No. 22-10306

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JONATHAN TAUM,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR THE UNITED STATES AS APPELLEE

CLARE E. CONNORS
United States Attorney

CRAIG S. NOLAN
Assistant United States Attorney
United States Attorney's Office
District of Hawaii
Room 6-100, PJKK Federal Bldg.
300 Ala Moana Boulevard
Honolulu, Hawaii 96850
(808) 541-2850

KRISTEN CLARKE
Assistant Attorney General

TOVAH R. CALDERON
NOAH B. BOKAT-LINDELL
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 598-0243

TABLE OF CONTENTS

PAGE

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

A. Factual Background 2

1. Taum is trained on the use of force 2

2. Taum leads a team to rehouse inmate Kaili. 3

3. Taum orders the ACOs to attack Kaili 5

4. Kaili suffers serious injury. 6

5. Taum conspires with his supervisees to cover up their uses of excessive force. 7

6. The co-conspirators repeatedly make false statements to investigators. 11

B. Procedural Background 12

SUMMARY OF ARGUMENT 14

ARGUMENT

I. The evidence more than sufficed for a reasonable, properly instructed jury to convict Taum. 16

A. Sufficient evidence supports Taum's Section 242 conviction, and the jury was properly instructed on that statute's felony enhancement. 18

TABLE OF CONTENTS (continued): PAGE

1. The jury rationally found that Taum violated the Eighth Amendment. 18

2. The court properly instructed the jury on bodily injury 23

B. The court properly instructed the jury, which rationally convicted Taum for conspiracy to obstruct justice. 26

1. The jury did not have to find that defendants conspired to violate both obstruction statutes. 27

2. The court properly instructed the jury on the conspiracy count. 30

II. Taum has no valid Confrontation Clause claim. 33

A. Neither Tagaloa's DPS statements nor most of Pinkney's FBI statements were introduced to prove the truth of the matter asserted. 34

B. Tagaloa's DPS statements were nontestimonial statements made during and in furtherance of defendants' conspiracy. 37

C. Admitting Pinkney's statements that were offered only against Pinkney did not violate *Bruton*. 39

D. The overwhelming evidence of Taum's guilt renders any Confrontation Clause violation harmless. 43

III. There was no prosecutorial misconduct warranting a new trial. 46

IV. The district court properly imposed a two-offense-level increase at sentencing for obstructing justice. 53

TABLE OF CONTENTS (continued): PAGE

V. The district court made no errors to accumulate, and the government's case was strong enough to overcome any cumulative error. 58

CONCLUSION 60

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

CASES: **PAGE**

Anderson v. United States, 417 U.S. 211 (1974) 36-37

Apprendi v. New Jersey, 530 U.S. 466 (2000)..24

Bearchild v. Cobban, 947 F.3d 1130 (9th Cir. 2020) 19

Bourjaily v. United States, 483 U.S. 171 (1987) 39

Bruton v. United States, 391 U.S. 123 (1968) 15, 34

Crawford v. Washington, 541 U.S. 36 (2004) 34, 37

Davis v. Washington, 547 U.S. 813 (2006) 34

Estate of Stern v. Tuscan Retreat, Inc., 725 F. App'x 518 (9th Cir. 2018) 33

Fowler v. United States, 563 U.S. 668 (2011)...29

Furnace v. Sullivan, 705 F.3d 1021 (9th Cir. 2013).................................. 19, 21, 25

Hayes v. Ayers, 632 F.3d 500 (9th Cir. 2011) 59

Hedgpeth v. Pulido, 555 U.S. 57 (2008) (per curiam)..31

Hoard v. Hartman, 904 F.3d 780 (9th Cir. 2018).. 19, 21

Hudson v. McMillian, 503 U.S. 1 (1992)..19

Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993) 22

Kashem v. Barr, 941 F.3d 358 (9th Cir. 2019) 19

Lopez v. Allen, 47 F.4th 1040 (9th Cir. 2022) 59

Lucero v. Holland, 902 F.3d 979 (9th Cir. 2018) 34, 37, 40

CASES (continued): **PAGE**

Malta-Espinoza v. Gonzales, 478 F.3d 1080 (9th Cir. 2007) 28

Michigan v. Bryant, 562 U.S. 344 (2011)..37

Oliver v. Keller, 289 F.3d 623 (9th Cir. 2002) 25

Samia v. United States, 599 U.S. 635 (2023) 33, 39-41

United States v. Alexander, 834 F. App'x 312 (9th Cir. 2020) 59

United States v. Allen, 425 F.3d 1231 (9th Cir. 2005)...45

United States v. Ancheta, 38 F.3d 1114 (9th Cir. 1994) 56

United States v. Anyanwu, 449 F. App'x 639 (9th Cir. 2011) 36

United States v. Audette, 923 F.3d 1227 (9th Cir. 2019)................................. 34, 45

United States v. Begay, 42 F.3d 486 (9th Cir. 1994) 31

United States v. Boen, 59 F.4th 983 (8th Cir. 2023)...25

United States v. Bonanno, 852 F.2d 434 (9th Cir. 1988)...28

United States v. Broce, 488 U.S. 563 (1989)...28

United States v. Carpenter, 772 F. App'x 419 (9th Cir. 2019) 43

United States v. Christensen, 828 F.3d 763 (9th Cir. 2015)...................................57

United States v. Del Toro-Barboza, 673 F.3d 1136 (9th Cir. 2012) 47, 52

United States v. Dunnigan, 507 U.S. 87 (1993) 54-57

United States v. Eller, 57 F.4th 1117 (9th Cir.),
cert. denied, 144 S. Ct. 309 (2023)..17

United States v. Fryberg, 854 F.3d 1126 (9th Cir. 2017).......................................38

CASES (continued): PAGE

United States v. Gomez, 725 F.3d 1121 (9th Cir. 2013) 46, 50

United States v. Gordon, 844 F.2d 1397 (9th Cir. 1988).......................................32

United States v. Harris, 293 F.3d 863 (5th Cir. 2002) 24

United States v. Hernandez-Orellana, 539 F.3d 994 (9th Cir. 2008).......................27

United States v. Herrera-Rivera, 832 F.3d 1166 (9th Cir. 2016)................ 54, 57-58

United States v. Hofus, 598 F.3d 1171 (9th Cir. 2010) 32

United States v. Holmes, 406 F.3d 337 (5th Cir. 2005)..36

United States v. Hougen, 76 F.4th 805 (9th Cir. 2023) 17, 19

United States v. Hui Hsiung, 778 F.3d 738 (9th Cir. 2015) 52

United States v. Jackson, No. 19-10070,
2022 WL 331687 (9th Cir. Feb. 3, 2022) (unpublished)..............................49

United States v. Johnson, 874 F.3d 1078 (9th Cir. 2017).......................................29

United States v. Johnson, 875 F.3d 1265 (9th Cir. 2017).......................................37

United States v. Koon, 34 F.3d 1416 (9th Cir. 1994),
aff'd in part, rev'd in part, 518 U.S. 81 (1996)..................................... 20, 23

United States v. Latu, 46 F.4th 1175 (9th Cir. 2022).. 37, 39

United States v. LaVallee, 439 F.3d 670 (10th Cir. 2006)......................................25

United States v. Lawson, 377 F. App'x 712 (9th Cir. 2010) 28

United States v. Lindsay, 931 F.3d 852 (9th Cir. 2019) 55, 58

United States v. Lloyd, 807 F.3d 1128 (9th Cir. 2015)..59

CASES (continued): PAGE

United States v. Lopez, 4 F.4th 706 (9th Cir. 2021),
cert. denied, 143 S. Ct. 121 (2022).. 23, 30, 42

United States v. Macias, 789 F.3d 1011 (9th Cir. 2015) 34, 40, 44, 49

United States v. Martinez, 588 F.3d 301 (6th Cir. 2009).......................................26

United States v. McChristian, 47 F.3d 1499 (9th Cir. 1995)..................................53

United States v. Meredith, 485 F. App’x 185 (9th Cir. 2012) 43

United States v. Mikhel, 889 F.3d 1003 (9th Cir. 2018) 40-41

United States v. Mongol Nation, 56 F.4th 1244 (9th Cir. 2023) 16-17

United States v. Moreland, 622 F.3d 1147 (9th Cir. 2010) 48-49

United States v. Orozco-Acosta, 607 F.3d 1156 (9th Cir. 2010)................ 43-44, 46

United States v. Phillips, 704 F.3d 754 (9th Cir. 2012)............................. 47-48, 53

United States v. Prior, No. 22-10022,
2024 WL 81102 (9th Cir. Jan. 8, 2024) (unpublished) 53

United States v. Quiroz, 860 F. App’x 477 (9th Cir. 2021)....................................51

United States v. Redlightning, 624 F.3d 1090 (9th Cir. 2010) 43

United States v. Redmond, 748 F. App’x 760 (9th Cir. 2018)................................42

United States v. Reed, 48 F.4th 1082 (9th Cir. 2022),
cert. denied, 143 S. Ct. 1044 (2023)..31

United States v. Reese, 2 F.3d 870 (9th Cir. 1993)..18

United States v. Rodella, 804 F.3d 1317 (10th Cir. 2015)......................................24

United States v. Rodriguez, 482 F. App’x 231 (9th Cir. 2012) 36

CASES (continued): **PAGE**

United States v. Rude, 88 F.3d 1538 (9th Cir. 1996) 49

United States v. Ruiz, 710 F.3d 1077 (9th Cir. 2013) 46

United States v. Saelee, 51 F.4th 327 (9th Cir. 2022) 18

United States v. Sanchez, 176 F.3d 1214 (9th Cir. 1999) 48

United States v. Sanders, 421 F.3d 1044 (9th Cir. 2005) 24, 31

United States v. Scheidt, 465 F. App'x 609 (9th Cir. 2012) 58

United States v. Shih, 73 F.4th 1077 (9th Cir. 2023), *cert. denied*, No. 23-693, 2024 WL 674836 (Feb. 20, 2024) 52

United States v. Slayden, 800 F. App'x 468 (9th Cir. 2020) 37

United States v. Solorio, 669 F.3d 943 (9th Cir. 2012) 59

United States v. Soto-Mendoza, 641 F. App'x 691 (9th Cir. 2016) 56-57

United States v. Stahlnecker, No. 20-50173, 2021 WL 5150046 (9th Cir. Nov. 5, 2021) (unpublished) 57

United States v. Stewart, 433 F.3d 273 (2d Cir. 2006) 36

United States v. Taylor, 749 F.3d 842 (9th Cir. 2014) 56-58

United States v. Wilkes, 662 F.3d 524 (9th Cir. 2011) 50, 53, 59

United States v. Woods, 710 F.3d 195 (4th Cir. 2013) 48

Wilkins v. Gaddy, 559 U.S. 34 (2010) 25

STATUTES:

18 U.S.C. 2 ..... 2, 12, 22

STATUTES (continued): **PAGE**

18 U.S.C. 242 .... 2, 12, 18, 24

18 U.S.C. 371 .... *passim*

18 U.S.C. 1512(b)(3) 15, 26, 29

18 U.S.C. 1519 .... 2, 12, 26

18 U.S.C. 3231 1

18 U.S.C. 3742 1

28 U.S.C. 1291 1

RULES:

Fed. R. App. P. 4(b)(1)(A)(i) 1

Fed. R. App. P. 4(b)(3)(A) 1

GUIDELINES:

Sentencing Guidelines § 3C1.1 (2021) 54-55, 58

Sentencing Guidelines § 3C1.1 comment. (n.8) (2021) 55

Sentencing Guidelines § 3D1.2 (2021) 55

MISCELLANEOUS:

Instruction 4.1, *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* (2022), https://www.ce9.uscourts.gov/jury-instructions/node/851 22

Instruction 11.1, *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* (2022), https://www.ce9.uscourts.gov/jury-instructions/node/951 27

STATEMENT OF JURISDICTION

Defendant Jonathan Taum appeals his judgment of conviction and sentence. The district court had jurisdiction under 18 U.S.C. 3231 and entered final judgment on November 17, 2022. 1-ER-2-9. Taum filed a timely notice of appeal on November 28, 2022. 4-ER-589-590; Fed. R. App. P. 4(b)(1)(A)(i) and (3)(A). This Court has jurisdiction under 18 U.S.C. 3742 and 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether, under plain error review, sufficient evidence supports Taum's deprivation-of-rights and conspiracy convictions, and whether the district court properly instructed the jury on these charges.

2. Whether the admission of statements by Taum's co-conspirators, nearly all of which did not constitute hearsay and many of which were admitted only against one of Taum's co-defendants, complied with the Confrontation Clause.

3. Whether the prosecution's statements during closing arguments comported with due process.

4. Whether the district court properly applied a two-level sentencing enhancement for Taum's convicted acts of obstruction.

5. Whether Taum fails to prove cumulative error.

STATEMENT OF THE CASE

Taum, a former Adult Corrections Officer (ACO) and sergeant at the Hawaii Community Correctional Center (HCCC), appeals his convictions stemming from his and other ACOs' vicious beating of inmate Chawn Kaili and their ensuing cover-up. Taum was tried before a jury along with Jason Tagaloa and Craig Pinkney, fellow ACOs whom Taum supervised. Another co-defendant, Jordan DeMattos, pleaded guilty. Taum was convicted of depriving Kaili of his right to be free from cruel and unusual punishment by use of excessive force under color of law, in violation of 18 U.S.C. 242 and 2; conspiracy to obstruct justice, in violation of 18 U.S.C. 371; and obstruction by false report, in violation of 18 U.S.C. 1519.

A. Factual Background

1. Taum is trained on the use of force.

Jonathan Taum joined the Hawaii Department of Public Service (DPS) as an ACO in 1998. 2-SER-411. By the time of the events in this case, Taum was a sergeant at HCCC, supervising other ACOs on his shifts. 2-SER-411.

Taum took basic correctional training upon joining DPS, and over a week's worth of supervisory training courses in 2014. 2-SER-485-487. From his training, and from the Standards of Conduct booklet provided to all ACOs, Taum knew that using excessive force on inmates violates their constitutional rights; that ACOs cannot kick or punch inmates in the head; that supervisors can neither order

subordinates to use excessive force on inmates nor order them to hold an inmate down while other ACOs use excessive force on the inmate; that ACOs cannot falsify or omit information in reports; and that ACOs cannot cover up—and supervisors cannot direct subordinates to cover up—the use of excessive force on inmates. 1-SER-220-222; 2-SER-487-497.

Less than six months before the assault on Kaili, HCCC's warden issued a memo to all ACOs, including Taum, regarding use of force. 1-SER-21-22, 222-224. The memo reminded ACOs that "every effort shall be made to avoid confrontations" and that the goal "should be to defuse or deescalate situations." 3-SER-636. It reiterated that ACOs were permitted to use only "the amount" of force "needed to gain control of the situation or inmate." 3-SER-636. And it stated that "[s]upervisors are responsible for managing their assigned subordinates." 3-SER-636. The memo warned ACOs that anyone using force on inmates that causes serious injury will be investigated and, if wrongdoing is found, disciplined. 1-SER-24-25; 3-SER-636.

2. Taum leads a team to rehouse inmate Kaili.

Taum was on duty on HCCC's night shift from June 14-15, 2015. 2-SER-413; 3-SER-646. Around 12:30 a.m., Kaili approached several ACOs in the Waianuenue housing complex's control center. 1-SER-29-30; 2-SER-329-331. The ACOs could tell that Kaili "wasn't in the right frame of mind" and sought to

place him in the building's visitation room, where they could monitor him. 1-SER-30-33; 2-SER-331-332. One ACO called Taum, who was the supervisor on duty, to inform him of this plan. 2-ER-38. Taum instead decided to send other ACOs to retrieve Kaili and rehouse him in another building. 2-ER-38-39; 1-SER-55-56.

While only two ACOs would typically escort an inmate for rehousing, and while Kaili was not considered a "problem inmate" (2-SER-450), Taum chose a team of four ACOs to rehouse Kaili: Tagaloa, Pinkney, DeMattos, and himself (1-SER-55-56). Tagaloa and Pinkney escorted Kaili from Waianuenue into the recreation (rec) yard. 2-ER-39-40, 51; 2-SER-333; Ex. 1-A at :01-:15.[1] The ACOs did not place Kaili in handcuffs because he did not resist and posed no threat. 2-ER-40, 46; 2-SER-294-295, 348-349. As Tagaloa and Pinkney walked Kaili out into the rec yard, Taum and DeMattos entered the yard from the Punahele housing complex on the yard's other side to receive Kaili. 2-ER-51; 2-SER-418-419. Kaili, who was high on methamphetamines and paranoid about being harmed, recoiled at the sight of the additional ACOs and backed up slightly into Tagaloa. 2-ER-41, 52, 172-173, 178; 3-ER-333.

[1] Pending before this Court is the United States' motion to transmit Exhibits 1, 1-A, 1-B, 1-C, 1-D, 1-E, 2, 2-C, 2-D, 2-E, 2-F, 3, 4, and 29-E. *See* Motion, C.A. Doc. 41 (filed March 22, 2024).

3. Taum orders the ACOs to attack Kaili.

Taum ordered Tagaloa to tackle Kaili to the ground, and Tagaloa complied. 2-ER-41, 52, 179; 3-ER-333-334; Ex. 1-A at :25-:28. Suddenly slammed to the asphalt, Kaili lay on his back, wriggling, his knees and hands raised to ward off a pummel of blows from the other ACOs who had launched themselves on top of him. 2-ER-42, 54-55. At the time, Taum weighed approximately 260 pounds, Pinkney and DeMattos about 300 pounds each, and Tagaloa between 360 and 380 pounds. 1-SER-56-57. Tagaloa was about 6'4" tall, and Pinkney was about 6'1". 1-SER-56-57. Kaili was approximately 5'8" tall and weighed less than 200 pounds. 2-ER-182; 1-SER-57. Tagaloa, Pinkney, and DeMattos took turns pressing themselves on Kaili and striking him with their hands and feet as they attempted to flip him onto his stomach to handcuff him. 2-ER-42, 55, 65; 3-ER-334.

After the ACOs flipped Kaili over, Taum held down Kaili's legs and directed the other ACOs to strike him. 2-ER-56-57, 158-159. Kaili kept his hands near his face to ward off the strikes. 2-ER-183-184. The ACOs spent several more minutes kicking, punching, and pounding a prone Kaili—landing multiple blows to Kaili's face and head—as they pressed themselves on top of him, before eventually handcuffing him. 2-ER-43-44, 56-57. Taum did nothing to stop anyone else's uses of force on Kaili. 2-ER-77; *see generally* Ex. 1. ACO Fred Tibayan later

entered the yard, in time to witness some of this force. 2-ER-57, 71; 3-ER-340; Ex. 1 at 3:46-4:00. Taum ordered Tibayan to take Taum's place holding down Kaili's legs, and Taum left the rec yard to return to Waianuenue before the others eventually handcuffed Kaili. 2-ER-57; 3-ER-340; 2-SER-365-367. At no point did Kaili aggressively resist, attempt to escape, or threaten the ACOs. 2-ER-42-43, 69-70, 75; 2-SER-479-480. Kaili repeatedly screamed for help, asked the ACOs why they were attacking him, and told them to stop. 2-ER-75-76. Kaili feared that he was going to die. 2-ER-184.

4. Kaili suffers serious injury.

By the time the ACOs picked Kaili back up and exited the rec yard, his face was swollen and wet with his own blood, which also stained his prison uniform. 2-ER-72, 74. A pool of his blood "the size of a pizza" remained on the ground. 1-SER-50-51.

Tagaloa, DeMattos, and Tibayan deposited Kaili in a jail cell in Punahele. 2-ER-72-74, 79-80, 84. A medical examination conducted several hours later revealed that Kaili had "apparent facial trauma." 1-SER-157. After a CT scan of his head, doctors determined that both Kaili's jaw and the bone of his right eye socket were broken. 1-SER-162-164. Those broken bones, in turn, pushed some of the fat cells surrounding Kaili's eye into his sinuses. 1-SER-164. Kaili also had new nasal fractures. 1-SER-168-169.

The attending physician prescribed several medications to reduce the swelling. 1-SER-166-167. Kaili was told not to blow his nose, as doing so would increase pressure that could further swell his right eye. 1-SER-171. Kaili was told not to chew because of his broken jaw, and to consume only liquids. 1-SER-171. The physician referred him to an oral surgeon, and Kaili had to have his jaw wired shut for somewhere between four and six weeks. 2-ER-196; 1-SER-171.

5. Taum conspires with his supervisees to cover up their uses of excessive force.

All ACOs are required to submit incident reports whenever they are involved in an incident with an inmate. 2-SER-287, 297. They likewise must complete use-of-force reports documenting any force used. 2-ER-123. Tagaloa, Pinkney, and DeMattos, like Taum, were required to complete both incident and use-of-force reports after their assault on Kaili. 2-ER-123-124. Those reports then had to be submitted to their supervisor on that shift: Taum. 2-ER-126.

DPS policy required ACOs to complete those reports by themselves to avoid one ACO's views tainting another's report. 2-SER-299. However, Tagaloa, Pinkney, and DeMattos decided to fill out their reports together. 2-ER-122-124; 2-SER-282-283. Their purpose was "[t]o maintain consistency throughout all of [their] reports so that no red flags are raised" and "to not implicate anybody so [they] wouldn't get in trouble." 1-SER-68, 148. To accomplish this purpose,

Tagaloa, Pinkney, and DeMattos spoke with one another about the content of their reports and reviewed one another's reports. 2-ER-125, 137; *see* 2-SER-283.

Tagaloa, Pinkney, and DeMattos agreed to and did omit almost any mention of their strikes on Kaili, even where the forms requested specifics regarding the force used during the incident; instead, they included vague and misleading language about the events in the rec yard and the fact that they had used force after taking Kaili down. 1-SER-69, 73-79, 148, 234-238, 240-246; 3-SER-624-629. Instead of stating that Taum had ordered some of the force used against Kaili, they stated that any force used was "reactive." 1-SER-77, 148, 244; 3-SER-624, 626, 628. They also agreed to and did state, falsely, that Kaili was "aggressive" to justify both Tagaloa's initial takedown and any ensuing use of force. 1-SER-72-73; 3-SER-624, 626, 628.

As the others drafted their reports, Taum stopped by and answered a request for help from Demattos, telling him to respond to a question in his use-of-force report by stating, falsely, that the ACOs used only the "amount necessary to gain control/compliance." 1-SER-76. Taum also stated that he would take responsibility for the events in the rec yard and would back up the others. 1-SER-82; 2-SER-285-286. Taum's use-of-force report, like the others', claimed that Kaili "resisted" the ACOs and that all the force used was "reactionary." 3-SER-621.

At the end of their shift, Taum collected everyone's incident and use-of-force reports. 1-SER-70, 72, 89. He signed off on Tagaloa's, Pinkney's, and DeMattos's reports (3-SER-503, 505, 509, 628-629), even though he knew at the time that the ACOs' reports had omitted any detail about or justification for any of their uses of force after taking down Kaili (3-SER-501-509).

Tibayan also completed incident and use-of-force reports. 2-SER-337-338, 341; 3-SER-509-510. Taum altered Tibayan's use-of-force report without his permission, in violation of HCCC rules: He eliminated a truthful statement that Taum had authorized the ACOs' use of force on Kaili, replacing it with a statement that the ACOs had used "reactive" force. 2-SER-359-361; 3-SER-509-514.

Another ACO, Frank Baker, had witnessed the assault on Kaili in real time over HCCC's video feed and drafted a multipage report truthfully documenting the incident. 1-SER-35-40, 46. Baker also included a detailed description of the assault against Kaili in the facility's logbook. 1-SER-45-46. He provided a copy of the report to Taum, left copies in all ACOs' cubbyholes, and provided a copy to the lieutenant in charge of HCCC. 1-SER-46-47. Soon after the assault, Taum, who referred to Baker's report as "bullshit" (1-SER-88), confronted Baker in an "aggressive" manner and insisted his report was "wrong" (1-SER-48-49). Shortly thereafter, Baker's report and logbook entry went missing and were never recovered. 1-SER-49-50, 89.

At least some of the ACOs believed that omitting their uses of excessive force on their reports would put an end to the matter. 1-SER-68-69, 80. They knew that the HCCC security system had a surveillance camera capturing the rec yard, but they mistakenly believed that it was a "live feed" without recording capability. 1-SER-82-83. However, Taum knew that the camera made recordings. Within a day or two of the assault, Taum reviewed the video of the incident. 2-SER-433. Taum thought the assault "looked like a Rodney King beating." 2-SER-433.

A week after the assault, HCCC's warden ordered an internal investigation into Taum and his fellow ACOs' conduct. 2-SER-438; 3-SER-619. Just before midnight that night, Taum returned to the control room and recorded the surveillance video with his phone. 1-SER-204-205, 264-265; 2-SER-481; 3-SER-633. It took another week or two for the warden's investigators to realize that the surveillance system had recorded the assault and to create their own copy using an official camcorder. 1-SER-204-205, 266-267; 2-SER-483-484; 3-SER-597.

After Taum had recorded the security footage of the assault, he invited Tagaloa, Pinkney, and DeMattos to his house for a series of meetings, joined at least once by fellow ACOs Tibayan, Andy Ahuna-Alofaituli, and Kyle Fernandez-Wise. 1-SER-90-93; 2-SER-371-372, 378-390, 441-443. In these meetings, Taum played the footage and coached the ACOs on how to explain away or justify each

of their actions. 1-SER-91-93, 99-108; 2-SER-379-381. Taum suggested that the ACOs give investigators several false excuses for their illegal strikes. 1-SER-108; 2-SER-381. Pinkney surreptitiously recorded a short portion of the first of these coaching sessions. 1-SER-96-98. At their second meeting, Taum frisked the other ACOs to remove any devices that might record their activities. 2-SER-446-447; 3-SER-515-517. During that meeting, Taum threatened that, if HCCC tried to fire him, he would "bring down the entire department, he'd bring down the warden, and everybody's going to burn for this." 2-SER-390.

6. The co-conspirators repeatedly make false statements to investigators.

The first of Taum's cover-up meetings occurred the day before the ACOs had to submit investigative questionnaires as part of the internal investigation. 1-SER-92, 261. DeMattos answered his questionnaire falsely, in keeping with Taum's coaching. 1-SER-109-110, 112-121. Taum also reneged on his earlier promise to back up the other ACOs, warning DeMattos that he could not state on his questionnaire that Taum had ordered any strikes on Kaili even though Taum had in fact ordered some of them. 1-SER-110-111.

After handing in their questionnaires, Taum, Tagaloa, DeMattos, and Pinkney faced disciplinary hearings before DPS personnel, which lasted through 2015 and 2016. 1-SER-111; 2-SER-449. There, they continued to tell the same lies that they had included in their prior reports and questionnaires. Tagaloa, for

instance, asserted that he had not struck Kaili in the face or head, despite video evidence to the contrary. 1-SER-226-230. And the "majority of the statements" that DeMattos made to DPS were "untrue." 1-SER-132, 140-141.

Other ACOs also lied about what happened. Two weeks before their final termination hearing, Alofaituli texted Tagaloa, Pinkney, and DeMattos that he "will involve myself to try and help you guys" and that he "will testify to any means needed." 2-SER-369. Alofaituli also organized a cover-up meeting at his house before the termination hearing, which Tagaloa and Pinkney attended, to form a strategy to prevent their firing. 2-SER-370-371. To explain Kaili's injuries, Alofaituli, Tibayan, and Fernandez-Wise testified falsely at the termination hearing that they had all seen Kaili jump either from or onto a bunk and hurt his face in the cell in which he was placed after the assault. 2-SER-290-292, 356-358, 373-375. Taum, Tagaloa, DeMattos, and Pinkney all were fired. 1-SER-202.

B. Procedural Background

1. In 2020, a federal grand jury returned an indictment charging Taum with deprivation of rights under color of law, in violation of 18 U.S.C. 242 and 2; conspiracy to obstruct justice, in violation of 18 U.S.C. 371; and obstruction by false report, in violation of 18 U.S.C. 1519. 4-ER-497-507. The indictment made similar charges against Tagaloa, DeMattos, and Pinkney. 4-ER-497-505.

DeMattos was charged separately by information and pleaded guilty to the same three crimes (3-SER-598-618), while Taum was tried before a jury along with Tagaloa and Pinkney.

2. Trial lasted from June 22 to July 8, 2022, featuring testimony from ten witnesses. 4-ER-625-638. DeMattos testified against his co-defendants, while Taum testified in his own defense. 4-ER-626-627, 635-637. After less than three hours of deliberation (4-ER-637), the jury found Tagaloa, Taum, and Pinkney guilty of one count each of deprivation of rights under color of law, conspiracy to obstruct justice, and obstruction by false report (4-ER-638). Although Taum had moved for judgment of acquittal after the prosecution rested (2-SER-318-320), he did not renew his motion at the close of evidence. Taum later filed a motion for a new trial based solely on a statement by government counsel during closing that, Taum asserted, argued facts not in evidence. 3-SER-582. The court denied the motion. 4-ER-462; 3-SER-574-578.

3. The court sentenced Taum to 120 months' imprisonment on the deprivation-of-rights charge, 60 months on the obstruction-by-false-report charge, and 144 months on the conspiracy charge, to be served concurrently. 1-ER-4. As part of its Sentencing Guidelines calculation, the court accepted the probation office's determination that the three charges should be grouped together with a two-level enhancement added to Taum's offense level on the deprivation-of-rights

charge because of his obstruction convictions. 3-ER-466-467; PSR 18-20 (presentence report).

SUMMARY OF ARGUMENT

This Court should affirm Taum's convictions and sentence.

1. On plain error review, sufficient evidence supports Taum's deprivation-of-rights and conspiracy charges, and the jury was properly instructed on those charges.

The government provided sufficient evidence to support the sole element of Taum's Section 242 conviction that he challenges, and the court's jury instructions were proper. Taum ordered, aided, and failed to intervene to stop his supervisees' uses of excessive force on Kaili in violation of the Eighth Amendment. And the district court correctly instructed the jury that the government can satisfy Section 242's felony enhancement by proving *either* bodily injury *or* use of a dangerous weapon. Even if proof of bodily injury were required, however, the government proved that the assault caused such injury.

The government also introduced sufficient evidence to establish the sole element of Taum's Section 371 conspiracy conviction that he challenges, and the jury permissibly convicted him. Conspiring to violate two statutes constitutes a single conspiracy, albeit one with two different means. Therefore, the government was entitled to charge Taum by alleging that he conspired to violate two different

obstruction statutes and obtain a conviction if it proved a conspiracy to violate either one. Even if the government had to prove a conspiracy to violate both statutes, it proved intent to obstruct under 18 U.S.C. 1512(b)(3) by showing that there was a reasonable likelihood that the communication of a federal offense, which the defendants conspired to hinder, would reach federal officials. The jury also did not need to—but nevertheless was instructed to—decide unanimously which of the two statutes defendants conspired to violate.

2. Admitting Tagaloa's DPS statements and Pinkney's FBI statements did not violate Taum's Confrontation Clause rights. Nearly all the challenged statements do not violate the Clause, as almost all were not hearsay and Tagaloa's statements were not testimonial. Taum also cannot show plain error as to the subset of statements he challenges that could trigger the rule in *Bruton v. United States*, 391 U.S. 123 (1968). These statements were not confessions and did not facially incriminate Taum, and Taum has forfeited any assertion that the district court's limiting instructions were inadequate to protect his rights.

3. The government's statements during closing arguments did not deprive Taum of due process on plain error review. Many of the challenged statements simply commented on the evidence showing that Taum had conspired to obstruct justice and testified falsely at trial, while the other challenged statements were all

well within the bounds of acceptable argument. Nor could any of the comments have affected Taum's substantial rights given the strength of the case against him.

4. The district court did not plainly err by applying the obstruction-of-justice enhancement to increase Taum's base offense level during sentencing. The Sentencing Guidelines required the court to group Taum's convictions and to provide a two-level increase to his base offense level because of his obstruction-related convictions. As his convictions alone justified the increase, the court did not have to make independent findings that Taum perjured himself at trial.

5. Because there were no errors to accumulate, and because the government presented overwhelming evidence of Taum's guilt, Taum cannot prove cumulative error.

ARGUMENT

I. The evidence more than sufficed for a reasonable, properly instructed jury to convict Taum.

Taum challenges (Br. 33-49) the sufficiency of the evidence on his deprivation-of-rights and conspiracy convictions as well as related jury instructions. While Taum raised some of his sufficiency arguments in a Rule 29(a) motion at the close of the government's evidence (2-SER-318-319), he did not "renew[]" them "in a post-trial motion for judgment of acquittal," *United States v. Mongol Nation*, 56 F.4th 1244, 1250-1251 (9th Cir. 2023); *see* 3-SER-527-531 (close of evidence); 4-ER-638-642 (posttrial proceedings). Hence, his claims "are

reviewed for plain error." *Mongol Nation*, 56 F.4th at 1251. Likewise, Taum either agreed to or affirmatively proposed the challenged jury instructions, subjecting those challenges to either plain error review or waiver. *See* pp. 23-24, 30-31, *infra*.

A defendant "must establish the following three prongs to be eligible for relief" on plain error review: "(1) error, (2) that is plain, and (3) that affects substantial rights." *United States v. Hougen*, 76 F.4th 805, 810 (9th Cir. 2023) (citation omitted), *petition for cert. pending*, No. 23-6665 (filed Feb. 1, 2024). Then this Court has "the '*discretion* to grant relief,' but only if [Taum] can demonstrate that the error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* at 810-811 (citation omitted). In evaluating claims of insufficient evidence, the Court must "view[] the evidence in the light most favorable to the prosecution" and affirm if "*any* rational trier of fact *could* have found the essential elements of the crime beyond a reasonable doubt." *United States v. Eller*, 57 F.4th 1117, 1119 (9th Cir.) (second emphasis added; citation omitted), *cert. denied*, 144 S. Ct. 309 (2023). The district court did not plainly err either in issuing its jury instructions or in accepting the jury's rational verdicts.

A. Sufficient evidence supports Taum's Section 242 conviction, and the jury was properly instructed on that statute's felony enhancement.

Section 242 prohibits "acting 'willfully' 'under color of any law' to 'subject' another 'to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.'" *United States v. Reese*, 2 F.3d 870, 880 (9th Cir. 1993) (quoting 18 U.S.C. 242); *see* 3-ER-509-510. Here, the charged deprivation was the right to be free from cruel and unusual punishment under the Eighth Amendment. 4-ER-499. Section 242 allows for up to ten years' imprisonment "if bodily injury results" or if the violation "include[s] the use, attempted use, or threatened use of a dangerous weapon." 18 U.S.C. 242.

Taum has forfeited any challenge regarding the color-of-law and willfulness elements. *United States v. Saelee*, 51 F.4th 327, 339 n.3 (9th Cir. 2022). He contests (Br. 33-43) only the evidence on the first element, deprivation of Kaili's Eighth Amendment rights, as well as the jury instructions regarding the statute's felony enhancement. Each challenge fails.

1. The jury rationally found that Taum violated the Eighth Amendment.

a. A rational jury easily could have found that Taum violated Kaili's Eighth Amendment rights. To find an Eighth Amendment violation, the jury was instructed to consider whether Taum (1) "used excessive and unnecessary force under all of the circumstances"; (2) "acted maliciously and sadistically for the

purpose of causing harm and not in a good faith effort to maintain or restore discipline"; and (3) "caused harm to the prisoner." 3-ER-510-511. These instructions were consistent with the Supreme Court's and this Court's precedents. *See Hudson v. McMillian*, 503 U.S. 1, 7 (1992); *Hoard v. Hartman*, 904 F.3d 780, 788 & n.9 (9th Cir. 2018). Taum challenges only the second of these elements. *See* Br. 33-35.[2]

To determine whether an Eighth Amendment violation occurred, the district court also instructed the jury to consider five factors from this Court's cases: (1) "[t]he extent of the injury suffered"; (2) "[t]he need to use force"; (3) "[t]he relationship between the need to use force and the amount of force used"; (4) "[a]ny threat reasonably perceived by a defendant"; and (5) "[a]ny efforts made to temper the severity of a forceful response." 3-ER-511; *see Bearchild v. Cobban*, 947 F.3d 1130, 1141 (9th Cir. 2020); *Furnace v. Sullivan*, 705 F.3d 1021, 1028 (9th Cir. 2013). Here, "[t]he videotape and the testimony of the government witnesses who interpreted it provided ample evidence that [Taum's] conduct was

---

[2] Taum also attacks *Hudson* and the "evolving standards of decency" test that it implements. Br. 40-43. Taum never raised this issue below, limiting him to plain error review. *Hougen*, 76 F.4th at 810. But as Taum admits (Br. 40), *Hudson* is binding Supreme Court precedent, and "it is that Court's 'prerogative alone to overrule one of its precedents,'" *Kashem v. Barr*, 941 F.3d 358, 376 (9th Cir. 2019) (citation omitted).

unreasonable." *United States v. Koon*, 34 F.3d 1416, 1451 (9th Cir. 1994), *aff'd in part, rev'd in part on other grounds*, 518 U.S. 81 (1996).

First, Kaili suffered extensive injuries. His jaw was broken and had to be wired shut for four to six weeks. 1-SER-171, 191-192. His eye socket was broken and his nose fractured. 1-SER-162-164, 168-169. His face was swollen and bloody, and he left a pool of blood on the ground of the rec yard. 1-SER-63, 65.

Second, there was no need for the force used. Even assuming that the initial takedown of Kaili was reasonable given his sudden movement, several witnesses testified that Kaili did not actively or aggressively resist the ACOs (*contra* Br. 34), but merely struggled to protect himself against their strikes (1-SER-37-38, 60-61, 66; 2-SER-479-480). Avery Gomes, who testified as an expert witness on basic training, stated that the strikes Tagaloa, Pinkney, and DeMattos used were inconsistent with DPS training and constituted lethal force. 2-SER-307-308, 311, 314-315. Other lay witnesses, including DeMattos and Taum himself, agreed that some of these strikes were unwarranted under the circumstances. 2-ER-65-70; 2-SER-459-462, 466-468, 470-471.

Third, the amount of force used was entirely disproportionate to the need to free Kaili's hands to place him in handcuffs. *Contra* Br. 34. Gomes testified that punches, hammer fists, and kicks of the sort that Tagaloa and Pinkney used against Kaili were unauthorized and that most constituted deadly force. *See* 2-SER-310-

315. Others who viewed the video recognized the assault's severity: Both Gomes and Baker testified that this was the worst beating they had seen in their respective 20-year careers in corrections (1-SER-18; 2-SER-315), and Taum himself referred to it as a "Rodney King beating" (2-SER-433).

Fourth, while Taum may reasonably have viewed Kaili as a threat when he backed up into Tagaloa, once Kaili was on the ground, witnesses testified that he posed no realistic threat to the ACOs and could not have escaped over an 18-foot, barbed-wire-topped fence. 1-SER-37-38, 60-61, 66; 2-SER-479-480. That Kaili was high on methamphetamines at the time (Br. 33-34) did not fundamentally alter the security risk to a set of ACOs who collectively weighed over six times more than Kaili (*see* p. 5, *supra*), nor did it justify defendants' kicking and punching Kaili in the face or using hammer fists that smashed Kaili's head into the asphalt. This disproportionate, unwarranted violence supports a jury determination that Tagaloa, DeMattos, and Pinkney used force "to cause harm," rather than in a good-faith effort to restore discipline. *See Hoard*, 904 F.3d at 789.

Finally, DeMattos testified that nobody tried to reduce the assault's severity or give Kaili orders. 2-ER-56-57, 77-79; 1-SER-134. "Officers cannot justify force as necessary for gaining inmate compliance when inmates have been given no order with which to comply." *Furnace*, 705 F.3d at 1029. While Taum claimed that the ACOs yelled at Kaili to allow himself to be restrained (2-SER-422-423),

no other witness corroborated this statement, and the jury was free to believe DeMattos on this point. Nor did it matter that the defendants did not pre-plan their attack (*contra* Br. 34): The governing Eighth Amendment standard takes into account that corrections officers often "act immediately and emphatically" to emerging situations. *Jordan v. Gardner*, 986 F.2d 1521, 1528 (9th Cir. 1993). The jury rationally concluded that Taum, like the other defendants, violated Kaili's Eighth Amendment rights.

b. Even if "all Taum did was to hold Kaili down" (Br. 33), Taum violated the Eighth Amendment under two different theories. First, as the court instructed the jury, aiding and abetting violates Section 242 if "someone else committed" a violation of Section 242 and if "a defendant aided, counseled, commanded, induced[,] or procured that person with respect to at least one element of" the crime, "acted with the intent to facilitate the commission of" the crime, and "acted before the crime was completed." 3-ER-511-512; *see* 18 U.S.C. 2; Instruction No. 4.1, *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* (2022), https://www.ce9.uscourts.gov/jury-instructions/node/851. Taum both commanded and aided Tagaloa, Pinkney, and DeMattos: He ordered some of their uses of unreasonable force, directing the others to punch and kick Kaili (2-ER-57, 70; 2-SER-311-312), and he helped hold down Kaili while the others used excessive force (2-ER-55; Exs. 2-C, 2-D, 2-E, 2-F; Br. 33).

Second, as the court also instructed the jury, a corrections officer violates the Eighth Amendment if they "observe[] another correctional officer using cruel and unusual punishment, ha[ve] a reasonable opportunity to intervene, and cho[o]se not to do so." 3-ER-513; *see Koon*, 34 F.3d at 1447 n.25. Taum could have intervened or ordered the others to stop assaulting Kaili. Yet Taum chose not to prevent their uses of force, and indeed ordered some of them. 2-ER-55, 57, 70, 77-78. Under either theory, the jury rationally found that Taum violated Section 242.

2. The court properly instructed the jury on bodily injury.

The court properly instructed the jury regarding Section 242's felony enhancement. Taum asserts on appeal that two jury instructions, Numbers 21 and 26, erred in allowing the government to meet the enhancement by proving either bodily injury *or* use of a dangerous weapon. Br. 36. However, Taum jointly proposed and agreed to Instruction Number 21 below. Br. 35; 3-ER-318-320; 4-ER-534; 3-SER-587. And he objected solely to the inclusion of certain statements in Instruction Number 26's second and third paragraphs, while providing that he otherwise had "no objection," including to the portion of the instruction's first paragraph that he now challenges. 3-ER-321; *see* 3-ER-321-322; 4-ER-545; 3-SER-589. Taum therefore has waived this challenge. *United States v. Lopez*, 4 F.4th 706, 732 (9th Cir. 2021), *cert. denied*, 143 S. Ct. 121 (2022). Even under

plain error review, however, *see United States v. Sanders*, 421 F.3d 1044, 1050 (9th Cir. 2005), Taum's claim fails.

a. To start, the bodily injury or dangerous weapon requirement is not an element of an Eighth Amendment violation or a Section 242 charge. *Contra* Br. 36. Rather, it is a statutory sentencing element that the government must charge and prove to elevate a Section 242 violation to a felony. *See* 18 U.S.C. 242; *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The felony enhancement applies "if bodily injury results from the acts committed in violation of this section *or* if such acts include the use, attempted use, or threatened use of a dangerous weapon." 18 U.S.C. 242 (emphasis added). The court's jury instructions properly followed the statutory text, which creates two disjunctive means of proving the felony sentencing element. *See, e.g.*, *United States v. Rodella*, 804 F.3d 1317, 1324, 1329 (10th Cir. 2015) (rejecting sufficiency of evidence challenge to Section 242 conviction where jury found use of dangerous weapon but not bodily injury); *United States v. Harris*, 293 F.3d 863, 870 (5th Cir. 2002) (determining that court could "affirm" Section 242 conviction without examining proof of bodily injury because "there was sufficient evidence that Harris used a 'dangerous weapon'").

Nor is bodily injury otherwise required to violate Section 242. The Supreme Court's decision in *Hudson* does not require bodily injury to prove an Eighth Amendment violation; the standard "focus[es] on the amount of *force* used, not the

nature or severity of the *injury* inflicted." *Oliver v. Keller*, 289 F.3d 623, 628 (9th Cir. 2002); *see Wilkins v. Gaddy*, 559 U.S. 34, 39 (2010) (affirming *Oliver*'s understanding of *Hudson*). Thus, as the district court instructed the jury, "the extent of injury suffered by an inmate" is just one of the "five factors . . . to be considered" in proving an Eighth Amendment violation. *Furnace*, 705 F.3d at 1028 (citation omitted).[3] The district court did not err in following the statutory text and this Court's cases.

b. Any error could not have affected Taum's substantial rights, because ample evidence confirms that defendants' actions resulted in Kaili's bodily injury. The court instructed the jury that "[b]odily injury' means: [A] a cut, abrasion, bruise, burn, or disfigurement; [B] physical pain; or [C] any other injury to the body, no matter how temporary." 3-ER-515. This definition, which Taum does not contest, follows the holdings of at least eight other circuits. *See United States v. Boen*, 59 F.4th 983, 993-994 (8th Cir. 2023) (citing cases). And bodily injury need only have been "a natural and foreseeable result of the offense conduct." 3-

[3] This Court expressly rejected the Fifth Circuit's determination that Eighth Amendment violations require injury. *Oliver*, 289 F.3d at 628; *contra* Br. 36 (citing Fifth Circuit case). And the district court in *United States v. LaVallee*, 439 F.3d 670 (10th Cir. 2006), instructed the jury solely on bodily injury because the case only involved that means of proving the enhancement, *see id.* at 687 (describing enhancement using only bodily-injury language); *contra* Br. 37.

ER-515; *see United States v. Martinez*, 588 F.3d 301, 317 (6th Cir. 2009) (discussing cases interpreting Section 242 and other similar statutes).

The video footage, confirmed by witness testimony, showed Tagaloa, Pinkney, and DeMattos punch, hammer fist, and kick Kaili in the head and punch him in the spine. *See* p. 5, *supra*. Kaili repeatedly screamed for help during the assault and sought to shield his face from the strikes. 1-SER-178-179; 2-SER-352-353. After the assault, Kaili had a swollen face and left a "pizza"-sized pool of blood on the ground. 1-SER-51, 63, 65. The medical evidence showed that Kaili suffered a broken jaw, eye socket, and nose, and that fat had been pushed from his eye socket into his sinus. 2-ER-253-260. The jury rationally could have concluded that any of these injuries, or any of the pain Kaili experienced, resulted from the ACOs' many blows. *Contra* Br. 38 (positing alternative explanations for the severest injuries). As Taum, at the very least, aided and abetted the others, and failed to intervene to stop these uses of force, he is criminally responsible for his co-defendants' violations of Section 242. *See* pp. 22-23, *supra*.

B. The court properly instructed the jury, which rationally convicted Taum for conspiracy to obstruct justice.

Taum also challenges his conviction under 18 U.S.C. 371, under which he was charged with conspiring to violate two obstruction statutes, 18 U.S.C. 1512(b)(3) (witness tampering) and 18 U.S.C. 1519 (falsifying records). 4-ER-500-501. A Section 371 conviction requires "(1) an agreement to engage in

criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit the substantive crime." *United States v. Hernandez-Orellana*, 539 F.3d 994, 1007 (9th Cir. 2008) (citation omitted). Taum challenges the sufficiency of the evidence that he conspired to violate Section 1512(b)(3), as well as the jury instructions that allowed the jurors to find that the defendants conspired to violate either obstruction statute. Taum cannot show plain error on either front.

1. The jury did not have to find that defendants conspired to violate both obstruction statutes.

Taum first asserts (Br. 44) that, because the indictment alleged that defendants conspired to violate Section 1512(b)(3) "and" Section 1519, the jury had to find that they conspired to violate *both*. He then asserts (Br. 44-46) that his conviction must be reversed because the evidence was insufficient to prove conspiracy to violate Section 1512(b)(3). Neither assertion is correct.

a. The court instructed the jury that the conspirators must have agreed "to commit *at least one of the crimes* listed in Count Three of the indictment." 4-ER-555 (emphasis added); *accord* Instruction 11.1, *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* (2022), https://www.ce9.uscourts.gov/jury-instructions/node/951. The court did not err, much less plainly, in so doing.

"It is common to charge conjunctively when an underlying statute proscribes more than one act disjunctively; such a charge permits conviction upon proof that the defendant committed either of the conjunctively charged acts." *Malta-Espinoza v. Gonzales*, 478 F.3d 1080, 1082 (9th Cir. 2007). Section 371 is a general statute that criminalizes conspiring "to commit any offense against the United States." 18 U.S.C. 371. "A single agreement to commit several crimes constitutes one conspiracy." *United States v. Broce*, 488 U.S. 563, 570-571 (1989). Therefore, "an agreement to commit multiple crimes" under Section 371 "may be alleged in a single count." *United States v. Lawson*, 377 F. App'x 712, 715 (9th Cir. 2010). Because conspiring to violate Section 1512(b)(3) and conspiring to violate Section 1519 "are independent and alternate" means of committing a Section 371 violation, both "may be alleged in the conjunctive in one count and proof of any one of those acts conjunctively charged may establish guilt." *United States v. Bonanno*, 852 F.2d 434, 441 (9th Cir. 1988). The jury thus permissibly could have convicted Taum based on conspiring to violate Section 1519 alone.

b. Even if proof were necessary as to both obstruction offenses, any error could not have affected Taum's substantial rights because a rational jury also could have found that Taum conspired to violate Section 1512(b)(3). Taum challenges the evidence as to only one element of Section 371: intent to commit a violation of

Section 1512(b)(3). *See* Br. 44-46. He then challenges the evidence as to only one element of that underlying offense: that obstructive acts be done with "intent to . . . hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." 18 U.S.C. 1512(b)(3).

The statute does not require a defendant to "ha[ve] some law enforcement officer or set of officers, or other identifiable individuals, particularly in mind" when engaging in obstructive acts. *Fowler v. United States*, 563 U.S. 668, 673 (2011). Rather, the government simply "must show that the likelihood of communication to a federal officer was more than remote, outlandish, or simply hypothetical." *Id.* at 678. Consistent with *Fowler*, 563 U.S. at 677, the district court instructed the jury that it must find "that there was a reasonable likelihood that the communication would reach a federal official" (4-ER-556).

The government made that showing. The evidence at trial showed that Taum and his co-conspirators agreed to work together for a single purpose: to obstruct any investigation into the ACOs' use of excessive force on Kaili. *See* pp. 7-12, *supra*. And the government met the *Fowler* standard by showing that federal officials "were in contact with" HCCC and DPS and "had established a policy or practice of investigating similar incidents in the area," including in this case. *United States v. Johnson*, 874 F.3d 1078, 1083 (9th Cir. 2017).

FBI Special Agent Robert Nelson testified that the Honolulu office of the FBI covers Hawaii, investigates "color of law violations" against state and local actors, including corrections officers' uses of excessive force on inmates, and often subpoenas documents like use-of-force policies from prisons during their investigations. 1-SER-196-197, 217. He also testified that the office investigates possible obstruction of state and local investigations, and that such obstruction also impedes federal investigations. 1-SER-200, 231-232. He testified that DPS's Internal Affairs investigators "referred" the uses of excessive force in this case to the FBI. 1-SER-197. And he testified that the FBI subpoenaed from HCCC and DPS many of the documents through which the defendants had sought to obstruct the investigation into their uses of excessive force. 1-SER-225-226, 232. This testimony proved that there was a reasonable likelihood that federal officials would receive communication of any violation of a federal offense.

2. The court properly instructed the jury on the conspiracy count.

Taum also challenges (Br. 47-49) Jury Instruction Number 29, which lays out both bases for the conspiracy charge, and asserts that the district court was required to issue special interrogatories to the jury to ensure that it unanimously convicted Taum under a single theory. Because Taum jointly requested the jury instruction he now challenges (4-ER-550-554; 3-SER-592-595), he has waived his challenge. *Lopez*, 4 F.4th at 732. At best, because Taum did not object to the

instruction (Br. 47), his claim is reviewed for plain error, *Sanders*, 421 F.3d at 1050.

The court did not err by issuing Instruction Number 29 and then using a general verdict form for Count Three. As Taum argues (Br. 47), "[a] conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (per curiam). But Taum does not assert that either charged means of violating Section 371 is a "legally invalid theory." *United States v. Reed*, 48 F.4th 1082, 1089 n.1 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 1044 (2023). He asserts only that the government failed to *prove* one of its theories. Br. 44-46. His claim thus does not trigger the doctrine he invokes.

Taum also briefly asserts (Br. 49) that listing the two obstruction statutes separately in the jury instructions automatically means that "multiple conspiracies took place," and that the jury must unanimously settle on one of them. Not so. "[W]hether a single conspiracy, rather than multiple conspiracies, has been proved is a question of sufficiency of evidence," not of whether jury instructions list multiple means of committing a single conspiracy. *United States v. Begay*, 42 F.3d 486, 501 (9th Cir. 1994). And here, "a reasonable jury could have found that the goals, methods, and conduct of the convicted co-conspirators were sufficient to establish the [single] conspiracy as charged in the indictment." *Ibid.* The evidence

at trial proved that all the defendants made a single agreement to obstruct investigators, beginning the night of the assault in June 2015 and lasting at least through the end of the DPS hearings in December 2016; and that the defendants engaged in a unified course of conduct aimed at furthering this one conspiracy to obstruct investigators via numerous overt acts. *See* pp. 7-12, *supra*. The jury thus did not need to agree unanimously on which of the two "offense[s]" Taum conspired to "commit," 18 U.S.C. 371, since these are "differences only of means" of violating the single conspiracy offense, *United States v. Hofus*, 598 F.3d 1171, 1177 (9th Cir. 2010).

Regardless, the jury unanimously found a single conspiracy. When "the facts could permit multiple ways of satisfying not only a single element of a charged crime, but could permit finding entirely separate offenses," the court can prevent any error by issuing "specific unanimity instructions." *Hofus*, 598 F.3d at 1177 n.3. Here, the district court did just that, instructing the jurors that "all of you must agree as to the particular crime the conspirators agreed to commit." 4-ER-557. Thus, the court did not need to provide the jury with a special verdict form to ensure jury unanimity. *See United States v. Gordon*, 844 F.2d 1397, 1401 (9th Cir. 1988) (requiring "curative instructions *or* . . . special interrogatories to ensure a unanimous verdict" (emphasis added)); *contra* Br. 48-49. Regardless, any asserted error could not have affected Taum's substantial rights because the government

proved that Taum conspired to violate Section 1512(b)(3) as well as Section 1519. *See* pp. 28-30, *supra*.

II. Taum has no valid Confrontation Clause claim.

Taum also challenges (Br. 23-32) the introduction of certain prior statements by his co-defendants, Tagaloa and Pinkney, because of his inability to confront them at trial. The Confrontation Clause "forbids the introduction of out-of-court 'testimonial' statements unless the witness is unavailable and the defendant has had the chance to cross-examine the witness previously." *Samia v. United States*, 599 U.S. 635, 643 (2023). Taum challenges two sets of statements introduced at trial: "statements of Tagaloa at a DPS hearing," labeled Exhibits 71-C and 71-E, and certain statements contained in clips from "FBI interviews of Pinkney," labeled Exhibits 77-A, 77-C, 77-E, 77-G, 77-I, and 77-K. Br. 23; *see* Br. 7-14.[4] Taum preserved a Confrontation Clause challenge to Tagaloa's statements (1-ER-16-17, 29), but only objected to Pinkney's statements to the extent "these exhibits are introduced against my client" (1-ER-13-14). Because the government offered Exhibits 77-A and 77-C against all defendants, and offered Exhibits "77E, -G, -I,

[4] Taum also mentions (Br. 6-7) Tagaloa's completed investigative questionnaire, labeled Exhibit 23. Because he does not make any argument regarding Exhibit 23, however (*see* Br. 23-32), he has "waived review" of any claim with respect to that document. *Estate of Stern v. Tuscan Retreat, Inc.*, 725 F. App'x 518, 522 n.4 (9th Cir. 2018). In any event, he would have no such claim for the same reasons applicable to Tagaloa's statements in Exhibits 71-C and 71-E.

and -K as to Defendant Pinkney only" (1-ER-13), Taum's claim as to the latter exhibits is reviewed for plain error, *see United States v. Macias*, 789 F.3d 1011, 1017 & n.2 (9th Cir. 2015). And none of the statements triggers the Confrontation Clause rule outlined in *Bruton v. United States*, 391 U.S. 123 (1968), regarding facially incriminating confessions by non-testifying co-defendants.

A. Neither Tagaloa's DPS statements nor most of Pinkney's FBI statements were introduced to prove the truth of the matter asserted.

Taum's *Bruton* claim cannot get off the ground as to most of the statements he challenges, because those statements would not "otherwise violate the Confrontation Clause" to begin with. *Lucero v. Holland*, 902 F.3d 979, 987 (9th Cir. 2018). The Confrontation Clause applies only to testimonial *hearsay*. *See Davis v. Washington*, 547 U.S. 813, 823-824 (2006). It thus "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004); *accord United States v. Audette*, 923 F.3d 1227, 1238 (9th Cir. 2019). And almost none of the challenged statements constitutes hearsay.[5]

The government introduced many of the challenged statements to prove that they were *false*. First, in Exhibits 71-C and 71-E, Tagaloa stated that he did not

[5] Government counsel did use Exhibit 77-K in closing to argue that Pinkney recorded defendants' cover-up meeting to enable blackmail. 3-ER-428.

kick Kaili in the face or hit Kaili in the head. As Taum recognizes, the government introduced these statements to prove via other testimony and documentary evidence that Tagaloa's statements were false and that "this lying was part of the overall conspiracy." Br. 27; *see* 1-ER-20.

Second, in Exhibit 77-A, Pinkney stated that he first saw the video footage of the assault years after it occurred. 1-SER-252-253. In Exhibit 77-G, by contrast, Pinkney stated that he saw the video at a meeting at Taum's house weeks after the assault. 1-SER-254-255; *see* Br. 28. The government introduced these statements to show through other evidence that Pinkney was lying in Exhibit 77-A and to show that Pinkney "changed his story" within the same interview. 3-ER-4; 1-SER-252-255. Taum acknowledges (Br. 27) that "show[ing] that Pinkney lied" was the government's purpose in introducing Exhibit 77-A.

Third, in Exhibit 77-C, Pinkney asserted that he had seen Kaili injure himself in his cell after the assault. 1-SER-210. The government introduced this statement so that it could then prove via other exhibits and testimony that this statement was false. 3-ER-424-427; 1-SER-210-216; *see also* Br. 28 (acknowledging other testimony contradicted this statement).

All these statements were introduced not to establish their truth, but rather "to establish [their] *falsity* through independent evidence," both "to show the existence of a scheme and to prove one of the overt acts charged in the

indictment." *United States v. Holmes*, 406 F.3d 337, 349 (5th Cir. 2005); *accord Anderson v. United States*, 417 U.S. 211, 220 (1974); *United States v. Stewart*, 433 F.3d 273, 291 (2d Cir. 2006). The Confrontation Clause does not apply to statements introduced for these purposes. *See United States v. Anyanwu*, 449 F. App'x 639, 641 (9th Cir. 2011); *Stewart*, 433 F.3d at 291; *Holmes*, 406 F.3d at 349.

The government likewise introduced Pinkney's statement in Exhibit 77-E "that he could neither confirm or deny that there was a meeting at Defendant Taum's house" to help prove that there was a conspiracy to obstruct justice and that Pinkney was a part of it. 1-SER-254; *see* 3-ER-422 ("That's what you say when the FBI's asking you about a conspiracy that you're a part of."). Pinkney's non-confirmation/non-denial contained no facts the government could have proven.

Finally, the government introduced Pinkney's statements in Exhibit 77-I that someone was "discussing the investigation" (Br. 28) and "[telling] the officers what he saw or didn't see in the rec yard video" (1-SER-256) not for the truth of those statements but rather "to establish the fact that [the statements] had occurred." *United States v. Rodriguez*, 482 F. App'x 231, 235 (9th Cir. 2012); *see* 1-SER-256 (asking witness only whether, "[i]n this clip, . . . the defendant Pinkney sa[id]" certain things). Moreover, "the prosecution made no reference to [these]

statements during closing arguments," which buttresses the finding that they were not admitted for their truth. *United States v. Johnson*, 875 F.3d 1265, 1279 (9th Cir. 2017). None of these statements constitutes hearsay, and so none violates the Confrontation Clause.

B. Tagaloa's DPS statements were nontestimonial statements made during and in furtherance of defendants' conspiracy.

Even if Tagaloa's statements during the DPS hearings were hearsay, they were not testimonial. "[O]nly statements whose 'primary purpose' was *testimonial* trigger the constitutional requirement" to confront witnesses, *United States v. Latu*, 46 F.4th 1175, 1180 (9th Cir. 2022) (citation omitted), or the *Bruton* rule, *see Lucero*, 902 F.3d at 988.

Co-conspirator statements during and in furtherance of a conspiracy are, "by their nature," not testimonial, *Crawford*, 541 U.S. at 56, because they "are, by their nature, made for a purpose other than use in a prosecution," *Michigan v. Bryant*, 562 U.S. 344, 362 n.9 (2011). Moreover, co-conspirators are considered one another's agents, making one's statements "in furtherance of the conspiracy" "admissible against" another. *Anderson*, 417 U.S. at 218 n.6 (citations omitted). These same rationales hold true even when co-conspirators speak to people investigating their conduct. *See United States v. Slayden*, 800 F. App'x 468, 472 (9th Cir. 2020) (holding that admitting a video of a conversation between one, non-

testifying co-defendant and a Border Patrol agent who detained the defendants "did not violate the Sixth Amendment" rights of the other co-defendant).

Tagaloa's responses fall within the co-conspirator non-hearsay rule. Tagaloa lied about kicking and punching Kaili during his DPS hearings in March and December 2016, during the time of the charged conspiracy. 4-ER-500, 593; Ex. 71-E.[6] And Tagaloa told those lies—which Taum had coached him to tell (1-SER-106-108)—to further the conspiracy's aim of preventing investigators from recognizing that the defendants had used excessive force (1-ER-20).

Even if co-conspirator statements in furtherance of a conspiracy sometimes *could* be considered testimonial, Tagaloa's statements to DPS would not be. A statement "is not 'testimonial' due to 'the mere possibility' that it could be used in a later criminal prosecution," even if it may be "foreseeable" to the statement's maker that the statement "might later be used in a criminal trial to establish [a] fact." *United States v. Fryberg*, 854 F.3d 1126, 1135-1136 (9th Cir. 2017) (citations omitted). Rather, "[t]he inquiry is whether the *primary* purpose of the record is 'for use as evidence at a future criminal trial.'" *Id.* at 1136 (citation and internal quotation marks omitted).

---

[6] Taum transmitted to this Court the audio files of Exhibits 71-E, 77-A, 77-C, 77-E, 77-G, 77-I, and 77-K. *See* Response to Court Order, C.A. Doc. 39 (Feb. 8, 2024).

Tagaloa made his statements to DPS internal investigators who were determining not whether to prosecute Tagaloa, but only whether Tagaloa and the other defendants should be disciplined in their employment or fired. 1-ER-15-16; 1-SER-111, 121-122, 201-202; 2-SER-289-290. "[S]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial." *Latu*, 46 F.4th at 1181 (citation omitted). And Tagaloa's statements fell within the deeply rooted co-conspirator hearsay exception, *Bourjaily v. United States*, 483 U.S. 171, 183 (1987), which likewise indicates that his statements were not testimonial, *Latu*, 46 F.4th at 1181.

C. Admitting Pinkney's statements that were offered only against Pinkney did not violate *Bruton*.

While the government offered Tagaloa's statements and Pinkney's statements in Exhibits 77-A and 77-C against all defendants, it offered Exhibits 77-E, 77-G, 77-I, and 77-K against Pinkney alone. 1-ER-13. Pinkney was thus not acting as a witness "against" Taum via those latter statements and did not trigger the Confrontation Clause. *Samia*, 599 U.S. at 644 (citation omitted). Taum now invokes (Br. 23-24) the *Bruton* exception to this rule. But his counsel only objected to Pinkney's statements at trial as "these exhibits are introduced against [Taum]." 1-ER-13-14. He thus did not preserve an objection to the very exhibits that could be subject to the *Bruton* exception in the first place: the exhibits

admitted only against Pinkney. His *Bruton* claim is therefore reviewed for plain error. *Macias*, 789 F.3d at 1017 & n.2.

1. The court did not plainly err by admitting Pinkney's statements. *Bruton* applies only to confessions, and Pinkney's statements "cannot accurately be described as a confession." *United States v. Mikhel*, 889 F.3d 1003, 1045 (9th Cir. 2018). "While he certainly corroborated portions of the government's evidence against him" by admitting that the defendants met at Taum's house and that he had recorded one of the meetings, "he never admitted to conduct that would satisfy any element of" the conspiracy charge, the only charge to which the meetings were relevant. *Ibid.* Nowhere did Pinkney admit that the defendants met as part of an agreement to pursue an illegal purpose. To the contrary, Pinkney's statements were "clearly an attempt to exculpate himself by offering an alternate narrative" of the meetings, *ibid.*, describing them blandly as an occasion where someone "showed the video" of the rec yard and "discuss[ed] what was going on and how it related to the investigation and what he saw or didn't see" (Exs. 77-G, 77-I).

Moreover, the *Bruton* exception is limited to confessions that "powerfully" and "facially incriminat[e]" the defendant. *Lucero*, 902 F.3d at 987 (citation omitted); *see Samia*, 599 U.S. at 655. None of the statements potentially subject to *Bruton* facially incriminates Taum. In fact, most of the statements "do 'not refer directly to'" Taum at all. *Samia*, 599 U.S. at 653 (citation omitted). Exhibit 77-K,

which discusses why Pinkney recorded the meeting at Taum's house, does not mention any person aside from Pinkney himself (Ex. 77-K), and Exhibits 77-G and 77-I merely use the word "he" at various points, without specifying whether "he" means Taum (Exs. 77-G, 77-I). Nor did government counsel specify, or elicit testimony stating, to whom each of the references to "he" in those statements might have referred. 1-SER-255-256. Nothing in *Bruton* or its progeny "provides license to flyspeck trial transcripts in search of evidence that could give rise to a collateral inference that [Taum] had been named" in a statement that did not itself name or describe him. *Samia*, 599 U.S. at 653.

While Exhibit 77-E does mention Taum, neither it nor any other challenged exhibit facially *incriminates* Taum. "[A] statement is not facially incriminating merely because it identifies a defendant; the statement must also have a sufficiently devastating or powerful inculpatory impact." *Mikhel*, 889 F.3d at 1044. None of Pinkney's statements contained "evidence" that "*on its own*, directly established" that Taum agreed to commit one of the obstruction crimes specified in the indictment, knowingly participated in such a conspiracy, or took an overt act in furtherance of a conspiracy. *Id.* at 1045; *see* 4-ER-555 (describing conspiracy elements). As Pinkney did not facially incriminate Taum, his statements cannot trigger *Bruton*. *See Mikhel*, 889 F.3d at 1046.

2. Taum acknowledges that Exhibits 77-E, 77-G, 77-I, and 77-K were offered against Pinkney alone, but nevertheless asserts that the court did not give a proper limiting instruction. Br. 29-30. Taum waived any such challenge by agreeing to withdraw a more specific jury instruction in favor of the instructions the court gave. *See United States v. Lopez*, 4 F.4th 706, 732 (9th Cir. 2021).

The parties initially submitted Joint Requested Jury Instruction Number 8, which provided: "[Y]ou must determine which evidence in the case applies to each defendant, disregarding any evidence admitted solely against some other defendants." 3-SER-586. However, at their mid-trial status conference, held five days after the challenged statements were admitted into evidence, the parties—including Taum—agreed to withdraw this instruction as "duplicative" of Joint Requested Instruction Number 45. 2-SER-396-402. The court then gave this latter instruction to the jury, renumbered as Jury Instruction Number 34. 4-ER-569; 3-SER-596. Having knowingly abandoned Instruction Number 8 in favor of another instruction he jointly proposed, Taum cannot now claim that the latter was an insufficient limiting instruction for *Bruton* purposes. *See, e.g.*, *United States v. Redmond*, 748 F. App'x 760, 762 (9th Cir. 2018).

Even if Taum had not waived any objection to the jury instructions, Taum failed either to request a limiting instruction for Pinkney's statements or to object to the court's admission of them without making such an instruction. These

failures to object, and Taum's agreement to withdraw Joint Requested Instruction Number 8, means that any claim of inadequate limiting instructions must be reviewed, at most, for plain error. *United States v. Redlightning*, 624 F.3d 1090, 1121 (9th Cir. 2010).

Taum cannot show plain error. None of the challenged statements facially incriminated Taum, and a court's failure to issue limiting instructions as to "non-incriminating statements" by a co-defendant is "not plain error." *United States v. Carpenter*, 772 F. App'x 419, 424 (9th Cir. 2019). Regardless, the government stated in front of the jury that it was introducing Exhibits 77-E, 77-G, 77-I, and 77-K against Pinkney only. 1-ER-13. And the approved jury instruction directed the jurors that "the case of each defendant should be considered by you separately and individually." 4-ER-569; 3-SER-596. Any error in not providing more specific limiting instructions was not so obvious as to constitute plain error, particularly where "defense counsel withdrew" the instruction he now claims was needed. *United States v. Meredith*, 485 F. App'x 185, 187 (9th Cir. 2012).

D. The overwhelming evidence of Taum's guilt renders any Confrontation Clause violation harmless.

Taum's convictions must be affirmed in any event because any Confrontation Clause error was harmless beyond a reasonable doubt. *See United*

States v. Orozco-Acosta, 607 F.3d 1156, 1161 (9th Cir. 2010).[7] Harmless error analysis depends on "the importance of the witness'[s] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross[-]examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id.* at 1161-1162 (citation omitted).

Tagaloa's and Pinkney's statements were cumulative of other evidence and paled in significance to that other evidence. As the portions of the government's closing arguments quoted in Taum's brief indicate (Br. 24-26), DeMattos and Alofaituli both testified about the meetings at Taum's house, and the jury viewed Pinkney's recording of the first meeting. This testimony and video evidence provided far more—and far more damning—detail about the meetings' purpose than did Pinkney's purposely vague statements. *See* 3-ER-421-424. Likewise, the government provided physical evidence, the video of the assault, an unchallenged statement by Pinkney to his union representative, and the testimony of DeMattos, Fernandez-Wise, Tibayan, and Alofaituli to prove that those claiming Kaili had injured himself in his cell were lying to justify his injuries. 3-ER-424-427.

---

[7] Nor can Taum meet his burden of showing that the statements admitted against Pinkney alone, to which he did not object, "affected the outcome of the district court proceedings" under plain error review. *Macias*, 789 F.3d at 1019 (citation omitted).

Pinkney's false statement that he did see Kaili injure himself was thus entirely cumulative. Regardless, the government argued to the jury that this self-inflicted-harm defense could not defeat the deprivation-of-rights charge. 3-ER-427-428.

And while Tagaloa's statements to DPS were admitted to show an overt act in furtherance of the conspiracy, the government charged and presented ample evidence of other overt acts, including: gathering the night of the assault to discuss how to fill out their reports, filing false incident and use-of-force reports, inviting the ACOs to Taum's house to decide how to explain away their uses of force, obtaining a copy of HCCC's surveillance video, holding cover-up meetings at Taum's house, conferring on how to complete their investigative questionnaires, DeMattos filing false responses to that questionnaire, and DeMattos lying during his DPS hearings. 3-ER-416-430; 4-ER-501-503. Proving any of these acts would sustain a conspiracy conviction. Because "[s]ignificant evidence introduced at trial" supported the same points for which the government used each challenged statement, and Taum had the opportunity to "rebut[] those statements" via cross-examination and argument, "any error was harmless." *Audette*, 923 F.3d at 1238.

Moreover, "there was overwhelming evidence connecting [Taum] to the conspiracy" and the assault. *United States v. Allen*, 425 F.3d 1231, 1235 (9th Cir. 2005). The government (1) presented surveillance footage of the assault on Kaili and video of one of the cover-up meetings at Taum's house, (2) entered Taum's

false incident and use-of-force reports into evidence, (3) elicited copious trial testimony from other ACOs confirming details of the assault and conspiracy, (4) qualified Gomes as an expert to explain that the defendants' strikes were untrained and constituted deadly force, and (5) presented evidence of Kaili's resulting injuries. *See* 1-SER-233-234; 3-SER-621-622; Exs. 1, 29-E; pp. 4-12, 20-22, *supra*. As "the government's case . . . was overwhelming, even without" the challenged statements, any error was harmless beyond a reasonable doubt. *Orozco-Acosta*, 607 F.3d at 1162.

III. There was no prosecutorial misconduct warranting a new trial.

Taum next argues (Br. 49-56) that certain statements by the government during closing statements warrant reversal. But Taum did not object to any of the challenged statements during trial, and he moved for a new trial based solely on a different closing statement not challenged on appeal. 3-SER-579-584. His claim is thus reviewed for plain error. *United States v. Gomez*, 725 F.3d 1121, 1131 (9th Cir. 2013). This Court can "reverse [Taum's] conviction only if the government's statements were improper and the statements resulted in substantial prejudice." *United States v. Ruiz*, 710 F.3d 1077, 1084 (9th Cir. 2013). The statements Taum challenges meet neither requirement.

1. The district court did not commit plain error by failing to sua sponte reverse Taum's conviction. This Court "will overturn a conviction because of

statements in closing arguments for plain error only where the statement 'undermine[s] the fundamental fairness of the trial and contribute[s] to a miscarriage of justice.'" *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1152 (9th Cir. 2012) (citation omitted; alterations in original). Taum challenges three sets of comments: (1) statements that Taum lied or coached his co-defendants to lie, (2) statements imploring the jury to enforce the Constitution, and (3) an argument that defendants' defense would justify barbaric practices like decimation to maintain order. None of these comments constituted error or affected the trial's fundamental fairness.

a. Counsel's statements about Taum having lied and coached the other defendants to lie were proper. Some of the complained-of comments (*see* Br. 49-50) simply discussed the evidence that Taum played a leading role in the conspiracy to obstruct justice by calling his co-conspirators to his house to formulate false justifications for their excessive force. 3-ER-421-423. It is unsurprising that a prosecutor in an obstruction-of-justice case will discuss the evidence that the defendants lied to cover up their crimes. Such a case "will almost always be built on assertions that the defendant deceived or lied to" investigators, "and it was clearly appropriate to point out those alleged lies here." *United States v. Phillips*, 704 F.3d 754, 767 (9th Cir. 2012). These statements also were identifying the evidence that Taum coached others to lie, "rather than calling

the defendant a 'liar'"—and "stating that the defendant lied by making a particular statement is less problematic than calling him a liar in general." *Ibid.*

Taum also takes issue (Br. 54) with the government's comment during rebuttal that Taum made false statements at trial. But *United States v. Woods*, 710 F.3d 195 (4th Cir. 2013), on which Taum relies, does not state the law of this circuit. Rather, "[u]nder [this Court's] case law, it is clear that" arguing that a defendant testified falsely "is a proper line of attack for a closing statement, as long as the prosecutor is commenting on the evidence and asking the jury to draw reasonable inferences." *Phillips*, 704 F.3d at 767. Prosecutors even "may refer to a defendant as a liar" under such circumstances. *United States v. Moreland*, 622 F.3d 1147, 1161 (9th Cir. 2010).[8] Here, the government explained to the jury that "you know from the evidence that" some of Taum's testimony "is false" because of "Exhibit 102, Exhibit 6[0]," and "several other exhibits." 3-ER-439. These exhibits indicated that, contrary to Taum's testimony that he had provided video footage of the assault to HCCC's warden, the warden had gotten the footage by having another ACO record it using HCCC's official camcorder. 3-ER-421; 1-SER-261-268; 3-SER-597, 619. Hence, the government's statement that Taum's

---

[8] *United States v. Sanchez*, 176 F.3d 1214 (9th Cir. 1999), on which Taum also relies, did not involve claims of false testimony; it involved "vouching for [the government's] witnesses, denigrating the defense as a sham, and arguing that it was the jury's duty to find the defendants guilty," *id.* at 1225.

testimony was false came only after "point[ing] out specific examples of contradictory [evidence] pointing to the conclusion that [Taum] was not telling the truth," and was a reasonable inference from that evidence. *Moreland*, 622 F.3d at 1161.

Likewise, the statement that Taum "was so immoral he would threaten to blackmail the warden" (3-ER-144) was an acceptable "hard blow[] based on the evidence." *United States v. Macias*, 789 F.3d 1011, 1023 (9th Cir. 2015) (citation omitted). The jury heard the audio of Taum making the threat (3-SER-517-526), which government counsel replayed just before making the challenged comment (3-ER-429). The prosecutor did not step out of bounds in commenting on that evidence. *See, e.g.*, *United States v. Rude*, 88 F.3d 1538, 1548 (9th Cir. 1996) (rejecting prosecutorial abuse claim where prosecutors "referred to the defendants as 'crooks' or 'evil' at least eleven times"); *United States v. Jackson*, No. 19-10070, 2022 WL 331687, at *2 (9th Cir. Feb. 3, 2022) (unpublished) (holding that prosecutor's "graphic descriptions about [defendant's] proclivities for domestic abuse" were acceptable "hard blows" (citation omitted)).

b. The government's statements urging jurors to enforce the Constitution did not ask the jury to convict based on "outside factors" or to "protect community values." Br. 55 (citation omitted). Counsel told the jury that the "right to be free from cruel and unusual punishment" is "just words on an old scrap of paper if

correctional officers like these defendants can brutally beat an inmate like Mr. Kaili and get away with it," and that the jury "can make sure that the constitutional rights mean[] something" by "enforc[ing] them in this case." 3-ER-435. Counsel made these statements immediately after explaining "the three ways in which Defendant Taum violated the Constitution" during the assault. 3-ER-434. And counsel began his closing by "review[ing] the evidence that proves the defendants [were] guilty" of "depriving Mr. Kaili of a fundamental right guaranteed to him under the U.S. Constitution." 3-ER-403. "Read in context," then, "the prosecutor was arguing that, *if* the jury finds that the prosecution has met its burden of proving the elements beyond a reasonable doubt, *then* it is the jury's duty to convict. Understood in that way, the prosecutor's statement is clearly proper." *Gomez*, 725 F.3d at 1131.

Taum similarly faults (Br. 54) the government's statement during rebuttal that the United States has a Constitution under which "everyone's accountable, including officers" (3-ER-438). This objection is equally unfounded. "[C]ourts should examine rebuttal arguments in the context of the arguments that they rebut." *United States v. Wilkes*, 662 F.3d 524, 539 (9th Cir. 2011). Government counsel made this argument in response to Taum's counsel's assertions that the prosecution should not second-guess defendants' uses of force on Kaili and that such second-guessing constituted "Monday morning quarterback[ing]." 3-ER-438. Taum's

counsel invoked the "Monday morning quarterbacking" metaphor at least three times during his closing statements and made the broader concept a theme of his closing. 3-SER-563, 569, 572-573. It was wholly appropriate for government counsel to rebut this argument by pointing out that American law requires juries to hold government officials accountable when they violate the Constitution. Particularly when the court had instructed the jury that "[c]orrectional officers have a duty to intercede when another correctional officer violates the constitutional rights of a prisoner." 4-ER-539.

The government also placed statements about the Constitution in proper context, informing the jury that "[w]hen you put those rights [to be free of excessive force and to have a jury trial] together, it means when officers use excessive force, it's your duty to judge their actions." 3-ER-438. "In context, the statement properly instructed the jury of its duties provided that the government satisfied its burden of proof beyond a reasonable doubt." *United States v. Quiroz*, 860 F. App'x 477, 479 (9th Cir. 2021).

c. Lastly, Taum objects (Br. 54) to a rebuttal argument responding to one of the defendants' principal defenses on the deprivation-of-rights claim: that their use of force was necessary to control Kaili because he was not handcuffed. 3-SER-539-540, 548, 556, 561-563, 566-567. Government counsel stated that "when you take [this 'control' defense] to its logical conclusion, you'll see that it doesn't

make sense," because it would also mean that the "barbaric" ancient Roman "practice of decimation could be revived at HCCC and it wouldn't violate the Constitution." 3-ER-448-449. This line of argument was "a 'fair response' to defense counsel's closing." *United States v. Shih*, 73 F.4th 1077, 1099 (9th Cir. 2023) (citation omitted), *cert. denied*, No. 23-693, 2024 WL 674836 (U.S. Feb. 20, 2024). Indeed, as Taum's opening brief notes (at 55 n.15), his counsel admitted during closing that the defendants "might be using excessive force" (3-ER-436) but attempted to justify that force on various grounds—including that defendants were simply trying to control Kaili (3-SER-563, 566-567).

For this same reason, it does not matter that the example of decimation had not arisen at trial before. *Contra* Br. 55-56. Counsel had latitude to raise what he himself described as an "absurd" comparison to illustrate why the jury should not follow the logic of defendants' proffered defense. 3-ER-449. This was "permissible argument," not "new evidence or allegations." *United States v. Hui Hsiung*, 778 F.3d 738, 746 (9th Cir. 2015). Even if Taum now thinks the comparison to decimation inapt (Br. 55-56), due process "does not mean that every jarring or badly selected metaphor renders a trial fundamentally unfair." *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1151-1152 (9th Cir. 2012).

2. "Even assuming, for argument's sake, that any of the prosecutor's closing comments were improper, they neither 'affected the jury's discharge of its duty to

judge the evidence fairly,' nor caused 'a miscarriage of justice,'" as is necessary to warrant reversal under plain error review. *United States v. Prior*, No. 22-10022, 2024 WL 81102, at *2 (9th Cir. Jan. 8, 2024) (unpublished) (citations omitted). First, "the presence of a factually strong case against a defendant runs contrary to the notion that improper remarks by the prosecutor materially affected the verdict." *United States v. McChristian*, 47 F.3d 1499, 1508 (9th Cir. 1995). And the evidence against Taum on all three counts of conviction was overwhelming. *See* pp. 4-12, Part I, *supra*. Second, the court had instructed the jury both at the opening and the close of trial that "any statements, objections, or arguments made by the lawyers are not evidence in the case" (3-ER-359; *see* 1-SER-10, 16), and again "remind[ed]" the jury before closing arguments that "the statements by the attorneys are not evidence" (3-ER-399-400); *see Phillips*, 704 F.3d at 767 n.12. "This same admonishment was also included in the jury instructions sent into the jury room." *Wilkes*, 662 F.3d at 539; *see* 4-ER-522. These "instruction[s] also helped to ensure that any error did not affect the outcome of [Taum's] trial." *Phillips*, 704 F.3d at 767 n.12.

IV. The district court properly imposed a two-offense-level increase at sentencing for obstructing justice.

Taum asserts (Br. 56-57) that the district court failed to make findings to support the two-level increase for obstruction of justice in his base offense level

under Sentencing Guidelines § 3C1.1 (2021).[9] As Taum acknowledges (Br. 56), he did not object to this enhancement, either in response to the presentence report (PSR) or at sentencing (PSR 40-44; 3-ER-456-466, 492). His claim is thus reviewed for plain error, *see United States v. Herrera-Rivera*, 832 F.3d 1166, 1172 (9th Cir. 2016), and fails under that standard.

1. The district court did not need to make explicit findings at sentencing, because the obstruction adjustment was not based on Taum's perjury at trial. Under this Court's case law, a "district court must make express findings on each element of perjury . . . before applying an obstruction of justice enhancement" when the enhancement is "based on a defendant's testimony at trial." *Herrera-Rivera*, 832 F.3d at 1175; *see United States v. Dunnigan*, 507 U.S. 87, 95 (1993) ("[I]f a defendant objects to a sentence enhancement *resulting from her trial testimony*, a district court must review the evidence and make independent findings." (emphasis added)). Here, however, the two-level obstruction-of-justice enhancement did not depend on Taum's false testimony at trial. *Contra* Br. 56. While the PSR did mention Taum's perjury as an additional basis for the increase,

[9] This enhancement "increase[s] the offense level by 2 levels" if a "defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction," and if the obstruction "related to" the "offense of conviction" or "a closely related offense." Sentencing Guidelines § 3C1.1 (2021).

the obstruction-of-justice adjustment applied primarily, and independently, because Taum was convicted of two obstruction offenses: conspiring to cover up the assault on Kaili and submitting false reports respecting the assault. PSR 17 ¶ 46, 20 ¶ 56.

The Guidelines mandated that the court apply the enhancement as it did. Where, as here, a defendant is convicted of both an underlying offense (here, the assault on Kaili) and an offense of obstruction with respect to that underlying offense (here, conspiring to obstruct justice and submitting false statements), the Guidelines require courts to group the offenses together under Sentencing Guidelines § 3D1.2(c). *See* Sentencing Guidelines § 3C1.1 comment (n.8). The "offense level for that group" then must be calculated as "the offense level for the underlying offense increased by" the greater of "the 2-level adjustment specified by [the obstruction of justice enhancement], or the offense level for the obstruction offense." *Ibid.* This procedure is mandatory. *See United States v. Lindsay*, 931 F.3d 852, 869 (9th Cir. 2019).

In accordance with these requirements, all three of Taum's convictions were grouped together, with the two obstruction offenses treated as "an adjustment (the 2-level increase for obstruction of justice under USSG §3C1.1) to the guideline applicable to" the deprivation-of-rights offense. PSR 18 ¶ 51. The PSR then calculated Taum's offense level by adding the applicable adjustments to the base

offense level for his deprivation-of-rights conviction, including by adding the two-level obstruction-of-justice enhancement. PSR 18-20.

The district court adopted the PSR's factual findings. 3-ER-466. It then determined Taum's "[t]otal offense level," as well as his ultimate guidelines range, "[b]ased on all of the information contained in the [PSR]." 3-ER-466-467. The court thus applied the obstruction-of-justice enhancement, as it was required to do, based on Taum's obstruction convictions. The court did not need to issue new findings when the jury had already found the elements of those crimes beyond a reasonable doubt. And because the convictions alone justify application of the enhancement, this Court need not examine the alternative, perjury-based rationale offered in the PSR. *See United States v. Ancheta*, 38 F.3d 1114, 1119 (9th Cir. 1994).

2. Regardless, Taum's failure to object below relieved the court of any burden to make on-the-record findings of the elements of perjury. Courts "must make such findings" only "where the defendant objects to the enhancement." *United States v. Soto-Mendoza*, 641 F. App'x 691, 695 (9th Cir. 2016); *see Dunnigan*, 507 U.S. at 95 (holding that district courts must make findings "if a defendant objects"); *United States v. Taylor*, 749 F.3d 842, 848 (9th Cir. 2014) (similar). Here, however, Taum made no objection to the obstruction enhancement. *See* Br. 56. "Absent such an objection, the district court was not

required to make explicit findings as to each element of obstruction of justice." *Soto-Mendoza*, 641 F. App'x at 695.[10]

3. Nor was any possible error plain. "A 'court of appeals cannot correct an error [under plain error review] unless the error is clear under current law.'" *United States v. Christensen*, 828 F.3d 763, 789-790 (9th Cir. 2015) (citation omitted; alteration in original). And "[n]o Supreme Court or Ninth Circuit precedent has clearly established" that courts must independently find the elements of an obstruction-of-justice adjustment either when it is based on obstruction convictions or when the defendant did not object to the adjustment. *United States v. Stahlnecker*, No. 20-50173, 2021 WL 5150046, at *3 (9th Cir. Nov. 5, 2021) (unpublished). To the contrary, the Supreme Court and this Court have only required such findings when (1) defendants object to adjustments (2) that were based on perjury at trial. *See Dunnigan*, 507 U.S. at 95; *Herrera-Rivera*, 832 F.3d

[10] Taum's situation differs from one in which a defendant objects to the enhancement but fails to "object to the district court's findings," which limits the defendant's claim to plain error review but maintains the district court's obligation to issue findings. *Herrera-Rivera*, 832 F.3d at 1172, 1175. Taum failed to object to the enhancement at all; hence, the district court was not required to make independent findings.

at 1175; *Taylor*, 749 F.3d at 848. There was thus no plain error for this court to correct. *See, e.g.*, *United States v. Scheidt*, 465 F. App'x 609 (9th Cir. 2012).[11]

4. Even had the district court committed a plain error, its failure to issue independent findings on the elements of an obstruction offense did not affect Taum's substantial rights. Under the Guidelines, the court was required to group together Taum's deprivation-of-rights conviction with his obstruction convictions and apply the latter as an obstruction increase to the former. *See* Sentencing Guidelines § 3C1.1 comment (n.8). "This increase is mandatory; the district court did not have discretion to ignore it." *Lindsay*, 931 F.3d at 870. Indeed, the court would have "committed procedural error" by failing to increase Taum's offense level. *Ibid.* Any error in announcing findings, therefore, would not have changed Taum's Guidelines range, *see Herrera-Rivera*, 832 F.3d at 1175, as the court would have been required to impose the same two-level increase in any case.

V. The district court made no errors to accumulate, and the government's case was strong enough to overcome any cumulative error.

Finally, Taum claims (Br. 58-59) that his asserted errors cumulatively deprived him of due process. However, where a defendant "fail[s] to establish

---

[11] For the same reasons, Taum's claim would fail even under the standards applicable to preserved sentencing claims. *See Taylor*, 749 F.3d at 845 (reviewing interpretation of conduct as falling under Sentencing Guidelines § 3C1.1 de novo and factual determinations for clear error).

multiple errors of constitutional magnitude, there can be no accumulation of prejudice amounting to a denial of due process." *Lopez v. Allen*, 47 F.4th 1040, 1053 (9th Cir. 2022); *see United States v. Solorio*, 669 F.3d 943, 956 (9th Cir. 2012) (multiple errors required); *Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011) ("error[s] of constitutional magnitude"). Because no error occurred, and certainly not multiple errors, "no cumulative prejudice is possible." *Hayes*, 632 F.3d at 524.

Regardless, as Taum acknowledges (Br. 58), cumulative error depends on the overall strength of the government's case. "[R]eversal on grounds of cumulative error is not available where 'evidence of guilt is otherwise overwhelming.'" *United States v. Alexander*, 834 F. App'x 312, 318 (9th Cir. 2020) (citation omitted). And "the government in this case presented ample evidence of [Taum's] guilt." *United States v. Wilkes*, 662 F.3d 524, 543 (9th Cir. 2011). Taum's convictions were not "based on largely uncorroborated testimony of a single accomplice or co-conspirator." *Ibid.* (citation omitted). The government presented abundant testimony and documentary evidence—including videos of both the assault and one of the cover-up meetings—that led the jury to convict Taum after less than three hours' deliberation. *See* 4-ER-637; pp. 4-12, Part I, Part II.D, *supra*. Even considered cumulatively, then, any "errors were harmless in light of the overwhelming evidence against" Taum. *United States v. Lloyd*, 807 F.3d 1128, 1168 (9th Cir. 2015).

CONCLUSION

For the foregoing reasons, this Court should affirm Taum's convictions and sentence.

Respectfully submitted,

CLARE E. CONNORS
United States Attorney

CRAIG S. NOLAN
Assistant United States Attorney
United States Attorney's Office
District of Hawaii
Room 6-100, PJKK Federal Bldg.
300 Ala Moana Boulevard
Honolulu, Hawaii 96850
(808) 541-2850

KRISTEN CLARKE
Assistant Attorney General

s/ Noah B. Bokat-Lindell
TOVAH R. CALDERON
NOAH B. BOKAT-LINDELL
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 598-0243

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 22-10306

I am the attorney or self-represented party.

This brief contains 13,653 **words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- [x] complies with the word limit of Cir. R. 32-1.
- [ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- [ ] is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- [ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- [ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - [ ] it is a joint brief submitted by separately represented parties.
  - [ ] a party or parties are filing a single brief in response to multiple briefs.
  - [ ] a party or parties are filing a single brief in response to a longer joint brief.
- [ ] complies with the length limit designated by court order dated ______.
- [ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Noah B. Bokat-Lindell **Date** 3/22/2024

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov