UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 22-10306
	)	
Plaintiff-Appellee,	)	DC: 1:20-cr-00044-LEK-3
	)	
vs.	)	
	)	
JONATHAN TAUM,	)	
	)	
Defendant-Appellant.	)	
	)	
	)	
_____	)	

DEFENDANT-APPELLANT'S REPLY BRIEF

The Honorable Leslie E. Kobayashi
United States District Court Judge
District of Hawai'i

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ARGUMENT

Defendant-Appellant Taum stands by and reasserts his arguments presented in his extensive opening brief. However, Defendant-Appellant Taum would respond to some of the Government's arguments as follows:

1. Whether statements were "testimonial"

In his opening brief, Defendant-Appellant has argued that a series of recordings of co-Defendant Tagaloa at his Department of Public Safety disciplinary hearing and FBI interviews of co-Defendant Pinkney were "testimonial" statements forbidden under *Bruton v. United States,* 391 U.S. 123 (1968) and were erroneously admitted into evidence. OB at 23.

In response, the Government argues, "[O]nly statements whose 'primary purpose' was *testimonial* trigger the constitutional requirement" to confront witnesses, *United States v. Latu*, 46 F.4th 1175, 1180 (9th Cir. 2022) (citation omitted), or the *Bruton* rule, *see Lucero*, 902 F.3d at 988. Co-conspirator statements during and in furtherance of a conspiracy are, 'by their nature, not testimonial, *Crawford*, 541 U.S. at 56, because they "are, by their nature, made for a purpose other than use in a prosecution," *Michigan v. Bryant*, 562 U.S. 344, 362 n.9 (2011)." Government's Brief at 37.

This issue was addressed in Defendant-Appellant's opening brief: "[t]he statements of Tagaloa at his DPS hearing and FBI interviews of Pinkney are testimonial under the Sixth Amendment. *See United States v. Latu*, 46 F.4th 1175, 1180 (9th Cir. 2022)('Testimonial statements resemble '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' . . . Examples can include **affidavits, depositions, prior testimony, or police interrogation'**)." OB at 23. (citations omitted)(emphasis added).

As stated by this Court,

> Although the Supreme Court in *Crawford* did not define what makes a statement testimonial, it noted that a core class of testimonial statements may be defined as " ex parte in-court testimony or its functional equivalent—that is, material such as affidavits ... or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." *Id.* at 51, 124 S.Ct. 1354 (citation omitted). . . . More recently, the Supreme Court has also noted that "[a] document created solely for an 'evidentiary purpose,' ... made in aid of a police investigation, ranks as testimonial." *Bullcoming v. New Mexico*, —— U.S. ——, 131 S.Ct. 2705, 2717, 180 L.Ed.2d 610 (2011).

United States v. Albino-Loe, 747 F.3d 1206, 1210 (9th Cir. 2014). *See also Davis v. Washington,* 547 U.S. 813, 824 (2006)(" 'testimony,' . . , is typically a solemn declaration or affirmation, made for the purpose of establishing or proving some fact.' . . . An accuser who makes a formal statement to government officers bears testimony, in a sense that the person who makes a casual remark to an acquaintance

does not' ")(citations omitted). More recently, this Court has held that items included within the class of "testimonial statements" are:

> ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Lucero v. Holland, 902 F.3d 979, 989 (9th Cir. 2018)(citations omitted).

Here, the statements of Tagaloa at his DPS hearing and FBI interviews of Pinkney are testimonial under the Sixth Amendment. They were either made under oath at a hearing concerning Tagaloa's ability to keep his job or during an interview of Pinkney by the F.B.I. Both are "testimonial." *See also United States v. Deleon*, 418 F.Supp.3d 682, 820 (D. N.M. 2019)("Additionally, J. Garcia's statements in an FBI interview are testimonial, so the Confrontation Clause permits their introduction only if J. Garcia takes the stand or if J. Garcia is unavailable. *See Crawford v. Washington*, 541 U.S. at 68").

2. Whether these statements "were used for purposes other than establishing the truth of the matter asserted?"

The Government argues, "The Confrontation Clause applies only to testimonial *hearsay*. *See Davis v. Washington*, 547 U.S. 813, 823-824 (2006). It thus

"does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004); *accord United States v. Audette*, 923 F.3d 1227, 1238 (9th Cir. 2019). And almost none of the challenged statements constitutes hearsay." Govt Brief at 34. The Government in footnote 5 admits, however, "Government did use Exhibit 77-K in closing to argue that Pickney recorded defendants' cover-up to enable blackmail. 3-ER-428." *Id.*

The Government argues that its "intent" was not to use these statements for the truth of the matter asserted, "but to prove that they were false." Govt Brief at 34. Unfortunately, this intent is not present in the record. The Government did not attempt to alert the court, the parties or the jury that this material was non-hearsay or was relevant for some purpose other than their truth. Further, there was no restriction on its use. And, as has been repeated time and again in the Defendant-Appellant's briefing, the Court gave no limiting instruction as to these Exhibits' use. This distinguishes this case from the others cited by the Government. *See United States v. Cantizano*, 2023 WL 3300515 at *2 (9th Cir. 2023)(Mem. Op.)("Here, the agent's testimony was not hearsay because it was admitted for a legitimate non-hearsay purpose: to show the statement's effect on the agents who are conducting the search, and to explain why they focus their investigation on Cantizano"). Unlike

the situation in *Cantizano*, none of these statements in the present case, **at the time of their admission**, were admitted for "a legitimate non-hearsay purpose." *See United States v. Anyanwu*, 449 Fed.Appx 639, 641 (9th Cir. 2011)(Mem.Op.)("Many of the documents were non-hearsay **because they were not admitted** to prove the truth of the matters asserted, but rather, to prove the very falsity of the assertions made in the documents")(emphasis added).

Nor did the court give an instruction to the jury in this regard. This failure is critical. As noted recently by the Supreme Court,

> This historical evidentiary practice is in accord with the law's broader assumption that jurors can be relied upon to follow the trial judge's instructions. Evidence at trial is often admitted for a limited purpose, accompanied by a limiting instruction. And, our legal system presumes that jurors will "'attend closely the particular language of [such] instructions in a criminal case and strive to understand, make sense of, and follow'" them. *United States v. Olano*, 507 U.S. 725, 740 (1993).
>
> Prosecutors have long defendants jointly in cases where the defendants are alleged to have engaged in a common criminal scheme. However, when prosecutors seek to introduce a nontestifying defendant's confession implicating his codefendants, a constitutional concern may arise. The Confrontation Clause of the Sixth Amendment states that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." And, in *Bruton v. United States*, 391 U.S. 123 (1968), this Court "held that a defendant is deprived of his rights under the Confrontation Clause when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant." *Richardson v. Marsh*, 481 U.S. 200, 201-202 (1987).

Samia v. United States, No. 22-196 (06/23/23) at 12-13. The Court continued,

> The [Bruton] Court acknowledged that a defendant is "'entitled to a fair trial but not a perfect one'" and conceded that "[i]t is not unreasonable to conclude that in many . . . cases the jury can and will follow the trial judge's instructions to disregard [certain] information." *Id.*, at 135 (quoting *Lutwak v. United States*, 344 U.S. 604, 619 (1953)). It even acknowledged that, "[i]f it were true that the jury disregarded the reference to [Bruton], no question would arise under the Confrontation Clause." 391 U.S., at 126.

Samia v. United States, No. 22-196 (06/23/23) at 14. Here, that simply was not done. The evidence was admitted with no restriction and no instruction to disregard the evidence against Taum, that such evidence was non hearsay and/or that the jury was not to consider the truth of contents of these recordings.

The Government, perhaps sensing danger, is now trying to go back in time and claim its non-documented intent should save the day. However, the difficulty of such an approach was addressed in *United States v. Dinh Vo*, 18-50041 (9th Cir. 2019)(Mem. Op.). In that case, this Court held,

> Under *Crawford v. Washington*, the admission of testimonial hearsay without "unavailability and a prior opportunity for cross-examination" violates the Confrontation Clause, but the admission of "testimonial statements for purposes other than establishing the truth of the matter asserted" does not. 541 U.S. 36, 68, 59 n.9 (2004); *see United States v. Wahchumwah*, 710 F.3d 862, 871 (9th Cir. 2013) ("*Crawford* applies only to testimonial hearsay.") (emphasis in original). The government argues that the informant's statements were not provided for their truth, but rather "as context for defendant's admissions and to show their effect on the listener." The government also argues that an informant's side of a recorded conversation should be admitted categorically, without further inquiry.

> "[I]nvoking the word 'context' does not permit an end-run around the hearsay rules such that the government may smuggle into evidence all [the informant's] statements," particularly when they "overwhelm the defendant's." *United States v. Collins*, 575 F.3d 1069, 1073-74 (10th Cir. 2009). Here, several of the informant's incriminating statements went beyond the bounds of placing the conversation in context:
>
> > 1) "It's like what you told me the other day if, you know, whatever it is, then you know, it's 15,000 on the side."
> >
> > 2) "Do you remember what you told me the other day? You said, 'Okay, pay 15,000 on the side.'"
> >
> > 3) "So then about the money, the 15,000 you talked about for the other side, I've got it all prepared already ok."
>
> These statements were also testimonial, as they were made with the "primary purpose" to "establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

Dinh Vo, No. 18-50041 at *2-3. *Accord United States v. Johnson*, 675 F.3d 1265, 1279 (9th Cir. 2017). Here, the Government is attempting to "smuggle into evidence" the statements under the guise of a non-hearsay argument. Here, these statements were used to establish "past events" – i.e., what these witnesses said and when they said them, and were used by the Government to prove their case. And, the Government referred to these recordings throughout its closing argument to argue that the defendants were guilty of the charges against them. That occurrence is addressed in detail in Defendant-Appellant's opening brief. See OB at 24-29.

3. Did Taum "waive" any objection to the lack of a limiting instruction being given to the jury?

The Government argues,

> Taum acknowledges that Exhibits 77-E, 77-G, 77-I, and 77-K were offered against Pinkney alone, but nevertheless asserts that the court did not give a proper limiting instruction. Br. 29-30. Taum waived any such challenge by agreeing to withdraw a more specific jury instruction in favor of the instructions the court gave. *See United States v. Lopez*, 4 F.4th 706, 732 (9th Cir. 2021).
>
> The parties initially submitted Joint Requested Jury Instruction Number 8, which provided: "[Y]ou must determine which evidence in the case applies to each defendant, disregarding any evidence admitted solely against some other defendants." 3-SER-586. However, at their mid-trial status conference, held five days after the challenged statements were admitted into evidence, the parties— including Taum—agreed to withdraw this instruction as "duplicative" of Joint Requested Instruction Number 45. 2-SER-396-402. The court then gave this latter instruction to the jury, renumbered as Jury Instruction Number 34. 4-ER-569; 3- SER-596. Having knowingly abandoned Instruction Number 8 in favor of another instruction he jointly proposed, Taum cannot now claim that the latter was an insufficient limiting instruction for *Bruton* purposes. *See, e.g.*, *United States v. Redmond*, 748 F. App'x 760, 762 (9th Cir. 2018).

Govt Brief at 42.

The problem with this argument is the issue of "waiver." Clearly, Taum and the other parties submitted Joint Instruction #8 that included language, "[Y]ou must determine which evidence in the case applies to each defendant, disregarding any evidence admitted solely against some other defendants." It was withdrawn with the

assurance from the Court and the Government that the language in #8 was included in the Court's instruction 45.

On July 1, 2022, a hearing was held on jury instructions on a non-testimony day during the jury trial. The actual discussion on this issue was as follows:

THE COURT: Okay. All right. So Jury Instruction No. 1 will be duty of the jury will be given by agreement. **Jury Instructions Nos. 2 that you folks had stipulated to through 8,** those are found at pages 3 to 11 on the draft version, those are withdrawn by agreement.
Defendants' Proposed Jury Instruction No. 3 having to do with You have to consider each charge against each defendant separately, that we're going to reserve.
MR. SINGH [Attorney for Tagaloa]: No objections.
THE COURT: All right. Given by agreement. Okay. Next is requested Jury Instruction No. 43, page 76 –
MR. HOKE [Counsel for Taum]: No objection.
THE COURT: -- on or about. Okay. Given by agreement. 45?
MR. PERRAS [Assistant United States Attorney]: Your Honor, I believe there's a typo.
THE COURT: Okay. Thank you.
MR. PERRAS: It's -- it should begin, "A separate crime" and then "or offense."
THE COURT: Oh, yeah, the beginning one is missing an "f," right?
crime."
MR. PERRAS: No. It's missing the words "a separate crime."
THE COURT: "A separate crime or offense," yeah, "A separate crime." So the beginning of the first sentence we should insert "A separate crime" and then it continues, "or offenses charged against one or more of the defendants in each count of the indictment." You're right.
MR. HOKE: Is this repetitive
MR. PERRAS: **It is, and those of Instruction 8 and have been withdrawn because they're duplicative of this one.**
MR. HOKE: I'm sorry?
THE COURT: Those were withdrawn.
MR. HOKE: I see.
THE COURT: Yeah, because that was the ones they had proposed, but this is like

our standard one. **It kind of puts it all together. So it's not redundant because they withdrew 8.**
MR. HOKE: **Actually, Instruction 8 was the one that we had proposed.**
THE COURT: So not 8, I'm sorry, not 8. 8 we're reserving on, right?
MR. HOKE: Yeah, but we're a addressing it now, I guess.
THE COURT: Yeah, 8, the -- right, not -- yours was 3, charged against one or more --
MR. HOKE: Yeah.
THE COURT: **Right. So your -- your 3, their 8, talked about doing each defendant separately, right? And the standard jury instruction that I give usually is what's encompassed in 45. So I would propose giving 45.**
MR. HOKE: That's fine.
THE COURT: Okay. So by agreement?
MR. HOKE: Yes, from me.

2-SER-399-402. Indeed, the Government stated to Mr. Hoke, "It is, and those of Instruction 8 and have been withdrawn because they're duplicative of this one." Due to these and other assurances, Mr. Hoke agreed to the giving of Instruction 45 thinking his requested language was contained in this instruction. This is not a knowing waiver. Further, if Mr. Hoke waived #8, it was due in considerable measure to the assurances of the Court and the Government that the requested language was included. The Government should be estopped from trying to claim waiver, when their own misrepresentations unfairly contributed to any withdrawal of Defense Joint Proposed Instruction #8. *See United States v. Macias*, 789 F.3d 1011, 1025 (9th Cir. 2015)("[W]aiver is a creature of judicial policy, informed in this purely federal context, by concerns of fairness, finality and economy").

Moreover, the failure of the court to give such instruction is error. *See United States v. Talley*, No. 12-13651 at *8-9 (11th Cir. 2014)(Mem.Op.)("In *Richardson*, however, the Supreme Court distinguished *Bruton* when a non-testifying co-defendant's statement did not incriminate the defendant on its face and the statement became incriminating only when linked with other evidence. 481 U.S. at 208-209, 107 S. Ct. at 1707-1708. In such situations, the jury is deemed to follow limiting instructions that the co-defendant's statement is to be considered by the jury only against the co-defendant and not against this defendant[.] *Id.* . . . Here, there was no limiting instruction, so there is error").

4. Was there "overwhelming evidence" that made the Bruton error a harmless error?

The Government agues because there was "overwhelming" evidence connecting him to the conspiracy and assault, any *Bruton* error would be harmless. *See* Govt Brief 43-54. Defendant-Appellant respectfully disagrees, and would refer to the facts listed in his opening brief that show a divergence of testimony on the alleged conspiracy, but show that at no point did Taum strike or assault Kaili. See OB at 33-35, 43-45.

This issue was addressed in Defendant-Appellant's opening brief, citing to *United States v. Esparza*, 791 F.3d 1067 (9th Cir. 2015) and *United States v. Young*,

720 Fed.Appx. 846 (9th Cir. 2017)(Mem. Op). In *Esparza*, a defendant was convicted of importing marijuana, and the only contested issue was the critical fact of who specifically owned the car he was driving. *Id.* at 1068. The trial court admitted two hearsay statements of the car's registered owner that she had sold the car to the defendant six days before the arrest. *Id.* The Government argued that, even if these statements were protected under the Sixth Amendment, the admission of them was harmless. *Id.* at 1074. In rejecting this argument, this court noted, "Even when the government's case is "strong," a Confrontation Clause violation is not harmless where the erroneously admitted evidence could have "significantly altered the evidentiary picture." *Esparza,* 791 F.3d at 1074 (citation omitted). In reversing, this court noted, "the government's heavy reliance on [the previous owner's] statement shows that it was 'very important to the prosecution's case,' and the statement's admission 'may have significantly altered the evidentiary picture.' . . . Therefore, the violation of Esparza's Confrontation Clause rights was not harmless." *Id.* at 1074 (citation omitted).

In *Young*, an inculpatory statement of a co-defendant member of a gang was allowed into evidence over a Confrontation Clause objection in a RICO murder case. The statement that the co-defendant "got one" was admitted, and testimony was given that this meant that they had "shot somebody in retaliation" for an earlier

murder. This co-defendant did not testify. *Id.* at 848. In overturning the conviction, this court noted this evidence should not have been admitted under the Confrontation Clause, and was not harmless error using the *Esparza* standard, noting that "even when the government's case is strong, a Confrontation Clause violation is not harmless where the erroneously admitted evidence could have 'significantly altered the evidentiary picture.' " *Id.* (citation omitted). Here, as in *Esparza*, and *Young*, these numerous recordings, entered over objection, with no limiting instruction, may have "altered the evidentiary picture," and reversal of Taum's convictions on all counts is warranted.

5. Preservation of Error.

The Government states, "But [Taum's] counsel only objected to Pinkney's statement at trial as 'these exhibits were introduced against '[Taum].' 1-ER-13-14. He thus did not preserve an objection to the very exhibits that could be subject to the *Bruton* exception in the first place: admitted against Pinkney." Govt Brief at 39-40.

Taum did preserve such objections. To clarify:

a. **Government Exhibit 71C** was an audio excerpt from Tagaloa's interview at a Department of Public Safety ("DPS") disciplinary proceeding. [2-ER-237-238; 253]. Defense counsel objected to the admission of Exhibit 71C on Sixth Amendment grounds. [1-ER-11]; [1-ER-15-17]. This objection was overruled and 71C and 71D were admitted into evidence. [1-ER-11-12]; [1-ER-29].

b. **Government Exhibit 71E** was a 12/20/16 recording of Tagaloa testifying at a DPS hearing. Defense counsel objected to 71E at the same time, and for the same basis, that he objected to 71C, *supra*. [1-ER-11]; [1-ER-15-17]. This objection was overruled and 71E was admitted into evidence. [1-ER-11-12]; [1-ER-29].
c. **Government's Exhibit 77A** is a recording of an audio interview with co-defendant Pinkney and FBI Agent Radzicki. The Government move to admit 77A against "all defendants." [1-ER-13]. This was admitted into evidence over the objection of Defendant Taum on 6th Amendment grounds. [1-ER-12-14].
d. **Government's Exhibit 77C** is another excerpt of an audio interview of co-defendant Pinkney by FBI Agent Radzicki. The Government offered 77C against "all defendants." [1-ER-13]. This was admitted into evidence over the objection of Defendant Taum on 6th Amendment grounds. [1-ER-12-14].
e. **Government's Exhibit 77E is** another excerpt of an audio interview of co-defendant Pinkney by FBI Agent Radzicki, which was admitted into evidence. The Government offered 77E against "Defendant Pinkney only." [1-ER-13]. This was admitted into evidence over the objection of Defendant Taum on 6th Amendment grounds. [1-ER-12-14].
f. **Government's Exhibit 77G** is another excerpt of an audio interview of co-defendant Pinkney by FBI Agent Radzicki, which was admitted into evidence. The Government offered 77G against "Defendant Pinkney only." [1-ER-13]. This was admitted into evidence over the objection of Defendant Taum on 6th Amendment grounds. [1-ER- 12-14].
g. **Government's Exhibit 77I** is another excerpt of an audio interview of co-defendant Pinkney by FBI Agent Radzicki. This was admitted into evidence over the objection of Defendant Taum on 6th Amendment grounds. [1-ER-12-14].
h. **Government's Exhibit 77K** is another excerpt of an audio interview of co-defendant Pinkney by FBI Agent Radzicki. The Government offered 77K against "Defendant Pinkney only." [1-ER-13]. This was admitted into evidence over the objection of Defendant Taum on 6th Amendment grounds. [1-ER-12-14].

6. Was there prosecutorial misconduct?

The Government argues that the AUSA's "comments about Taum having lied and coached the other defendants to lie was proper." Govt' Brief at 47. It asserts that the AUSA's argument that Taum "was so immoral he would blackmail the warden" was acceptable argument. Govt Brief at 49. It argues that urging a jury to convict so that "Constitutional rights mean something" is acceptable argument. Govt Brief at 50. It also asserts that its reference to "decimation" in its closing was acceptable as well. Government Brief at 51. And, even if all of this is not acceptable, it nevertheless is not reversible error. Govt Brief at 52.

Respectfully, this argument should not be accepted by this Court. As noted in Defendant-Appellant's Opening Brief:

> It was highly improper for the Government to state its opinion that Taum lied throughout the course of the trial as "any statement of personal belief jeopardizes the integrity of the trial process." *United States v. Woods*, 710 F.3rd 195, 203 (4th Cir. 2013)(citation omitted). In *United States v. Sanchez*, 176 F.3d 1214 (9th Cir. 1999), this court noted, "in closing argument, the prosecutor vouched for the Government's witnesses and denigrated the defense as a sham." *Sanchez*, 176 F.3d at 1224. This included telling the jury "the defense in this case read the records and then told a story to match the records. And, ladies and gentlemen, I'm going to ask you not to credit that scam that has been perpetrated on you here. And to find these two defendants guilty of the charges against them." *Id.* . . .

> In regard to imploring the jury to do its "duty" and convict, *Sanchez* found prosecutorial misconduct in part because the prosecutor "did not tell the jury that it had a duty to find the defendant guilty only if every element of the crime had been proven beyond a reasonable doubt." *Id.* at 1225. In finding reversible error had occurred, this court noted: "[C]redibility is a matter to be decided by the jury. *See Sanchez-Lima*, 161 F.3d at 548; *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir.1973). 'As a general rule, a prosecutor may not express his opinion of the defendant's guilt or his belief in the credibility of government witnesses.' *United States v. Molina*, 934 F.2d 1440, 1444 (9th Cir.1991)." *Sanchez*, 176 F.3d at 1224-1225.

O.B. at 50-51. A number of other points were made by the Defendant-Appellant relevant to this issue, including 1) "'it is highly improper for the government to refer to a defense witness as a liar,' and further noted that we had 'continually admonished the government not to engage in such conduct. *Id.* at 481. (emphasis added)." *Woods*, 710 F.3d at 202; 2) "[I]t is settled law that 'a prosecutor may not use the bully pulpit of a closing argument to inflame the passions or prejudices of the jury or to argue facts not in evidence.' " *United States v. Khatallah*, 41 F.4th 608, 636 (D.C. Cir. 2022)(citation omitted) and 3) "In particular, prosecutors `may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence.' " *United States v. Nobari*, 574 F.3d 1065, 1076 (9th Cir. 2009) (citation omitted). OB at 50-54.

Among other things, the Government called Defendant Taum a liar and "immoral," urged the jurors to convict so as to uphold the Constitution, and injected issues completely unrelated to this case in its closing i.e., the curious reference to "decimation" as relevant to this case.[1] OB 49-56. Here, for the reasons described more fully in Defendant-Appellant's opening brief, the Government overstepped its bounds and committed prosecutorial misconduct in its closing argument.

7. Exhibit 23

In Taum's opening brief, he discusses Exhibit 23 at length:

> a. Government Exhibit 23 was the 7/17/24 DPS questionnaire of co-Defendant Tagaloa concerning this incident. In this document, among other things, Tagaloa wrote numerous statements about Taum, including "Inmate backed into my chest. Sgt. Taum ordered me to take him down" and "Sgt Taum supervised the use of force incident. Supervisory commands were used numerous times."[2]
>
> Exhibit 23 was admitted over Taum's attorney's objection that to admit such evidence would violate "his client's confrontation rights." [2-ER-255, 256]. The following day, the Court indicated it was going to "de-admit" Exhibit 23 and replace it with a redacted version that had no details of what Tagaloa had

[1] The Government added in its rebuttal "And to illustrate why it doesn't make sense, I'll use an example of one of the oldest methods of controlling a big group of disorderly people: decimation. Decimation got its start in ancient Rome, and it means just what it says, removal by intent. When a large group of Roman soldiers became rowdy, they would be lined up and one out of every 10 would be killed. And the message is get in line, stay disciplined, or else." [3-ER-164].

> put in his response. The court indicated it also would do a curative instruction. [2-ER-263-264]. A redacted exhibit 23 was admitted as 23B with no objection. [2-ER-280; 4-ER-591]. A curative instruction was later given advising the jury not to consider Exhibit 23, and "it must be treated as if you no knowledge of it," and the jury "should not speculate about Exhibit 23." [3-ER-32].[3]

OB at 7. Footnote 2 provides, "Exhibit 23 is not part of the record in this case. On October 27, 2023, Defendant- Appellant filed a *Motion to Supplement The Record On Appeal*, which contains Exhibit 23, attached as Exhibit "A." *See* Ninth Cir. Docket #20." That motion has yet to be ruled upon.

On November 2, 2023, Defendant-Appellant filed his *Motion to Transmit*. See Docket #27. In it, Defendant-Appellant request to transmit a DVD to the Ninth Circuit "containing one document and seven audio files to this Court." The specified document was Exhibit 23. On February 4, 2024, this Court granted the motion to transmit, and ordered Defendant-Appellant to submit four copies of the exhibits on DVDs within seven days of that order. *See* Docket #38. On February 8, 2024, Defendant-Appellant filed a Response to said order, indicating that the DVDs had been mailed. See Docket #39. On February 12, 2024 an EO was filed indicating that the 4 copies of the DVD were "filed." Exhibit 23 has thus already been made a part of the record of this case.

In Govt Brief, footnote #4, page 44, it indicates:

> Taum also mentions (Br. 6-7) Tagaloa's completed investigative questionnaire, labeled Exhibit 23. Because he does not make any argument regarding Exhibit 23, however (*see* Br. 23-32), he has "waived review" of any claim with respect to that document. *Estate of Stern v. Tuscan Retreat, Inc.*, 725 F. App'x 518, 522 n.4 (9th Cir. 2018). In any event, he would have no such claim for the same reasons applicable to Tagaloa's statements in Exhibits 71-C and 71-E.

Respectfully, the issue of admissibility of Exhibit 23 should not be deemed waived. In *Estate of Stern v. Tuscan Retreat, Inc.*, 725 F. App'x 518, 522 n.4 (9th Cir. 2018), an unpublished decision, footnote 4 notes, "Plaintiffs have waived review of the other evidentiary decisions below, because they challenge them in their opening brief with only a single conclusory sentence." That is not situation here, as the admission of Exhibit 23 is one of numerous exhibits entered into evidence in this case that the Defendant objects to on a Confrontational Clause basis. Further, Exhibit 23 has been mentioned in detail to this Court and the facts surrounding are not in question and thus, fully developed. Because of this, this Court may, in its discretion, consider this issue. *See In re Apple Inc. Device Performance Litig*., 50 F.4th 769, 782 n.9 (9th Cir. 2022)("Normally, arguments not raised in an opening brief are forfeited. See, e.g., *Iraheta-Martinez v. Garland* , 12 F.4th 942, 959 (9th Cir. 2021). We can, however, exercise "discretion to consider a purely legal question when the record relevant to the matter is fully developed." *Saucillo*, 25 F.4th at 1130 n.7 (*quoting United States v. Northrop Corp.* , 59 F.3d 953, 957 n.2 (9th Cir. 1995)"). It

is also appropriate as the Government has already made its position known on this issue ("In any event, he would have no such claim for the same reasons applicable to Tagaloa's statements in Exhibits 71-C and 71-E"). Government Brief at 44, footnote #4.

Should this Court decide to consider the admission of Exhibit 23, it was admitted over the Confrontation Clause objection of Taum. 2-ER-255-256. As noted above, Government Exhibit 23 was the 7/17/24 DPS questionnaire of co-Defendant Tagaloa concerning this incident. In this document, among other things, Tagaloa wrote numerous statements about Taum, including "Inmate backed into my chest. Sgt. Taum ordered me to take him down" and "Sgt Taum supervised the use of force incident. Supervisory commands were used numerous times." These were clearly out of court statement by a co-defendant implicating Taum who he could not cross-examine. The trial court made a mistake in allowing this unredacted document to the jury, and "took it back" shortly thereafter. However, the damage had already been done however, and the jury was exposed to this questionnaire.

CONCLUSION

Based on the arguments above and set out in his Opening Brief, Defendant-Appellant requests this court to remand this case to the district court for new trial and/or resentencing.

DATED: May 13, 2024 Honolulu, Hawai'i

Respectfully submitted,

/s/ Lars Robert Isaacson
LARS ROBERT ISAACSON
Attorney for Defendant-Appellant

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendant-Appellant, through his undersigned attorney, hereby certifies the following pending appeals arising out of the same facts as this case:

a. *United States v. Jason Tagaloa*, 22-10318

b. *United States v. Craig Pinkney*, 23-10005

DATED: May 13, 2024 Honolulu, Hawai'i

Respectfully submitted,

/s/ Lars Robert Isaacson
LARS ROBERT ISAACSON
Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 5236words.

DATED: May 13, 2024 Honolulu, Hawai'i

Respectfully submitted,

/s/ Lars Robert Isaacson
LARS ROBERT ISAACSON
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that, on the dates and by the methods of service noted below, a true and correct copy of the foregoing was served on the following at their last known addresses:

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DATED: May 13, 2024 Honolulu, Hawai'i

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