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NO 29794
IN THE INTERMEDIATE COURT OF APPEALS
STATE OF HAWAI`I

STATE OF HAWAI`I, Plaintiff-Appellee, vs. NELSON KUUALOHA ARMITAGE, Defendant-Appellant.	Case No. 29794 APPELLANTS' OPENING BRIEF; CERTIFICATE OF SERVICE APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL CIRCUIT. HON. SIMONE POLLACK.
STATE OF HAWAI`I Plaintiff-Appellee, vs. RUSSELL KAHOOKELE Defendant-Appellant.	APPEAL FROM FINAL JUDGMENT AS FILED ON APRIL 3, 2009
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DEFENDANTS'-APPELLANTS' OPENING BRIEF
(CERTIFICATE OF SERVICE ATTACHED)

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	)	
Plaintiff-Appellee,	)	DEFENDANTS'-APPELLANTS'
vs.	)	OPENING BRIEF
	)	
NELSON KUUALOHA ARMITAGE,	)	
RUSSELL KAHOOKELE	)	
HENRY MAILE NOA	)	
Defendants'-Appellants'.	)	
	)	

DEFENDANTS'-APPELLANTS' OPENING BRIEF

INTRODUCTION

This case stems directly from the last one hundred and sixteen years of Hawai`i's history, including:

- The overthrow of the Kingdom of Hawai`i in 1893;
- The "Apology Resolution" of 1993 in which the federal government acknowledged that the overthrow of the Kingdom of Hawai`i was illegal and would not have been successful without the active support and intervention of U.S. diplomatic and military representatives[1];
- Various acts of the Hawai`i legislature acknowledging that the actions of the United States in relation to the overthrow were "illegal" and "immoral"[2]; and

[1] Apology Resolution, Pub.L. No. 103-150, 107 Stat. 1510 (1993).
[2] See, e.g., 1993 Haw. Sess. L. Act 354, § 1 (stating "[t]he legislature has also acknowledged that the actions by the United States were illegal and immoral, and pledges its continued support to the native Hawai`ian community by taking steps to promote the restoration of the rights and dignity of native Hawai`ians); 1993 Haw. Sess. L. Act 359, § 1 (stating, "[i]n 1893, the United States Minister to the sovereign and independent Kingdom of Hawai`i, John L. Stevens, conspired with a small group of non-Hawai`ian residents of the Kingdom (including citizens of the United States) to overthrow the indigenous and lawful government of Hawai`i" and "[i]n pursuit of that conspiracy, the United States Minister and the naval representative of the United States caused armed forces of the United States to invade the sovereign Hawai`ian Nation in support of the overthrow indigenous and lawful government, and the United States Minister thereupon extended diplomatic recognition to a provisional government formed by the conspirators without the consent of the native Hawai`ian people or the lawful Government of Hawai`i in violation of treaties between two nations and of international law").

- Acknowledgements by both the federal and Hawai`i state governments that native Hawai`ians did not relinquish their claims to their inherent sovereignty as a people but were instead denied their sovereignty without consent or compensation.[3]

These events and this case raise a question of grave significance to native Hawai`ians and all people who have sought fulfillment of the elusive promise of reinstatement of Hawai`ian sovereignty, and one that the federal and Hawai`i state courts and legislatures have long danced around but have never confronted.

If, as is universally acknowledged, the overthrow of the Hawai`ian Kingdom was illegal and immoral, and was achieved only by the indispensable support and intervention of the United States, and if the federal government and the state of Hawai`i have acknowledged that Native Hawai`ians did not willingly relinquish their sovereignty, and if the federal government has even apologized to Native Hawai`ians for having forcefully stolen their sovereignty from them, how is it then that the state of Hawai`i continues to refuse to acknowledge any inherent sovereignty Hawai`ian entity (even failing to create any process by which it could acknowledge such an entity[4]) and also refuses to honor the concomitant fundamental rights of native Hawai`ians from who sovereignty was stolen and to whom its return (and return of the Island of Kaho`olawe) has been promised?

Subsequent to the federal government's adoption of the Apology Resolution, the state enacted legislation aimed at "promoting the restoration of the rights and dignity of native Hawai`ians, "[5] and to "facilitate the efforts of native Hawai`ians to be governed by an indigenous sovereign nation of their own choosing."[6] However, there has resulted no recognition of native Hawai`ian sovereignty. More importantly, some native Hawai`ians,

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[3] See Apology Resolution, Pub.L. No. 103-150, 107 Stat. 1510 (1993); 1993 Haw. Sess. L. Act 359, § 1.

[4] The record in this case demonstrates that all three branches of State Government have now refused to consider any claim of an organic nation, revived and created by and for those whose sovereignty was previously usurped. In the case at bar, Defendants' / Appellants' offered expert testimony the legislative and executive branches of government have failed to afford any process by which recognition as a sovereign nation can be obtained. Appellants thus turned to the Judicial branch – offering into evidence organic documents from their government including Proclamation of Reinstatement, a Constitution and voluminous records from the Legislature, testimony from Reinstated Hawai`ian Government officials, and expert testimony that Appellant's government qualifies as a sovereign government under both State v. Lorenzo, infra, 77 Hawai`i 21, and pursuant to international law and – yet the Court held that the matter of Hawai`ian nationhood presents a "political question" that it was without jurisdiction to answer.

[5] 1993 Haw. Sess. L. 354, § 1 at 999-1000.

[6] 1993 Haw. Sess. L. 354, § 2 at 999-1010.

such as Appellants here, are skeptical of the notion that recovery of their inherent sovereignty ought to, or even can, depend on any actions one way or the other of the state or federal governments.

Defendants-Appellants assert that they proved at trial that they have revived and recreated the stolen sovereign Hawai`ian government and that this sovereign Hawai`ian government and its citizens have certain fundamental constitutional rights including P.A.S.H. rights and property rights in Kaho`olawe, which were violated when they were arrested for entering the Kaho`olawe reserve without first seeking permission from the State of Hawai`i.

This excursion gave rise to the present case.

CONCISE STATEMENT OF THE CASE

On July 31, 2006, several Native Hawai`ians[7] traveled to Kaho`olawe. Two of them, Defedants-Appellants Nelson K. Armitage and Russell Kahookele, stayed on the island of Kaho`olawe while others, including Defendant Henry Maile Noa, traveled on a boat in the waters near Kaho`olawe[8]. They did not ask permission from the State of Hawai`i before they left. All Defendants are members of the Reinstated Hawai`ian Government (RHG). ROA at 40-81 (Noa Decl. at ¶ 2; Armitage Decl. at ¶ 2; Kahookele Decl. at ¶ 2). [1]

The stated purpose of the visit was threefold: first, to allow the Reinstated Hawai`ian Government to exercise property rights in Kaho`olawe; second, to allow the Reinstated Hawai`ian Government to proclaim its beneficial ownership of Kaho`olawe, and; third, to allow representatives of the Reinstated Hawai`ian Government to build a heiau and perform a prayer on the site. ROA at 40-81 (Armitage Decl. at ¶ 4; Kahookele Decl. at ¶ 3).

Native Hawai`ians have unsuccessfully endeavored many times to assert their inherent sovereignty by asking the courts to negate the sovereignty the state exercises

[7] Defendants / Appellants are Native Hawai`ians. TR (1/25/08) p 49 l 13.
[8] Dr. Gates, defendants' expert at trial, testified that the permission requirement for entrance onto Kaho`olawe – in these unique circumstances – was inconsistent with State and Federal law promising management and control of that island to a sovereign nation. TR (7/27/07) p 81 l 11.

over them. See e.g. State v. French, 77 Hawai`i 222, 231-32, 883 P.2d 644, 653-54 (App. 1994)(holding that persons claiming to be citizens of the Kingdom of Hawai`i and not of the State of Hawai`i are not exempt from the laws of the State of Hawai`i applicable to all persons (citizens and non-citizens) operating motor vehicles on public roads and highways within the State of Hawai`i); State v. Fergerstrom, 106 Hawai`i 43, 55, 101 P.3d 652, 664 (App. 2004)(holding that the State has the jurisdiction and authority to enforce traffic laws within the State, including against "[p]ersons claiming to be citizens of the Kingdom of Hawai`i and not of the State of Hawai`i"); State v. Jim, 80 Hawai`i 168, 171-172, 907 P.2d 754, 757-758 (1995) (holding that the exercise of police powers on Hawai`ian home lands does not require the consent of Congress).

One such case was State v. Lorenzo, 77 Hawai`i 219, 883 P.2d 641 (Hawai`i App. 1994). Although joining the chain of cases denying native Hawai`ian claims that the state lacks jurisdiction over them, the Lorenzo court took a different approach than previous cases and rejected Lorenzo's jurisdictional claim on the grounds that Lorenzo had failed to present evidence to establish native sovereignty. 883 P.2d at 643. Noting the recognition of the illegality of the overthrow contained in the then recently passed Apology Resolution, and noting the state government's recognition that the takeover and subsequent events denied native Hawai`ians their inherent sovereignty, the court rejected the lower tribunal's reasoning that the illegality of the overthrow is irrelevant to the analysis. Id. at 642-43. Rather, the court held out the tantalizing prospect that future courts would seriously consider evidence and arguments in support of recognition of the inherent sovereignty of native Hawai`ians. Id. at 643.

Subsequent courts have been clear that the illegality of the overthrow will not be seen as providing immunity from jurisdiction. See e.g. Nishitani v. Baker, 82 Hawai`i 281, 921 P.2d 1182 (App.1996)(rejecting defense that, as "birth descendants of Native Hawai`ians, who inhabited the Hawai`ian Islands prior to 1778," defendants enjoy immunity from a civil suit regarding contracts entered into by them in the State of Hawai`i); Fergerstrom, 106 Hawai`i 43, 101 P.3d 652 (stating, "[w]hatever may be said regarding the lawfulness of the Provisional Government in 1893, the Republic of Hawai`i in 1894, and the Territory of Hawai`i in 1898, the State of Hawai`i was, on February 9,

2002, and is now, a lawful government…[having] lawful jurisdiction over all persons operating motor vehicles on public roads or highways within the State of Hawai`i").

However, immunity from jurisdiction based on sovereignty is not Appellants' defense or concern here.[9] Rather, Lorenzo is seen as providing a road map for obtaining recognition of a sovereign Hawai`ian entity. While native Hawai`ians have been frustrated by decades of official denial of their inherent sovereignty, alongside official confessions of guilt and apologies, Lorenzo held out the prospect that they could prove the existence of their nation in the Judicial branch.

After stating in Lorenzo that "it was incumbent on Defendant to present evidence supporting his claim [regarding sovereignty]," 883 P.2d at 643, the Lorenzo court went on to provide guidance to litigants who would subsequently make sovereignty showings, characterizing as "open to question in light of international law" the lower court's decision that "even if…the 1893 overthrow of the Kingdom was illegal" it would have no bearing on the outcome of the case. 883 P.2d at 643. The court even recognized federal case law regarding definitions and requirements of sovereign statehood. Id. at 643-644.

In the case at bar, defendants – appellants adduced proof of their sovereign nation. Mr. Noa testified that the genesis of the Reinstated Hawai`ian Government ("RHG") was the 1993 U.S. Public Law 103 – 105 (The Apology Bill). TR (1/25/08) p 50 l 17. After the passage of the Apology Bill, he began to research public law and international public law and he realized that nations possessed certain rights – including the right to re-exist – and that the legal term of reinstatement is actually a part of the international law. TR (1/25/08) p 52 20. Beginning in 1999 the RHG invited Native Hawai`ians from all the islands to 'come to a convention and initiate the process.' TR (1/25/08) p 51 l. 19.

In 1999, a convention of Native Hawai`ians and Hawai`ians was held on the island of Oahu to form a government pro tempore to represent the Kingdom of Hawai`i. See Declaration of Henry Noa (hereinafter "Noa Decl.") attached to Defendant's Motion

[9] Indeed, Appellant-Defendants willingly submitted themselves to the court's jurisdiction. Nevertheless, it is worth noting that the Lorenzo court went on to quote the *Restatement (Third) of the Foreign Relations Law of the United States § 202(2)* as stating, "[a] state has an obligation not to recognize or treat as a state an entity that has attained the qualifications for statehood as a result of a threat or use of armed force in violation of the United Nations Charter," and then reflected that "[t]he illegal overthrow leaves open the question whether the present governance system should be recognized, even though the illegal overthrow pre-dated the United Nations Charter." Id. at fn. 2.

to Dismiss[10]. ROA at 40-81 (Noa Decl. at ¶ 3). The purpose of the convention was to reestablish the Kingdom of Hawai`i as a sovereign nation. Native Hawai`ians held a parliamentary election in 1999, reestablishing the Kingdom of Hawai`i. ROA at 40-81(Noa Decl. at ¶ 8G). See also TR (1/25/08) p. 46 l. 18. The Reinstated Kingdom of Hawai`i adopted resolutions, Id. (Noa Decl. at ¶ 6C), adopted an amended Constitution, Id. (Noa Decl. at ¶ 6A), and issued and published a Proclamation of its existence ROA at 40-81 (Noa Decl. at ¶ 6F).

The Reinstated Hawai`ian Government engages in governmental functions, including issuing personal identification cards, Id. (Noa Decl. at ¶ 6D), personal certificates of citizenship, Id. (See Noa Decl. at ¶ 6D), accepting applications for and keeping membership records, voter records, and administering candidacy and citizenship oaths and maintaining records Id. (Noa Decl. at ¶ 6I). The Reinstated Hawai`ian Government has corresponded with and visited various sovereign entities and continues to do so on a regular basis. Id. (Noa Decl. at ¶ 6E, Letters to Heads of State and Records of Visits).

In furtherance of their efforts to illustrate to the satisfaction of the state and federal governments Defendants'-Appellants' inherent native Hawai`ian sovereignty, on July 31, 2006, Defendants-Appellants traveled to the island of Kaho`olawe in order to allow the Reinstated Hawai`ian Government to exercise property rights in Kaho`olawe, to allow the Reinstated Hawai`ian Government to proclaim beneficial ownership of Kaho`olawe, and to allow representatives of the Reinstated Hawai`ian Government to build a heiau and perform a prayer on the site. Id. (Armitage Decl. at ¶ 4; Kahookele Decl. at ¶ 3).

Defendants Nelson K. Armitage, Russell Kahookele and Henry Maile Noa were cited, and on August 22, 2006 a complaint was filed in the District Court of the Second Circuit charging Defendant-Appellant with a violation of the following:

> HAR §13-261-10 Entrance into the reserve. No person or vessel shall enter or attempt to enter into or remain within the reserve unless such person or vessel: (a) Is specifically authorized to do so by the commission or its authorized representative as provided in section 13-261-11; or, (b) Is specifically authorized to do so

[10] The parties stipulated at trial that all evidence from the Motion to Dismiss would be admitted at trial.

> through a written agreement approved by the commission; or (c) Is trolling in zone B, in compliance with section 13-361-13(b)(3); or (d) Must enter the reserve to prevent probable loss of vessel or human life, provided that: (1) Prior to entering the reserve and at such reasonable intervals thereafter, such person shall make every reasonable effort to notify the commission staff or the United States Coast Guard that loss of vessel or human life is probable; (2) All fishing gear shall be stowed immediately upon entering the reserve; and (3) Such person shall vacate the reserve immediately after the threat of probable loss of vessel or human life has passed.

ROA at 1.

On January 9, 2007, Defendants filed a Motion to Dismiss. ROA at 40. The evidentiary hearing on the motion took place over the course of several days, requiring just over one year of litigation. The parties stipulated that, should the case merit an eventual trial, the testimony and evidence in the Motion to Dismiss would be incorporated into such trial. TR (7/27/07) p. 4 l. 21; ROA at 224-229. The parties also stipulated that Defendant Noa's testimony would be applied to Defendants Armitage and Kahookele as if they had testified the same way at the hearing. Id.

Defendants-Appellants entered numerous documents related to their government into evidence. Mr. Noa explained each document in evidence to the Court. These documents included citizenship requirements of the RHG (Ex. A), loyalty oaths (Ex. B and C), citizenship documents, a 1999 letter to Madeleine Albright (Ex. E), a Proclamation of Existence (Ex. H), various resolutions of the RHG. They included elections documents (Ex. M), citizenship tests (Ex. Y), the various Constitutions of the Kingdom of Hawai`i and ultimately, the Constitution of the Reinstated Hawai`ian Government.

Mr. Noa testified that he and Defendants Armitage and Kahookele went to Kaho`olawe "understanding that our intent is to be recognized, who we are as a people, as a Nation, to exercise a right as a Nation." TR (1/25/08) p 103 l 18.

Upon landing on Kaho`olawe, the Defendants undertook a traditional ceremony. "In our traditional practice, in our culture, it is well understood that when you have an event, be it a small event, or large event, you always pay respect to your ancestors, to your various Gods that our religion has or just to Akua itself. So, before we left, we already planned that we would institute a protocol, and part of that protocol was to ask

our ancestors to welcome us to the island. We do that through prayer, and that is what we did when we arrived. And it is a part of our traditional protocol in our case, because we're a nation that is coming into being, we had already decided that we would build an ahu[11] to signify our arrival, our accomplishment. TR (1/25/08) p 104 l 6. Mr. Noa testified that this type of ceremony was practiced on the island of Kaho`olawe prior to 1893. TR (1/25/08) at 106 l 11. He also testified that prior to 1893, Native Hawai`ians exercised management and control of the island of Kaho`olawe. TR (1/25/08) p 107 l 10. The State did not rebut this testimony[12].

> Q: When you went to Kaho`olawe did you go there as an individual with the intention of breaking some State regulation? Or did you go there primarily for the purpose that you testified today?
>
> A: No, we went there primarily for the purpose that I speak about today. That once we fulfilled our obligation as a nation, I truly believe that it's now a nation's responsibility to exercise those sovereign powers." TR (1/25/08) p 108 l 2.

Mr. Noa noticed that the Kaho`olawe transfer statute "basically said that management and control shall be returned back to the sovereign Hawai`ian governing entity.' "And what I saw was the word sovereign. That was the key. It wasn't just another entity. There are lots of entities on Hawai`i. A lot of organizations. You take the Office of Hawai`ian Affairs (OHA), I believe that's an entity. But sovereign entities? No. There weren't any. And this is what motivated us. This is what motivated myself to pursue establishing that sovereign nation." TR (1/25/08) p 58 l 4.

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[11] "An ahu is an altar. You can have personal ahus; you can have community ahus. You can have national ahus. Some national ahus are referred to as Heiaus. But [an ahu] is a sacred place where you reveal your sincerity. You invoke support from your amakuas, from your ancestors. This is where you come to give thanks giving to provide hookupo among either just you or collectively." TR (1/25/08) p 104 l 23.

[12] This was offered as prima facia evidence of the second prong of the 3-part defense pursuant to In State v. Hanapi , 970 P.2d 485, 493-94, 89 Haw. 177, 186-86 (1998), the Hawai`i Supreme Court articulated a three-part test that a criminal Defendant claiming a PASH privilege must prove: (1) he or she must qualify as a "native Hawai`ian" within the guidelines set out in PASH; (2) his or her claimed right is constitutionally protected as a customary or traditional native Hawai`ian practice; and (3) the exercise of the right occurred on undeveloped or less than fully developed property. None of the Defendant's evidence related to this defense was rebutted by the State.

Mr. Noa's testimony also highlighted the constitutional issues involved in this case, stressing that the "permission requirement" of the rule he was accused of violating was not narrowly tailored to achieve a compelling government interest.

> Q. -- I guess my question is, … -- does having your culture approved in advance by a state agency make it somehow less likely that you're going to get exploded?
> A. I don't think so.

TR (4/4/08) p 22. The State did not rebut this testimony.

The defense also called, and the Court accepted Dr. John Gates as an expert in the principles of both Federal (US) and International Law as applicable to indigenous people. Id. at l. 10.

Dr. Gates explained that "self-determination," is a legal term of art in international law which refers to the collective right of a people to determine for themselves the right to live under the Government, live under the laws they establish to protect their land and natural resources to promote the preservation of their language and to protect the territory that they occupy. TR (7/27/07) p 19 l 18.

Dr. Gates testified that he analyzed this case based on International Law, US Federal law, Hawai`i State statutes and Common law, as well as numerous organic documents[13] he received from Defendants. TR 7/27/07) p 30 l 13.

Dr. Gates testified that prior to the illegal 1893 overthrow the Kingdom of Hawai`i was a member of the International Community of Nations. TR (7/27/07) p 69 l 17. Dr. Gates testified that Native Hawai`ians traditionally and customarily[14] exercised management and control of the island of Kaho`olawe prior to 1893. TR (7/27/07) p 79 l 6. The State did not rebut this testimony.

Dr. Gates testified that several laws protect the right of Native Hawai`ians to organize and create an autonomous sovereign Hawai`ian government. These include Act 357, passed in 1983 and Act 200, passed in 1994 – each expressing the State's intent to recognize the right of a Native Hawai`ian sovereign government to exist. TR (7/27/07) p

[13] These documents in evidence include a copy of the Constitution of the Reinstated Hawai`ian Government (RHG), copies of their minutes and conventions, a 1999 Proclamation of Existence that they had publicly issued, correspondence between the RHG and foreign governments, a letter from the RHG to then Secretary of State Madeleine Albright and the Citizenship roles of the Government.
[14] This is also prima facia evidence of the defense of privilege under Hanapi, infra.

78 l 15. He also relied on the Hawai`i State Constitution, Article 12, that "seeks to respect customary rights of Native Hawai`ians to their culture and to their territories…'" TR (7/27/07) p 79 l 2.

The Government admitted in its Opposition to the Motion to Dismiss (p. 24) that the State has recognized the rights of Native Hawai`ian People to reestablish an autonomous sovereign government with control over the lands and resources.

Given that the alleged trespass in this case took place on Kaho`olawe, Dr. Gates also examined the 'transfer statute[15].' TR (7/27/07) p 81 l 16. Dr. Gates acknowledged that Hawai`i State Administrative Regulations impose certain conditions upon entry onto Kaho`olawe. TR p.. 80 l..16. But Dr. Gates also noted that the State has no process for the transfer of the management and control of Kaho`olawe to a *sovereign* nation. TR (7/2707) p 81 l 5. In this regard, he discussed the Akaka Bill. Dr. Gates explained that while the transfer statute promises management and control of Kaho`olawe to a *sovereign* nation, the Akaka Bill would create a *domestic dependent nation*[16].

He discussed the case of Cherokee Nation v. Georgia, infra, in which the Court explained the difference between domestic dependent nations (Indian tribes) and sovereign nations. TR (7/27/07) p 70 l 13. In a sovereign nation, he stated, the sovereignty emanates from within it does not – it cannot come from anywhere else. "The people are sovereign because they wish to be sovereign. And you cannot – an outside [government] does not bestow that or grant sovereignty to someone, in my opinion, it comes from within.." TR (7/27/07) p 71 l 13. Dr. Gates then distinguished a sovereign nation from the type of government that would be created by the Akaka Bill. "Again, it is seeking to bestow – a foreign power seeking to bestow and define Native Hawai`ian rights as a people and to say, OK, you are going to play by our rules and you are going to take a particular form and that form is going to be within the domestic dependent nation paradigm that is represented in Federal Indian Law today. So there is a distinct difference between what might be a domestic dependent nation and what really is a

[15] HRS 6 K provides that Upon its return to the State, the resources and waters of Kaho`olawe shall be held in trust as part of the public land trust; provided that the State shall transfer management and control of the island and its waters to the sovereign native Hawai`ian entity upon its recognition by the United States and the State of Hawaii. (emphasis added).

[16] He compared the Akaka Bill (a.k.a. Native Hawai`ian Government Reorganization Act) to the 1932 Indian Reorganization Act. "The Indian Reorganization Act, in essence, stripped Native People of their right to traditionally organize and govern themselves." TR p 82 l 22.

sovereign nation. I mean, the Declaration of Independence of the United States says, 'We the People." It did not say "Britain says that you are the People now.' TR (7/27/07) p 72 l 12.

He stated that the Akaka Bill is "attempting to … turn Native Hawai`ians into a quasi-Indian tribe whose powers emanate from Congress". TR (7/27/07) P 83 l 16.

Given that, management and control of Kaho`olawe is promised to a *sovereign* nation and the Akaka Bill holds no promise for such a nation, Dr. Gates then examined the long process necessary to build a truly sovereign nation. TR (7/27/07) p. 77 l. 11.

Dr. Gates ultimately concluded that the Reinstated Hawai`ian Government is a sovereign nation within the context of state and international Law. TR (7/27/07) p 75 l 22. He applied a five-part test to determine that the RHG had achieved that level of nationhood status that justified its exercise of control in its national lands. First, he testified that a nation requires a *people*, explaining that there are certain elements that a *people* must possess. TR (7/27/07) p 73 l 16. Second, a nation must "have a territory and a right to exercise control over and maintain that territory." TR (7/27/07) p 74 l 8. Third, "I would look at whether or not there is a Treaty that exists… with another foreign government, with another sovereign entity, that talks about the duties and relationships between these two sovereigns." TR (7/27/07) p 74 l 11. Fourth, "I would look and see if the people has historically exercised management and control over their recognized territory." Id. And fifth, whether or not in the contemporary sense, they continue to exercise or attempt to exercise management and control over their territory. TR (7/27/07) P 74 l 20.

He noted that the Kingdom of Hawai`i executed the first Treaty of Friendship of Commerce and Navigation with the United States in 1826 – clearly demonstrating a sovereign recognition, government to government relationship between those two powers. TR p. 91 l. 2. He testified that the Treaty has never been abrogated. Id. The State did not rebut this testimony. He considered that the RHG "has written, adopted a Constitution that defines, like every Constitution, rights and duties of their citizens, rights and duties of their several branches of government. "They have officially publicly and officially proclaimed their existence through publications that have been disseminated throughout the islands… they have adopted strict citizenship requirements, that are clear

and easy to understand. They have conducted regular conventions where they have adopted laws and ordinances that they have integrated within their organic documents." TR (7/27/07) p 76 l 4. Dr. Gates concluded his testimony by offering his opinion that the permission requirement for entrance onto Kaho`olawe – in these unique circumstances – was inconsistent with State and Federal law promising management and control of that island to a sovereign nation. TR (7/27/07) p 81 l 11.

After several days of hearings, the parties made verbal closing arguments. Defendants claimed that their activities were protected by Hawai`i law – and that the criminal prosecution at bar – cannot be reconciled with their protected right to form a sovereign nation.

> MR. HEMPEY: "[O]ur first defense that has to do with lenity. Our second defense has to do with constitutional issues. But as to lenity what we have is a regulation that creates a petty misdemeanor for trespass.
>
> What we have competing with that on this record is - we have Act 359 which protects the right to form a nation. We have the Public law 103 - 105, the Apology Bill [and in] in OHA versus HCDCH at 117 Hawai`i 174, the Supreme Court confirmed that the Apology Bill is law, and it should be given the force of law.
>
> And on this record, we have expert testimony that is completely uncontradicted. And to summarize the expert's testimony he testified that the reinstated government is a nation that is entitled to exercise its rights in self determination. And he testified that it was -- it is a nation under both State law and international law. And he went further to say that when State law does not protect a nation in such circumstances the Court may look to international law for guidance. He's also said that the rights -- that this nation had in treaties or components of nationhood, that Kaho`olawe has been accepted in treaty with indigenous Hawai`ian people, and that when the Defendants went there they did so as officials of a nation. And finally, and perhaps most importantly, was his conclusion that this action was protected by law, because it is a necessary component of forming a nation, the right to do so being protected by the Constitution by Act 359, by the Apology Bill, and ,by all the laws we've stated in our brief. And what that gives us, of course, is a conflict between the administrative regulation and the fundamental, very well codified, right to create a nation. And, again, on this record the conclusion that claiming rights in Kaho`olawe was a necessary -- absolutely necessary and a protected aspect of forming a nation it con -- conflicts with the administrative regulation. And that is why lenity and due process come into play."

TR (4/4/08) p 29 l 10 - p 31.

On October 9, 2008, the District Court filed Findings of Fact, Conclusions of Law, and Order Denying Defendants' Motion to Dismiss. ROA at 201-221. Trial was completed on April 3, 2009 with the Court finding Appellants guilty. ROA at 231. The Notice of Entry of Judgment and Order was also filed on April 3, 2009. ROA at 231. On April 3, 2009, Defendants were sentenced and ordered to pay a fee in the amount of $30 to Criminal Injuries Compensation Fund and ordered to perform 25 community service work hours. TR (4/29/09) p. 37, ll. 5-9. On April 3, 2009, the District Court ordered a stay of the sentence pending appeal in this matter. ROA at 231.

On April 21, 2009, Defendants'-Appellants' timely filed a Notice of Appeal with the clerk of the District Court of the Second Circuit. ROA at 232-258. Defendants'-Appellants''s Statement of Jurisdiction was timely filed July 6, 2009.

CONCISE STATEMENT OF POINTS OF ERROR

1. THE COURT COMMITTED PLAIN ERROR WHEN IT DETERMINED IT WAS INCOMPETENT TO MAKE A DETERMINATION OF SOVEREIGNTY AND WHEN IT THUS DECLINED TO RECOGNIZE DEFENDANTS'-APPELLANTS' NATION'S INHERENT SOVEREIGNTY

The court below erroneously determined that the court is incompetent to make a determination as to Defendant's-Appellants' nation's inherent native Hawai`ian sovereignty based on the doctrine of political question. ROA at 214 – 216 (C.O.L. ¶¶ 21 – 32). Defendants'-Appellants' argued that the matter was not a political question and that, if it was, the rule of lenity required dismissal. Defendants' Written Closing Argument, filed 5/27/08 at p. 19. ROA at 191.

Defendants-Appellants asked the court below to recognize the Reinstated Nation of Hawai`i as the sovereign native Hawai`ian entity. ROA at 208 (F.O.F. ¶16). See also TR (1/25/08) p 103 l 18. Defendants-Appellants cited to Cherokee Nation v. Georgia 30 U.S. 1 (1835) for the proposition that courts have jurisdiction to make determinations of nationhood. Defendants' Written Closing Argument, filed 5/27/08 at p. 19. ROA at 191. Defendants argued that the political question doctrine did not bar consideration of their defenses.

The trial court concluded that such "[a]n action by this Court would, in turn, direct Congress and the State Legislature to recognize the Reinstated Nation of Hawai`i as the native Hawai`ian sovereign entity, and this Court cannot act where Congress and the State Legislature must." ROA at 216 (C.O.L. ¶ 30).

2. THE COURT BELOW ENGAGED IN IMPROPER BURDEN SHIFTING AND COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO REQUIRE THE PROSECUTION AS PART OF ITS BURDEN OF PERSUASION TO PROVE BEYOND A REASONABLE DOUBT THE FACTS NEGATIVING DEFENDANTS'-APPELLANTS'' NON-AFFIRMATIVE DEFENSES

Defendants-Appellants presented non-affirmative defenses. TR (4/3/2008) p. 12, l. 16 – p. 15, l. 9; ROA at 206 et. seq.; ROA at 172 et. seq. The Prosecution failed to present any facts negativing the defense and in fact made no effort whatsoever to negative Defendants'-Appellants' non-affirmative defenses as required by HRS §701-115. Defendants'-Appellants' raised the Prosecution's failure to present any such facts to the court. TR (4/3/2008) p. 12, l. 10 – p. 20, l. 14. Defendants-Appellants brought the Prosecution's burden of proof to prove such facts to the attention of the court. TR (4/3/2008) p.12, l. 22 - p.13, ll. 25. The Court declined to properly hold the Prosecution to its burden of proof. TR (4/3/2008) p. 25, l. 19 – p. 27, l. 2.

Additionally, as set forth below, Defendants-Appellants presented competent evidence of all three elements of a non-affirmative defense based on a fundamental right of privilege pursuant to State v. Hanapi , 970 P.2d 485, 493-94, 89 Haw. 177, 186-86 (1998). See Defendants' Written Closing Argument, filed 5/27/08 at p. 27. ROA at 199.

3. THE COURT APPLIED THE WRONG STANDARD WHEN IT REJECTED DEFENDANTS'-APPELLANTS'S' DEFENSE THAT THE REGULATIONS THEY ARE ALLEGED TO HAVE VIOLATED ARE UNCONSTITUTIONAL AS A PRIOR RESTRAINT ON NATIVE HAWAI`IAN RIGHTS

Defendants-Appellants presented a defense on grounds that the regulations Defendants-Appellants are alleged to have violated are unconstitutional as a prior restraint on their fundamental rights as native Hawai`ians. ROA at 40-81 (Memorandum in Support of Motion to Dismiss, p. 23 et. seq.). The court rejected this defense stating:

> HAR §§13-261-10 or 13-261-11 are presumptively constitutional;
> Defendants have made no showing that either HAR §§13-261-10 or 13-

> 261-11 have clear, manifest, and unmistakable constitutional defects, and they certainly have failed to prove that the rules are unconstitutional beyond a reasonable doubt [citing SHOPO v. Soc. of Prof. Journalists, 83 Haw. 378, 389, 927 P.2d 386, 397 (1996)].

ROA at 209 (C.O.L. ¶ 5).

The court applied the incorrect standard in analyzing Defendants'-Appellants's' constitutional defense. While the constitutionality of a statute is generally presumed, this presumption "does not apply to laws which classify on the basis of suspect categories or impinge on fundamental rights expressly or impliedly granted by the constitution." Child Support Enforcement Agency v. Doe, 109 Hawai`i 240, 246, 125 P.3d 461, 467 (2005) (citation omitted). When this occurs, "[s]uch laws are presumed to be unconstitutional unless the state shows compelling state interests which justify such classifications, and that the laws are narrowly drawn to avoid unnecessary abridgments of constitutional rights." Id. (citations and emphasis omitted).

Defendants-Appellants raised the issue of the unconstitutionality of HAR §§13-261-10 or 13-261-11 as applied to them, and as a prior restraint on their fundamental rights throughout the case. Defendant's Motion to Dismiss. P 13-16. p 24-26.

4. THE COURT WAS IN ERROR WHEN IT REJECTED DEFENDANTS'-APPELLANTS'' DEFENSE OF PRIVILEGE UNDER PASH AND HANAPI

Defendants-Appellants presented a defense of privilege under State v. Hanapi , 970 P.2d 485, 493-94, 89 Haw. 177, 186-86 (1998) and Public Access Shorelines Hawai`i v. Hawai`i County Planning Comm., 79 Haw. 425, 903 P.2d 1246 (1995)(hereinafter referred to as "PASH). ROA at 40-81 (Memorandum in Support of Motion to Dismiss, p. 16 et. seq.). The court rejected the Defendants'-Appellants' defense of privilege. ROA at 210-212 (C.O.L. ¶¶ 6 – 13). Furthermore, as with the defense based on sovereignty and nationhood discussed immediately above, the Prosecution failed to present any facts negativing the defense and in fact made no effort whatsoever to negative Defendants'-Appellants'' non-affirmative defenses.

Defendant-Appellants raised the issue of the citation as a violation of their fundamental rights under PASH and Hanapi throughout the case. Defendant's Motion to Dismiss. P 17-24.

STANDARDS OF REVIEW

1. FAILURE TO RECOGNIZE DEFENDANTS'-APPELLANTS'' NATION'S INHERENT SOVEREIGNTY

The court's determination that the court is incompetent to determine the question of Defendants'-Appellants' inherent native Hawai`ian sovereignty was a conclusion of law. ROA at 216 (C.O.L. ¶ 30). A conclusion of law is not binding upon an appellate court and is freely reviewable for its correctness. Ordinarily conclusions of law are reviewed under the right/wrong standard. State v. Reis, 115 Hawai`i 79, 84, 165 P.3d 980, 985 (2007)

However, the question of native Hawai`ian inherent sovereignty is one of fundamental human rights and justice. The appellate court "will apply the plain error standard of review to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights." State v. Vanstory, 91 Hawai`i 33, 42, 979 P.2d 1059, 1068 (1999) (internal quotation marks omitted).

2. FAILURE TO REQUIRE THE PROSECUTOR TO BEAR THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT WITH RESPECT TO NEGATIVING DEFENDANTS-PLAINTIFFS' NON-AFFIRMATIVE DEFENSES

Raines v. State, 79 Hawai`i 219, 900 P.2d 1286 (1995) held that where a jury has been given instructions on a defense other than an affirmative defense, but has not been instructed that the prosecution bears the burden of proof beyond a reasonable doubt with respect to negativing that defense, substantial rights of the defendant may be affected and plain error may be noticed. See also HRS §701-115.

Moreover, under Hawai`i law:

> A [conclusion of law] is not binding upon an appellate court and is freely reviewable for its correctness. This court ordinarily reviews [conclusions of law] under the right/wrong standard. Thus, a [conclusion of law] that is supported by the court's finding of fact and that reflects an application of the correct rule of law will not be overturned. However, a [conclusion of law] that presents mixed questions of fact and law is reviewed under the

> clearly erroneous standard because the court's conclusions are dependent upon the facts and circumstances of each individual case.

State v. Reis, 115 Hawai`i 79, 84, 165 P.3d 980, 985 (2007) (internal quotation marks, citations, and original brackets omitted) (format altered).

Because the court below declined to hold the prosecution to its burden of proof with respect to negativing Defendants'-Appellants' non-affirmative defense, substantial rights of Defendants-Appellants were affected and this court may recognize the court's failure as plain error.

3. THE UNCONSTITUTIONALITY OF THE REGULATIONS AS A PRIOR RESTRAINT ON NATIVE HAWAI`IAN RIGHTS

The Hawai`i courts have characterized the standard of review when laws impinge on fundamental rights as follows:

> "The constitutionality of a statute is a question of law that we review under the right/wrong standard." Child Support Enforcement Agency v. Doe, 109 Hawai`i 240, 246, 125 P.3d 461, 467 (2005) (citation omitted). Moreover, "[w]e have long held that: (1) legislative enactments are presumptively constitutional; (2) a party challenging a statutory scheme has the burden of showing unconstitutionality beyond a reasonable doubt; and (3) the constitutional defect must be clear, manifest, and unmistakable." Id. (citations and quotation marks omitted).
>
> However, this presumption "does not apply to laws which classify on the basis of suspect categories or impinge on fundamental rights expressly or impliedly granted by the constitution." Id. (citation omitted). When this occurs, "[s]uch laws are presumed to be unconstitutional unless the state shows compelling state interests which justify such classifications, and that the laws are narrowly drawn to avoid unnecessary abridgments of constitutional rights." Id. (citations and emphasis omitted).

4. THE COURT'S REJECTION OF DEFENDANTS'-APPELLANTS'' DEFENSE OF PRIVILEGE UNDER PASH AND HANAPI AND ITS FAILURE TO REQUIRE THE PROSECUTION TO PROVE FACTS NEGATIVING THAT DEFENSE.

A conclusion of law is not binding upon an appellate court and is freely reviewable for its correctness. State v. Reis, 115 Hawai`i 79, 84, 165 P.3d 980, 985 (2007).

Where a jury has been given instructions on a defense other than an affirmative defense, but has not been instructed that the prosecution bears the burden of proof beyond a reasonable doubt with respect to negativing that defense, substantial rights of the defendant may be affected and plain error may be noticed. Raines v. State, 79 Hawai`i 219, 900 P.2d 1286 (1995).

ARGUMENT

The United States government and the State of Hawaii have acknowledged that a United States Minister assigned to the sovereign and independent Kingdom of Hawai`i conspired with others, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawai`i, and that in pursuance of the conspiracy to overthrow the Government of Hawai`i, the United States Minister and naval representatives of the United States caused armed naval forces of the United States to invade the sovereign Hawai`ian nation on January 16, 1893. Pub.L. No. 103-150, 107 Stat. 1510 (1993).[17] 1993 Haw. Sess. L. Act 359, § 1.

The United States government has likewise acknowledged that the indigenous Hawai`ian people never directly relinquished to the United States their claims to their inherent sovereignty as a people or over their national lands. Id. Furthermore, the United States Government has apologized to Native Hawai`ians for the overthrow of the Kingdom of Hawai`i with the participation of agents and citizens of the United States, and for the resulting deprivation of the rights of Native Hawai`ians to self-determination. Id. at § 1.

Simiarly, the Hawai`i state government has also admitted that the sovereign Hawai`ian Nation was overthrown as the indigenous and lawful government, and the United States Minister thereupon extended diplomatic recognition to a provisional government formed by the conspirators without the consent of the native Hawai`ian people or the lawful Government of Hawai`i in violation of treaties between two nations and of international law. 1993 Haw. Sess. L. Act 359, § 1. The Hawai`i state government

[17] Defendants'-Appellants's are cognizant that under Hawai`i, et al. v. Office of Hawai`ian Affairs___U.S.___(2008), Pub.L. No. 103-150, 107, the Apology Resolution, does not change or modify the "absolute" title (under U.S. law) to the public lands of the State of Hawai`i.

has also acknowledged that the actions by the United States were illegal and immoral. 1993 Haw. Sess. L. Act 354, § 1.

1. THE COURT COMMITTED PLAIN ERROR WHEN IT DETERMINED IT WAS INCOMPETENT TO MAKE A DETERMINATION OF SOVEREIGNTY AND WHEN IT THUS DECLINED TO RECOGNIZE DEFENDANTS'-APPELLANTS'' NATION'S INHERENT SOVEREIGNTY

An entity does not cease to be a sovereign even if it has been occupied by a foreign power or has lost control of its territory temporarily. Vattel, E., The Law of Nations or the Principles of Natural Law (1758, trans. Fenwick, C. 1916), pg. 315. The courts may make determinations regarding a peoples' sovereignty or nationhood. See, e.g. Cherokee Nation v. Georgia, 30 U.S. 1, 5 Pet. 1; 8 L.Ed. 25 (1835)(making a determination of the character of the Cherokee Nation's sovereignty for purposes of a standing analysis).

Indeed, the Intermediate Court of Appeals of Hawai`i has indicated that parties making defenses based on sovereignty may present evidence to the Court in support of their sovereignty claims. Lorenzo, 883 P.2d at 643. The record in this case is replete with such evidence.

Defendants-Appellants offered testimony from an expert in the rights of indigenous peoples the rights of self-governance. Dr. Gates testified that, given the various government promises of recognition, the "apology bill" the fact that the island of Kaho`olawe has been set aside for return to a sovereign Hawai`ian entity – Defendants'-Appellants' had a fundamental right as a part of a sovereign nation to make a claim to manage and control Kaho`olawe.

> Q: So it is like a 'catch 22' you can't be a Sovereign entity without exercising your rights on the land, right?
> A: Right.
>
> Q: But the State says you have to ask permission to exercise the rights in the land, and that would be completely inconsistent with being a sovereign entity?
> A: It would be.
>
> TR (1/25/08) p 29 l 10 - p 31 l 23.

Defendants–Appellants contend that the right to organize and (re)form a sovereign Native Hawai`ian entity implies that their conduct in going to Kaho`olawe to exercise their rights in that island must be afforded the protection of a fundamental right. However, despite proof of the building of a nation would have provided a basis for a defense that the defendants' conduct is privileged, the Court instead held that the defense was based on a political question that it lacked jurisdiction to answer.

Courts recognize plain error to correct errors which seriously affect the fairness, integrity, or public reputation of judicial proceedings, to serve the ends of justice, and to prevent the denial of fundamental rights. State v. Sawyer, 88 Hawai`i 325, 330, 966 P.2d 637, 642 (1998).

In side-stepping the question of rights stemming from the right to form a nation, the trial court first relies upon Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) for the great Federalist Chief Justice John Marshall's proposition that "questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made by [the] court[s]." ROA at 214 (C.O.L. ¶ 21). Ironically, the issue before that court was famously found not to be a political question at all, but rather one "affecting the absolute rights of individuals" and therefore, wrote Justice Marshall for the Court, "it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment …" 5 U.S. at 171.[18]

As in the present case, the Marbury court was confronted with an issue that the political branches *should have* addressed, but did not. Here, the court is likewise confronted with an issue of political branch intransigence. The political branches acknowledge that sovereignty was stolen from the indigenous Hawai`ian people, and that the indigenous Hawai`ian people never relinquished to the United States or, for that matter, to the state of Hawai`i, their claims to their inherent sovereignty. It is a matter of international law that an entity does not cease to be sovereign just because it has been occupied by a foreign power that has taken control of its territory. And yet the political

[18] The familiar facts of Marbury will not be recounted here. It will be recalled that although the Marbury court determined that the petitioner had a right to redress and that the laws afforded him a remedy, the court famously determined that, contrary to the Judiciary Act of 1789, the court did not have original jurisdiction under the Constitution to issue the mandamus sought by the petitioner.

branches refuse to acknowledge the inherent sovereignty of the native Hawai`ian people. The political branches' refusal to act should not be an excuse for the court to avoid the issue. Rather, the political branches' inaction is precisely why this court must squarely address the Defendants'-Appellants' claims of sovereignty – or at least what rights are protected when they attempt to exercise that sovereignty.

The court below worries that "[a]n action by this court would, in turn, direct Congress and the State Legislature to recognize the Reinstated Nation of Hawai`i as the native Hawai`ian sovereign entity, and this Court cannot act where Congress and the State Legislature must." ROA at 216 (C.O.L. ¶ 30). Here the court misapprehends the fundamental mandate of Marbury and the court's own duty. Sovereignty is an issue of fundamental right and justice. The theft of Hawai`ian sovereignty is acknowledged to have been illegal. Marbury v. Madison asked whether an act of the legislature that is found to be repugnant to the law nevertheless "bind[s] the courts and oblige[s] them to give it effect?" 5 U.S. at 177. In answering in the negative, the court stated, "[i]t is emphatically the province and duty of the judicial department to say what the law is." Id. Thus, the court below has it precisely backwards. Under Marbury, where the other governmental branches flaunt the law, the judiciary must act.

It is worth noting that Marbury's author, Chief Justice Marshall, later authored the decision in the above-mentioned Cherokee Nation v. Georgia, 30 U.S. 1, 5 Pet. 1; 8 L.Ed. 25 (1835) in which the Supreme Court in fact did make a determination of the character of, in that case, the Cherokee Nation's sovereignty for purposes of a standing analysis.

In further support of the erroneous proposition that it is barred by the political question doctrine from addressing the issue of Defendants'-Appellants' sovereignty claim, the court below relies upon a string of cases that addressed questions ancillary to the issue. The court evokes Territory v. Kapiolani Estate, 18 Haw. 640 (1908), and Territory v. Puahi, 18 Haw. 649 (1908), in which the Supreme Court rejected claims disputing the territory's title to ceded lands on grounds that such did not present a judicial question. ROA at 215 (C.O.L. ¶¶ 24, 26). Likewise, the court raises State v. French, 77 Hawai`i 222, 883 P.2d 644 (App. 1994), and it's statement of the familiar law that persons denying state jurisdiction by dint of claims to be citizens of a separate Hawai`ian sovereignty are not exempt from the laws of the state. ROA at 217 (C.O.L. ¶ 35).

The court below erroneously implies that such cases stand for the proposition that sovereignty is a non-judiciable political question. The court is wrong. None of these cases squarely addresses the issue of sovereignty, or characterize the question of Hawai`ian sovereignty as the exclusive province of the legislature. Rather, each of them addresses ancillary issues that, while it is true, very well might obtain new import in light of a judicial recognition of the inherent sovereignty of the native Hawai`ian people, nevertheless are not themselves decided by such recognition. In other words, for the court to recognize the inherent sovereignty of the native Hawai`ian people is not the same thing as deciding the various related side-issues that the court heretofore has left to the other branches.

The political branches have acknowledged the illegality and immorality of the theft of native Hawai`ian sovereignty. But they have fallen short of acknowledging that sovereignty. This inaction has left native Hawai`ians with nowhere to turn for redress but the courts. It would be difficult to contrive a scenario more damning of the fairness, integrity and the public reputation of the judiciary than a court's refusal to entertain a question concerning so fundamental a right as a people's sovereignty. The court below states that, "this Court cannot act where Congress and the State Legislature must." On the contrary, this court must act where Congress and the State Legislature have refused.

Accordingly, Defendants-Appellants contend the judgment should be reversed.

2. THE COURT BELOW COMMITTED ERROR WHEN IT FAILED TO REQUIRE THE PROSECUTION AS PART OF ITS BURDEN OF PERSUASION TO PROVE BEYOND A REASONABLE DOUBT THE FACTS NEGATIVING DEFENDANTS'-APPELLANTS' NON-AFFIRMATIVE DEFENSES

HRS §701-115, Defenses, provides in relevant part:

> (1) A defense is a fact or set of facts which negatives penal liability.
>
> (2) No defense may be considered by the trier of fact unless evidence of the specified fact or facts has been presented. If such evidence is presented, then:
>
> (a) If the defense is not an affirmative defense, the defendant is entitled to an acquittal if the trier of fact finds that the evidence, when considered in the light of any contrary prosecution evidence, raises a reasonable doubt as to the defendant's guilt[.]

This court has described the operation of this statute as follows:

> HRS § 701-115(2) embodies two rules as to the burden of persuasion in cases in which a defense has been raised. In cases involving an affirmative defense, the defendant must prove the facts constituting the defense by a preponderance of the evidence. On the other hand, in cases involving a defense other than an affirmative defense, the prosecution as part of its burden of persuasion must prove beyond a reasonable doubt the facts negativing the defense.

State v. McNulty, 60 Haw. 259, 588 P.2d 438, fn. 4 (1978), cert. denied, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979), overruled on other grounds by Raines v. State, 79 Hawai`i 219, 900 P.2d 1286 (1995) (holding, contra McNulty, that where the jury has been given instructions on a defense other than an affirmative defense, but has not been instructed that the prosecution bears the burden of proof beyond a reasonable doubt with respect to negativing that defense, substantial rights of the defendant may be affected and plain error may be noticed).

In the present case, Defendants-Appellants asserted non-affirmative defenses, which the prosecution made no efforts whatsoever to negative. Furthermore, although the prosecution failed to put on evidence as required, negativing beyond a reasonable doubt Defendants'-Appellants' non-affirmative defenses, the court nevertheless relieved the prosecution if its statutory burden.

Counsel for Defendants-Appellants summed up in general terms Defendants'-Appellants' non-affirmative defenses as follows:

> I would like to concentrate on burden of proof and, particularly, stress one of the defenses, which was really the bulk of how the Court ruled on the motion to dismiss, and that's the defense that the activities my clients engaged in are protected by State law and international law.
>
> …
>
> We submit that, as a matter of law, the defense, that this conduct is protected by State law and international law, given the evidence of nationhood before the Court…My clients' position is that their government, which is a sovereign entity, but is not yet recognized by the State, holds a property interest in the Island of Kaho`olawe pursuant to State law and international law.

> …[W]e start with the proposition, your honor, that there was an illegal overthrow of a Hawai`ian nation. I mean, on a Federal level, we have an Act of Congress admitting that and apologizing for illegally taking and stealing land. Kaho`olawe is specifically set aside by State statute for a - - a sovereign Hawai`ian nation once recognized. The State has promised recognition to a sovereign Hawai`ian entity, but it hasn't done anything legislatively to fulfill that promise. And so, as our expert testified, we have to look to international law. And, again, we presented evidence of that facts in question that give rise to this defense. The burden shifted to the State to disprove beyond a reasonable doubt th[e defense].

TR (4/3/2008) p. 12, l. 16 – p. 15, l. 9.

Among other evidence the court heard in support of Defendants'-Appellants' non-affirmative defenses was the expert witness testimony of Mr. John Gates who, the court found, testified as follows:

a. The Kingdom of Hawai`i was recognized as a sovereign nation by the international community of nations prior to its illegal overthrow by the United States in1893.

b. The Kingdom of Hawai`i's monarch, Queen Liliuokalani preserved in perpetuity the Kingdom of Hawai`i's right to reestablish, or re-instate itself once again as the sovereign native Hawai`ian entity.

c. Federal common law denominates Native American tribes as domestic dependent nations, and not sovereign nations or entities.

d. The Reinstated Kingdom of Hawai`i is not an Indian tribe, but rather stands apart from, and in distinction to, the federal Indian law model of domestic dependent nationhood.

e. The Reinstated Kingdom of Hawai`i qualifies as a sovereign nation under international law.

f. The Reinstated Kingdom of Hawai`i was democratically created through free and fair elections, and have undertaken various steps to reinstate the Kingdom of Hawai`i, such and the drafting and adoption of its constitution, maintaining and updating citizenship rolls, holding regularly scheduled governmental conventions, passing and adopting ordinances, producing citizenship documents, and reestablishing diplomatic communications with several nation states.

g. It is necessary for a nation, or a people, to assert rights to its territories under international law whether it has formally been recognized by the

international community, or by the nation within which its territory currently is occupied.

h. That Defendants' entry onto Kaho`olawe was a necessary step in their quest for nation status.

i. Contemporary international law and norms are based upon the principles of peaceful relations and the right to self determination, and that all peoples under international law are entitled to exercise the right to self determination.

j. That native Hawai`ians qualify as a people under international law.

k. That an entity does not cease to be a sovereign entity even though it is temporarily occupied by a foreign power or has lost control of its territory temporarily.

l. That no process exists, nor is contemplated, under state or federal law, to establish or recognize a true, Native Hawai`ian sovereign entity.

m. That a sovereign nation is different than a domestic dependent nation.

n. That prior to the illegal 1893 overthrow, that the Kingdom of Hawai`i was a member of the International Community of Nations.

o. That the "permission requirement" of HAR §13-261-10 is inconsistent with the right of a sovereign Hawai`ian entity to access Kaho`olawe.

p. That measures taken by the federal government since 2000 to create a procedure for recognition, such as the "Akaka Bill", are not intended to recognize a sovereign Native Hawai`ian entity, but rather would recognize in essence another manifestation of a domestic dependent nation, or Indian tribe.

q. That "self determination," is a legal term of art in international law which refers to the collective right of a people to determine for themselves the right to live under the Government, live under the laws they establish to protect their land and natural resources to promote the preservation of their language and to protect the territory that they occupy.

ROA at 206 et. seq.

Counsel for Defendants-Appellants argued that the Prosecution bore the burden of persuasion to prove beyond a reasonable doubt the facts negativing the defense, stating, "I would like to…point[] to Hawai`i Revised Statutes 701-115, and that governs defenses

at trial. TR (4/3/2008) p.12, l. 22. "The Defense's burden, under the statute, is only to present evidence of the specific facts at trial, and then the burden of proof shifts to the State to prove beyond a reasonable doubt that the defense is wrong." TR (4/3/2008) p.13, ll. 22 21-25.

The court addressed the Defendants'-Appellants' arguments regarding their non-affirmative defenses and the Prosecution's subsequent burden to prove beyond a reasonable doubt the facts negativing the defense as follows:

> The argument was made that the State has to, essentially, introduce evidence to disprove the defense raised, and that is certainly true, but it doesn't have to be evidence that comes after the introduction of the Defense's evidence. In other words, if the evidence that the State has presented in its case is sufficient to prove a case beyond a reasonable doubt, and the Court examines the Defense's evidence introduced, and the State's evidence still is sufficient to prove the case beyond a reasonable doubt, and also those facts disprove the Defense, then enough evidence, again, is present for the State to have proven the case beyond a reasonable doubt and for the Court to conclude that the raised offense [sic] is not applicable and the defendant is not entitled to an acquittal.
>
> In this case, specifically, addressing Mr. Gates' testimony. If the Court does not believe Mr. Gates' testimony and believes the State's - - well, and believes all the other evidence that has been introduced, whether it comes from the State or the Defense, as the stipulations would appear to be by both parties, then the Court must find that the defendant is not entitled to an acquittal, even considering the statement by Mr. Gates.
>
> So, in this case, Mr. Gates testified of the reinstated nation - - I'm sorry, reinstated Kingdom of Hawai`i is a state in accordance with recognized attributes of a state's sovereign nature by his various testimony. The court will find the Court does not believe that fact. It does not accept the expert's testimony. And so, for that reason, the Court, as I indicated before, will find that the State has proven its case beyond a reasonable doubt…

TR (4/3/2008) p. 25, l. 19 – p. 27, l. 2.

This is a misstatement of the law. In cases involving a defense other than an affirmative defense, the prosecution as part of its burden of persuasion *must prove beyond a reasonable doubt the facts negativing the defense*. McNulty, 60 Haw. fn. 4. Defendants'-Appellants' presented a non-affirmative defense. The Prosecution stipulated all of Defendants'-Appellants'' evidence regarding the non-affirmative defense into

evidence and, contrary to the Prosecutions' burden, made no effort whatsoever to negative that defense. The Court may not, as it has here, simply dismiss Defendants'-Appellants'' non-affirmative defense with a waive of its hand. The prosecution must present evidence to negate the defense.

Accordingly, Defendants-Appellants contend the judgment should be reversed.

3. THE COURT APPLIED THE WRONG STANDARD WHEN IT REJECTED DEFENDANTS'-APPELLANTS' DEFENSE THAT THE REGULATIONS THEY ARE ALLEGED TO HAVE VIOLATED ARE UNCONSTITUTIONAL AS A PRIOR RESTRAINT ON NATIVE HAWAI`IAN RIGHTS

Defendants-Appellants presented a defense on grounds that the regulations Defendants-Appellants are alleged to have violated are unconstitutional as a prior restraint on their fundamental rights as native Hawai`ians. ROA at 63 (Memorandum in Support of Motion to Dismiss, p. 23 et. seq.). The court rejected this defense stating:

> HAR §§13-261-10 or 13-261-11 are presumptively constitutional; Defendants have made no showing that either HAR §§13-261-10 or 13-261-11 have clear, manifest, and unmistakable constitutional defects, and they certainly have failed to prove that the rules are unconstitutional beyond a reasonable doubt [citing SHOPO v. Soc. of Prof. Journalists, 83 Haw. 378, 389, 927 P.2d 386, 397 (1996)].

ROA at 209 (C.O.L. ¶ 5).

Here the court has applied the incorrect standard. While the constitutionality of a statute is generally presumed, this presumption "does not apply to laws which classify on the basis of suspect categories or impinge on fundamental rights expressly or impliedly granted by the constitution." Child Support Enforcement Agency v. Doe, 109 Hawai`i 240, 246, 125 P.3d 461, 467 (2005) (citation omitted). When this occurs, "[s]uch laws are presumed to be unconstitutional unless the state shows compelling state interests which justify such classifications, and that the laws are narrowly drawn to avoid unnecessary abridgments of constitutional rights." Id. (citations and emphasis omitted).

The court below failed to apply the correct presumptions in this case. HAR §13-261 10 as applied in this denied Defendants-Appellants the right to form their nation. It also denied their fundamental rights under State v. Hanapi , 970 P.2d 485, 493-94, 89 Haw. 177, 186-86 (1998) and Public Access Shorelines Hawai`i v. Hawai`i County Planning Comm. 79 Haw. 425, 903 P.2d 1246 (1995).

Any system of prior restraint on expression bears a heavy presumption against its constitutional validity. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976) citing Carroll v. Princess Anne, 393 U.S. 175, 181 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

The government may impose reasonable restrictions on the time, place, or manner of protected speech. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, (1984). However, these restrictions must: (1) be justified without reference to the content of the regulated speech; (2) be narrowly tailored to serve a significant governmental interest; and (3) leave open ample alternative channels for communication of the information. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981); Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

A message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative. Symbolic expression may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984) citing Spence v. Washington, 418 U.S. 405 (1974); Tinker v. Des Moines School District, 393 U.S. 503 (1969).

Here, the regulation unconstitutionally restrains defendants' rights to exercise an interest in their national lands, as well as the right enter their ancestral lands and practice their religion.

1. The Regulations Are Not Content Neutral.

HAR §§ 13-261-10 and 11 assess the validity of applications by native Hawai`ians seeking to enter Kaho`olawe to practice their customary or traditional rights based on opinion of "cultural practitioners" -- an undefined, seemingly arbitrary designation.

HAR §13-261-11 provides, in relevant part:

> Procedure for the authorization of entrance into and activity within the reserve . . . (b) Entrance into and activities within the reserve requested by applicants seeking to exercise traditional and customary rights and practices compatible with the law, shall be approved or disapproved by the commission after review and consultation with cultural practitioners.
>
> (emphasis added).

Because the statute is so vague with respect to the term "cultural practitioner" (i.e., lack of definition, lack of safeguards in the process of how they are chosen and consulted), and the criteria to be used in deciding whether to approve or disapprove an application, there is no safeguard that the statute is, in effect, content neutral.

2. The Regulations Are Not Narrowly Tailored.

> [A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the ··· regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." United States v. Albertini, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536 (1985); see also Community for Creative Non-Violence, supra, 468 U.S., at 297, 104 S.Ct., at 3071. … Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.
>
> Ward v. Rock Against Racism, 491 U.S. 781, 798-800 (1989).

Here, the compelling State interest, according to the State is protecting people from unexploded ordinance. However, the regulation that access to the reserve be approved by "cultural practitioners" does is not narrowly tailored to meet that interest.

> Q. -- I guess my question is, … -- does having your culture approved in advance by a state agency make it somehow less likely that you're going to get exploded?
> A. I don't think so.
>
> TR (4/4/08) p 22.

The Rules, as presently enacted, give the KIRC arbitrary and unreviewable power in allowing access to native Hawai`ians. Such a scheme cannot be considered "narrowly tailored."

3. The Court Applied an Incorrect Standard.

In concluding that HAR §§13-261-10 or 13-261-11 are presumptively constitutional, and that Defendants-Appellants failed to show that either HAR §§13-261-10 or 13-261-11 have clear, manifest, and unmistakable constitutional defects, and failed to prove that the rules are unconstitutional beyond a reasonable doubt, the court applied the wrong standard. The Defendants-Appellants alleged that the rules impinge on fundamental rights expressly and impliedly granted them by the constitution. The court below was therefore bound to presume the allegedly violated rules to be unconstitutional unless the state shows compelling state interests which justify such classifications, and that the laws are narrowly drawn to avoid unnecessary abridgments of constitutional rights.

4. **THE COURT WAS IN ERROR WHEN IT REJECTED DEFENDANTS'-APPELLANTS' DEFENSE OF PRIVILEGE UNDER PASH AND HANAPI**

Defendants-Appellants presented a defense of privilege under State v. Hanapi , 970 P.2d 485, 493-94, 89 Haw. 177, 186-86 (1998) and Public Access Shorelines Hawai`i v. Hawai`i County Planning Comm., 79 Haw. 425, 903 P.2d 1246 (1995)(hereinafter referred to as "PASH). ROA at 40-81 (Memorandum in Support of Motion to Dismiss, p. 16 et. seq.). The court rejected the Defendants'-Appellants' defense of privilege. ROA at 210-212 (C.O.L. ¶¶ 6 – 13).

In State v. Hanapi , 970 P.2d at 493-94, 89 Haw. at 186-86, the Hawai`i Supreme Court articulated a three-part test that a criminal defendant claiming a PASH privilege must prove: (1) he or she must qualify as a "native Hawai`ian" within the guidelines set out in PASH; (2) his or her claimed right is constitutionally protected as a customary or traditional native Hawai`ian practice; and (3) the exercise of the right occurred on undeveloped or less than fully developed property.

Defendants meet all of the requirements mandated by Hanapi. There was no evidence to the contrary.

1. Defendants Are "Native Hawai`ians" Within The Guidelines Set Out in PASH.

The PASH definition for "native Hawai`ian" was used by the Hanapi court in the context of criminal law, and is therefore applicable to this case. Defendants are native

Hawai`ians under this guideline. ROA at 40-81. (Noa Decl. ¶ 1, Armitage Decl. at ¶ 1, Kahookele Decl. at ¶ 1).

2. Defendants' Claimed Right, To Enter Their Ancestral Land and Practice Their Religion, Is Constitutionally and Statutorily Protected As A Customary or Traditional Native Hawai`ian Practice.

Mr. Noa testified that testified that prior to 1893, Native Hawai`ians exercised management and control of the island of Kaho`olawe. TR (1/25/08) p 107 l 10. This was never contradicted by the State.

The Hawai`i State Constitution, statutes and case law each also all support defendants' claims that their right to enter their ancestral lands on Kaho`olawe and practice their religion is a protected customary or traditional native Hawai`ian practice.

Article XII, section 7 of the Hawai`i Constitution provides:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua' a tenants who are descendants of native Hawai`ians who inhabited the Hawai`ian Islands prior to 1778, subject to the right of the State to regulate such rights (emphasis added).

Therefore, "[t]he Hawai`i State Constitution places an affirmative duty on the state and its agencies to preserve and enforce traditional rights exercised by descendants of native Hawai`ians for subsistence, cultural and religious purposes." Id. at 45 (internal citations omitted).

Haw. Rev. Stat. § 1-1 provides:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawai`i in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawai`ian judicial precedent, or established by Hawai`ian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State (emphasis added).

In Pele Defense Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992), the Hawai`i Supreme Court directly addressed the range of protections provided by Article XII, Section 7, and HRS § 7-1[19]. The Court found that the drafters of Article XII, Section 7

[19] Haw. Rev. Stat. § 7-1 provides:

"intended this provision to protect the broadest possible spectrum of native rights[.]" Id. at 619. The Court held that "native Hawai`ian rights protected by article XII, § 7 may extend beyond the ahupua'a in which a native Hawai`ian resides where such rights have been customarily and traditionally exercised in this manner." Id. at 620, 837 P.2d at 1272. These rights are not limited to those specifically named in HRS § 7-1. Id. at 618, 837 P.2d at 1270-1271 (citing Kalipi v. Hawai`ian Trust Co., Ltd., 66 Haw. 10, 656 P.2d 751 (1982)).

In State v. Hanapi , 970 P.2d at 493-94, 89 Haw. at 186-86 (1998), the Hawai`i Supreme Court applied Public Access Shorelines Hawai`i v. Hawai`i County Planning Comm., 79 Haw. 425, 903 P.2d 1246 (1995) ("PASH"), to the criminal defense context. In that case, the Hawai`i Supreme Court reviewed that Court's case law regarding protection of traditional and customary rights:

> This court has consistently recognized that "the reasonable exercise of ancient Hawai`ian usage is entitled to protection under article XII, section 7." Public Access Shoreline Hawai`i v. Hawai`i County Planning Comm'n, 79 Haw. 425, 442, 903 P.2d 1246, 1263 (1995) (hereinafter "PASH") (emphasis in original). See also Kalipi v. Hawai`ian Trust Co., Ltd., 66 Haw. 1, 656 P.2d 745 (1982) (recognizing Hawai`i's constitutional mandate to protect traditional and customary native Hawai`ian rights); Pele Defense Fund v. Paty, 73 Haw. 578, 620, 837 P.2d 1247, 1272 (1992)) (upholding the "Kalipi rights" defining the "rudiments of native Hawai`ian rights protected by article XII, § 7" of the Hawai`i Constitution). In PASH, we further examined the legal developments of land tenure in Hawai`i and concluded that "the issuance of a Hawai`ian land patent confirmed a limited property interest as compared with typical land patents governed by western concepts of property.
>
> Although PASH did not discuss the precise nature of Hawai`i's "limited property interest," one limitation would be that constitutionally protected native Hawai`ian rights, reasonably exercised, qualify as a privilege for purposes of enforcing criminal trespass statutes**.**

Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

Id (emphasis added).

Defendants here are claiming this very privilege. This is a non-affirmative defense. Evidence of each element of the defense was presented or stipulated to at trial. Yet the Court relieved the State of its obligation to negative the defense.

There is strong support to show that Defendants were practicing a traditional and/or customary native Hawai`ian practice. This fact is acknowledged in several statutes: Sec. 10001(a), *Conveyance of Kaho`olawe Island to the State of Hawai`i*, P.L. 103-139, 107 Stat. 1418 (1993); ("Prior to its transfer in 1898, Kaho`olawe provided a place for important cultural and religious ceremonies and shrines for Native Hawai`ians").

Hawai`i Senate Concurrent Resolution No. 67 (2002) also underscored the importance of Kaho`olawe for Hawai`ians:

> WHEREAS, the island of Kaho`olawe was inhabited for over a thousand years. Hawai`ians fished, farmed, and lived in coastal and interior settlement across the entire island; and
>
> WHEREAS, called in ancient times, "Kanaloa" or "Kohemalamalama," the island was a place where kahuna and navigators were trained and played an important role in early Pacific migrations; and
>
> WHEREAS, named for the god of the ocean and the foundations of the earth, Kaho`olawe is a sacred island that in modern times has served as the foundation for the revitalization of Hawai`ian cultural practices;

See also ROA at 40-81 (Noa Decl. at ¶ 5).

Here, Defendants practiced their traditional and customary rights to enter Kaho`olawe, not only to practice their religion there by building a heiau and praying, but also to exercise management and control of that island. The un-contradicted testimony was that this is what Native Hawai`ians traditionally and customarily did at Kahoolawe prior to 1893.

3. The Island Reserve of Kaho`olawe, Where Defendants Right to Access Their Ancestral Lands and Practice Their Religion Was Exercised, Is Undeveloped Or Less Than Fully Developed Property.

By the terms of Haw. Rev. Stat. §6K-3, Kaho`olawe must remain an undeveloped island: Therefore, Defendants have met all three parts of Hanapi defense.

4. The Regulations, As Applied To Defendants, Place An Unconstitutional Burden on the Native Hawai`ian Right to Form a Nation as Well as on PASH Rights.

While the State has the authority to regulate customary and traditional practices, it must do so reasonably, and in a way that allows for the practice of rights to the extent feasible: "[T]the State is obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawai`ians to the extent feasible." PASH, supra, 79 Haw. at 450 n. 43, 903 P.2d at 1271 n. 43. Here, the State says there is a right for Native Hawai`ians to form a nation, but it would criminalize Native Hawai`ians who seeks to manifest that nation by exercising their rights in their nation's lands.

As discussed in length above, the relevant statutory and constitutional provisions which guide Hawai`i's unique framework are Haw. Rev. Stat. § 7-1, Haw. Rev. Stat. § 1-1, and Article XII, section 7 of the Hawai`i Constitution. See State v. Hanapi, 970 P.2d at 494, 89 Haw. at 186 (1998). However, "the fact that the claimed right is not specifically enumerated in the Constitution or statutes, does not preclude further inquiry concerning other traditional and customary practices that have existed." Hanapi, supra, 89 Haw. at 186, 970 P.2d at 494 citing PASH, 79. Haw. at 438, 903 P.2d at 1259.

Here, by requiring native Hawai`ians whose right to reclaim their nation demands that they exercise customary, traditional and/or religious rights on Kaho`olawe without prior permission from the KIRC, the State unconstitutionally burdens native Hawai`ian constitutional rights in violation of Art. XII, section 7 and HRS §§ 1-1, 7-1.

The court below erred when it rejected Defendants'-Appellants' defense based in the rules of Hanapi and PASH. Furthermore, as with the defense based on sovereignty and nationhood discussed above, the Prosecution failed to present any facts negativing the defense and in fact made no effort whatsoever to negative Defendants'-Appellants'' non-affirmative defenses. The analysis regarding the court's failure to require the Prosecutor to present facts negativing the defense is the same as that presented above.

CONCLUSION

The court below committed plain error when it declined to recognize the Defendants'-Appellants' inherent right to form a sovereign nation for native Hawai`ians; It committed plain error by failing to hold that, on this record, the conduct was proven to be privileged. The court below committed error when it failed to require the prosecution as part of its burden of persuasion to prove beyond a reasonable doubt the facts negativing Defendants'-Appellants' non-affirmative defenses; the court applied the wrong standard when it rejected Defendants'-Appellants' defense that the regulations they are alleged to have violated are unconstitutional as a prior restraint on their native Hawai`ian rights. Finally, the court was in error when it rejected Defendants'-Appellants' defense of privilege under PASH and Hanapi. For the foregoing reasons, Defendants-Appellants respectfully request that the judgment be reversed and remanded to the court below for a finding that the Reinstated Hawai`ian Government is a sovereign entity.

DATED: Lihu`e, Kauai, Hawai`i, September 3, 2009.

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NO. 29794
IN THE INTERMEDIATE COURT OF APPEALS
STATE OF HAWAI`I

STATE OF HAWAI`I, Plaintiff-Appellee, vs. NELSON KUUALOHA ARMITAGE, Defendant-Appellant.	Case No. 29794 DEFENDANTS'-APPELLANTS' OPENING BRIEF APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL CIRCUIT HON. SIMONE C. POLAK
STATE OF HAWAI`I, Plaintiff-Appellee, vs. RUSSELL KAHOOKELE, Defendant-Appellant.	APPEAL FROM FINAL JUDGMENT AS FILED ON APRIL 3, 2009
STATE OF HAWAI`I, Plaintiff-Appellee, vs. HENRY MAILE NOA, Defendant-Appellant.	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Defendants'-Appellants' Opening Brief* was duly served upon the following parties at their last respective addresses, below:

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