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
	)	District of Hawai`i, Honolulu
ETHAN MOTTA, a.k.a. MALU, Defendant - Appellant.	)	

APPELLANT'S OPENING BRIEF; CERTIFICATE OF SERVICE.

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

The Honorable Susan Oki Mollway, Chief Judge.

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JURISDICTIONAL STATEMENT

This case concerns the defendant-appellant Ethan Motta's alleged involvement in illegal gambling in Hawai`i, and security factions that provided protection for these operations.

The United States District Court Hawai`i had original jurisdiction of this matter pursuant to 18 U.S.C. § 3231. This Court has jurisdiction to review Motta's conviction and sentence under 28 U.S.C. § 1291.

The district court imposed sentence on November 30, 2009, with the Judgment entered on December 10, 2009. [ER1 4-11].[1] Motta filed the Notice of Appeal on November 30, 2009. [ER1 1]. Pursuant to F.R.A.P. 4(b) the appeal is timely.

ISSUES PRESENTED

A. Whether the Court Violated Motta's Sixth Amendment Right to Counsel

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[1] As used here "ER1", "ER2", "ER3", and "ER4" refer to the four volumes of Excerpts of Record; "CR" refers to the district court clerk's record in ER4; "CR Ninth Circuit" refers to the Ninth Circuit clerk's record in ER4; "PSR" refers to the Presentence Report prepared in this matter in 2009; "PSR2" refers to an earlier Presentence Report prepared in 2008, both of which are filed in this Court under seal pursuant to 9th Circuit Rule 30-1.10; "Joseph OB" refers to the opening brief of codefendant Rodney Joseph filed with this Court on June 14, 2010, in these consolidated appeals, and referred to in Motta's accompanying Motion to Join in Part in Existing Brief.

When it Permitted the Government to Use a Surreptitiously Obtained Recording Between Motta and a Government Agent that Contained Incriminating Statements?

B. Whether the Court Abused its Discretion in Denying the Motion to Disqualify Itself?

C. Whether the District Court Erred in Denying the Government's Motion to Depart below the Statutory Minimum for Substantial Assistance?

D. Whether Motta's Legal Counsel Provided Ineffective Assistance under the Sixth Amendment When Motta Pleaded Guilty?

E. Whether Sufficient Evidence Supported all Convictions Because the Government Failed to Establish the Prerequisite RICO Enterprise?

STATEMENT OF THE CASE

On January 13, 2004, the Honolulu prosecutor filed an indictment against Rodney Joseph ("Joseph"), Kevin Gonsalves ("Gonsalves") and Ethan Motta

("Motta") charging murder and firearm offenses relating the January 7, 2004 shootings at the Pali Golf Course on O`ahu. *See* State v. Joseph, 109 Hawai'i 482, 488, 128 P.3d 795, 801 (2006). The Hawai`i state court appointed attorney Todd Eddins to represent Motta, who pleaded not guilty to the charges.

In March 2006 the United States District Court granted removal from state to federal court. [*See* CR1]. On October 12, 2006, a federal grand jury returned an eight-count Second Superseding Indictment (the "Indictment") against Motta and eight codefendants including Kai Ming Wang ("Wang"), Joseph and Gonsalves. [ER3 244]. The Indictment charged Motta with six of the eight counts:

- Count 1, RICO in violation of 18 U.S.C. § 1961(1) and § 1961(5) based upon racketeering act one, illegal gambling business, and racketeering act two, extortion conspiracy;
- Count 2, RICO Conspiracy in violation of 18 U.S.C. § 1962(d);
- Count 3, Illegal Gambling Business in violation of 18 U.S.C. § 1955 and § 2;
- Count 6, Murder in violation of 18 U.S.C. § 1959(a)(1) and § 2;
- Count 7, Murder in violation of 18 U.S.C. § 1959(a)(1) and § 2;
- Count 8, Attempted Murder in violation of 18 U.S.C. § 1959(a)(5) and § 2.

[ER3 244-256]. Codefendants Joseph and Gonsalves were charged under these counts, as well as Counts 4 and 5, respectively, Assault with a Dangerous Weapon in August 2003, and Assault with a Dangerous Weapon on September 11, 2003. [ER3 252-253].

If convicted under Counts 6 and 7 the mandatory minimum sentence was life in prison pursuant to 18 U.S.C. § 1951(a)(1). Motta was not aware of this. Hence in February 2008 he executed a Memorandum of Plea Agreement (the "Plea "Agreement") under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure[2] in which he agreed to plead guilty to Counts 2, 6 and 8 in exchange for the government's promise to dismiss the remaining counts at sentencing, and he stipulated to a Guidelines prison range of 240-to-330 months. [ER3 228, 230, 237]. At the plea hearing Motta entered guilty pleas, which the court accepted and adjudged him guilty, as the court did at the hearings for Joseph and Gonsalves who also pleaded guilty on the same day. [ER3 226;CR 716; 717;720; 721].

Belatedly acknowledging the mandatory minimum life sentence, on May 16, 2008, the government filed motions for departures and sentencing

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[2] "If the defendant pleads guilty ... to either a charged offense ... the plea agreement may specify that an attorney for the government will: * * * (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case ... (such a recommendation or request binds the court once the court accepts the plea agreement)." Fed.R.Crim.P. 11(c)(1)(C).

recommendations as to Motta, Joseph and Gonsalves. [ER3 188]. As discussed under Arguments "C" and "D", *infra*, the court denied these motions. Motta, Joseph and Gonsalves withdrew their guilty pleas and the court reinstated their original not-guilty pleas. [ER3 184-86; CR 861, 866]. Gonsalves eventually pleaded guilty again. [ER3 133-135]. Prior to trial Motta and Joseph moved to disqualify presiding Judge Mollway, which motion the court denied. [ER1 41].

Motta and Joseph went to trial. After jury selection the government provided notice of a secret recording between Motta and the government's confidential informant obtained in October 2004 *after* Motta had acquired legal counsel (Todd Eddins) and was released on bail. [ER3 71]. The court granted Motta and Joseph's motion to suppress the government's use of the recording in its case-in-chief. [ER3 68-69]. At the end of the government's case Motta moved for acquittal, which motion the court denied. [ER1 40]. Motta moved again for acquittal after the parties rested, which the court denied. [ER1 35]. And he moved for acquittal once more post conviction, which motion the court denied. [ER1 12, 35; ER2 1].

On March 20, 2009, the jury returned verdicts finding both Motta and Joseph guilty of all counts charged against them in the Indictment. [CR 1089]. The court imposed punishment that included, for Counts 6 and 7, two mandatory

minimum life prison terms to run concurrently for both Motta and Joseph. [ER1 6; CR 1152]. Motta appealed. [ER1 1].

On April 21, 2010 this Court consolidated Motta's appeal, C.A. No 09-10499, with the direct appeal of codefendant Rodney Joseph (C.A. No. 09-10289) and C.A. Nos. 09-10441 and 10-10114. [CR Ninth Circuit 10]. Under the Court's order dated February 17, 2011, this opening brief is due no later than April 4, 2011. Motta simultaneously files with this brief a Motion Join in Part in the Existing Opening Brief Filed by codefendant Rodney Joseph.

BAIL STATUS

Motta (Registration No. 95609-022) is serving two life prison terms at USP Lee, U.S. Penitentiary; P.O. Box 305; Jonesville, VA 24263.

STATEMENT OF RELEVANT FACTS

This case concerned a rivalry between security factions in Hawai`i's gambling underworld. Wang, the lead defendant in this case, owned and operated illegal[3] gambling operations on O`ahu which consisted of rented game rooms furnished with card tables and video gambling machines. [PSR ¶ 19]. In the

[3] *See* Hawai`i Revised Statutes § 712-1221.

racially stratified gambling underworld, the game rooms were financed and operated by Asian interests. [ER3 47, 50-51]. These interests contracted with security factions dominated by Polynesian interests to protect the operations primarily by placing doormen at the game rooms' entrances. [Id.; PSR ¶ 19].

In 2003 the security factions vied with each other for control of lucrative security contracts at the game rooms. Wang's game room was located in Honolulu on Kapiolani Avenue, with security provided by codefendant Raymond Gomes and Tino Sao. [PSR ¶ 20]. On June 2, 2003, a security crew led by one Robert Kaialau took over Wang's game room. [PSR ¶ 22]. Wang moved his operation to a new location on Young Street, maintaining the Gomes/Sao security. [PSR ¶ 23]. On July 30 Kaialau attacked Wang's Young Street operation, assaulting Gomes and Sao. [PSR ¶ 25-27]. In August Kaialau struck again by assaulted Wang's managers and, two weeks later, assaulting Wang himself. [PSR¶ 28-30].

Gomes turned to his friend Motta, who lived in Hilo. [PSR ¶ 30]. Motta knew Kaialau's influential uncle Billy Makaila, who owned a respected security firm that provided protection for visiting U.S. presidents and other dignitaries. [ER2 240, 263-264]. Motta contacted Makaila, who in turn spoke to Kaialau, and the attacks stopped. [ER2 264-265].

Wang wanted revenge and called upon Joseph and Gonsalves. Joseph and

Gonsalves went to a game room in Pearl City, O`ahu, owned by one of Wang's rivals and secured by Kaialau. [PSR ¶ 32, 33]. Joseph and Gonsalves wrecked the game room. A couple weeks later they returned and robbed the customers. (Counts 4 & 5). [PSR ¶ 33, 34].

Wang had contracted with Joseph to provide security for his game room, with Joseph organizing a crew to do so that including codefendants Siaosi Alapati, Matthew Taufetee, Peter Matautia and Joe White. [PSR ¶ 31]. But these defendants began complaining that Joseph was not paying them. [PSR ¶ 35]. On January 4, 2004, they met with a mob of up to 50 others and decided to take over two Honolulu game rooms, one of which was owned by Wang and secured by Joseph. [ER3 42-43; PSR ¶ 35-36].

The mob divided into two groups, went to the two game rooms and took over the respective operations. [ER3 42-44]. Afterward the mob reconvened and discussed, *inter alia*, money Joseph allegedly owed them. [ER3 30-39]. Among the individual's present was Lepo Taliese who promised the group that he would confront Joseph about the debt. [ER3 36-37]. During the meeting Taliese called Joseph and notified him of the takeover. [PSR ¶ 35].

Taliese was among the most feared of the Hawai`i underworld bosses. In the late 1970s, Motta's brother had been incarcerated in Hawai`i with Taliese.

[ER2 242]. Motta's brother told his about prison race riots in which Taliese allegedly murdering an opponent. [ER2 243]. As a result Taliese was convicted and received a life sentence, but was eventually granted parole. [ER2 243].

The Golf Course Shootings.

On January 7, 2004, Motta flew to O`ahu from his home in Hilo to attend the funeral of Gomes' father. Joseph, who was Motta's cousin, also attended the funeral, along with Gonsalves. [PSR ¶ 38]. Taliese attended the funeral with Tino Sao, Romelius Corpuz and Nixon Maumalanga. [PSR ¶ 38].

During the service a meeting was arranged between Joseph and Taliese, with Joseph asking Motta to accompany him. [ER2 246; PSR ¶ 38]. The parties drove in two vehicles to a nearby golf course, meeting in the parking lot. [PSR ¶ 39]. Before Joseph left the car to speak with Taliese, he showed Motta a gun and told him to be careful. [ER2 251].

Motta testified that when Sao, Taliese, Corpuz and Maumalanga began walking toward him he feared for his safety. [ER2 254-255]. Then Sao grabbed Motta, who broke free. [ER2 255-257]. Fearing for his life he grabbed the gun in the car and began firing, hitting Sao and Taliese. [ER2 257-259]. Motta testified to hearing other shots fired. Motta, Joseph and Gonsalves fled from the golf course. Later that day police arrested Motta as he was boarding a plane to return to Hilo.

[PSR ¶ 43]. Sao survived the shooting (Count 8), but both Taliese (Count 6) and Corpuz (Count 7) died. [PSR ¶¶ 39-41].

At trial Motta denied that he shot Sao and Taliese to maintain his position in a gambling operation, rejecting the proposition that he had any position to begin with. [ER2 262]. The government relied heavily on a recorded conversation between Motta and a confidential informant obtained after Motta had been indicted and his legal counsel appeared, in which Motta made incriminating statements about the case.

SUMMARY OF ARGUMENTS

A. The Court Violated Motta's Sixth Amendment Right to Counsel When it Permitted the Government to use a Surreptitiously Obtained Recording Between Motta and a Government Agent that Contained Incriminating Statements.

Once the Sixth Amendment right to counsel attaches the government is forbidden from "deliberately elicit[ing]" incriminating statements from the defendant. Massiah v. United States, 377 U.S. 201, 206 (1964). The government violates the Sixth Amendment when it designates an informant to question the accused on its behalf, outside the presence of counsel. Id. While the statements may not be admitted as substantive evidence in the government's case-in-chief,

they are admissible to impeach conflicting testimony by the defendants, provided the statements were voluntary. Michigan v. Harvey, 494 U.S. 344, 349-53 (1990).

Here, the government violated the Sixth Amendment when it sent its confidential informant to interview Motta about the case in October 2004, after he was indicted and his attorney had appeared on his behalf. The government surreptitiously recorded the conversation, in which Motta made incriminating statements. The record shows that Motta's statements were not voluntary. Further, even if the statements were voluntary, the government used the recording far beyond the permissible impeachment purposes. Under plain error review, Motta's convictions based upon the October 2004 recording must be reversed.

B. The Court Abused its Discretion in Denying the Motion to Disqualify Itself.

Title 28 U.S.C. § 455(a) provides that, "[a]ny ... judge ... of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Section 455(b)(1) provides that the judge must disqualify himself, "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

Analysis under these sections demonstrates that Judge Mollway should have

granted defendants' pretrial motion to disqualify on the grounds appearance of partiality under § 455(a), and because she had personal knowledge of disputed evidentiary facts under § 455(b)(1).

C. The Court Erred in Denying the Government's Motion for Departure below the Statutory Minimum for Substantial Assistance.

In February 2008 Motta pleaded guilty to, *inter alia,* Count 6, Violent Crime of Murder in Aid of Racketeering ("VICAR" count), believing he would be sentenced within the Guidelines range of 240-to-330 months pursuant to the Fed.R.Crim.P. 11(c)(1)(C) Plea Agreement he entered with the government. In fact, if convicted under Count 6 Motta faced a mandatory minimum life sentence pursuant to 18 U.S.C. § 1959(a)(1).

Seeking to effectuate the parties' Plea Agreement, in May 2008 the government filed a motion pursuant to 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1 for departure below the mandatory minimum sentence on the grounds of substantial assistance to authorities. The court denied the motion.

The court's denial was fundamentally flawed and must be reversed. Under § 5K1.1 analysis: Motta's guilty pleas directly led to the guilty plea of the codefendant Wang; Motta's guilty pleas were part and parcel of a joint defense

plan with Joseph and Gonsalves to simultaneously plead guilty; Motta's guilty pleas greatly assisted the government in resolution of a complex, costly case the disposition of which was far from certain. The court failed to give the required deference to the government's rationale for filing the motion. The court's denial of the motion forced Motta to undergo the risk-filled trial he sought to avoid, which resulted in conviction and his current sentence of two life prison terms.

D. Motta's Legal Counsel Provided Ineffective Assistance under the Sixth Amendment When Motta Pleaded Guilty.

To demonstrate ineffective assistance of counsel a convicted defendant must show both that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). The two-part Strickland test "applies to challenges to guilty pleas based on ineffective assistance of counsel." Hill v. Lockhart, 474 U.S. 52, 58 (1985).

Motta's attorney Eddins admitted post-guilty plea that he failed to apprehend the mandatory minimum life sentence that applied to the VICAR counts in counseling Motta to plead. This was prejudicial because it resulted in Eddins' failure to develop a record to support a departure motion under § 5K1.1, the only way to avoid the life sentence. The record shows that Eddins could have

developed the record, and that had he done so the court would have likely granted the government's departure motion. Motta would not have proceeded to the risk-filled jury trial that resulted in guilty verdicts and the imposition of two life sentences for the VICAR murder counts.

E. Insufficient Evidence Supported all Convictions Because the Government Failed to Establish the Prerequisite RICO Enterprise.

Motta argues that insufficient evidence supported all convictions because the government failed to establish the prerequisite RICO enterprise as to Count 1. With the few modifications made herein, he joins the argument, authorities and excerpt of record references in Joseph's opening brief entitled "SUFFICIENCY OF EVIDENCE". [Joseph's OB 36-43].

ARGUMENTS

A. The Court Violated Motta's Sixth Amendment Right to Counsel When it Permitted the Government to use a Surreptitiously Obtained Recording Between Motta and a Government Agent that Contained Incriminating Statements.

1. Standard of Review.

Motta moved to suppress the October 2004 recording, which motion the court granted, expressly declining to decide whether the government's actions in

obtaining the recording violated the Sixth Amendment. Whether a defendant was denied his Sixth Amendment right to counsel is a question of law reviewed de novo. United States v. Ortega, 203 F.3d 675, 679 (9th Cir. 2000).

Motta did not explicitly raise the issue of whether his statements in the recording where voluntary, and did he did not object to the government's use of the recording beyond impeachment of inconsistent testimony during cross-examination. Unpreserved issues are reviewed for plain error. "Under plain-error review, reversal is permitted only when there is (1) error that is (2) plain, (3) affects substantial rights, and (4) "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Johnson v. United States, 520 U.S. 461, 467 (1997) (*quoting* United States v. Olano, 507 U.S. 725, 732 (1993)).

2. Discussion.

a.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This right to counsel attaches "at or after the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." McNeil v. Wisconsin, 501 U.S. 171, 175 (1991). Once the right attaches the government is

forbidden from "deliberately elicit[ing]" incriminating statements from the defendant. Massiah, 377 U.S. at 206. The government violates the Sixth Amendment when it designates an informant to question the accused on its behalf, outside the presence of counsel. Id.

The defendant must show that the informant was acting as the government's agent when he obtained the information from defendant, and that the informant made some effort to "stimulate conversations about the crime charged." United States v. Henry, 447 U.S. 264, 271 n. 9 (1980). The police and their informant must take "some action ... designed deliberately to elicit incriminating remarks." Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986). Implicit questions and discussion about the crimes charged against the defendant constitute a Sixth Amendment violations. Fellers v. United States, 540 U.S. 519, 524 (2004).

Even if a government interview violates the Sixth Amendment so that the statements relating to the criminal offenses may not be admitted as substantive evidence in the government's case-in-chief, they are admissible to impeach conflicting testimony by the defendants, provided the statements were voluntary. Harvey, 494 U.S. at 349-53.

b.

On January 13, 2004, the State of Hawai`i filed a criminal indictment

against Motta concerning crimes later charged in the federal Indictment. Joseph, 109 Hawai'i at 488. Attorney Eddins made his appearance and Motta pleaded not guilty. [ER3 71; PSR2, at 1]. The state court permitted release on bail, but on condition of house-arrest at Motta's mother's home in Hilo. [ER2 218].

Motta's cousin was the convicted drug trafficker Jonnaven Monalim. [ER2 150-152, 154]. In February 2004 the FBI searched Monalim's O`ahu home and seized evidence related to renewed drug trafficking. [ER2 155-157]. Monalim agreed to cooperate. Remaining at liberty, Monalim participated in controlled drug transactions and discussed gambling in Hawai`i with federal agents. [ER2 159, 161-162, 231]. The government compensated him for his cooperation. [ER2 20-21, 220.1; *see* ER1 30]. Monalim would later admit at trial that his purpose in cooperating was to avoid going back to prison. [ER2 166, 190, 192].

Although Motta was under indictment and represented by attorney Eddins, on October 30, 2004, the government arranged for Monalim to fly to Hilo where federal agents at a hotel equipped him with a recording devise, then told him to meet Motta and "talk to him about the gambling." [ER2 232-233]. Monalim met Motta for approximately one hour and 30 minutes, and engaged him in discussion concerning this case. [ER2 233-234]. Then Monalim returned to the hotel where agents obtained the recording. [ER2 234].

Four and a half years later in 2009, after jury selection in this case, the government notified Motta and Joseph about the secret recording, in which the government alleged that Motta made incriminating statements concerning the charges against him. [CR 989]. Motta filed a motion to suppress on the grounds, *inter alia*, that the recording was obtained in violation of his Sixth Amendment right to counsel and he sought an order prohibiting the government from introducing the recording in its direct case. [ER3 70]. The government argued that the recording was made to gain information on other criminal activity and not this case. [ER3 75.1-75.4].

The court granted Motta's motion to suppress, prohibiting the government from using the recording in its case-in-chief; however, if Motta chose to testify then the government could use the recording to impeach contradictory statements. [ER3 67-68]. The court made no finding as to whether Motta knowingly and voluntarily waived his Sixth Amendment right to counsel, even though the court acknowledged that the otherwise inadmissible recording could be used for impeachment "provided the statements were voluntary." [ER3 68]. The court expressly declined to make a finding as to whether the government's actions in obtaining the October 2004 recording violated the Constitution. [ER3 69].

At the trial Motta testified that he was not involved in gambling or security

for game rooms, and that he acted in self defense at the golf course on January 7, 2004. [ER2 242-262]. On cross-examination the government sought to impeach Motta's inconsistent testimony using the October 2004 recording. In response Motta acknowledged speaking with Monalim on October 30, 2004, but he denied making incriminating statements or telling Monalim that: he was "organizing all of the guys"; he needed a gun and that somebody had one; he had spoken about shooting Tino Sao; he needed the governor to pardon him; and "you got to be a Machiavellian". [ER2 262.1-262.15].

After cross examination the parties agreed to redactions as to inaudible and/or unintelligible portions of the recording, then the government introduced the entire recording as Exhibit 149. [ER2 214-215, 217]. The next day the government presented its rebuttal case with no further reference to the October 2004 recording. At the end of its rebuttal case the government represented that it had no further witnesses. [ER2 223].

But it did. On March 5 and 6, 2009, the government put on Monalim who was, in effect, its star witness. Monalim's lengthy, two-day testimony delved deeply into the recording, in which he testified that Motta made incriminating statements, both audible and inaudible, as well as incriminating gestures. [ER2 97-212, 228-237].

c.

Motta's Statements Were Not Voluntary.

When Monalim met with Motta on October 30, 2004 the government ran afoul of the Sixth Amendment. Massiah, 377 U.S. at 206. Under de novo review there is no question that the Sixth Amendment prerequisites were met. First, there was a "prosecution" because the State of Hawai`i had indicted Motta and hence he was an "accused" at the time the government sent the wired Monalim to talk to him. Second, Motta was represented by attorney Todd Eddins who had entered an appearance on his behalf. Third, Monalim was clearly acting on behalf of the government as he was their paid informant who, at their behest, flew to Hilo, wore the wire, met with Motta and later surrendered the recording to the government. Fourth, there is no question that the government sought intelligence on this case, with Monalim testifying that the government told him to talk with Motta about gambling. [ER2 232].

Government actions that deliberately elicit incriminating statements from an indicted defendant in the absence of counsel are improper under the Sixth Amendment. Maine v. Moulton, 474 U.S. 159, 176-180 (1985); Henry, 447 U.S. at 274; Massiah, 377 U.S. at 206. 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. *See* Harvey, 494 U.S. at 349-53; Ortega, 203 F.3d at 681; United States v. Danielson, 325 F.3d 1054, 1066 -1067 (9th Cir. 2003). A statement becomes voluntary when "[a] defendant whose Sixth Amendment right to counsel has attached by virtue of an indictment [ ] execute[s] a knowing and intelligent waiver of that right in the course of a police-initiated interrogation." Harvey, 494 U.S. at 352 (citation omitted).

While the district court acknowledged that use of the recording for impeachment was permissible *if* the incriminating statements were voluntary [ER3 68], the court made no finding in this regard. The record does not support a finding that Motta's statements during the October 2004 recorded government interview were voluntary because there is no evidence of a knowing and voluntary waiver of his right to have his legal counsel present. Like the defendant in Massiah, Motta didn't even know that he was under interrogation by a government agent. Massiah, 377 U.S. at 206. How could he? The court had released him on bail and he was confined at his mother's house – the last place he would suspect government interrogation and the need for his lawyer's presence.

In fact, the idea of an informed waiver of right to counsel prior to the interview was the last thing on the government's mind on October 30, 2004, as

agents equipped Monalim with the recording device. The very purpose in using the wired Monalim was to trick Motta into making incriminating statements that could be used against him. As Monalim testified, the agents directed him to talk to Motta about gambling, and Monalim knew Motta would talk to him because they were cousins and Motta trusted him. [ER2 98]. There is no question that the government agent "deliberately elicit[ed]" inculpatory statements from Motta in the absence of his voluntary and knowing waiver of his right to counsel, thus making his statements in voluntary. Harvey, 494 U.S. at 348-49.

"We have mandated the exclusion of reliable and probative evidence for all purposes only when it is derived from involuntary statements." Harvey, 494 U.S. at 351 (citations omitted). Here the recording consisted of involuntary statements and should have been excluded. The convictions based on this evidence must be reversed.

d.

The Government Used the Recording Beyond Impeachment.

The court prohibited use of the recording in the government's case-in-chief, and permitted use only if Motta testified and in order to impeach any inconsistent statements. Motta submits that the government used the recording far beyond impeachment.

In Harvey the Supreme Court held that a statement obtained in violation of the Sixth Amendment right to counsel 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. 494 U.S. at 350-51, *citing* Michigan v. Jackson, 475 U.S. 625 (1986). The ability to impeach with evidence obtained in violation of the Sixth Amendment should be limited to cross examination. United States v. Abdi, 142 F.3d 566, 569 (2nd Cir. 1998), *citing* Harvey, 494 U.S. at 350-51.

After Motta's direct testimony the government used the recording during cross examination to impeach inconsistent statements. [ER2 262.1-262.15]. That task completed, no further use of the highly prejudicial recording should have been permitted. However, after cross examination of Motta was completed and after the parties rested [*see*, ER2 223] the government put on Monalim. For the next two days the government delved into the recording with Monalim, long after the opportunity for cross examination and permissible impeachment of Motta's inconsistent statements had passed.

Furthermore, prior to Monalim's testimony the court issued no instructions to the jury limiting consideration of the recording to impeachment of Motta's inconsistent testimony. Likewise, after the parties rested the court provided no

instructions to the jury limiting their consideration of the recording to impeachment and prohibiting consideration as a part of the government's case-in-chief. [ER2 45-89]. Closing arguments in this case followed the jury instructions. [*See* CR 1070]. The government launched its closing arguments by playing excerpts from the recording. [ER2 92-93]. Thereafter, the government played the recording for the jury seven more times and, as well, twice during its rebuttal closing remarks. [ER2 43, 93-95]. The jury could have reasonably believed that it was permissible to consider the recording as a part of the government's case-in-chief.

The record indicates that the jury did. On day four of jury deliberations, the jury sent a note to the court asking to hear the October 2004 recording. [ER2 33]. The court played the entire recording for the jury, again providing no limiting instruction restricting consideration to impeachment of Motta's prior inconsistent testimony. [ER2 37]. On the seventh day of deliberation the jury returned verdicts finding Motta guilty on all the charged counts. [CR 1089]. Use of the highly prejudicial recording obtained in violation of Motta's Sixth Amendment right to counsel, far beyond the permissible limits of cross-examination of inconsistent statements, should have been barred under Harvey.

Beyond Sixth Amendment consideration, fair trial concerns are implicated.

"[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." Strickland, 466 U.S. at 684. "It is not implicated, as a general matter, in the absence of some effect of the challenged conduct on the trial process itself. It is thus the use of the evidence for trial, not the method of its collection prior to trial, that is the gravamen of the Sixth Amendment claim." Harvey, 494 U.S. at 362-363 (STEVENS, J., dissenting) (internal quotation marks and citations omitted).

Thus, Motta's reliance on the Sixth Amendment right to counsel invokes the need to protect the fundamental right to a fair trial. Strickland, 466 U.S. at 684. "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause..." Id., at 684-685.

e.

Plain Error.

The lack of voluntary statements obtained without waiver of right to legal counsel's presence during the government interview, coupled with the use of the recording beyond impeachment, represents error which is plain. As well, the recording was prejudicial in that it was clearly pivotal in the jury deliberations, with the jury requesting the playing of the recording again.

Given the foul play employed by the government to obtain the recording in violation of the Six Amendment, its use during the trial denied Motta both the right to counsel as well as the right to a fair trial. Id. His conviction based on these circumstances "seriously affects the fairness, integrity, or public reputation of judicial proceedings" and must be reversed. Johnson, 520 U.S. at 467.

B. The Court Abused its Discretion in Denying the Motion to Disqualify Itself.

1. Standard of Review.

On December 1, 2008, Joseph and Motta filed a motion to disqualify Judge Mollway, which the judge denied. [ER1 41; ER3 80; 76]. The Court reviews the denial of a recusal motion for abuse of discretion. United States v. Johnson, 610 F.3d 1138, 1147 (9th Cir. 2010).

2. Discussion.

a.

Title 28 U.S.C. § 455(a) provides "[a]ny ... judge ... of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Section 455(b)(1) provides that the judge must disqualify himself, "[w]here he has a personal bias or prejudice concerning a party,

or personal knowledge of disputed evidentiary facts concerning the proceeding."

The principal distinction between § 455(a) and § 455(b) is apparent from the face of the statute. Section 455(a) addresses the appearance of partiality, guaranteeing not only that a partisan judge will not sit, but also that no reasonable person will have that suspicion. Liteky v. United States, 510 U.S. 540, 566-567 (1994)(Justice KENNEDY concurring in the judgment.) In contrast § 455(b) delineates specific circumstances where recusal is mandated, including if the judge has personal knowledge of disputed evidentiary facts concerning the proceeding. Id., *and see* 28 U.S.C. § 455(b)(1).

"Because the appearance of partiality may arise when in fact there is none, the reach of § 455(a) is broader than that of § 455(b). One of the distinct concerns addressed by § 455(a) is that the appearance of impartiality be assured whether or not the alleged disqualifying circumstance is also addressed under § 455(b)." Liteky, 510 U.S. at 567 (internal citations omitted)

b.

Section 455(a).

On February 11, 2008, Motta pleaded guilty to Counts 2, 6 and 8, which pleas the court, the Honorable Susan Oki Mollway presiding, accepted and the case went to sentencing. [ER3 225-226]. Probation submitted PSR2 (the first

presentence report for Motta) that tracked the Plea Agreement and plea admissions, identified conduct supporting the pleas and recited prejudicial information concerning Motta's criminal history and prior arrests for gambling-related offenses. [PSR2 ¶¶ 11-36, 104-108]. The court also reviewed the presentence reports for Gonsalves, Joseph and Wang [*See* ER3 87; CR 780, 851], as well as four other codefendants who had pleaded guilty earlier. [CR 766 (Siaosi Alapati), 768 (Peter Matautia), 793 (Matthew Taufetee, 832 (Joe White)]. After Judge Mollway reviewed these defendants' presentence reports, she presided over Motta and Joseph's jury trial.

This sequence of events violated Fed.R.Crim.P. 32(e)(1), which states: "Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court ... until the defendant ... has been found guilty." The reason for restricting judicial access to presentence reports is that:

> "[t]here are no formal limitations on their contents, and they may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged.... [T]here is no reason for [the judge] to see the document until the occasion to sentence arises, and under the rule he must not do so."

Gregg v. United States, 394 U.S. 489, 492 (1969).

This Court has explained that:

"[d]isclosure of the presentence report 'to the judge who will pronounce the

> defendant's guilt or innocence or who will preside over a jury trial would seriously contravene [Rule 32's] purpose of preventing possible prejudice from premature submission of the presentence report.'"

In re Ellis, 356 F.3d 1198, 1204 (9th Cir. 2004) (*quoting* Gregg, 394 U.S. at 492); United States v. Park, 521 F.2d 1381, 1382-83 (9th Cir.1975) (per curiam) (holding that violation of Rule 32 compels reversal).

In addition to revealing presentence reports, Judge Mollway presided over these defendants' guilty pleas. Most damaging was Gonsalves' second plea in which the court accepted his highly prejudicial admissions concerning the underlying events in the Indictment – albeit Gonsalves pleaded guilty to an Information. Under Count 1 of the Information, Gonsalves agreed to plead guilty to knowingly conducting and participating directly or indirectly in the affairs of an enterprise through a pattern of racketeering activities, the same enterprise charged against Motta in Count 1 of the Indictment. [ER3 120].

Gonsalves admitted the five elements of the offense including the existence of an enterprise from 1999 to June 2004 [ER3 106], that the enterprise engaged in activities affecting interstate or foreign commerce, that he was employed by or associated with the enterprise, that he knowingly conducted or participated directly or indirectly in the conduct of the affairs of the enterprise, and that he knowingly participated in the affairs of the enterprise through a pattern of

racketeering activity. [ER3 120-121].

As well, he admitted: to joining the Wang "enterprise" and providing protection for Wang's illegal gambling businesses located in Honolulu; that he agreed to extort Wang's competitor's illegal game room in Pearl City; that from August 2003 he assisted Wang's enterprise by providing protection and security for the games, which games included illegal gambling paraphernalia and slot machines that were manufactured outside the State of Hawai`i and transported in interstate or foreign commerce to Hawai`i, and that these games grossed revenue in excess of $2,000 on any given day and employed more than five individuals at any one time. [ER3 124-126].

Moreover, Gonsalves admitted: that he discussed in August 2003 with Joseph and others closing down the rival illegal game room in Pearl City; that he was successful in destroying that rival game room; that in December 2003 another gambling security faction seized control of Wang's game rooms and took over security operations that had been working under the direction of Joseph and "Mr. Motta". [ER3 126-127]. This rival security group was led by several Samoan individuals and their intention was to take charge of Wang's security operations and replace Joseph and "Mr. Motta" as "security bosses." [ER3 127]. Joseph was informed of the takeover by the rival security group. [ER3 127-128].

Among the six racketeering activities Gonsalves participated in, Racketeering Act 6 was based upon the January 7, 2004 shooting of Romelius Corpuz at the Pali Golf Course and murder in the second degree pursuant to Hawai`i Revised Statutes. [ER3 123]. This act underlies Count 7 of the Indictment against Motta.

Concerning the shootings, Gonsalves admitted that on January 7, 2004, he attended a funeral for a friend's father, which funeral Joseph and Motta also attended, with "all three men ... armed with handguns". [ER3 127]. Gonsalves assisted in arranging a meeting between Joseph and Motta, and members of the rival security faction who also attended the funeral, with Gonsalves admitting that the meeting was arranged because Joseph and Motta wanted to confront Lepo Taliese concerning the takeover of Wang's security operations. [ER3 128].

Joseph and Motta drove to the Pali Golf Course parking lot, followed by Taliese who was accompanied by Corpuz, Maumalanga, Sao and Gonsalves; right after arriving Gonsalves and Joseph, armed with 38 caliber firearms, shot Corpuz and intentionally caused his death in retaliation for the takeover, to stabilize Wang's security and prevent further disruption of Wang's gambling business. [ER3 128, 132-134].

Gonsalves also pleaded guilty to Count 2 of the Information, Illegal

Gambling Business, admitting that he assisted in the management of the business engaged in illegal gambling under Hawai`i statutes, and that the business involved five or more persons who conducted, financed and managed the business, that the business was in substantially continuous operation by five or more persons for more than 30 days, and had a gross revenue of $2,000 in a single day. [ER3 123-124]. This charge tracks Count 1 of the Indictment against Motta, racketeering act one Illegal Gambling Business, as well as Count 3, Illegal Gambling Business. [ER3 248, 251].

At Gonsalves' sentencing hearing on December 1, 2008, the court acknowledged reviewing his presentence report that recommended a Guidelines range of 324-to-405 months. The court accepted the plea agreement and imposed a prison term of 330 months. [ER3 87-92]. In doing so the court found that Gonsalves "had more of a soldier's role in the organization" than Motta or Joseph. [ER3 95]. Concerning events at the golf course, the court referred to the "horror" of the shootings that "appear[ed] to have been motivated by a desire to regain control of the security portion of the gambling enterprise." [Id.]. Moreover, the court stated:

> "[w]hen I look at the evidence that is in the record, it tells me that victims were lured to the Pali Golf Course, probably thinking that there would be a meeting at which competing differences would be worked out. Instead, as

> soon as those victims arrived at the golf course, they were gunned down. I have no evidence that they did anything to initiate or provoke that immediate confrontation, and yet they were killed."

[ER3 95-96].

These remarks clearly show that Judge Mollway considered Motta a leader and organizer in a RICO enterprise. Further, it is hard to imagine that Judge Mollway could have kept an open mind as to Motta's defense of self-defense at his upcoming trial since she accepted Gonsalves' admissions that Motta and Joseph "lured" the victims to the golf course where they were "gunned down" without provocation.

These considerations indicate § 455(a) grounds for recusal, which we view through the lens of Liteky wherein the Supreme Court held *inter alia* that:

> "First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves ... they cannot possibly show reliance upon an extrajudicial source.... Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible."

510 U.S. at 555 (internal citations omitted).

This case represents the "rarest of circumstances" wherein the judge's conduct during the proceedings should have formed the basis for recusal under § 455(a). Id., at 554-56. The court was privy to defendants' highly prejudicial

admissions concerning the crimes charged, as well as the prejudicial content of defendants' presentence reports. Further, Judge Mollway's comments during Gonsalves' sentencing clearly show that she had reached definitive conclusions about the evidence, and Joseph and Motta's guilt.

The court's partiality was displayed during the trial in which Motta's defense to the VICAR counts was self-defense: he shot Sao and Taliese because he thought were about to attack him. Before the trial the court determined that Motta's plea-related statements were inadmissible because his waiver of protections under Fed.R.Evid. 410 was not knowing and voluntary. [*See* CR 916, 928].

But at trial, just before Motta took the stand in his own defense, the court questioned how he could testify that he was acting in self-defense and feared for his life when such testimony would be directly contrary to his sworn plea admission from February 2008 to committing murder. [ER3 21].

The court:

- queried trial defense counsel Charles Carnesi[4] as to how he could have Motta testify to the opposite of what he admitted during the sworn plea

[4] In September 2008 the court granted Todd Eddins' motion to withdraw and substituted trial counsel with Walter Rodby and Charles Carnesi. [CR 906]. Rodby and Carnesi represented Motta until July 8, 2009. [CR 1149].

colloquy [ER3 24];

- rebuked Carnesi, stating that had it believed Motta was lying in his guilty pleas it would not have permitted withdrawal of the pleas [ER3 25-26];

- accused Carnesi of, "making a mockery of proceedings ... That's what you're asking me to accept as a basis on which you can stand up here and have Motta testify to the complete opposite of what he testified to earlier" [ER3 26];

- warned that testimony by Motta seeking to establish the defense of self-defense could constitute perjury. [ER3 20].

The court's use of Motta's inadmissible plea admissions against him suggests a deep-seated antagonism that is prohibited under Liteky and required the court's recusal. Liteky, 510 U.S. at 555.

The objective test for determining whether recusal is required under § 455(a) is, "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned". Clemens v. U.S. Dist. Court for the Cent. Dist. of Cal., 428 F.3d 1175, 1178 (9th Cir.2005)

(internal quotation marks and citation omitted). Here that test was met. In addition to Judge Mollway's prohibited review of the defendants' presentence reports, it is difficult to conceive how she could have continued impartially with Motta and Joseph's trial after accepting Gonsalves' pleas and imposing sentence. The court's remarks at Gonsalves' sentencing clearly demonstrated that she possessed a preconceived notion about both Joseph and Motta's guilt. The court's remarks during the trial as Motta sought to testify in his own defense indicate bias and would cause a reasonable person to harbor doubts about the court's impartiality. Liteky, 510 U.S. at 555.

Section 455(b)(1).

Section § 455(b) delineates specific circumstances where recusal is mandated, one of them being where the judge has personal knowledge of disputed evidentiary facts concerning the proceeding. Id., at 566-567; *and see* 28 U.S.C. § 455(b)(1). Analysis under this section requires review of Gonsalves' proceedings in September 2008 and the court's order for ex parte briefing from Gonsalves and the government.

The order directed the parties to address in ex parte briefing, *inter alia*: "what, if any, risks are the parties protecting themselves from"; whether defendant is giving up a viable defense; evidentiary problems; "details of what they might

face if the case were tried". [ER3 150-152]. The court indicated that recusal would be warranted if the case went to trial:

> "the parties need be concerned that, even after reviewing details provided by the parties, the court will nevertheless reject the plea agreement, leaving the parties with the trial judge who will make evidentiary rulings informed by the parties' ex parte admissions of the weaknesses in their proof. Even if this judge reviews details from the parties, rejects the plea agreement, ***and then considers recusing herself from the trial,***[5] the court will want to be assured that the replacement judge will try the case, not go through the same plea agreement exercise presented to this judge, leading to a repetition of the entire exercise."

[ER3 151-152].[6]

After review of the ex parte filings [CR 894, 895, 896, 897], the court did not recuse itself and accepted Gonsalves' guilty plea, hence trial disposition did not occur. Yet now the court had personal knowledge of disputed evidentiary facts, i.e., all the risks and weaknesses as to Gonsalves' position submitted for the court's review ex parte. These risks and weaknesses were undoubtedly identical, or nearly identical, to the risks and weaknesses in Motta's proofs and defenses because he was charged based upon the same factual allegations.

We consider whether the ex parte Gonsalves' disclosures can be "personal

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[5] As to quotations, emphasis of text through bolding and italicizing has been added and is not part of the original, unless so stated.

[6] The order warned of judicial bias, with the court stating that it had "an uncontested record supporting the federal murder conviction." [ER3 148].

knowledge". 28 U.S.C. § 455(b)(1). "The point of distinguishing between 'personal knowledge' and knowledge gained in a judicial capacity is that information from the latter source enters the record and may be controverted or tested by the tools of the adversary process." Edgar v. K.L, 93 F.3d 256, 259 (7th Cir. 1996) *cert. denied*, 519 U.S. 1111 (1997). Knowledge received in other ways, which can be neither accurately stated nor fully tested, is "extrajudicial." Id. Off-the-record briefings in chambers leave no trace in the record, Id., and are certainly not tested by the adversarial process.

Here, the court sealed the parties' ex parte briefs, making the disclosures only available to court personnel and to the filing party. [CR 898]. Hence what information passed to the judge, and how reliable it may have been, are unknowable. Edgar, 93 F.3d at 259. This is "personal knowledge of disputed evidentiary facts" and mandatory disqualification under § 455(b)(1) should have followed. Id.

The duty to recuse and the duty to sit do not exert equal pull; in close cases, "doubts ordinarily ought to be resolved in favor of recusal." United States v. Snyder, 235 F.3d 42, 46 (1st Cir. 2000) *cert. denied*, 532 U.S. 1057 (2001)(citations omitted). Under these unique circumstances the court abused its discretion in denying the motion to disqualify itself.

C. The Court Erred in Denying the Government's Motion for Departure below the Statutory Minimum for Substantial Assistance.

1. Standard of Review.

The court's refusal to depart below the statutory minimum sentence is reviewed de novo because that decision involved a question of law and not the exercise of discretion. United States v. Wipf, 620 F.3d 1168, 1169 (9th Cir. 2010).

2. Discussion.

a.

Counts 6 and 7 charged Motta with VICAR murder in violation of 18 U.S.C. § 1959(a)(1). If convicted the mandatory minimum prison term was life. 18 U.S.C. § 1959(a)(1)[7]; United States v. Rollness, 561 F.3d 996, 998 (9th Cir. 2009). Pursuant to 18 U.S.C. § 3553(e)[8] and U.S.S.G. § 5K1.1[9], upon the

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[7] "(a) Whoever ... for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders ... any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished— (1) for murder, by death or life imprisonment, or a fine under this title, or both;" 18 U.S.C. § 1959(a)(1).

[8] "Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution

government's motion a district court may depart below the mandatory minimum sentence and the Guidelines sentencing range when a defendant renders substantial assistance to authorities. *See* United States v. Evans-Martinez, 611 F.3d 635, 642 -643 (9th Cir. 2010) *cert. denied*, 131 S.Ct. 956 (2011).

"The Guidelines 'afford[ ] the sentencing judge' wide 'latitude' in evaluating the 'significance and usefulness of the defendant's assistance but direct courts to give 'substantial weight ... to the government's evaluation' of that assistance." United States v. Awad, 371 F.3d 583, 586-87 (9th Cir.2004), *quoting* U.S.S.G. § 5K1.1 cmt. n. 3 ("[s]ubstantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain"). This is because as written § 5K1.1 focuses on assistance that a defendant provides to the government, rather than to the judicial system. Cf. U.S.S.G. ch.1, Part A, Introduction 4(g) (Sentencing Ranges). Accordingly, the decision to make a § 5K1.1 motion is "expressly lodged in the prosecutor's discretion." United States v.

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of another person who has committed an offense." 18 U.S.C. § 3553(e).

[9] "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." U.S.S.G. § 5K1.1.

Garcia, 926 F.2d 125, 128 (2nd Cir. 1991).

b.

Motta, Joseph and Gonsalves defended against the prosecution in both state and federal court as a team, even where individual interests may have been compromised. Their agreement was memorialized in two joint defense agreements, the first on August 31, 2004, and the second in the federal prosecution, executed on May 11, 2007. [ER3 168]. As they jointly reported to the district court in supporting the government's departure motions:

> "The Defendants did in fact jointly defend the state and federal prosecutions during pre-trial stages of the cases by, inter alia, sharing information developed in the course of the investigation of the cases, holding numerous joint defense meetings with each other and their respective counsel at the First Circuit Court and the Federal Detention Center Honolulu, and presenting a comprehensive joint submission to the United States Department of Justice in Washington, DC, in successfully opposing the authorization of this case for the death penalty. In the final stages of preparation for the trial, the Defendants shared and divided investigation responsibilities, drafted joint proposed jury instructions, and prepared joint trial exhibits.
>
> Even pleading negotiations were jointly conducted with the government. These negotiations began in earnest in December of 2007, when counsel for the Defendants met with Assistant United States Attorney Thomas J. Brady, several federal case agents, and state Deputy Prosecuting Attorney Lucianne Khalaf, at the offices of the United States Attorney in Honolulu. From the inception of these negotiations, the Defendants stated their intention that they would only plead guilty if they could plead as a group, each receiving the same sentence as the other, without any requirement to cooperate against each other. These negotiations eventually

> resulted in the Defendants usually inducing each other to enter guilty pleas, pursuant to plea agreements with the government, on the eve of trial on February 11, 2008. Their pleas also induced co-defendant Wang to plead guilty."

[ER3 168-169; *and see* ER3 155-156, 243; CR 118, 122].

Motta pleaded guilty to Counts 2, 6 and 8, and stipulated to a Sentencing Guidelines range of 240-to-330 months pursuant to Fed.R.Crim.P. 11(c)(1)(C). [ER3 236-237]. Motta believed that the *maximum* sentence he faced was life in prison as advised by his lawyer Eddins, as affirmed by the government and confirmed by the district court that told him the, "worst sentence you could get if we proceeded here without this plea agreement is life in prison". [ER3 203].

Joseph and Gonsalves also entered guilty pleas under Fed.R.Crim.P. 11(c)(1)(C), which pleas the court accepted. [CR 717 & 721 (Joseph); 716 & 720 (Gonsalves)]. Codefendant Wang had refused to plead guilty. But when he learned that Motta, Joseph and Gonsalves had done so, he entered a plea agreement given the possibility that one or more of these defendants – including Motta – might testify against him. [ER3 163; CR 719, 723].

After Motta, Joseph and Gonsalves entered their plea agreements, their attorneys and the government realized that under the VICAR counts the mandatory *minimum* prison term was life. [ER3 157-158]. The only way to get around this

and effectuate the Rule 11(c)(1)(C) plea agreements was through government-filed departure motions for substantial assistance. [Id.]. Hence on May 16, 2008, the government filed motions seeking departures. [ER3 188; CR 812 (Joseph), 813 (Gonsalves)]. As to Motta, the government filed the motion on the grounds that a life imprisonment term would not adequately take into account his willingness to accept responsibility, as well as the desirability of a prompt and certain disposition of the case, the need to avoid delay in the disposition of other pending related matters, and the expense of trial and appeal. [ER3 190-191].

Moreover, the government advised the court that Motta's guilty plea "substantially assisted the Government and resulted, in part, with the successful prosecution of some of the remaining defendants in the matter." [ER3 191]. Wang's legal counsel confirmed to the court that the simultaneously guilty pleas by Motta, Joseph and Gonsalves directly resulted in Wang's guilty plea. [ER3 163].

At a hearing on May 27, 2008, the court considered the government's departure motion, acknowledging that it could impose a sentence below the statutory minimum of life only if it granted the motion. [ER3 180]. The court found that it did not have a factual basis to conclude that Motta "substantially assisted the government in its investigation or prosecution of somebody else", and

it continued the hearing. [ER3 180-181].

Defendants' counsel filed a joint declaration in support of the government's departure motion:

> "There was no language in the Defendants' plea agreements regarding cooperation with the government because at the time the pleas were entered the undersigned attorneys and Assistant United States Attorney Thomas J. Brady failed to consider that a downward departure for substantial assistance would be necessary in order to effectuate the agreed-upon sentences because the VICAR murder counts carry a mandatory minimum term of life imprisonment."

[ER3 157; underline in original].

At the continued hearing on July 22, 2008, the government agreed with the court that generally pleading guilty alone was not sufficient substantial assistance. [ER1 80]. However, this was not the run-of-the-mill case wherein the government gave credit to a cooperating defendant who assisted in prosecuting uncooperative codefendants; here the defendants jointly defended the prosecution then simultaneously pleaded guilty, which obviated the need for trial and appellate litigation. [ER1 80, 83]. Notwithstanding, the court denied the motions on the ground of lack of substantial assistance on defendants' part. [ER1 84-85]. As a result the court rejected the plea agreements, Motta withdrew his guilty plea and reinstated his original plea of not-guilty. [ER1 85-86].

c.

When determining the appropriate extent of a substantial-assistance downward departure, the court should consider the following five factors:

> "(1) the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered; (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the defendant's assistance; (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; (5) the timeliness of the defendant's assistance."

U.S.S.G. § 5K1.1(a).

Since Motta, Joseph and Gonsalves followed a joint defense plan and worked as a team, including their decision to simultaneously plead guilty, only three of the five § 5K1.1(a) factors are applicable. Factor (2) is not applicable because Motta did not provide information or testimony about other defendants because everyone pleaded guilty including, eventually, Wang. Further, the record does not indicate that the government sought debriefing sessions with Motta concerning the underlying events in the case. Factor (4) is not applicable as there was no danger or risk of injury because Motta did not provide information against others.

As to factor (1), the departure motion pointed out to the court that Motta's Plea Agreement resulted in the successful prosecution the remaining defendant,

Wang. [ER3 190-191]. The Indictment charged Wang with RICO (Count 1), RICO Conspiracy (Count 2) and Illegal Gambling Business (Count 3). [ER3 245, 250-251]. Wang intended to go to trial, denying any involvement in the racketeering allegations, although admitting that he ran a gambling establishment. [ER3 154, 162-163]. But when he learned that Motta, Joseph and Gonsalves entered plea agreements Wang decided to plead guilty. Wang's attorney confirmed to the court that Wang's decision, "was clearly influenced by the fact that the co-defendants were agreeing to enter into plea agreements with the possibility that one or more would testify against him". [ER3 163].

The court ignored this important causal connection between Motta, Joseph and Gonsalves' guilty pleas, and Wang's guilty plea:

> "the attorneys have labored to assure me that in this case pleading guilty did amount to substantial assistance because it purportedly caused others to plead guilty. And the problem I have is, I don't have a record showing that causal connection. I just have one person pleading guilty and another pleading guilty. And without more in the record, I will not say that that constitutes substantial assistance."

[ER1 85]. The record shows, however, that had it not been for Motta, Joseph and Gonsalves' guilty pleas, Wang would not have pleaded guilty.

As to factor (3), the nature and extent of the assistance, the government argued to the court the following points concerning the merits of Motta, Joseph

and Gonsalves' guilty pleas: the desirability of a prompt and certain disposition of the case; the need to avoid delay in the disposition of other pending related matters; the expense of trial and appeal, both of which would be avoided by the guilty pleas and downward departures. [ER3 190-191].

But the court insisted on analyzing the departure motion as if this were a typical cooperation situation in which one defendant testifies against another. The court stated:

> "The record is totally lacking in evidence that either Mr. Gonsalves or Mr. Motta agreed to give information to the government or to testify on behalf of the government against any other person. That's typically the nature of assistance. There may well be other forms of assistance that could occur here, but I'm not aware of any such other assistance."

[ER1 84]. Referring to Motta's guilty plea, the court found that, "pleading guilty does not in my view equate without more to substantial assistance." [ER1 84-85].

The problem is that the court's definition of 'substantial assistance' as "testi[mony] on behalf of the government against any other person" had no bearing on the case. Except for Wang, discussed *supra*, Motta could not testify against Joseph and Gonsalves since all three pleaded guilty on February 11, 2008. The court's requirement that Motta engage in "testi[mony] on behalf of the government against any other person" in order to find "substantial assistance" under § 5K1.1 was an irrelevant construct of the phrase under the circumstances of

this case, and should not have been applied.

Further, no language in § 5K1.1(a) requires that the substantial assistance take the form of testifying against others, nor does the case law support the court's narrow interpretation. This is because § 5K1.1(a) motions are creatures of the government's making: the discretion lies with the government as to whether or not a defendant has provided substantial assistance, and courts must defer to the government's determination of the same. Awad, 371 F.3d at 586-87.

The court's characterization of the avoidance of trial as merely a "coincidental benefit to the government" does not withstand scrutiny. [ER3 187.1]. Defendants' simultaneously guilty pleas obviated the need for a trial in a case that had been declared "complex" under 18 U.S.C. § 3161(h)(7)(B)(ii).[10] [ER1 80; CR 70]. Further, the "desirability of a prompt and certain disposition of the case, the need to avoid delay in the disposition of other pending related matters, and the expense of trial and appeal" was hardly a "coincidental benefit". [ER3 191]. Specifically, defendants' joint plea agreements saved the government

[10] Case complexity included considerations as to: "[w]hether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section." 18 U.S.C. § 3161(h)(7)(B)(ii).

the tremendous expense of trying a case in which:

- the government anticipated the trial alone would last for two months;
- the government's proposed a witness list identified more than 100 individuals;
- the government expected the trial would involve the full-time employment of several federal government agents.

[ER3 158-159]. Moreover, the joint plea agreements eliminated the government's burden of going forward on problematic evidence and, as well, eliminated post-conviction litigation including direct appeals and collateral attacks against the judgments and sentences. [Id.]

Concerning timeliness under factor (5) the government acknowledged the useful timing of defendants' plea agreements, prior to commencement of the lengthy, complex trial. [ER1 80; *and see* ER3 169-170, 190-191]. The court did not acknowledge what weight it gave, if any, to the timing of the plea agreements that obviated the need for the government to move forward with the trial, a factor generally considered by sentencing courts. *See, e.g.,* United States v. Burns, 577 F.3d 887, 890 (8th Cir.2009)(en banc).

Finally, considerations of court administration are warranted even though the issue under § 5K1.1 is focused upon the government's perspective. The court

ignored not only the material assistance to the prosecution, but as well the aid provided to the court in the administration of justice. United States v. Shrewsberry, 980 F.2d 1296, 1298 (9th Cir.1992) *cert. denied* 510 U.S. 839 (1993). A guilty plea that conserves judicial resources and thereby facilitates administration of justice can be, in theory, a mitigating factor on which court may predicate a downward departure. United States v. Dethlefs, 123 F.3d 39, 46 (1st Cir.1997).

The court's denial of the departure motion was prejudicial, forcing Motta to undergo a risk-filled trial he sought to avoid and which he ultimately lost, resulting in two life sentences. Under de novo § 5K1.1 analysis, this Court should vacate the district court's denial of the government's departure motion.

D. Motta's Legal Counsel Provided Ineffective Assistance under the Sixth Amendment When Motta Pleaded Guilty.

1. Standard of Review.

In the alternative to Argument "C", Motta argues that attorney Eddins provided ineffective assistance of counsel as to the guilty plea. Usually this issue is brought under 28 U.S.C. § 2255 because the appellate record lacks a sufficient evidentiary basis as to what counsel did, why it was done, and what, if any,

prejudice resulted. United States v. Quintero-Barraza, 78 F.3d 1344, 1347 (9th Cir.1995) *cert. denied*, 519 U.S. 848 (1996).

The Court will review this issue on direct appeal, however, "in the unusual cases (1) where the record on appeal is sufficiently developed to permit determination of the issues, or (2) where the legal representation is so inadequate that it obviously denies a defendant his Sixth Amendment right to counsel." United States v. Jeronimo, 398 F.3d 1149, 1156 (9th Cir.2005). The record in this case supports review under both these factors, which review is de novo. Quintero-Barraza, 78 F.3d at 1347.

2. Discussion.

a.

The right to counsel guaranteed by the Sixth Amendment[11] includes "the right to the effective assistance of counsel." Strickland, 466 U.S. at 686. To demonstrate ineffective assistance of counsel a convicted defendant must show both that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Id., at 687. The two-part Strickland test "applies to challenges to guilty pleas based on ineffective assistance of counsel."

[11] "In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence."

Hill, 474 U.S. at 58.

In the context of a guilty plea, the Supreme Court has held that the petitioner must show that: (1) his "counsel's representation fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id., at 57, 59 (internal quotations and citations omitted). "Counsel's competence, however, is presumed and the defendant must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986) (internal citation omitted).

b.

Under § 1959(a)(1) Congress imposed a mandatory minimum sentence of life imprisonment for VICAR murder. *See* Rollness, 561 F.3d at 998. Counts 6 and 7 charged Motta with VICAR murder under § 1959. Under his Plea Agreement entered with the advice of his attorney, Motta agreed to plead guilty to, *inter alia*, VICAR murder under Count 6, stipulating to a Guidelines prison range of 240-to-330 months. [ER3 230]. If the district court rejected the Plea Agreement then it would be "null and void and neither party ... bound thereto."

[ER3 241]. If Motta withdrew the Agreement, he waived the protections of Fed.R.Crim.P. 11(f) and Fed.R.Evid. 410[12] regarding the use of the Plea Agreement and statements made during his guilty plea, which could be used against him in a subsequent trial. [ER3 241-242].

Prior to pleading guilty on February 11, 2008, the court sought to inform Motta concerning the sentencing consequences of his plea.

> "If you decide to keep your guilty plea, knowing that I am not in agreement with the range that you and the government have agreed to, then it is ***possible*** that I will sentence you to something higher than the range you and the government have agreed to. Do you understand?
>
> THE DEFENDANT: Yes, Your Honor."

[ER3 202].

Concerning the sentence for Count 6, the court told Motta:

> "... as you can tell from what Mr. Brady just said, the ***worst*** sentence you could get if we proceeded here without this plea agreement is life in prison. Do you understand?"
>
> THE DEFENDANT: Yes. I do.

---

[12] Fed.R.Crim.P. 11(f) states: "The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410."

Fed.R.Evid. 410 states in relevant part: "evidence of the following is not ... admissible against the defendant who made the plea or was a participant in the plea discussions: (1) a plea of guilty which was later withdrawn; * * * (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure".

THE COURT: That is for count 6, the murder count."

[ER3 203]. The court's description of the life prison term as a the "worst sentence", and indication that a life term was merely "possible", echoed the Plea Agreement that stated that Motta faced a ***possible*** life imprisonment term. [ER3 231, 236-237].

After Motta entered the Plea Agreement, both the government and Eddins realized that under § 1959(a)(1) the mandatory minimum sentence was life. [ER3 157, 225-226]. Therefore on May 16, 2008, the government filed the departure motion, discussed *supra*, seeking to effectuate the stipulated range in the Plea Agreement of 240-to-330 months on the grounds of substantial assistance under § 5K1.1.

The problem was that neither party had sought to develop intelligence through debriefing or other investigatory efforts to provide Motta with an opportunity to substantially assist the government, and the Plea Agreement contained no cooperation provision. Attorney Eddins filed a declaration with the court acknowledging that he had improperly advised Motta as to pleading guilty:

> "[t]here was no language in the Defendants' plea agreements regarding cooperation with the government because at the time the pleas were entered the undersigned attorneys and Assistant United States Attorney Thomas J. Brady failed to consider that a downward departure for substantial assistance would be necessary in order to effectuate the agreed upon

> sentences because the VICAR murder counts carried a mandatory minimum term of life imprisonment."

[ER3 157].

At the hearing on July 22, 2008, Eddins admitted rendering ineffective assistance of counsel: "we did fail to consider the mandatory minimum". [ER1 99]. Further, he pointed out that at the February 2008 plea hearing the court itself incorrectly advised Motta: "the colloquy did not necessarily talk about the mandatory minimum either". [Id.]. But the court cut him off, insisting: "the colloquy most certainly did tell the defendants that there was a mandatory life sentence on the murder counts." [Id.]. Eddins disagreed, then characterized his belated recognition of the mandatory minimum life sentence as an "afterthought". [Id.].

c.

Deficient Performance.

In counseling his client concerning VICAR murder, Eddins admitted to failing to apprehend the severe sentencing ramifications of pleading guilty to Count 6. This fundamental failing is repeated, ultimately resulting a missed opportunity to act upon a one-time-only opportunity to avoid a life sentence. First, Eddins provided Motta with the wrong sentencing information for the Plea

Agreement, negotiating a Guidelines range of 240-to-330 months that was irrelevant to the application of § 1959(a)(1). Eddins' belief that he could negotiate this range is mystifying given the language of the statute that imposes a sentence of death or life imprisonment. 18 U.S.C. § 1959(a)(1). Presumably Eddins was aware of this since he negotiated with the Department of Justice to remove the threat of the death penalty. [ER3 168, 243].

Second, he permitted Motta to enter the Plea Agreement without sufficient knowledge of the relevant circumstances. Third, when the court incorrectly notified Motta at the plea hearing that the "worst" sentence he faced was life, Eddins failed to correct the court and protect his client. [ER3 202-203]. Fourth, as Eddins later stated he, "failed to consider that a downward departure for substantial assistance would be necessary in order to effectuate the agreed upon sentences", and therefore failed to develop the record as to substantial assistance. [ER3 157].

Eddins' counsel concerning Motta's sentencing reality was not merely an inaccurate prediction, but it represented a gross mischaracterization of the statutorily mandated outcome. Hence, it was unreasonable, fell below the level of competence required of defense attorneys, and cannot by any stretch of the imagination be considered sound strategy. Even applying the strong presumption

of competence, the Court should find that counsel's representation was deficient.

Prejudice.

In the plea agreement context in order to satisfy the prejudice component the defendant "must show there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59. The unique record in this case creates a different argument as to the prejudice component under Strickland: but for Eddins' deficient performance, Motta would have cooperated with the government and developed the record to support the § 5K1.1 departure motion.

Eddins admitted prejudice in his declaration to the court:

> "[t]here was no language in the Defendants' plea agreements regarding cooperation with the government because at the time the pleas were entered [he] ... failed to consider that a downward departure for substantial assistance would be necessary in order to effectuate the agreed upon sentences because the VICAR murder counts carried a mandatory minimum term of life imprisonment."

[ER3 157-158].

Further, there is a reasonable probability that but for Eddins' deficient performance Motta would have entered and fulfilled a cooperation agreement with the government and provided substantial assistance pursuant to §5K 1.1. Unlike Joseph and Gonsalves' plea agreements, Motta's Plea Agreement did not include a

provision in which he refused to cooperate. [*See* ER3 156-157; 228-242]. Motta's factual statements made at the plea hearing clearly show that Motta could have provided information concerning the gambling underworld on O`ahu and security factions vying for control. [*See* ER3 218-220]. This would have provided the court with a factual basis in the record to grant the government's § 5K1.1 departure motion, accept the guilty plea and sentence Motta in accordance with the parties' stipulation to a Guidelines range of 240-to-330 months.

With that factual basis, the court would likely have granted the government's departure motion since the court's sole rationale for denying the government's motion (and rejecting Motta's Plea Agreement) was its finding that Motta did not provide substantial assistance. This would have resulted in a sentence within the stipulated range of 240-to-330 months, rather than the reality Motta now faces of life in prison due to the ineffective assistance of Eddins.

We note that there is no doubt Motta placed great reliance on Eddins' advice to enter the Rule 11(c)(1)(C) Plea Agreement, representing at the plea hearing that he was "very satisfied" with Eddins' representation, who "[was] highly qualified, and I thank him for being my legal counsel." [ER3 197-198]. Motta made this accolade because under Eddins' counsel he mistakenly believed that the Plea Agreement removed the threat of life in prison. The court's colloquy

did not help, compounding, actually, the erroneous legal advise by notifying Motta that if convicted without the Plea Agreement the "worst sentence" possible would be life ("So, Mr. Motta, as you can tell from what Mr. Brady just said, the ***worst*** sentence you could get if we proceeded here without this plea agreement is life in prison.". [ER3 203].

In fact, no matter how he was convicted under the VICAR counts – under a plea agreement or by jury verdict, under a Rule 11(c)(1)(C) agreement or some other species of plea agreement – Congress required the imposition of a mandatory minimum life sentence. 18 U.S.C. § 1959(a)(1). Eddins failure to apprehend this and, as a result, failure to create a record to support a § 5K1.1 departure motion when the record clearly indicates that he could have done so, represents reversible error under de novo review.

E. Insufficient Evidence Supported all Convictions Because the Government Failed to Establish the Prerequisite RICO Enterprise.

Motta joins argument number 10 in Joseph's opening brief, and the authorities and excerpt of record references under the issue entitled "SUFFICIENCY OF EVIDENCE", which challenges convictions on all counts because the government failed to present sufficient evidence that Wang's

gambling operation had the necessary structure to constitute a RICO enterprise, and that Motta was involved in the alleged enterprise. [*See* Joseph OB 36-44].

Motta's argument differs only slightly as to predicate racketeering activity. Under Count 1 of the Indictment Motta is charged with racketeering act one, Illegal Gambling Business, and racketeering act two, Extortion Conspiracy. [ER3 248-249]. Under the same count, Joseph is charged with the same two racketeering acts as Motta, as well as robbery in August 2003, and robbery on September 11, 2003. [ER3 249-250].

1. Standard of Review.

Motta joins Joseph's standard of review.

2. Discussion.

a. No Enterprise was Established.

Motta joins subpart "A" of Joseph's argument that the government failed to establish an enterprise. [Joseph's OB 36-37].

b. Motta Did Not "Conduct or Participate" in the Alleged Enterprise "Through a Pattern of Racketeering Activity".

Motta joins subpart "B" of Joseph's argument. Like Joseph, Motta submits that the government failed to establish that Motta "conduct[ed] or participate[d]" in the operation or management of the alleged enterprise pursuant to Reves v.

Ernst & Young, 507 U.S. 170, 185 (1993). Like Joseph, the government failed to show that Motta operated or managed the alleged enterprise's affairs in any respect. [*See* Joseph OB 38].

As well, like Joseph the government failed to establish that Motta was connected to Wang's operation "through a pattern of racketeering activity." [*See* Joseph 38-39]. With respect to Motta the government did not show that his alleged racketeering acts one and two, Illegal Gambling Business and Extortion Conspiracy, were connected in any meaningful way to Wang's operation. Rather, like Joseph's argument, the evidence if any showed that Motta was operating purely on his own behalf. [Joseph OB 39].

c. The Alleged Racketeering Acts Did Not Form a Pattern.

Motta joins a subpart "C" of Joseph's argument as related to Motta's alleged involvement in racketeering acts one and two. As with Joseph, likewise Motta argues that the government failed to prove that the alleged racketeering acts formed a pattern, and that the government failed to demonstrate the continuity aspect of the alleged pattern. [Joseph OB 39-43].

CONCLUSION

This Court should reverse Motta's conviction because:

- the government's use during the jury trial of the October 2004 recording violated Motta's Sixth Amendment right to counsel as well as his right to a fair trial;

- the district court abused its discretion in denying the motion to disqualify itself;

- the conviction was ultimately the result of ineffective assistance of counsel;

- insufficient evidence supports the RICO enterprise allegation, which insufficiency infects all counts of the indictment against Motta.

The district court's denial of the government's departure motion must be reversed because the record supported a finding of substantial assistance on Motta's part.

Finally, this Court should reverse Motta's conviction under the issues argued in the opening brief filed by codefendant Rodney Joseph, which Motta seeks leave to join, as set forth in the accompanying Motion to Join in Part

Existing Brief.

DATED: Wailuku Maui, Hawai`i, April 4, 2011.

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

STATEMENT OF RELATED CASES

Counsel for Ethan Motta is aware that the following case pending in this Court that has been consolidated with this case and, hence, carries the same Case Numbers 09-10289, 09-10441, 09-10499, 10-10114:

United States v. Rodney Joseph, CA No. 09-10204.

DATED: Wailuku Maui, Hawai`i, April 4, 2011.

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

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Attorney for: Appellant, Ethan Motta

Date: April 4, 2011

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

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