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 REPLY BRIEF

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ARGUMENT

I. THE GOVERNMENT DID NOT APPEAL THE *GARRITY* RECONSIDERATION ORDER AND THEREFORE, IS PRECLUDED FROM ARGUING TAGALOA WAIVED HIS *GARRITY* RIGHTS IN THIS APPEAL.

The Government argues "[t]he [district] court did not err . . . when it allowed Tagaloa's investigative questionnaire into evidence [(i.e. Exhibit 23)] because Tagaloa validly waived his Garrity[1] rights in 2020." AB[2] at 16 (footnote added). Only towards the conclusion of that argument did the Government acknowledge the district court reversed that ruling when issuing the *Garrity* Reconsideration Order. Compare *Id.* at 25, with OB at 20-21. However, the Government did NOT appeal the *Garrity* Reconsideration Order. See 2-ER-272-73. Therefore, the Government is precluded from arguing that Tagaloa waived his *Garrity* Rights because that issue is not properly before the Court. *See generally NEI Contracting & Engineering, Inc. v. Hanson Aggregates Pacific Southwest, Inc.,* 926 F.3d 528, 533 (9th Cir. 2019) (An appellant that does not appeal a ruling waives the right to argue on appeal the same was in error).

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[1] *Garrity v. New Jersey,* 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967).
[2] "AB" refers to the Brief For The United States As Appellee; "OB" refers to Pinkney's Opening Brief; "ER" refers to Pinkney's Excerpts of Record; "PSR" refers to Pinkney's Presentence Investigation Report; and "SER" refers to the United States Supplemental Excerpts Of Record.

Since the Government did not appeal the *Garrity* Reconsideration Order, all of the arguments based upon its claim that Tagaloa waived his *Garrity* Rights should be disregard by the Court. In that event, Argument I.B.,[3] Argument I.C.1.,[4] a portion of Argument II.A.,[5] and Argument II.B.2.a.[6], all relying on the admissibility of Tagaloa's Questionnaire Responses (i.e. Exhibit 23) are deemed waived by the Government. In that event, the only arguments for the Court to consider in this appeal are whether: (1) Pinkney has standing to challenge the admissibility of Exhibit 23; (2) any error in the admission of Exhibit 23 affected Pinkney's substantial rights; and (3) Pinkney should be accorded discretionary relief. See AB at 17-18, 26-29 and 30, respectively.

II. ALTERNATIVELY, PINKNEY'S *GARRITY* RIGHTS ARE IMBEDDED IN TAGALOA'S QUESTIONNAIRE ANSWERS BECAUSE THE GOVERNMENT'S THEORY IS THAT ALL THE CO-DEFENDANTS CONSPIRED WITH EACH OTHER TO COMPLETE THEIR ANSWERS TOGETHER.

Assuming the Court agrees that the Government may maintain the argument that Pinkney waived his arguments because of Tagaloa's waiver of his *Garrity* Rights, the first issue to address is then whether Pinkney has standing to

[3] AB at 19-21.
[4] *Id.* at 22-26.
[5] *Id.* at 33.
[6] *Id.* at 38-39.

challenge the admissibility of Tagaloa's Questionnaire Responses because those responses implicated Pinkney's Fifth Amendment Rights. See generally AB at 17-18. Specifically, the Government argues the "questionnaire responses were Tagaloa's statements, not Pinkney's, and Tagaloa's *Garrity* rights regarding those responses belonged to him alone."[7] AB at 18 (emphasis in original) *citing United States v. Blackman,* 72 F.3d 1418, 1426 (9th Cir. 1995). However, that argument is incorrect because in the Statement of the Case, the Government cites to the record below that:

> **Pinkney, Tagaloa, and DeMattos[8] decided to fill out their reports together.** Their purpose was to maintain consistency throughout all of their reports so that no red flags were raised and to not implicate anybody so they wouldn't get in trouble. To accomplish this purpose, **Pinkney, Tagaloa, and DeMattos spoke with one another about the content of their reports and reviewed one another's reports.**

AB at 6 (internal quotation marks, brackets, and citations to SER omitted) (emphasis and footnote added).

Based upon the above quoted text, it is readily apparent each defendant "adopted" the others' responses as his own. *See generally United*

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[7] "Tagaloa" refers to one of Pinkney's Co-Defendants in the court below also appealing his conviction in *United States of America v. Jason Tagaloa;* No. 22-10318. Pinkney's other Co-Defendant is Jonthan Taum and likewise, his is appealing his conviction in *United States of America v. Jonathan Taum;* No. 22-10306.

[8] "DeMattos" was another Adult Correction Officer involved in the June 15, 2015, Incident, but charged and pleaded guilty separately. AB at 1-2.

States v. Almonte, 956 F.2d 27, 29 (2nd Cir. 1992) ("[A] third party's characterization of a witness's statement does not constitute a prior statement of that witness unless the witness has subscribed to that characterization.") (internal quotation marks omitted). Consequently, the cases cited by the Government are inapposite because Pinkney's argument is not that he is asserting his *Garrity* rights to Tagaloa's responses. Instead, Tagaloa's responses are deemed to be Pinkney's responses because all three of them (i.e. Pinkney, Tagaloa and DeMattos) "decided to fill out their reports together." AB at 6. *See generally Almonte,* 956 F.2d at 29. Therefore, Pinkney does have standing to assert his *Garrity* Rights to Tagaloa's responses because he essentially adopted them as his own.

Alternatively, if the Court permits the Government to continue arguing Tagaloa waived his *Garrity* Rights, the next issue to address is whether Pinkney's *Garrity* Rights to Tagaloa's Responses are waived because Pinkney did not contest the waiver of Tagaloa's *Garrity* Rights at trial. AB at 19-20. However, that argument is of no consequence because the "*Garrity* rule, like *Miranda,*[9] is prophylactic . . . [and] the privilege is said to be 'self-executing' and **may be claimed after the fact.**" *United States v. Goodpaster,* 65 F.Supp.3d 1016, 1026 (D. Ore 2014) (*italics* in original; **bold** emphasis and footnote added) *citing Minnesota v. Murphy,* 465 U.S. 420, 436, 437, 104 S.Ct. 1136, 1147,

[9] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 79 L.Ed.2d 409 (1966)

79 L.Ed.2d 409 (1984). In other words, even if Pinkney's trial counsel did not object to the admission of Exhibit 23, it was plain error for the district court to have initially admitted Exhibit 23.[10] *See generally United States v. Whitehead*, 200 F.3d 634, 638-39 (9th Cir. 2000) (It is plain error for the trial court to admit evidence of a defendant's silence once *Miranda* warnings are given). In fact, the district court acknowledged that error with the issuance of the *Garrity* Reconsideration Order. Dkt. 297.

The Government's next argument that survives based upon its failure to appeal the *Garrity* Reconsideration Order, is whether the erroneous admission of Exhibit 23 affected Pinkney's substantial rights. AB at 23-26. Clearly it did because Pinkney was convicted of Count 3 which concerned all three of them filing out their *Garrity* Reports together "to maintain consistency throughout all of their reports so that no red flags were raised and to not implicate anybody so they wouldn't get in trouble." AB at 6 (brackets omitted) *citing* 1-SER-96, 162. Moreover, the district court observed the erroneous admission of Exhibit 23 is

[10] The Government references *United States* v. Wells, 719 Fed.Appx. 587, 588, n.1 (9th Cir. 2017) that a *Garrity* violation raised for the first time on appeal need not be addressed by the Court. AB at 21, n.4. However, that unpublished memorandum disposition is "not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." Rule 36-3(a) of the *Circuit Rules*. Neither exception applies in this appeal. Moreover, there are no facts relevant to the *Garrity* inquiry in *Wells* to determine whether prophylactic protection should have been accorded to the defendant in that case.

"like *Miranda.* **You really can't cure it once you, you know, took the unprotected statement without doing it.**" 1-ER 25 (emphasis added). In other words, "you cannot unring a bell that has already been rung." *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 presented to the jury.)

The Government further argues that the "district court gave an instruction to cure any possible error." AB at 27. However, Exhibit 23B was never published to the Jury when the Curative Instruction was given to them. See generally 1-ER-17. The Jury only saw Exhibit 23. 1-ER-54-56. Based upon these facts, the Government cannot establish the erroneous admission of Exhibit 23 was harmless beyond a reasonable doubt.[11] *See generally 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).

The last surviving issue for the Government is whether Pinkney deserves discretionary relief due to the district court's erroneous admission of

[11] The Government also argues "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.**" AB at 28 (emphasis added). Again, that is incorrect because the "[G]overnment 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.**" *Id.* at 12 *quoting* 2-ER-230 (emphasis added).

Exhibit 23. AB at 30. Specifically, the Government asserts Pinkney should not be afforded discretionary relief because it would cost too much for the taxpayers to conduct a new trial. AB at 30. However, enforcement of a constitutional right is priceless. *See e., g., Walters v. National Association of Radiation Survivors,* 473 U.S. 305, 370, n.21, 105 S.Ct. 3180, 3215, n.21, 87 L.Ed.2d 220 (1985) (Stevens, J., dissenting) (Freedom of Speech); *Mcllwain v. United States,* 464 U.S. 972, 977, 104 S.Ct. 409, 413, 78 L.Ed.2d 349 (1983) (Brennan, J., dissenting) (Right To Fair and Impartial Jury); *American Communications Association, C.I.O., et al. v. Douds,* 339 U.S. 382, 442, 70 S.Ct. 674, 706, 94 L.Ed. 925 (1950) (Jackson J., concurring and dissenting, each in part) (Freedom of Speech); and *Stacher v. United States,* 258 F.2d 112, 119 (9th Cir. 1958) (Citizenship). Therefore, protection of Pinkney's constitutional *Garrity* Rights outweighs those cost considerations.

In summary, all the arguments based upon Tagaloa's waiver of his *Garrity* Rights are precluded because the *Garrity* Reconsideration Order was not appealed by the Government. Therefore, the three remaining arguments will not prevent Pinkney from receiving a new trial because his substantial rights were affected by the erroneous admission of Exhibit 23, and there was no publication of Exhibit 23B when the Curative Instruction was given to the Jury. See generally 1-ER-17. Moreover, discretionary relief is warranted to protect Pinkney's

priceless constitutional *Garrity* right. *See e.g., Walters,* 473 U.S. at 370, n.21, 105 S.Ct. at 3215, n.21 (Stevens, J., dissenting) (Freedom of Speech); *Mcllwain,* 464 U.S. at 977, 104 S.Ct. at 413 (Brennan, J., dissenting) (Right To Fair and Impartial Jury); *American Communications Association, C.I.O., et al.,* 339 U.S. at 442, 70 S.Ct. at 706 (Jackson J., concurring and dissenting, each in part) (Freedom of Speech); and *Stacher,* 258 F.2d at 119 (Citizenship). Therefore, the Government is unable to prove the constitutional error in the admission of Exhibit 23 was harmless beyond a reasonable doubt. *Lopez,* 500 F.3d at 845.

III. PINKNEY DID NOT WAIVE HIS SEVERANCE ARGUMENT BECAUSE IT WAS PREVIOUSLY RAISED AND TO DO SO AGAIN MULTIPLE TIMES DURING TRIAL WOULD BE A FUTILE EFFORT BECAUSE THE DISTRICT COURT ALREADY MISTAKENLY BELIEVED HE HAD WAIVED THIS ARGUMENT.

With respect to Pinkney's second principle argument in this appeal, the Government claims he waived "his severance argument because he failed to renew his motion to sever at the close of evidence." AB at 31. However, there is an exception to this rule as noted by Pinkney. OB at 43. If "it would have been fruitless for [Pinkney] to continually raise severance-type objections . . . renewal [thereof] at the close of all evidence . . . would be an unnecessary formality." *Id.* (internal quotations marks omitted) *quoting United States v. Vasquez-Velasco,* 15 F.3d 833, 845 (9th Cir. 1994) (internal quotation marks omitted). It would have

been an unnecessary formality because the district court was already under the mistaken belief that "nobody sought to sever." 2-ER-157.

Next, the Government is incorrect that Motion For Severance II "raised issues that Pinkney has abandoned on appeal." AB at 32. Motion For Severance II repeated Pinkney's request in Motion For Severance I that he "wishes to have a separate trial, because he does not feel that he can have a fair trial with the other two defendants present." See Dkt. 24 at 3, and Compare with 2-SER-481. The specific reasons, along with citations to the Record on Appeal, are contained in Pinkney's Opening Brief. OB at 36-44. Additionally, the *Bruton*[12] issue is another example of Pinkney's fear that he would not have a fair trial with the other two defendants (especially Tagaloa) present.

The Government further seeks to excuse the misstatements made by its counsel's during opening and closing statements that Pinkney kicked Kaili when the record does not support those representations, in claiming Pinkney should have objected and renewed his severance requests "when those statements were made." AB at 34. That response is of concern because the Government should be held to a higher standard than only being penalized when its conduct is called into question. Even more troubling is the Government's failure to address the admission by DeMattos that he testified "during the Grand Jury Proceedings to

[12] *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)

ensure his answers aligned with the Government's case and charges in the Indictment." OB at 18, and Compare with AB at 2-9. Finally, the Government continues to argue in this appeal that Pinkney **kicked** Kaili despite the record to the contrary, and the acknowledgment in another part of its brief that never occurred.[13] Compare AB at 4, with *Id.* at 40 and 2-ER-80, 87, 89, 100, 111, and 195.

Finally, the Government argues notwithstanding all of its missteps and "liberal" interpretation of the record on appeal, such actions would not warrant severance because Exhibit 23 would still be admitted even if Pinkney were to have a separate trial. AB at 38-39. However, that is not a foregone conclusion because the *Garrity* Reconsideration Order which was not appealed by the Government. Therefore, Tagaloa's answers (i.e. Exhibit 23) will be excluded at Pinkney's retrial for that reason.

CONCLUSION

For all the foregoing reasons, and those set forth in the Opening Brief, the Court is respectfully requested to vacate Pinkney's Conviction and Sentence, and remand this case back to the district court for a New Trial on all three (3)

[13] But see AB at 38 where the Government claims its counsel was "speaking collectively" about the individuals in the video clips when referring to Pinkney kicking Kaili. However, the record on appeal indicates otherwise. 2-ER-80, 87, 89, 100, 111, and 195.

counts because Pinkney's *Garrity* Rights were violated with the erroneous admission of Exhibit 23, and the unpublished Exhibit 23B, along with the delayed Curative Instruction, did not remedy that constitutional violation beyond a reasonable doubt.

Additionally, Pinkney's Conviction and Sentence should be vacated and this case remanded back to the district court because severance should have been granted due to the *Bruton* Issue. It would have been fruitless to raise this severance argument at the close of the evidence because the district court already mistakenly believed Pinkney had already waived this severance argument.

DATED at Honolulu, Hawaii, April 22, 2024.

/s/ Harlan Y. Kimura
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CRAIG PINKNEY

CERTIFICATE OF COMPLIANCE

I hereby certify that this Rely Brief is proportionately spaced in 14-point Times New Roman typeface. It contains 2,522 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 Reply Brief complies with the word limit of Rule 32-1 of the *Circuit Rules*.

DATED at Honolulu, Hawaii, April 22, 2024.

/s/ Harlan Y. Kimura_____
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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2024, 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, April 22, 2024.

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