

Law Offices Of:
HARRISON & MATSUOKA

WILLIAM A. HARRISON #2948
1001 Bishop Street, Suite 1180
Davies Pacific Center
Honolulu, Hawaii 96813
Telephone Number: 523-7041
Facsimile Number: 538-7579
E-Mail: wharrison@hamlaw.net

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Attorney for Defendant
TIFFANY MASUNAGA

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

STATE OF HAWAII

Plaintiff,

vs.

TIFFANY MASUNAGA,

Defendant.

) CR. NO. 15-1-01338

)

) COUNT 10:

) PROMOTING A DANGEROUS

) DRUG IN THE FIRST DEGREE

) (HRSS 712-1241(1) (B))

)

) COUNT 11:

) PROMOTING A DANGEROUS

) DRUG IN THE THIRD DEGREE

) (HRSS 712-1243)

)

) COUNT 12 & 15:

) PROMOTING A DANGEROUS

) DRUG IN THE SECOND DEGREE

) (HRSS 712-1242(1)(A) ;(1) (B))

)

) (*Caption continued next page*)

)

)

-) COUNT 13:
 -) PROMOTING A CONTROLLED
 -) SUBSTANCE (HRS§ 712-1249.6)
 -)
 -) COUNT 14:
 -) PROMOTING DETRIMENTAL
 -) DRUGS IN THE THIRD DEGREE
 -) (HRS§ 712-1249)
 -)
 -) COUNT 16:
 -) PROMOTING HARMFUL DRUGS IN
 -) THE THIRD DEGREE (HRS§ 712-
 -) 1246)
 -)
 -) COUNT 17 & 18:
 -) PROMOTING HARMFUL DRUGS IN
 -) THE SECOND DEGREE (HRS§ 712-
 -) 1245(1) (A))
 -)
 -) COUNT 19:
 -) PROHIBITED ACTS RE DRUG
 -) PARAPHERNALIA (HRS§ 329-43.5A)
 -)
 -) **MOTION TO DISMISS CASE *AB***
 -) ***INITIO* FOR PROSECUTORIAL**
 -) **MISCONDUCT; DECLARATION**
 -) **OF COUNSEL; EXHIBIT "A";**
 -) **NOTICE OF HEARING MOTION;**
 -) **CERTIFICATE OF SERVICE**
 -)
 -) **HEARING:**
 -) Date: January 14, 2020
 -) Time: 2:30 p.m.
 -) Judge: Hon. Catherine H. Remigio
 -)
 -)
-

**MOTION TO DISMISS CASE AB INITIO FOR PROSECUTORIAL
MISCONDUCT**

COMES NOW, TIFFANY MASUNAGA, by and through her counsel William A. Harrison and Harrison & Matsuoka, and hereby respectfully moves this Honorable Court for an order dismissing the case, *ab initio* with prejudice for prosecutorial misconduct.

This Motion and requested orders are brought pursuant to Rules 12, 16 (4) and 47 of the Hawai'i Rules of Penal Procedure, Rules 1.6, 3.3 (d), 3.8 and 4.2 of the Hawai'i Rules of Professional Conduct ("HRPC"), Defendant's rights to Due Process of Law and a fair trial, as guaranteed by Article I, Sections 5 and 14 of the Hawaii State Constitution, and the 5th, 6th and 14th Amendments to the United States Constitution. This motion is also supported by the Declaration of Counsel, the Memorandum in Support of Motion, and any evidence, which may be presented at the hearing on this matter.

DATED: Honolulu, Hawaii, October 30, 2019.

Law Offices Of:
HARRISON & MATSUOKA

/s/ William A. Harrison
WILLIAM A. HARRISON
Counsel for Defendant
TIFFANY MASUNAGA

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 -) PARAPHERNALIA (HRSS 329-43.5A)
 -)
 -) **DECLARATION OF COUNSEL**
-

DECLARATION OF COUNSEL

I, WILLIAM A. HARRISON, declare as follows:

1. That Declarant is the attorney of record for TIFFANY MASUNAGA herein;

2. That Declarant has reviewed all the discovery provided him in this case, spoken to Defendant and other witnesses and the facts contained in the attached Memorandum are true and correct to the best of Declarant’s knowledge and belief;

3. That attached hereto as Exhibit “A” is a true and correct copy of the Memorandum of Plea Agreement filed in the case of *United States v. Katherine Kealoha*, Cr. No.: 19-00015-JMS-WRP; and

DECLARANT FURTHER ATTESTS, UNDER THE PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE

BEST OF HIS KNOWLEDGE AND BELIEF.

DATED: Honolulu, Hawai'i, October 30, 2019.

Law Offices of:
HARRISON & MATSUOKA

/s/ William A. Harrison
WILLIAM A. HARRISON

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) **MEMORANDUM IN SUPPORT OF**
) **MOTION**

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Rudolph B. Puana (“Puana”), the brother of Katherine Kealoha, is a board-certified anesthesiologist and pain doctor licensed to practice in the State of Hawai’i. Beginning in or about July 2015, and continuing to February 7, 2019, Puana was involved in a conspiracy to dispense and distribute federally controlled substances which included Oxycodone, Fentanyl and Xanax. As part of the conspiracy Puana would sell and barter the controlled substances in exchange for cocaine, which was for his personal use.

At some point Puana’s illegal activity was uncovered by a Honolulu Police Department (“HPD”) Detective. When informed by the HPD Detective of this fact, Katherine Kealoha assumed control of the

investigation, “which included herself Puana and others, to ensure they were not prosecuted.” See *Memorandum of Plea Agreement* in Cr. No. 19-00015 JMS-WRP, filed on October 22, 2019 – attached as Exhibit “A.”¹

As part of the ongoing investigation, which included her brother, as well as herself, Katherine Kealoha drafted and approved an affidavit in support of a search warrant for the residence of defendant Tiffany Masunaga. Katherine Kealoha concealed from the HPD Detectives working on the drug conspiracy, the fact that Puana was involved in the drug conspiracy. See Exhibit “A,” page 6.

Katherine Kealoha prevented HPD Detectives from questioning Tiffany Masunaga about the source of the controlled substances, which included 114 fentanyl transdermal patches² which were recovered with other drugs from Tiffany Masunaga’s residence.

During the prosecution of Tiffany Masunaga for drug crimes, which surreptitiously involved Puana, DPA Kealoha “cultivated a close personal

¹ This plea agreement was entered into by Katherine Kealoha and the United States on October 22, 2019. Katherine Kealoha adopted the facts contained in the plea agreement, under oath during her plea colloquy with the court.

² These 114 fentanyl patches were obtained from Puana.

relationship with [Tiffany]³- by, among other things, communicating with [Tiffany] using an encrypted messaging app – to reduce the likelihood that [Tiffany] would reveal Puana’s role in the drug conspiracy.” See Exhibit “A,” at page 7. This was all while Tiffany was under the same indictment⁴ brought by Kealoha and was represented by counsel.⁵

Kealoha later offered Tiffany a plea agreement that “reduce[d] the likelihood [that Tiffany] would reveal that Puana was the source of [the] controlled substances seized and [that Puana] had participated in the distribution of federally controlled substances.” See Exhibit “A,” at page 7. Kealoha then orchestrated the sealing of the plea agreement, as well as the plea hearing colloquy involving the terms of the plea. It took a Supreme Court appeal to unseal that agreement and the plea hearing colloquy.

The plea agreement by the State controlled with whom Tiffany could speak with. Therefore, effectively prohibited her from obtaining a cooperation agreement with the federal government, thereby extinguishing any possibly of obtaining federal immunity.

³ In the plea agreement Tiffany Masunaga is identified as “CC#4.”

⁴ An indictment which did not include Puana.

⁵ It was during this time that Tiffany was being represented by the same counsel who was also representing Katherine Kealoha.

II. ARGUMENT

A. THE PROSECUTORIAL MISCONDUCT IN THIS PARTICULAR MATTER IS SO EGREGIOUS THAT THE ONLY REMEDY THAT WOULD PROTECT THE INTEGRITY OF THE JUDICIAL PROCESS WOULD BE DISMISSAL OF THIS CASE

In our system of justice, public prosecutors have a unique and significant role:

Each decision [prosecutors] make [] has tremendous impact on the lives of individuals involved, if not on the entire community.

* * *

Prosecutors must strive diligently to raise the ethical, technical, and professional standards of all prosecutors throughout the nation. A single unprofessional, corrupt, or unscrupulous prosecutor can undo the fine work being done by the many thousands of dedicated prosecutors throughout the country.

The modern prosecutor cannot simply be the defender of the status quo. He cannot be content to simply perpetuate himself in office by withdrawing from the frontline battle and practicing old routines. He must be a respected voice in the community with unquestioned integrity. From that operating base, he must become a respected voice in the legislative body of his jurisdiction. The prosecutor must truly represent "the people" and conduct himself in a way to make that obvious when he rises to state his views in legislative halls.

Hon. Evelle J. Younger, *The Challenge of the Prosecutor's Office*, in *The Prosecutor's Deskbook* 3, 3-4 (Patrick F. Healy & Jason P. Manak, eds., 1977).

Due to this role, public prosecutors owe a higher duty to the justice system than other lawyers. As the United States, Supreme Court has explained, the interest of a prosecutor:

is not that he shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.

Berger v. United States, 295 U.S. 78, 88 (1935); see also *Collier v. State*, 266 Ga App. 345, 352, 596 S.E.2d 795, 802 (Ga. App. 2004) (“A prosecuting attorney represents, not an ordinary party, but a sovereignty, whose obligation is to govern impartially and whose interest in a particular case is not necessarily to win, but to do justice.”); National Association of District Attorneys, National Prosecution Standards § 1- 1.1 (3d ed. 2010) (“Nat’l Prosecution Standards”) (“The prosecutor is an independent administrator of justice in the criminal justice system.. The primary responsibility of a prosecutor is to seek justice.”); American Bar Association, ABA Standards for Criminal

Justice: Prosecution Function and Defense Function, Standard 3- 1,2(c) (3c1 ed. 1993) (“ABA Standards for Criminal Justice”) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice”); Hawai’i Rules of Professional Conduct, Rule 3.8 comment [1] (2014). Moreover,

This court has repeatedly noted that “[t]he prosecution has a duty to seek justice, to exercise the highest good faith in the interest of the public and to avoid even the appearance of unfair advantage over the accused.” *Quitog*, 85 Hawai’i at 136 n. 19, 938 P.2d at 567 n. 19 (quoting *State v. Moriwaki*, 71 Haw. 347, 354, 791 P.2d 392, 396 (1990)(citations and internal quotation marks omitted)); *State v. Pemberton*, 71 Haw. 466, 476, 796 P.2d 80, 85 (1990). The American Bar Association (ABA) Prosecution Function Standard 3-1.2(c) (3d ed.1993) states that “[t]he duty of the prosecutor is to seek justice, not merely to convict.”

State v. Rogan, 91 Hawai’i 405,412, 984 P.2d 1231, 1239 (1999); *State v. Moriwake*, 65 Haw. 47, 56, 647 P.2d 705, 712 (1982).

Further, because of this role and the immense authority endowed to the public prosecutor, she has a concomitant obligation as a public official to seek to improve the justice system, an obligation well-established and oft

repeated in professional standards.⁶ As the National District Attorneys Association admonishes its members:

A prosecutor. . . should put the rights and interests of society in a paramount position in exercising prosecutorial discretion in individual cases . . . [and] societal interests rather than individual or group interests should also be paramount in a prosecutor's efforts to seek reform of criminal laws.

Nat'l Prosecution Standards § L1-2. Therefore, it is understood, that societal interests include a legal system where the prosecutor seeks justice in an adversarial system and ensures that all those who come before a court of law receive due process. Thus, prosecutors have a sworn duty to respect the rights of criminal defendants.

A prosecutor must adhere to these high standards because of the dire societal consequences that result from misconduct among public officials who are charged with enforcing the law:

⁶ See, e.g., Model Rules of Prof'l Conduct, R 3.8 (2002) (the "Model Rules"); Model Code of Prof'l Responsibility, EC 7-13 (1980) (the "Model Code"); ABA Standards for Criminal Justice, Standards 3-1.2(c), 3-1.4(a)-(b); see also Lee Adlerstein, *Ethics, Federal Prosecutors, and Federal Courts: Some Recent Problems*, 6 Hofstra L Rev. 755, 755 n.3 (1978); Edwin H. Allier, *Actions Against Prosecutors who Suppress or Falsify Evidence*, 47 Tex. L. Rev. 642, 642 (1969); Bennett L. Gershman, *The Burger Court and Prosecutorial Misconduct*, 21 Crim. L. Bull. 217 (1985); Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 Sw. L.J. 965, 988 (1984).

Decency, security, and liberty alike demand that government officials shall be subject to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private citizen—would bring terrible retribution.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, S., dissenting),
overruled in part by Katz v. United States, 389 U. S. 347 (1967) and *Berger v. New York*, 388 U.S. 41 (1967).

Nothing will detract more from the proper administration of the law than for the people to be impressed that the courts or prosecuting officers are unfair in their treatment of those charged with the law's violation.

State v. Cox, 246 La. 748, 167 So.2d 352, 38 n.6 (1964) (quoting *State v. Nicholson*, 7 S.W.2d 375 (Mo. App. 1928)).

The above law makes it clear that a prosecutor holds a special place in our society that requires that she seek and do justice, not just merely seek convictions.

From the inception of this case prosecutor Katherine Kealoha clearly was involved in prosecutorial misconduct. She knew that her brother was a co-conspirator in a drug ring and took every opportunity to cover that matter up. Instead of acknowledging that her brother's involvement in the offense created an unresolvable conflict which required that she remove herself from the case, she made a conscious decision to not only inject herself into the case, but to intentionally cover up her brother's culpability. This she did to the detriment of Tiffany Masunaga.

Katherine Kealoha not only violated her sworn duty, she violated other HRPC's provisions, as well as National Prosecutorial standards. First, as indicated she violated HRCF conflict rules as she had a personal stake in the case and did nothing. Secondly, she violated national standards as a:

prosecutor should excuse himself or herself from any investigation, prosecution, or other matter where personal interests of the prosecutor would cause a fair-minded, objective observer to conclude that the prosecutor's neutrality, judgment, or ability to administer the law in an objective manner may be compromised.

National Association of District Attorneys, National Prosecution Standards § 1-3.3 (Specific Conflicts) (3d ed. 2010).

Thirdly, she communicated with Tiffany, a defendant who was represented. HRCP Rule 4.2 states: “[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.” *Hawai’i Rules of Professional Conduct*, Rule 4.2.

Moreover, by her involvement in the conspiracy and seeking to cover up another’s involvement, Kealoha violated HRCP Rule 8.4 - “[i]t is professional misconduct for a lawyer to: (a) attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;....” *Hawai’i Rules of Professional Conduct*, Rule 8.4.

B. **AS A RESULT OF THE EGREGIOUS CONDUCT IN THIS CASE THIS COURT HAS THE ABSOLUTE DISCRETION, AUTHORITY AND INHERENT POWER TO DISMISS THIS MATTER WHICH DEFENDANT SUBMITS IT SHOULD EXERCISE**

In *State v. Alvey*, 67 Haw. 49, 57-58, 678 P.2d 5, 10 (1984), this court noted that a judge's inherent power to dismiss an indictment is not generally so broad as to dismiss an indictment with prejudice before trial unless the State's misconduct represents a serious threat to the

integrity of the judicial process or there is a clear denial of due process, a violation of some constitutional right, is an arbitrary action, or is the result of some other governmental misconduct. . . We are cognizant of the State's strong interest in prosecuting crime, but we are equally cognizant that the State's duty is to pursue justice, not convictions, and the prosecutor has a duty to act as a minister of justice to pursue prosecutions by fair means. We must weigh the State's interests against the defendants' rights to fundamental fairness

State v. Wong, 97 Hawai'i 512, 527, 40 P.3d 914, 929 (2002).

Furthermore:

In *State v. Moriwake*, 65 Haw. 47, 647 P.2d 705 (1982) this court held that a trial court's power to administer justice may be properly invoked to dismiss an indictment with prejudice. Our duty to administer justice requires that we invoke that authority here to mandate dismissal of these indictments with prejudice. As the *Moriwake* court noted:

[W]e are cognizant of the deference to be accorded the prosecuting attorney with regard to criminal proceedings, but such deference is not without bounds. As stated elsewhere:

Society has a strong interest in punishing criminal conduct. But society also has an interest in protecting the integrity of the judicial process and in ensuring fairness to defendants in judicial proceedings. Where those fundamental interests are threatened, the "discretion" of the prosecutor must be subject to the power and responsibility of the court. *State v. Braunsdorf*, 98 Wis.2d 569, 297 N.W.2d 808, 817 (1980) (Day, J., dissenting).

State v. Wong, 97 Hawai'i 512, 527, 40 P.3d 914, 929 (2002), citing *State v.*

Moriwake, 65 Haw. 47, 56, 647 P.2d 705, 712 (1982).

The prosecutorial misconduct in this matter: (1) represents a serious threat to the integrity of the judicial process; (2) presents a clear denial of due process; and (3) is a violation of Tiffany Masunaga's constitutional right of due process. The misconduct therefore challenges the very processes for which the State is mandated to uphold.

III. CONCLUSION

Accordingly, based upon the authorities and arguments cited herein, Defendant would respectfully request that this Honorable court grant the above motion and dismiss this case *ab initio* with prejudice.

DATED: Honolulu, Hawai'i, October 30, 2019.

Law Offices of:
HARRISON & MATSUOKA

/s/ William A. Harrison
WILLIAM A. HARRISON
Attorney for Defendant
TIFFANY MASUNAGA

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 -)
 -) **NOTICE OF HEARING MOTION;**
 -) **CERTIFICATE OF SERVICE**
-

NOTICE OF HEARING OF MOTION

TO: LONDON MURATA, ESQ.
 Deputy Attorney General
 845 Queen Street
 Honolulu, Hawaii 96813
 Attorney for State of Hawai'i

NOTICE IS HEREBY GIVEN that the above identified Motion, shall come on for hearing before The Honorable Catherine H. Remigio, Judge of the above-entitled Court, in her courtroom at 777 Punchbowl Street, Honolulu, Hawaii, 96813 at **2:30 p.m.**, on **January 14, 2020**, or as soon thereafter as counsel can be heard.

DATED: Honolulu, Hawaii, October 30, 2019.

Law Offices of:
 HARRISON & MATSUOKA

/s/ William A. Harrison
 WILLIAM A. HARRISON
 Attorney for Defendant
 TIFFANY MASUNAGA

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion will be served on the above-identified parties at their respective addresses by means of Email and/or hand delivery on the date of filing or as soon thereafter as practicable.

DATED: Honolulu, Hawaii, October 30, 2019.

Law Offices Of:

HARRISON & MATSUOKA

 /s/ William A. Harrison
by WILLIAM A. HARRISON
Attorney for Defendant
TIFFANY MASUNAGA