UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

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. 1:22-00048-TMB-NC

ORDER ON UNITED STATES' MOTION *IN LIMINE* NO. 9
(Dkt. 581)

**** UNDER SEAL ****

I. INTRODUCTION

Before the Court is the United States' "Motion *in Limine* No. 9: To Introduce Rudy Alivado's Sworn Statement to Cure Misimpression" (the "United States' Motion No. 9") and attached Exhibit 1, Grand Jury "Testimony of Rudy Alivado."[1] Defendants Keith Mitsuyoshi Kaneshiro ("Kaneshiro"), Dennis Kuniyuki Mitsunaga, Terri Ann Otani, Aaron Shunichi Fujii, Chad Michael McDonald and Sheri Jean Tanaka ("Tanaka") (collectively,

[1] Dkts. 581 (United States' Sealed Unredacted Motion No. 9), 581-1 (Exhibit 1, Grand Jury Testimony of Rudy Alivado, July 29, 2021); *see also* Dkt. 574 (United States' Redacted Motion No. 9).

"Defendants") oppose.[2] The matter is fully briefed. For the following reasons, the Court GRANTS the United States' Motion No. 9.

II. BACKGROUND

Given the voluminous litigation in this matter, the Court assumes the Parties are familiar with the factual and procedural history of the case. The Court incorporates by reference the factual and procedural history included in its Order at Docket 484.

Relevant here, in 2014, Rudy Alivado ("Alivado") testified in *Mau v. Mitsunaga & Associates, Inc.*[3] ("L.J.M. Civil Case").[4] In 2021, Alivado also testified before the grand jury in this case.[5]

A. United States' Motion No. 9

The United States seeks to introduce Rudy Alivado's 2021 grand jury testimony pursuant to Federal Rule of Evidence ("Rule") 106, commonly known as the "rule of completeness."[6] The United States notes that Defendants have expressed intent to introduce portions of Alivado's testimony in the L.J.M. Civil Case "for its effect on the listener," but it argues such "narrow" testimony would leave misimpressions about "Alivado's actual perspective of his exchange with [L.J.M.]."[7] Therefore, it seeks the Court's leave to introduce "relevant pieces of Alivado's grand jury testimony" to correct

[2] Dkt. 618 (Defendants' Sealed Unredacted Response in Opposition to United States' Motion No. 9); *see also* Dkt. 609 (Defendants' Redacted Response in Opposition to United States' Motion No. 9).
[3] No. 1:12-cv-00468-DKW-BMK (D. Haw. 2014); *see* Dkt. 581-1.
[4] *See* Dkt. 345-2 (Exhibit 2, Civil Trial Testimony of Rudy Alivado, July 22, 2014).
[5] *See* Dkt. 581-1.
[6] Dkt. 581 at 2.
[7] *Id.* at 1.

misimpressions that may arise should Defendants introduce an excerpt of his civil testimony.

1. Alivado's Civil Trial Testimony

The United States asserts that Defendants "intend[] to introduce Rudy Alivado's federal civil trial testimony" via a "narrow," "brief," and "vague" excerpt which would "leave[] a grave misimpression about Alivado's actual perspective."[8] The United States suggests that the portion of Alivado's trial testimony Defendants will introduce contains a "pivotal exchange coming in the form of a compound, leading question from Defendant Tanaka" that "can be twisted to make it appear Alivado in fact believes [L.J.M.] deceitfully stole cash from him" when L.J.M. asked for cash payments for her interior design work on Alivado's Kaneohe home.[9]

The United States highlights a single question-and-answer from Alivado's civil trial testimony:

> **Q. (Defendant Tanaka):**
>
> Okay. And you just assumed it was a[] [Mitsunaga and Associates, Inc.] project, and you were paying in her capacity as an architect on behalf of Mitsunaga & Associates, Inc.; is that correct?
>
> **A. (Rudy Alivado):**
>
> That was my assumption, yes.

[8] *Id.* at 1–2.
[9] *Id.* at 1–3.

The United States asserts that Defendants used this single question-and-answer to support claims in Defendant McDonald's Declaration[10] and two of the four counts in the Felony Information filed against L.J.M. asserting that L.J.M.'s cash payments from Alivado were theft.[11]

2. Alivado's Grand Jury Testimony

Aiming to correct possible "misimpressions" raised at trial by the Defendants' introduction of this single question-and-answer excerpted from Alivado's civil trial testimony, the United States seeks to introduce Alivado's grand jury testimony. Alivado's grand jury testimony, the United States suggests, demonstrates that Alivado did not consider himself a theft victim at all and, in fact, shows Alivado "had no issues paying [L.J.M.] 'because she did a good job. She worked hard, she visited a site with [him], and [he] thought she deserved payment.'"[12]

The United States describes Defendant Tanaka's question as "compound [and] leading" and Alivado's elicited response as "brief and vague."[13] But, it argues, Alivado's more expansive answers in his 2021 grand jury testimony provide important context for his civil testimony by showing that Alivado did not think the cash payment was a theft, that he paid L.J.M. because he thought she deserved payment, and that he knew he was paying her and "not Mitsunaga."[14] Therefore, the United States argues, Alivado's more

[10] *Id.* at 5–6.
[11] *Id.* at 4–5.
[12] *Id.* at 2 (quoting Dkt. 581-1 at 41–42).
[13] *Id.* at 4.
[14] *Id.* at 10.

robust explanation in his 2021 grand jury testimony would correct several misimpressions drawn from the short excerpt of his civil trial testimony.[15]

B. Defendants' Response in Opposition

Opposing the United States' Motion No. 9, Defendants point to this Court's prior order confirming the admissibility of Alivado's prior statements for the non-hearsay purpose of demonstrating the effect on a listener and signal that, pursuant to the Court's "strong encourage[ment]" in its order, they intend to submit "complete and accurately representative portions of [Alivado's] testimony at trial."[16]

Defendants argue that the United States' proposed use of Alivado's grand jury testimony would be an "improper use of [Rule] 106" but note that it would be proper as an "*impeach[ment* of] Mr. Alivado with prior inconsistent statements under [Rule] 613."[17] Defendants suggest that Alivado's grand jury testimony is not properly admissible under Rule 106 because it "does not 'serve to correct a misleading impression of a prior statement created by taking . . . comments out of context.'"[18] Instead, Defendants suggest that Alivado's grand jury testimony is relevant only for impeachment, and therefore may come in when Alivado testifies.[19]

Defendants further suggest, without citation to any legal authority, that this Court adopt a new approach to Rule 106: that evidence regarding Alivado's civil trial testimony "must

[15] *Id.* at 10–11.
[16] Dkt. 618 at 2 (quoting Dkt. 486 (Order on Defendants' Motion *in Limine* No. 5) at 6).
[17] *Id.* at 3.
[18] *Id.* at 4 (quoting *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996)).
[19] *Id.* at 3–4.

relate *to its effect on the Defendants*" because the Court has ruled that Alivado's civil trial testimony would be admissible for its effect on the listener.[20] Defendants reason that under this new approach, again without legal authority in support, any Rule 106 evidence would be "necessarily limited to the time frame of the charged conspiracies, when charging decisions were being made by the [City and County of Honolulu Department of the Prosecuting Attorney]," which would bar Alivado's 2021 grand jury testimony.[21]

Defendants also note that any conflict between Alivado's civil trial and grand jury testimony would implicate his Fifth Amendment rights because he testified under penalty of perjury.[22] Defendants suggest that the Court should *sua sponte* advise Alivado regarding his Fifth Amendment rights if he takes the stand, regardless of whether he actually invokes the Fifth Amendment.[23]

III. LEGAL STANDARD

*A. Motion*s in Limine

"A motion *in limine* is a procedural device to obtain an early and preliminary ruling on the admissibility of evidence"[24] and may be used to request evidence be either excluded or admitted before trial.[25] Motions *in limine* are appropriate when the "mere mention of

[20] *Id.* at 4.
[21] *Id.* at 4–5.
[22] *Id.* at 5.
[23] *Id.*
[24] *Barnard v. Las Vegas Metro. Police Dep't*, No. 2:03-cv-01524-RCJ-LRL, 2011 WL 221710, at *1 (D. Nev. Jan. 21. 2011); *Research Corp. Techs. v. Microsoft Corp.*, No. CV-01-658-TUC-RCJ, 2009 WL 2971755, at *1 (D. Ariz. Aug. 19, 2009).
[25] *See* Fed. R. Evid. 103; *United States v. Williams*, 939 F.2d 721, 723 (9th Cir. 1991) (affirming district court's ruling *in limine* that prosecution could admit impeachment evidence under Fed. R. Evid. 609).

evidence during trial would be highly prejudicial."[26] "*[I]n limine* rulings are not binding on the trial judge, and the judge may always change his mind during the course of a trial."[27]

A party seeking to exclude evidence through a motion *in limine* must satisfy a "high standard" and show the evidence is inadmissible on all potential grounds.[28] Otherwise, "evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context."[29]

B. Rule of Completeness

Under Rule 106, which "sets forth the rule of completeness,"[30] "[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."[31]

By allowing the other party to present the remainder of the writing or recorded statement ("remainder") immediately rather than later on during cross-examination,

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[26] *Barnard*, 2011 WL 221710, at *1 (quoting BLACK'S LAW DICTIONARY 1109 (9th ed. 2009)); *Research Corp.*, 2009 WL 2971755, at *1.

[27] *Ohler v. United States*, 529 U.S. 753, 758, n.3 (2000).

[28] *Barnard*, 2011 WL 221710, at *1 (citations omitted); *BNSF Ry. Co. v. Quad City Testing Lab'y, Inc.*, No. CV-07-170-BLG-RFC, 2010 WL 4534406, at *1 (D. Mont. Oct. 28, 2010) (citations omitted); *Research Corp.*, 2009 WL 2971755, at *1 (citations omitted).

[29] *Barnard*, 2011 WL 221710, at *1 (citations omitted); *BNSF*, 2010 WL 4534406, at *1 (citations omitted); *Research Corp.*, 2009 WL 2971755, at *1 (citations omitted).

[30] *United States v. Goxcon-Chagal*, No. CR 11-2002 JB, 2012 WL 3249473, at *3 (D.N.M. Aug. 4, 2012).

[31] Fed. R. Evid. 106; *see also Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988) ("The common-law 'rule of completeness,' which underlies [Rule] 106, was designed to prevent exactly the type of prejudice of which [petitioner] complains. . . . [T]he rule [permits an] . . . 'opponent, against whom a part of an utterance has been put in, [to] . . . complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance.'" (quoting 7 J. Wigmore, Evidence in Trials at Common Law § 2113, p. 653 (J. Chadbourn rev. 1978))).

Rule 106 avoids the situation where a statement taken out of context "create[s] such prejudice that it is impossible to repair by a *subsequent* presentation of additional material."[32]

However, Rule 106

> does not give a green light of admissibility to all excised portions of statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party has created a misimpression about the statement, and the adverse party proffers a statement that in fact corrects the misimpression. 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.[33]

As amended in 2023, under Rule 106, a completing statement is admissible over a hearsay objection.[34] "A party that presents a distortion can fairly be said to have forfeited its right to object on hearsay grounds to a statement that would be necessary to correct the misimpression."[35]

IV. DISCUSSION

The Court concludes that Alivado's 2021 grand jury testimony is admissible as a remainder for his 2014 civil trial testimony under Rule 106, and defers ruling on whether it is alternatively or additionally admissible for impeachment as a prior inconsistent statement, unless and until the United States offers it for that purpose.

[32] *Beech Aircraft*, 488 U.S. at 171 n.14 (emphasis in original).
[33] Fed. R. Evid. 106 Advisory Committee Notes to 2023 Amendment.
[34] *Id.*
[35] *Id.*

A. The identified passages of Alivado's grand jury testimony are admissible remainders for the identified passages of Alivado's civil trial testimony under Rule 106.

The Court finds that the identified portions of Alivado's grand jury testimony are admissible as remainders to correct potential misimpressions raised by the identified portion of his civil trial testimony. Rule 106 permits the admission of "any other writing or recorded statement" to correct a misimpression, and courts construe this clause "expansive[ly]."[36]

First, the Court is not persuaded by Defendants' suggestion that Alivado's grand jury testimony is not properly admissible under Rule 106 because it "does not 'serve to correct a misleading impression of a prior statement created by taking . . . comments out of context.'"[37] Courts have recognized that "[m]eaning and context are inextricably intertwined."[38] When a statement in context with another statement "results in one set of possible meanings," but "in isolation tends to create a different meaning," "[t]here is a serious risk that presentation of only [one] [statement], separate and apart from the [other], would distort, misrepresent, or confuse the meaning of the . . . statement."[39] Accordingly, as the Rule of Completeness recognizes:

> Statements are inextricably intertwined when the meaning of a statement, if divorced from the context provided by the other statement, is different than the meaning the statement has when read within the context provided by the other statement. Under those circumstances, a court must take care to avoid distortion or misrepresentation of the speaker's meaning, by requiring that

[36] *See* § 5078 Material Introduced for Completeness, 21A Fed. Prac. & Proc. Evid. § 5078 (2d ed.) (citing *United States v. Maccini*, 721 F.2d 840, 844 (1st Cir. 1983)).
[37] *Id.* at 4 (quoting *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996)).
[38] *United States v. Castro-Cabrera*, 534 F. Supp. 2d 1156, 1160 (C.D. Cal. 2008).
[39] *Id.*

> the statements be admitted in their entirety and allowing the jury to determine their meaning. Here, unless [the speaker's] statement is viewed in its entirety, there is a significant danger that its meaning will be taken out of context and misrepresent to the jury a meaning other than the one [the speaker] was communicating.[40]

Here, this analysis appears to apply in a straightforward application of Rule 106. Alivado's statement at the civil trial alone appears to create a different meaning than his statement in context with the other answers he provided on the subject before the grand jury.

The Court further disagrees with Defendants' unsupported assertion that any testimony offered under Rule 106 "must relate *to its effect on the Defendants*" or else be inadmissible hearsay because of the Court's ruling that Alivado's civil trial testimony would be admissible for its effect on the listener.[41] Rather, Rule 106 on its face declares that evidence may be offered over a hearsay exception. There also is no bar on using Alivado's grand jury testimony to clarify misimpressions raised by his vague answer at the civil trial.[42] Indeed, the rule does not set forth any requirement of meeting the time or purpose of the original statement, and the Court will not require one.

If the Defendants introduce selective portions of Alivado's civil trial testimony such that a misleading "misimpression" is created, the United States may introduce "any other statement" in fairness to avert misunderstandings and distortions.[43] For example, the Court finds that the single question-and-answer excerpt of Alivado's civil trial testimony creates

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[40] *Id.* at 1160–61.
[41] Dkt. 618 at 4.
[42] *United States v. Maccini*, 721 F.2d 840, 844–45 (1st Cir. 1983) (finding no abuse of discretion to read additional testimony and grand jury testimony contemporaneously, given breadth of Rule 106).
[43] Fed. R. Evid. 106.

a misimpression that could be corrected by introducing Alivado's grand jury testimony. In other words, Alivado's vague and misleading answer to the compound question at the civil trial could be clarified by introducing as a remainder his more detailed answers on the same topic before the grand jury. Within those parameters and subject to those limitations, the remainder may be introduced concurrently with the misleading excerpt.

Under this analysis, the Court is not convinced that Alivado's answers before the grand jury and at the civil trial constitute potential perjury that would implicate Alivado's Fifth Amendment right against self-incrimination. The Court is not in a position to determine whether Alivado has perjured himself. But on the record before the Court, it appears to the Court that Alivado's answers under oath are not inherently contradictory. Rather, the Court's understanding is that Alivado's answer at the civil trial was vague and, particularly considering the compound nature of the question, could mislead the trier of fact regarding his positions, whereas his answers before the grand jury were more detailed and would clarify any misimpressions and incorrect inferences that could be drawn from his civil trial testimony. Therefore, at this time and on the limited record before it, the Court cannot conclude that Alivado should be prevented from testifying on the Defendants' self-incrimination theory alone based on the passages identified. Regardless, the Court is aware of its obligations should Alivado invoke his Fifth Amendment right against self-incrimination and will instruct Alivado accordingly.

B. The Court defers ruling on whether Alivado's grand jury testimony is admissible as prior inconsistent statements offered for impeachment.

Defendants further argue that Alivado's grand jury testimony is admissible for impeachment as prior inconsistent statements. The United States has not argued for the admission of these statements as prior inconsistent statements offered for impeachment. If any party seeks to admit the statements in this capacity, the Court will rule on their admission for this purpose at that time.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS the United States' Motion No. 9 at Docket 581.

IT IS SO ORDERED.

Dated this 15th day of April, 2024.

/s/ *Timothy M. Burgess*
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE