilmember Bynum in her office. Bynum stated that he was concerned because it was well known that he and Shaylene did not 'get along' and adamantly believed that the only reason Shaylene hired her was to 'get back at him.' These statements and allegations continued for a prolonged period, leaving Parongao to feel uncomfortable and offended.

Councilmember Bynum's inappropriate confrontation with Ms. Parongao regarding her employment at the OPA demonstrates Mr. Bynum's continued undue bias toward me and my office. This bias and proclivity to engage in inappropriate conduct with OPA employees further establishes the need to have Mr. Bynum precluded from participating in any matters relating to the operations of the OPA.

## **3. Bynum's Pending Criminal Case**

On November 9, 2011, the OPA filed a criminal complaint in the District Court of the Fifth Circuit against Timothy Bynum, alleging 4 counts of violations of the Kaua'i County Code. Each Count is a misdemeanor offense, punishable by up to one year in jail and a \$2,000.000 fine for each. This means that if convicted, Bynum could face up to 4 total years imprisonment and \$8,000.00 in fines. There have already been two motion hearings on the case, in which Mr. Bynum has been represented by a private attorney. At each hearing, First Deputy Prosecutor Jake Delaplane represented the State and made all arguments on behalf of the State.

Councilmember Bynum's criminal case clearly establishes a conflict with the OPA. He has a clear financial interest in the operations of the OPA, as he would directly benefit if the OPA's operations were negatively impacted by any action of the Council. By virtue of being a criminal

defendant, he has a vested interest in ensuring that the OPA not operate at peak efficiency. In accordance with Article XX of the Kaua'i County Charter, this financial interest clearly prohibits Bynum from participating in any matter relating to the OPA that comes before the Council.

Further, because Councilmember Bynum is represented by an attorney in his criminal case, our office is prohibited from having direct contact with Bynum without his attorney present; as such contact would violate Bynum's 6<sup>th</sup> Amendment Right to Counsel and could result in dismissal of his case.

Bynum's paranoid belief that the actions taken by our office were calculated personal attacks against him is without any merit and is completely baseless. The criminal case against his son was investigated by the Kaua'i Police Department and referred to our office for prosecution. The case initiated against Councilmember Bynum was investigated by the Planning Department and referred to our office for criminal prosecution. The contact with Ms. Parongao was solely initiated by Councilmember Bynum. Her decision to apply to the OPA and our decision to hire her was purely based on Ms. Parongao's exceptional experience and qualifications.

For the above stated reasons, Councilmember Bynum has a clear conflict of interest with the Office of the Prosecuting Attorney and should not be allowed to participate in any Council proceedings involving the OPA. It is our hope that the Council will address this situation in a timely and appropriate manner. Feel free to contact me with any questions regarding this matter.

---

SHAYLENE ISERI-CARVALHO  
PROSECUTING ATTORNEY





IN THE DISTRICT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,

v.

TIM BYNUM,

Defendant.

CR NO. 12-1-0131

DECLARATION OF TIM BYNUM

DECLARATION OF TIM BYNUM

I, TIM BYNUM, hereby declare, under penalty of law that the following is true and accurate to the best of my knowledge and belief:

1. I am the defendant in this action. I have personal knowledge of the matters discussed below and if called as a witness, I could competently testify to them.
2. I am an elected member of the Kauai County Council.
3. On January 18, 2012 a special Council meeting was held and convened at 1:50pm. The agenda item for that meeting was: C 2012-08 Communication (12/06/2011) from the Council Vice Chair, requesting the presence of Shaylene Iseri-Carvalho, Prosecutor, to provide the Council with an update on the status of the Victim Witness Program and Office of the Prosecuting Attorney as it relates to:

- 1) Case backlog caused by furloughs.
- 2) Funding — how utilized and whether sufficient to address concerns.
- 3) Levels of staffing and level of service for the Victim Witness program.

4) Caseload open, closed and pending.

3. Prior to the meeting, the Prosecuting Attorney had sent a letter stamped “confidential” to all councilmembers, other than myself. Also copied were County Clerk Rick Watanabe and County Attorney, Al Castillo.

4. Attached to the Motion to Recuse, as “Exhibit B” is a true and correct copy or a letter that the prosecuting attorney gave to the Kauai County Council prior to the meeting in January 18, 2012. A copy of the letter letter was later posted on the internet. Among other things, the letter state that I engaged in harassing behavior in the courthouse and that I am “paranoid”.

5. The text of the letter that was posted on the Internet, somewhat redacted. I am informed and believe that the prosecuting attorney caused the letter to be released to the press. The day after the council meeting I spoke with Leo Azambuja, a reporter from The Garden Island who said the Prosecutor had sent the letter to the newspaper.

6. On March 14, 2012 there was another Council agenda item involving the OPA related to permission to hire a Law Office Assistant. Part of the rationale for this request was the fact that there was only one Victim Witness Counselor on the job and the new hire, if allowed, would be doing some of the Victim Witness work.

7. While the Council was in session and I raised my hand to ask a question. Ms. Iseri-Carvalho interjected stating: “I would state at this time there is a pending criminal case that our office is handling with Mr. Bynum and we're definitely unable to speak with Mr. Bynum because he is represented by counsel. I also believe there is a conflict in him asking questions of our office in light of the fact that there is pending criminal case against Mr. Bynum by our office. So I will not be entertaining any

questions...". She did not mention that I was presumed innocent of the charges. This meeting was televised on local television.

8. Ms. Iseri-Carvalho later again repeated that I was a defendant "in a criminal case we have pending against you." Again, she did not mention that I am presumed innocent.

9. The next Wednesday March 21, 2012 there was a Special Council meeting for the same agenda item. At the opening of the meeting the public was informed that County Attorney Jennifer Winn was representing Ms. Iseri-Carvalho and would be asking me questions before we could begin. At the meeting she asked if I would "waive my rights and if I am aware that "statements that you make can be used against you in the criminal proceeding." This meeting was televised. Neither the prosecutor nor her attorney mentioned that I was presumed innocent.

10. I believe that the prosecuting attorney has gone out of her way to share her "confidential" memo sent to my fellow councilmembers and staff with the media, which has resulted in front pages newspaper articles repeating the accusations in the criminal case against me, without ever mentioning that I am presumed innocent of those charges.. I do not believe that I am paranoid, as the prosecutor claims in her letter. I believe that the prosecutor has sabotaged my right to a fair trial due to unfair pre-trial publicity – especially when the publicity fails to comply with the Rules of Professional Conduct – as applied to government prosecutors.

11. Throughout this criminal case, while I have been in council meetings (which are also televised), the prosecutor has repeatedly asked me to waive my rights

while identifying me as a criminal defendant - without ever offering the required disclaimer that I am innocent until proven guilty.

12. The facts, as set forth are true and correct, to the best of my knowledge, memory and belief.

FURTHER DECLARANT SAYETH NAUGHT.

DATED: Lihue, Hawaii, March 26, 2012.

  
Tim Bynum



