

SEALED

BY ORDER OF THE COURT

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FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
Apr 03, 2024, 10:15 am
Lucy H. Carrillo, Clerk of Court

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEITH MITSUYOSHI KANESHIRO (1),
DENNIS KUNIYUKI MITSUNAGA (2),
TERRI ANN OTANI (3),
AARON SHUNICHI FUJII (4),
CHAD MICHAEL MCDONALD (5),
SHERI JEAN TANAKA (6),

Defendants.

Case No. CR-22-00048-TMB-NC

**DEFENDANTS RESPONSE IN
OPPOSITION TO UNITED
STATES SEALED MOTION IN
LIMINE NO. 9; CERTIFICATE
OF SERVICE**

(REDACTED BRIEF)

Judge: Hon. Timothy M. Burgess
Trial Date: March 12, 2024

**DEFENDANTS RESPONSE IN OPPOSITION
TO UNITED STATES MOTION *IN LIMINE* NO. 9**

Defendants Keith M. Kaneshiro, Dennis K. Mitsunaga, Terri A. Otani, Aaron S. Fujii, Chad M. McDonald, and Sheri J. Tanaka (the “Defendants”) hereby file their response in opposition to United States Sealed Motion *in Limine* No. 9: To Introduce Rudy Alivado’s Sworn Statement to Cure Misimpression (“MIL 9”). ECF No. 581.

I. INTRODUCTION

On July 22, 2014, Rudy Alivado testified in *Mau v. MAI* (D. Hawai‘i, 12-cv-00468-DKW-BMK). Regarding this evidence, this Court ruled that “the statements by . . . R.A. made during litigation in the L.J.M. and Masui Civil Cases are admissible for the non-hearsay purpose of effect on the listener. . . . R.A.’s statements provide details about L.J.M.’s alleged ‘side jobs’ and are relevant to demonstrate the Defendants’ belief that there was probable cause to charge L.J.M. with criminal theft.” ECF No. 486 at 5-6. The Court has prepared a limiting instruction for this purpose. ECF No. 568 at 4. Further, the Court “strongly encourages the parties to submit complete and accurately representative portions of . . . R.A.’s testimony at trial.” ECF No. 486 at 6. This is exactly what the Defendants intend to do.

Now, however, the government moves *in limine* to admit Mr. Alivado’s July 29, 2021 grand jury testimony under Fed. R. Evid. 106 to “clarify, explain, and

correct the misimpressions left hanging in his civil trial testimony.” ECF No. 581 at 10. This is an improper use of Fed. R. Evid. 106. While Mr. Alivado’s testimony before the grand jury differs significantly from his testimony during the *Mau v. MAI* civil trial, the government does not seek to provide context to Mr. Alivado’s civil trial testimony under Fed. R. Evid. 106. Instead, the government seeks to *impeach* Mr. Alivado with prior inconsistent statements under Fed. R. Evid. 613. Although the government is entitled to do this on direct or cross examination, the law does not allow them to misuse Rule 106 for this purpose. This is especially improper because Mr. Alivado is listed as a government witness, and during direct examination they may impeach him with his 2021 grand jury testimony if warranted.

II. LEGAL STANDARD

Under Fed. R. Evid. 106, “[i]f a party introduces all or part of a statement, an adverse party may require the introduction, at that time, of any other part – or any other statement – that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.” The rule “applies only to the narrow circumstances in which a party has created a misimpression about the statement, and the adverse party offers a statement that in fact corrects the misimpression.” Fed R. Evid. 106 advisory committee’s notes. “The mere fact that

a statement is probative and contradicts a statement offered by the *opponent is not enough* to justify completion under Rule 106.” *Id.* (emphasis added.)

III. ANALYSIS

The purpose of Rule 106 is to address concerns of “misleadingly-tailored snippet[s]” of statements. *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996). Admission of Rudy Alivado’s 2021 grand jury testimony does not “serve to correct a misleading impression of a prior statement created by taking . . . comments out of context.” *Id.* Rather, it serves to impeach Mr. Alivado through prior inconsistent statements.

The government’s motion is not supported by the Court’s Order. The Court was clear that Mr. Alivado’s testimony in the *Mau v. MAI* civil trial would be hearsay if offered for the truth, and therefore may *only* be considered for the proper, non-hearsay purpose of showing its effect on the Defendants and their belief that there was probable cause to charge L.J.M. with criminal theft. ECF No. 486 at 6. This permissible use is necessarily limited to the time frame of the charged conspiracies, when charging decisions were being made by the DPA.

Given this limited purpose, any curative testimony proffered under Fed. R. Evid. 106 must relate *to its effect on the Defendants*. But Mr. Alivado’s 2021 grand jury testimony could not have had any effect on any defendant (or any other person) during the course of the charged conspiracies, because his testimony was

four years *after* the alleged crimes ended and because it was made in the secrecy of grand jury proceedings with no defendants present. It is only relevant for the purpose of impeaching Mr. Alivado's credibility, which the government may probe when it (or the defense) calls him as a witness. Thus, the government's proposal is an abuse of Fed. R. Evid. 106 and is not grounded in the Court's prior ruling on this issue.

In addition, because Mr. Alivado's under penalty of perjury testimony in the *Mau v. MAI* case and the 2021 grand jury conflict, Mr. Alivado's fifth amendment rights are implicated by any testimony he might provide in this jury trial. Should Mr. Alivado be called as a witness, Mr. Alivado should be informed by the Court outside the presence of the jury of his fifth amendment right not to incriminate himself through his testimony in the instant matter, and that he should seek advice from counsel prior to testifying.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court deny United States Sealed Motion *in Limine* No. 9: To Introduce Rudy Alivado's Sworn Statement to Cure Misimpression.

Dated: April 2, 2024.

Respectfully submitted,

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UNITED STATES OF AMERICA,

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KEITH MITSUYOSHI KANESHIRO (1),
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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true and correct copy of the foregoing **DEFENDANTS RESPONSE IN OPPOSITION TO UNITED STATES SEALED MOTION *IN LIMINE* NO. 9** was served electronically through CM/ECF:

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DATED: at Honolulu Hawai‘i, on April 2, 2024.

/s/ Nina Marino
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