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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’ MOTION IN  
LIMINE NO. 23: TO EXCLUDE  
THE GRAND JURY  
TESTIMONY OF ERNEST  
MORITOMO; CERTIFICATE OF  
SERVICE**

Judge: Hon. T. Burgess

**DEFENDANTS' MOTION *IN LIMINE* NO. 23: TO EXCLUDE THE  
GRAND JURY TESTIMONY OF ERNEST MORITOMO**

Defendants hereby move *in limine* to exclude the grand jury testimony of Ernest Moritomo pursuant to the Federal Rules of Evidence and the Confrontation Clause of the Sixth Amendment to the United States Constitution.

**I. INTRODUCTION**

On April 25, the government noticed their intention to introduce the grand jury testimony of Ernest Moritomo, since deceased,<sup>1</sup> pursuant to Federal Rule of Evidence section 807. On April 27, defense counsel contacted the government to inquire as to their basis for such admission and whether a notice and/or motion would be filed with the Court. No response was received.

The government's attempt to introduce Moritomo's grand jury testimony fails for two reasons: (1) the Confrontation Clause of the Sixth Amendment prohibits its introduction, as Defendants have not had a prior opportunity to confront and cross examine Mr. Moritomo (U.S. Const. Amnd. VI.); and (2) introduction of this evidence is inadmissible hearsay and does not qualify for admission pursuant to Federal Rule of Evidence section 807 for a number of reasons. The transcript is being offered for the truth of the matter asserted, no

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<sup>1</sup> The testimony at issue is June 2, 2022 grand jury testimony provided by Moritomo. Mr. Moritomo died in 2023 at the age of 80. The subject matter of the testimony was from 2011 and 2012, a full decade prior to the testimony at the grand jury.

proper notice was provided, and the testimony (like much of the grand jury testimony in this case) lacks reliability. The Court should, therefore, exclude the testimony.

## II. ARGUMENT

### A. The Confrontation Clause Bars Introduction of the Moritomo Testimony

The Confrontation Clause states that “[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.” (U.S. Amnd. VI.) “In *Crawford v. Washington*, the Supreme Court abrogated decades of Confrontation Clause jurisprudence, which had allowed the admission of an unavailable witness’s out-of-court statement so long as it ‘falls under a firmly rooted hearsay exception’ or bears ‘particularized guarantees of trustworthiness.’ *United States v. Esparza*, 791 F.3d 1067, 1071 (9th Cir. 2015) (citing *Crawford v. Washington*, 541 U.S. 36, 60, 62-69 (2004)). See also *Ocampo v. Vail*, 649 F.3d 1098, 1108 (9th Cir. 2011) (“*Crawford* altered Confrontation Clause law so that it generally covers “testimonial” out-of-court statements whether or not they “fall[ ] within a firmly rooted hearsay exception.” (citing *Ohio v. Roberts*, 541 U.S. at 51–52 (1980) (abrogated by *Crawford*, 541 U.S. 36))); *United States v. Bruno*, 383 F.3d 65, 79 (2d Cir. 2004), as amended (Oct. 6, 2016) (finding that the district court committed plain error when, in violation of Confrontation Clause, it admitted hearsay statements consisting of a plea allocution and grand jury testimony

pursuant to Fed. R. Evid. §§ 804(b)(3) and 807 which had not been subjected to cross-examination).

Under *Crawford*, the “hearsay testimonial statement of a witness who does not appear at trial may *never* be used unless “the [witness] is unavailable, and *only* where the defendant has had a prior opportunity to cross-examine.” *Esparza*, 791 F.3d at 1071 (citing *Crawford*, 541 U.S. at 55-56) (emphasis added).<sup>2</sup> In so ruling, the *Crawford* Court determined that the “‘bedrock procedural guarantee’ of the Confrontation Clause ‘commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.’” *Esparza*, 791 F.3d at 1071 (quoting *Crawford*, 541 U.S. at 42, 61). “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” *Crawford*, 541 U.S. at 68–69.

Although the *Crawford* Court declined to give a bright line rule for out-of-court statements that are considered testimonial, grand jury testimony was one of the few examples it did provide, calling it “[a] modern practice[] with closest

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<sup>2</sup> There are only two very limited recognized exceptions to the Confrontation Clause that existed under common law at the time of the founding and have been recognized by the Supreme Court: “declarations made by a speaker who was both on the brink of death and aware that he was dying,” and “statements of a witness who was ‘detained’ or ‘kept away’ by the ‘means or procurement’ of the defendant.” *Giles v. California*, 554 U.S. 353, 358 (2008). Since neither one of these are at issue here, they are not addressed in further detail.

kinship to the abuses at which the Confrontation Clause was directed.” *Crawford*, 541 U.S. at 68.

Defendants do not dispute that Mr. Moritomo is unavailable, having since passed away since his grand jury testimony in June 2022. However, the testimonial evidence of an unavailable witness still may not be introduced against Defendants without the prior opportunity to confront and cross examine the witness. *See id.* Since none of the defendants previously had that opportunity, the United States Constitution and Supreme Court precedent preclude introduction of Mr. Moritomo’s grand jury testimony.

**B. The Moritomo Grand Jury Testimony is Inadmissible Hearsay**

Recognizing the grand jury testimony of Mr. Moritomo is inadmissible under Federal Rules of Evidence sections 803 or 804, the government has sought to introduce this testimony pursuant to section 807, the residual exception to hearsay. Fed. R. Evid. § 807.

Federal Rule of Evidence section 807 provides a residual hearsay exception in the following circumstances:

**(a) In General.** Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:

**(1)** the statement is supported by sufficient guarantees of trustworthiness--after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

(2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

**(b) Notice.** The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement--including its substance and the declarant's name--so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing--or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Moritomo's grand jury testimony is neither reliable nor was it properly noticed.

1. Failure to Provide Proper Notice

Mr. Moritomo passed away in August 2023,<sup>3</sup> long before any motions in limine were due to the Court in January of this year. Witness lists were due on March 6. Trial began on March 12, with the taking of evidence commencing on March 20. The government's notice of Moritomo testimony was provided in an email with no further explanation on April 25, roughly six weeks into trial.

The government knew about the existence of Moritomo for many years. The very testimony the government wishes to introduce was elicited years ago by the same prosecution attorneys presenting this case. Ernest Moritomo was not listed as a witness on the government's witness list, presumably as they knew of his passing well in advance of this trial.

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<sup>3</sup> Ernest Moritomo Obituary, published by Star Advertiser August 13, 2023. <https://hawaiiobituaries.com/us/obituaries/hawaiiobituaries/name/ernest-moritomo-obituary?id=52689090>

If the government wished to rely on the Fed. R. Evid. § 807 residual exception, they were required to provide proper notice. The notice should have been provided in a timely manner to allow defense counsel time to file a motion in limine back in January.

## 2. Reliability of Moritomo's Grand Jury Testimony

A recurring theme throughout this case has been the need for witnesses to clarify or explain inaccuracies from their grand jury testimony. The subject of testimony has generally occurred many years prior to the investigative grand jury commencing.

In the case of Moritomo, his actions in this case took place in 2011 and 2012, yet he did not testify in the grand jury until June of 2022 – a full decade after his involvement in this case.

Many witnesses in this case, including those closely related to the subject matter relating to Moritomo (such as Officers Phillip Snoops and Cyrel Lozano) were drastically incorrect in their grand jury testimony. Witnesses have explained that they were not prepared in the grand jury for the subject matter and did not have a recollection at the time of what happened a decade earlier.

Further complicating matters with Mr. Moritomo was his age. In 2012, Moritomo was already a retired police officer. By 2022, he was 79 years old.<sup>4</sup>

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<sup>4</sup> Mr. Moritomo died in August 2023 at the age of 80. See n. 3, *supra*.

For the government to posit that Moritomo's grand jury testimony, a full decade after the subject matter he testified to, at the age of 79, is somehow reliable while witness after witness throughout trial has had to explain why their grand jury testimony was inaccurate or needed correction is a baseless argument.

### III. CONCLUSION

For the above reasons, defendants hereby move *in limine* to exclude the grand jury testimony of Mr. Ernest Moritomo.

DATED: April 28, 2024

Respectfully submitted,

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THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,

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KEITH MITSUYOSHI KANESHIRO (1),  
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Defendants.

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

**CERTIFICATE OF SERVICE**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of  
**DEFENDANTS' MOTION *IN LIMINE* NO. 23: TO EXCLUDE THE  
GRAND JURY TESTIMONY OF ERNEST MORITOMO** was served  
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DATED: at Honolulu, Hawai‘i on April 28, 2024.

/s/ Nina Marino  
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