

**Electronically Filed  
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NO. SCPW-24-0000537

IN THE SUPREME COURT OF THE STATE OF HAWAII

HAWAII POLICE DEPARTMENT, COUNTY OF HAWAII,	)	ORIGINAL PROCEEDINGS
	)	CASE NOS. 3CSP-23-0000003;
	)	3CSP-23-0000017
Petitioner.	)	
	)	PETITION FOR WRIT OF MANDAMUS
vs.	)	
	)	THIRD CIRCUIT COURT
THE HONORABLE PETER K. KUBOTA, Judge of the Circuit Court of Third Circuit, State of Hawaii,	)	HONORABLE PETER K. KUBOTA
	)	JUDGE
Respondent Judge.	)	
	)	
and	)	
	)	
ALBERT IAN and SHAWN SCHWEITZER,	)	
	)	
Respondents.	)	
_____	)	

RESPONDENT SHAWN SCHWEITZER'S ANSWER TO PETITION

and

CERTIFICATE OF SERVICE

KEITH S. SHIGETOMI 3380  
ATTORNEY AT LAW  
P.O. BOX 17779  
HONOLULU, HAWAII 96817  
TELEPHONE NUMBER (808) 753-1774

RAQUEL BARILLA #2655526  
(California) (*pro hac vice*)  
THE INNOCENCE CENTER  
5449 MISSION GORGE ROAD #379  
SAN DIEGO, CALIFORNIA 92120  
TELEPHONE NUMBER (702) 250-6870

ATTORNEYS FOR RESPONDENT  
SHAWN SCHWEITZER

IN THE SUPREME COURT OF THE STATE OF HAWAII

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ALBERT IAN and SHAWN	)	
SCHWEITZER,	)	
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Respondents.	)	
_____	)	

RESPONDENT SHAWN SCHWEITZER'S ANSWER TO PETITION

I

COUNTER-STATEMENT OF THE CASE

The Petition for Writ of Mandamus sought by the Hawaii County Police Department (HCPD) seeks to vacate the denial of HCPD's Motion to Quash *Subpoena Duces Tecum*, Served August 1, 2024. (SCPW-24-0000537, Dkt. 1, 2, 12-23). On August 15, 2024, Court Order Denying Hawaii Police Department's Motion to Quash *Subpoena Duces Tecum*, filed on August 2, 2024 was filed. (SCPW-24-0000537, Dkt. 16). See Appendix "A" for Court Order Denying Hawaii Police Department's Motion to Quash *Subpoena Duces Tecum*, filed on August 2, 2024. HCPD alleged compelling disclosure of these records contravenes law. (SCPW-24-0000537, Dkt. 1, 6). The Petition arose from the consolidated cases of Albert Ian Schweitzer vs. State of Hawaii, 3CSP-23-0000003 and Shawn

Schweitzer vs. State of Hawaii, 3CSP-23-0000017. (SCPW-24-0000537), Dkt. 1, 2-3).

Albert Ian Schweitzer (Ian) had his conviction in State of Hawaii vs. Albert Ian Schweitzer and Shawn Schweitzer, Case No. 3PC990000147 vacated. (Case 3CSP-23-0000003, Dkt. 117). By stipulation, Shawn Schweitzer (Shawn) was allowed to withdraw his guilty pleas and the State nolle prosequed all counts in the aforementioned case. (Case No. 3PC990000147, Dkts. 487, 491).

Both Schweitzers filed a Joint Petition for Relief Pursuant to HRS Chapter 661B, seeking a finding of "actual innocence." (Case No. 3CSP-23-0000003, Dkt. 127; Case No. 3CSP-23-0000017, Dkts. 79,81). Petitioners filed Motion to Preserve and Compel Discovery Re: Joint Petition for Relief Pursuant to HRS Chapter 661B, requesting, inter alia, the Hawaii County Prosecuting Attorney (HCPA) and Hawaii County Police Department (HCPD) to produce all evidence in their possession in relation to the Dana Ireland murder investigation and Case Nos. 3PC990000147, 3CSP-23-0000003, and 3CSP23-00000017 from the time of the Dana Ireland murder on December 24, 1991, through the present, as well as any evidence that may be obtained in the future . . . ." (Case No. 3CSP-23-0000003, Dkt. 133).

The aforementioned Motion documented the following events:

1. On or about February 7, 2024, Petitioner's counsel, Barry Scheck contacted Steven Kramer ("Kramer") from Indago Solutions to assist Petitioners in identifying Unknown Male #1, whose DNA was recovered on all relevant crime scene evidence collected by the Hawaii County Police Department on or around December 24, 1991, the date of Ms. Ireland's murder;
2. On or about February 26, 2024, Kramer notified Petitioner's Counsel that Indago Solutions had identified a person who they believed could be Unknown Male #1;
3. Kramer contacted the FBI's genetic genealogy team to follow up on the FGG information and independently review Indago's results;
4. A few weeks later, Kramer advised Petitioner's Counsel that the FBI had confirmed Indago's results

(the suspect that Kramer had identified as likely being Unknown Male #1) and that they would be working with the Hawaii County Police Department ("HCPD") to obtain an abandoned DNA sample from Unknown Male #1;

5. On July 1, 2024, Forensic Analytical Crime Lab ("FACL") notified Petitioner's Counsel that the abandoned DNA from suspected Unknown Male #1 matched the Unknown Male #1's DNA from relevant evidence collected from the crime scene. FACL sent this information to the Hawaii County Prosecuting Attorney ("HCPA");

6. At a July 2, 2024, confidential status conference, Petitioner's Counsel, over the objection of deputy prosecuting attorneys Shannon Kagawa and Michael Kagami, requested the Court order HCPD and the HCPA follow best practices when investigating suspected Unknown Male #1's involvement in Ms. Ireland's murder. Specifically, Petitioners' Counsel requested that HCPD and the HCPA record any search or interrogation of now identified Unknown Name #1, that any warrant go through the Honorable Peter K. Kubota, and also requested that the Hawaii FBI assist in the investigation;

7. Petitioner's Counsel specifically emphasized that they thought the HCPD had a conflict of interest. Petitioners' Counsel explicitly warned, based on advice from Steve Kramer and Petitioner's Counsel Barry Scheck's personal knowledge of how arrests and searches are done in these situations, that all efforts be made to isolate Unknown Male #1 from close associates so they could be separately interviewed, and measures be taken to prevent him from fleeing, destroying evidence, or committing suicide;

8. On July 19, 2024, unbeknownst to Petitioners' Counsel at the time, HCPD collected DNA via buccal swabs from suspected Unknown Male #1 and sent it to FACL to be compared to the abandoned DNA sample of the suspected Unknown Male #1 that had already been collected and submitted for testing on July 1, 2024;

9. On July 24, 2024, FACL sent Petitioners' Counsel a report confirming that suspected Unknown Male #1's DNA matched the prior surreptitious sample, and all DNA evidence collected and tested from crime scene evidence for Ms. Ireland's murder;

10. At a July 25, 2024, confidential status conference, Petitioners' Counsel asked HCPA to notify Petitioners' Counsel and the Court when Unknown Male #1 was arrested and in custody of HCPD. HCPA refused to answer Petitioners' Counsels' questions, stating that it was an ongoing investigation;

11. On July 26, 2024, Petitioners' Counsels learned that Unknown Male #1 had committed suicide on July 23, 2024;

12. At a July 26, 2024, confidential status conference, the Court was informed that Unknown Male #1 had committed suicide. The Court instructed Petitioner's Counsel to file a Motion to Compel Discovery to HCPD and HCPA, requiring them to produce any relevant information regarding Ms. Ireland's murder, especially the facts and circumstances surrounding their actions in the investigation of Unknown Male #1 and his subsequent suicide.

(Case No. 3CSP-23-0000003, Dkt. 133, 6-18).

The Court granted Petitioners' Motion to Preserve Evidence and to Compel Discovery Re: Joint Petition for Relief Pursuant to HRS Chapter 661B. (Case No. 3CSP-23-0000003, Dkt. 169). The Order directed that a subpoena be issued to the Hawaii Police Department for the following items:

All documents, tapes (audio and video), photographs, emails, digital information, or any other physical evidence obtained by the Hilo Police Department, Hawaii County law enforcement, or the FBI that have been gathered since February 7, 2024 when Stephen Kramer, of Indago Solutions, forwarded information from his genetic genealogy investigation identifying Albert Lauro, Jr. which tend to show that Albert Lauro, Jr. committed the assault, kidnapping, sexual assault, and murder of Dana Ireland on December 24, 1991. This includes but is not limited to the following:

- a. Any tapes (video or oral), emails, or written communications concerning the taking of a swab from Albert Lauro, Jr. on July 19, 2024 including everything said by anyone to Albert Lauro, Jr. before, during, and after the swabbing; what he said before, during and after the swabbing; where the swabbing took place, surveillance of Albert Lauro, Jr. before the swabbing took place and afterwards;
- b. Any and all information gathered that shows a relationship between Albert Lauro, Jr. and either Ian Schweitzer, Shawn Schweitzer, or Frank Pauline;
- c. All surveillance (reports, photos, videos, over hearings of voice communications, or digital communications) of Unknown Male #1;
- d. All interviews of family members, friends, or others

concerning Albert Lauro, Jr. before or after February 7, 2024;

- f. The date and time the Hilo Police Department, Hawaii County law enforcement or Hawaii County Prosecutors learned about the death of Albert Lauro, Jr.;
- g. Evidence obtained from a search warrant for Albert Lauro, Jr.'s phones, computers or other devices;
- h. Evidence obtained from a search of Albert Lauro Jr.'s phones, computers, or other devices;
- i. The autopsy report on the death of Albert Lauro, Jr.'s and all investigative reports concerning whether the manner of death was suicide or homicide;
- j. Any and all information discovered during the investigation of Albert Lauro Jr., that tends to exculpate Petitioners.

(Case No. 3CSP-23-0000003, Dkt. 169). The Order further directed that all items required to be produced pursuant to the Order be delivered to the chambers of Honorable Peter K. Kubota for an *in camera* inspection. (Case No. 3CSP-23-0000006, Dkt. 169).

During a press conference, Hawaii island Police Chief Ben Moszkowicz confirmed that Albert Lauro, Jr. was the source of semen and other DNA retrieved from Ireland's body and a t-shirt soaked with Ireland's blood. (Appendix "B"). Moszkowicz said that Lauro met with police detectives at the Hilo police station on July 19 and spoke with police for an hour. (Appendix "B"). Police took a court-ordered swab of Lauro before letting him go. (Appendix "B"). Moszkowicz confirmed that Lauro gave police information but he did not give police anything that police felt added to the probable cause threshold. (Appendix "B"). Moszkowicz stated that the police believed the presence of Lauro's DNA at the crime scene was in and of itself not sufficient to prove Lauro intentionally or knowingly caused Ireland's death. (Appendix "B"). Moszkowicz said police lacked probable cause to bring Lauro in on a murder charge. (Appendix "B").

After a subpoena duces tecum was served on the Hawaii Police Department as directed by the Order Granting Motion to Compel

Discovery Re: Joint Petition for Relief Pursuant to HRS Chapter 661B, HCPD filed Hawaii Police Department's Motion to Quash Hawaii Police Department's Motion to Quash *Subpoena Duces Tecum*, Served August 1, 2024. (Case No. 3CSP-23-0000003, Dkt. 176). On August 5, 2024, HCPD produced materials pursuant to the subpoena duces tecum. (Case No. 3CSP-23-0000003, Minutes of 08/05/24). The Court orally denied Hawaii Police Department's Motion to Quash *Subpoena Duces Tecum* Served on August 1, 2024 and indicated that it would conduct an in camera review and make a determination as to what would be released, subject to a protective order. (Case No. 3CSP-23-0000003, Minutes of 08/05/24).

On August 6, 2024, HCPD filed Hawaii Police Department's Emergency Motion to Stay and Enjoin Compliance with Petitioners' *Subpoena Duces Tecum* Served August 1, 2024 Pending Mandamus Review. (Case No. 3CSP-23-0000017, Dkt. 111). The Motion argued that since HCPD's Motion to Quash was denied, HCPD had to either acquiesce in the Court's ruling in contravention of Haw. Rev. Stat. Sections 92F-13 and 92F-22 or run the risk of sanctions for contempt of court. (Case No. 3CSP-23-0000017, Dkt. 111). Shawn pointed out that HCPD had already produced the materials so there was no risk of sanctions for contempt. (Case No. 3CSP-23-0000017, Dkt. 113).

On August 7, 2024, Petitioner filed Petition for Writ of Mandamus in the instant case. (SCPW-24-0000537, Dkt. 1). On August 8, 2024, this Court ordered that an Order Denying Motion to Quash Subpoena be filed within seven days. On August 15, 2024, Court Order Denying Hawaii Police Department's Motion to Quash *Subpoena Duces Tecum*, Filed on August 2, 2024 was filed. (SCPW-24-0000537, Dkt. 16).

The Court found that Chapter 92F, the Hawaii Uniform Information Act Practices Act did not apply to this case but



assuming that it did apply, the information regarding Albert Lauro Jr.'s 1 hour long interview with HPD, and any other information confirming him as previously Unknown male #1, is relevant and essential for the determination of the Actual Innocence of Albert Ian Schweitzer and Shawn Schweitzer. (SCPW-24-0000537. Dkt. 16). The Court expressly found that the interest of determination of Actual Innocence of the Schweitzers, and the public right to review matters which have been of great significance to this community over the past 33 years, greatly outweighs HPD's request to keep its investigation private. (SCPW-24-0000537, Dkt. 16). The Court further found that the principles of due process and good faith obligations of law enforcement from Brady v. Maryland, are applicable and enforceable in the HRS Chapter 661B matter. (SCPW-24-0000537, Dkt. 16).

## II

### STANDARDS OF REVIEW

#### 1. Writ of Mandamus.

"A writ of mandamus is an extraordinary remedy that will not issue unless the petitioner demonstrates a clear and undisputable right to relief and a lack of alternative means adequate to redress the alleged wrong or to obtain the requested action." Nakagawa v. Heen, 58 Haw. 316, 568 P.2d 508 (1977). "A court will generally not issue a writ unless there are special circumstances to make it a rare and exceptional case. Nakagawa v. Heen, 58 Haw. 316, 568 P.2d 508 (1977),

#### 2. Abuse of discretion.

"The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant 44, 51, 185 P.3d 229, 236 (2008). The burden of establishing abuse of discretion is on appellant, and a strong showing is required to

establish it." State v. Wong, 97 Hawaii 512, 517, 40 P.3d 914, 919 (2002).

### III

#### ARGUMENT

A. There is no Clear and Undisputable Right to Relief.

In Tighe v. City and County, 55 Haw. 420, 520 P.2d 1345 (1974), the Court explained there is no absolute privilege that insulates police records from discovery in civil or criminal cases. Id. at 422-23, 429 citing McCormick, Evidence (2d ed. 1972) Section 112 8 Wigmore, Evidence (McNaughton rev. 1961) Section 2378, especially n. 7. The documents requested in the Subpoena Duces Tecum (SDT) were for the purposes of investigating Shawn and Ian Schweitzers' petition for findings of "actual innocence" following their Hawaii Rules of Penal Procedure Rule 40 petitions which resulted in Ian's conviction being vacated and Shawn's charges being dismissed. Rule 40 petitions, which are special proceedings, are "basically criminal, and not civil, in nature." Penalfor v. Mossman, 141 Hawaii 358, 409 P.3d 770 (Haw.Ct.App. 2017). Thus, the rule against absolute privilege applies.

1. Section 92F-1(3) does not apply.

HCPD argued the requested documents are protected under the Uniform Information Practices Act (UIPA) and specifically cite to Sections 92F-13 and 92F-22. Section 92F-13, HRS, provides:

Section 92F-13 Government records, exceptions to general rule. This part shall not require disclosure of:

- (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
- (2) Government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable;
- (3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;

(4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure;

(5) Inchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports, work product, records or transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to section 21-4 and the personal files of members of the legislature.

In arguing protection under subsection (2), HCPD refers to the Exemption 7(A) of the Freedom of Information Act (FOIA) to interpret its meaning. HCPD argues this exception protects the disclosure of information which could be reasonably be expected to interfere with enforcement proceedings. HCPD also attempts to shield itself from disclosing evidence because of an alleged need to protect witnesses from intimidation, the alleged need for law enforcement to protect the legitimacy of the investigation, and to make sure witnesses remain cooperative. HCPD does not, however, provide specification or documentation to support these allegations. Instead, HCPD hides behind a generalized statement that there is an "ongoing investigation."

a. Disclosure will not interfere with a criminal proceeding.

The court in National Public Radio v. Bell, 431 F.Supp 509, 514 (D.D.C. 1977), recognized an exemption when an investigation will "hopefully" lead to a law enforcement proceeding. The court explained the exemption applied because there was a very real possibility of a criminal learning in alarming detail of the government's investigation of his crime before the government has had an opportunity to bring him to justice." Id. at 515.

Here, the "criminal" that HCPD purports to be protecting is Albert Lauro, Jr. (Lauro). Lauro killed himself after HCPD informed him that they were investigating his involvement in Ireland's murder. HCPD interfered with and bungled their own investigation when they failed to arrest Lauro after confirming his identity as Unknown Male #1 on July 1, 2024. When Lauro

killed himself, he killed HCPD's only chance of capturing and prosecuting the actual culprit in Ireland's murder. For nearly thirty three years HCPD and HCPA had miserably failed to arrest and prosecute the actual culprit. Moszkowicz told the public that Lauro did not disclose anything that police felt amounted to probable cause. Because Lauro is dead, there is no "very real possibility" of Lauro learning further details of the "ongoing investigation." HCPD already informed him of the details of the "ongoing investigation" and he took his own steps to evade capture and prosecution. At this stage, the only persons that HCPD are seeking to "protect" are themselves.

b. Disclosure will not interfere with witness cooperation; the information has already been released to the public or the circuit court can redact protected information.

The information HCPD is seeking to protect has already been disseminated to the public after HCPD held a press conference. During the press conference, Moszkowicz confirmed to the public that DNA tied Lauro to Ireland's case, Lauro voluntarily gave his DNA sample to HCPD and Lauro committed suicide after HCPD failed to arrest him. HCPD, by its own actions and negligence, has waived any argument under 92F-13(3), HRS, as the information has already been disclosed to the public, and, by extension any relevant witnesses. Moszkowicz admitted that Lauro did not provide police with any information that gave the police probable cause to arrest anyone.

HCPD has not specifically alleged or proven there are other witnesses or potential criminals who should not be privy to the requested discovery. Even if there is protected information in the discovery, there is an alternative means to protect the specific information. The circuit court would be in the best position to conduct an in camera review of the information and protect any otherwise protected witnesses.

2. Section 92F-22 does not apply

HCPD also argued that Section 92F-22, HRS, prohibits the release of the requested materials because of an ongoing investigation. Section 92F-22, HRS states:

An agency is not required by this part to grant an individual access to personal records, or information in such records:

(1) Maintained by an agency that performs as its or as a principal function any activity pertaining to the prevention, control, or reduction of crime, and which consist of:

(A) Information or reports prepared or compiled for the purpose of criminal intelligence, including reports of informers, witnesses, and investigators; or

(B) Reports prepared or compiled at any stage of the process of enforcement of criminal laws from arrest or indictment through confinement, correctional supervision, and release from supervision.

HCPD repeatedly cited to an ongoing criminal investigation. The analysis is the same as described, *supra*, as there is no absolute privilege that insulates police records from discovery. First, HCPD's argument is moot. HCPD already produced the requested materials, in compliance with the provision in the Order Granting Motion to Compel Discovery Re: Joint Petition for Relief Pursuant to HRS Chapter 661B which ordered production and delivery of the required items to the Court's chambers for in camera review. Quashing of the subpoena duces tecum is moot. HCPD's issue is not with the production of materials but with the disclosure of the materials. Thus, this Petition for Writ of Mandamus is frivolous and should be denied so the Schweitzers can finally put an end to their thirty three year long nightmare of wrongful conviction.

Second, HCPD's claim of an ongoing criminal investigation is a nonsensical, deceptive, delay tactic to deflect criticism of HCPD. Moszkowicz stated that Lauro did not provide information to police to establish probable cause to arrest him or anyone

else for murder. Judge Kubota's Order recognized that "due to the suicide of Albert Lauro, Jr. following HPD's interview, the "ongoing investigation" into his role as Dana Ireland's killer is essentially over . . . ."

The sad truth is that the Innocence Project and affiliated organizations solved the crime that HCPD was unable to solve for nearly thirty three years. After being given the answers to the test, HCPD allowed the dog to eat the answers. HCPD failed to follow best practices and informed Lauro that he was the target of the investigation and then allowed him to commit suicide. Lauro's suicide was his dying declaration of his guilt.

Moszkowicz' statement that police lacked probable cause to arrest Lauro for murder was disingenuous, or at the very least misinformed, as HCPD and HCPA lacked an eye witness and a DNA match but insisted on prosecuting the Schweitzers for Murder in the Second Degree. The Schweitzers were alternatively charged with Murder in the Second Degree by omission. The same legal liability would have applied to Lauro.

In this age of shot clocks and pitch clocks, HCPD's Petition for Writ of Mandamus is a stall tactic whose only purpose is to delay and avoid public humiliation; which only serves to obstruct justice. HCPD's unsupported assertion of an ongoing investigation is a sham.

B. There are Alternative Means which were Explored and Considered by the Circuit Court.

The proper and judicially prescribed procedure for the resolution of what materials should be disclosed is for the court to conduct an in camera review. A review by the trial judge, in camera, of those documents would provide the safeguards needed to balance between the claim of privilege and the need for documents. Kerr v. United States District Court, 426 U.S. 394 (1976).

That has occurred here. HCPD produced the requested materials. The Court completed the in camera review and was prepared to disclose appropriate materials with a protective order, however, HCPD filed the instant Petition for Writ of Mandamus.

Because of this procedural history, this Petition for Writ of Mandamus is both moot and not ripe. It is moot because HCPD has already produced the materials and it is not ripe because HCPD did not wait for the Court to rule on the disclosure of materials with a protective order. Thus, this Petition for a Writ of Mandamus is frivolous and nothing but a last ditch effort to shield HCPD from further humiliation.

The circuit court followed the correct procedure and is best situated to determine if the requested materials should be disclosed, with a protective order, if appropriate. The Petition for Writ of Mandamus should be denied.

IV

CONCLUSION

For the foregoing reasons and authorities cited, Respondent Shawn Schweitzer requests that this Honorable Court deny the Petition for Writ of Mandamus in the above-entitled matter.

DATED: Honolulu, Hawaii, August 17, 2024.

/s/ Keith S. Shigetomi

KEITH S. SHIGETOMI

RAQUEL BARRILA

ATTORNEYS FOR RESPONDENT

SHAWN SCHWEITZER

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Judge of the Circuit Court of )	HONORABLE PETER K. KUBOTA
Third Circuit, State of Hawaii, )	JUDGE
)	)
Respondent Judge. )	)
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and )	)
)	)
ALBERT IAN and SHAWN SCHWEITZER, )	)
)	)
Respondents. )	)
)	)

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document was electronically served on the following party on August 18, 2024:

Office of the Corporation Counsel  
Attorneys for Hawaii Police Department  
101 Aupuni Street, Suite 325  
Hilo, Hawaii 96720

Office of the Prosecuting Attorney - County of Hawaii  
655 Kilauea Avenue  
Hilo, Hawaii 96720

Jennifer Brown  
L. Richard Fried  
William A. Harrison  
Hawaii Innocence Project  
2485 Dole Street, Suite 206  
Honolulu, Hawaii 96822

DATED: Honolulu, Hawaii, August 18, 2024.

/s/ Keith S. Shigetomi