No. 23-10005

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CRAIG PINKNEY,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

Defendant Craig Pinkney appeals his judgment of conviction. The district court had jurisdiction under 18 U.S.C. 3231 and entered final judgment on January 9, 2023. 1-ER-2. Pinkney filed a timely notice of appeal on January 17, 2023. 2-ER-236-237; Fed. R. App. P. 4(b)(1)(A)(i) and (3)(A). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether Pinkney lacks standing to bring a *Garrity* claim challenging admission of his co-defendant's responses to an internal investigation questionnaire; whether Pinkney has nonetheless waived any *Garrity* argument; or, in the alternative, whether his arguments fail under plain error review.

2. Whether Pinkney waived his severance argument by failing to renew his motion to sever at the close of all the evidence or, if not, whether his argument nonetheless fails under plain error review.

STATEMENT OF THE CASE

Pinkney, a former Adult Corrections Officer (ACO) at the Hawaii Community Correctional Center (HCCC), appeals his convictions stemming from his and other ACOs' vicious beating of inmate Chawn Kaili and their ensuing cover-up. Pinkney was tried before a jury along with two co-defendants: fellow ACO Jason Tagaloa and their supervisor, Jonathan Taum. Another co-defendant,

ACO Jordan DeMattos, pleaded guilty. Pinkney was convicted of depriving Kaili of his right to be free from cruel and unusual punishment by use of excessive force under color of law, in violation of 18 U.S.C. 242 and 2; conspiracy to obstruct justice, in violation of 18 U.S.C. 371; and obstruction by false report, in violation of 18 U.S.C. 1519.

A. Factual Background

1. Pinkney is ordered to rehouse inmate Kaili.

Pinkney was on duty on the night shift at HCCC from June 14-15, 2015. 2-SER-500-522. Around 12:30 a.m., Kaili approached Pinkney and three other ACOs in the control center of the Waianuenue housing complex. 1-SER-37; 2-SER-303-304. The ACOs could tell that Kaili "wasn't in the right frame of mind" and sought to place him in the building's visitation room, for his own safety, where they could monitor him. 1-SER-37-40; 2-SER-305-306. One ACO called Taum, a sergeant and the supervisor on duty, to inform him of this plan. 1-SER-40. Taum instead decided to send other ACOs to retrieve Kaili and rehouse him in another building. 1-SER-40-41, 67-68.

While only two ACOs would typically escort an inmate for rehousing, and while Kaili was not considered a "problem inmate" (2-SER-389), Taum chose a team of four ACOs to rehouse Kaili: Pinkney, Tagaloa, DeMattos, and himself (1-SER-67-68). Pinkney and Tagaloa escorted Kaili from the Waianuenue housing

complex into the recreation (rec) yard. 1-SER-41-42, 71; 2-SER-306-307; Ex. 1-A at :01-:15.[1] The ACOs did not place Kaili in handcuffs because he did not resist and posed no threat. 1-SER-42, 48, 267-268; 2-SER-310-311. As Pinkney and Tagaloa walked Kaili out into the rec yard, Taum and DeMattos entered the yard from the Punahele housing complex on the yard's other side to receive Kaili. 1-SER-71; 2-SER-373-374. Kaili, who was high on methamphetamines and paranoid about being harmed, recoiled at the sight of the additional ACOs, believing that they had brought him into the rec yard to beat him, and backed up slightly into Tagaloa. 1-SER-43, 72, 180-181, 185; 2-SER-375; Ex. 1-A at :20-:25.

2. Pinkney and his co-defendants attack Kaili.

Taum ordered Tagaloa to tackle Kaili to the ground, and Tagaloa complied. 1-SER-43, 72, 187; 2-SER-375-376; Ex. 1-A at :25-:28. Suddenly slammed to the asphalt, Kaili lay on his back, wriggling, his knees and hands raised to ward off a pummel of blows from Tagaloa, Pinkney, and DeMattos, who had launched themselves on top of him. 2-ER-178-179; 1-SER-44. At the time, Taum weighed approximately 260 pounds, Pinkney and DeMattos about 300 pounds each, and

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[1] Pending before this Court is the United States' motion to transmit Exhibits 1, 1-A, 1-B, 1-C, 1-D, 1-E, 2, 2-C, 2-D, 2-E, 2-F, 3, 4, and 29-E as part of its supplemental excerpts of record. *See* Motion, C.A. Doc. 30 (filed March 1, 2024).

Tagaloa between 360 and 380 pounds. 1-SER-68-69. Tagaloa was about 6'4" tall, and Pinkney was about 6'1". 1-SER-68-69. Kaili was approximately 5'8" tall and weighed less than 200 pounds. 1-SER-69, 190. Pinkney and the other ACOs took turns pressing themselves on Kaili and striking him with their hands and feet as they attempted to flip him onto his stomach to handcuff him. 2-ER-179; 1-SER-44, 79; 2-SER-376.

After the ACOs flipped Kaili over, Taum held down Kaili's legs and directed Pinkney and the other ACOs to strike him. 2-ER-180-181. Kaili kept his hands near his face to ward off the strikes. 1-SER-191-192. Pinkney and the others spent several more minutes kicking, punching, and pounding a prone Kaili as they pressed themselves on top of him, before eventually handcuffing him. 2-ER-180-181; 1-SER-45-46. At no point did Kaili aggressively resist, attempt to escape, or threaten the ACOs. 1-SER-44-45, 83-84, 89; 2-SER-395-396. Kaili repeatedly screamed for help, asked the ACOs why they were attacking him, and told them to stop. 2-SER-314-315. Kaili feared that he was going to die. 1-SER-192.

Pinkney took an active part in the assault. While Kaili was pinned face-down on the pavement, Pinkney delivered several knee strikes and punched Kaili continuously for approximately six seconds. 1-SER-78, 84, 282-283; Ex. 1, at 1:30-1:32; Ex. 1-E, at :02-:04, :19-:26. Pinkney also helped to hold down Kaili (2-

ER-179), while Tagaloa kicked and punched Kaili's face (1-SER-81-82, 284-285; Ex. 1 at 1:52-1:54, 2:14-2:16; Exs. 1-B, 1-C, 1-D, 2-C, 2-D, 2-E), threw a series of "hammer fists"—a closed fist brought downward—onto the back of Kaili's head, knocking his head into the asphalt (1-SER-83, 282; Ex. 1 at 2:48-2:52; Exs. 1-E, 2-F), and struck Kaili multiple times in the spine with his forearm (1-SER-280-281; 2-SER-390-394, 488-491). Pinkney did nothing to stop anyone else's uses of force on Kaili. 1-SER-91-92; *see generally* Ex. 1.

3. Kaili suffers serious injury.

By the time the ACOs picked Kaili back up and began to exit the rec yard, his face was swollen and wet with his own blood, which also stained his prison uniform. 1-SER-86, 88. A pool of his blood "the size of a pizza" remained on the ground. 1-SER-57-58.

A medical examination conducted several hours later revealed that Kaili had "apparent facial trauma." 1-SER-165. After a CT scan of his head, doctors determined that both Kaili's jaw and the bone of his right eye socket were broken. 1-SER-170-172. Those broken bones, in turn, pushed some of the fat cells surrounding Kaili's eye into his sinuses. 1-SER-172. Kaili also had new nasal fractures. 1-SER-176-177. The physician referred him to an oral surgeon, and Kaili had to have his jaw wired shut for somewhere between four and six weeks. 1-SER-179, 195.

4. Pinkney conspires with his fellow ACOs to cover up their uses of excessive force.

All ACOs are required to submit incident reports whenever they are involved in an incident with an inmate. 1-SER-255, 270. They likewise must complete use-of-force reports documenting any force used. 1-SER-95. Pinkney, Tagaloa, and DeMattos were required to complete both incident and use-of-force reports after their assault on Kaili. 1-SER-95-96. Those reports then had to be submitted to their supervisor on that shift: Taum. 1-SER-98.

Hawaii Department of Public Safety (DPS) policy required ACOs to complete incident and use-of-force reports by themselves to avoid one ACO's views tainting another's report. 1-SER-272. However, Pinkney, Tagaloa, and DeMattos decided to fill out their reports together. 1-SER-94-96, 250-251. Their purpose was "[t]o maintain consistency throughout all of [their] reports so that no red flags [we]re raised" and "to not implicate anybody so [they] wouldn't get in trouble." 1-SER-96, 162. To accomplish this purpose, Pinkney, Tagaloa, and DeMattos spoke with one another about the content of their reports and reviewed one another's reports. 1-SER-97, 109; *see* 1-SER-251.

Pinkney, Tagaloa, and DeMattos agreed to and did omit almost any mention of their strikes on Kaili, even where the forms requested specifics regarding the force used during the incident; instead, all three employed vague and misleading language about the events in the rec yard and the fact that they had used force after

taking Kaili down. 1-SER-97, 101-107, 162, 224-228, 230-236; 2-SER-514-519. Instead of stating that Taum had ordered some of the force used against Kaili, they explained that any force used was "[r]eactive." 1-SER-105, 162, 234; 2-SER-514, 516, 518. They also agreed to and did state, falsely, that Kaili was "aggressive" to justify both Tagaloa's initial takedown and any ensuing use of force. 1-SER-100-101, 227; 2-SER-514, 516, 518.

At the end of their shift, Taum collected everyone's incident and use-of-force reports. 1-SER-98, 100, 117. He signed off on Pinkney's, Tagaloa's, and DeMattos's reports (2-SER-412, 414, 416, 518-519), even though he knew at the time that the ACOs' reports had omitted any detail about or justification for any of their uses of force after taking down Kaili (2-SER-410-418).

At least some of the ACOs believed that omitting their uses of excessive force on their reports would put an end to the matter. 1-SER-96-97, 108. They knew that the HCCC security system had a surveillance camera capturing the rec yard, but they mistakenly believed that it was a "live feed" without recording capability. 1-SER-110-111. However, Taum knew that the camera made recordings. Within a day or two of the assault, Taum reviewed the video of the incident. 2-SER-377. Taum thought the assault "looked like a Rodney King beating." 2-SER-377.

A week after the assault, HCCC's warden ordered an internal investigation into Pinkney and his fellow ACOs' conduct. 2-SER-382, 513. Just before midnight that night, Taum returned to the control room and recorded the surveillance video with his phone. 1-SER-210-211, 244-245; 2-SER-407, 523.

After Taum had recorded the security footage of the assault, he invited Pinkney, Tagaloa, and DeMattos to his house for a series of meetings, joined at least once by fellow ACOs Fred Tibayan, Andy Ahuna-Alofaituli, and Kyle Fernandez-Wise. 1-SER-118-121; 2-SER-332-333, 337-349, 385-387. In these meetings, Taum played the footage and coached the ACOs on how they could explain away or attempt to justify each of their actions. 1-SER-119-120, 127-136; 2-SER-338-341. Taum suggested that the other ACOs give investigators several excuses for their illegal strikes, all of which were false. 1-SER-136; 2-SER-341. Pinkney surreptitiously recorded a short portion of the first of these coaching sessions. 1-SER-124-126; Ex. 29-E.

5. The co-conspirators repeatedly make false statements to investigators.

The first of Taum's coaching sessions occurred the day before the ACOs had to complete and submit investigative questionnaires as part of the internal investigation. 1-SER-120, 241. DeMattos answered his questionnaire falsely, in keeping with Taum's coaching. 1-SER-137-138, 145-154.

After handing in their questionnaires, Pinkney, Tagaloa, DeMattos, and Taum faced disciplinary hearings before DPS personnel, which lasted through the remainder of 2015 and 2016. 1-SER-139; 2-SER-388. They answered questions in these hearings while under oath. 1-SER-204. However, they continued to tell the same lies that they had included in their prior reports and questionnaires. Tagaloa, for instance, asserted that he had not struck Kaili in the face or head, despite video evidence to the contrary. 1-SER-216-220. And the "majority of the statements" that DeMattos made to DPS were "untrue." 1-SER-151, 157-158.

Other ACOs also lied about what happened. Two weeks before their final termination hearing, Alofaituli texted Pinkney, Tagaloa, and DeMattos that he "will involve myself to try and help you guys" and that he "will testify to any means needed." 2-SER-330. Alofaituli also organized a meeting at his house before the termination hearing, which Pinkney and Tagaloa attended, to form a strategy to prevent their firing. 2-SER-331-332. To provide an alternative explanation for Kaili's injuries, Alofaituli, Tibayan, and Fernandez-Wise testified falsely at the termination hearing that they had all seen Kaili jump either from or onto a bunk and hurt his face in the cell in which he was placed after the assault. 1-SER-259-261; 2-SER-327-329, 334-336. Ultimately, Pinkney, Tagaloa, DeMattos, and Taum all were fired. 1-SER-204.

B. Procedural Background

1. In 2020, a federal grand jury returned an indictment charging Pinkney with deprivation of rights under color of law, in violation of 18 U.S.C. 242 and 2; conspiracy to obstruct justice, in violation of 18 U.S.C. 371; and obstruction by false report, in violation of 18 U.S.C. 1519. 2-ER-225-233. The indictment made similar allegations against Tagaloa and Taum. 2-ER-227-234. DeMattos was charged separately by information and pleaded guilty to the same three crimes (2-SER-492-512), while Pinkney was tried before a jury along with Tagaloa and Taum.

2. One month after being indicted, Pinkney "demand[ed]" his counsel move to dismiss his indictment and to have a separate trial from his co-defendants "because he does not feel that he can have a fair trial with the other two defendants present." 2-SER-484-485. He did not explain why he thought a joint trial would be unfair. 2-SER-485. At a hearing the next month, Pinkney asked "permission to have that" motion "denied without prejudice as he may seek in the future to file a motion to dismiss." 1-SER-7-8. The court granted the request and denied Pinkney's severance motion without prejudice. 1-SER-8.

In April 2022, Pinkney filed a second motion for severance. 2-SER-480-481. Pinkney stated that he believed that he and his co-defendants had "potential antagonistic defense strategies" because he "intend[ed] to call co-defendants to

testify in his case," and that he "wishe[d] to have a separate trial, because he does not feel that he can have a fair trial with the other two defendants present." 2-SER-481. Pinkney later stated that he sought to call Tagaloa and Taum to testify about statements they made to the Hawaii Labor Relations Board and Hawaii Employment Security Appeals Referees' Office about the extent of Pinkney's violent acts. 2-SER-477-479.

The district court denied Pinkney's motion. 1-ER-71-72. It held that Pinkney asserted the existence of antagonistic defenses "without providing any basis." 1-ER-74. The court also agreed with the government that no "clear prejudice" would result from a joint trial because Pinkney could not call his co-defendants at a trial, whether joint or severed, as long as they maintained their Fifth Amendment rights not to testify. 1-ER-74. Pinkney did not move for severance again before or during trial.

3. Before trial, Pinkney and his co-defendants filed a motion in limine seeking to prevent the government from entering into evidence a questionnaire that Tagaloa completed as part of DPS's internal investigation into the assault on Kaili. 2-ER-253; 2-SER-473-474. They argued that admitting the questionnaire would violate Tagaloa's rights under *Garrity v. New Jersey*, 385 U.S. 493 (1967), despite his later waiver of those rights. 2-ER-253, 258; 2-SER-469-474. The government responded that Tagaloa had voluntarily waived his *Garrity* rights when he spoke to

the FBI nearly five years after completing the questionnaire and more than three years after he left DPS. 2-ER-259; 2-SER-458-468. The government sought to introduce the questionnaire into evidence because Tagaloa's false statements in the questionnaire were charged as one of the overt acts committed in furtherance of the conspiracy. 2-ER-230. The court granted defendants' motion. 2-ER-260; 2-SER-450-457.

The government moved to reconsider the court's decision. 2-ER-260; 2-SER-441-449. After multiple discussions during trial, the court heard arguments on the issue the morning of June 27, 2023. 1-ER-44-46; 2-ER-262. Tagaloa's attorney expressly dropped any objection to admitting the questionnaire except to request an evidentiary hearing outside the jury's presence to establish the voluntariness of Tagaloa's waiver during his FBI interview. 1-ER-44-45; *see* 1-ER-26-27. Pinkney's counsel raised no objection to admitting the questionnaire. 1-ER-46. The court denied Tagaloa's request for a hearing, holding based on an FBI recording of the interview that the government had submitted to the court that Tagaloa's waiver was knowing, voluntary, and intelligent. 1-ER-45-46; *see* 1-ER-27; *see also* 2-SER-468 (stating in Tagaloa's signed consent form that he "fully understand[s]" that his statements "could be considered as having been given under administrative compulsion and therefore could not be used against [him] in any criminal investigation or proceeding," but that he now "knowingly, intelligently,

and voluntarily waive[s] [his] constitutional and statutory right not to have those statements used against [him]"). The court admitted the questionnaire into evidence as Exhibit 23. 1-ER-49-50.

Later that same day, the court issued a written decision reversing its admission of the questionnaire. 2-SER-437-440. Relying entirely on *United States v. Goodpaster*, 65 F. Supp. 3d 1016 (D. Or. 2014), a district court decision that did not involve a post-employment waiver of *Garrity* rights, the court determined that, because Tagaloa's initial questionnaire responses were subject to *Garrity* protection when made, "the subsequent execution of the FBI's Consent Form cannot change that protection," notwithstanding the voluntariness of his waiver. 2-SER-438-440; *see* 1-ER-25, 28-30 (explaining this reasoning in court the following morning).

The next morning, the court proposed un-admitting Exhibit 23 and issuing a curative instruction to the jury. 1-ER-25-26. The government asked that it be allowed to introduce a redacted version of Exhibit 23, with only Tagaloa's name and the date remaining, to help establish the timeline of the overt acts supporting the conspiracy. 1-ER-30-31. Defense counsel did not object to either proposal. 1-ER-31-33. Later that afternoon, the court admitted the government's redacted exhibit without objection. 1-ER-34.

The following day, the court addressed the timing of a curative instruction with the parties; it agreed with the government's request to wait to see if Tagaloa testified and whether his testimony opened the door to discussion of otherwise-protected statements. 2-SER-294-295. Again, no defense attorney objected. 2-SER-295, 354-355. After Tagaloa informed the court on July 5 that he would not testify (2-SER-362-364), the court issued a curative instruction to the jury, admonishing the jurors that they "must not consider Exhibit 23" and that "[i]t must be treated as if [they] ha[ve] no knowledge about it" (2-SER-372). No defendant objected to the adequacy or timing of this instruction. 2-SER-369, 372.

4. The jury found Pinkney, Tagaloa, and Taum guilty of one count each of deprivation of rights under color of law, conspiracy to obstruct justice, and obstruction by false report. 2-ER-268-269. The court sentenced Pinkney to 60 months' imprisonment on each count, to be served concurrently. 1-ER-4.

SUMMARY OF ARGUMENT

This Court should affirm Pinkney's convictions.

1. This Court should reject Pinkney's argument that the district court improperly admitted (before later un-admitting) Tagaloa's completed internal investigative questionnaire, in violation of *Garrity v. New Jersey*, 385 U.S. 493 (1967). Pinkney lacks standing to make that argument because he has no *Garrity* rights with respect to his co-defendant's questionnaire responses. Even if Pinkney

could challenge the admissibility of Tagaloa's responses under *Garrity*, Pinkney waived that argument when he abandoned his objection before the district court. Regardless, any *Garrity* argument would fail under plain error review. Tagaloa validly waived his rights in an interview with the FBI, an entity that could not impose the employment-related coercive pressure that underlies *Garrity*'s prophylactic rule. And that waiver occurred years after his employment with DPS, and thus DPS's own coercive pressure, had ceased. *See United States v. Smith*, 821 F.3d 1293, 1304 (11th Cir. 2016). Moreover, the court issued a sufficient curative instruction, and the questionnaire played a minimal role at trial.

2. This Court also should reject Pinkney's severance claim because Pinkney waived that claim when he failed to renew his motion to sever at the close of evidence. And this Court should not excuse that waiver, as Pinkney cannot show that he diligently pursued severance on the grounds that he now raises or that seeking severance on those grounds at trial would have been futile. In any event, Pinkney's severance claim would fail under plain error review because his primary argument on appeal—that his trial rights were violated by the district court's temporary admission of Tagaloa's internal investigation questionnaire responses—lacks merit for many of the same reasons that Pinkney's *Garrity* claim fails. Moreover, the court's failure to sever did not affect Pinkney's substantial rights, since Tagaloa's responses (and other statements that Pinkney suggests violated his

trial rights) could have been admitted or made in a severed trial, and the court's instructions to the jury reduced any possibility of prejudice.

ARGUMENT

I. Pinkney cannot challenge the admissibility of Tagaloa's statements under *Garrity* and, even if he could, any *Garrity* argument fails under plain error review.

Pinkney asserts (Br. 28-35) that his convictions must be reversed because the district court temporarily admitted Tagaloa's completed investigative questionnaire into evidence (before reversing itself), in violation of *Garrity v. New Jersey*, 385 U.S. 493 (1967).[2] *Garrity* prohibits government employers from requiring information that may incriminate an employee upon threat of termination or similarly severe employment consequences, unless that information is immunized from future use in criminal proceedings. *See United States v. Wells*, 55 F.4th 784, 792 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 2682 (2023). This Court should decline to review this issue because Pinkney lacks standing to assert a *Garrity* claim based on Tagaloa's right against self-incrimination. Even if Pinkney had standing to assert such a claim, Pinkney waived any argument under *Garrity* because he withdrew his *Garrity* objection during trial. At the very least, because

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[2] As the district court was correct to admit the completed questionnaire in the first instance, it erred when it later reversed itself and un-admitted it. However, this Court need not decide whether the later reversal was error to affirm the initial admission on plain error review.

he failed to preserve throughout trial the argument that he now makes on appeal, his argument is subject to plain error review. But the district court did not err, much less plainly, by initially admitting the questionnaire; and, even assuming error, any error did not prejudice Pinkney.

A. Pinkney lacks standing to challenge the admissibility of Tagaloa's questionnaire responses because those responses did not implicate Pinkney's Fifth Amendment rights.

Pinkney lacks standing to bring a *Garrity* claim because he has no *Garrity* rights to assert with respect to Tagaloa's questionnaire. "[T]he right to resist compelled self-incrimination is a 'personal privilege,'" *In re Twelve Grand Jury Subpoenas*, 908 F.3d 525, 528 (9th Cir. 2018) (citation omitted), that "applies only to compulsion of the individual holding the privilege," *United States v. Blackman*, 72 F.3d 1418, 1426 (9th Cir. 1995). As this Court has repeatedly stated, a defendant "has no standing to assert the . . . Fifth Amendment rights of others," *United States v. Ward*, 989 F.2d 1015, 1020 (9th Cir. 1992), let alone to claim those rights as their own.[3]

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[3] *See, e.g.*, *United States v. Smith*, No. 21-55714, 2022 WL 2188393, at *1 (9th Cir. June 17, 2022) (self-incrimination); *United States v. Howell*, 470 F.2d 1064, 1066-1067 (9th Cir. 1972) (same); *Bowman v. United States*, 350 F.2d 913, 916 (9th Cir. 1965) (same); *United States v. Sorensen*, 307 F. App'x 52, 53 (9th Cir. 2009) (*Miranda* rights); *United States v. Pruitt*, 464 F.2d 494, 495 (9th Cir. 1972) (same).

Tagaloa's completed questionnaire, submitted to DPS investigators, does not implicate Pinkney's Fifth Amendment rights. The questionnaire responses were Tagaloa's statements, not Pinkney's, and Tagaloa's *Garrity* rights regarding those responses belonged to him alone. *See Blackman*, 72 F.3d at 1426. His questionnaire's admission into evidence placed Pinkney "under no compulsion to 'affirm the truth of the content of the document[].'" *Matter of Fischel*, 557 F.2d 209, 213 (9th Cir. 1977) (citation and internal quotation marks omitted). Because Pinkney has no *Garrity* rights regarding Tagaloa's questionnaire responses, his *Garrity* claim fails at the outset.

That Pinkney was charged and convicted of conspiring with Tagaloa does not change the calculus. *Contra* Br. 35. "Coconspirators and codefendants have been accorded no special standing" to assert claims flowing from others' alleged constitutional harms. *Alderman v. United States*, 394 U.S. 165, 172 (1969). Whatever constitutional "interests" one co-conspirator may have, "the conspiracy itself neither adds to nor detracts from them." *United States v. Padilla*, 508 U.S. 77, 82 (1993) (per curiam); *see ibid*. (rejecting this circuit's "coconspirator exception" to Fourth Amendment standing doctrine as "contrary to the holding of *Alderman*").

B. Pinkney waived any *Garrity* argument.

Even if Pinkney had standing to assert a *Garrity* challenge to the admissibility of Tagaloa's questionnaire responses, Pinkney waived that objection during trial, and he cannot revive it now. When a defendant waives an argument in the district court, that "waiver precludes appellate review altogether." *United States v. Depue*, 912 F.3d 1227, 1232 (9th Cir. 2019) (en banc). Constitutional arguments, like any other argument, can be waived. *See United States v. Knight*, 56 F.4th 1231, 1236 (9th Cir.) (holding that Fifth and Sixth Amendment rights are waivable), *cert. denied*, 143 S. Ct. 2478 (2023). Waiver requires "the 'intentional relinquishment or abandonment of a known right.'" *Ibid.* (citation omitted). This Court "review[s] the adequacy of a criminal defendant's waiver of constitutional rights de novo." *Ibid.*

Pinkney plainly was aware of the *Garrity* issue: His counsel had moved jointly with his co-defendants' counsel to keep Tagaloa's investigative questionnaire, among other documents, out of evidence because their introduction allegedly would violate *Garrity*. 2-ER-253; 2-SER-469-472. The court initially granted his motion. 2-SER-452-453. So when the government moved for reconsideration and the parties first discussed that motion on June 24, 2022, Pinkney knew that he could continue making his *Garrity* arguments. *See* 1-SER-196-199.

Yet instead of maintaining a *Garrity* objection during the parties' mid-trial argument on the issue on June 27, 2022, Pinkney's counsel sat by without protest as Tagaloa's counsel intentionally narrowed defendants' focus to the voluntariness of Tagaloa's waiver to the FBI. Tagaloa's counsel stated that a voluntariness hearing "should be sufficient" to allay any concerns. 1-ER-44-45. And—apparently on behalf of all three defendants—he expressly dropped any other objection under *Garrity* to the questionnaire's admission:

> [O]ur understanding is that this -- that the only information that they are asking to allow us not to challenge the *Garrity* issue is the internal affairs question and answer form and that was handed out by Lieutenant Cravalho and answered by my client. We have no problem with that.

1-ER-44. The court then asked whether "everybody said what they want to say with regard to Mr. Tagaloa's *Garrity* issue," and Pinkney's counsel did not speak or object. 1-ER-46. When the government offered the questionnaire into evidence as Exhibit 23 later that day, Tagaloa's counsel again consented, stating: "I think we kind of agreed that these are relevant [and that] they should be brought into evidence, so we have no objection to these pieces of evidence to be introduced for the jury." 1-SER-223. Pinkney's counsel, after hearing Tagaloa's counsel's explanation, stated that he, too, had no objection. 1-SER-223.

Pinkney thus "'considered the controlling law, . . . and, in spite of being aware of the applicable law,' relinquished his right." *Depue*, 912 F.3d at 1233

(citation omitted; alteration in original). Because he validly waived his *Garrity* argument—and because he does not challenge (Br. 28-35) on appeal the voluntariness of Tagaloa's waiver to the FBI, the sole issue the defendants preserved below—Pinkney cannot challenge the introduction of Tagaloa's questionnaire responses. *See, e.g.*, *United States v. Wells*, 719 F. App'x 587, 588 n.1 (9th Cir. 2017) (refusing to address *Garrity* claim not raised below); *United States v. Romos-Gonzales*, 542 F. App'x 582, 583 (9th Cir. 2013) (declining to address issue of *Miranda* waiver's voluntariness not raised below).[4]

C. There is no reversible plain error.

Even if Pinkney had standing to assert a *Garrity* claim, and even if he did not knowingly waive that claim, Pinkney did not object "when the court ruling or order [was] made or sought," *Puckett v. United States*, 556 U.S. 129, 135 (2009) (citation omitted), either during the mid-trial arguments over admission of the investigative questionnaire or when the government moved it into evidence (1-ER-44-46, 49). Thus, his *Garrity* argument is at best subject to plain error review. *See, e.g.*, *United States v. Castellanos*, 524 F. App'x 360, 361 (9th Cir. 2013)

[4] That *Garrity* rights are "self-executing" and can be "claimed after the fact" (Br. 33 (citation omitted)) does not excuse defendants who fail to claim those rights before the district court—much less defendants who knowingly waive those rights. *See, e.g.*, *Wells*, 719 F. App'x at 588 n.1 ("declin[ing] to address" *Garrity* argument "raised for the first time on appeal").

(subjecting to plain error review forfeited claim that *Miranda* waiver was involuntary); *United States v. Mejia*, 559 F.3d 1113, 1117 (9th Cir. 2009) (analyzing adequacy of *Miranda* warning under plain error standard).

"Under the familiar plain error review test, [a defendant] must establish the following three prongs to be eligible for relief: '(1) error, (2) that is plain, and (3) that affects substantial rights.'" *United States v. Hougen*, 76 F.4th 805, 810 (9th Cir. 2023) (citation omitted), *petition for cert. pending*, No. 23-6665 (filed Feb. 1, 2024).[5] Then, "[u]nder the fourth prong of plain error review," this Court has "the '*discretion* to grant relief,' but only if [Pinkney] can demonstrate that the error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* at 810-811 (citation omitted). Pinkney meets none of the requirements for relief under the plain error test.

1. The court did not err, much less plainly err, when it allowed Tagaloa's investigative questionnaire into evidence because Tagaloa validly waived his *Garrity* rights in 2020.

The district court properly allowed Tagaloa's completed investigative questionnaire into evidence, even though it later reversed itself. The government consistently has treated Tagaloa's statements as *Garrity*-compelled because they were made to internal DPS investigators on pain of termination. 1-ER-29.

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[5] It is only on de novo review, and not under plain error review, that the government bears the burden of proof. *Contra* Br. 32.

However, Tagaloa later voluntarily waived those protections, under circumstances that lacked the administrative compulsion against which *Garrity* protects.

a. The Supreme Court's *Garrity* doctrine is a prophylactic, intended to protect the Fifth Amendment's right against self-incrimination. *See, e.g.*, *Chavez v. Martinez*, 538 U.S. 760, 768 n.2 (2003) (plurality opinion). "The principle" underlying *Garrity* "is that a witness need not expressly invoke the privilege where some form of official compulsion denies him a free choice to admit, to deny, or to refuse to answer." *Salinas v. Texas*, 570 U.S. 178, 185 (2013) (plurality opinion) (citation and internal quotation marks omitted).

However, the right against self-incrimination is an individual right that can be knowingly and voluntarily waived. *See Colorado v. Spring*, 479 U.S. 564, 573 (1987); *Knight*, 56 F.4th at 1236-1237; *United States v. Swacker*, 628 F.2d 1250, 1252-1253 (9th Cir. 1980). "*Garrity* protections—which derive from the Fifth Amendment—are no exception to this general rule." *United States v. Smith*, 821 F.3d 1293, 1304 (11th Cir. 2016). Hence, when the compulsive conditions that give rise to *Garrity* protections do not exist—either when the person who gave the incriminating statements is later questioned by someone who lacks employment-based coercive power, or when the person has left government employment and so can no longer be threatened with severe employment-related disciplinary consequences for refusing to provide testimony—that person can choose to waive

his existing *Garrity* rights and make *Garrity*-protected statements available to investigators. *See ibid.*; *cf. Oregon v. Elstad*, 470 U.S. 298, 310-311 (1985) (holding same for *Miranda* rights).

While neither the Supreme Court nor this Court has addressed this question in the *Garrity* context, the one circuit that has done so has held that *Garrity* rights can be waived. The Eleventh Circuit in *United States v. Smith* confronted facts similar to those here: A state prison guard made *Garrity*-protected statements to internal investigators who were investigating him for fighting with another guard and seeking to cover up his misconduct. 821 F.3d at 1297-1298. The FBI later investigated the same incident after the guard had been fired, and the FBI presented and explained to him a consent form nearly identical to that used in this case. *Compare id.* at 1300, *with* 2-SER-468. The former guard signed the form, waiving his *Garrity* rights, and agreed to hand over his prior *Garrity*-protected statements from the internal state investigation. *Smith*, 821 F.3d at 1299-1300.

The Eleventh Circuit upheld the waiver. It held that "a state employee can, after he has been fired, waive his *Garrity* rights and allow his prior compelled and protected statements to be used by the federal government in a criminal investigation," at least "as long as the employee's waiver is voluntary, knowing, and intelligent." *Smith*, 821 F.3d at 1296. And it found that, "[b]y signing the consent form, Mr. Smith" validly waived his *Garrity* rights. *Id.* at 1305; *see also*

United States ex rel. Wojtycha v. Hopkins, 517 F.2d 420, 425 (3d Cir. 1975) (finding "no constitutional defect" where defendant initially refused to testify before grand jury for fear of losing his job but later "stated on the record that he would testify voluntarily and executed a waiver of rights").

Likewise, here, Tagaloa validly waived his *Garrity* rights. His employment at HCCC had ended more than three years before the FBI met with him, and the FBI would have had no coercive power over his employment even if he had still worked at HCCC. 1-SER-204; 2-SER-468. He therefore freely waived his *Garrity* rights and offered his prior statements to federal investigators. *See Smith*, 821 F.3d at 1296. The district court properly found, based on the audio recording the FBI took of the non-custodial interview in which Tagaloa signed the consent form, that his waiver was knowing, voluntary, and intelligent. 1-ER-27, 46. And Pinkney does not challenge the voluntariness of Tagaloa's waiver on appeal. Br. 28-35; *see United States v. Saelee*, 51 F.4th 327, 339 n.3 (9th Cir. 2022). The court therefore did not err in admitting the questionnaire responses into evidence.[6] Its only error was in later reversing its ruling.

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[6] When defendants preserve *Garrity* arguments, this Court reviews the district court's underlying legal conclusions de novo and its factual findings for clear error. *Wells*, 55 F.4th at 791. For the reasons outlined herein, Pinkney's claim would fail under this standard, as well.

b. Even if the district court had committed an error, any error was not *plain*. There cannot be "plain error when the Supreme Court and this court have not spoken on the subject, and the authority in other circuits is split." *United States v. Thompson*, 82 F.3d 849, 855 (9th Cir. 1996) (citation omitted). Here, there is not even a circuit split—the only court of appeals to reach the issue has held that former employees *can* waive their *Garrity* rights. *See Smith*, 821 F.3d at 1296. By contrast, the government is not aware of any other federal court that has ruled that *Garrity* rights *cannot* be waived. Because of "the lack of controlling authority, and the fact that there is at least some room for doubt about the outcome of this issue" given the Eleventh Circuit's decision in *Smith*, this Court "cannot brand the court's failure to exclude the evidence plain error." *Thompson*, 82 F.3d at 856 (internal quotation marks omitted); *see United States v. Ghanem*, 993 F.3d 1113, 1131 (9th Cir. 2021).

2. Any supposed error from the initial admission of Tagaloa's investigative questionnaire did not affect Pinkney's substantial rights.

Pinkney's *Garrity* claim also fails because any assumed error was harmless. "To establish prejudice under the plain-error test, [Pinkney] must show 'that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding.'" *United States v. Ramirez-Ramirez*, 45 F.4th 1103, 1110 (9th Cir. 2022) (citation omitted). Pinkney cannot show this.

a. The district court gave an instruction sufficient to cure any possible error.

First, the district court ameliorated any potential harm from the investigative questionnaire by issuing a curative instruction to the jury before trial ended. It informed the jury that it "ha[d] made a legal ruling" and instructed the jury that it "must not consider Exhibit 23, which is Mr. Tagaloa's responses to the internal affairs questionnaire," nor "consider any testimony about his responses." 1-ER-17. "It must be treated," the court said, "as if you had no knowledge about it." 1-ER-17. Pinkney asserts (Br. 34 n.14) without more that this instruction could not "remedy the Constitutional Violation of his *Garrity* Rights." But "[t]he jury is *presumed* to have followed that instruction, and there is" no "basis for concluding that the jury may have failed to do so here." *Saelee*, 51 F.4th at 345 (emphasis added; citation omitted). Nor were Tagaloa's questionnaire responses "so inherently and overwhelmingly incriminating that a jury could not be expected to follow an explicit instruction directing them to disregard" them. *Ibid.* Particularly since the government made little use of the questionnaire before the court reversed its admission of the document into evidence. *See* p. 29, *infra*.

Pinkney also takes issue (Br. 32-34, 40 n.16) with the court's delay in instructing the jury, but it had a perfectly legitimate reason for doing so: Tagaloa still reserved his right to testify, and any testimony about the questionnaire responses on direct examination could open the door to cross-examination. 2-

SER-294-295; *United States v. Black*, 767 F.2d 1334, 1341 (9th Cir. 1985). It is therefore unsurprising that no defense attorney objected to the court's decision to wait until Tagaloa testified, or decided not to, before issuing the instruction. *See* 2-SER-295, 354-355. As soon as it became clear that Taum would be the only defendant to testify, the court determined that it would provide the curative instruction before the close of Tagaloa's case. 2-SER-363-369. It provided the instruction moments later. 2-SER-372.

b. Tagaloa's investigative questionnaire was not material to the jury's verdict.

Introduction of the questionnaire did not affect Pinkney's substantial rights for another reason: It was not material to the jury's verdict on the conspiracy count. Pinkney "does not argue that . . . there would have been any difference in the court's finding of guilt" had the questionnaire never been entered into evidence, "nor is there any evidence in the record to support such a conclusion." *Ramirez-Ramirez*, 45 F.4th at 1110.

For one thing, Tagaloa's questionnaire responses were consistent with other statements that Pinkney does not challenge on appeal, including those in the defendants' incident and use-of-force reports and those made during their DPS hearings. *See* 1-ER-50-54; 1-SER-216-220. The government also introduced ample testimony and video evidence to demonstrate that Pinkney participated in a conspiracy to obstruct justice. *See* Ex. 29-E; pp. 6-9, *supra*. This other evidence

"was powerfully incriminating." *United States v. Lopez*, 500 F.3d 840, 846 (9th Cir. 2007). The questionnaire's brief introduction into evidence does not meaningfully change the facts from which the jury reached its verdict.

Nor could the questionnaire's admission have prejudiced Pinkney. The government asked its witness about Tagaloa's answers to only two of the questions on his questionnaire (1-ER-55-56), and the court ordered the jury to disregard the witness's answers about one of them (1-ER-56). Before the jury could view the other questionnaire responses for itself during deliberations, the court withdrew the document from evidence and replaced it with a redacted version showing only Tagaloa's signature and the date. 1-ER-34. The jury thus never saw the remainder of the questionnaire.

Finally, the jury required less than three hours to reach its verdicts on six different counts involving three defendants. 2-ER-268. The jury's alacrity likewise "suggest[s] that any error in allowing" the questionnaire responses into evidence "was harmless." *Lopez*, 500 F.3d at 846.[7]

[7] For similar reasons, even had Pinkney preserved his *Garrity* challenge, any error was "harmless 'beyond a reasonable doubt.'" *Neder v. United States*, 527 U.S. 1, 7 (1999) (citation omitted); *see Ramirez-Ramirez*, 45 F.4th at 1109.

3. Pinkney does not warrant discretionary relief.

The Court also should not exercise its discretion to grant relief under plain error's fourth prong. Pinkney does not indicate any way in which the questionnaire's brief admittance into evidence prejudiced his case. *See* Br. 28-35. By contrast, reversal would require duplicating a ten-day, ten-witness trial—a "substantial" cost to the parties, witnesses, and the court. *Hougen*, 76 F.4th at 812. It also would require retrial of an incident that took place more than eight years ago, "with memories of the underlying incident fading." *Ibid.* And because Pinkney's counsel dropped his *Garrity* objection at trial, reversing Pinkney's convictions now would provide "precisely the kind of 'windfall for the defendant' that the Supreme Court has cautioned is 'not in the public interest.'" *Ibid.* (citation omitted).[8]

II. Pinkney waived his severance argument, which nonetheless fails under plain error review.

Pinkney also argues (Br. 36-44), on grounds not raised below, that the district court should have severed his trial from his co-defendants'. He now asserts

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[8] Pinkney's *Garrity* arguments cannot affect his convictions under 18 U.S.C. 242 and 18 U.S.C. 1519. *Contra* Br. 35 n.15. As Pinkney admits, his argument is only "related to Count 3," his conspiracy conviction. *Ibid.* Tagaloa's investigative questionnaire responses post-date, and are irrelevant to, the assault on Kaili for which Pinkney was convicted of excessive force. And Pinkney's obstruction charge was based solely on his use-of-force report. 2-ER-232-233.

(*ibid.*) that severance was needed to avoid prejudice resulting from admission of Tagaloa's investigative questionnaire responses, and from certain statements government counsel made during opening and closing arguments. But Pinkney has waived his severance argument because he failed to renew his motion to sever at the close of evidence. Even absent waiver, Pinkney cannot show under plain error review that the court erred in holding a joint trial, as doing so did not violate Pinkney's trial rights or prevent the jury from making a reliable finding of guilt or innocence. Nor can Pinkney prove that holding a joint trial affected his substantial rights. This Court should reject his challenge.

A. Pinkney waived his argument for severance.

"[I]t is well settled that the motion to sever 'must be renewed at the close of evidence or it is waived.'" *United States v. Singh*, 979 F.3d 697, 732 (9th Cir. 2020) (citation omitted); *see* Br. 42 (recognizing this rule). The motion-renewal requirement "enable[s] the trial court to assess more accurately whether a joinder is prejudicial at a time when the evidence is fully developed," *United States v. Decoud*, 456 F.3d 996, 1008 (9th Cir. 2006) (citation omitted), and prevents defendants from sandbagging, *United States v. Free*, 841 F.2d 321, 324 (9th Cir. 1988). As Pinkney implicitly concedes (Br. 42), he did not renew his severance motions at the close of evidence. *See* 2-SER-296-302 (close of government's evidence); 2-SER-418-422 (close of defense evidence). He therefore "waived [his]

appeal" of the severance issue. *United States v. Soto-Barraza*, 799 F. App'x 456, 458 (9th Cir. 2020).

Pinkney cannot be excused from the waiver rule. *Contra* Br. 42-43. This Court excuses waiver in this context only when a defendant can show "that he diligently pursued severance" on any of the bases raised on appeal "or that renewing the motion would have been an unnecessary formality." *United States v. Sullivan*, 522 F.3d 967, 981 (9th Cir. 2008) (citation omitted). Pinkney can show neither.

Pinkney attempts to illustrate diligence by pointing to his two pretrial severance motions. Br. 42-43. But he himself asked the court to deny his first motion. 1-SER-7-8. And his second motion raised issues that Pinkney has abandoned on appeal. 2-SER-481.[9] Pinkney does point to a statement from his

[9] Pinkney argued in his second severance motion that he and the other defendants would have antagonistic defense strategies and that he would want to call his co-defendants to testify on his behalf. 2-SER-477-479, 481. Pinkney makes neither argument on appeal (Br. 36-44) and so has forfeited both, *United States v. Saelee*, 51 F.4th 327, 339 n.3 (9th Cir. 2022). Nor would either argument succeed. Viewing his motion at "the time of denial," *United States v. Kaplan*, 554 F.2d 958, 966 (9th Cir. 1977), Pinkney did not provide any evidence to show that the "co-defendants [sought] to present mutually exclusive defenses, such that severance is a prerequisite to the defendants' due process right to mount a defense," *United States v. Stinson*, 647 F.3d 1196, 1205 (9th Cir. 2011); *see* 1-ER-74 (rejecting motion for this reason). Nor did he provide any reason to think that his "codefendant[s] would in fact testify" at a severed trial rather than preserve their own self-incrimination rights, or that any testimony about the extent of his violent acts would be "substantially exculpatory" given that Pinkney could violate

second motion that he did "not feel that he can have a fair trial" if tried with his co-defendants. Br. 43. Yet Pinkney gave no reason for that conclusory assertion below and did not renew it at trial. 2-SER-481. In short, neither of his requests for severance below was based on the concerns with Tagaloa's questionnaire responses that primarily drive his severance argument on appeal, even though he knew about the questionnaire and separately objected to its admission. 2-SER-481.

Pinkney also asserts that renewing his motion would have been futile because the court during trial criticized the defendants' failure to move to sever on another ground. Br. 43-44. Read in context, however, the court was not indicating that *any* renewal would have been futile. Tagaloa objected to admitting portions of his testimony from the DPS hearings, asserting that their admission could violate his co-defendants' confrontation rights under *Bruton v. United States*, 391 U.S. 123 (1968). *See* 2-ER-148-149, 156-157.[10] The court responded by noting that "if you guys thought that this was going to be a *Bruton* issue, you could have moved to sever because you knew about these statements, you knew about the various

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18 U.S.C. 242 without having used excessive force himself. *United States v. Reese*, 2 F.3d 870, 892 (9th Cir. 1993) (citation omitted); 1-ER-74 (rejecting motion for failure to show co-defendants would testify in severed trial); *see* pp. 40-41, *infra* (discussing alternative theories of liability).

[10] This argument was mistaken, as government counsel and the court both recognized. 2-ER-149, 152, 156-158. Pinkney did not object on any grounds to introducing Tagaloa's DPS statements. 2-ER-148.

hearings and so forth." 2-ER-157. Read in this context, the court's next statement—"Nobody sought to sever" (2-ER-157)—refers only to defendants' failure to seek severance based on a particular objection (under *Bruton*) to particular exhibits (the transcripts of Tagaloa's DPS interviews).

The court's statement was not indicating—as Pinkney suggests (Br. 43)—that the court wrongly believed that nobody had ever previously sought to sever for *any* reason. Nor was the court prejudging any other severance motion Pinkney might have made on other grounds. Br. 44 n.19; *see United States v. Vasquez-Velasco*, 15 F.3d 833, 845 (9th Cir. 1994) (stating that requiring defendant "to move for severance *on the same grounds* for which several of his motions had already been denied would be an 'unnecessary formality'" (emphasis added)).

Pinkney also argues (Br. 41) that severance was necessary to prevent prejudice resulting from government counsel's opening and closing statements, which Pinkney says erroneously suggested that Pinkney had kicked Kaili during the assault. But Pinkney did not object or seek to sever when those statements were made. 2-ER-80, 87, 89, 100, 111, 195. Pinkney thus cannot show either his own diligence or the futility of renewing a severance motion. *See United States v. Shults*, 730 F. App'x 421, 423 (9th Cir. 2018) (rejecting waiver exception when "defendants allege[d] that, as the trial progressed, additional facts supporting

severance emerged—yet they did not renew the motion when those facts were introduced”).

B. The district court did not plainly err by trying Pinkney with his co-defendants.

Even if this Court were to find that Pinkney did not waive his severance claim entirely or that his waiver should be excused, this Court should review the argument only for plain error because Pinkney failed to move to sever below on the grounds that he now raises on appeal. *See United States v. Hernandez-Orellana*, 539 F.3d 994, 1001 (9th Cir. 2008). Pinkney cannot meet his “heavy burden” to meet all four prongs of the plain error standard. *United States v. Hougen*, 76 F.4th 805, 810 (9th Cir. 2023) (citation omitted), *petition for cert. pending*, No. 23-6665 (filed Feb. 1, 2024).

1. The district court did not err at all, let alone plainly, “in failing to sever” his case from Tagaloa’s and Taum’s based on the grounds he now raises on appeal. *Hernandez-Orellana*, 539 F.3d at 1001. “Defendants jointly indicted ordinarily should be jointly tried,” *United States v. Mikhel*, 889 F.3d 1003, 1046 (9th Cir. 2018) (citation omitted), and a “joint trial is particularly appropriate where,” as here, “the co-defendants are charged with conspiracy,” *United States v. Barragan*, 871 F.3d 689, 701 (9th Cir. 2017) (citation omitted). “Severance is appropriate under Rule 14 ‘only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a

reliable judgment about guilt or innocence.'" *United States v. Stinson*, 647 F.3d 1196, 1205 (9th Cir. 2011) (quoting *Zafiro v. United States*, 506 U.S. 534, 539 (1993)). Pinkney shows neither.

First, the joint trial compromised none of Pinkney's trial rights. The only specific trial rights that Pinkney argues were violated stem from the court's temporary admission of Tagaloa's investigative questionnaire responses. Br. 39-41.[11] But for the reasons already discussed, Pinkney has no basis for challenging the admission of those responses, their admission complied with *Garrity* in any event, and any error was not prejudicial. *See* Part I, *supra*. Pinkney also briefly complains that the responses' admission violated his confrontation rights (Br. 40), but he did not object on this basis in the district court (1-ER-46; 1-SER-223), and makes merely a "bare assertion[] without supporting argument" on the issue in his opening brief before turning back to his *Garrity* claim, *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 335 (9th Cir. 2017); *see* Br. 40. Any Confrontation

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[11] Pinkney does not assert (Br. 41) that government counsel's statements during opening and closing arguments rose to the level of denying him due process or violated any other specific trial right. *See, e.g.*, *Runningeagle v. Ryan*, 686 F.3d 758, 781 (9th Cir. 2012).

Clause argument is thus "doubly forfeited." *Suruki v. Ocwen Loan Servicing, LLC*, 735 F. App'x 286, 288-289 (9th Cir. 2018).[12]

Second, Pinkney has provided no indication that the jury could not make a reliable judgment of guilt or innocence. Pinkney's only contention on this score (Br. 41)—that he was prejudiced by statements from the government's opening and closing statements characterizing the defendants' assault on Kaili—fails under plain error review. To begin, despite Pinkney's repeated insistence (Br. 11-13, 41), government counsel never asserted that Pinkney himself kicked Kaili. Rather, counsel spoke collectively about the defendants' actions as a shorthand, stating in opening that the "three defendants plus a fourth officer had been caught on video

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[12] Regardless, admitting the questionnaire responses complied with the Confrontation Clause. The Clause applies only to testimonial statements, and statements in furtherance of a conspiracy are, "by their nature," not testimonial. *Crawford v. Washington*, 541 U.S. 36, 56 (2004); *accord United States v. Allen*, 425 F.3d 1231, 1235 (9th Cir. 2005). Tagaloa's responses fall within this exception, as they were made during the charged conspiracy to further the conspiracy's aim of preventing investigators from recognizing that the defendants had used excessive force. Even if the statements were testimonial, the Confrontation Clause does not apply to co-conspirator statements that, as here, are introduced not to establish their truth, but rather "to establish [their] *falsity* through independent evidence," in order "to show the existence of a scheme and to prove one of the overt acts charged in the indictment." *United States v. Holmes*, 406 F.3d 337, 349 (5th Cir. 2005); *accord United States v. Stewart*, 433 F.3d 273, 291 (2d Cir. 2006). And "even if the statements complained of were improperly admitted, any error was harmless, as there was overwhelming evidence" of the conspiracy and of other overt acts in furtherance of it. *Allen*, 425 F.3d at 1235; *see* pp. 6-9, *supra*.

punching and kicking an inmate as the inmate lay on the ground" (2-ER-195), and in closing that "these defendants took turns punching and kicking" Kaili (2-ER-80). Each of the other statements to which Pinkney points likewise described the defendants' acts collectively, using the word "they" or naming all three defendants at the same time. 2-ER-87, 89, 100, 111.

Counsel also discussed or played the video clips of the assault when making some of these statements, confirming that while he was speaking collectively, his words referred only to the strikes that the videos showed each defendant making. 2-ER-80, 111. Counsel never mischaracterized Pinkney's actions, much less committed any wrong that required severance. Pinkney does not show any way in which these statements possibly could have "prevent[ed] the jury from making a reliable judgment about guilt or innocence." *Mikhel*, 889 F.3d at 1046. After all, the undisputed video evidence does show Pinkney "punching" (and delivering knee strikes to) Kaili while he was face-down on the pavement. 2-ER-80; *see* p. 4, *supra*.

2. There also was no significant likelihood of a different result had the court severed, and thus no prejudice for purposes of plain error review. *United States v. Ramirez-Ramirez*, 45 F.4th 1103, 1110 (9th Cir. 2022).

a. For reasons already discussed, Pinkney cannot show that admitting Tagaloa's responses affected Pinkney's substantial rights. *See* Part I.C.2, *supra*.

Neither did the court's failure to sever based on the admission of those responses prejudice Pinkney. Because the defendants all were involved in the assault on Kaili and were charged with conspiracy, "the evidence introduced would have been admissible against [Pinkney] in a separate trial." *United States v. Slayden*, 800 F. App'x 468, 472 (9th Cir. 2020). Nor would granting Pinkney's pretrial motion to sever on other grounds have avoided the question of Exhibit 23's admissibility. *Contra* Br. 40-41. Tagaloa's completed questionnaire would have been relevant evidence against Pinkney in a severed trial, as Tagaloa's lies on the questionnaire constituted an overt act in furtherance of the defendants' conspiracy. 2-ER-230. "A defendant normally would not be entitled to exclude the testimony of a former codefendant if the district court did sever their trials," *United States v. Throckmorton*, 87 F.3d 1069, 1072 (9th Cir. 1996) (quoting *Zafiro*, 506 U.S. at 540), and the questionnaire is no exception.

b. The government's statements about defendants' violent acts were not prejudicial to Pinkney, either. The indictment charged, and the evidence at trial proved, that Pinkney participated in both an assault and a related conspiracy with Tagaloa, DeMattos, and Taum. *See* pp. 3-9, *supra*. Hence, the government "relied on much of the same overlapping evidence" in its case against each defendant, *United States v. Ruelas*, 798 F. App'x 70, 75 (9th Cir. 2019), and government counsel occasionally spoke of their actions collectively. But the court expressly

warned the jury that the attorneys' opening and closing statements "are not evidence." 1-SER-26; 2-SER-427-428. The court also "instructed the jury to consider each defendant separately," which "reduc[es] the possibility of prejudice." *Barragan*, 871 F.3d at 701-702; 2-SER-435-436. The jury repeatedly viewed the video footage of the assault, and several witnesses testified about each defendant's acts separately, further lowering the likelihood that the jury would conflate Pinkney's actions with the others'. 1-SER-79-86, 282-286. And the jury acquitted Tagaloa on Count 2, "demonstrating its ability to compartmentalize" the evidence presented to it. *Barragan*, 871 F.3d at 702.

Moreover, any confusion that counsel's statements might have caused could not have affected Pinkney's Section 242 conviction. For one thing, though Pinkney did not kick Kaili, he did use excessive force by delivering several punches and knee strikes while Kaili was face-down on the pavement. *See* p. 4, *supra*. For another, Pinkney did not himself need to use force to violate Section 242. As the court correctly instructed the jury, aiding and abetting also qualifies if "someone else committed" a violation of Section 242 and if "a defendant aided . . . that person with respect to at least one element of" the crime, "acted with the intent to facilitate the commission of" the crime, and "acted before the crime was completed." 2-SER-431-432; *see* 18 U.S.C. 2; Instruction No. 4.1, *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit*

(2022), https://www.ce9.uscourts.gov/jury-instructions/node/851. And corrections officers violate the Eighth Amendment if they "observe[] another correctional officer using cruel and unusual punishment, ha[ve] a reasonable opportunity to intervene, and cho[o]se not to do so." 2-SER-433-434; *see United States v. Koon*, 34 F.3d 1416, 1447 n.25 (9th Cir. 1994), *aff'd in part, rev'd in part on other grounds*, 518 U.S. 81 (1996). Pinkney held Kaili down and did nothing to prevent others from using excessive force against him, rendering Pinkney liable regardless of his own violence. 2-ER-179; 1-SER-91-92; Exs. 1, 2-C, 2-D, 2-E, 2-F. The failure to sever thus did not affect Pinkney's substantial rights.[13]

3. Even if Pinkney could prove the first three plain error prongs, the Court should not exercise its discretion to reverse. *See Hougen*, 76 F.4th at 812. Pinkney barely attempts to show that the failure to sever prejudiced him. Br. 36-44.[14] By

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[13] Pinkney's severance claim would fail for the same reasons even absent the plain error standards. Denial of severance is reviewed for abuse of discretion, which requires meeting an even higher standard of prejudice: The defendant must show that "a joint trial was so manifestly prejudicial as to require the trial judge to exercise his discretion in but one way, by ordering a separate trial." *Mikhel*, 889 F.3d at 1046-1047 (citation omitted). This Court's "review in this area is 'extremely narrow.'" *Id.* at 1047 (citation omitted).

[14] While Pinkney asserts that he would have attempted to preclude testimony or evidence of his co-defendants' actions during the assault (Br. 44 & n.20), the evidence of their acts was highly probative to proving the Section 242 charge under the "aiding and abetting" and "failure to intervene" alternative theories of liability. *See* pp. 32-33 note 9, pp. 40-41, *supra*.

contrast, reversal would lead to the same heavy costs as if the Court reversed over Pinkney's *Garrity* claim. *See* p. 30, *supra*. And given that Pinkney dropped his objection to admitting Exhibit 23 below and never objected to any of counsel's statements during trial, reversing his convictions now would provide an undue "windfall for the defendant." *Hougen*, 76 F.4th at 812 (citation omitted).

CONCLUSION

For the foregoing reasons, this Court should affirm Pinkney's convictions.

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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