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IN THE SUPREME COURT OF THE STATE OF HAWAII

SHAYLENE ISERI-CARVALHO,)	PETITION FOR WRIT OF MANDAMUS
PROSECUTING ATTORNEY, COUNTY)	TO THE FIFTH JUDICIAL CIRCUIT,
OF KAUAI, STATE OF HAWAII)	COUNTY OF KAUAI, STATE OF
)	HAWAII
Petitioner,)	
)	
vs.)	
)	
THE HONORABLE KATHLEEN N.A.)	
WATANABE, CIRCUIT JUDGE, FIFTH)	
JUDICIAL CIRCUIT)	
)	
Respondent.)	

PETITION FOR WRIT OF MANDAMUS TO THE FIFTH JUDICIAL CIRCUIT, COUNTY
OF KAUAI, STATE OF HAWAII

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PETITIONER’S SUPPLEMENT TO PETITION FOR WRIT OF MANDAMUS TO THE FIFTH JUDICIAL CIRCUIT, COUNTY OF KAUAI, STATE OF HAWAII

Petitioner Shaylene Iseri-Carvalho respectfully submits this supplement to the PETITION FOR WRIT OF MANDAMUS TO THE FIFTH JUDICIAL CIRCUIT, COUNTY OF KAUAI, STATE OF HAWAII. This supplement, as outlined below, asks for additional relief in light of the facts and circumstances surrounding the actions of Judge Kathleen N.A. Watanabe on October 29, 2012.

This petition is made pursuant to Hawai‘i Rules of Appellate Procedure Rules 21 and 27.

I. STATEMENT OF FACTS:

1. On October 29, 2012 Petitioner Shaylene Iseri-Carvalho, respectfully petitioned this Honorable Court to issue a writ of mandamus directing Fifth Circuit Judge Kathleen N.A. Watanabe to immediately convene an open session of the Fifth Circuit Court in order to receive the return from the Grand Jury Session held on Friday October 26, 2012.

2. As a matter of clarification, the “Court’s Clerk” referred to in the Petition’s statement of facts #'s 2, 6, 9, and 11 was Court Administrator Vera Tabe, who is assigned to the Grand Jury sessions and was present for the October 25, 2012 and October 26, 2012 sessions.
3. Judge Watanabe’s “Law Clerk” also referred to as “Legal Clerk” in the Petition’s statement of facts #'s 7, 17, 18, 19, and 24 is Sherri Rego, Judicial Assistant to Judge Watanabe. Ms. Rego was not present for the Grand Jury proceeding and was the point of contact with Judge Watanabe’s Chambers.
4. On October 29, 2012 at 9:12 am, First Deputy Prosecutor Jake Delaplane submitted a Declaration of Counsel under seal to this Honorable Court that stated:

On October 26, 2012, the Grand Jury of the Fifth Circuit issued a True Bill on an indictment against Darren Galas for Murder in the 2nd Degree for the 2006 homicide of his estranged wife Sandra Galas.
5. This Declaration of Counsel was filed under seal because Hawaii Rule of Penal Procedure 6(e)(1) expressly prohibits disclosure of matters occurring before the Grand Jury.
6. On October 29, 2012 at 12:21 pm, this Honorable Court issued an order stating in pertinent part:

IT IS HEREBY FURTHER ORDERED that the respondent judge shall file an answer to the petition for a writ of mandamus within two days from the date of this order.

IT IS HEREBY FINALLY ORDERED that the respondent judge shall convene an open session of the Fifth Circuit Court, State of Hawaii to receive the return from the grand jury session held on Friday, October 26, 2012, no later than 4:00 p.m. on Monday, October 29, 2012.

7. At approximately 12:45 pm, First Deputy Prosecutor Jake Delaplane received a call from Hawai'i Supreme Court Staff informing him that the order had been issued and that Judge Watanabe's office would be notified of the order.
8. At approximately 1:00 pm, First Deputy Prosecutor Jake Delaplane was informed that an internet blog writer posted an article that began with the following statement:

OK, so here's what really happened regarding the Darren Galas murder arrest. My report is based on a conversation with a clerk in Judge Kathleen Watanabe's office, and court documents.
9. Said article, which is time-stamped 12:55 pm, is attached in its entirety to this supplement.
10. The article goes on to detail information that was not contained within the Petition for Writ of Mandamus, including allegations that the Grand Jury proceeding was "not approved by the court" and describes alleged communications between Judge Watanabe and the Office of the Prosecuting Attorney.
11. The Office of the Prosecuting Attorney was informed at approximately 1:30 pm by an email from Court Administrator Vera Tabe, that Judge Watanabe scheduled the Grand Jury return to occur at 3:30 pm in Courtroom 1.
12. The open session began at 3:30 pm in Courtroom 1 with Judge Watanabe presiding, Court Administrator Vera Tabe, Prosecuting Attorney Shaylene Iseri-Carvalho, Grand Jury Counsel Jonathan Chun, and a newspaper reporter present.
13. Judge Watanabe, after stating that Grand Jury Council and Prosecuting Attorney Shaylene Iseri-Carvalho were present, began the open session by announcing that the Court was proposing to continue the matter and noted it was done on very short notice.

14. Judge Watanabe then stated that several attempts were made to contact Ms. Akita, the Grand Jury Foreperson, but that she was not able to be contacted to be present for the open session.
15. Grand Jury Counsel Jonathan Chun, at approximately 3:20 pm, had informed Prosecuting Attorney Shaylene Iseri-Carvalho that he had only been told at 2:30pm to begin attempting to contact Grand Jury Foreperson Ms. Akita. It is unknown whether other court staff attempted to contact Ms. Akita before 2:30 pm.
16. Judge Watanabe stated that the Court received a fax in response to a Motion for Writ of Mandamus to “entertain a return on State v. Galas” and that the court set the return for 3:30pm.
17. Judge Watanabe stated that at 12:30pm, the court was informed of the Supreme Court’s order to convene the open session return by 4:00pm.
18. Judge Watanabe stated that the Court will be responding to the motion for Writ of Mandamus and that the Court was given two days, until Wednesday, to respond.
19. Judge Watanabe stated that the Court will be responding because the Court has concerns with statements filed by the Prosecuting Attorney
20. Judge Watanabe stated that it was an unprecedented move that a Grand Jury Session be continued to the following day without approval by “this court.”
21. Judge Watanabe stated that this was following information that at 12:00pm on October 25, 2012, the Office of the Prosecuting Attorney did not proceed.
22. Judge Watanabe stated that “this court” said it would not be available past noon.
23. Judge Watanabe stated that this was a very unusual situation.

24. Judge Watanabe stated that if the Grand Jury was not completed on October 25, 2012, that it would have been continued to December 27, 2012.
25. Judge Watanabe stated that she was disturbed by the allegations filed in the Supreme Court.
26. Judge Watanabe stated that she did call the Prosecutor's Office on October 26, 2012.
27. Judge Watanabe stated that she was asked to set the Grand Jury return on October 29, 2012.
28. Judge Watanabe stated that she would not *sua sponte* set the return on Monday, and that she informed the Prosecutor's Office that they could file a motion with the court requesting that the return be set on Monday.
29. Judge Watanabe stated that she was very surprised that she did not see a motion from the Prosecutor's Office, but instead saw a writ.
30. Judge Watanabe stated that it was very unusual for the Supreme Court to ask that the court take action without giving the court the opportunity to first respond.
31. Judge Watanabe stated that she would continue the Grand Jury return to Tuesday October 30, 2012 at 2:00pm in Courtroom 6.
32. Judge Watanabe stated that this was the first available time for the court.
33. Judge Watanabe stated "for the record" that the court had complied with the Supreme Court order.
34. Judge Watanabe stated that the court "feels compelled to make it clear" that the Court was ready, willing, and able to work with the Prosecutor's office if they filed a motion to have the return scheduled.

35. Judge Watanabe stated that she was surprised by the “need to take extreme measures.”
36. Judge Watanabe stated that the court will make it clear by its response to the writ of her exact concerns of the” misrepresentations and clear untruths in the record.”
37. At no time during this session did the Judge allow the Prosecuting Attorney to speak.
38. A recording of this proceeding has been requested and will be provided to this Honorable Court for review.

II. ISSUES PRESENTED AND RELIEF SOUGHT

A. Issues Presented

1. Judge Watanabe’s clerks statements to the media, as evidenced by the attached internet blog article, were improper and violation of Rule 2.10(a) of the Rules of the Supreme Court – Code of Judicial Conduct which states:

A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

This rule is imputed to staff members by Rule 2.10(c) which states:

A judge shall require court staff, court official, and others subject to the judge’s immediate direction and direct control to refrain from making statements that the judge would be prohibited from making by Rule 2.10(a) and 2.10(b).

Here, it appears that Judge Watanabe’s staff spoke with a member of the media regarding the Prosecutor’s filing of the Writ of Mandamus, and alleged that the Grand Jury proceeding was “without approval by the court.” In fact, many of the allegations and suppositions contained in the internet blog article mirror Judge

Watanabe's retaliatory statements during the open session convened at 3:30pm. The staff member's statements can be easily ascertained from the article, as they are statements that did not appear in the Petition for Writ of Mandamus and purport to detail conversations between the Court and the Office of the Prosecuting Attorney. These statements, particularly that the proceeding was "without the approval of the court" and the alleged conversations between the Court and the Office of the Prosecuting Attorney, can be reasonably expected affect the outcome of impact the fairness of a matter pending or impending in the court. The implication from the statements is that the Grand Jury proceeding was improper or somehow rogue. This calls into question, in the minds of the public and potential jurors when the case proceeds to trial, the validity and legitimacy of the proceeding that initiated the charges in the case. Such statements are strictly prohibited for good reason, and the Judge's staff should not be engaging in this type communication with members of the public because of the potential for a prejudicial effect.

2. Judge Watanabe's reference to "State v. Galas" (see Statement of Facts # 16), violated Rule 6(e)(1) of the Hawai'i Rules of Penal Procedure by revealing a "matter occurring before the Grand Jury" before the return was taken. The Petitioner took great care in not revealing the specific case or "matters occurring before the Grand Jury" within its Petition for Writ of Mandamus. The name of the Defendant in the case and the outcome of the Grand Jury proceeding was only revealed within the Petitioner's Declaration of Counsel, which was sealed upon filing it with this Honorable Court on Monday October 29, 2012 at 9:12am. As a

matter of rule, policy, and practice, Defendant names are kept confidential until the return on the indictment is complete. Here, Judge Watanabe completely deviated from normal practice by revealing the specific Defendant that was the subject of the matter occurring before the Grand Jury.

The U.S. Supreme Court has addressed the issue of secrecy in grand jury proceedings. In the case of *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-682 (1958), it provided five reasons why secrecy is required. The Court held that secrecy is necessary:

"(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witness who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

Because the Grand Jury return has not yet been received by the Court, there has not been an official, on-the-record finding of probable cause in this case. In fact, because of the delay in conducting the return, an arrest warrant was secured and the individual was taken into custody to protect the public from a person who may have had the knowledge that he was about to be brought in on a murder charge.

The individual was arraigned, and the Preliminary Hearing is now set for Wednesday October 31, 2012 at 1:00 pm. Public disclosure of the name of the individual involved in the case before the return was received could have affected

the free and untrammelled disclosure by persons who have information with respect to the case that would potentially testify at the preliminary hearing. Revealing the name constituted a clear deviation from normal practice since the return could not be completed at the session.

3. Judge Watanabe's retaliatory and berating statements during the open session, outlined in paragraphs 16-36 of the Statement of Facts, were completely improper and well outside the scope of a simple return on a Grand Jury session. This Honorable Court's Order on October 29, 2012 contained a very plain and direct requirement to Judge Watanabe to "convene an open session of the Fifth Circuit Court, State of Hawai'i to receive the return from the grand jury session held on Friday October 26, 2012." The session began routinely with Judge Watanabe stating that the matter would need to be continued to the following day because the Grand Jury foreperson could not be contacted. However, Judge Watanabe, with a member of the media present, then proceeded to use the open session as a public platform to voice her concerns and disapproval of the Office of the Prosecuting Attorney's choice to seek a Writ of Mandamus to have the open session convened. Open sessions to take Grand Jury returns are quite routine, and, as stated in the Petition for Writ of Mandamus, normally take no longer than 5 minutes per case to complete. Instead of following the routine practice of taking the return, or in this case, continuing the return without further comment, Judge Watanabe spent approximately 15 minutes lambasting the Prosecuting Attorney for exercising her right to seek a Writ of Mandamus to ensure that a Grand Jury return session was convened expeditiously. Judge Watanabe further

called the integrity and veracity of the Prosecutor and her staff into question by suggesting that there were “misrepresentations and clear untruths” contained within the Petition for Writ of Mandamus, without detailing the substance or nature of these alleged lies or giving the Prosecutor an opportunity to respond. It appeared, from the repeated nature of Judge Watanabe’s attacks, that the purpose of the open session had transformed into a forum by which Judge Watanabe was attempting to harass, embarrass, and retaliate against the Prosecutor for filing the Petition for Writ of Mandamus.

Canon 1 of the Code of Judicial Conduct states:

“A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY.”

Further, Rule 1.2 of the Rules of Judicial Conduct states:

A judge shall act at all times in a manner that promotes public confidence and in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.

Here, Judge Watanabe took extraordinary measures to speak for an extended period of time on her concerns and disapproval of the State’s filing of a Petition for Writ of Mandamus and her unsupported contention that the Petition contained “misrepresentations and clear untruths.” A public, open session for a simple, single-case Grand Jury return is not the proper forum for this kind of retaliatory diatribe. Judge Watanabe’s statements were shocking, improper, and devoid of qualities that promote public confidence in the integrity and impartiality of the judiciary.

Canon 2 of the Code of Judicial Conduct states:

“A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.”

From the circumstances surrounding the October 29, 2012 session ordered by this Honorable Court, Judge Watanabe has appeared to violate every element of Canon 2. First, her statements, accusations, and improper comments evidenced a clear partiality against the Office of the Prosecuting Attorney. Second, by revealing the name of the defendant before the return has completed and by turning the open session into a chance to provide a response to the State’s Petition for Writ of Mandamus, Judge Watanabe patently failed to competently perform the duties of her office. Third, it appears that Judge Watanabe failed to diligently perform the duty to have the Grand Jury Foreperson present at the return so that it could be completed that day. From Watanabe’s statements during the session, she made clear that her office had notice of the order as early as 12:30pm. While it is unknown as to whether other court staff attempted to contact the Grand Jury Foreperson, it is clear that the Grand Jury Counsel was not assigned or informed of this task until 1 hour before the session was scheduled to occur.

4. The delay of the return on the indictment may still require the State to proceed with a preliminary hearing on Wednesday October 31, 2012 at 1:00pm in relation to the case described in the Petition for Writ of Mandamus. We are requesting an expedited warrant, but because of the retaliatory nature of the Judge’s comments

at the October 29, 2012 open session, we are unsure as to whether this request will be granted.

5. Judge Watanabe flagrantly and intentionally violated this Honorable Court's October 29, 2012 order. Although Judge Watanabe declared "for the record" that she had complied with this Honorable Court's Order, her actions during the session were a mockery of that order and constituted a blatant disregard for the integrity of this Honorable Court. She was ordered to file an answer to the Petition within two days of the order, and to convene and open session to receive the return from the Grand Jury Session. Instead, she convened an open session and used it to verbally retaliate against the Prosecutor – all for the Prosecutor's Office pursuing the only legal remedy available to ensure that the return on the Grand Jury session occurred in a manner that avoided a substantial waste of State and county resources. This retaliatory and improper behavior by the Judge has a chilling effect on those that would seek similar remedies in the future, and is a clear violation of not only the Rules of Judicial Conduct, but also the United States Constitution. The United States Supreme Court has cautioned that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (citation omitted), *reh'g denied*, 435 U.S. 918, 98 S.Ct. 1477, 55 L.Ed.2d 511 (1978).

B. RELIEF SOUGHT

1. The Petitioner requests that this Honorable Court issue an order prohibiting Judge Watanabe and her staff from making further public statements with regard to the Prosecutor's filing of the Petition for Writ of Mandamus.
2. The Petitioner requests that this Honorable Court issue an order disqualifying Judge Kathleen N.A. Watanabe from presiding over the trial of the case named in Petitioner's Declaration of Counsel filed on October 29, 2012 due to her misconduct evidencing bias against the Office of the Prosecuting Attorney.
3. The Petitioner requests that this Honorable Court issue an order for appropriate sanctions against Judge Watanabe for her improper conduct at the October 29, 2012 hearing.
4. The Petitioner requests that this Honorable Court initiate an investigation into the improper media comments made by the Judge's staff.
5. The Petitioner requests that this Honorable Court issue an order authorizing and directing the Judiciary to expedite the preparation of a warrant, if necessary, to accompany a Grand Jury indictment, should one be returned, in relation to the case listed in Petitioner's sealed Declaration of Counsel filed October 29, 2012 at 9:12 am.

DATED: Līhu'e, Hawai'i, October 30, 2012.

/s/ Jacob Delaplane
JACOB DELAPLANE
DEPUTY PROSECUTING ATTORNEY
Attorney for Petitioner