IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee,	)	C.A. Nos. 09-10289, 09-10441, 09-10499, 10-10114
v.	)	D.C. No. 1:06-cr-00080- SOM-BMK-5
ETHAN MOTTA, a.k.a. MALU, Defendant - Appellant.	)	District of Hawai`i, Honolulu

APPELLANT'S REPLY BRIEF.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI`I

The Honorable Susan Oki Mollway, Chief Judge.

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INTRODUCTION

In his opening brief, defendant-appellant Ethan Motta argues, *inter alia*, that the district court violated his Sixth Amendment right to counsel when it permitted the government to use the recording of an discussion from October 30, 2004, between Motta and the confidential informant that contained incriminating statements.

In its answering brief the government provides four arguments attacking this issue:

- voluntary statements elicited from Motta may be used to impeach him during cross-examination because he testified at trial;
- Motta intentionally abandoned and relinquished the claim;
- Motta introduced the recording into evidence, and therefore it could be used in the government's rebuttal and be considered by the jury as substantive evidence of his guilt;
- the recording concerned different criminal activity not protected by the Sixth Amendment right to counsel.

As argued herein, this Court must reject these arguments.[1]

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[1] As used here "ER2" and "ER3" refer to volumes in Motta's filed excerpts of record; "SER" refers to the government's supplemental excerpts of record; "AB" refers to the government's answering brief.

ARGUMENTS

A. The Sixth Amendment Precludes a Finding that Motta Knowingly and Voluntarily Waived the Right to Counsel where He Was Unaware that the Confidential Informant was Actually a Government Agent Expressly Commissioned to Secure Evidence.

Waiver of the Sixth Amendment right to counsel is valid only when it reflects "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). The accused must "kno[w] what he is doing" so that "his choice is made with eyes open." Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 242, 87 L.Ed. 268 (1942). Courts should "indulge every reasonable presumption against waiver of fundamental constitutional rights." Johnson, 304 U.S. at 464, 58 S.Ct. at 1023. Hence, the state has the burden of establishing a valid waiver. Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424 (1977). Before a criminal defendant's statement can be used against him, the government must prove its voluntariness by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477, 489, 92 S.Ct. 619, 626, 30 L.Ed.2d 618 (1972); United States v. Pinion, 800 F.2d 976, 980 (9th Cir.1986), *cert. denied*, 480 U.S. 936, 107 S.Ct. 1580, 94 L.Ed.2d 770 (1987). "Doubts must be resolved in favor of protecting the constitutional claim. This [is the] settled approach to

questions of waiver..." Michigan v. Jackson, 475 U.S. 625, 633, 106 S.Ct. 1404, 1409 (1986).

The key inquiry under this issue must be: Was the accused made sufficiently aware of his right to have counsel present during the questioning, and of the possible consequences of a decision to forgo the aid of counsel? Patterson v. Illinois, 487 U.S. 285, 293, 108 S.Ct. 2389, 2395 101 L.Ed.2d 261 (1988).[2] A claim is intentionally abandoned and relinquished, and, therefore, unreviewable by the appellate court if it is the "intentional relinquishment or abandonment of a known right." United States v. Olano, 507 U.S. 725, 733, 113 S.Ct. 1770, 1777, 123 L.Ed.2d 508 (1993) (*quoting* Johnson, 304 U.S. at 464, 58 S.Ct. at 1023). Forfeited rights are reviewable for plain error, while waived rights are not. Id. "If a legal rule was violated during the District Court proceedings, and if the defendant did not waive the rule, then there has been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection." United States v. Perez, 116 F.3d 840, 845 (9th Cir. 1997), *quoting* Olano, at 733-34, 113 S.Ct. at 1777.

"The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances

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[2] In Patterson, the Court found that by admonishing petitioner with Miranda warnings, the respondent met this burden and the petitioner's waiver of his right to counsel at the questioning was valid. Id.

surrounding that case, including the background, experience, and conduct of the accused." Johnson, 304 U.S. at 464, 58 S.Ct. at 1023. An inculpatory statement is voluntary only when it is the product of a rational intellect and a free will. Blackburn v. Alabama, 361 U.S. 199, 208, 80 S.Ct. 274, 281, 4 L.Ed.2d 242 (1960); United States v. Crespo de Llano, 830 F.2d 1532, 1541-42 (9th Cir. 1987).

Importantly,

> "the concept of a knowing and voluntary waiver of Sixth Amendment rights ***does not apply*** in the context of communications with an undisclosed undercover informant acting for the Government. [Citation omitted.] In that setting, [the defendant], being unaware that [the informant] was a Government agent expressly commissioned to secure evidence, cannot be held to have waived his right to the assistance of counsel."

United States v. Henry, 447 U.S. 264, 273, 100 S.Ct. 2183, 2188 (1980), *citing* Johnson, 304 U.S. 458, 58 S.Ct. 1019 (emphasis added).

In its answering brief, the government argues that because Mr. Motta participated in the recorded conversation without being coerced and overborne by the confidential informant Jonnaven Monalim, his statements were voluntary. The government writes: "[Motta] spoke with Monalim – his cousin – of his own volition and in the privacy of his own home, with no noticeable police presence. Cf. Illinois v. Perkins, 496 U.S. 292, 296-98 (1990) (no danger of coercion when a suspect speaks to 'those whom he assumes are not officers')". [AB 82]. To

clarify, Motta never raised the issue in district court proceedings that his statements to Monalim were coerced through physical or psychological force or intimidation, and he does not make that argument on appeal. The government's focus on that aspect of 'voluntary' is not relevant.

What is relevant, and what the government goes on to discuss, is the issue of whether "a voluntary statement deliberately elicited from a criminal defendant in the absence of a valid waiver of the Sixth Amendment right to counsel may be used to impeach the defendant if he testifies at trial." [AB 83]. Relying on Kansas v. Ventris, — U.S. —, 129 S.Ct. 1841, 1844, 1874 (2009), the government answers in the affirmative. The Court must reject this argument because it fails to apply governing Sixth Amendment precedent.

In Jackson, the Supreme Court determined that once a defendant invokes his Sixth Amendment right in a government-initiated interrogation, any subsequent waiver of that right is presumed invalid, even if the waiver is knowing and voluntary. 475 U.S. at 629–32, 106 S.Ct. at 1407–09. Statements elicited in violation of this rule are inadmissible in the government's case-in-chief. Id. at 636, 106 S.Ct. at 1411. The Court revisited this issue in Michigan v. Harvey, 494 U.S. 344, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990), and held that a statement obtained in violation of Jackson may be used by the prosecution to impeach a defendant on

cross-examination if the defendant, in fact, knowingly and voluntarily waived his Sixth Amendment right to counsel. Id. at 350–51, 110 S.Ct. at 1180–81. Harvey explicitly did not decide "the admissibility for impeachment purposes of a voluntary statement obtained in the absence of a knowing and voluntary waiver of the right to counsel." Id., at 354, 110 S.Ct. at 1182.

The Second Circuit has addressed the issue left open in Harvey.

> "Harvey limited Jackson, by holding that a statement obtained during police initiated questioning after a request for counsel, while violative of Sixth Amendment prophylactic standards, may be admissible to impeach a defendant on cross-examination *if given after a knowing and voluntary waiver of his right to counsel*."

United States v. Spencer, 955 F.2d 814, 818 (2d Cir.1992)(italics added).[3] The Court held that to be admissible for impeachment purposes, a statement elicited after the right to counsel attaches must be *both* voluntary *and* accompanied by a knowing and voluntary waiver of the defendant's right to counsel. Id., at 819–20; *see generally* Edwards v. Arizona, 451 U.S. 477, 482–84, 101 S.Ct. 1880,

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[3] In Spencer, an armed robbery case, the Second Circuit ordered a remand to determine whether defendant's waiver of his previously invoked right to counsel during government-initiated interrogation was knowing and voluntary; defendant's statement to government agents (not a confidential informant) had been suppressed because they had initiated the interrogation, but court did not determine whether statement was otherwise voluntary, so as to permit use at trial of testimony of third-party witness whose identity was discovered during the interrogation. Spencer, 955 F.2d at 818.

1883–85, 68 L.Ed.2d 378 (1981) (defining a knowing and voluntary waiver). The Second Circuit observed that, "in the absence of a later waiver of the initially invoked right to counsel, any subsequent statement transgresses the core constitutional right to counsel, rather than a judicially created prophylactic rule for the protection of that right, and therefore should not be available to the prosecution *for any purpose*." Spencer, 955 F.2d at 820 (italics added).

In this case, in addition to Harvey's requirement that the defendant's statement must be the result of a knowing and voluntary waiver of his Sixth Amendment right to counsel, we rely on Henry. Henry dealt with the issue of waiver of the defendant's Sixth Amendment right when he is unaware that he is participating in a government-led interview and speaking with an undercover informant who was seeking to gather inculpatory evidence. In Henry the Court found that a defendant cannot be deemed to have knowingly and voluntarily waived his Sixth Amendment right where he is unaware of the actual context of the communication in which he is participating, and that the undercover informant is acting as a government agent expressly commissioned to secure evidence. Henry, 447 U.S. at 273, 100 S.Ct. at 2188.

We find the analysis of the Second Circuit in Spencer applicable and persuasive. There the Court applied Harvey and found that statements in violation

of the Sixth Amendment may not be admissible to impeach a defendant on cross-examination in the absence of a knowing and voluntary waiver of right to counsel. Spencer, 955 F.2d at 818. The same rationale should apply all the more so given Henry. Like Henry, in this case Motta had no idea he was participating in a government-organized discussion with a confidential informant, the purpose of which was to gather evidence against him. Under these circumstances, Henry clearly indicates that he could not have been deemed to have knowingly and voluntarily waived his Sixth Amendment right. Henry, 447 U.S. at 273, 100 S.Ct. at 2188. Because the case law clearly states that only voluntary statements may be used to impeach conflicting testimony by defendants, (s*ee* Harvey, 494 U.S. at 349-53; United States v. Ortega, 203 F.3d 675, 681 (9th Cir. 2000); United States v. Danielson, 325 F.3d 1054, 1066 -1067 (9th Cir. 2003)), and Motta's statements were not voluntary, they should have been suppressed.

In this case the government knew that Motta was represented by attorney Todd Eddins, who was appointed shortly after the State of Hawai`i filed the indictment on January 13, 2004.[4] Notwithstanding, the government sent its paid

[4] The Sixth Amendment right to counsel attaches at the "initiation of adversary judicial proceedings," such as arraignment. United States v. Gouveia, 467 U.S. 180, 187–88, 104 S.Ct. 2292, 2296–98, 81 L.Ed.2d 146 (1984). Once the right has attached, the Sixth Amendment renders inadmissible in the government's case-in-chief, statements elicited by the government outside the presence of a

informant Monalim to Hilo, equipping him with a hidden recording device to obtain evidence against Motta who was free on bail but confined to his mother's house.[5] Motta spoke for more than an hour with Monalim, his cousin whom he had known since childhood, concerning matters including the Pali Golf Course shootings and, as well, he answered Monalim's repeated inquiries concerning his criminal case and the state court judge presiding over the matter (discussed *infra*).

In its answering brief the government does not explain how Motta could have knowingly and voluntarily waived his Sixth Amendment right in this situation where he did not know that his right to counsel was in jeopardy because a trusted family member came to visit him – pretending to offer support but in fact recording the conversation for the government in order to secure evidence against him. In this context Motta cannot be deemed to have knowingly and voluntarily

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defendant's counsel that are not accompanied by a waiver of this right. Henry, 447 U.S. at 273–74, 100 S.Ct. at 2188–89.

[5] While Mr. Motta was not in prison during the Monalim interview, he was 'in custody.' The Supreme Court has held that a pretrial releasee is considered in some ways to be in custody. *See* Hensley v. Mun. Ct., 411 U.S. 345, 349, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973) (noting that "a substantial number of courts, perhaps a majority, have concluded that a person released on bail or on his own recognizance may be 'in custody' " and this line of cases "reflects the sounder view"). *See* United States v. Scott, 450 F.3d 863, 891 (9th Cir. 2006). The record indicates that in addition to confinement at his mother's home, Motta was required to wear a monitor around his ankle.

waived his Sixth Amendment right when he was completely unaware that Monalim was a government agent and recording every word. Indeed, the whole point of the government's use of the wired-and-recording Monalim was to trick Motta into making incriminating statements to be used as evidence against him. Otherwise, why pay Monalim to manipulate and cajole Motta into making statements about the Pali Golf Course shootings, and his trial strategy (discussed *infra*)? Why equip Monalim with the recording device and later recover and secure the recording at the FBI offices?

The government relies upon Kansas v. Ventris, which case we find unpersuasive. 129 S.Ct. 1841. In Ventris Court did not discuss Henry and the longstanding rule that a defendant cannot be deemed to have knowingly and voluntarily waived his Sixth Amendment right where he is not aware of the need to have counsel present because he is not aware that he has fallen into a government-laid, unconstitutional trap constructed to secure evidence against him. Henry, 447 U.S. at 273, 100 S.Ct. at 2188. Thus, Ventris does not foreclose this issue, which must be reviewed by the court.

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B. During District Court Proceedings Motta Did Not Intentionally Abandon and Relinquish the Claim That His Statements to Monalim Were Involuntary.

After the government revealed the existence of the secret Monalim recording (post-jury selection; pre-opening arguments), the district court heard argument on the defendants' motion to suppress the recording. [ER3 62-75.4]. The government argues in its answering brief that during these proceedings Motta intentionally abandoned and relinquished the argument that his statements to Monalim were not voluntary. [AB 80]. Review of the record shows that this argument is unavailing.

Citing the case Danielson, 325 F.3d 1054, at the hearing on the motion to suppress on January 30, 2009, the court stated:

> "[I]n that case ... [t]he Ninth Circuit said that the government had elicited incriminating statements from an indicted defendant in the absence of counsel, and this was a Sixth Amendment violation. And it was a situation where the government said it was looking at separate offenses from the ones in the indictment and so forth. But the Ninth Circuit said: Any statements so gathered must be excluded from the government's case in chief. Although, they are admissible to impeach conflicting testimony by the defendants, provided the statements were voluntary.
>
> So everybody then is also in agreement that, if Mr. Motta testifies, the government is not barred by the Sixth Amendment from impeaching or rebutting through use of the conversation, leaving for another day the issue of nonconstitutional evidentiary objections that I may have to rule on in the course of that."

[ER3 68].

Mr. Motta's legal counsel apparently agreed that the government could use the Monalim recording to impeach if Motta testified. [ER3 68]. However, he never intentionally relinquished his Sixth Amendment challenge to the recording, as set forth in the motion to suppress. [ER3 70-74]. Case law prohibits drawing the conclusion the government reaches in its answering brief, which is that Motta abandoned the claim. Courts should "indulge every reasonable presumption against waiver of fundamental constitutional rights." Johnson, 304 U.S. at 464, 58 S.Ct. at 1023.

Furthermore, the district court clearly indicated the limits of its ruling: if Motta testified, then the government could use the Monalim recording to impeach; however, the court expressly declined to rule on the issue of whether Motta's statements to Monalim represented a constitutional violation.

> "so is there anything else, then, that I need to do with respect to the motion to suppress? If not, I'm going to grant it; that is, grant it to the extent it seeks what the government has agreed to, which is no use in the government's case in chief, but with the defense conceding that if Mr. Motta takes the stand, the government may use this conversation to impeach or rebut his contrary statements.
>
> Okay. Now, *I'm not making a finding at this point that there was a constitutional violation by the government*. I understand that that's the underpinning of the motion to suppress, but I think I need not reach that issue, given the government's agreement on how it's going to limit the use. So I'm not making that finding. I want that clear. Okay?"

[ER3 68-69; italics added].

The court did not decide the issue of the voluntariness of Motta's statements, and Motta certainly did not waive it. The issue is properly before this court for review.

The Government's relies on United States v. Streich. [AB 79]. In Streich the defendant raised on appeal the district court's failure to resolve his objection to a specific paragraph of his presentence report. 560 F.3d 926, 930 n. 1 (9th Cir. 2009). The district court did not resolve this objection because Streich expressly withdrew it in his second sentencing memorandum and then declined to revive it at the sentencing hearing. Id. This Court found, therefore, that Streich did more than forfeit his objection but instead completely waived it. The Court made a similar finding of waiver in Perez, 116 F.3d 840, also relied upon by the government in its answering brief. [AB 79].

Both Perez and Streich rely on the Supreme Court's discussion concerning the difference between forfeited and waived rights in Olano. 507 U.S. 725, 113 S.Ct. 1770. Olano stated that forfeiture is the failure to make a timely assertion of a right, whereas waiver is the "intentional relinquishment or abandonment of a known right." Id., at 733, 113 S.Ct. at 1777 (*quoting* Johnson, 304 U.S. at 464, 58 S.Ct. at 1023). Here, there was no waiver during court proceedings on the motion to suppress because there was no expression of intentional abandonment or

relinquishment of Motta's Sixth Amendment his claim.

C. Motta Did Not Waive His Claim That the Government Improperly Used the Recording Outside of its Cross-Examination by Offering the Recording into Evidence During His Defense Case.

During Motta's redirect case, he offered the Monalim recording into evidence in order to explain his statements in the recording. [SER 511]. The government argues now that Motta waived the claim that it improperly used the recording beyond cross-examination because Motta himself offered the recording into evidence during his defense case. [AB 80]. As well, the government argues that because Motta introduced the tape into evidence, there was no limit on the government's use of the tape. [AB 81]. The Court must reject these arguments.

If a government interview violates the Sixth Amendment then the statements relating to the criminal offenses may not be admitted as substantial evidence in the government's case-in-chief, but are only permissible to impeach conflicting testimony by the defendant – providing the statements were voluntary. Harvey, 447 U.S. at 349-53.

Upon learning of the existence of the Monalim recording, Motta objected and filed a motion to suppress. [ER3 70-74]. The district court granted this motion and prohibited the government from using the recording in its case-in-chief, but

permitted use of the recording to impeach contradictory statements Motta might make if he chose to testify. [ER3 67-68].

Motta testified, which decision – under the court's limited ruling – triggered the availability of the Monalim recording to the government to impeach during cross-examination. During cross-examination, however, the government did not enter the recording into evidence and did not play it for the jury. Instead the government questioned Motta while referring to a transcript of the recording. [*See* ER2 262.1 to 263]. The government announced that it would play the recording in its rebuttal case and with rebuttal witness Jonnaven Monalim, the confidential informant. [*See* SER 503-504].

Learning of this strategy, Motta's counsel asked the court for surrebuttal after the government completed its rebuttal case. [SER 503]. The court responded that, "it's not an automatic thing that defense gets surrebuttal." [SER 503]. Motta implored the court, arguing that without surrebuttal he would not have an opportunity to respond to the recording and explain to the jury his version of seemingly inculpatory statements about the Pali Golf Course shootings and events surrounding the shootings. The court replied that "Motta was perfectly free to offer that tape into evidence" [SER 503] – even though Motta had sought to suppress the damaging recording.

Faced with the possibility that he would not be able to explain to the jury his version of the damaging recording, Motta's trial counsel, Mr. Carnesi, decided to admit the recording during his redirect case rather than run the risk of being precluded from doing so:

> "MR. CARNESI: If that's the only way we can discuss the tape, yes.
>
> THE COURT: Well, I don't know it's the only way. I'm just saying that surrebuttal is not an automatic matter. You can move for it, I'll consider it, but I don't think you should proceed on the assumption that you're automatically entitled to surrebuttal."

[SER 504].

The government's argument in the answering brief that Motta has waived the issue of improper use of the recording beyond the bounds of cross-examination fails to take into account this unique evidentiary problem. The record shows that Motta introduced the recording during his redirect case (SER 511) because this was the only surefire way of providing the jury with his explanation of the recording. It was the only surefire way given the district court's refusal to guarantee "surrebuttal" – or the ability to defend himself from Monalim's testimony concerning the recording – once the government completed its rebuttal case with Monalim.

Had Motta chosen not to admit the recording during his redirect, then he ran

the risk of being precluded from explaining to the jury his statements in the recording. Hence he had no choice but to discuss the recording during his redirect testimony, since the government did not admit the recording during its cross-examination. As a result, to now argue in its answering brief that Motta's introduction of the recording opened the door to use in its case-in-chief turns the Sixth Amendment rule on its head. The government's argument should not be followed by this Court.

D. The Monalim Interview Focused on the Pali Golf Course Shootings and Motta's Trial Strategy.

On January 13, 2004, the State of Hawai`i indicted Motta on charges of murder and firearms violations in relation to the Pali Golf Course shootings. Shortly thereafter, the state court appointed attorney Todd Eddins to represent Motta. On October 30, 2004, the government sent Monalim to Hilo to interview Motta, with Monalim wired and secretly recording the conversation.

The Sixth Amendment right to counsel is offense-specific. McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991). Motta had a right to counsel on the offenses for which he had been indicted, and any other offenses that constituted the "same offense" under the Blockburger test. *See*

Texas v. Cobb, 532 U.S. 162, 167–73, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001); Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Had the government used Monalim to obtain Motta's statements regarding separate offenses for which he had not been indicted, that would not have been an impermissible intrusion into the attorney-client relationship or have violated his Sixth Amendment rights. *See* Cobb, 532 U.S. at 173, 121 S.Ct. 1335.

The government suggests in its answering brief that the Monalim interview on October 30, 2004, did not violate the Sixth Amendment because the government sent Monalim to interview Motta concerning ongoing criminal activity "involving witness tampering, drug trafficking, and illegal gambling." [AB 73]. This representation is not borne out in the record.

The government provides no references to the record demonstrating that Monalim asked Motta questions concerning the alleged separate offenses of drug trafficking, witness tampering and gambling. Moreover, we find none ourselves. The government states that even though it provided Monalim with instructions to avoid eliciting information about the Pali Golf Course shootings, the conversation "veered" to that topic. [AB 74].

The conversation did not 'veer' in that direction. The conversation focused upon the Pali Golf Course shootings, with Monalim's commentary clearly

encouraging Motta to discuss the topic. [*See* ER2 129, 131-133; 136, 140, 142-143, 146, 148.] As well, the discussion concerned events leading up to the shootings, including commentary on gambling and security operations that represented the backdrop to the dispute resulting in the Pali Golf Course shootings. [ER2 134-135]. Moreover, Monalim repeatedly raised the subject of how Motta would cope with the murder trial and control the presiding judge. [ER2 130, 173-174, 180, 185-189].

Concerning the latter, Monalim actively encouraged Motta to bribe the state court judge because he had "no guaranty" of acquittal, and he could not trust that his lawyer would get him off. [*See* ER2 185-189]. This topic concerned trial strategy – however rogue the strategy of judicial bribery may be – which subject matter this Court has expressly condemned in the elicitation of incriminating statements from an indicted defendant in the absence of counsel. *See* Danielson, 325 F.3d at 1068.

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CONCLUSION

The Court should not follow the government's arguments that Mr. Motta waived his Sixth Amendment right under this issue, or that he intentionally abandoned and relinquished this claim.

For the reasons set forth in this reply brief, and all the arguments set forth in the opening brief and those Motta has joined from Rodney Joseph's brief, the Court should reverse the convictions.

DATED: Wailuku Maui, Hawai`i, July 22, 2011.

/s/ Georgia K. McMillen
GEORGIA K. MCMILLEN
Attorney for Defendant-Appellant

C.A. Nos. 09-10289, 09-10441,
09-10499, 10-10114

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Attorney for: Appellant, Ethan Motta

Date: July 22, 2011

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