No. 23-10005

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

CRAIG PINKNEY,

Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAIʻI
The Honorable Leslie E. Kobayashi, United States District Judge
D.C. No. 1:20-cr-00044-LEK-2

DEFENDANT-APPELLANT'S OPENING BRIEF

HARLAN Y. KIMURA
Central Pacific Plaza
220 South King Street, Suite 1660
Honolulu, Hawaii 96813
Telephone: (808) 521-4134
Facsimile: (808) 521-0361
Email: hyk@harlankimuralaw.com

Attorney for Defendant-Appellant
CRAIG PINKNEY

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ISSUES PRESENTED

I. **WHETHER PINKNEY'S *GARRITY* RIGHTS WERE VIOLATED WITH THE INTRODUCTION AND PUBLICATION OF GOVERNMENT'S EXHIBIT 23, AND REPLACEMENT OF IT WITH AN UNPUBLISHED REDACTED VERSION, ALONG WITH A DELAYED CURATIVE INSTRUCTION A WEEK LATER, DID NOT RENDER THAT CONSTITUTIONAL ERROR HARMLESS BEYOND A REASONABLE DOUBT.**

II. **WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PINKNEY'S MOTION FOR SEVERANCE BECAUSE THE EVIDENCE AGAINST HIS CO-DEFENDANTS MANIFESTLY PREJUDICED HIM FROM HAVING A FAIR TRIAL.**

PERTINENT CONSTITUTIONAL PROVISIONS,

TREATIES, STATUTES, ORDINANCES, REGULATIONS OR RULES

Pursuant to Rule 28-2.7 of the *Circuit Rules*, the applicable Constitutional Provisions, Treaties, Statutes, Ordinances, Regulations or Rules, are reproduced in the Addendum hereto.

STATEMENT OF THE CASE

Defendant-Appellant CRAIG PINKNEY ("Pinkney"), and three (3) other Adult Correctional Officers ("ACOs"), all employed by the Hawaiʻi Department of Public Safety ("DPS") assigned to the Hawaiʻi Correctional Center located on the island of Hawaiʻi, were accused of beating an inmate during the early morning hours of June 15, 2015. The ACOs were also alleged to have subsequently conspired to obstruct the DPS Internal Affairs Investigation ("IA Investigation") by falsifying their reports of that incident claiming the inmate's actions required them to employ "reactionary force" to gain control over him. Five (5) year later, the Government brought charges against the ACOs for inflicting cruel and unusual punishment on that inmate as a result of the June 15, 2015 incident. Additionally, they were charged with conspiracy to obstruct justice for allegedly getting together to falsify their reports of that incident ("Obstruction Charge").

Within thirty (30) days of Pinkney being arrested to answer these charges, he filed a request to be tried separately from the other ACOs on grounds he wouldn't get a fair trial with the other two defendants present.[1] However, that

[1] The two other defendants were Jason Tagaloa ("Tagaloa") and Jonathan Taum ("Taum"). The fourth ACO, Jordan DeMattos ("DeMattos"), cooperated with the Government and was charged separately in a different case. See footnote no. 5, *infra*.

request for severance was withdrawn until Pinkney could gather more evidence to support this request. As Pinkney was preparing for trial, he renewed his request to be severed from trial with Tagaloa and Taum on grounds there would be antagonistic defenses between him and those other two defendants. That request was denied because the district court determined antagonistic defenses are not prejudicial *per se*. During trial, the fears of antagonistic defenses became a reality because the Government introduced evidence from Tagaloa's IA Investigation (sometimes "Exhibit 23") against all three of them. The defense objected to that admission, but the district court overruled the objections and mistakenly stated they should have sought severance, rather than raise this issue in the middle of trial.

Finally, in preparation for trial, Pinkney, Tagaloa and Taum (sometimes "the Defendants"), jointly filed a motion in limine to exclude any evidence regarding their responses in the IA Investigation which were provided to DPS under pain of dismissal if they refused to do so. The Government conceded the responses of Pinkney and Taum were protected from disclosure to the Jury under *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967) (sometimes "*Garrity*"). However, the Government argued Tagaloa waived his *Garrity* Rights to the statements he made in the IA Investigation ("Tagaloa Waiver") and therefore, Exhibit 23 should be admitted into evidence. The district

court initially agreed and permitted the publication of Exhibit 23 to the Jury on **day four** of the trial.

After the conclusion of trial the day Exhibit 23 was published to the Jury, the district court issued an order ruling Tagaloa's Waiver as not voluntary and therefore, Exhibit 23 is inadmissible under *Garrity*. The next day, the district court proposed to give a curative instruction that the Jury was not to consider Exhibit 23 ("Curative Instruction"). In response, the Government offered a redacted version of Exhibit 23 ("Exhibit 23B") to replace the original version because that document was important in its case against the Defendants with respect to the Obstruction Charge. Exhibit 23 was withdrawn, and Exhibit 23B admitted in its stead on that **day five of the trial**, but the Jury was neither advised of that switch when made, nor was Exhibit 23B ever published to the Jury. More troubling, the Curative Instruction was not given to the Jury until **seven days later on day eight of the trial.**

JURISDICTION

The district court had jurisdiction of this matter pursuant to 18 U.S.C. § 3231. On January 9, 2023, the Judgment In A Criminal Case was entered in the district court ("Sentence"). Pinkney then timely filed his Notice Of Appeal on January 17, 2023, pursuant to Rule 4(b) of the *Federal Rules of Appellate Procedure* appealing the Sentence imposed upon him, as well as any and all rulings and orders issued related thereto. This Court has jurisdiction pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

BAIL STATUS

Pinkney is presently in custody at FCI La Tuna in Anthony, Texas ("FCI La Tuna"). According to the Bureau of Prisons' Website, Pinkney's Release Date is September 18, 2026.

STATEMENT OF THE FACTS

A. The June 15, 2015 Incident.

"In summer 2015, four correctional officers [(i.e. the ACOs)] were under investigation for [allegedly] beating an inmate at the Hawaii Correctional Center or HCCC as it is known [('Incident')]."[2] 2-ER-194-95.[3] The four ACOs were Pinkney, Tagaloa, Taum and DeMattos. 2-ER-196. According to the Government, they "had been caught on video punching and **kicking** an inmate, Chawn Keoni Kaili ('Kaili'),] as [he] lay on the ground [in the Recreation Yard of HCCC]." 2-ER-195 (emphasis added). "[T]he day before [the ACOs] were scheduled to answer questions from investigators about the [alleged] assault caught on video [(i.e. IA Investigation)], they met up at the house of the highest ranking officer, Defendant Taum, [allegedly] to devise a cover-up plan. At [this] meeting, the group [allegedly] came up with a plan to obstruct the investigation and cover up the beating." *Id.*

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[2] HCCC is located in Hilo, Hawai'i. Dkt. 1 at 2, ¶1. "Dkt. ___" refers to the docket entry in the district court case of *United States vs. Craig Pinkney,* D.C. No. 1:20-cr-00044-LEK-2, unless otherwise specified to the contrary.

[3] "__-ER-__" refers to Pinkney's Excerpts of Record filed contemporaneously with this Opening Brief; and "A-Dkt." refers to the docket entries in this appeal.

B. Indictment.

Five (5) years later, the Government alleged in Count 1 of the Indictment filed on June 10, 2020, in the district court ("Indictment')[4] that Pinkney, along with Tagaloa and Taum, as well as separately charged DeMattos[5] (i.e. the ACOs) "while acting under color of law and while aiding and abetting one another [on or about June 15, 2015], willfully deprived Kaili of the right, secured and protected by the Constitution and laws of the United States, to be free from cruel and unusual punishment." Presentence Investigation Report Prepared on 10/18/2022 and Revised on 12/15/2022 ("PSR")[6] at 5, ¶5.

Count 3 of the Indictment charged that Pinkney, Tagaloa and Taum, on or about and between June 15, 2015, and December 20, 2016, "knowingly and willfully combined, conspired, and agreed with one another and with other correctional officers known and unknown to commit . . . offenses against the United States . . . [t]o falsify, conceal, cover up, or make a false entry in a record or document with the intent to impede, obstruct, or influence the investigation or proper administration of a matter within federal jurisdiction . . . in violation of

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[4] See Dkt. 1 at 2-3.

[5] DeMattos was charged by Information in *United States v. Jordan DeMattos,* D.C. No. 1:20-cr-00121-HG-1 ("DeMattos Case"). The offenses in the DeMattos Case are identical to those in the Indictment. Compare Dkt. 1 in the DeMattos Case, with Dkt. 1.

[6] The PSR is filed herein "Under Seal" contemporaneously with this Opening Brief.

18 U.S.C. § 1519; and . . . [t]o knowingly engage in misleading conduct toward another person with the intent to hinder, delay, or prevent the communication to a federal law enforcement officer or judge of truthful information relating to the commission or possible commission of a federal offense, in violation of 18 U.S.C. § 1512(b)(3) [(i.e. Obstruction Charge)]." PSR at 5-6, ¶6.

Count 5 alleged Pinkney on or about June 15, 2015, "acting in relation and in contemplation of a matter within the jurisdiction of the United States, knowingly falsified, concealed, covered up, and made a false entry in a record and document with the intent to impede, obstruct, and made a false entry in a record and document with the intent to impede, obstruct, and influence the investigation and proper administration of that matter." PSR at 6, ¶7. "Specifically, [Pinkney] wrote, signed, and submitted a Use of Force Report ('UFR') documenting a[n alleged] false cover story intended to cover up the [alleged] assault charged in Counts 1 (sic) of the Indictment." *Id.*

C. Pretrial Motions.

1. Motions For Severance.

In less than thirty (30) days from Pinkney's first appearance to answer the charges in the Indictment, he filed his first Motions To Dismiss Indictment In Violation Of The Statute Of Limitations, And/or For Severance And Review From Prejudicial Joinder Pursuant To Rule 14, F.R.C.P., And/or Production Of The

Grand Jury Transcripts ("Motion For Severance I"). Compare Dkt. 14, with Dkt. 24. Motion For Severance I requested, among other relief, "a separate trial, because [Pinkney] does not feel that he can have a fair trial with the other two defendants present." Dkt. 24 at 3. The Government opposed Motion For Severance I on grounds the same failed to comply with *Fed. R. Crim. P.* 47(b) and *CrimLR* 12.2(a). Dkt. 29 at 2-3. Specifically, Motion For Severance I did not set forth the basis for the requested relief, or a brief and complete statement of the facts and all points and authorities upon which Pinkney intends to rely. *Id.* at 2. At the August 12, 2020, hearing on then Counsel for Pinkney's Motion To Withdraw As Counsel, Pinkney made an oral motion to deny Motion For Severance I without prejudice because he did not consider same having fully developed the facts to support that request. See generally Dkt. 33 at 2. That request was granted by the district court. *Id.*

As Pinkney was preparing for Trial, he filed his second Motion For Severance And Relief From Prejudicial Joinder Pursuant To Rule 14, F.R.C.P. requesting "a separate trial due to potential antagonistic defense strategies . . . [because he] intends to call co-defendants to testify in his case [('Motion For Severance II')]." Dkt. 117 at 2. He also included the same reason advanced in Motion For Severance I that "he does not feel that he can have a fair trial with the other two defendants present." *Id.* The Government opposed Motion

For Severance II "because the indictment properly joins all three Defendants [pursuant to Rule 8, *Federal Rules of Criminal Procedure*]; because their defenses are not mutually antagonistic; **because no serious risk exists that a joint trial would unfairly prejudice any of the Defendants**; and because a joint trial serves the interests of justice." Dkt. 129 at 5 (emphasis added).

In reply, Pinkney averred he was present at his administrative hearing with the Hawaiʻi Department of Labor and Industrial Relations Employment Security Appeals Referees' Office ("ESARO"), and both Tagaloa and DeMattos testified under oath he "did not kick or strike Kaili in the face." Dkt. 138-1 at 2-3. Pinkney also argued Motion For Severance II should be granted because "the jurors will be exposed to seeing Defendant Taum doing certain things that will prejudice [him]." 2-ER-209. Likewise, "the actions of Mr. Tagaloa further will expose [Pinkney] being in the same boat." *Id.*

The Government responded to Pinkney's argument that unlike Taum and Tagaloa, "**the government does not assert that Mr. Pinkney kicked the victim [(i.e. Kaili)]**". 2-ER-211 (emphasis added). However, that is exactly what the Government did in its Opening Statement.[7] 2-ER-195. The Government informed the Jury that the ACOs (including Pinkney) "had been caught on video

[7] Following the Opening Statement, the Trial took **nine (9) days**, with Closing Arguments on the tenth (10th) day. See Dkt. 287, 288, 290, 293, 299, 303, 307, 310, 313, and 315.

punching **and kicking an inmate as the inmate lay on the ground.**" *Id.* (emphasis added). In describing the Incident, DeMattos also testified that when he and Pinkney rushed over to assist Tagaloa, "We throw punches, **kicks,** and knees to – any attempt to restrain him." 2-ER-178 (emphasis added) and see also 2-ER-180. Additionally, Taum was directing him, Tagaloa and Pinkney, to "**kick** and punch" Kaili while he lay on the ground. 2-ER-181 (emphasis added). Despite these instructions and observations, DeMattos then appeared to retract his earlier testimony and observed Pinkney only striking and kneeing Kaili, **not kicking him**. 2-ER-182.

Although representing otherwise in opposing Motion For Severance II, and DeMattos indicating Pinkney did NOT kick Kaili, the Government in its Closing Statement continued to ague he, along with Tagaloa and Taum, **kicked Kaili**. Compare 2-ER-211 and 182, with 2-ER-80, 87, 89, 100 and 111. In five (5) separate instances, the Government represented to the Jury "these defendants [(i.e. Tagaloa, Taum AND PINKNEY)] took turns punching **and kicking him as he was lying face down in a pool of his own blood, punches like this, kicks like this. (Video played.)"**[8] 2-ER-80 (emphasis added). Kaili "couldn't move much less resist and **they continued to punch and kick him.**"

[8] The Jury was probably more receptive to this description of the video's contents of the Incident because of its poor quality rendering the respective ACOs' individual identities virtually unrecognizable.

2-ER-87 (emphasis added). "**They** used deadly force by punching and **kicking him in the head**." 2-ER-89 (emphasis added). The three (3) of them wrote false reports about the Incident, instead of "**admit[ting] they kicked** and punched an inmate dozens of times". 2-ER-100 (emphasis added). The Government cannot claim "**they**" only meant Tagaloa and Taum because later in its Closing Argument, the Government reminded the Jury that "[a]s you know from the video, Tagaloa, DeMattos, **and Pinkney punched, kneed, and kicked Mr. Kaili in the head** and body dozens of time during the incident." 2-ER-111 (emphasis added).

Although not fully articulated by Pinkney's trial counsel, Pinkney was also concerned with being considered an Alpha Dawg should he be tried with Tagaloa and Taum. About eight (8) of the graduates from the Basic Corrections Training Academy, or BCT, with DeMattos, belonged to the Alpha Dawgs. 2-ER-165. Alpha Dawgs were adult correction officers at HCCC that would assault inmates for any reason, or no reason at all. e.g., 2-ER-168-69. They also protected each other by, among other things, lying to protect them from the consequences of their wrongful actions. 2-ER-166. Pinkney was NOT one of the Alpha Dawgs. 2-ER-184.

Pinkney's fear of being associated with the Alpha Dawgs was realized when the Government gave its Closing Argument. 2-ER-82 and 123-24.

> Tagaloa and DeMattos were part of a tight-knit group of officers called the **Alphas, a group that Pinkney was friends**

> **with.** During this trial you heard that the **Alphas had a reputation for using force against inmates.** **They** were big guys and **they** thought of themselves as tough guys. **They** puffed their chest out, **they** didn't take crap from inmates, and with their words and actions they sent a message: **Follow our orders or else.**

2-ER-123-24 (emphasis added).

Despite these fears, the district court denied Pinkney's Motion For Severance II on grounds he did not establish "clear prejudice" would ensue if his co-defendants are tried with him. 1-ER-74-75. Pinkney's argument that he would advance antagonistic defenses against his Co-Defendants is not "prejudicial *per se.* . . . Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief granted, if any, to the district court's sound discretion." *Id.* at 3 *quoting Zafiro v. United States,* 506 U.S. 534, 538-39, 113 S.Ct. 933, 938, 122 L.Ed.2d 317 (1993), *citing United States v. Lane,* 474 U.S. 438, 449, n.12, 106 S.Ct. 725, 732, n.12, 88 L.Ed.2d 814 (1986) and *Opper v. United States,* 348 U.S. 84, 95, 75 S.Ct. 158, 165, 99 L.Ed.2d 101 (1954). The district court also advised the public authority defense that either Pinkney and/or Tagaloa acted only pursuant to Taum's direction, order and authority, is an **affirmative defense** and therefore, "must be proven by a preponderance of the evidence." 1-ER-076 *quoting United States v. Doe,* 705 F.3d. 1134, 1146 (9th Cir. 2013).

During the fourth (4th) day of trial the issue of Tagaloa, Taum and Pinkney all being tried together arose again in a *Bruton* context.[9] 2-ER-148-49. Specifically, the Government sought to introduce "Exhibit 71C and -E,[10] and offer[ed] -D and -F, the transcripts of those proceedings, as demonstratives." 2-ER-148 (footnote added). Tagaloa was concerned "a *Bruton* problem possibly here with the introduction of this type of evidence in relationship to the other defendants." 2-ER-148-49. Taum objected on "Sixth Amendment grounds". 2-ER-148. The district court requested the Government "go around this issue and go to the next one, we'll take it up at the break [outside the presence of the Jury]." 2-ER-149.

During the first break of the morning, and outside the presence of the Jury, the Government argued Exhibits 71C and E are admissible because Tagaloa's statements in those exhibits: (a) were voluntary and not compelled under threat of employment termination as prohibited by *Garrity*; (b) are exempt from *Bruton* because the evidence in those exhibits only concerned Tagaloa; and (c) not

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[9] "*Bruton*" refers to *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The *Bruton* problem arises when two defendants are tried together, and the statement of one defendant inculpates the other. *Bruton,* 391 U.S. at 137, 88 S.Ct. at 1628.

[10] Exhibit 71-C is an audio recording in which "Tagaloa denies striking inmate in face 3-21-16" and Exhibit 71-E is an audio recording in which "Tagaloa denies striking inmate in head DPS [(i.e. Hawaii Department of Public Safety)] 12-20-16". Dkt. 318 at 3.

testimonial. 2-ER-152. Taum's Sixth Amendment Right of Confrontation objection was overruled because Tagaloa's statements fall under the Co-Conspirator Hearsay Exception. 2-ER-152-56. Tagaloa's *Bruton* Objection was likewise denied by the district court. 2-ER-156-57. The district court reminded the Defendants that they knew prior to trial these exhibits would be offered into evidence and "**Nobody sought to sever.**" 2-ER-157 (emphasis added). **However, that observation is incorrect because Pinkney previously filed Motion For Severance I and Motion For Severance II.** See Dkts. 24 and 117.

2. Motions To Dismiss Indictment.

Tagaloa filed a Motion To Dismiss Indictment on grounds the Government's questioning DeMattos when testifying before the Grand Jury "continually requested that [he] testify that every use of force applied, or what the defendants did, was 'unlawful' [('Motion To Dismiss')]." Dkt. 141 at 6. Moreover, "[t]he icing came when the prosecutor requested that DeMattos agree that the force used was 'excessive.'" *Id.* That mode of questioning DeMattos was especially troubling because he had already pled Guilty to the same charges Pinkney, Tagaloa and Taum, were preparing to contest at Trial. Compare, Dkt. 14 and 19 in the DeMattos Case, with Dkt. 92. Therefore, Tagaloa argued such action "is thoroughly an unacceptable usurpation of the grand jury's role [and amounts to

prosecutorial misconduct]." Dkt. 141 at 6. Pinkney and Taum filed their respective Joinders to the Motion To Dismiss ("Joinders"). Dkt. 164 and 158.

The district court denied the Motion To Dismiss and Joinders. Dkt. 197. In short, the district court ruled that line of questioning, as well as the mode in which it was delivered, did not amount to prosecutorial misconduct. Dkt. 197 at 11. DeMattos had personal knowledge of the matters testified because he "was a percipient witness in that he participated, according to his testimony, in the punching and kicking of the inmate." *Id.* at 10. Moreover, his "testimony about whether the strikes, punches and kicks that he observed and that he caused were lawful or not is clearly within his specialized knowledge as an adult correctional officer." *Id.* at 11. Therefore, the "heavy burden to demonstrate that the prosecutor engaged in flagrant misconduct in deceiving the grand jury or significantly impairing its exercise of independent, unbiased judgment [was not met]." *Id. quoting United States v. Venegas,* 800 F.2d 868, 869-70 (9th Cir. 1986) (internal brackets omitted).

During trial, however, DeMattos admitted that he was testifying in a manner to advance the Government's case. 2-ER-171. The Government asked DeMattos during redirect "What did you agree to, in generally speaking, in paragraph 21A [of your Plea Agreement]?" *Id.* DeMattos replied "To be truthful." *Id.* Taum's Counsel immediately objected, but before he could state the grounds

for his objection, DeMattos corrected himself and stated "**I'm sorry – to agree with the government.**" *Id.* (emphasis added). Based upon this admission, it is now abundantly clear leading questions were asked of DeMattos during the Grand Jury Proceedings to ensure his answers were aligned with the Government's case and charges in the Indictment. Compare Dkt. 1, with 2-ER-171.

3. *Garrity* Motion.

Pursuant to the Criminal Final Pretrial Conference held on May 23, 2022, Tagaloa, Pinkney and Taum ("Defendants" unless otherwise specified to the contrary"), filed their Motion In Limine Re: *Garrity* Evidence on May 24, 2022 ("*Garrity* Motion"), among other motions in limine. Compare Dkt. 172 at 2, with Dkt. 186. The *Garrity* Motion sought to exclude their "compelled responses to questions asked by internal affairs investigator Michael Carvalho, or information derived therefrom, pursuant to *Garrity v. New Jersey,* 386 U.S. 493 (1967) [(sometimes 'IA Questionnaire')]." Dkt. 186 at 2. Although the district court was inclined to grant the *Garrity* Motion, the Government construed the Defendants' objection thereto as a request that "expands the scope of their motion to include all statements of a party-opponent noticed by the Government [('*Garrity* Expansion Request')]." Dkt. 262 at 2, and compare with Dkts. 211 at 12-13 and 247.

Ultimately, the Government agreed with the *Garrity* Motion that "the investigative questionnaires of Defendants Taum and Pinkney [should be not be

offered into evidence, but] . . . Defendant Tagaloa knowingly and voluntarily relinquished his *Garrity* rights by signing a written waiver, [and therefore, his answers to that questionnaire should be admissible (i.e. Tagaloa Waiver)]." Dkt. 262 at 2. However, the Government opposed the *Garrity* Expansion Request because the Defendants first have to prove that any other evidence sought to be excluded under *Garrity* were elicited under "threat of job loss." Dkt. 262 at 6 *citing United States v. Dellinger,* No. Cr-13-00065-PHX-DGC, 2013 WL 4177400, at *4 (D. Ariz. Aug. 15, 2013). The district court granted the *Garrity* Motion despite the Tagaloa Waiver ("*Garrity* Order"). Dkt. 280 at 3-4.

The Government's Motion For Reconsideration Of *Garrity* Order was filed the next day on June 20, 2022 ("*Garrity* Motion For Reconsideration"), claiming the district court made "a mistake of fact: that Defendant Tagaloa had been forced to sign away his Garrity rights *before* he answered the investigative questionnaire." Dkt. 281 at 2 (emphasis in original). In a footnote, the Government purportedly quotes the pertinent portion of the *Garrity* Order that supports its assertion. See Dkt. 281, n.1. **However, nowhere in the *Garrity* Order is the Government's quotation that "As to Tagaloa only the Government contends that he was advised of his rights and waived them voluntarily before responding to the investigative questionnaires."** *Id.* (emphasis added). More correctly, the pertinent portion of the *Garrity* Order

observes the Government "points out, however, that Tagaloa (unlike Taum and Pinkney) knowingly and voluntarily relinquished his *Garrity* rights by signing a written waiver and has thereby waived his right to preclude . . . use of his *Garrity* statements at trial." Dkt. 280 at 4 (internal quotation marks omitted).

Toward the end of the second day of trial, June 23, 2022, the district court raised the issue concerning which party has the burden to establish that the Tagaloa Waiver was knowing, voluntary, and intelligent. 2-ER-185-89. In response, the Government submitted its' Filing Re: Circumstances Of Jason Tagaloa's *Garrity* Waiver the next day explaining the Tagaloa Waiver took place in May 2020 when he was being interviewed at his home by FBI Special Agent Pyszczymuka. Dkt. 289 at 2. On the other hand, the Defendants did not offer any submissions on the burden of proof issue concerning the Tagaloa Waiver. Compare Dkt. 289, with Dkt. 290-97.

On the fourth (4th) day of trial, June 27, 2022, the Government sought to introduce Tagaloa's IA Questionnaire as Exhibit 23[11] in violation of the *Garrity* Order. Compare 1-ER-49, with Dkt. 280 at 3-4. The district court admitted Exhibit 23 over the objections of Taum. Compare 1-ER-50, with 1-ER-49-50. Exhibit 23 was then published to the Jury. 1-ER-54-56. At the end of that trial day, the district court issued its Order Denying Government's Motion For

[11] A copy of Exhibit 23 may be found at 2-ER-213-22.

Reconsideration Of *Garrity* Order ("*Garrity* Reconsideration Order"). Dkt. 297. The district court rejected the Government's claim that the Tagaloa Waiver was valid permitting the introduction of the Tagaloa IA Questionnaire (i.e. Exhibit 23) into evidence. Dkt. 297 at 4. The rationale for the district court rejecting the Government's claim the Tagaloa Waiver was voluntary, knowing, and intelligent, is the language in that waiver being coercive and therefore, serves as the basis for the *Garrity* protection. Dkt. 297 at 4.

At the beginning of the proceedings the next day, June 28, 2022, and outside the presence of the Jury, the district court raised the issue concerning the *Garrity* Reconsideration Order in relation to admission of Exhibit 23 the day before. 1-ER-25. The district court explained "[t]hen the question becomes the subsequent FBI waiver [(i.e. Tagaloa Waiver)]. But it's like *Miranda.* **You really can't cure it once you, you know, took the unprotected statement without doing it.**" 1-ER-25 (emphasis added). Notwithstanding this constitutional error, the district court proposed to issue a "curative" instruction "along the lines of, You're not to consider Exhibit 23, you're not to consider any responses or testimony or evidence that you may have heard or seen with regarding to the internal affairs questionnaire. **Mr. Tagaloa has a constitutional right to not have that evidence in this trial, and it must be as if it never happened** [(i.e. Curative Instruction)]." 1-ER-25-26 (emphasis added). The Government then

responded by proposing a new Exhibit 23 with all responses redacted except for Tagaloa's name and date of the questionnaire to replace the original Exhibit 23.[12] 1-ER-30-31. The Defendants did not have any objections to the Curative Instruction proposed by the district court, or the new redacted Exhibit 23 suggested by the Government. 1-ER-31-33.

After excusing the Jury for their final break that day, June 28, 2022, the Government provided the redacted Exhibit 23 to the district court and "move[d] into evidence [Exhibit] 23B[13] which is two pages of the investigative questionnaire with everything redacted except for the signature and the date at the very top." 1-ER-34. Hearing no objections from the Defendants, the district court received Exhibit 23B into evidence "and deemed Exhibit 23 withdrawn." *Id.* and see also Dkt. 299 at 2. However, the Curative Instruction related to Exhibit 23 wrongfully admitted and published to the Jury on June 27, 2022, was not given to them until **a week later on July 5, 2022; day eight of trial.** Compare 1-ER-50 and 54-56, with 1-ER-17. Moreover, Exhibit 23B was not published to the Jury when the Curative Instruction was read to the Jury. See generally 1-ER-17.

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[12] The Government also responded there was no "bad faith" in introducing Exhibit 23 the day before because the district court preliminarily indicated the Tagaloa Waiver voluntary and the Defendants did not object to its introduction. Compare 1-ER-26-27, with 1-ER-46 and 49-50. **However, Taum did object to Exhibit 23 being introduced because it violated his Sixth Amendment Right of Confrontation.** 1-ER-49-50.

[13] A copy of Exhibit 23B may be found at 2-ER-223-24.

D. Guilty Verdicts And Sentences.

The Jury began its deliberations upon conclusion of the Closing Arguments. 2-ER-128. Thereafter, the Defendants were found Guilty of all the charges against them, except the Jury found Tagaloa not guilty "as to Count II of the Indictment: Deprivation of Rights under Color of Law." Dkt. 315 at 2.

On November 16, 2022, Taum was sentenced to a term of imprisonment of One Hundred Twenty (120) Months as to Count 1, One Hundred Forty-Four (144) months as to Count 6, and Sixty (60) months as to Count 3, with all counts to run concurrently. Dkt. 393 at 2. Supervised Release of three (3) years as to each count to run concurrently was also imposed at that time. *Id.* Taum is presently in custody at FCI Big Spring, in Big Spring, Texas, and his anticipated date of release according to the Bureau of Prisons is September 5, 2032. He is appealing his conviction and sentence in Case No. 22-10306.

On December 5, 2022, Tagaloa was sentenced to a term of imprisonment of Ninety-Six (96) Months each as to Counts 1 and 4, and Sixty (60) months as to Count 3, with all counts to run concurrently. Dkt. 406 at 1. Supervised Release of three (3) years as to each count to run concurrently was also imposed at that time. *Id.* Tagaloa is presently in custody at FCI Safford, in Safford, Arizona, and his anticipated date of release according to the Bureau of

Prisons is April 29, 2029. He is appealing his conviction and sentence in Case No. 22-10318.

On January 5, 2023, Pinkney was sentenced to a term of imprisonment of Sixty (60) Months each as to Counts 1 and 4, and Sixty (60) months as to Count 3, with all counts to run concurrently. Dkt. 425 at 1. Supervised Release of three (3) years as to each count to run concurrently was also imposed at that time. *Id.* Pinkney is presently in custody at FCI La Tuna, in Anthony, Texas, and his anticipated date of release according to the Bureau of Prisons is September 18, 2026. He is appealing his conviction and sentence herein.

E. Motion For Release Pending Appeal.

On July 21, 2023, Pinkney filed herein his Motion For Release Pending Appeal arguing "(a) there is clear and convincing evidence he is not likely to flee or pose a danger to the safety of any other person or the community if released; (b) this Appeal is not for the purpose of delay and raises a substantial question of law or fact concerning violation of his rights under *Garrity v. State of New Jersey,* 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), which would result in a reversal or new trial; and (c) it is clearly shown there are exceptional reasons why his detention would not be appropriate [('Motion For Release')]." A-Dkt. 12 at 1-2.

The Government opposed the Motion For Release on grounds: (1) the same failed to state with particularity the legal argument necessary to support it; (2) Pinkney should have first filed this motion with the district court, rather than this Court; and (3) alternatively, this motion was procedurally and substantively defective. A-Dkt. 15 at 4-11.

In reply, Pinkney argued: (i) Rule 9-1.2(a) of the *Circuit Rules* permits the filing of the Motion For Release with this Court; (ii) the cases cited by the Government were from other Courts of Appeals, rather than this Court and therefore, not binding precedent; (iii) the Motion For Release is not procedurally and substantively defective because the Declaration and Exhibits attached thereto comply with the applicable rules of this Court; and (iv) Pinkney's sacrosanct *Garrity* Rights violated at the district court level should not await resolution after full briefing and decision by this Court. A-Dkt. at 3-10.

On August 9, 2023, this Court "denied without prejudice to renewal, if necessary, following presentation of the [Motion For Release] to the district court." A-Dkt. 17. Pinkney may do so after this Opening Brief is filed herein. *See generally Id.* However, it is even more important for this Court to address Pinkney's *Garrity* Rights in this Appeal to ensure all district court's understand that "**[y]ou can't cure it once you, you know, took the unprotected statement without doing it [and publish it to the Jury].**" 1-ER-25 (emphasis added).

SUMMARY OF ARGUMENT

Pinkney raises two (2) arguments in this appeal.

First, Pinkney's *Garrity* Rights were violated when Exhibit 23 was admitted and published to the Jury. Subsequent withdrawal of that exhibit and replacement with Exhibit 23B, along with the delayed Curative Instruction a week later, did not render that constitutional violation harmless beyond a reasonable doubt. Additionally, Exhibit 23 related to the Conspiracy Obstruction Charge in Count 3 of the Indictment. Therefore, Tagaloa's completion of the IA Questionnaire wrongfully admitted as Exhibit 23, could have been sufficient for the Jury to convict Pinkney of that charge. Therefore, Pinkney's conviction must be vacated and this case remanded back to the district court for a new trial.

Second, Pinkney knew from the very beginning that he would not get a fair trial with Tagaloa and Taum present. That issue was raised during trial in the *Bruton* context ("*Bruton* Problem") with respect to Exhibit 23. The *Bruton* Problem continued with Government's Exhibit 71C and E which were audio recordings of Tagaloa's denial of anything other than his use of "reactionary force" against Kaili. Third, despite representing otherwise in response to Pinkney's Motion For Severance II, during Closing Arguments the Government argued FIVE TIMES that Tagaloa, Taum AND PINKNEY kicked Kaili in the head. Finally, the Government argued Pinkney was close friends with members of the Alpha Dawgs

and **they** had a reputation of using unjustified force against inmates. All combined, these series of events manifestly prejudiced Pinkney from having a fair trial. Pinkney was also diligent in raising this severance request with objections from the Defendants during trial, and the district court's mistaken belief that no motion to sever was ever filed rendered a renewal of same at the close of all the evidence an unnecessary formality.

ARGUMENT

I. PINKNEY'S *GARRITY* RIGHTS WERE VIOLATED WITH THE INTRODUCTION AND PUBLICATION OF GOVERNMENT'S EXHIBIT 23, AND REPLACEMENT OF IT WITH AN UNPUBLISHED REDACTED VERSION, ALONG WITH A DELAYED CURATIVE INSTRUCTION A WEEK LATER, DID NOT RENDER THAT CONSTITUTIONAL ERROR HARMLESS BEYOND A REASONABLE DOUBT.

A. Standard of Review.

This Court reviews for abuse of discretion the district court's admission or exclusion of evidence. *See generally Spencer v. Peters,* 857 F.3d 789, 798 (9th Cir. 2017) *citing McEuin v. Crown Equip. Corp.,* 328 F.3d. 1028, 1032 (9th Cir. 2003) and *In re Oracle Corp. Securities Litigation,* 627 F.3d 376, 385 (9th Cir. 2010) *citing United States v. Mitchell,* 502 F.3d 931, 964 (9th Cir. 2007). However, Exhibit 23 involves *Garrity* Rights because the Defendants were compelled to answer the IA Questionnaire or else would be terminated from their employment. *See generally Garrity,* 385 U.S. at 499-500, 87 S.Ct. at 620. Therefore, the introduction and publication of Exhibit 23, and attempt to remedy same by the replacement with Exhibit 23B, and delayed Curative Instruction, is "a constitutional error [rendered] harmless beyond a reasonable doubt rests with the government." *United States v. Lopez,*

500 F.3d 840, 845 (9th Cir. 2007) *citing United States v. Williams,* 435 F.3d 1148, 1162 (9th Cir. 2006).

B. Discussion.

In 1967, the United States Supreme Court was presented with the issue whether the confessions of New Jersey State police officers under investigation for fixing traffic tickets given a choice of either incriminating themselves, or forfeiting their jobs if they refused to do so, were voluntary or coerced in violation of the Fifth Amendment by way of the Fourteenth Amendment. *Garrity,* 385 U.S. at 494-96, 87 S.Ct. at 617-18. In other words, whether "a State, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee." *Id.* at 499, 87 S.Ct. at 620. The Supreme Court held "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of [the] body politic." *Id.* at 500, 87 S.Ct. at 620.

In this case, the district court in denying the *Garrity* Motion For Reconsideration rejecting the Tagaloa Waiver and affirming its decision to prelude any evidence regarding the Defendants' responses in the IA Investigation relied heavily on *United States v. Goodpaster,* 65 F.Supp.3d 1016 (D. Or. 2014).

Dkt. 297 at 2-3 and see also Dkt. 280 at 3-4. Based upon that authority, the district court stated:

> It is clear that Tagaloa's employer used the "classic penalty situation" – either answer the questions or face dismissal from employment. Therefore, the Garrity protection remains in force, and Tagaloa's responses to the internal affairs questionnaire are protected. **Because his responses are protected by Garrity, the subsequent execution of the FBI's Consent Form cannot change that protection.**

Dkt. 297 at 4 (emphasis added).

Although not expressly noted by the district court, the Tagaloa Waiver also included the "classic penalty situation." See Dkt. 289 at 3. It reads as follows:

> **I, Jason Tagaloa, fully understand that some of my prior statements regarding the use-of-force incident at Hawaii Community Correctional Center against [Inmate 1] could be understood as having been given under administrative compulsion and therefore could not be used against me in any criminal proceeding.**
>
> Nevertheless, I believe that all pertinent information should be provided to federal law enforcement officials in their investigation of that incident. I therefore, knowingly, intelligently, and voluntarily waive my constitutional statutory right not to have those statements used against me, and I voluntarily give my consent that all of my prior statements be furnished to special agents of the Federal Bureau of Investigation, knowing that these prior statements may be used against me in any criminal proceeding.

Dkt. 289 at 3 (emphasis added; brackets in original).

With respect to Exhibit 23, it was abundantly clear to the Government and Defendants that the district court would not permit any responses of the Defendants to their IA Questionnaires. Dkt. 280 at 4. Moreover, the district court issued that ruling fully aware the Government argued its case was built around the Tagaloa Waiver and "**charged in Count 3 of the Indictment that Defendant Tagaloa committed an overt act in furtherance of the Defendants' conspiracy to obstruct justice by writing and submitting an internal affairs questionnaire that stuck to the Defendants' false cover story**." See Dkt. 262 at 5 (emphasis added). Nonetheless, the Government filed its *Garrity* Motion For Reconsideration claiming the district court's decision with respect to the Tagaloa Waiver was based upon "a mistake of fact: that Defendant Tagaloa had been forced to sign away his Garrity rights *before* he answered the investigative questionnaire. (ECF No. 280)." Dkt. 281 at 2 (emphasis in original; footnote and internal quotation mark omitted). In a footnote, the Government argued the basis for that "mistake of fact" claim is that portion of the *Garrity* Order stating "As to Tagaloa only, the Government contends he was advised of his rights and waived them voluntarily before responding to the investigative questionnaires." Dkt. 281 at 2, n.1. **However, the Government is mistaken because that quoted text is nowhere to be found in the *Garrity* Order.** See Dkt. 280 at 3-4.

The Government's next misstep occurred when it introduced Exhibit 23 sandwiched between a number of other exhibits *before* the district court acted on its *Garrity* Motion For Reconsideration. Compare 1-ER-49, with Dkt. 281 and 297. When the district court announced it would deny the *Garrity* Motion For Reconsideration, and invited the parties to comment on its proposed remedy for the wrongful admission of Exhibit 23, the Government justified its introduction of Exhibit 23 because the district court had indicated earlier it considered the Tagaloa Waiver to be voluntary, and the Defendants did not object, to the Exhibit 23. 1-ER-26-27. However, that is incorrect because Taum did object to Exhibit 23 on Sixth Amendment grounds. 1-ER-49-50.

In this Appeal, the Government has the burden to prove beyond a reasonable doubt that the wrongful admission and publication of Exhibit 23 to the Jury was harmless because Exhibit 23B replaced that exhibit without similar publication to the Jury and the delayed Curative Instruction was given one week later. *Lopez*, 500 F.3d at 845 ("The burden of proving a constitutional error harmless beyond a reasonable doubt rests upon the government."). The Government will be unable to do so for several reasons. First, Exhibit 23 was central to Count 3 as stated by the Government in its Memorandum In Opposition to the *Garrity* Motion, and published to the Jury when admitted. Compare with Dkt. 262 at 5-6, with 1-ER-54-56. However, Exhibit 23B was NOT accorded that

same opportunity, whether when it was admitted, during the announcement of the Curative Instruction, or at anytime thereafter. See e.g., 1-ER-34-35 and 17. Second, all three of the Defendants were convicted of Count 3 of the Indictment (i.e. Obstruction Charge) which is based upon the Tagaloa IA Questionnaire (i.e. Exhibit 23) as argued by the Government. Compare 2-ER-133, with Dkt. 262 at 5-6 and 2-ER-97-98. Finally, the Jury Instructions provide, and Government's Closing Argument reiterates, the actions of one Defendant applies to all three Defendants. Dkt. 312 at 43-52 (Jury Instruction 29 and 30) and Compare with 2-ER-97. Hence, the alleged cover-up that included Exhibit 23 could have been a contributing factor in the Jury convicting all three Defendants of Count 3 of the Indictment.

The last question is the remedy available to Pinkney for the wrongful admission of Exhibit 23 under *Garrity* and Government's anticipated inability to prove beyond a reasonable doubt that this constitutional error was harmless. "[T]he *Garrity* rule, like *Miranda,* is prophylactic." *Goodpaster,* 65 F.Supp.3d at 1026 *citing Chavez v. Martinez,* 538 U.S. 760, 768 & n.2, 123 S.Ct. 1994, 2001 & n.2, 155 L.Ed.2d 984 (2003) (plurality opinion). This "privilege is said to be 'self-executing' and may be claimed after the fact." *Goodpaster,* 65 F.Supp.3d at 1026 *citing Minnesota v. Murphy,* 465 U.S. 420, 436-37, 104 S.Ct. 1136, 1147, 79 L.Ed.2d 409 (1984). By extension, Pinkney submits his Trial Counsel need not

have objected to the introduction of Exhibit 23 in order to preserve his *Garrity* Rights.[14] *Id.* Therefore, this constitutional violation requires a reversal of Pinkney's conviction and new trial because of the admission of Exhibit 23, and subsequent replacement thereof with Exhibit 23B and the ill-timed Curative Instruction given a week later, did not render this constitutional violation harmless beyond a reasonable doubt. See generally *United States v. Heldt*, 745 F.2d 1275, 1276 (9th Cir. 1984) (This Court "reverse[d] and remand[ed] for a new trial because of the admission at trial of statements taken in violation of [the defendant's] rights under *Miranda v. Arizonia,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).") and *United States v. Garcia,* 431 F.2d 134 (9th Cir. 1970) (per curiam) ("Error in admitting [the defendant's] inculpatory statements obtained in violation of Miranda v. Arizona (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, compels reversal of her conviction and a remand for a new trial from which those statements will be excluded.").

[14] Alternatively, Pinkney submits it was plain error for the district court to determine that replacement of Exhibit 23 with Exhibit 23B, and delayed Curative Instruction given to the Jury a week later, would remedy the Constitutional Violation of his *Garrity* Rights beyond a reasonable doubt. *See generally United States v. Schultz,* 664 Fed.Appx. 610, 612 (9th Cir. 2016) ("Where an appellant argues that a district court committed a procedural error for failure to adequately address all arguments offered to the court, but did not object to this at sentencing, the standard of review is for plain error. . . . Plain error is (1) an error that (2) is plain, (3) affects substantial rights, and (4) seriously affects the fairness, integrity or public reputation of judicial proceedings.").

In summary, Pinkney's *Garrity* Rights were violated because of the erroneous admission and publication of Exhibit 23, and replacement Exhibit 23B with the untimely Curative Instruction, did not remedy that constitutional violation harmless beyond a reasonable doubt. Additionally, because of the "conspiracy-type" of charges in the Indictment, the Tagaloa IA Questionnaire identified as Exhibit 23 directly affected Pinkney's *Garrity* Rights because as argued by the Government during Closing Arguments, the actions of a single defendant could convict all defendants See generally 2-ER-96-97. Therefore, Pinkney's conviction must be vacated and this case remanded back to the district court for a new trial.[15]

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[15] Pinkney submits this argument and remedy regarding Exhibit 23 as related to Count 3, should apply to ALL COUNTS because of the prophylactic nature of his *Garrity* Rights. *See generally Goodpaster,* 65 F.Supp.3d at 1026 *citing Chavez,* 538 U.S. at 768 & n.2, 123 S.Ct. at 2001 & n.2.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PINKNEY'S MOTION FOR SEVERANCE BECAUSE THE EVIDENCE AGAINST HIS CO-DEFENDANTS MANIFESTLY PREJUDICED HIM FROM HAVING A FAIR TRIAL.

A. Standard of Review.

The Court "review[s] for abuse of discretion for a denial of severance." *United States v. Sherlock,* 962 F.2d 1349, 1359 (9th Cir. 1989) *citing United States v. Gonzales,* 749 F.2d 1329, 1333 (9th Cir. 1984). In doing so, the Court references Rule 14 of the *Federal Rules of Criminal Procedure* (sometimes "Rule 14") to determine whether "it appears that a defendant may be prejudiced significantly by a joint trial with his co-defendant." *Sherlock,* 962 F.2d at 1359 *citing* Rule 14.

B. Discussion.

In order to prevail on this second issue, Pinkney "must demonstrate that a joint trial was so manifestly prejudicial as to require the trial judge to exercise [her] discretion in but one way, by ordering a separate trial." *Sherlock,* 962 F.2d at 1359-60 *citing United States v. Abushi,* 682 F.2d 1289, 1296 (9th Cir. 1982) and *United States v. Escalante,* 637 F.2d 1197, 1201 (9th Cir. 1980), *cert. denied,* 449 U.S. 856, 101 S.Ct. 154, 66 L.Ed.2d 71 (1980).

> He must also show violation of one of his substantive rights by reason of the joint trial: **unavailability of full**

> **cross-examination**, lack of opportunity to present an individual defense, **denial of Sixth Amendment confrontation rights**, lack of separate counsel among the defendants with conflicting interests, or failure properly to instruct the jury on admissibility of evidence as to each defendant.

Sherlock, 962 F.2d at 1360 (emphasis added) *citing Escalante,* 637 F.2d at 1201.

In *Sherlock* the defendant "moved to sever the trials on grounds that the likely admission of a statement by [his codefendant] implicating him would violate his Fifth and Sixth Amendment rights." 962 F.2d at 1353. In reliance on *Bruton,* 391 U.S. 123, 88 S.Ct. 1620, the defendant stated he was prejudiced by the admission of his codefendant's statement that allegedly implicated him in the assault of the victim. *Sherlock,* 962 F.2d at 1359. The defendant also argued he was prevented from impeaching his co-defendant with a prior assault conviction after that incriminating statement was admitted, and their irreconcilable defenses mandated severance. *Id.* Impeachment would occur after the investigator relayed what the co-defendant told him about the defendant's involvement in the charged offense. *Id.* at 1360. This Court noted the prior conviction of the co-defendant would be inadmissible under *Fed. R.Evid.* 403 and 609(a). However, "if the trials had been severed, the conviction for impeachment would have been admissible. **This ruling emphasizes the prejudice caused [the defendant] by the joint trial.**" *Sherlock,* 962 F.2d at 1360, n.4 (emphasis added).

Upon the conclusion of the investigator relaying the statements made by the co-defendant, the trial court gave a limiting instruction that those statements were only to be considered against that co-defendant and not the defendant. *Id.* at 1360 n.5. The trial court's jury instruction repeated that limiting instruction. *Id.* at 1360. However, "in rebuttal, despite the two limiting instructions, the prosecutor emphasized three times that [the co-defendant's] statement buttressed the government's case against [the defendant]." *Id.* The defendant's motion for mistrial on that ground was denied as proper rebuttal in replying to the arguments of the defendant's counsel. *Id.* This Court disagreed and concluded the defendant was manifestly prejudiced by the joinder with his co-defendant. *Id.*

With respect to the *Bruton* claim, "a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant." *Id.* at 1361. However, the *Bruton* claim may be eliminated by redaction of the facially incriminating confession and a limiting instruction. *See e.g., Richardson v. Marsh,* 481 U.S. 200, 209, 107 S.Ct. 1702, 1708, 95 L.Ed.2d 176 (1987). Nonetheless, a prosecutor may undo that limiting instruction by urging the jury to use the redacted statement in evaluating the co-defendant's case. *Sherlock,* 962 F.2d at 1361 and n.6.

Finally, this Court noted "[t]o show that the court abused its discretion in denying severance, [the] defendant must show prejudice from the joint trial of such magnitude that he was denied a fair trial." *Id.* at 1361-62 *citing Escalante,* 637 F.2d at 1201. "He must show that he suffered compelling prejudice against which the trial court was unable to afford protection." *Sherlock,* 962 F.2d at 1362 (internal quotation marks omitted) *quoting United States v. Romanello,* 726 F.2d 173, 177 (5th Cir. 1984). The prosecutor's actions, and the defendant's inability to cross-examine his co-defendant, suffice to show the defendant was significantly prejudiced. *Sherlock,* 962 F.2d at 1362.

In this case, the "manifest prejudice" involved Tagaloa's IA Questionnaire erroneously being admitted into evidence and published to the Jury as Exhibit 23 after the district court was initially convinced by the Government that the Tagaloa Waiver was voluntary. 1-ER-50 and 54-56. However, after conducting additional research on this issue, the district court denied the *Garrity* Motion For Reconsideration ruling that Exhibit 23 is inadmissible. Dkt. 297. Unfortunately, by that time the damage had been done because Exhibit 23 was shown to the Jury, and it is a foregone conclusions that "you cannot un-ring the bell." See generally *Brodit v. Cambra,* 350 F.3d 985, 1005 (9th Cir. 2003) (Berzon, J., dissenting) (Motions *in limine* avoid the obviously futile attempt to unring the bell once the evidence has been present

before the jury.). Furthermore, Exhibit 23B which replaced Exhibit 23 was not published to the Jury, AND the Curative Instruction was not given until a week after the former's admission into evidence.[16] Compare 1-ER-34, with 1-ER-17. Moreover, the Transcripts for the remaining days of the Trial do not indicate Exhibit 23B was every published to the Jury before its deliberations. Compare Dkts. 435, 437, 440, 441 and 442, with 2-ER-128.

Second, Pinkney's Sixth Amendment confrontation rights were irreparably prejudiced because Tagaloa did not testify, but Exhibit 23 was published to the Jury. Compare Dkt. 310 at 1, with 1-ER-54-56. In other words, the Government enjoyed the benefit of its' missteps by publishing Exhibit 23 to the Jury, replacing it with Exhibit 23B and not showing it to the Jury, and then agreeing to the belated Curative Instruction in the district court's efforts to remedy this constitutional error. All of this at the expense of Pinkney's constitutional rights designed to be protected by *Garrity*. Pinkney submits these series of events "manifestly prejudiced" him.

Third, if the district court had granted Pinkney's Motion For Severance II, the issue regarding Exhibit 23 would never have surfaced. The

[16] Pinkney submits the Curative Instruction also failed to neutralize prejudice because it was untimely. *See generally United States v. Tootick*, 952 F.2d 1078, 1085 (9th Cir. 1991) ("In order to neutralize prejudice, however, the instructions must be proper and timely.")

Government conceded that Pinkney's *Garrity* Rights precluded his IA Questionnaire from being introduced into evidence. See generally Dkt. 262 at 2. Furthermore, the district court ultimately ruled Tagaloa's *Garrity* Rights were not waived by him with the execution of the Tagaloa Waiver. Dkt. 297 at 4. Therefore, Exhibit 23B and the Curative Instruction would have been unnecessary because Exhibit 23 would never had been even introduced in a separate trial.

Finally, Pinkney **never kicked** Kaili. 2-ER-182. The Government also represented in opposition to Motion For Severance II that it "does not assert that Mr. Pinkney kicked the victim." 2-ER-211. However, the Government's Opening Statement promised to show the Jury that Pinkney DID KICK THE VICTIM. See 2-ER-195. Even more disheartening is the Government's Closing Argument which REPEATED FIVE TIMES THAT PINKNEY KICKED THE VICTIM. 2-ER-80, 87, 89, 100 and 111. Therefore, any limiting instruction to compartmentalize the evidence to the applicable Defendant was undermined by the Government.[17] Compare Dkt. 312 at 62 (Jury Instruction No. 34), with 2-ER-80, 87, 89, 100 and 111. Another "manifest prejudice" suffered by Pinkney.

[17] See generally *Sherlock*, 962 F.2d at 1360 (The prime consideration in assessing the prejudicial effect of a joint trial is whether the court may reasonably expect the jury to collate and appraise the independent evidence against each defendant in view of its volume and the court's limiting instructions."). Even if a limiting instruction would be inapplicable on this "Kicking Issue," the numerous other prejudices attendant with a joint trial as previously detailed combine to establish

Now, the Government may argue that Pinkney was required to renew his request for severance at the close of the evidence. *United States v. Vasquez-Velasco,* 15 F.3d 833, 845 (9th Cir. 1994) *citing United States v. Felix-Gutierrez,* 940 F.2d 1200, 1208 (9th Cir. 1991), *cert. denied,* 508 U.S. 906, 113 S.Ct. 2332, 124 L.Ed.2d 244 (1993). "However, this requirement is not an inflexible rule; waiver may be absent when the motion accompanies the introduction deemed prejudicial and a renewal at the close of all evidence would constitute an unnecessary formality." *Vasquez-Velasco,* 15 F.3d at 845 *citing Felix-Gutierrez,* 940 F.2d at 1208. "The guiding principle is whether the defendant diligently pursued the motion." *Felix-Gutierrez,* 940 F.2d at 1208 *citing United States v. Kaplan,* 554 F.2d 958, 966 (9th Cir. 1977) (per curiam), *cert. denied,* 434 U.S. 956, 98 S.Ct. 483, 54 L.Ed.2d 315 (1977).

In this case, Pinkney's Motion For Severance I was filed less than thirty (30) days from his Initial Appearance. Compare Dkt. 24, with Dkt. 14. Motion For Severance I was withdrawn because Pinkney needed to further develop

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"manifest prejudice." *See e.g., Escalante,* 637 F.2d at 1201 (Severance warranted where the prejudiced party, among other substantive rights, is unable to fully cross-examine her co-defendant, or is denied her Sixth Amendment Right of Confrontation.)

the record before proceeding with this request for relief.[18] See Dkt. 33. Pinkney filed Motion For Severance II once the record was more fully developed and he was preparing for trial. See Dkt. 117. At that time, he believed severance was warranted because: (1) there would be potential antagonistic defense strategies among the Defendants; (2) Pinkney anticipated calling his Co-Defendants to testify at trial; and (3) he does not feel that he can have a fair trial with the other two defendants present. Dkt. 117 at 2. During the trial it became painfully evident Pinkney was correct that he was not getting a fair trial, and his constitutional rights were being manifestly prejudice with the other two defendants present.

Additionally, on the fourth (4th) day of the Trial the Defendants objected to the introduction of Exhibits 71C and E. 2-ER-148-49. By doing so, they raised the issue of "severance" by way of objections to those exhibits. However, the district court was of the erroneous belief that "[n]obody sought to sever." 2-ER-157. Therefore, it would have been fruitless for the Defendants to continually raise "severance-type" objections thereafter, as well as "a renewal at the close of all evidence [because that] would constitute an unnecessary formality." *Vasquez-Velasco,* 15 F.3d at 845 (internal quotation marks omitted) *quoting*

[18] Pinkney made a wise choice in doing so because the Court "must view [the trial court's] denial of a motion to sever as of the time of denial." *Kaplan,* 554 F.2d at 966.

Felix-Gutierrez, 940 F.2d at 1208. Therefore, severance was diligently pursued during the trial.[19]

In summary, by reason of the joinder with Tagaloa and Taum, Pinkney's substantive rights were manifestly prejudiced because he was unable to challenge the contents of Exhibit 23 since Tagaloa did not testify. For the same reason, Pinkney was denied his Sixth Amendment Confrontation Rights with the erroneous admission of Exhibit 23. Finally, there would be little or no testimony of the involvement of Tagaloa and Taum in the Incident with which the Government could argue he was part of "their actions."[20] A severance in which Pinkney would be tried separately would alleviate any of the aforesaid undue prejudice.

CONCLUSION

For all the foregoing reasons, this Court is respectfully requested to vacate Pinkney's Conviction and Sentence, and remand this case back to the

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[19] Pinkney submits any further "formal" requests for severance would have been summarily dismissed because the district court already admonished the Defendants 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 hearings and so forth. **Nobody sought to sever.**" 2-ER-157 (emphasis added).

[20] This would be attempted through a Motion In Limine to preclude that testimony because the unfair prejudice of this evidence would substantially outweigh any probative value thereof. See Rule 403 of the *Federal Rules of Evidence.*

district court for a New Trial on all three (3) counts because Pinkney's *Garrity* Rights were violated with the erroneous admission of Exhibit 23, and the unpublished Exhibit 23B, along with the untimely Curative Instruction, did not remedy that constitutional violation beyond a reasonable doubt.

Secondly, Pinkney's Conviction and Sentence should also be vacated and this case remanded back to the district court for a new trial with Pinkney being tried separately from Tagaloa and/or Taum if either, or both, of them are successful in their respective appeals.

DATED at Honolulu, Hawaii, October 24, 2023.

/s/ Harlan Y. Kimura_____
HARLAN Y. KIMURA
Attorney for Defendant-Appellant
CRAIG PINKNEY

STATEMENT OF RELATED CASES

Counsel is aware of the following cases related to this matter presently pending before the Court:

1. *United States of America v. Jason Tagaloa;* No. 22-10318; and
2. *United States of America v. Jonathan Taum;* No. 22-10306.

The above Defendants-Appellants were Co-Defendants with Mr. Craig Pinkney in *United States of America v. Jason Tagaloa, et al.;* D.C. No. 1:20-cr-00044-LEK.

DATED at Honolulu, Hawaii, October 24, 2023.

/s/ Harlan Y. Kimura
HARLAN Y. KIMURA
Attorney for Defendant-Appellant
CRAIG PINKNEY

CERTIFICATE OF COMPLIANCE

I hereby certify that this Opening Brief is proportionately spaced in 14-point Times New Roman typeface. It contains 9,694 words, excluding the items exempted by Rule 32(a) (7) and Rule 32(f) of the *Federal Rules of Appellate Procedure*.

I further certify that this Opening Brief complies with the word limit of Rule 32-1 of the *Circuit Rules*.

DATED at Honolulu, Hawaii, October 24, 2023.

/s/ Harlan Y. Kimura_____
HARLAN Y. KIMURA
Attorney for Defendant-Appellant
CRAIG PINKNEY

ADDENDUM

Rule 28-2.7, *Circuit Rules*

ADDENDUM

Rule 8. Joinder of Offenses or Defendants

(a) Joinder of Offenses. The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged--whether felonies or misdemeanors or both--are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

(b) Joinder of Defendants. The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Rule 14. Relief from Prejudicial Joinder

(a) Relief. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

(b) Defendant's Statements. Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated at Honolulu, Hawaii, October 24, 2023.

/s/ Harlan Y. Kimura
HARLAN Y. KIMURA
Attorney for Defendant Appellant
CRAIG PINKNEY